



# Handbook on Diversity and the Law

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Navigating a Complex Landscape  
to Foster Greater Faculty and Student  
Diversity in Higher Education



ADVANCING SCIENCE, SERVING SOCIETY

# **Navigating A Complex Landscape To Foster Greater Faculty and Student Diversity In Higher Education**

The Law Governing Effective Faculty and Student Body Diversity Programs in STEM and Related Disciplines...and Its Implications for Institutional Policy

**American Association for the Advancement of Science**

with participation by the **Association of American Universities**



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These materials were presented at a workshop hosted by the American Association for the Advancement of Science with participation by the Association for American Universities, held in October 2009, in Washington, D.C.

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\*The research and editing assistance of Elizabeth Hutton and Allison Crawford of Nelson, Mullins, Riley & Scarborough (which is affiliated with EducationCounsel) and the contribution to neutral alternatives of Dr. Paul J. D'Anieri, Dean of the University of Florida College of Liberal Arts and Sciences, are gratefully acknowledged.

***Project Funding Provided By:***

**The Alfred P. Sloan Foundation**

***Supplementary Project Funding Provided By:***

**The National Science Foundation**

The American Association for the Advancement of Science gratefully acknowledges the support of these sponsors of Phase I of this project.

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These materials represent the views and analyses of the authors and contributors, and do not necessarily represent the views or analyses of the American Association for the Advancement of Science, the Association of American Universities, the Alfred P. Sloan Foundation, the National Science Foundation, the University of Florida, or any participating institution or representative attending any related workshop or contributing to the project.

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(Direct Link: <http://php.aaas.org/programs/centers/capacity/publications/complexlandscape>)

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# I. PREFACE AND PROJECT OVERVIEW

These materials were developed for a project led by the American Association for the Advancement of Science ("AAAS"), with participation by the Association of American Universities ("AAU"). The project addresses a pressing issue posed by leaders of industry, academia, government and philanthropy: How can policy leaders of our nation's colleges and universities increase the racial and gender diversity of their faculties and student bodies so as to champion and sustain effective science, technology, engineering and mathematics ("STEM") programs in what often seems to be an overly complicated, barrier-laden, and hostile legal environment?

This issue goes to the heart of what our nation needs to do in the 21<sup>st</sup> Century to continue its leadership position in higher education, innovation, and the global economy. Successfully addressing this issue is vital if we are to maintain our national security and democracy; and to be successful, diversity efforts must be legally sustainable.

AAAS and AAU have engaged on this issue in an effort to influence policy and practice regarding our nation's critical need for greater access by racial minorities and women to educational opportunities and academic careers in STEM fields. This national need reflects a practical reality, which does not align with any particular political view.

AAAS and AAU consider STEM fields a special case because: (1) science and engineering are national assets that drive innovation, economic strength, leadership and our national security; (2) the United States has been a leader in producing research and development ("R&D") and the personnel responsible for its renewal; and (3) the federal investment in STEM fields continues to shape what colleges and universities do and what K-12 schools teach. Moreover, the Obama Administration has announced an aggressive agenda focused on environmental stewardship, alternative energy, and health promotion that depends on robust research and development investments as a key to economic recovery.<sup>1</sup>

The current political, legal and policy climates continue to demand new strategies and new thinking about how to broaden and increase participation in STEM fields. This project is one important step in helping the higher education community meet those challenges -- reflective of an authentic collaboration involving institutions of higher education and industry, government agencies, policy experts, and lawyers, to share and highlight those practices that are most likely replicable, effective, and lawful.

The project giving rise to this publication is the outgrowth of a day-long roundtable hosted by AAAS and the National Action Council for Minorities in Engineering, Inc. ("NACME") on January 15, 2008 in Washington, D.C. Funded by the Alfred P. Sloan Foundation, AAAS, and NACME, and attended by representatives of the National Science Foundation ("NSF") and the National Institutes of Health ("NIH"); leaders of industry, research universities, and the National Academy of Engineering; and policy-makers at education testing organizations, the roundtable

<sup>1</sup> *The American Reinvestment and Recovery Plan – By the Numbers* (2009), [www.whitehouse.gov/assets/Documents/Recovery\\_Plan\\_Metrics\\_Report\\_508.pdf](http://www.whitehouse.gov/assets/Documents/Recovery_Plan_Metrics_Report_508.pdf).

explored the status of efforts to increase the racial and gender diversity of faculties and student bodies at the nation's research universities in the fields of science, technology, engineering and mathematics ("STEM").<sup>2</sup>

The higher education community won important ground in the U.S. Supreme Court in 2003, with the decision in the University of Michigan law school admissions case. However, this gathering of policy-makers recognized the challenges still posed by the legal context in which diversity efforts are pursued. The roundtable focused on the intersection of law and policy by initiating the day with a panel of legal scholars.<sup>3</sup> The panel painted the legal landscape for diversity efforts in the era of U.S. Supreme Court jurisprudence after the Court's University of Michigan law school and undergraduate admissions decisions in 2003, *Grutter v. Bollinger*<sup>4</sup> and *Gratz v. Bollinger*,<sup>5</sup> and the decision in the consolidated public school student assignment cases in 2007, *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County Board of Education*.<sup>6</sup> While *Grutter* was an important victory for higher education, the Court also reinforced the limitations on use of race and ethnicity under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.<sup>7</sup>

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<sup>2</sup> For a report on the roundtable, see *Standing Our Ground II: Efficacy of University-Based S&E Programs Despite Limitations of 'Strict Scrutiny'*, at [www.aaas.org/news/releases/2008/0204diversity.shtml](http://www.aaas.org/news/releases/2008/0204diversity.shtml).

<sup>3</sup> The panel was comprised of Professor Theodore Shaw of Columbia University School of Law (formerly the Director/Counsel of the NAACP Legal Defense and Educational Fund), Professor Michael Olivas of the University of Houston Law Center, and Richard Kahlenberg, Senior Fellow of The Century Foundation. The panel was moderated by Jamie Lewis Keith, Vice President and General Counsel of the University of Florida, member of the AAAS Capacity Center's Advisory Board and the AAU General Counsels Group, and former primary inside counsel for Massachusetts Institute of Technology. For articles by Professor Olivas and Dr. Kahlenberg written for the roundtable, see [http://php.aaas.org/programs/centers/capacity/07\\_Engagement/07\\_LawPolicyPractice.php](http://php.aaas.org/programs/centers/capacity/07_Engagement/07_LawPolicyPractice.php).

<sup>4</sup> 539 U.S. 306 (2003).

<sup>5</sup> 539 U.S. 244 (2003).

<sup>6</sup> 551 U.S. 701 (2007). The student assignment decision highlights the pivotal role of Justice Kennedy on the current Supreme Court. Justice Kennedy, as he had in *Grutter*, endorsed the view that the *educational benefits* of a diverse student body are compelling, thereby justifying consideration of race and ethnicity in an educational context. Yet, at the same time, he rejected the race-conscious means before him as insufficiently circumscribed and inappropriately designed to achieve those desired ends. *Id.*

<sup>7</sup> In *Grutter*, 539 U.S. at 325-33, 338-39, and 341-43, and *Gratz*, 539 U.S. at 270-71, the Supreme Court held that, under the Constitution and federal non-discrimination laws:

1. Higher education institutions could establish a compelling interest in the *educational benefits* to all students that accrue from a broadly (not just racially) diverse student body. Correspondingly, the *Grutter* majority also acknowledged the related mission-driven interest of serving the nation's need for well-prepared citizens and leaders to support our democracy and a well-prepared labor pool to support our economy and national security. (At the same time, the Court cautioned that race may not be used to remedy general societal discrimination or to achieve parity in the representation of minorities in a student body as compared with their representation in society at large, i.e. "racial balance.")
2. In that context, race could be taken into account as one of many factors in undertaking a holistic assessment of each individual for admission to college or graduate school, using the same criteria for all applicants individually—not uniformly—weighing race when, and only to the extent that, it is necessary to do so to achieve mission-driven compelling educational interests. The Court ruled that institutions considering race must ensure that viable, "workable alternatives" to the consideration of race do not exist.

And in 2009, the Supreme Court made clear -- in *Ricci v. DeStefano* -- that, absent an adequate "justification, ... express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race," given the "important purpose of Title VII -- that the workplace be an environment free of discrimination, where race is not a barrier to opportunity."<sup>8</sup> The *Ricci* opinion noted that "remediating an unintentional disparate impact" provides one such justification,<sup>9</sup> but it is unclear whether the courts will hold that *Grutter's* diversity rationale provides another. While it provides some insights, *Ricci* is a case involving the use of an employment test, not one addressing affirmative action.

Although it is easy in this context to focus on what *cannot* be done legally, it is essential for college and university General Counsels to have an understanding of, and an orientation toward, what *can* be done legally in order to achieve the central educational goals associated with a diverse faculty and student body. Correspondingly, the administrative and policy leaders in STEM higher education and research must communicate effectively about the role of their institutions and the creative, collaborative nature of STEM fields in our society. In short, policy and legal leaders must reach a common understanding of what approaches are both effective and legally sustainable. Indeed, judgments with respect to each go hand-in-hand.<sup>10</sup>

***"[P]olicy and legal leaders must reach a common understanding of what approaches are both effective and legally sustainable. Indeed, judgments with respect to each go hand-in-hand."***

The Sloan Foundation saw the opportunity to advance diversity efforts on campus and this project was born.<sup>11</sup> This guide, and the two-day AAAS and AAU workshops in which this guide is first being released, are offered as tools for the legal and policy leaders of institutions of higher education. Our goal is to provide sophisticated legal resources to General Counsels to help them and their academic leadership create, implement and sustain successful diversity programs.

<sup>8</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673-74 (June 29, 2009).

<sup>9</sup> *Id.*, 129 S. Ct. at 2677 ("We hold ... that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remediating an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious discriminatory action."); *see also id.* at 2675 ("Th[is] Court has held that certain government actions to remedy past racial discrimination -- actions that are themselves based on race -- are constitutional only where there is a "strong basis in evidence" that the remedial actions were necessary.") (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (discussed *infra*)).

<sup>10</sup> Arthur L. Coleman and Scott R. Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues*, at 4 (College Board, 2006) ("Properly understood, federal law should affirm sound educational judgments . . . The basic answers to . . . inherently educational [questions] drive conclusions about the legal soundness of the policies in question."); *see generally Grutter*, 539 U.S. 306 (2003).

<sup>11</sup> The AAAS role in the current effort originated with a Sloan Foundation-funded conference in January 2004 and resulting report, *Standing Our Ground: A Guidebook for STEM Educators in the Post-Michigan Era*, S.M. Malcom, D.E. Chubin, and J.K. Jesse, AAAS-NACME, October 2004 [www.aaas.org/standingourground](http://www.aaas.org/standingourground).



It is important to note what we have *not* done in preparing this guide. We have not sought to capture all legally sustainable approaches to diversity efforts on campus. The absence of an approach -- or a variation on an approach -- from this guide does not indicate that the approach or variation is legally unsustainable. Similarly, our approaches are not intended to substitute for legal advice on the particular programs implemented by an institution. That analysis must be institution and context specific and should be undertaken by the lawyers for the institution in collaboration with their academic colleagues. Nothing in this guide or the appendices to this guide is intended to provide such legal advice.

We gratefully acknowledge the Alfred P. Sloan Foundation for its grant in support of the first phase of this project, and the NSF for its supplementary funding. We also thank our project's outside counsels, Fulbright & Jaworski L.L.P. (Robert Burgoyne, Theodore Shaw, Ralph Dawson and Rena Scheinkman), who focused primarily but not exclusively on faculty diversity; and EducationCounsel LLC (Art Coleman, Scott Palmer, Steve Winnick and Jennifer Rippner), who focused primarily but not exclusively on student diversity, for their generous contributions of firm resources and their outstanding expertise. The project's Expert Legal Advisory Board also brought wisdom and experience to this endeavor, and we gratefully recognize Art Coleman of EducationCounsel LLC, who also serves as Chair of the Advisory Board, and Jonathan Alger, Senior Vice President and General Counsel of Rutgers University, Lawrence White, General Counsel of the University of Delaware, and John Payton, the Director and Counsel of the NAACP Legal Defense and Educational Fund (and former senior partner of WilmerHale LLP and a primary counsel in the University of Michigan Supreme Court cases), who serve as Advisory Board members with Ms. Keith.

Finally, the AAAS hopes to periodically supplement this guide, in consultation with our Expert Legal Advisory Board, as the legal landscape is ever changing.

Dr. Daryl E. Chubin  
Jamie Lewis Keith, Esq.  
Dr. Shirley M. Malcom

**PERSPECTIVES: Association of American Universities**

"During nearly all of the forty-five plus years that I have been involved with higher education, as a faculty member or administrator, the hope of achieving a more diverse faculty and student body has been a goal – too often an elusive one – of our universities . . .

[A]chieving more diverse campuses remains a central objective for our universities. We know, from several compelling studies, that increasing campus diversity has profound educational advantages for all students, that achieving diversity and excellence are not mutually exclusive goals, and that the failure to reduce disparities of educational attainment among all of our citizens has profound consequences for national economic and civic development . . .

It is important that we understand the legally sustainable efforts our universities can undertake to achieve diversity; and it is important that we explore the means of succeeding in achieving diversity. What is legal and what works? . . .

Our commitment to diversity is not a product of an effort at rebalancing the scales of social justice, however long they may have been imbalanced. Rather it is because we believe our institutions will be better, our society enriched, our economy enhanced by educating better our richly diverse population. And it is inspired as well by the conviction that all students admitted to our institutions are capable of succeeding in a challenging curriculum and carrying that success with them to their world beyond the campus."

*Association of American Universities, Robert M. Berdahl, Written Statement, October 2009*



## II. HISTORICAL CONTEXT

Before reviewing particular laws and cases that govern college and university diversity programs, some historical context is in order. The origins of what we now call "diversity" efforts are found in the 1960's civil rights movement for equal rights and justice for African Americans. That movement coincided with a reawakening of the struggle for women's rights, and a broad demand for equality of all persons regardless of who or what they were.

Colleges and universities played a central role in opening opportunities to African Americans, Latinos, Native Americans, and other minority group members. They did not originally undertake that effort out of a concern for the educational benefits of broadly defined "diversity" as we now know it. In fact, if one were to scour the social, political, and judicial discourse of the time during which higher education first began to enroll significant numbers of minority students at historically white colleges and universities, there would be little focus on "diversity." The doors to higher education were opened as part of an effort to counter the effects of years, decades, and centuries of exclusion and discrimination by specific institutions as well as society at large.<sup>12</sup> While there was an increase in minority enrollment in higher education during the civil rights movement, much of the imperative came after the assassination of Dr. Martin Luther King, Jr. and the violence that wracked our cities in the late 1960's. Colleges and universities were not thinking as much about the benefits of diversity in the classroom in the sixties and early seventies as they were about their part in addressing the massive inequality and exclusion of black and brown people as a consequence of discrimination. Affirmative action in higher education began as a remedial imperative.<sup>13</sup>

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<sup>12</sup> In 1960, 38.6% of black Americans graduated from high school, and 5.4% from college. Only 3.8 % of black men and 6% of black women were professionals. The percentage of physicians who were black was 2.8%, the same as it had been in 1940. Of lawyers, 1.2% were black, as were 0.5% of engineers. There were only 265 black elected officials in the nation in 1965; of these, four were in Congress and there were no black senators. Four federal judges were black. (William G. Bowen and Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions, Princeton Univ. Press, at 2 (2d ed. 2008) (hereafter "The Shape of the River"). In 1965, barely 1% of all law students in the country were black; one-third of them attended black law schools. Barely 2% of all medical students were black; three-fourths of them attended two all-black medical schools. *Id.* at 5.

<sup>13</sup> Institutions of higher education today have recognized the critical educational benefits of diversity. In the early years of affirmative action in higher education, however, many universities probably were acting to address what the Supreme Court would come to call "societal discrimination." In contemporary debates or discourse on race-conscious measures to achieve diversity in higher education, there is little to be gained by recounting the remedial imperative for societal discrimination, except historical accuracy. Remedial imperatives may still have some vitality for Congress under Section 5 of the 14<sup>th</sup> Amendment, however and for institutions that seek to remedy the present effects of their own discrimination or of others' discrimination in which they can demonstrate they passively participated.

Bowen and Bok note that in the early days, "[a] few universities said that they were acting out of a desire to rectify past racial injustices." They primarily focus, however, on the following important reasons why institutions of higher education pursue diversity efforts today: (1) a desire to enrich the education of all students by including race as another element in assembling a diverse student body, and (2) action on a "perceive[ed]"and "widely recognized need for more members of minority groups in business, government, and the professions" so that "minority students would have a special opportunity to become leaders in all walks of life." *Id.* at 7.

*Bakke* changed all of that. If colleges and universities were not thinking of diversity prior to *Bakke*, after it they were. Justice Powell's 1978 opinion in *Bakke* rested race-conscious efforts aimed at minority enrollment on First Amendment academic freedom principles and desired educational outcomes -- and not on the (distinct but related) access interests of minority students.<sup>14</sup> The educational interests were reaffirmed (and expanded upon) twenty-five years later by a Court majority in *Grutter*.

In the interim, colleges and universities across the nation relied upon Justice Powell's *Bakke* opinion, although as time passed it began to fray as the result of a sustained attack on its viability. That attack was reflected at the appellate court level in *Hopwood v. Texas* and *Johnson v. Board of Regents of the University of Georgia*,<sup>15</sup> in which the Fifth and the Eleventh Circuits held that diversity was not a compelling state interest and that *Bakke* was not controlling because there was no majority rationale. *Grutter* overruled *Hopwood* and *Johnson* and put to rest the controversy over *Bakke*'s vitality. There is now firm judicial precedent in support of efforts to ensure that our institutions, including our colleges and universities, corporations, and the military, are diverse and inclusive.

Today, regardless of one's political viewpoint of social justice, the nation's demographic trends demand a society in which our educational system, the academy, and industry include minorities and women; otherwise, our economic strength and national security will decline. Industry, government and higher education must communicate this reality more effectively or misunderstanding of this national imperative will persist and it will be more difficult to succeed in the diversity efforts on which our nation's and all of our citizens' future in part depends.

The Supreme Court has changed since *Grutter*. Justice Sotomayor recently replaced Justice Souter, and it is too early to evaluate the significance of this change. Former Chief Justice Rehnquist's replacement by Chief Justice Roberts is unlikely to change the Court's alignment on issues of race. However, Justice O'Connor's departure and the arrival of Justice Alito likely leaves the Court with a more conservative posture. Notably, however, Justice Kennedy's assumption of "swing vote" status introduces an element of unpredictability to the Court's race jurisprudence, as evidenced by the decision in *Parents Involved*, the student assignment case.<sup>16</sup> Justice Kennedy, who dissented in *Grutter* and joined the majority in *Parents Involved* in

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<sup>14</sup> Justice O'Connor's opinion for the majority in *Grutter* highlights these distinctions. She stated that "[t]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.... Effective participation by members of all racial and ethnic groups in the civic life of our nation is essential if the dream of one nation, indivisible, is to be realized." 539 U.S. at 331-32. This language arguably provides the basis for an independent compelling interest which recognizes the importance of access to higher education for minority students. It at least expands the scope of educational benefits that flow from diversity beyond educating all students and encompasses the service mission of the institution. What is no longer arguable, however, is that "diversity is a compelling state interest that can justify the use of race in university admissions;" as a result, "the Equal Protection Clause does not prohibit the ... narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." *Id.* at 325, 343. That interest belongs to the university.

<sup>15</sup> *Hopwood I*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996); *Hopwood II*, 236 F.3d 932 (5<sup>th</sup> Cir. 2000); *Johnson*, 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).

<sup>16</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

striking down the challenged plans, refused to go as far as Chief Justice Roberts' plurality opinion in prohibiting race-conscious considerations because "parts of the opinion by the Chief Justice imply an all-too-unyielding insistence that race cannot be taken into account in instances when, in my view, it may be taken into account."<sup>17</sup>

Colleges and universities, then, are at the center of the debates over affirmative action and diversity, which in turn have a significant impact on the nation's economic strength and national security. Higher education, particularly in the fields of science, technology, engineering and mathematics, plays a critical role by increasing basic knowledge and generating a well-trained workforce on which industry and government depend. Whatever one's politics may be, for the good and prosperity of all U.S. citizens, society and the nation, higher education must prevail in its goal of increasing access for minorities to education at all levels and in all fields, but particularly in STEM fields.

***"Higher education, particularly in the fields of science, technology, engineering and mathematics, plays a critical role by increasing basic knowledge and generating a well-trained workforce on which industry and government depend. Whatever one's politics may be, for the good and prosperity of all U.S. citizens, society and the nation, higher education must prevail in its goal of increasing access for minorities to education at all levels and in all fields, but particularly in STEM fields."***

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<sup>17</sup> *Id.* at 787 (Kennedy, J., concurring). For an expanded analysis of the Court's *Seattle School District* opinion and the differing factions on the Court, see *Echoes of Bakke: A Fractured Supreme Court Invalidates Two Race-Conscious K–12 Student Assignment Plans but Affirms the Compelling Interest in the Educational Benefits of Diversity* (College Board, 2007).



### III. THE COMPELLING CASE FOR DIVERSITY

#### A. The Diversity Imperative in 21<sup>st</sup> Century STEM Education

##### 1. Background

For decades, the higher education community has recognized the imperative of achieving diversity among students and faculty as a necessary foundation for attaining each institution's mission-driven core educational goals. That mission encompasses delivery of the best education to all of the institution's students, production of excellent research to increase knowledge and enrich learning, and service in support of the nation's most critical needs. Although established in a variety of ways, several central elements most often characterize diversity-related aims, particularly in the rapidly changing 21<sup>st</sup> Century world: (1) improving educational outcomes, both with respect to knowledge and skills, and civic engagement; (2) establishing foundations for a better prepared (and ultimately more productive) workforce that will support a more robust national and international economy; (3) conducting excellent technology research that will enable industry to serve the needs of a diverse and global society, thereby supporting innovation, economic strength and national security; and (4) enhancing the knowledge and skills of future military and national security personnel, and thus enhancing national defense at home and abroad. With respect to the importance of these goals, there is, at the end of the first decade of the 21<sup>st</sup> Century, little meaningful debate.<sup>18</sup> There is likewise little debate that institutions of higher learning may properly conclude that broadly-defined "diverse" faculties and student bodies are critical to achieving these goals.

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**PERSPECTIVES**

"Racial diversity . . . provides the necessary conditions under which other educational policies can facilitate improved academic achievement, improved intergroup relations, and positive long-term outcomes."

*Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases*, Washington, DC: National Academy of Education, 2007, p.49

In 2003, the United States Supreme Court weighed in for the first time in a quarter century on the then-central question of the day: Whether the educational goals associated with student diversity could ever rise to the level of a "compelling interest" that would, in certain cases, support race- and ethnicity-conscious means, such as in the admissions practices that were before the Court.

<sup>18</sup> See generally Coleman, Palmer, Rippner and Riley, *A 21st-Century Imperative: Promoting Access and Diversity in Higher Education* (College Board and American Council on Education, October 2009).



With a clear (if narrow) majority (and, indeed, with *all nine* Members of the Court acknowledging in 2007 the 2003 binding precedent regarding the issue in the higher education context)<sup>19</sup>, the Court recognized and embraced the educational imperative vigorously pressed by the education, business, military and other communities.<sup>20</sup>

This picture of consensus changes, however, as the discussion shifts from the question of broad-based *diversity goals* (that include, but are not limited to, race-, ethnicity-, and gender-conscious goals) to the question of *the precise means* by which that diversity is to be achieved. More specifically, despite strong support for certain practices, debates continue to surface regarding the educational and legal appropriateness of race-, ethnicity-, and gender-conscious strategies designed to achieve educational mission-driven diversity goals (ranging, for instance, from questions regarding higher education's race-conscious admissions and financial aid practices to its consideration of race in faculty recruitment and hiring).

It is in this context that the central question of diversity in STEM (and other) fields surfaces.

## 2. Diversity and STEM Education

The national imperative to enhance the diversity of institutions invested in STEM education, and ultimately in STEM fields, is best understood in the context of the broader diversity interests that have come to characterize higher education and workforce aims: improved and enhanced educational, civic, economic and national security outcomes. Increasing the diversity of academic research institutions' faculties, as well as undergraduate and graduate student bodies, is critical for the nation's continued leadership in innovation, higher education and the global economy.

### a. Educational and Civic Outcomes

Research establishes that students learn more and the workforce is more productive and successful in a broadly diverse setting.<sup>21</sup> Students, both minority and non-minority, who are educated in racially, ethnically, and otherwise diverse academic settings, benefit from experiencing a broader array of questions and perspectives as they identify and solve problems and are better equipped to function and thrive in an increasingly multi-cultural world. The

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<sup>19</sup> See *Parents Involved in Community Schools*, 551 U.S. 701, (2007) (Roberts, C.J., announcing the judgment and opinion of the Court; Thomas, J., concurring; Kennedy, J., concurring in part and concurring in the judgment; Breyer, J., dissenting).

<sup>20</sup> See *Grutter* 539 U.S. at 331, 343. See also *Smith v. Univ. of Washington Law School*, 392 F.3d 367 (9<sup>th</sup> Cir. 2004), *cert. denied*, 546 U.S. 813 (2005) (concluding that the law school's admission program had been narrowly tailored to serve the school's compelling interest in obtaining the educational benefits that flow from a diverse student body).

<sup>21</sup> See e.g., Patricia Gurin, et al., "Diversity and Higher Education: Theory and Impact on Educational Outcomes," 72 *Harv. Educ. Rev.* 3, 330-36 (2002); The Shape of the River, *supra*; Helen Lippman, "Variety is the Spice of a Great Workforce," *Business & Health Archive* (May 1, 2000); Somnath Saha, Gretchen Guiton, Paul Wimmers, and LuAnn Wilkerson, "Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in US Medical Schools," *JAMA*, 300(10):1135-1145 (2008); and Scott E. Page, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies, Princeton Univ. Press (2008).

graduates of STEM degree programs will have to work collaboratively and productively with -- and identify and serve the needs of -- a diverse society. Students learn not only in the classroom, but also through their experiences living, studying, working and interacting with each other and with faculty at colleges and universities across the country. Faculty, too, are more productive and creative teachers and researchers when they work with diverse colleagues and students.<sup>22</sup> Many institutions of higher education have determined that they require a broadly diverse faculty in STEM and other fields to achieve their mission-driven objectives in a diverse and global society. Importantly, science and technology should be understood as actively evolving (not static) fields, requiring creative and collaborative undertakings in a world that is increasingly connected and diverse. Thus, diverse learning environments are vital settings for enhancing relevant knowledge and skills. U.S. academic research institutions must provide diverse campus, educational, research and living experiences to enable such learning inside and outside the classroom and the laboratory.

<sup>22</sup> *Id.*; see also Appendix IX, *infra*, "U.S. Leaders Speak," 17 SEI 2008, [www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42](http://www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42); Amici Curiae Brief of Massachusetts Institute of Technology, Leland Stanford Jr. University, E. I. DuPont De Nemours and Company, International Business Machines Corp., National Action Council for Minorities in Engineering, the National Academy of Sciences and the National Academy of Engineering, in *Grutter* (upholding University of Michigan Law School's holistic assessment of each candidate for admission, taking race among other factors into account), and *Gratz* (striking down as unconstitutional University of Michigan's automatic award of 20 points to minorities in the admissions evaluation process) [web.mit.edu/newsoffice/nr/2003/amicus-brief.pdf](http://web.mit.edu/newsoffice/nr/2003/amicus-brief.pdf) ("MIT Brief").

**PERSPECTIVES: From the Classroom**

**"In speaking of broad diversity, one must recognize that every individual—of every ethnicity, gender, etc.—will bring different perspectives, experiences, creativity . . . . But when individuals from groups that face traditional biases in our society are excluded or inadequately represented, we inherently limit the diversity that is possible—and with that, we limit the potential for achievement, discovery, innovation and learning in the sciences (and likely in other fields). [T]his limits the robustness of the scientific enterprise as a whole . . . .**

**I offer . . . my judgment as an educator in science whose experience informs me that broad diversity of students and faculty in the classroom and laboratory enriches the learning environment for all students.**

**My experiences as an educator seem to have correlations with my observations about how progress occurs in the expansion of human scientific knowledge. The identification, recognition and exploitation of multiple distinct pathways for asking questions about and solving scientific problems often precedes discovery—and sometimes—head-spinning new paradigms. These new answers and advances in science [aid] its evolution and avoid the fate of becoming a static state of knowledge . . . .**

**My observation is that the broadest possible manifestation of diversity is a critical force-multiplier to the learning process for all students in a science classroom or laboratory. Diversity, in its inherent differences in background, experience and intellectual aesthetics (or style), seems to lead to the broadest spectrum of questions about any posed problem. Although there may be one answer to a physics, chemistry or mathematics problem (based on the current state of knowledge), there are often multiple paths for arriving at that answer. In a broadly diverse classroom, all students thus benefit from hearing the different questions posed in the educational arena. Fostering habits of seeking multiple pathways to solutions would seem a prudent strategy for the development of innovation in thinking of students in addition to enhancing each student's mastery of existing science."**

**S. James Gates, Jr., J. S. Toll Professor of Physics and Center for Particle & String Theory Director at the University of Maryland, College Park, "Thoughts On Creativity, Diversity and Innovation in Science and Education," at 3, 4 (2009), available at [www.aaas.org/](http://www.aaas.org/)**

## b. *Economic and National Security Outcomes*

STEM fields are important economic and innovation drivers and, consequently, provide an essential foundation for national security.<sup>23</sup> According to the National Science Foundation ("NSF"), "scientists and engineers contribute enormously to technological innovation and economic growth," far exceeding in impact the five percent of the U.S. civilian workforce that they represent.<sup>24</sup>

Because technology is "increasingly recognized as a key determinant of economic growth by most nations,"<sup>25</sup> NSF has emphasized that our "international economic competitiveness ... depends on the U.S. labor force's innovation and productivity" and that a "diverse, globally-oriented workforce of scientists and engineers" is needed to support continued U.S. economic leadership.<sup>26</sup>

## c. *Conclusion: Benefits to All*

Academic research institutions educate much of our nation's STEM workforce and increase fundamental knowledge from which industry can develop practical solutions to the needs of a diverse society. This is the incomparable U.S. partnership of higher education, academic research, government and industry that has resulted in innumerable advances in knowledge and improvements in the quality of life, health, and productivity of society in this country and around the world.<sup>27</sup> Broadly diverse faculties and student bodies are critical to the success of the academic research endeavor and its partnership with government and industry, benefiting all in our nation and society in general.

## 3. **The Challenges We Face**

U.S. leadership in STEM innovation, higher education and the global economy is at risk.

Illustrating this point, NSF, the President's Council of Advisors on Science and Technology ("PCAST"), and the Commission on Professionals in Science and Technology ("CPST") all report a negative trend in the first decade of the 21<sup>st</sup> Century: U.S. students' interest in STEM

<sup>23</sup> See, e.g., n. 61, *infra*; Massachusetts Institute of Technology, June 12, 2002, "Report of the Ad Hoc Faculty Committee on Access to and Disclosure of Scientific Information," Executive Summary, i-ii, 1-6 (committee chaired by MIT Professor, Sheila Widnall, former Secretary of the Air Force) ("National security, the health of our nation, and the strength of our economy depend heavily on the advancement of science and technology and on the education of future generations....").

<sup>24</sup> NSF, 1 *Science and Engineering Indicators 2002*, at Chs. 2, 3, 5, [www.nsf.gov/sbe/srs/seind02/start.htm](http://www.nsf.gov/sbe/srs/seind02/start.htm) (NSF's *Science and Engineering Indicators* are cited "SEI"); NSF, *Women, Minorities, and Persons With Disabilities in Science and Engineering 2000*, [www.nsf.gov/sbe/srs/nsf003271](http://www.nsf.gov/sbe/srs/nsf003271) ("WMD"); President's Council of Advisors on Science and Technology ("PCAST"), Workforce/Education Subcommittee, [www.ostp.gov/pcast](http://www.ostp.gov/pcast), in the June 2004 report entitled, "Science and Engineering Capabilities," parts 2 and 3.

<sup>25</sup> 1 SEI at 5-44; The National Academies, *Rising Above The Gathering Storm: Energizing and Employing America for a Brighter Economic Future* (2005), [www.nap.edu/catalog.php?record\\_id=11463](http://www.nap.edu/catalog.php?record_id=11463).

<sup>26</sup> 1 SEI 3-15 to 3-29, 5-29 to 5-30; WMD at 1.

<sup>27</sup> See n. 22, MIT Brief, *supra*.

careers and their performance in science and mathematics continue to decline, while foreign students' interest and performance in these areas continue to increase. Only about one-third of the bachelors degrees earned in the United States in 2005 to 2006 were in STEM fields, whereas 56 percent of the bachelors degrees earned in China and 63 percent in Japan in 2005 were in STEM fields. Furthermore, in the U.S., about 5 percent of all bachelor's degrees are awarded in engineering, compared to 20 percent in Asia.<sup>28</sup> Overall, the United States trailed 16 countries in Europe and Asia in the proportion of each country's college population who earned degrees in science and engineering in 2001.<sup>29</sup>

Demographic trends are even more striking. Data from the U.S. Census Bureau and NSF demonstrate that individuals who today are referred to as minorities will soon constitute the majority of the college-age population and then the majority of the total population of the United States. Minorities constituted one in three members of the college-age population and about 24 percent of the total population of the U.S. in 2000. By 2025, NSF projects that minorities will constitute 38 percent of the college-age population. Minorities are projected to surpass Caucasians in the U.S. population soon after 2050.<sup>30</sup>

In 2006, women already constituted 57 percent of the college-age population as well as more than half of the total U.S. population of the United States.<sup>31</sup>

While the gender gap in high school preparation in science and mathematics has largely been eliminated, women are still lagging in the pursuit of STEM higher education and wide racial and ethnic gaps persist in high school preparation. African American, Hispanic, and American Indian and Alaska Native students are less likely than Asian and non-Hispanic Caucasian students to take key advanced mathematics, chemistry, and physics courses in high school.<sup>32</sup> This evidence signals the perpetuation of a severe pipeline problem in STEM fields.

African American, Hispanic, and Native American individuals, whose representation in the college-age and U.S. population is increasing, are under-represented in both STEM degrees and all degrees at the college and graduate school levels. Women are under-represented in STEM degrees at all levels. Consider the following data on degrees in STEM and other fields at the bachelors and doctoral levels.

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<sup>28</sup> SEI 2008, [www.nsf.gov/statistics/seind08/c2/c2s5.htm](http://www.nsf.gov/statistics/seind08/c2/c2s5.htm).

<sup>29</sup> WMD at 20; MIT Brief; PCAST, June 2004 report at parts 3 and 4.

<sup>30</sup> U.S. Census Bureau, U.S. Summary 2000 (July 2002), [www.census.gov/population/cen2000/phc-t08](http://www.census.gov/population/cen2000/phc-t08) (Tables 3 and 4 averaged)(15-24 year-olds in the U.S. population based on 2000 census data); 2 SEI, Table 2-2 (Appendix Tables); see also U.S. Department of Commerce, Minority Business Development Agency, "Minority Population Growth: 1995 to 2050," at 1-3 (1999); U.S. Census Bureau, "Dynamic Diversity: Projected Changes In U.S. Race and Ethnic Composition 1995-2050," at 1 (1999).

<sup>31</sup> See National Center for Education Statistics, *Digest of Education Statistics*, 2006, Table 6, [http://nces.ed.gov/programs/digest/d06/tables/dt06\\_006.asp](http://nces.ed.gov/programs/digest/d06/tables/dt06_006.asp)

<sup>32</sup> CPST 2008, *Professional Women and Minorities*, Chs. 1-2.

Women have outnumbered men in undergraduate education since 1982 and earned 58 percent of all bachelor's degrees in 2005, but earned only about half of all bachelor's degrees in science and engineering since 2000.<sup>33</sup> African Americans, Hispanics and Native Americans together accounted for only 18 percent of STEM bachelors degrees in 2005-2006.<sup>34</sup> Of PhDs awarded between 2005 and 2006 in the U.S. in STEM fields, only 20 percent were earned by women, and only 6 percent were earned by African Americans, Hispanics and Native Americans.<sup>35</sup>

It is critical that women's robust representation in college generally not obscure their lesser representation in PhD programs and in STEM fields at all levels. Data on freshman "intentions" to major in a field, actual enrollments, and degree completions show wide variations by gender and broad field. The sex ratio of interest ranges from 9:1 in computer science, 6:1 in engineering, and 1.5:1 in physical sciences. Women's interest outpaces men's only in the biological sciences.<sup>36</sup> These patterns persist in enrollments and degree completion with the gap in retention rates narrowing to parity in many fields, but not in all, *e.g.*, 4:1 male to female in engineering.<sup>37</sup> The impact of these differentials on the composition of the STEM faculty is clear.

This relative dearth of science and technology degrees earned by minorities and women has led to severe under-representation in academia and the workforce, with only 10 percent of the science and engineering workforce in 2006 comprising African Americans, Hispanics and Native Americans.<sup>38</sup> Under-represented minorities, women and persons with disabilities represent two-thirds of the U.S. workforce, but hold only one-fourth of the science and technology jobs that drive the global economy.<sup>39</sup> Caucasians and Asians, who represent the vast majority of this workforce and have the most experience, are aging.<sup>40</sup> The university faculty looks glaringly unlike the undergraduate student body. In the context of these demographics, *all* students and

<sup>33</sup> SEI 2008, [www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42](http://www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42).

<sup>34</sup> 2 SEI at Appendix Table 2-17; WMD at 20; MIT Brief, *supra* n. 22; PCAST, June 2004 report at parts 3 and 4; *see also* National Center for Education Statistics, [www.nces.ed.gov/programs/digest/d06/tables/dt06\\_274.asp](http://www.nces.ed.gov/programs/digest/d06/tables/dt06_274.asp); CPST 2008, Figure 3-1.

<sup>35</sup> CPST 2008, Figure 3-1; *see also* T.B. Hoffer, M. Hess, V. Welch, Jr., and K. Williams, *Doctorate Recipients from United States Universities: Summary Report 2006* (National Opinion Research Center 2007) (reporting on data collected in the Survey of Earned Doctorates, conducted for six federal agencies, NSF, NIH, USED, NEH, USDA, and NASA by NORC).

<sup>36</sup> *The American Freshman*, issued annually, UCLA: Higher Education Research Institute, [www.gseis.ucla.edu/heri/heri.html](http://www.gseis.ucla.edu/heri/heri.html)

<sup>37</sup> *See Professional Women and Minorities: A Total Human Resources Data Compendium, 17<sup>th</sup> Edition*, Washington, DC: Commission on Professionals in Science and Technology, November 2008, Chs. 2-4.

<sup>38</sup> CPST 2008, *Professional Women and Minorities*, Ch. 5.

<sup>39</sup> PCAST, June 2004 report at part 3.

<sup>40</sup> 1 SEI at 3-12, 3-15 to 3-24, 3-27, 5-29; WMD at 20-22, Text Table 5-2 at 52. Only 9.1 percent of all higher education faculty are members of these minority groups so the percentage who are faculty in science and technology fields is even less. *See* Nat'l Center for Education Statistics, [www.nces.ed.gov/programs/digest/d06/tables/dt06\\_229.asp](http://www.nces.ed.gov/programs/digest/d06/tables/dt06_229.asp).

the entire nation will suffer if we do not address quality of and access to STEM education, while increasing the racial and gender diversity of the workforce available to STEM fields.<sup>41</sup>

As long as public kindergarten through 12<sup>th</sup> grade ("K-12") education is deficient, the demographics of applicant pools for selective institutions of higher education may not yield significantly greater racial diversity when only socio-economics are considered.<sup>42</sup> Even minorities of high socio-economic status with better K-12 preparation statistically face lower expectations that may lead to under-performance.<sup>43</sup>

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<sup>41</sup> S.A. Jackson, "The Quiet Crisis: Falling Short in Producing America's Scientific and Technical Talent, Building Engineering and Science Talent (BEST)" (2004), [www.bestworkforce.org/PDFdocs/Quiet\\_Crisis.pdf](http://www.bestworkforce.org/PDFdocs/Quiet_Crisis.pdf); AAAS-NACME, *Standing Our Ground: A Guidebook for STEM Educators in the Post-Michigan Era* (Oct. 2004), [www.aaas.org/standingourground.org](http://www.aaas.org/standingourground.org) (hereafter "*Standing Our Ground*").

<sup>42</sup> See *The Shape of the River*, *supra*, at 49 (noting that there are six Caucasians for every African American in low socio-economic groups with "A" grade point averages and high enough test scores to be seriously considered for admission to selective colleges and universities based on national demographic data); see also Thomas J. Kane in *Standing Our Ground*, *supra*, at Appendix C; Travis L. Gosa and Karl L. Alexander, "Family (Dis)Advantage and the Educational Prospects of Better Off African American Youth: How Race Still Matters," *Teachers College Record*, 109, 285-321 (2007).

<sup>43</sup> *The Shape of the River*, *supra*, at 77-79, 88.

**PERSPECTIVES: Helping Students Finish the 4-Year Run**

**"America's public universities enroll a high percentage of the college-going population—about two-thirds of all full-time students seeking B.A.'s and more than three-fourths of all students in four-year programs . . . — [and have] the strongest historical commitment to promoting social mobility. Six major findings related to 21 flagship universities and all 47 four-year public universities in Maryland, North Carolina, Ohio and Virginia are:**

- 1. Disparities in outcomes (especially graduation rates and the time it takes to earn a degree) are strongly related to socioeconomic status, race and ethnicity.**
- 2. Lengthy time-to-degree is a major problem.**
- 3. Withdrawals from flagship universities are far less concentrated in the first two years of study than many people assume.**
- 4. Money matters.**
- 5. But money is by no means the entire story, perhaps not even the largest part.**
- 6. "Sorting" of applicants by universities, especially overreliance on standardized tests, is consequential and problematic."**

William G. Bowen, Matthew M. Chingos, and Michael S. McPherson, *Crossing The Finish Line, Completing College at America's Public Universities*, Princeton University Press, 2009, Ch. 3, pp. 32-56.

Available on-line, *The Chronicle of Higher Education*, Sept. 8, 2009,  
<http://chronicle.com/article/Helping-Students-Finish-the/48329>

PREFACE AND  
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DISCRETION

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#### 4. Moving Forward

Industry leaders heavily invested in STEM education and professions have noted that, irrespective of one's political or social viewpoint, we must increase participation of minorities and women in STEM fields.<sup>44</sup> Observing that students educated in STEM fields in China and India often lack creative and collaborative abilities that are as well developed as students educated in American institutions of higher education, these leaders note that these countries realize the need to foster such creativity and collaboration in STEM education and are working on enhancing their approach. In addition, these leaders have opined that if we fail to make significant progress in increasing participation of minorities and women in U.S. STEM higher education and industry in approximately the next five or six years, the nation's economic strength, leadership in innovation, and security may be expected to decline appreciably, just as other countries' effectiveness and creativity in STEM education is expected to ascend.

***"Industry leaders heavily invested in STEM education and professions have noted that, irrespective of one's political or social viewpoint, we must increase participation of minorities and women in STEM fields . . . [or] the nation's economic strength, leadership in innovation, and security may be expected to decline appreciably...."***

Until our nation can provide access to high quality public K-12 science and mathematics education to a high percentage of all segments of our society, including under-represented minorities and women, institutions of higher education -- particularly selective institutions -- will have to continue to take race and gender into account to achieve the racial and gender components of the broad diversity in STEM undergraduate and graduate student bodies and faculties that they require to achieve their educational missions.

Until we confront the root causes of our nation's deficiency in STEM fields, our businesses and industries will continue to struggle to build a sufficiently diverse workforce that effectively identifies our society's needs, develops products and services to address those needs, and competes in the world's markets to provide those products and services. This inter-generational pipeline problem is one of the greatest challenges facing institutions of higher education and our nation in the 21<sup>st</sup> Century. U.S. colleges and universities must respond creatively and unequivocally.

Arguably, nowhere have race and ethnicity been more prominent in American life than in education, with institutions of higher education serving a pivotal role in opening opportunities to individuals. In many STEM fields, this has also been true for women. The effects of the shortage

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<sup>44</sup> See Remarks of the Chief Executive Officer of Northrop Grumman Corporation, the Executive Vice President of IBM Corporation and the President of the National Academy of Engineering in CHUBIN, D.E., MALCOM, S.M., KEITH, J.L., AND BOBB, K., "Standing Our Ground II: Efficacy of University-based S&E Programs Despite Limitations of 'Strict Scrutiny'," A SUMMARY OF THE MEETING, AAAS-NACME Roundtable 15 January 2008, revised April 2008, pp. 6-7

[http://php.aaas.org/programs/centers/capacity/07\\_Engagement/07\\_LawPolicyPractice.php](http://php.aaas.org/programs/centers/capacity/07_Engagement/07_LawPolicyPractice.php)

of educational opportunities, particularly in STEM fields, for racial minorities and women have been correspondingly felt in the faculties of our nation's colleges and universities and in the workforces of our nation's industries and businesses. Educational attainment is the pathway to individual upward mobility. But for at least 40 years, the influence of family and neighborhood, and to a lesser extent the influence of gender in STEM fields, have confounded school district policies to ensure equal educational opportunity and advance equitable educational outcomes.<sup>45</sup>

### **PERSPECTIVES: Race Still Matters**

**"We know from years of research that racial/ethnic gaps persist in almost every corner of our nation's campuses.**

- **There are racial disparities in college enrollment and college completion. Over the last three decades, undergraduate enrollment rates for racial/ethnic minority students have increased, nearly doubling. Minorities have also made gains in completion rates at the high school and collegiate levels; however, when compared to Whites, gaps in student achievement remain for nearly all minority groups.**
- **There are racial disparities in fields of study and graduate education. Fewer racial/ethnic minority students graduate in fields like science and engineering; fewer receive post-baccalaureate training and attain master's, doctorate, and professional degrees.**
- **There are racial disparities in perceptions of campus climate. Racial/ethnic minority students are less likely to express satisfaction with their overall undergraduate experience. They also are less likely to feel a sense of belonging, interact with faculty/staff, and hold leadership positions in clubs/organizations.**
- **There are racial disparities in hiring, tenure, and compensation policies. Post graduation, racial/ethnic minorities earn less, with the same credentials, as their White counterparts. Even within the ranks of our liberal-minded institutions, Blacks and Hispanics are grossly underrepresented in our faculties...."**

Michelle Asha Cooper and David A. Longanecker, Inside Higher Ed, Sept. 3, 2009, [www.insidehighered.com/layout/set/print/views/2009/09/03/cooper](http://www.insidehighered.com/layout/set/print/views/2009/09/03/cooper)

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<sup>45</sup> Isabel Sawhill, "Opportunity in America: The Role of Education," *The Future of Children, Princeton-Brookings, Policy Brief, 2* (Fall 2006).

In a perfect world, the lessons of R&D would permeate educational institutions with a short lag and little controversy. As it is in the United States, however, every state, school district, college, and university must decide for itself what works, how to translate the most effective and legally sustainable approaches into its own structure, and what to measure as a demonstration of successful outcomes. In a word, the wheel is being constantly "re-invented" within an environment awash in information of varying validity.

If we are focused on the educational benefits for all students and the nation's needs rather than on trying to include those who have been historically excluded or to achieve "racial balancing," then we still must consider race, ethnicity and gender (among other diversity characteristics and qualities) appropriately.<sup>46</sup> The issue is not one of whether an African American student or prospective faculty member "deserves" or "needs" consideration of his or her race as one factor among many. Rather, a college or university may need to consider such a student's or prospective faculty member's *combination* of race and socio-economic background to achieve the broad diversity in each racial group that is required to combat stereotyping and produce educational benefits for all students and the nation. This is an especially important consideration if there are many more non-minorities who apply for college admission or faculty positions in a given discipline.

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<sup>46</sup> See *Grutter*, 539 U.S. at 326-30; *Bakke*, 438 U.S. at 289-90, 306-07, 310.

## IV. KEY DEFINITIONS

These definitions are used throughout the materials and are important for the analysis provided.

### A. *Race-, Ethnicity-, and Gender-Conscious, -Exclusive and –Neutral Policies*

*Race-, ethnicity-, and gender-conscious, -exclusive and –neutral policies*, lack definitional coherence throughout all of federal law,<sup>47</sup> but as a general rule tend to refer to the following descriptions that will be followed in this guidance:

*Race-, ethnicity- and gender-conscious policies* are policies that reflect an express race, ethnicity or gender preference or that are principally motivated by those aims, with corresponding impact. Thus, for example, race-conscious policies may include explicit racial classifications (such as the University of Michigan Law School's race-as-a-factor admissions policy), where race was an express factor used in evaluating applicants, as well as those that are neutral on their face but that are motivated by a race-based purpose, resulting in disparate impact based on race. (Race-, ethnicity-, and gender-based policies, in contrast, tend to refer only to policies or practices reflecting express consideration of the preference of relevance.)<sup>48</sup>

*Race-, ethnicity- and gender-exclusive policies* qualify as a subset of the conscious policies. Beyond merely reflecting an express preference, they condition eligibility upon the particular race, ethnicity or gender of the targeted individuals. Thus, for example, a race-conscious financial aid policy (pursuant to which race is one factor among several considered when awarding aid) should be distinguished from a race-exclusive financial aid policy, pursuant to which the race of a student is a condition for eligibility for that aid.

*Race-, ethnicity- and gender-neutral policies* generally refer to policies that do not include an express preference and that are not principally motivated by race, ethnicity or gender purposes (with corresponding effects). Such policies have aims apart from racial, ethnic or gender diversity (such as socio-economic or geographic diversity or the need to attract individuals who have strong records of inclusive conduct and multi-cultural skills). Such policies may, as an ancillary albeit welcome matter, also contribute to racial, ethnic or gender diversity, but their aim is distinct. Also, although less well described in the relevant caselaw, "inclusive" outreach and recruitment policies that expand efforts to generate additional applicant interest are typically considered to be neutral so long as they do not confer material benefits to the exclusion of non-

<sup>47</sup> For a more comprehensive analysis of relevant federal caselaw and U.S. Department of Education definitions, see Coleman, Palmer and Winnick, *Race Neutral Policies in Higher Education: From Theory to Action* (College Board, 2008).

<sup>48</sup> See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (referring at times to the challenged employment practice as "express, race-based decisionmaking"); *Parents Involved in Community Schools*, 551 U.S. 701 (2007) (referring to challenged policy involving explicit consideration of race as "race-based"); United States Department of Education Policy Guidance, Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756 (Feb. 23, 1994) (referring to "race-based" policies).

targeted individuals. (The law regarding inclusive outreach and recruitment policies is described in Section VII.C.4 below.)

**B. *Intentional and Disparate Impact Discrimination***

**1. *Intentional discrimination* or *disparate treatment*** is purposeful treatment on grounds of race, color, religion, sex or national origin, or some other prohibited basis. Title VII of the Civil Rights Act of 1964 prohibits intentionally discriminatory employment decisions and actions. Intentional discrimination can be proven by direct or circumstantial evidence. Where there is an adjudicated finding or strong evidence of prior intentional racial or gender discrimination, the violator can take race- or gender-conscious action to remedy the current effects of its own prior actions.

There is a similar concept of disparate treatment in participation of students and conferring benefits of educational programs. Titles VI (respecting race) and IX (respecting gender) prohibit intentional discrimination.

**2. *Disparate impact*** is the consequence of facially neutral actions that bear more heavily on one group than another. Under Title VII, regardless of intent, employment practices that have disparate impact on grounds of race, color, religion, sex, or national origin, for which the employer cannot demonstrate job relatedness and business necessity, may violate Title VII and require remediation.

There is a similar concept of disparate impact in participation of students and conferring benefits of educational programs. By federal regulation, Titles VI (respecting race) and IX (respecting gender) prohibit disparate impact discrimination in the absence of an educational necessity.<sup>49</sup>

**C. *Strict, Intermediate and Rational Basis Scrutiny***

**1. *Strict scrutiny*** is a legal term of art, referring to the most rigorous standard of judicial review. It is applicable to policies that treat individuals differently on the basis of their race or ethnicity ("race-conscious" policies). Such policies are "inherently suspect" under federal law, and to satisfy strict scrutiny and be upheld by a court, they must serve a "compelling interest" and be "narrowly tailored" to achieve that interest. This requirement is derived from federal constitutional principles (which apply to public higher education institutions) and identical principles of Title VI of the Civil Rights Act of 1964 (which apply to any recipient of federal funding, public or private).

**a. *A compelling interest*** is the aim that must be established as a foundation for maintaining lawful race- and ethnicity-conscious programs that confer opportunities or benefits.

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<sup>49</sup> Of note, the Supreme Court has held that there is a private right of action under Title VI as to disparate treatment claims but not disparate impact claims. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

*b. Narrow tailoring* refers to the requirement that the means used to achieve the compelling interest must "fit" that interest as precisely as possible (*i.e.*, not be over-broad), with race or ethnicity considered only in the most limited manner possible to achieve the compelling aim. Federal courts examine several interrelated criteria in determining whether a given program is narrowly tailored, including:

- the flexibility of the use of race in the program,
- the necessity of using race or ethnicity (*i.e.*, whether there are "workable" race-neutral alternatives that would achieve the compelling aim) -- or the extent it is being used (*e.g.*, whether consideration of race as one factor among others would achieve the aim so that an exclusive racial prerequisite is not necessary),
- the significance and effectiveness of benefits provided to targeted individuals balanced against the the burden imposed on non-beneficiaries of the racial/ethnic preference, and
- whether the policy has an end point and is subject to periodic review (*i.e.*, to determine whether the need to use race and the extent it is used continue to be necessary to achieve a compelling aim and whether workable neutral alternatives are available).

**2. *Intermediate scrutiny*** is also a legal term of art, referring to a standard of judicial review that is less demanding than "strict scrutiny" but significantly more demanding than the "rational basis" standard that is applicable to most non-race, -ethnicity and -gender-conscious classifications under federal law. Intermediate scrutiny is applicable to policies that treat individuals differently on the basis of their sex or gender. Such polices must serve an "important interest" (also referred to in some contexts as "an exceedingly persuasive justification") and be "substantially related" to that interest. This requirement is derived from federal constitutional principles (which apply to public higher education institutions) and similar principles of Title IX of the Education Amendments of 1972 (which apply to any recipient of federal funding, public or private). The burden of proof is on the institution to establish that it has an important interest or exceedingly persuasive justification and its approach to achieving that interest, while not necessarily the most narrowly tailored, is substantially related.

**3. *Rational basis scrutiny*** is a legal term of art that reflects the standard applicable to the provision of most non-race, -ethnicity and -gender-conscious benefits or opportunities conferred by public or private institutions (where, in the latter case, the institution is a recipient of federal funds). It is the least rigorous standard of review, in which courts largely defer to decisions by educational institutions and others when preferences based on, *e.g.*, socio-economic status, special skills and talents, particular life experiences, etc. are challenged. The burden of proof is on the challenger of the classification to show that the institution was being "arbitrary and capricious" or had an "illegitimate or illegal" purpose. Programs using most non-race, -ethnicity, and -gender classifications are usually upheld by the courts.

## D. Diversity Interests

1. *Diversity* is a term that is best regarded as inextricably related to desired mission-driven educational outcomes ("the *educational benefits* of diversity"), inherently institution-specific, and broadly defined -- embodying the various qualities and characteristics a higher education institution may seek in its students or faculty. The precise meaning of "diversity" derives from an institution-specific context based upon the goals the school establishes for itself -- often reflected in mission and related policy statements.<sup>50</sup> Diversity qualities and characteristics can include various talents, life experiences, religions, geographic origins/experiences, socio-economic background, sexual orientation and more -- as well as race, ethnicity and gender characteristics.

In this context, federal law cautions that, whatever the institutional definition, the concept of diversity cannot relate solely to race or ethnicity. If it does, then it is likely to be viewed as reflecting more of an interest in proscribed racial balancing than in permitted educational diversity. (The same principle is probably true for gender-based preferences, as well.) In addition, diversity should be understood as a means to an end, not an end in itself: Diversity for diversity's sake is likely to be viewed as little more than an effort to achieve certain numerical goals, divorced from educational objectives -- and, as a result, more challenging to defend.

Note that throughout this document, multiple facets of diversity are discussed -- frequently with reference to race, ethnicity and gender. In many instances, relevant and detailed guidance exists with respect to race- and ethnicity-conscious programs (such as the U.S. Department of Education's policy guidance on race-conscious financial aid and scholarships, discussed below), but not to gender-conscious programs. Thus, relevant omissions of discussions associated with gender preferences stem likely from a dearth of substantial legal authority on point.

## E. Remedial Interests

The term "*remedial*" refers to the context for actions taken to cure or ameliorate the effects of discrimination in employment that are the consequence of intentional actions or disparate impact. It can also extend to a range of actions aimed at addressing other conditions that impede opportunity for women and minorities in the fullness of opportunity.

Higher education institutions may also take steps to avoid being a "*passive participant*" in discrimination by others (*e.g.*, state educational systems or elementary and secondary schools). In order to do so, they would have to show that they would otherwise become part of a system of racial or gender exclusion through financial or other support of entities that exclude minorities or women. Where justified, a public or private college or university that sits at the pinnacle of a

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<sup>50</sup> See, *e.g.*, *Grutter*, 539 U.S. at 306; see also Arthur L. Coleman and Scott R. Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues*, at 12 (College Board, 2006) ("[H]igher education officials should ensure that their educational goals are clearly stated and understood . . . . [T]here must be clarity regarding what kind of student body the institution wants to attract (and why) and how the institution conceptualizes (or defines) its goals and objectives . . . . Ultimately, given the obligation to ensure that race- and ethnicity-conscious measures are limited in both scope and time, higher education officials should be able to define success with respect to their goals, and to recognize when they've achieved it.")

state or private system of education in which discrimination and inequity affect minorities or women, may take steps to remedy a resulting pipeline problem which it passively helped to create.

Employers may also be allowed to undertake race-conscious measures to address "*underutilization*" of minorities or women under the Office of Federal Contractor Compliance Programs ("OFCCP") regulations or to address "*manifest imbalances*" under court interpretations of Title VII in their workforce or particular job categories, where women or minorities are significantly underrepresented compared to their availability in the pool of qualified workers.

(See Sections VIII.C and VIII.E for a more complete discussion of these concepts and how they may be used.)

A remedial justification also exists in the student context if an institution itself has discriminated against minorities or women and seeks to take steps to remedy the current effects.

## F. Critical Mass and Racial, Ethnic, or Gender Balancing

1. *Critical mass* is not a legal term but is rather a term derived from social science. Social science research reflects that individuals from minority groups are easily marginalized when they have only a small presence in a larger population, and as a result, may not contribute as fully to their learning environment. The same phenomenon is observed when women are a small presence in a larger population. When, by contrast, the group's presence and level of participation grows to a point of critical mass, relations between minority and non-minority, women and men, changes positively and qualitatively.

In the University of Michigan cases, critical mass was framed as "neither a rigid quota nor an amorphous concept defying definition." Instead, it was defined as a "contextual benchmark that allows the Law School to exceed token numbers within its student body and to promote the robust exchange of ideas and views that is so central to the Law School's mission."<sup>51</sup> In the University of Michigan cases, the expert reports of Patricia Gurin and Stephen W. Raudenbush were most directly relevant to the critical mass issue.<sup>52</sup>

2. *Racial, ethnic or gender balancing* is seeking to achieve a representation of a minority group or women in the student body or faculty that approximates their representation in the local community, state or nation. The Supreme Court has made clear in a number of educational contexts that racial balancing is not a compelling interest and is not permissible for public institutions under the Equal Protection Clause of the U.S. Constitution. Racial balancing

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<sup>51</sup> See Brief of the American Educational Research Association, the Association of American Colleges and Universities, and the American Association for Higher Education as *Amici Curiae* in Support of Respondents at 25, *Grutter v. Bollinger*, 539 U.S. 301 (2003).

<sup>52</sup> See <http://www.vpcomm.umich.edu/admissions/research/#um>. Extensive background on the concept of critical mass and the ways in which federal courts have addressed the issue can be found in *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issue*, Ch. 4 (College Board, 2006). A provocative and thoughtful paper on the topic is Larry White's *One Year After the Michigan Cases: What Are We Doing* (2004).



is also prohibited for private institutions that receive federal funding under Title VI, as is gender balancing under Title IX. Notably, the goal of achieving a "*critical mass*" of minorities and women in the student body and faculty in order to achieve the educational benefits of broadly defined (not just racial and gender) diversity is a different concept than racial or gender balancing.

The representation of minorities and women in society at large may be relevant to the adequacy of their representation in the student body and faculty for purposes of satisfying the service aspect of a college's or university's mission (*e.g.*, to produce the well-prepared workforce and citizenry the nation needs in STEM and other fields, considering the demographics of the nation). Minority and female representation in relevant populations may be considered for this purpose. However, the adequacy of the representation of minorities and women in the student body and faculty for the purpose of achieving educational benefits in the classroom, research laboratory and other campus settings, is not based on their representation in society at large, but rather is based on some critical number that will break down stereotyping (*e.g.*, the assumption that all members of one race hold the same opinions, have the same experiences and interests, and possess the same personal characteristics) and support inclusion of those with a broad range of perspectives, broader issue-identification and enhanced problem-solving in learning, teaching, research and service. Adequacy of representation is best conceived in a broad manner, not tied only or primarily to societal representation.

#### **G. Underrepresented Students**

As a general rule, issues of student diversity tend to focus on "*underrepresented students*," with a typical institutional goal of working to increase the numbers of those students to achieve some diversity-related objective. In *Grutter*, the University of Michigan's law school successfully defended a race-conscious admissions policy that was aimed at achieving a "critical mass" of historically underrepresented students (defined as African Americans, Hispanics, and Native Americans at that institution based on its demographics) *in order to achieve the campus-specific educational benefits of diversity -- a mission-driven, internal and educational – outcome focused goal*. The Court approved of the critical mass objective established with respect to these "underrepresented students." *See* definition of remedial, *infra*, and Section VIII concerning underrepresented faculty.

#### **H. Individualized, Holistic Review**

As a concept embodying the admissions process approved by the Supreme Court in *Grutter*, *individualized, holistic review* refers to a process by which, with respect to each applicant's file, "serious consideration" is given "to all the ways an applicant might contribute to a [broadly] diverse educational environment" that is needed to serve the institution's mission-driven educational objectives. It is a process involving and applying the same criteria to "applicants of all races," without an "automatic acceptance or rejection based on any single 'soft' variable" (for example, without any "mechanical, predetermined diversity 'bonuses' based on race or ethnicity"). Such a process is also "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" in every case. All applicants are able to compete for all spots under the same criteria.

## I. Inclusive Conduct and Multi-cultural Skills

As used in this guidance, *inclusive conduct and multi-cultural skills* refers to demonstrated success -- through conduct in classroom, research, mentoring and/or other work activities -- in including and fostering participation by individuals of different cultures, socio-economic backgrounds, races, genders, and life experiences in pursuit of increased understanding and exploration of a broad range of perspectives. This is not a proxy for any one viewpoint and instead focuses on the workplace conduct of an individual. Inclusive conduct provides opportunities to identify and utilize understanding of differences and broad perspectives in teaching, learning, research and mentoring. Inclusive conduct and multi-cultural skills create an inclusive environment in which individuals of a broad range of cultures, backgrounds, experiences and perspectives, including but not limited to different races and genders, can fully participate and work productively and creatively together. Inclusive conduct and multi-cultural skills provide opportunities to break down stereotypes that assume all individuals of a particular race, ethnicity, gender, or socio-economic group or who have a disability share the same views, personal qualities, and experiences. These are race- and gender-neutral qualities that individuals of any race or gender may possess -- or lack.

Inclusive conduct and multi-cultural skills should be understood to relate to criteria associated with *workplace conduct* desired by some higher education institutions to achieve their educational mission. Notably, these criteria do not regulate viewpoint, diminish principles of academic freedom that apply in public and private institutions, or violate rights protected under the First Amendment that apply in public institutions.<sup>53</sup>

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<sup>53</sup> Thus, in making various decisions, a higher education institution may consider whether a faculty member, regardless of his or her viewpoint on race or gender -- through his or her conduct in classroom, research, mentoring or other relevant activities -- has a record of successfully fostering participation by colleagues and students who have broadly diverse perspectives, experiences and backgrounds including, without limitation, racial minorities, women and people from low socio-economic backgrounds or with disabilities. Individuals of any race or gender may possess or lack this attribute, which provides opportunities to enhance educational and research outcomes through broad and multi-cultural issue identification, collaboration, and problem-solving. This attribute is *inclusive and non-discriminatory*. See Appendix IV, Section 1, *infra*, for a related discussion of First Amendment and academic freedom.



## V. RACE- AND GENDER-NEUTRAL ALTERNATIVES

### A. Neutral Alternatives In General

Having a general understanding of neutral alternatives as a foundation for examining student and faculty policies in more detail is important for a number of reasons. First, and as explained further in subsequent sections, the consideration of such alternatives is a clear requirement as a matter of federal law -- under constitutional principles, as well as under Titles VI, VII and IX. In jurisdictions where race and gender may be considered appropriately, neutral approaches may reduce reliance on race and gender in some programs, making consideration of race and gender in other programs easier to justify. Second, neutral alternatives will often directly advance institutional diversity goals associated with mission-driven aims, and correspondingly may foster more inclusive and broadly diverse faculties and student bodies, without triggering strict scrutiny under constitutional or statutory constraints. In addition, these criteria may be used in jurisdictions where race, ethnicity and gender may not be considered. (They can help achieve independently important, non-race, -ethnicity, and -gender-conscious institutional goals, even as they also have the ancillary benefit of increasing racial, ethnic, and gender diversity. )

Two key race-, ethnicity- and gender-neutral criteria are a record of inclusive conduct and multi-cultural skills and socio-economic status. (There are many others such as urban and rural geographic background; first in family to attend a four-year college or pursue STEM fields; other significant disadvantage in pursuit of or success in higher education generally or STEM fields in particular; an institution's surrounding community; etc.)

Notably, considering the demographics of students applying to selective institutions, race and socio-economic background generally do not correlate in a manner that allows full realization of the necessary diversity to achieve a selective institution's educational, research and service mission as a mere ancillary benefit of considering inclusive conduct and multi-cultural skills or socio-economics. It is important to achieve socio-economic diversity within each racial group to break down stereotypes, and not to achieve racial diversity only among those from lower socio-economic backgrounds.<sup>54</sup> Nor, for that matter, should minorities and women be assumed to possess and utilize inclusive conduct or multi-cultural skills and experiences that anyone of any race or gender may possess (or lack) and utilize (or not). Consequently, reliance on a record of inclusive conduct and multi-cultural skills or socio-economic background alone is unlikely in most instances to be adequate to achieve broad diversity. Community colleges and other institutions that are not as selective (on the basis of standardized test scores and grades), may be able to rely more heavily -- if not necessarily exclusively -- on these race- and gender-neutral approaches, depending on the demographics of their applicant pools that are competitive for admission.

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<sup>54</sup> See *The Shape of the River*, *supra*, at 49 (noting the relative numbers of Caucasians and African Americans in low socio-economic groups with "A" grade point averages and high test scores, based on demographic data).

## **B. Inclusive Conduct and Multicultural Skills as a Criterion**

### ***1. Definition and Use of Inclusive Conduct and Multi-cultural Skills Criterion***

Inclusive conduct and multi-cultural skills refer to demonstrated success -- through conduct in classroom, research, mentoring and/or other work activities -- in including and fostering participation by individuals of different cultures, socio-economic backgrounds, races, genders, and life experiences in pursuit of increased understanding and exploration of a broad range of perspectives. This is not a proxy for any one viewpoint and focuses instead on the workplace conduct of an individual. Inclusive conduct and multi-cultural skills provide opportunities to identify and utilize broad perspectives in teaching, learning, research and mentoring. Inclusive conduct and multi-cultural skills create an inclusive environment in which individuals reflecting a range of cultures, backgrounds, and experiences, including but not limited to different races and genders, can fully participate and work productively and creatively together. Inclusive conduct and multi-cultural skills provide opportunities to break down stereotypes that assume all individuals of a particular race, ethnicity, gender, or socio-economic group or who have a disability share the same views, personal qualities, and experiences. These are race- and gender-neutral qualities that individuals of any race or gender may possess -- or lack.<sup>55</sup>

Position and program descriptions, selection criteria, and selection processes for employment, fellowships, assistantships, admissions, funding, participation in mentoring and other programs and their related advertisements may include, as a preferred or required criterion, a record of utilizing inclusive conduct and multi-cultural skills as defined above. This means that an individual -- through his or her conduct in classroom, research, mentoring or other relevant workplace activities -- has a record of successfully including and fostering participation by colleagues and students with broadly diverse perspectives, experiences and backgrounds including, without limitation, racial minorities, women and people from low socio-economic backgrounds or with disabilities. Individuals of any race or gender may possess or lack a record of inclusive conduct and multi-cultural skills, which provide opportunities to enhance educational and research outcomes through broad and multi-cultural issue identification, collaboration, and problem-solving. Performance evaluations, promotion evaluations, program selection and admissions decisions may include consideration of the presence or absence of a record of such inclusive conduct and multi-cultural skills. In doing so, it is important that this criterion is evaluated on the basis of inclusive conduct that provides opportunities for multi-cultural collaboration, issue identification, creativity and problem-solving in classroom, research, laboratory, mentoring and other workplace activities, not on the basis of personal viewpoint.

An individual's specific life experiences and conduct that are valued under this criterion include the following experiences, and how the individual has responded to and uses these experiences in teaching, research and mentoring, and, for students, learning:

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<sup>55</sup> The inclusive conduct and multi-cultural skills criterion concerns a person's *workplace conduct* of inclusion and non-discrimination on the basis of race, gender, other specified bases, and perspective, *not* a person's viewpoint. See Appendix IV, Section 1, *infra* ("Diversity Considerations, the First Amendment and Academic Freedom").

- a record of demonstrated success in removing barriers for, and including and fostering participation by, broadly diverse individuals in classroom, research, mentoring or other relevant workplace activities;
- experiences of discrimination or barriers to achievement on any basis or a record of removing such barriers for others;
- experiences of isolation in residential, educational and/or professional/work settings or a record of eliminating such isolation for others;
- a record of experiences living, working, teaching or learning with individuals of different perspectives, cultural or socio-economic backgrounds, races, ethnicities, and/or genders;
- a record of experiences and conduct increasing understanding of individuals of different cultural or socio-economic backgrounds, races, ethnicities, and/or genders and different perspectives;
- a record of experiences and conduct using understanding of such different backgrounds, attributes, and perspectives to enhance collaboration, problem-solving, learning, research and/or mentoring;
- experiences as the first in the individual's family to pursue a STEM (or other relevant) field and/or any academic career;
- a record of experiences and conduct enabling collaborative work among individuals whose primary languages are different.

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Seeking individuals who have a record of inclusive conduct and multi-cultural skills is a race- and gender-neutral consideration, as individuals of any race or gender may possess (or lack) such a record. Inclusive conduct fosters participation by broadly diverse individuals, providing opportunities for multi-cultural collaboration, issues identification, and problem-solving in the learning and research environment. For example, a person of African descent who grew up in the Caribbean as a member of the majority race and a Caucasian who grew up in the Caribbean as a member of a minority race; an African American male or female who grew up in an upper middle income family in a primarily Caucasian suburb; a female of any race or a person who is from an under-represented minority group who majored in a STEM field in college or graduate school; any individual who grew up in a lower income family in an inner city; an African American individual who grew up in a primarily Hispanic neighborhood (or vice versa); an African American male or female who grew up in a rural area -- whether primarily minority or not -- who succeeded in navigating college; a U.S. born individual who spent significant years living in another country; and a person of any race or gender with a record of creating an inclusive and productive environment for colleagues of every race, gender, culture, background and perspective, may have multi-cultural skills and experiences and may utilize inclusive conduct to create a more inclusive and better learning and research environment.

## ***2. Relevance to Institutional and Academic Unit Mission and Goals and Value of Inclusive Conduct and Multi-cultural Skills.***

An institution may have an authentic, mission-critical interest in building a faculty and student body that possess multi-cultural skills and exhibit inclusive conduct, recognizing that individuals with these abilities and conduct are needed to expand opportunities for excellence in research and teaching in a broadly diverse society. Such individuals create a more robust intellectual environment and a more broadly welcoming academic community for research and learning by

broadly diverse individuals. In furtherance of its mission, the institution may also have a non-discrimination policy that prohibits discriminatory conduct in university work on the basis of race, gender, ethnicity, religion, age, sexual orientation, etc. It is a good practice to be explicit about the institution's and unit's multi-pronged mission and related multi-cultural and broad diversity needs.

Inclusive conduct and multi-cultural skills help faculty to include, and to provide opportunities to work creatively and productively with (and to foster learning by students to work creatively and productively with), individuals of different perspectives, experiences, cultures, socio-economic backgrounds, races, ethnicities, and genders. Such conduct and skills help all faculty and students to identify the needs of a diverse society, to solve problems more collaboratively and effectively, to ask a broader range of questions, to pursue a broader range of paths to solutions (which are particularly important in STEM and certain other fields), and to create solutions, products and services that serve the needs of a diverse society. Such conduct and skills help faculty and students to shed stereotypes and to foster a more inclusive campus, which in turn supports broad (including but not limited to racial, gender and socio-economic) diversity with its corresponding educational benefits. Inclusive conduct and multi-cultural skills and broad diversity enhance learning, teaching, research and service. If some aspects of broad diversity have been achieved in the faculty and graduate and undergraduate student bodies, but the racial, gender and socio-economic aspects of broad diversity have not been adequately achieved, considering inclusive conduct and multi-cultural skills in securing and retaining faculty members and students may provide the ancillary benefit of increasing racial and gender diversity.

While consideration of inclusive conduct and multi-cultural skills is race and gender-neutral, as long as race and gender still affect the life experiences of individuals, minorities and women are likely to have different and more difficult experiences than many others and are likely to have to overcome these experiences to succeed. In some cases, it may be that a person's race or gender put the person in a position to acquire multi-cultural skills and utilize inclusive conduct. However, it is an individual's experience (of discrimination, isolation, breaking down barriers and eliminating isolation for others, etc.), how the individual used the experience, overcame barriers (or helped others to do so), and how the individual applies the experience, through inclusive conduct, to teaching, research and mentoring now, that are considered -- not the individual's race or gender. It is recognized that anyone, regardless of race or gender, may have a record of creating an inclusive learning, research and mentoring environment and may have acquired multi-cultural skills and be able to provide opportunities for multi-cultural interactions and experiences at the institution. *See D.4 below for how to apply this criterion.*

## **C. Low Socio-economic Background/First In Family To Four-Year College As A Criterion**

### ***1. Definition of Low Socio-economic Status and Use as a Criterion***

A more comprehensive definition of low socio-economic background than is typically used considers total wealth, including but not limited to family income and concentration of poverty

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in the family's residential area and school district.<sup>56</sup> This formulation provides a more complete reflection of low socio-economic status, which alone is an authentic and important aspect of broad diversity, and also has the ancillary effect of increasing racial diversity. In a country with a history of slavery, residential and school segregation and discrimination on the basis of race, individuals who are members of racial minority groups tend to have less total wealth than other individuals with equal annual income. Of course, higher socio-economic status is also important to broad diversity, but may be easier to achieve.

Employment opportunities and benefits for faculty members (e.g., hiring, promotion, retention, community building and mentoring in support of preparation for tenure, supplemental compensation, research funding and facilities, participation in other programs, etc.); selection of students for post-doctoral fellowships and research and teaching assistantships; admission of students; and selection of students to participate in other programs or to receive other educational benefits may be based on low socio-economic background, without considering race and gender, sometimes in combination with being the first in one's family to graduate from a four-year college, to pursue a STEM career, and/or to pursue any career in academia. Socio-economic (or "class") diversity within all groups is also required to achieve mission-critical broad diversity. Consideration of a student's low socio-economic background relates to a student's family's socio-economic status. If this criterion is a consideration for faculty, it relates to family background.

**2. *Relevance to Institutional and Academic Unit Mission and Goals and Value of Socio-economic Status***

If the institution and each academic unit have determined that achievement of their educational, research and service mission (including excellence) in STEM (or other) fields requires a broadly diverse faculty and student body, the institution and its units may find that this requires inclusion of individuals from a broad range of socio-economic backgrounds, including those who are from lower socio-economic backgrounds. Many institutions of higher education recognize the important role of college and graduate school in providing access for individuals to a better quality of life and to an opportunity to fully participate in our society and democracy. The ability of all students to identify and serve the needs of our diverse society may depend in part on their understanding of the role of poverty in many societal challenges. Including individuals on the faculty and in the student body who come from lower socio-economic backgrounds is critical to such understanding. It is a good practice to be explicit about the institution's and unit's multi-pronged mission and related socio-economic and broad diversity needs.

**D. *How Inclusive Conduct and Multi-cultural Skills And/Or Socio-Economic Status Are Considered With Other Eligibility Considerations***

Academic accomplishments, intellectual capacity and, if applicable, particular discipline expertise, are baseline requirements. A strong record -- in classroom, research, mentoring or other relevant workplace activities -- of including and fostering full participation by individuals of different cultures, socio-economic backgrounds, races, genders, experiences, and perspectives,

<sup>56</sup> Richard Kahlenberg, "Affirmative Action in Higher Education After the Seattle and Louisville Decisions: Reexamining the Socio-economic Alternative," [http://php.aaas.org/programs/centers/capacity/07\\_Engagement/07\\_LawPolicyPractice.php](http://php.aaas.org/programs/centers/capacity/07_Engagement/07_LawPolicyPractice.php).



and/or an individual's socio-economic background, is one factor among many that may "tip the balance" in a holistic assessment of an individual, or may be a prerequisite, when making a decision concerning hiring, compensation, promotion, research support, mentoring, participation in fellowships, admissions, participation in other programs, and/or conferring other employment or educational benefits. Whether an individual is first in his or her family to attend a four-year college, enter a STEM field, or pursue any academic career may also be considered.

### ***1. Significance of Institutional Resources Committed***

Significant, or not very significant, funding, staffing and other resources may be provided to those rated highly for inclusive conduct and multi-cultural skills and/or low socio-economic status, either alone or in combination with other attributes. It should not matter to the legal sustainability of the approach.

### ***2. Assessment of Impact***

These are race- and gender-neutral approaches that are based on authentic institutional needs apart from race and gender. These neutral approaches should result in an environment that is inclusive and productive for everyone, including racial minorities and women -- as well as in an increase in the numbers of individuals from such groups coming to the institution and succeeding there.

Measures of the impact the approach has in achieving the institution's and unit's mission may include:

1. Annual evaluation of faculty includes consideration of their record of inclusion of broadly diverse people and perspectives in workplace activities.
2. Student evaluations of faculty include a question on whether the faculty member includes and fosters participation by broadly diverse individuals and/or whether opportunities for considering multi-cultural perspectives and socio-economic experience are included in learning experiences.
3. Surveys or focus groups explore the ways in which inclusive conduct and multi-cultural skills and socio-economic diversity are brought to bear on teaching, research, learning experiences, and mentoring of junior faculty and students.
4. Data are collected to track increases in racial, ethnic, gender and socio-economic diversity.
5. Climate studies test whether there is an environment of inclusiveness.

### ***3. Commentary and Examples***

If these approaches are properly applied, race and gender and individual viewpoint (as distinguished from inclusive workplace conduct that provides opportunities for multi-cultural interactions, experience, problem-solving and issue identification to strengthen research, teaching, learning and advising) are not considered in employment or educational decisions and

benefits. These inclusive conduct/multi-cultural skills and socio-economic approaches also are not used as a proxy for race or gender because these criteria fulfill separate authentic institutional needs. Strict judicial scrutiny should not apply and the prohibition against racial and gender discrimination in hiring and in the terms and benefits of employment under Title VII of the Civil Rights Act of 1964, the Equal Protection Clause, Title IX of the Education Amendments of 1972, and any state law or executive order should not be invoked. *See* Section VI, *infra*. Also, academic freedom and First Amendment rights should not be impinged upon. *See* Appendix IV, Section 1, *infra* and Section VIII, *infra*.

Similarly, use of these approaches for student programs, fellowships and graduate teaching or research assistantships should not trigger strict judicial scrutiny or be prohibited under Title VI, Title IX, the Equal Protection Clause, or any state law or executive order. *See* Sections VI and VII, *infra*.

Under the "rational basis" standard of judicial review, decisions that take inclusive conduct and multi-cultural skills and/or socio-economic background into account need only avoid being arbitrary and capricious. That standard should be met if there is any relationship between the institution's mission and fostering an environment of inclusiveness for individuals of different socio-economic backgrounds, cultures and perspectives, including race and gender.<sup>57</sup>

Although a compelling interest is not necessary to satisfy the "rational basis" standard of review, noting such an interest may be helpful where there might be a disparate impact on race or gender that requires an educational necessity to be sustainable. *See* Sections VII. A and B. Inclusive conduct and multi-cultural skills or socio-economic background contribute to broad diversity, apart from race and gender diversity, but also may have the ancillary benefit of increasing the racial and gender components of broad diversity.

These approaches do not disparately burden non-minorities and men if the same criteria (including consideration of record of inclusive conduct/multi-cultural skills and socio-economic background) and the same process are applied, and as long as the same opportunity to compete for positions and benefits are afforded to all candidates -- regardless of race and gender. (*See* Section VII.A.2, *infra* (undue burden)).

The following are examples of evidence that the same criteria, process and opportunities are provided to all candidates, and that race and gender do not define whether a candidate has and can contribute inclusive conduct and multi-cultural skills or socio-economic diversity to the institution:

a. An individualized assessment is made of whether each candidate has a strong record of inclusive conduct that provides opportunities for multi-cultural experiences and interactions. All women and minorities are not automatically determined to have such a record of inclusive conduct or to possess or contribute multi-cultural skills -- at all, in the same way, or to the same extent. Men and non-minorities are also acknowledged to be able to bring a strong record of

<sup>57</sup> *See* Section IV.C.3, *infra*.

inclusive conduct and to contribute multi-cultural skills. In all cases, it depends on the individual.

b. The numbers or percentages of individuals from different groups who are determined to satisfy this criterion vary over time, depend on the individual candidates, and are flexible. There are no "quotas" for any group -- minority or non-minority, women or men -- which utilizes this conduct, possesses these skills, and contributes the attendant opportunities for multi-cultural collaboration, issue identification, problem-solving and experiences.

c. Considerations of socio-economic background do not include race or gender.

It is critical that Deans, Department heads and the members of search, program and admissions committees understand how to apply these neutral approaches. It takes considerable individualized assessment to determine whether a person, regardless of race or gender, has a record of utilizing inclusive conduct and multi-cultural skills. Socio-economic background also does not denote race or gender. Some institutions require the members of search, program and admissions committees to take a short training program, addressing many important aspects of the hiring or other selection process, including how to consider inclusive conduct and multi-cultural skills and socio-economic background.

**4. *Examples of How Inclusive Conduct and Multi-cultural Skills and Low Socio-economic Status May be Used in Diversity Efforts***

**a. *Advertisement, Interview and Evaluative Questions***

An institution may include in its advertisements and/or position descriptions: "The University seeks to increase the diversity of its professoriate, workforce and undergraduate and graduate student populations because broad diversity (including all aspects of individuals that contribute to a robust academic environment)\* is critical to achieving the University's mission of excellence in education, research, educational access and service in an increasingly diverse society. Therefore, in holistically assessing many qualifications of each applicant—of any race or gender—we would factor favorably an individual's record of conduct that includes students and colleagues with broadly diverse perspectives, experiences and backgrounds in educational, research or other work activities. Among other qualifications, we would also factor favorably experience overcoming or helping others overcome barriers to an academic career or degree. This workplace conduct of inclusion and experience provide opportunities to enhance educational, research and other work outcomes by increasing opportunities for participation of a broad range of individuals and the potential to expand issue identification, collaboration, and problem-solving." "\*Broad diversity means all aspects of individuals that contribute to a robust academic environment including experience, perspectives, disciplines, geographic background, talent, family socio-economic background, disability, ethnicity, race, gender and other characteristics. Some aspects of broad diversity have been easily achieved, while others—including racial and in some disciplines gender diversity—have been more elusive and require focused efforts."

Sample evaluative questions to assess such conduct include:

- (i) Have you either experienced discrimination or barriers to achievement on any basis, felt isolated in your residential setting or educational or professional/work experience--or identified the existence of these or other barriers, and then removed such barriers and created an inclusive community, for others? Describe.
- (ii) Have you ever mentored or collaborated with a student/faculty member/staff member from a different background, perspective or experience than your own (e.g., a different race, gender, sexual orientation, socio-economic background, political perspective)? Was the collaboration, student/faculty member/staff member successful? Explain.
- (iii) How much and what kind of contact have you had as an educator/supervisor with students/faculty/staff of different backgrounds, perspectives and experiences than your own? Were you able to achieve equal success with students/faculty/staff of such differences? Explain.
- (iv) Have you experienced as a student close collaboration with faculty members of different backgrounds, perspectives, or experiences than your own? Were you able to successfully bridge any differences? Explain.
- (v) For people applying for higher level positions: Have you helped an undergraduate with a different background, perspectives, experiences than your own get into a Ph.D. program/a junior staffer with a different background advance his or her career? Mentored such a Ph.D. to conclusion? Hired such a post-doctoral associate into your laboratory? Describe.
- (vi) What is your experience educating people around you about the issues that people of different groups encounter in higher education/academic research?
- (vii) Are you the first in your family to pursue a STEM field and/or an academic career in any field?

The Kahlenberg model for determining socio-economic background is used to identify those from lower socio-economic groups. *See* Section V.C.1, *supra*.

***b. Target of Opportunity Funding and Positions For Those Having Strong Records of Inclusive Conduct and Multi-cultural Skills***

Special target of opportunity funding and/or the creation of a special position are provided through the Provost, a Dean or Department head to hire an individual as a faculty member who not only satisfies the usual academic requirements, but also can especially advance the institution's mission in important ways. Possessing a pronounced talent and distinguished record of inclusion of broadly diverse individuals and perspectives in teaching, research, mentoring or other workplace activities qualifies an individual -- regardless of race or gender -- for target of opportunity funding and positions. (Target of opportunity funding and positions may also be available to those from low socio-economic backgrounds, or who hold Nobel and other top prizes, or who bring another uniquely exceptional accomplishment in service, research or teaching to the institution.)

To the extent permitted in the jurisdiction and generally by law, race and gender may be factors considered, among others, that together enable an individual to contribute exceptionally to the institution.

**c. Research Funding**

Research funding is made available to individuals who bring a strong record of inclusive conduct/multi-cultural skills to the institution.

Below is an example of how a special endowment may be established to fund the research of individuals who bring a strong record of inclusive conduct and multi-cultural skills to a research center and thereby support greater gender or racial diversity.

The institution inserts the name of the center and the relevant disciplines, but may use the following as a description of the funding program:

The \_\_\_\_ Center at the University has determined that it has a compelling interest in producing excellent research and educational experiences that identify and develop solutions to problems involving \_\_\_\_\_ disciplines, and that the Center requires a broadly diverse faculty to achieve this compelling interest in an increasingly diverse society. While many aspects of diversity have been achieved at the Center and at the University, racial and gender diversity have not been adequately achieved in the Center's research faculty. Individuals with a strong record of including broadly diverse colleagues and students in research and mentoring activities, providing opportunities for multi-cultural issue identification, problem-solving and analysis, are recognized as employing workplace conduct that will foster greater diversity in all of its dimensions -- including, but not limited to, race and gender.

Donor has contributed a research endowment to stress the importance of and to support increasing racial and gender diversity in the following disciplines at the Center:\_\_\_\_\_.

This endowment will be used to support those research faculty at the Center in the relevant disciplines who, individually and as members of the community of researchers and students at the Center, can demonstrate that they actively include broadly diverse colleagues and students in research, mentoring and teaching activities and provide opportunities for multi-cultural issue identification, collaboration, and problem-solving that will enable them, through their research, mentoring and teaching, to foster broad diversity, including greater racial and gender diversity, at the Center and achieve excellence in research outcomes.

It is recognized that individuals of any race or gender may be able to do so.

**d. Other Programs**

A strong record of inclusive conduct/multi-cultural skills and socio-economic background may be used as criteria or prerequisites for participation in other programs for faculty and students. These may relate to employment, promotion, research support, and other benefits of employment, as well as to admissions, financial aid and mentoring for education and other educational programs.

## E. Diversity Considerations, the First Amendment and Academic Freedom

To understand appropriate implementation of diversity efforts in higher education, it is helpful to recognize the generally peaceful co-existence of such efforts with First Amendment rights and academic freedom principles -- a co-existence that reflects the necessary balance of academic freedom and responsibility.<sup>58</sup> Consideration of diversity in higher education reaches the fundamental purposes of the academic endeavor. Colleges and universities, whose multi-pronged educational missions embrace providing excellent educational experiences for all students, producing excellent research to increase and disseminate knowledge, increasing educational access, and serving the nation's needs for a well-prepared citizenry and workforce, have a compelling interest in creating a broadly diverse student body<sup>59</sup> and faculty.<sup>60</sup> Public colleges and universities play a special role in society by providing otherwise unavailable broadly affordable access to higher education.<sup>61</sup> Many public and private institutions of higher education require a broadly diverse community in order to provide excellent educational experiences and produce excellent research in a global, multi-cultural and diverse society.<sup>62</sup> A broadly diverse academic community is fundamental to higher education's endeavor to best serve all students, and to contribute to solutions that will enable our nation and society-at-large to progress and prosper. Many institutions' faculties have found and embraced this necessity.

***"[There is a] generally peaceful co-existence of [diversity] efforts with First Amendment rights and academic freedom principles – a co-existence that reflects the necessary balance of academic freedom and responsibility."***

Freedom to express ideas, however controversial and offensive, is also a deeply held value that defines great institutions of higher education, public and private.<sup>63</sup> This academic freedom,

<sup>58</sup> Arthur L. Coleman, *Live by the Score, Die by the Score: Academic Freedom and Responsibility in Admissions Decisions* (Diversity Digest, Summer 1998), available at <http://www.diversity.web.org/digest/Sm98/score.html>

<sup>59</sup> *Grutter*, 539 U.S. at 325, 330-32, 338-39.

<sup>60</sup> See *Walker v. Bd. of Regents of the Univ. of Wis. Sys.*, 329 F. Supp. 2d 1018 (W.D. Wis. 2004); *Univ. & Comm. College Sys. of Nev. v. Farmer*, 930 P.2d 730 (Nev. 1997) (faculty diversity is a compelling interest in a manner similar to student body diversity in higher education that may justify consideration of race in faculty hiring), *cert. denied*, 523 U.S. 1004 (1998); cf. *Rudin v. Lincoln Land Comm. College*, 420 F.3d 712, 719 (7th Cir. 2005) (district court had granted summary judgment for the college, which argued that compelling diversity interests justified consideration of race in a faculty hiring decision, but this argument was not made in the appeal).

<sup>61</sup> See *Grutter*, 539 U.S. at 331-32.

<sup>62</sup> This is particularly the case in STEM fields because STEM fields are critical to the economic strength and security of the nation. In light of national demographics, which demonstrate that African Americans, Hispanics, Native Americans and women are severely underrepresented in STEM higher education and careers, while their numbers are increasing in the college age and total U.S. populations, there is a national imperative to increase the racial and gender diversity of STEM higher education, business and industry in a short time. If higher education fails to meet this national need, the nation's leadership in higher education, innovation and the global economy, as well as our national security, may be expected to decline. See Section III.A.2, above.

<sup>63</sup> See, e.g., YALE UNIVERSITY, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE, 5 (1975) ("The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think

which extends to the institution itself as well as to faculty and students, is a fundamental policy governing academic life. Academic freedom is accompanied by the countervailing policy of academic responsibility, which is also a foundation of academic culture and is embedded in many institutions' internal regulations and, indeed, in federal research funding agencies' requirements.<sup>64</sup> Members of the college and university community have the responsibility, in the exercise of their academic freedom, to act legally, ethically, and with academic honesty (*e.g.*, in scholarship, research, test-taking, and grading); and to not unreasonably interfere with the ability of others in the academic community to participate fully in academic life.

Neither free speech rights protected by the First Amendment to the U.S. Constitution that apply in public educational institutions,<sup>65</sup> nor principles of academic freedom that apply in most public and private institutions of higher education, are offended when the institution appropriately considers whether faculty and students practice conduct of *inclusion and non-discrimination on the basis of race, gender, other specified bases and perspectives* to achieve essential educational benefits of, and the rich discourse that results from, broad diversity. This tenet is true in the context of employment, the classroom and the research laboratory. Consideration of faculty and student *workplace conduct* required by the institution to achieve its educational mission does not regulate viewpoint or diminish principles of academic freedom. Hence, the institution may consider whether a faculty member, regardless of his or her viewpoint on race or gender (and regardless of his or her race and gender) -- through conduct in class, research, advising or other relevant workplace activities with students and colleagues -- has a record of success in including and fostering full participation of broadly diverse individuals of different perspectives, socio-economic backgrounds, races, genders, ethnicities and experiences that will provide opportunities for multi-cultural analysis, issue identification, collaboration and problem-solving. This consideration does not judge the viewpoint or subject that a faculty member or student may possess or pursue in research or, in most situations, in didactic pursuits or as a citizen.

The dimensions of First Amendment rights in public institutions of higher education and academic freedom in public and private institutions as they relate to diversity efforts, involves consideration of a number of factors and interests. (Appendix IV, Section I, includes a more complete discussion of this topic.)

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the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views."); COMMITTEE ON A CIVIL, SAFE, AND OPEN ENVIRONMENT, UNIVERSITY OF FLORIDA, FINAL REPORT (2008); NARRATIVE REPORT AND GENERAL RECOMMENDATIONS, TASK FORCE ON ASSEMBLY AND EXPRESSION, UNIVERSITY OF TEXAS AT AUSTIN (2002).

<sup>64</sup> See, *e.g.*, *id.*; 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS ("AAUP 1940 Statement")("Institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole" and academic freedom in teaching and learning is accompanied by "duties correlative with [such] rights."); 42 C.F.R. Parts 50, 93 (Public Health Service, Office of Research Integrity regulations); 2 C.F.R. Part 180.

<sup>65</sup> The First Amendment applies through the 14th Amendment of state institutions of higher education. See *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925); see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993).

## VI. RELEVANT STATE LAWS: VOTER INITIATIVES AND ADMINISTRATIVE RULES<sup>66</sup>

A threshold question that must be addressed by higher education institutions that seek to pursue racial, ethnic, or gender preferences is whether relevant state laws permit consideration of race, ethnicity and gender within the limits of federal law.

In a number of states, voters (or the executive branch) have promulgated rules that limit the consideration of race, ethnicity and gender in education (among other activities such as employment and contracting). These prohibitions may not trump, and in fact may include exemptions for, federal law that mandates certain race-conscious action (such as where remedial obligations exist to address the present effects of an institution's own past discrimination or underutilization of minorities and women, and race-conscious policies are required to address those interests). However, nothing in federal law compels the institutional pursuit of non-remedial interests such as the educational benefits of diversity. Thus, to the extent that voter initiatives or other state law rules legitimately dictate higher education policy under state laws, then nothing in the Court's diversity opinions to date prohibits the enactment of state constitutional, statutory, or regulatory provisions that forbid the use of race or ethnicity in public higher education. In short, federal law establishes a "floor" upon which state law may, in appropriate circumstances, "build."

The language adopted in the four states where, as of October 2009, voters have approved statutory or state constitutional restrictions on the consideration of race, ethnicity and gender -- Nebraska, Michigan, Washington and California -- prohibits: "Public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes." Exceptions are provided for certain federal mandates. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges and school districts.

Nebraska's law, Michigan Proposal 2, and California Proposition 209 were adopted as constitutional amendments. Washington I-200 was adopted as a state statute.<sup>67</sup> None of these prohibitions extend to private institutions.

<sup>66</sup> The effect of First Amendment interests of institutions of higher education on the viability of state restrictions has not been fully explored by the courts. This section is derived from and synthesizes *From Federal Law to State Voter Initiatives: Preserving Higher Education's Authority to Achieve the Educational, Economic, Civic and Security Benefits Associated with a Diverse Student Body* (College Board, 2008).

<sup>67</sup> Initiative 200 differs from other state initiatives in several other ways: (1) Initiative 200 contains additional language expressly stating that "this section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin"; and (2) the official ballot statement accompanying Initiative 200 included language emphasizing that it "does not end all affirmative action programs" but "prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant." Noting these differences, the Washington Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 72 P.3d 151 (2004), adopted a more liberal reading of Initiative 200, holding in that case that the Seattle School District could consider race as a tie-breaker in student assignment. This decision thus played an important role in establishing the record that was ultimately addressed by the U.S. Supreme Court in 2007.



The One Florida Initiative was adopted in November of 1999, when then Florida Governor Jeb Bush issued Executive Order No. 99-281. As a result of this initiative, a regulation was added to Florida's administrative code and its Board of Governors' regulations prohibiting the use of race, national origin, or sex in university admissions, as well as in employment and contracting by state agencies including state universities. The regulation added pursuant to Governor Bush's executive order states: "Neither State University System nor individual university admissions criteria shall include preferences in the admissions process for applicants on the basis of race, national origin or sex."

## VII. LEGAL ISSUES ASSOCIATED WITH STUDENT DIVERSITY<sup>68</sup>

### A. Overview Of Governing Legal Principles

Federal constitutional and statutory provisions, along with corresponding legal principles regarding the consideration of race, ethnicity and gender in educational programs govern many student diversity efforts at institutions of higher education and are summarized below. (See Appendix 1 for additional background information regarding federal laws.<sup>69</sup>)

#### 1. Equal Protection Clause (U.S. Constitution, 14<sup>th</sup> Amendment)

The Equal Protection Clause of the U.S. Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Public institutions are subject to Constitutional restrictions; private institutions are not. However, Title VI has been held to be coextensive with the Equal Protection Clause as it relates to race discrimination. Title IX also tracks equal protection principles on key points with respect to sex discrimination, although some differences exist between those two laws. Consequently,

- PREFACE AND OVERVIEW
- HISTORICAL CONTEXT
- COMPELLING CASE FOR DIVERSITY
- KEY DEFINITIONS
- RACE/GENDER-NEUTRAL ALTERNATIVES
- RELEVANT STATE LAWS
- STUDENT DIVERSITY
- FACULTY DIVERSITY
- BROADER DISCRETION
- ENFORCEMENT

<sup>68</sup> This section is based upon and adapted from various publications of the College Board's Access & Diversity Collaborative, with express permission of the College Board. Those publications include: *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (College Board, 2006); *Federal Law and Financial Aid: A Framework for Evaluating Diversity-Related Programs* (College Board, 2005); *Federal Law and Recruitment, Outreach and Retention: A Framework for Evaluating Diversity-Related Programs* (College Board, 2005); and *An Action Blueprint: Key Principles and Model Practices for Achieving the Benefits of Diversity in Higher Education* (College Board, in press). Information on the Access & Diversity Collaborative can be found at [www.collegeboard.com/diversitycollaborative](http://www.collegeboard.com/diversitycollaborative).

This section is also based upon and adapted from two publications of the Association of American Medical Colleges, with express permission of the AAMC. Those publications include: *Roadmap to Diversity: Key Legal and Educational Policy Foundations for Medical Schools* (AAMC, 2008), and *Roadmap to Diversity: Effective, Efficient and Sustainable Enrollment Policies that Promote Mission-Related Goals* (AAMC manuscript). These and other diversity-related resources can be found at [www.aamc.org](http://www.aamc.org).

<sup>69</sup> The relevant federal statutory provisions that are summarized in Appendix I, with applicable citations, include the *Civil Rights Restoration Act of 1987* (applying various federal anti-discrimination laws to an entire institution when any part of the institution receives federal financial assistance); *Title VI of the Civil Rights Act of 1964* (prohibiting racial, color and national origin discrimination by covered recipients of federal funds, which may extend to certain employment that is the primary objective of the funding or affects educational benefits); *Title VII of the Civil Rights Act of 1964* (prohibiting race, color, sex, religion and national origin discrimination by public and private employers, which applies to faculty and staff and may apply to certain student employment); *Title IX of the Education Amendments of 1972* (prohibiting sex discrimination by education programs or activities operated by recipients of federal financial assistance); *Section 1981* (proscribing private as well as public racial discrimination in the making and enforcement of contracts); *Section 1983* (providing additional remedies for individuals whose civil rights are violated by government officials and representatives); *Section 1985(3)*(proscribing private as well as public conspiracies to intentionally discriminate on the basis of race by interfering with civil rights created by other laws); *Section 1988* (authorizing court-awarded attorneys' fees to prevailing parties in actions under Titles VI and IX, *Sections 1981 and 1983* and various other civil rights laws); and *Executive Orders 11246 and 11375* (which together prohibit covered federal contractors from discriminating on the basis of race, color, religion, national origin, and sex).

private institutions that receive federal funds are effectively subject to the same restrictions as those that arise under the Equal Protection Clause in their educational programs (under Title VI respecting race and under Title IX respecting gender).<sup>70</sup>

## 2. *Title VI (42 U.S.C. § 2000d)*

Title VI prohibits discrimination on the basis of race, color and national origin by public and private recipients of federal funds: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>71</sup> Title VI applies with respect to all aspects of an institution's operations, including its educational program and certain employment matters (the latter being addressed in Section VIII, *infra.*)

As interpreted by the agencies and the courts, Title VI prohibits both intentional discrimination (disparate treatment) and the use of facially neutral procedures or practices that have the effect of subjecting individuals to discrimination based on their race, color or national origin (disparate impact). The analysis of intentional discrimination claims under Title VI is similar to the analysis of disparate treatment under the Equal Protection Clause,<sup>72</sup> and can be proved through direct evidence of discriminatory motive or intent; or in the absence of such evidence, using an analysis similar to Title VII burden-shifting analysis<sup>73</sup> -- requiring the establishment of an "educational necessity" similar to Title VII's business necessity standard to justify disparate impacts. (As discussed below, compelling educational interests in broadly diverse student bodies and faculties should establish an educational necessity.) Meanwhile, the Supreme Court has held that there is a private right of action under Title VI as to disparate treatment claims, but not disparate impact claims.<sup>74</sup>

**Strict scrutiny and other standards of review.** Federal legal principles regarding the consideration of race and ethnicity when conferring educational opportunities and benefits to students appear well settled. Under the Equal Protection Clause of the 14th Amendment of the United States Constitution and Title VI of the Civil Rights Act of 1964, higher education institutions that include racial or ethnic preferences<sup>75</sup> in their programs and policies must ensure

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<sup>70</sup> Most colleges and universities are not subject to the Fifth Amendment, which imposes an equal protection requirement on federal governmental entities, but Fifth Amendment case precedent is nonetheless relevant. Equal protection claims under the 14<sup>th</sup> Amendment are "indistinguishable" from equal protection claims under the Fifth Amendment. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995).

<sup>71</sup> 42 U.S.C. § 2000d.

<sup>72</sup> *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

<sup>73</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (discussed in Section VIII, *infra*, in connection with employment discrimination and Title VII).

<sup>74</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

<sup>75</sup> Ethnicity, or national origin, refers to heritage, nationality group, lineage, or country of birth of the person or the person's parents or ancestors before their arrival in the United States. See American Community Survey, U.S. Census Bureau, Subject Definitions, [www.census.gov/acs/www/UserData/Def/Hispanic.htm](http://www.census.gov/acs/www/UserData/Def/Hispanic.htm). See also *Dawavendewa v. Salt River Project*, 154 F.3d 1117 (9th Cir. 1998) (ruling that "national origin" includes "the

that they comport with strict scrutiny standards -- ensuring that those programs and policies are supported by a compelling interest and that the policy and program design is narrowly tailored to achieve those compelling goals.<sup>76</sup> In addition, the status of the entity responsible for making the race- or ethnicity-conscious decisions is unlikely to affect the level of legal scrutiny applied. The 14th Amendment of the U.S. Constitution, which applies to "state actors" or public entities, is coextensive with Title VI, which applies to any recipient of federal education funds, public or private. Therefore, a college or university's status as public or private is unlikely to affect the determination regarding whether strict scrutiny applies to a particular policy or practice.

Although strict scrutiny standard is the most probing standard applicable to preferences that may be provided to some students, the rigor of the analysis does not result in an impossible hurdle. In Justice O'Connor's words, "strict in theory does not mean fatal in fact" -- as the University of Michigan's Law School demonstrated in its successful defense of its race-conscious admissions policies. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context. The higher education context -- an institution's mission, its academic freedom interests, and role in society -- do matter to the analysis.<sup>77</sup>

**Compelling interests.** Federal courts have expressly recognized a number of interests that can be sufficiently compelling to justify the consideration of race or ethnicity -- ranging from remedial interests in multiple settings to a university's interest in promoting the educational benefits of a diverse student body on its campus.<sup>78</sup> With respect to this latter interest, it is important to note

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country of one's ancestors" in a Title VII employment discrimination case); Office of Management & Budget, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

<sup>76</sup> In the landmark decision of *Adarand v. Peña*, the U.S. Supreme Court explained why strict scrutiny is "essential" when reviewing classifications based on race and ethnicity:

Absent searching judicial inquiry into the justification for "...race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the [relevant] body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype...." "More than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system."

515 U.S. 200, 226 (1995) (citations omitted).

<sup>77</sup> *Grutter*, 539 U.S. at 327. ("[S]trict scrutiny is not blind to context...[T]o determine whether a particular racial classification offends the equal protection guarantee, a reviewing court must factor any and all relevant contextual considerations into the decisional calculus.") (citing *Adarand*, 515 U.S. at 228).

<sup>78</sup> The U.S. Department of Education's Title VI regulations also authorize "a recipient to take additional steps to make the benefits of Title VI fully available to racial and nationality groups previously subject to discrimination." 34 C.F.R. § 100.5(h). The regulations recognize that affirmative steps may be needed, and appropriate, in situations where there has been no prior discrimination:

Even though an applicant or recipient has never used discriminatory policies ... [the] benefits of the program or activity it administers may not in fact be equally available to some racial or

the centrality of the educational aims. The interest in diversity is not "diversity for diversity's sake" nor can the interest be one of "racial balancing" -- mirroring the representation of certain racial or ethnic groups in relevant service areas or society at large -- or remedying societal discrimination. In addition the compelling interest recognized by law requires a broader focus, encompassing the educational benefits of nonracial and non-ethnic diversity as well as of racial and ethnic diversity. The type of diversity at the core of a compelling educational interest is a diversity of individuals -- their backgrounds, cultures, and life experiences -- of which race and ethnicity may be only two of several determinants.

Although some judicial hostility to expanding the list of compelling interests is apparent<sup>79</sup>, the U.S. Supreme Court in the University of Michigan decisions did not address (and did not rule out) other interests that might justify race- and ethnicity-conscious practices in the higher education context. The Court's decision may also be viewed as having recognized a broader definition of educational benefits that encompasses a university's multi-pronged teaching, research, access, and service mission. (Moreover, the U.S. Department of Education in federal policy guidance has expressly declined to "foreclos[e] the possibility that there may be other bases [in addition to remedial and diversity-related interests] on which a college may support its consideration of race or national origin in awarding financial aid."<sup>80</sup>)

**Narrow tailoring.** As a corollary, higher education institutions must be able to demonstrate programmatic coherence between the design of their policies and the compelling educational interests they seek to achieve. To gauge the design of race-conscious policies, federal courts typically examine several interrelated criteria in determining whether a given program is narrowly tailored, including:

- The flexibility of use of race in the program,
- The necessity of using race or ethnicity at all (which includes an examination of viable race-neutral alternatives) and the necessity of the extent to which race or ethnicity is used (which considers whether a lesser use -- *e.g.*, as one factor of many rather than as an exclusive requirement -- would be adequate),
- The effectiveness of the program and the benefit to those who are targeted for assistance, as well as the burden imposed on non-beneficiaries of the racial/ethnic preference, and

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nationality groups. In such circumstances an applicant or recipient may properly give special consideration to race, color or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

34 C.F.R. § 100.5(i).

<sup>79</sup> See *Grutter*, 539 U.S. at 395 (Kennedy dissenting) (approving consideration of race in "this one context"); *Grutter*, 539 U.S. at 349-378 (Thomas dissenting) (expansive discussion of hostility to racial classifications); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).

<sup>80</sup> United States Department of Education, Notice of Policy Guidance, 59 Fed. Reg. 8756, n.1 (Feb. 23, 1994), available at [www.ed.gov/about/offices/list/ocr/docs/racefa.html](http://www.ed.gov/about/offices/list/ocr/docs/racefa.html)

- Whether the policy has an end point and is subject to periodic review (i.e., to determine whether the need to use race and the extent it is used continue to be necessary to achieve a compelling aim and whether workable neutral alternatives are available).

As reflected in various federal court opinions, narrow tailoring factors generally should not be viewed or applied in a rigid mechanical way, but rather, they should be considered in light of each other, as part of a comprehensive assessment. It is possible for instance, that the relative strength of one or more factors might offset weaker support related to another of the narrow tailoring factors.<sup>81</sup> Of course, when strict scrutiny applies, it is helpful to have a reasonably strong position on each factor.

**Flexibility.** Under federal law, race- and ethnicity-conscious admissions policies may not operate as quotas -- to preclude candidates from competition with others based on certain desired qualifications, and imposing a "fixed number or percentage [of students based on certain race, ethnicity or gender characteristics] that must be attained or that cannot be exceeded." By contrast, so long as such policies operate in a way that permits competitive consideration among all applicants, higher education institutions may establish and seek to attain flexible goals (requiring, in operation, "only a good faith effort...to come within a range demarcated by the goal itself"). In sum, "some attention to numbers" can be appropriate so long as relevant practices do not operate to insulate certain students from comparison with others based on race or ethnicity.

Moreover, in the context of efforts to achieve the educational benefits of diversity, federal law requires that race- and ethnicity-conscious admissions policies be flexible enough to take into account all pertinent elements of educational diversity (not merely race and ethnicity) that each applicant may bring to an institution. As a result, and as the Court in the University of Michigan cases explained, applicants' files in the admissions process should be subject to a "highly individualized, holistic review," with "serious consideration" to "all the ways an applicant might contribute to a diverse educational environment." In short, admissions practices should not result in an applicant's race becoming "the defining feature of his or her application."<sup>82</sup>

The Court's emphasis on the need for flexible, individualized review in the admissions process has several implications related specifically to questions that have arisen regarding financial aid, recruitment, outreach, and retention programs, described in sections below.

**Necessity.** As with other elements of the narrow tailoring analysis, the necessity of maintaining race- or ethnicity-conscious practices should be evaluated in the context of the goals the institution seeks to achieve with those practices. Specifically, race and ethnicity may be used only to the extent necessary to achieve the institution's compelling interest -- in many cases, the educational benefits of diversity.

<sup>81</sup> *Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Peña*, Department of Justice, Memorandum to General Counsels (June 28, 1995).

<sup>82</sup> *Grutter*, 539 U.S. at 337. Thus, the use of points assigned to members of minority races on the basis of race, coupled with the "relative weight" of the totality of points assigned, was found to be unconstitutional in *Gratz*, 539 U.S. 244 (2003).

Correspondingly, federal courts have insisted that institutions give "serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek." To this end, the Supreme Court in *Grutter* admonished that higher education institutions "draw on the most promising aspects of . . . race-neutral alternatives as they develop" -- specifically pointing to experimentation in states where race- and ethnicity-conscious admissions practices had been banned as a matter of state law.<sup>83</sup>

Importantly, the need to consider (and try, as appropriate) race- or ethnicity-neutral alternatives to race- or ethnicity-conscious practices does not mean that an institution must exhaust "every conceivable race-neutral alternative...[or] choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." Thus, institutions need not use a lottery or percentage of high school class approach to admissions, nor lower its admissions standards, nor abandon an individualized holistic assessment of each applicant, to achieve the racial aspect of broad diversity. Instead, they should evaluate the implementation of their diversity goals and ensure the appropriate consideration of race-neutral alternatives in the context of other related institutional goals.

Similarly, higher education institutions are not faced with an "either-or" choice when it comes to the use of race-neutral alternatives when pursuing access and diversity-related goals. On many campuses where consideration of race is not prohibited by state law and educational goals associated with student body diversity are paramount, enrollment management, student affairs, and academic officials are pursuing *both* race-neutral *and* race-conscious practices. The two can often work together to help institutions achieve their diversity-related goals *and* to help institutions demonstrate that their strategies are narrowly tailored toward the achievement of their goals.<sup>84</sup>

**Undue Burden.** Under federal law, race- and ethnicity-conscious policies must not "unduly burden individuals who are not members of the [policy's] favored racial and ethnic groups." As a general rule, the less severe and more diffuse the burden on individuals who do not benefit from a race- and ethnicity-conscious policy, the more likely the policy will pass legal muster. As the Supreme Court in the University of Michigan cases recognized, for example, the use of race and ethnicity as "plus" factors in admissions in the context of an "individualized consideration" of all applicants under the same criteria did not disqualify non-minority applicants from competing for every seat in the class and did not result in undue harm to non-minority candidates.<sup>85</sup>

**Periodic Review.** The Supreme Court in the University of Michigan decisions, recognizing that a "core purpose of the 14th Amendment was to do away with all governmentally imposed discrimination based on race," ruled that "all governmental use of race must have a logical end point." In the context of higher education, the Court established that this "durational requirement" can be met by sunset provisions and "periodic reviews to determine whether racial

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<sup>83</sup> *Id.*

<sup>84</sup> See generally Coleman, Palmer and Winnick, *Race Neutral Policies in Higher Education: From Theory to Action* (College Board, 2008).

<sup>85</sup> *Grutter*, 539 U.S. 306 (2003).

preferences are still necessary to achieve student body diversity." (Notably, the inclusion of a sunset provision is not a categorical requirement imposed by federal law; the University of Michigan in *Grutter* successfully defended its law school policy, which did not include a sunset provision.)

To ensure that race is used only to the extent necessary to further an interest in the educational benefits of diversity, an institution should therefore regularly review its race- and ethnicity-conscious policies to determine whether its use of race or ethnicity continues to be necessary, and if necessary, whether the policies merit refinement in light of relevant institutional and contextual developments. (Periodic review can be especially important in light of the changing racial and ethnic demographics and the potential changes over time to institutional missions and goals.) Such periodic reviews may show that an institution's interest in educational diversity is attainable without the use of race and ethnicity or with uses of race and ethnicity that are less restrictive than current practices. Conversely, such reviews may establish the necessary foundations that justify race, ethnicity or gender consciousness as elements in certain policies.

### 3. *Title IX (20 U.S.C. §§ 1681-1688)*

Title IX prohibits sex/gender discrimination by education programs or activities that receive federal financial assistance:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>86</sup>

Title IX applies to all aspects of "education programs or activities" that are operated by recipients of federal financial assistance, including admissions, educational programs and benefits, and employment. Moreover, Title IX is not limited in its application to colleges, universities, and elementary and secondary schools. It applies to "any education or training program operated by a recipient of federal financial assistance. For example, Title IX would cover such diverse activities as a forestry workshop run by a state park receiving funds from the Department of Interior ... [or] state and local courses funded by the Federal Emergency Management Agency in planning how to deal with disasters ...."<sup>87</sup>

Title IX was modeled after Title VI and much of the Title VI case law is broadly applicable in Title IX cases. There are important differences between the statutes, however. Title IX includes various statutory exemptions that are absent under Title VI. For example, Title IX does not prohibit single-sex admissions policies of public and private elementary and secondary schools or private undergraduate schools.<sup>88</sup> The Title IX regulations provide additional exemptions of possible relevance to the present analysis, including one that permits affirmative action to

<sup>86</sup> 20 U.S.C. § 1681.

<sup>87</sup> U.S. DOJ, "Title IX Legal Manual," at 6 (Jan. 11, 2001), available at [www.usdoj.gov](http://www.usdoj.gov).

<sup>88</sup> *Id.* at 10.



overcome the effects of conditions that result in limited participation in a program by persons of a particular sex, and one that requires appropriate remedial action if an agency finds that a recipient has discriminated against individuals on the basis of sex.<sup>89</sup>

Notably, public entities do have a constitutional duty not to discriminate on the basis of sex, even if conduct is carved out of Title IX's general prohibition on sex discrimination.<sup>90</sup> Even if Title IX has been satisfied, equal protection obligations still apply to public institutions. Like Title VI, Title IX recognizes three general types of discrimination: (1) disparate treatment, (2) disparate impact, and (3) retaliation. The analysis of Title IX disparate treatment and disparate impact claims essentially tracks the analysis of such claims under Title VI, which is discussed above -- but with a different level of scrutiny.

**Gender: Intermediate Scrutiny Analysis.** In contrast to the strict scrutiny that applies to race-conscious policies and programs that condition opportunities or benefits, policies and programs based on gender or sex trigger "intermediate scrutiny," which means that such programs must:

- Serve "important" or "exceedingly persuasive" (rather than "compelling") governmental objectives; and
- Be "substantially related" (rather than "narrowly tailored") to the achievement of those objectives.

Major legal challenges to diversity efforts in higher education have focused on race, largely in the context of admissions. Gender is also an important element of diversity, however.

"Without equating gender classifications, for all purposes, to classifications based on race or national origin, the [Supreme] Court in [recent] decisions, has carefully inspected official action that closes a door to women (or to men)."<sup>91</sup> Under the applicable intermediate scrutiny standard, a governmental actor making gender-based decisions must demonstrate an important governmental objective. The Supreme Court has stressed that to rise to the level of an "important governmental objective," a justification "must be genuine not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males or females."<sup>92</sup>

In invalidating VMI's all-male admissions policy in 1996 in *United States v. Virginia*, the Supreme Court noted, "once again, the core instruction of th[e] Court's pathmaking decisions: Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."<sup>93</sup> The Supreme Court has expressly stated that "[s]ex

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<sup>89</sup> *Id.* at 11.

<sup>90</sup> See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (nursing school policy that excluded male applicants violated 14<sup>th</sup> Amendment notwithstanding the applicability of a Title IX exemption).

<sup>91</sup> *United States v. Virginia*, 518 U.S. 515, 532 (1996) (invalidating the Virginia Military Institute's all-male admissions policy on Equal Protection grounds).

<sup>92</sup> *Id.* at 532-33.

<sup>93</sup> *Id.* at 531 (citations omitted). In theory, then, it should be easier to sustain gender-based affirmative action or diversity efforts than race-based. But, in practice, a court might treat gender diversity efforts as it would those based

classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,'...to promot[e] equal employment opportunity,'...[and] to advance full development of the talent and capacities of our Nation's people."<sup>94</sup>

***Classifications Other than Race, Ethnicity, and Gender.*** Still further removed from the rigor of strict scrutiny review, federal courts will employ a "rational basis" standard for most other classifications (such as when students receive opportunities or benefits based on income or special talents). As the least rigorous federal standard of review applicable to classifications of individuals, the rational basis analysis requires only that the purpose or interest be "legitimate," and that the means be "rationally related" to the accomplishment of that interest.<sup>95</sup>

## B. The Importance of Mission Alignment

The University of Michigan's successful defense of its law school policy in *Grutter* stemmed in substantial part from the clear articulation of its compelling mission-driven interest and the close association between its race-conscious admissions policy and its mission-related goals. Thus, a key element affecting the likely success of diversity-related policies by higher education institutions is the alignment between the range of enrollment policies associated with access and diversity goals and the core, mission-driven education interests of the institution.

Notably, the U.S. Supreme Court's recognition that the educational benefits associated with student diversity – improved teaching and learning and preparation for a 21<sup>st</sup> Century workforce, for instance -- are *as a matter of law compelling* establishes an important baseline to guide higher education institutions in their framing of related institutional goals. This baseline is particularly important in STEM fields, where (as noted in more detail in Section III above) science and technology are creative and collaborative enterprises. By definition, the ultimate success associated with STEM disciplines is dependent upon the kind and quality of learning that students pursuing those fields are exposed to. This includes providing students with learning experiences that offer a diversity of perspectives, backgrounds and intellectual challenges and the opportunity to work collaboratively and productively with individuals having many differences from themselves. These experiences shape students' development and help set the stage for their professional success (along with the advancement of relevant scientific aims). Further, diverse STEM graduates and those exposed to diverse students during their STEM education and training may be more likely to identify and advance STEM areas to meet the needs of a diverse society (*e.g.*, engineering items for specifically for handicapped persons or women).

Sources for Justice Powell's 1978 *Bakke* opinion (which was a central foundation for the U.S. Supreme Court's decisions in the University of Michigan cases a quarter century later) concretely illustrate the educational benefits associated with diversity, many of which relate so directly to STEM fields.

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on race and apply what amounts to strict scrutiny. Moreover, the context of a given case might make the challenged action more difficult to defend even if a lower standard is applied.

<sup>94</sup> *Id.* at 533-34 (citations omitted).

<sup>95</sup> See, *e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *New Orleans v. Dukes*, 427 U.S. 297 (1976).

[T]he overall quality of the educational program is affected not only by the academic and personal qualities of the individual students who are enrolled, but also by the characteristics of the entire group of students who share a common educational experience. ...In a residential college setting, in particular, a great deal of learning occurs informally ...through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. ... People do not learn very much when they are surrounded only by the likes of themselves... In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth...These kinds of learning experiences, sometimes very satisfying and sometimes very painful, are important not only for particular students in an immediate sense but also for the entire society over time. Our society -- indeed our world -- is and will be multiracial. We simply must learn to work more effectively and more sensitively with individuals of other races, and a diverse student body can contribute directly to the achievement of this end.<sup>96</sup>

Importantly, the U.S. Supreme Court's recognition of the "substantial" and "real" educational benefits associated with student diversity in *Grutter*, while significant, does not eliminate the advisability for institutions to address the question, more specifically, of how *their particular programs* advance the diversity interests that are central to their mission. To that end, a good practice in developing mission statements and related policies associated with STEM objectives is to reflect:

1. That the benefits of diversity, including those associated with STEM and other disciplines, are a core institutional value and priority;
2. A concrete articulation of the benefits of diversity associated with STEM and other disciplines -- including educational, civic, economic/workforce and national security benefits, as appropriate to the institution -- that will explain the connections between the diversity of a student population and the educational success of the institution;
3. The importance of multiple facets of diversity in achieving institutional goals (not just a focus on race, ethnicity and gender);
4. Any unique institutional history that may bear on the institution's mission regarding access and diversity-related goals, including a history of discrimination or exclusion; and
5. As applicable, the process leading to policy approval, including the role of faculty and students in affirming the importance of access and diversity to their individual and collective educational success associated with STEM and other disciplines.<sup>97</sup>

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<sup>96</sup> Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly, at 9-10 (Sept. 26, 1977) (portions cited in *Bakke*, 438 U.S. at 313, n.48 (1978) (Powell, J.)).

<sup>97</sup> See *Grutter*, 539 U.S. at 314-15 (observing that in 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to achieve its goals - including seeking "a mix of students with varying

Institution-specific research -- ranging from student and faculty surveys to data regarding the association between diversity and desired educational outcomes -- should be gathered and evaluated over time in light of policy statements of relevance. Generally, narrow tailoring requires that a program aimed at increasing diversity to provide certain compelling benefits to the institution be effective in advancing that aim. It is important to measure the effectiveness of an institution's diversity programs to achieve the intended educational and other benefits.

### **PERSPECTIVES: Yale University's Commitment to Diversity**

**"Yale University, in order to secure its place as a leading research institution, and situated in an increasingly competitive, globalized, multiethnic and multiracial environment, has adopted an inclusive strategy . . . [that] conveys to our potential as well as current faculty, students, and staff, and our institutional and business partners, Yale's readiness to compete successfully in a world demanding intercultural skills. It is imperative for Yale not only to employ measures to attract persons who bring diversity, but also to avoid discouraging and losing underrepresented minorities, women, and others who contribute to diversity at Yale. We are convinced that academic excellence is impaired as much by unintentional hurdles as by intentional neglect of individuals and groups who face structural impediments to academic opportunity. Yale's admissions and personnel search processes attach value to diverse backgrounds and life experiences that broaden the repertoire of ideas and ways of thinking available to the entire University community....**

**Ethnic, gender and other kinds of diversity among the faculty increases the diversity in perspectives and approaches shared with students including those in the cultural majority. Yale is committed to providing an environment in which all members of the academic community can grow and flourish as scholars. Failure to do so would place a large tax on the possibilities for excellence at Yale."**

*Yale University's Commitment to Diversity: A Report Prepared for the American Association for the Advancement of Sciences*

PREFACE AND  
OVERVIEW

HISTORICAL  
CONTEXT

COMPELLING  
CASE FOR  
DIVERSITY

KEY  
DEFINITIONS

RACE/GENDER-  
NEUTRAL  
ALTERNATIVES

RELEVANT  
STATE LAWS

STUDENT  
DIVERSITY

FACULTY  
DIVERSITY

BROADER  
DISCRETION

ENFORCEMENT

backgrounds and experiences who will respect and learn from each other" - and that upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.)

## C. Issues Related to Enrollment

### 1. In General

**Comprehensive review.** Although never definitively addressed by federal courts, the logic of the strict scrutiny analysis suggests that policies and programs should be evaluated in the context of all others that are designed to operate in tandem as part of a comprehensive effort to achieve access and diversity goals.<sup>98</sup> Simply put, higher education institutions should not evaluate access- and diversity-related programs in isolation.

Multiple foundations establish the justification for this broader lens of analysis. In particular, narrow tailoring principles that inform strict scrutiny review focus on the corresponding issues of effectiveness in achieving goals and strategies for pursuing the least discriminatory avenue to achieve success. For these principles to be appropriately assessed, one should understand an individual program's or policy's impact on goals, as well as the impact that other related programs and policies may have.

**Exclusive programs.** The comprehensive policy assessment that can be important in gauging both legal soundness and educational effectiveness also has implications for race-, ethnicity- and sex-exclusive program evaluations. For example, the evaluation over time of an admissions policy (which the Supreme Court has made clear may not employ quotas or other exclusive approaches) should reference potentially related recruitment, outreach and aid policies that may in some cases (where they are particularly effective) mitigate the weighting of race in the admissions process. Or, a school might actually be able to eliminate consideration of race and ethnicity in its admissions process and still achieve its diversity goals if it expands in a limited and appropriate manner (with a solid evidentiary foundation) the race-exclusive scholarships that it awards, along with a more robust diversity recruitment program. Under general legal principles, such policy evolution could be viewed as "less discriminatory" and thus more legally sustainable. In the end, such an analysis requires more than an isolated program evaluation and a substantial evidentiary basis.

Importantly, no federal case or Department of Education rule categorically rejects all race- or ethnicity-exclusive practices under strict scrutiny standards, except in admissions. Indeed, as explained below, federal guidance regarding financial aid and scholarships specifically contemplates the legal defensibility of such aid (in limited, appropriate circumstances). In the end, the core legal question to be posed is one of whether the exclusive nature of any program or policy is demonstrably necessary to achieve legally-recognized, compelling institutional goals (with no viable and less extreme or less categorical use of race or ethnicity promoting

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<sup>98</sup> Notably, through its enforcement of Title VI, the U.S. Department of Education's Office for Civil Rights has in fact inquired about the range of enrollment practices that bear on diversity interests, even in cases where Title VI complaints relate only to, e.g., a race-conscious financial aid policy. See, e.g., *Federal Law and Financial Aid: A Framework for Evaluating Diversity Related Programs*, at Appendix D (Sample OCR Data/Information Request) (College Board, 2005).

achievement of the goals).<sup>99</sup> In any event, exclusive programs attract challenges, warrant careful, evidence-based justification, and are best used judiciously.

For instance, certain exclusive recruitment and outreach programs may operate as the less discriminatory alternative to achieve greater diversity and thus the increased educational benefits, when compared to, *e.g.*, race-conscious (but not exclusive) admissions or financial aid policies. And financial aid programs may be considered to be less beneficial to recipients and less burdensome to non-recipients than admissions. Recruitment and outreach programs confer much lesser benefits on the recipients (and burdens on non-recipients) than admissions or financial aid. When some recruitment and outreach is specifically designed to attract minorities or women within the context of a broader program of recruitment and outreach that is not racially or gender-focused, the racially and gender focused programs may be justified as "inclusive," and may not even be viewed as conferring a race or gender based benefit or triggering strict scrutiny.

## 2. Admissions

In contrast to other facets of enrollment-related policies, where there is a dearth of on-point U.S. Supreme Court guidance, the U.S. Supreme Court has on three occasions addressed the merits of questions related to discrimination in higher education admissions. In the seminal 1978 decision in *Bakke*, the U.S. Supreme Court struck down a medical school policy in which sixteen out of 100 positions were reserved for minority students. Twenty-five years later, the Court addressed two University of Michigan policies -- upholding its law school admissions policy in *Grutter*, characterized by individualized, holistic review; and striking down its undergraduate admissions policy in *Gratz*, characterized by a point system in which race and ethnicity were significantly weighted (20 points out of a potential total of 150, and where 100 points for any applicant practically ensured admission). Taken together, these landmark decisions highlight the importance of the following principles,<sup>100</sup> which should inform the development and

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<sup>99</sup> In *Florida Atlantic University*, Case No. 04-90-2067, OCR in 1997 specifically approved of a scholarship program "restricted to black applicants on the basis of their race" in the context of a resolution that recognized that transforming the program to one involving "race-as-a-plus-factor" (if successful in meeting diversity interests) could "strengthen the legal support" for the program. In that case, OCR cited as support for its conclusion the following evidence:

- Black students indicated that they could not have attended the University without the aid in question;
- The State of Florida Board of Regents found that "black student recruitment and retention [were] heavily dependent upon financial assistance programs" and the provision of financial aid was "among one of the most important criteria [for] black college-bound high school seniors in choosing a college";
- The University had implemented "numerous non-race exclusive measures," which were successful in recruiting students of other races and ethnicities, but "not...as successful in recruiting black students"; and
- Only 7-8% of the University's scholarship financial aid was allocated to race-targeted programs, and there was "no indication that these programs created an undue burden" on the University's ability to offer scholarship aid to non-minority students.

<sup>100</sup> Many of these principles are, in various ways, reflected in sources listed in n. 67, *supra*.

implementation of admissions policies that include voluntary consideration of race and ethnicity (and in all likelihood, gender)<sup>101</sup>:

### In General

1. Institutional, mission-driven foundations (i.e., educational benefits) should also drive the scope and substance of admissions policies;
2. Admissions policies should provide for the assessment of the merit of students the institution seeks to admit holistically, with a focus on all relevant qualifications and characteristics -- those related to numerical as well as more qualitative academic preparation and potential (*e.g.*, standardized test scores and grades, as well as drive, dedication, ability to overcome set-backs, creativity, etc.), *and* those related to other student qualities that the institution values such as aptitude for and interest in STEM fields, inclusive conduct and multi-cultural skills, experiences and talents, as set forth in mission-related policies;
3. All applicants who are admitted, regardless of background, must be qualified.
4. Good educational and psychometric foundations should inform judgments regarding students who are deemed qualified and those who are not similarly evaluated;
5. Admissions policies should be integrated and aligned with related enrollment policies;
6. The weighting of race, ethnicity and gender (among other factors) should not fundamentally undercut the value of individualized holistic review; or create rigid or quota-like mechanisms as part of the admissions process;
7. Each applicant should be evaluated in light of all criteria, all of the applicant's attributes, and the many kinds of diversity that together create educational benefits, so that all applicants are on the "same footing for consideration."
8. All applicants should be evaluated under the same criteria without separate evaluation criteria or admissions tracks based on race. Each member of the same race should not have his or her race weighted in the same way or to the same extent.
9. Qualified, non-minority applicants who bring other particular attributes should have the opportunity to be admitted over minority applicants with higher grades and scores;<sup>102</sup>

### The Necessity of Considering Race, Ethnicity and/or Gender

10. Policies should consider the race, ethnicity and/or gender of applicants only where it has been determined that such consideration is necessary in order to achieve institutional diversity-related educational goals, and in such cases, policies should reflect:

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<sup>101</sup> Given the relationship between "strict scrutiny," which applies to race- and ethnicity-conscious policies, and "intermediate scrutiny," which applies to gender-conscious policies, references to the latter have been included in principles discussed below, despite the absence of on-point federal guidance.

<sup>102</sup> *Gratz* provides an example of how the existing student body and the applicant pool may influence the consideration of race and other attributes in admissions decisions. An individual who is African American from a wealthy and well-educated family would contribute differently to the student body than would an African American applicant who is from an inner city ghetto. Another student who is an exceptional artist would bring something else. The school should look at each individually for all attributes each would bring to the student body and consider what attributes, including what aspects of diversity, are most needed at the time in order to select among the three.

- a. A process of individualized, holistic review, through which candidates are evaluated based on their background and record, is followed;
- b. That diversity-related attributes are valued as part of the admissions process but are not limited to race, ethnicity, and/or gender;
- c. That neither race, ethnicity, nor gender operates as a driving force in selection such that the admissions of all minimally qualified minority students is explainable by the consideration of race, ethnicity or gender in the selection process;
- d. A periodic evaluation of the policy with a focus on its effectiveness in the achievement of diversity-related compelling educational goals (serving as a foundation for policy changes over time, as appropriate); and
- e. The evolution of the policy to reflect changing circumstances, including shifts in applicant pools and the evolution of institutional goals.<sup>103</sup>

### How Race, Ethnicity and/or Gender May Be Considered

11. Race, ethnicity and/or gender may be considered as one, but may not be the only, diversity "plus" factor in evaluating all attributes of each and every applicant. Race may not be given the same weight in relation to all applicants of a particular race -- or at all times. Consideration of race should be flexible, taking into account the educational needs of the student body as they may change over time and the many attributes of each applicant.
12. Race ethnicity and/or gender may be weighted more heavily than other diversity "plus" factors in a particular case, but not for all applicants of a particular minority group. Race may not be the only defining or outcome-deciding feature for applicants of a particular race. All members of a minority group may not be assumed to offer the same contribution to the student body based on their race.
13. Race, ethnicity and/or gender may be "outcome determinative" by "tipping the balance" when it is considered with all other attributes of a particular applicant who is academically qualified but isn't in the top range of grades and scores; and there may be more minority applicants than non-minority applicants who aren't in the top range of grades and scores and are offered admission.

### **3. *Financial Aid and Scholarships***

Unlike in the admissions setting, discussed above, there is a notable lack of widespread federal caselaw that relates specifically to race- and ethnicity-conscious financial aid and scholarships. No U.S. Supreme Court decision has comprehensively addressed the lawfulness of race-, ethnicity- or, gender-conscious financial aid and scholarships, and only a few lower court

<sup>103</sup> See generally *Bakke*, 438 U.S. at 315-17 (opinion of Powell, J.) (to be narrowly tailored, a race-conscious admissions program cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants;" instead, it may consider race or ethnicity only as a " 'plus' in a particular applicant's file;" it must be "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"); *Grutter*, 539 U.S. at 309 (law school program adequately ensured that all factors that may contribute to diversity are meaningfully considered alongside race).



decisions have included such analysis. Four reported cases have addressed race, ethnicity or gender preferences in some fashion; in apparently every setting, the relevant legal analysis was shaped in the context of remedial (as opposed to non-remedial diversity-related) interests.<sup>104</sup> The one case on financial aid and scholarships considered by many to be the leading decision -- the 1994 Fourth Circuit decision in *Podberesky v. Kirwan* -- was by its terms highly fact-based and limited to the remedial justifications asserted by the University of Maryland; the University of Maryland did not assert (and the court did not address) the educational benefits of diversity rationale.

***U.S. Department of Education Guidance.*** The dearth of federal caselaw of relevance to aid issues associated with the educational benefits of diversity stands in contrast to the comprehensive federal guidance on the topic -- federal policy guidance promulgated by the U.S. Department of Education in 1994. A brief history of that policy, and of its substantive parameters, is important:

On December 4, 1990, an official of the U.S. Department of Education's Office for Civil Rights declared "that Title VI categorically prohibited colleges and universities from awarding scholarships on the basis of race." Two weeks later, however, OCR issued a press release announcing a substantially more tolerant policy on minority scholarships.... On March 20, 1991, Secretary of Education Lamar Alexander ... announced in a press conference that he had withdrawn both policy statements and indicated that [the Department of Education] would continue to interpret Title VI as permitting federally funded institutions to provide minority scholarships."<sup>105</sup>

Then, on December 10, 1991, the U.S. Department of Education issued for notice and comment Proposed Policy Guidance on Title VI's applicability to race- and national origin-conscious scholarship awards.<sup>106</sup> That guidance indicated that:

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<sup>104</sup> In *Flanagan v. President & Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976), the court found that a minority financial aid policy that arbitrarily set aside 60% of its financial aid dollars for the 11% minority population in its freshman class violated Title VI.

In *Knight v. Alabama*, 900 F. Supp. 272 (N.D. Ala. 1995), the court recognized the viability of race-conscious scholarships.

In *Sharif v. New York State Education Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989), an action in which female plaintiffs alleged that the State's gender-neutral use of the SAT in the award of State scholarships violated the Equal Protection Clause and Title IX, the court enjoined the particular "discriminatory practice" at issue and stated: "It is undisputed...that the SAT predicts the success of students differently for males and females." Males outscore females on the verbal and math sections of the SAT, and the "probability that these score differentials happened by chance is approximately one in a billion and the probability that the result could consistently be so different is essentially zero."

In *Podberesky v. Kirwan* (discussed in Appendix II, *infra*), a case involving two federal district court decisions (in 1991 and in 1993) that were reversed by the Fourth Circuit (in 1992 and in 1994), the appellate court considered the constitutionality of a scholarship program that "exclude[d] all races from consideration but one," African Americans and ruled that the program was unlawful. See 38 F.3d 147 (4<sup>th</sup> Cir. 1994).

<sup>105</sup> *Washington Legal Foundation v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993).

<sup>106</sup> See 56 Fed. Reg. 64,548 (1991).

- The Department's few previous statements regarding race-exclusive scholarships were "inconsistent;"
- There had never been a "full policy review and clear set of principles" regarding the use of race-exclusive scholarships;
- The Department would continue to interpret Title VI "as permitting race-based scholarships in a variety of instances;" *and*
- In any event, and regardless of the final agency rules, there would be "a four-year transition period" in which the Department would work with colleges to bring them into compliance, without harming any student under scholarship.

Subsequently, pending the issuance of a Congressionally-directed General Accounting Office Report on race-conscious scholarships, the Department of Education deferred final issuance of its policy. Then, on February 23, 1994, the Department of Education issued its final policy guidance.<sup>107</sup> Among the salient points of that Guidance were the following principles:

- a. ***Financial Aid for Disadvantaged Students -- A college may make awards of financial aid to disadvantaged students without regard to race or national origin even if that means that these awards go disproportionately to minority students***

Pursuant to Principle 1, the Department stated that higher education institutions are "free to define the circumstances under which students will be considered to be disadvantaged, as long as that determination is not based on race or national origin." The Department noted that such policies might have "a disproportionate effect on students of a particular race or national origin," but (consistent with Title VI and the 14th Amendment of the U.S. Constitution) disproportionate effect alone does not implicate strict scrutiny. The Department concluded by expressing:

<sup>107</sup> The Department's final policy guidance followed the publication of a report by the United States General Accounting Office: "Report to Congressional Requesters: Information on Minority Scholarships" (B-251634, Jan. 14, 1994). The GAO report was designed to "inform policymakers about the current use and perceived benefits of [minority-targeted] scholarships." The report concluded:

- Although many schools used race- or ethnicity-conscious scholarships, a "relatively small proportion of scholarship dollars" were devoted to race- or ethnicity-conscious scholarships. At undergraduate schools, the proportion was about four percent.
- Higher education institutions reported that such scholarships were "valuable tools for recruiting and retaining" minority students. (They identified the help scholarships provided in "overcom[ing] the traditional difficulties...in enrolling and graduating minority students, such as financial hardships and a perception of cultural isolation.")
- Some higher education officials concluded that such scholarships "help[ed] build a critical mass of minority enrollment and sen[t] a message that the school sincerely want[ed] to attract [minority] students."

See GAO Report at 11.

The Department of Education subsequently concluded that the GAO report did "not indicate the existence of serious problems of noncompliance with the law in postsecondary institutions," finding that "race-targeted scholarships constitute[d] a very small percentage of the scholarships awarded to students at postsecondary institutions." See United State Department of Education Policy Guidance, Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756 (Feb. 23, 1994).

[the] view that awarding financial aid to disadvantaged students provides a sufficiently strong educational purpose to justify any racially disproportionate effect the use of this criterion may entail. In particular, the Department believes that an applicant's character, motivation, and ability to overcome...disadvantage are educationally justified considerations...in financial aid decisions. Therefore, the award of financial assistance to disadvantaged students does not violate Title VI.

***b. Financial Aid Authorized by Congress -- A college may award financial aid on the basis of race or national origin if the aid is awarded under a federal statute that authorizes the use of race or national origin***

Pursuant to Principle 2, the Department recognized that "financial aid programs for minority students that are authorized by a specific federal law cannot be considered to violate another Federal law, i.e., Title VI." The Department observed, however, that: (1) this principle would not insulate public colleges and universities from challenges pursuant to federal constitutional (versus statutory) principles; and (2) any federal authorization of race-conscious financial aid programs would not "serve as an authorization for States or colleges to create their own [race-conscious aid] programs."

***c. Financial Aid to Remedy Past Discrimination -- A college may award financial aid on the basis of race or national origin, if the aid is necessary to overcome the present effects of past discrimination***

Pursuant to Principle 3, the Department reaffirmed the long-standing principle that the use of race- or ethnicity-conscious measures may be justified in the name of "ensuring the elimination of discrimination on the basis of race or national origin." In this context, the Department reaffirmed the applicability of strict scrutiny to such measures. In addition, the Department explained that while the use of race- or national origin-conscious financial aid measures might further remedial objectives based on court or administrative agency findings, such findings were not a necessary predicate of such aid. The Department concluded:

Allowing colleges to implement narrowly tailored remedial affirmative action if there is strong evidentiary support for it -- without requiring that it be delayed until a finding is made by OCR, a court or a legislative body -- will assist in ensuring that Title VI's mandate against discrimination based on race or national origin is achieved.

- d. Financial Aid to Create Diversity -- A college should have discretion to weigh many factors, including race and national origin, in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures -- provided that the use of race or national origin is a narrowly tailored means to achieve the goal of a diverse student body*<sup>108</sup>

Pursuant to Principle 4, and based on the application of principles derived from Justice Powell's opinion in *Bakke*, the Department concluded that a higher education institution can consider race and national origin as: (1) "one factor, with other factors, in awarding financial aid if necessary to promote diversity"; and (2) "as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity."<sup>109</sup>

The Department also observed that there were "important differences" between financial aid and admissions decisions that might affect relevant legal analyses regarding the use of race or ethnicity. Specifically, the Department noted that the burden on those students "excluded from the benefit conferred by the classification based on race" in financial aid and scholarship decisions might be less severe than the burden associated with certain admissions decisions. For example, the Department observed:

- Unlike admissions policies which have "the effect of excluding applicants...on the basis of race," race-conscious financial aid "does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race."
- Unlike "the number of admissions slots," the amount of financial aid available to students is not necessarily fixed.<sup>110</sup>

<sup>108</sup> Consistent with Titles VI and IX, U.S. Department of Education regulations provide that: "*Even in the absence of prior discrimination*, a recipient [of federal funds] in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin." 34 C.F.R. §100.3; 34 C.F.R. §106.3(b) (emphasis added). The Department of Education reviewed its Title VI regulations after the Supreme Court's *Bakke* opinion and concluded that "no changes in the regulations are required or desirable. The Court affirmed the legality of voluntary affirmative action.... The Department...encourages the continuation and expansion of voluntary affirmative action programs." 45 C.F.R. Part 80 (1991).

<sup>109</sup> The distinction between the two articulated standards is apparently premised upon the Department's presumption that "a college's use of race or national origin as a plus factor, with other factors, is narrowly tailored to further the compelling governmental interest in diversity, as long as the college periodically reexamines whether its use of race or national origin as a plus factor continues to be necessary to achieve a diverse student body." *Id.* at n.10. Thus, while adopting both the necessity and periodic review prongs of narrow tailoring analysis for race-as-a-factor aid, the Department as a matter of its administrative enforcement responsibilities presumed flexibility and minimal adverse impact on non-qualifying students, based on the "as-a-factor" operation of such policies.

<sup>110</sup> Notably, the Department in its Final Title VI Guidance framed the question as whether the effect of the use of race or ethnicity (in this case, for minority students) was "sufficiently small and diffuse so as not to create an undue burden on [non-qualifying, majority students'] *opportunities to receive financial aid.*" United States Department of Education Race-Targeted Scholarship Policy, 59 Fed. Reg. 8756 at 8757 (Feb. 23, 1994) (emphasis added).

#### 4. *Outreach and Recruitment*

With one notable exception, federal non-discrimination principles regarding recruitment and outreach activities tend to track those applicable to other facets of enrollment policy, such as admissions and financial aid. The exception relates to "inclusive" recruitment activities which, by definition, involve institutional efforts to expand the pool of qualified applicants (potentially through race- or ethnicity-conscious measures) but that do not do so in ways that exclude individuals from eligibility or selection for the actual program or benefit. Absent such a denial of material educational benefits to some students and not others, the presence of race- and ethnicity-consciousness (in program intent or design) has tended *not* to subject the program to strict scrutiny review.

The U.S. Department of Education's Office for Civil Rights has not promulgated policy guidance regarding race-conscious recruitment, outreach, and retention programs as it has with respect to financial aid. However, Department regulations that address Title VI standards comport with the federal caselaw relating to recruitment and outreach practices: Under Title VI regulations, recipients of federal funds are prohibited from engaging in "specific discriminatory actions," including denying "services" or "benefits" on the basis of race or national origin (except in limited circumstances).

In different settings, federal courts have addressed the particulars of recruitment and outreach programs with respect to these guiding principles.<sup>111</sup> In higher education, employment and contracting contexts (among others), federal courts have tended to rule that strict scrutiny principles do not in the first instance apply to race- or ethnicity-conscious recruiting and outreach programs *so long as* those programs do not confer tangible benefits upon individuals based on their race or national origin, to the exclusion of other individuals. In these situations, federal courts have upheld such programs against charges of illegal discrimination, frequently characterizing such race-conscious measures as "inclusive" (and, in legal terms, race-neutral) rather than "exclusive." In an admissions context, for example, one federal district court stated that "[r]acial classifications that serve to broaden a pool of qualified applicants and to encourage equal opportunity but do not confer a benefit or impose a burden do not implicate the Equal Protection Clause."<sup>112</sup>

Expanding on this principle in a fair housing marketing challenge, another district court reasoned that while the recruitment of minority applicants might be "race-conscious," that action -- standing alone -- would not constitute a "preference" within the meaning of federal authorities on

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<sup>111</sup>"Mere outreach and recruitment efforts...typically should not be subject to the *Adarand* [strict scrutiny] standards." *Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Pena*, Department of Justice, Memorandum to General Counsels (June 28, 1995) (cited in *Raso v. Lago*, 958 F. Supp. 686 (D. Mass. 1997), *aff'd* 135 F.3d 11 (1<sup>st</sup> Cir.), *cert. denied* 525 U.S. 811 (1998)); *see also Sussman v. Tanoue*, 39 F. Supp. 2d 13 (D.D.C. 1999); *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535 (M.D. Ala. 1995); *Honadle v. Univ. of Vermont*, 56 F. Supp. 2d 419 (D. Vt. 1999). Note that, by contrast, federal courts that have addressed governmental rules regarding recruitment and outreach have tended to be more exacting in their analysis. *See MD/DC/DE Broadcasters Assn. v. FCC*, 236 F.3d 13 (D.C. Cir. 2001); *Bowen Engineering Corp. v. Village of Chammalion*, 2003 WL 21525254 (N.D. Ill. 2003).

<sup>112</sup> *Weser v. Glen*, 190 F. Supp. 2d 384, 399 (E.D.N.Y. 2002) (*internal quotations omitted*).

the subject. It stated: "The crucial distinction is between expanding the applicant pool and actually selecting from that pool. Expanding the pool is an inclusive act. Exclusion [based on race]...can only occur at the selection stage."<sup>113</sup>

Absent directly controlling authority from the U.S. Supreme Court on the subject, it is important to consider particular federal circuit-specific decisions that may bear on institution specific judgments about which programs may -- or may not -- be subject to strict scrutiny. Importantly, the mere fact that a program is labeled "recruitment" does not insulate it from strict scrutiny. Facts matter. And the way in which recruitment and outreach programs operate (and, consequently, are characterized by federal courts) will shape the determination about whether recruitment and outreach programs confer race-conscious benefits or opportunities sufficient to trigger strict scrutiny. Potentially relevant factors in the analysis include the following:

- The extent to which recruitment or outreach practices are balanced -- that is, if they include a focus on certain populations, there are corresponding practices that reach groups of individuals beyond the race, ethnicity or gender focus of the particular practice.
- The extent to which recruitment and outreach efforts (including through the establishment of relationships with other institutions, participating in forums, and contacting professional organizations) do not "confer a benefit or impose a burden" on students based on race, ethnicity or gender -- but merely extend opportunities more broadly.
- The extent to which recruitment and outreach efforts merely articulate diversity-related goals, without more (*e.g.*, without quotas).

By contrast, programs that compel certain race-conscious actions in the context of limited resources and that result in more limited information being provided to certain parties based on race or in influencing ultimate selection decisions based on race are likely subject to strict scrutiny.<sup>114</sup>

### 5. *Student Mentoring, Retention, and Enrichment*

Policies and programs that are designed to provide student support (academic or otherwise) should also comport with relevant federal principles. As a practical matter, the legal defense of retention programs that qualify as race- or ethnicity-conscious often will be challenging to defend in cases where the educational benefits or opportunities offered are not provided, broadly, to all students demonstrating comparable need (regardless of their race or ethnicity background).

However, where regression analysis demonstrates that, all other factors (*e.g.*, parental educational attainment, standardized test scores, grades, etc.) being equal, minority racial group membership or gender statistically result in a lower success rate at the institution, it may be

<sup>113</sup> *Raso v. Lago*, 958 F. Supp. 686, 702 (D. Mass. 1997), *aff'd* 135 F.3d 11 (1<sup>st</sup> Cir. 1998).

<sup>114</sup> *E.g.*, *Lutheran Church-Missouri Synod* 141 F.3d 344, 354 (D.C. Cir. 1998) ("We do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces [decisions]...with an eye toward meeting the numerical target.... [As a consequence,] strict scrutiny applies."). *See also MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001).

justifiable to focus targeting efforts for students of the relevant race and gender, so long as the program is inclusive, with participation by other students who demonstrate need.

#### **D. Student-Related Policy and Program Principles and Program Illustrations**

The legal overview and analysis set forth above provides general guidance regarding the law that governs diversity-related, student-oriented policies and programs that educational institutions may pursue. The elements of each policy and program contemplated or implemented by an institution should be analyzed to determine whether it is covered by constitutional, statutory or case law limitations, and if so, whether those policies and programs are properly designed to mitigate legal risk.

This section provides an overview of key principles that should be considered in policy and program design, as well as descriptions of specific types of programs and initiatives that are framed in ways likely to be legally sustainable while advancing educational, STEM-related goals. Notably, this section does not describe *all* legally sustainable approaches to diversity efforts on campus. Institutions have constructed (and undoubtedly will construct) other approaches to achieving their diversity goals, consistent with their educational missions and applicable law.<sup>115</sup>

Moreover, in jurisdictions where state law prohibits the use of race and gender in admissions, the programs and policies described in this Section involving the use of race and gender in admissions may not be used. However, race and gender-targeted outreach and barrier removal relating to increasing applications for admissions in the context of an overall outreach program aimed at all potential students may be permissible in some of those jurisdictions. Additional legal advice and a good evidentiary basis are important, particularly in jurisdictions that restrict use of race and gender.

In addition, in concluding that the following programs are generally likely to be legally sustainable while also race- and/or gender-conscious, it is assumed that potential race- and gender-neutral criteria in lieu of or in addition to race- or gender-conscious criteria are being evaluated and utilized when feasible. Institutions might carefully consider inclusive conduct/multi-cultural skills and socio-economic criteria described in more detail in Section IV.C.2.

##### ***1. Key Elements of Legally Sustainable Policies and Programs***

This section outlines general elements that are important to consider when creating and implementing race- and/or gender-conscious policies and programs.

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<sup>115</sup> Moreover, the absence of an approach—or a variation on an approach—from this guide, is not an indication that the approach or variation is legally unsustainable. Similarly, the discussion of the approaches addressed is not intended to substitute for legal advice on the particular programs implemented by an institution. That analysis must be context-specific and should be undertaken by the lawyers for the institution.

**a. *Relationship to Institutional Mission***

Each program described in this part is driven by the institution's overall mission (or a department's mission in relation to certain specific STEM fields) and implemented where the institution has determined that achieving its educational, research and service mission in STEM (and other fields) requires a broadly diverse student body. Often many aspects of diversity have been achieved in the graduate and undergraduate student bodies, but a "critical mass" of certain groups such as racial minorities, women, and students from lower socio-economic groups, that are needed to achieve broad diversity or diversity in certain academic disciplines has not been adequately achieved. Where that is the case, more race- or gender-consciousness in recruitment programs (building preparedness and enhancing access to STEM higher education and careers); financial aid (scholarships, fellowships, assistantships); and mentoring programs, (providing access; building experience, and social and professional community relationships; encouraging interest, fostering success, and increasing pursuit of undergraduate or graduate education and careers in STEM (and other) fields), may be warranted. The efforts identified in this document can contribute to fulfilling missing aspects of broad diversity or support overall efforts to achieve broad diversity.

**b. *Minimal Adverse Impact of Eligibility Criteria***

Eligibility criteria used for policies and programs developed to further student diversity goals should have minimal adverse racial, ethnic and gender impact on students who do not qualify because of those considerations, as further illustrated below:

***Criteria for Admission to Program of Study:***

Grades and standardized test scores, as well as challenging coursework are frequent baseline requirements, but may not generate the otherwise qualified and diverse student body (particularly in certain STEM fields) that the institution is seeking. Additional, important criteria may include: personal attributes, interest and motivation, ability to overcome adversity, talents, experiences, accomplishments, conduct that demonstrates an active orientation toward inclusion, interest in and proclivity towards STEM fields, service to the community, geography, age,<sup>116</sup> and demonstrated success in collaborating and fostering full participation by broadly diverse people (inclusive conduct and multi-cultural skills) are also considered to identify qualified students. These criteria may be evidenced through essays, recommendations, and interviews. An institution may find that it could populate its student body with individuals having the highest range of test scores and grades, but that such students would not be as qualified to contribute to

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<sup>116</sup> 34 C.F.R. Part 110 sets out the U.S. Department of Education's rules for implementing the Age Discrimination Act of 1975. If a school or college uses factors other than age as criteria for admission to a program (such as requiring applicants to have graduated from their previous school within 2 years), and it has the effect of excluding older people who may have graduated many years ago, the Act may prohibit this if the requirement being questioned is not needed for the normal operation of the program being offered.



and benefit from the educational experience as the more broadly qualified students it seeks to select.<sup>117</sup>

***Criteria for Admissions Supporting Programs (e.g., recruitment, retention programs):***

i) *Disadvantage criteria* (low socio-economic background and financial need; first in family to attend college or enter a STEM field; single parent household; English as a second language; weaker than desired preparation in last educational institution; other statistically significant barriers to overcome);

ii) *Ability to contribute to program objectives* (the applicant demonstrates that, as an individual and as one of the group selected to participate, s/he would contribute the most to and derive the most from the program and its objectives -- and it is recognized that individuals of every race or gender may contribute even where the primary objective of the program is to increase diversity, as individuals of any race or gender may foster inclusiveness, break down barriers for others, and build multi-cultural understanding);

iii) *Special talents, achievements or demonstration of interest* (is particularly relevant to programs around STEM fields as students may have not been exposed to rigorous STEM-related work, but have a strong interest that if fostered could reap benefits for the student and the institution);

iv) *School partnership* (student has an already-established association with the institution or program through a partner high school or community college).

***c. Assessment of Effect***

If the policy or program is adequately aligned with the institutional mission, and eligibility criteria have minimal adverse impact as described above, the policy or program should still be periodically assessed for effectiveness and progress towards diversity goals. In such assessment, administrators of the program question whether race-neutral alternatives would now be as or more effective than the race-conscious program in place; what quantitative and qualitative impact the program is having on institutional diversity goals and what the impact is on non-eligible students. The following measurement models help the institution assess and demonstrate the effectiveness (and therefore an attribute of necessity) of the programs.

***Faculty Assessments:*** Through Presidential ad hoc committees, focus groups, surveys, faculty senate reviews and resolutions, the faculty periodically assess the diversity of the student body and faculty overall and in relevant disciplines and their observations and experiences of the effect of such diversity on learning, research and service.

***Student Body, Alumni Surveys and Program:*** Students (freshmen and senior) and alumni are surveyed concerning the importance of diversity in the student body and faculty in their educational experience. Comparisons are made of incoming and graduating students'

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<sup>117</sup> See *Bakke*, 438 U.S. at 316 (opinion of Powell, J.) (approving discussion of the Harvard plan).

perceptions. Alumni are surveyed on the importance to their professional success of diversity in their student experience.

**Data Collection:** (a) for Admissions, Financial Aid, Bridging and Retention/Mentoring Programs -- GPA, graduation rates, presence or absence of academic probation, attainment of STEM degree, pursuit of STEM graduate or professional school; and (b) for Recruitment and Bridging Programs -- number or percentage of participants in the program who are from minority groups or are women and are successfully recruited to this institution or to any institution to study in a STEM field and success (GPA, absence of academic probation, pursuit and achievement of STEM degree, graduation rate) are measured for program participants as compared with non-program participants.

**Regression Analysis:** Performed for a list of characteristics of students (*e.g.*, high or lower SAT scores and high school grades, educational attainment of parents, socio-economic background, race, gender, quality of high school, etc.) to evaluate the statistical effect of race on GPA, graduation rate, and field of study. (If, even in the absence of disadvantage criteria, there is a statistical correlation between minority status and lower GPA, lower graduation rate, and participation in STEM fields, consideration of race, even without disadvantage criteria, may be justified when selecting participants for mentoring and retention programs.)

## 2. *Illustrative Program Examples*

This section provides examples of programs designed to make progress towards institutional diversity, STEM-related goals. These examples are illustrative representations of common (and likely effective) programs in many settings. The legal analysis and context in which the following programs are implemented are important when evaluating potential legal sustainability.

### a. *Holistic Admissions Program (including inclusive conduct and multicultural skills)*

#### Overview

The admissions process affects every institution and department and is arguably the most effective avenue for building a diverse class. Below some range or level of high school GPA and standardized test scores, applicants are generally deemed unlikely to succeed, regardless of other factors. Although some numerical value may be assigned to quantitative measures (GPA, standardized test scores, difficulty of high school curriculum), these quantitative measures do not define "merit" or, by themselves, answer the question regarding who is qualified to attend an institution.

Each applicant who has adequate quantitative measures to indicate the possibility of success in further study is then reviewed more holistically, considering many personal attributes, accomplishments and experiences, including but not limited to race and gender, to determine which applicants best embody the total person and contribute to the right mix of persons needed to serve the institution's educational, research and service needs. Every applicant is also reviewed in the same process and under all of the same criteria to assemble an entire "class" that,

with the existing student body, reflects a broadly diverse, richly talented community that actively contributes to the learning and living environment on campus.

Different personal attributes distinguish one student from another with similar quantitative statistics and may in certain cases "tip the balance"<sup>118</sup> in favor of admission. It is hard to determine which attribute was determinative in any case because the whole package of each individual is so different. There are no quotas, reserved spaces or automatic and uniformly applied point systems or numerical values assigned on the basis of race or gender. (The Supreme Court has rejected these more rigidly race-conscious approaches to admissions.)

Professional school admissions are similar, but are more challenging from the perspective of achieving mission-driven diversity objectives because graduate school admissions in STEM fields often include consideration of the "fit" of an applicant with a faculty sponsor and are highly decentralized. (Professional school graduate admissions are more akin to undergraduate admissions.) For very large institutions and in some professional schools the quantitative measures weigh heavier because holistic assessment must be limited to a smaller, more manageable cohort.

### **Variations**

Non-professional, graduate school admissions are usually decentralized by department, depend heavily on connections made among students and faculty sponsors based on intellectual interests and personal style, and often involve a smaller number of applicants and admitted students. Therefore, it may be important to ensure that Deans and Department Heads have special sensitivity to ensuring a diverse class with respect to race, gender, and other criteria rather than solely relying on the connections made between students and faculty sponsors. Special outreach may be needed, including tracking talented undergraduates, to increase diversity.

### **Discussion**

Another criterion that may be considered is demonstrated success in collaborating with and fostering full participation by broadly diverse people, including but not limited to women, racial minorities and individuals of low socio-economic backgrounds or who are disabled. Such inclusive conduct and multi-cultural skills can be an independently authentic and important factor to achieve an institution's mission-driven need for broad diversity. In addition, inclusive conduct and multi-cultural skills and socio-economic background might also provide some ancillary benefit in building more racial and gender diversity, which is of particular importance for institutions that are prohibited from considering race and gender under state laws (or otherwise). (See Section V.B and C, *supra*.) However, these criteria often do not substitute for consideration of race and gender where permitted. Notably, socio-economic background and inclusive conduct and multi-cultural skills do not produce the necessary educational benefits for

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<sup>118</sup> See *Grutter*, 539 U.S. at 339, referencing Justice Powell's approving discussion of the Harvard plan in *Bakke*, 438 U.S. at 316 ("When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor.").

all students because they do not achieve the full range of diversity within each racial group and gender and do not fully break down stereotypes.

Whether or not permitted to consider race or gender in selection, institutions may include essay questions that address the applicant's perceptions of the role of race and gender in society or that are aimed at identifying inclusive conduct and multi-cultural experiences and skills, in order to build a student body that will create an inclusive environment for a broadly diverse campus community. (See Section V.D.4, *supra*, regarding interview questions for consideration of inclusive conduct and multi-cultural skills in hiring faculty that are also useful in admissions and include examples.)

***b. Introductory or Preview Minority Weekend***

**Overview**

The Institution (for undergraduates) or a College or Department (for undergraduate and graduate students) hosts a weekend for minority and/or women students who have been offered admission or are being recruited to apply. This is a community building, social and welcoming experience. Faculty and current students participate to provide insights and help new students or applicants make social and academic connections and learn about available resources.

**Variations**

i) Any student who has been offered admission or is applying may attend if they timely register, as space permits, and information on registration is provided on a Web site. Individual invitations are extended to minorities and women interested in STEM fields, as part of targeted outreach within an overall program of general outreach, where general outreach has not been as effective to attract minorities and women.

ii) If the size of the program is limited, all participating students may receive travel costs and/or room and board.

iii) Alternatively, a sub-set of students may be offered travel costs, room and board based on their superior holistic qualifications. If the pool of registered students is largely comprised of members of minority groups and women, race and gender are not considered in awarding these program scholarships. If not, and if, for example, regression analysis statistically correlates race or gender with barriers to success, race and gender in STEM fields may be considered with other factors (*e.g.*, low socio-economic background and financial need; first in family to attend college or enter a STEM field; single parent household; English as a second language; weaker than desired preparation in last educational institution; and/or other significant barriers to overcome) that determine the individuals who would contribute the most to and benefit the most from the program.

iv) If the institution lacks the resources to select participants in a holistic review, GPA and standardized test scores may establish baseline requirements and criteria may be provided to high school counselors. The institution may then select participants based on counselor recommendations.

## **Discussion**

Institutions may consider focusing certain orientation programs on issues of interest to women or minority students but open attendance to all. This approach may serve the institution's compelling interest without triggering heightened scrutiny. Consideration of a record of inclusive conduct and multi-cultural skills and socio-economic background may be used and are often necessary attributes (apart from race and gender) among those required to achieve broad, mission-driven diversity at the institution. For institutions that are prohibited to consider race and gender, consideration of a record of inclusive conduct and multi-cultural skills and socio-economic background provides some ancillary benefit in building more racial and gender diversity. However, these criteria do not substitute for consideration of race and gender where permitted. Socio-economic background and inclusive conduct and multi-cultural skills do not produce the necessary educational benefits for all students because they do not achieve the full range of socio-economic or other diversity within each racial group and gender and do not fully break down stereotypes.

If the institution offers other significant orientation opportunities for all students, without regard to race and gender, a dedicated opportunity for minorities and women in STEM fields within the overall program that is broadly defined may be justified.

Further, if the institution has done a regression analysis showing a statistical correlation between minority status and challenges to success and is not in a jurisdiction where race may not be considered, consideration of minority status or, if other similar opportunities are available to other students, even a dedicated opportunity for minorities may be justified.

### ***c. Bridge/Mentoring/Scholarship Programs***

#### **Overview**

These programs (solely or in combination) provide community-building, social and academic support and resources to enhance preparation for admitted students who face barriers to success based on low socio-economic background and financial need; first in family to attend college or enter a STEM field; single parent household; English as a second language; weaker than desired preparation in last educational institution; and/or other significant barriers to overcome.

#### **Variations**

- i) Room and board are provided for a period of weeks between high school and the first year of college (hence a "bridge" between high school and college) for admitted students who meet one or more of the criteria listed above.
- ii) The program could also include 4-year scholarship support. Tutoring, counseling, and resources are available during academic years, and possibly summers, through graduation. Performance in mathematics and science courses is tracked by the program to provide timely intervention if needed. Participation in workshops on living skills (financial management, safety in social situations) and writing are required of participants.

iii) The program may also support preparation for graduate school applications and testing and provide opportunities for financial support through graduate school.

iv) Peer involvement builds community and fosters study groups, joint research and group problem-solving. Faculty participate, providing opportunities for relationship building that may extend into graduate school and an academic career. Parental involvement is encouraged.

v) A bridging, mentoring and scholarship program for graduate students is similarly modeled, but with the bridges extending into graduate school and then into the academy. Academic and professional advising focus on research and thesis development, grant acquisitions, academic career issues, tenure and promotion. Fellowships or research assistantships may be included. Assistance may be provided to help participants avoid being pigeonholed in teaching assistantships at the expense of research assistantships. (*See Section VIII.E, infra*, regarding junior faculty, fellows and graduate student assistantships.)

vi) An office is set up within the institution to solely focus on providing tutors and mentors to students who may face barriers to success as described above.

vii) A program provides faculty, senior administrators and staff of the college or university as mentors to several hundred entering first year minority students and, in STEM fields, female students. STEM-oriented faculty and professionals are specifically recruited as mentors. These volunteers enhance orientation, community, and identification with the university for student participants. Mentors provide informal academic and social advice, participate in activities or share a meal with their mentees periodically throughout the year. An annual reception at the President's house celebrates mentors and mentees.

### **Discussion**

In jurisdictions where the law does not prohibit consideration of race and gender, consideration of race and, in STEM fields, gender, among other disadvantage criteria, is warranted for selection of participants. If the institution offers other significant bridging, mentoring and scholarship opportunities for all students who need such support, without regard to race and gender, and race and gender neutral alternatives are not effective, a dedicated opportunity for minorities and women in STEM fields, within the overall program that is available to all students in need, may be justified in jurisdictions where this is possible. If, for example, the institution has done a regression analysis showing a statistical correlation between minority status and challenges to success, minority status may be considered.

Inclusive conduct and multi-cultural skills and low socio-economic status may be among other criteria considered and may be important criteria for their primary aim, as well as to increase racial and gender diversity in jurisdictions where consideration of race and gender is not legally permissible. (*See Section V.B and C, supra*)

*d. Summer Research Program (University or Industry)*

**Overview**

This program provides on-campus research opportunities or fosters placement with industry for research opportunities during the summer for students who face barriers to pursuit of STEM graduate study and careers based on low socio-economic background and financial need; first in family to attend college or enter a STEM field; single parent household; English as a second language; weaker than desired preparation in last educational institution; or other significant barriers to overcome.

**Variations**

- i) The institution provides financial support to faculty members to offer these research opportunities to students during the summer. Federal funding may also be available through the National Institutes of Health or National Science Foundation. Room and board and a summer stipend are provided. Social and cultural, community-building events are included.
- ii) Some programs may include weekly workshops on standardized test preparation, the graduate school application process and writing and researching skills.
- iii) Students may participate in clusters formed during the academic year and extend into the summer or multiple summers through the research program to provide a community of STEM peers. Faculty sponsors also may serve as mentors during the academic year and during the summer. Partnerships may be formed with other institutions, including Historically Black Colleges and Universities, to expand opportunities for students to participate.

**Discussion**

In jurisdictions where the law does not prohibit consideration of race and gender, consideration of race and, in STEM fields, gender, among other disadvantage criteria, is warranted for selection of participants. If the institution offers other significant summer research opportunities for all students, without regard to race and gender, and race and gender neutral alternatives are not effective, a dedicated opportunity for minorities and women in STEM fields, within the overall program that is available to all students in need, may be justified in jurisdictions where this is possible. If, for example, the institution has done a regression analysis showing a statistical correlation between minority status and challenges to success, minority status may be considered.

Inclusive conduct and multi-cultural skills and low socio-economic status may be among other criteria considered and may be important criteria for their primary aim, as well as to increase racial and gender diversity in jurisdictions where consideration of race and gender is not legally permissible. (*See Section V.B and C, supra*)

e. *Partner Schools for Undergraduate and Graduate Program Preparedness and Recruitment*

**Overview**

The institution partners with under-achieving elementary, middle and/or high schools in its local community to support the preparation of students for higher education, particularly in STEM fields, and to recruit promising students for undergraduate study. Any student in the partner school may participate.

The institution's faculty and graduate students provide professional development opportunities to partner school teachers in STEM fields. The institution's students volunteer in the partner schools, mentor participating students to enrich their experience, lead STEM projects and after school clubs and field trips, and supplement teacher resources. Counseling and advice are provided by the institution to partner school students and their parents on the transition to high school and college, as well as on study skills and success in high school. Campus visits and activities are provided, including exposure to cutting edge research experiences. Membership in a program Facebook page is provided.

**Variations**

i) The institution also partners with high schools in inner-cities across the country to provide supplementary learning resources (curriculum, STEM project packets, on-line professional development for teachers and educational experiences for students). The institution sends representatives to the partner schools to provide information and counseling to students and parents on completing applications to college.

ii) The institution partners with community colleges in its local community to provide a pipeline to four-year colleges and recruit students in STEM fields. Curriculum coordination opportunities are provided through institutional agreements. Opportunities for campus visits and exposure to cutting edge research are also provided. The institution sends representatives to the partner community colleges to provide information and counseling to students and parents on completing applications to college.

iii) Partner school students who participate in the program may apply to participate in summer STEM and research experiences at the institution, "science camps" for younger students and pre-college programs for high school students.

iv) Partner school students who participate in the program and are admitted to the institution for college may apply for multi-year scholarships with mentoring components.

**Discussion**

College scholarship recipients and summer program participants are selected by the institution based on GPA, standardized test scores, interest, teacher recommendations, promise, and disadvantage factors (low socio-economic background and financial need; first in family to attend college or enter a STEM field; single parent household; English as a second language;



weaker than desired preparation in last educational institution; or other significant barriers to overcome). If the institution has done a regression analysis showing a statistical correlation between minority status and challenges to success and is not in a jurisdiction where race may not be considered, minority status may be considered.

If the institution does not have the resources to holistically evaluate applications for the summer program, it provides guidelines to the partner schools and bases selection on recommendations of the schools.

The institution also partners with "feeder" colleges and universities such as Historically Black Colleges and Universities and Hispanic Serving Institutions to support preparation of students for graduate school in STEM fields and to recruit graduate students.

These are race-neutral programs. A high percentage of students from partner schools are from lower socio-economic groups and would be the first in their families to attend college; an ancillary benefit is that many are from racial minority groups.

## VIII. LEGAL ISSUES ASSOCIATED WITH FACULTY DIVERSITY

### A. Overview of Governing Legal Principles

The legality of taking race or gender into account when making hiring and other employment decisions will depend in large part on whether an institution is acting in a remedial context or trying to enhance the overall diversity of its faculty so as to achieve its broad educational mission -- or some combination thereof. The remedial rationale is well established in Supreme Court precedent. The diversity rationale in an employment setting, however, has not yet been tested in the Supreme Court. Grounded in First Amendment-protected academic freedom interests, the diversity rationale applied in *Grutter* with respect to student admissions should logically extend to faculty hiring and related employment issues.

***"Grounded in First Amendment-protected academic freedom interests, the diversity rationale applied in Grutter with respect to student admissions should logically extend to faculty hiring and related employment issues."***

This section addresses the employment law framework and its implications for affirmative action related initiatives involving faculty hiring. More detailed information about the relevant federal constitutional and statutory provisions is provided in Appendix I.<sup>119</sup>

#### 1. Equal Protection Clause (U.S. Constitution, 14<sup>th</sup> Amendment)

The Equal Protection Clause of the U.S. Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>119</sup> The relevant federal statutory provisions that are summarized in Appendix I, *infra*, with applicable citations, include the *Civil Rights Restoration Act of 1987* (applying various federal anti-discrimination laws to an entire institution when any part of the institution receives federal financial assistance); *Title VI of the Civil Rights Act of 1964* (prohibiting race, color and national origin discrimination by covered recipients of federal funds); *Title VII of the Civil Rights Act of 1964* (prohibiting race, color, sex, religion and national origin discrimination by public and private employers); *Title IX of the Education Amendments of 1972* (prohibiting sex discrimination by education programs or activities operated by recipients of federal financial assistance); *Section 1981* (proscribing private as well as public racial discrimination in the making and enforcement of contracts); *Section 1983* (providing additional remedies for individuals whose civil rights are violated by government officials and representatives); *Section 1985(3)* (proscribing private as well as public conspiracies to intentionally discriminate on the basis of race by interfering with civil rights created by other laws); *Section 1988* (authorizing court-awarded attorneys' fees to prevailing parties in actions under Titles VI and IX, Sections 1981 and 1983 and various other civil rights laws); and Executive Orders 11246 and 11375 (which together prohibit covered federal contractors from discriminating on the basis of race, color, religion, national origin, and sex).

Public institutions are subject to Constitutional restrictions; private institutions are not. However, Title VI (regarding race), when it applies to employment as addressed below, has been held to be coextensive with the Equal Protection Clause. Title IX (regarding gender) also tracks equal protection principles on key points, although some differences exist between those two laws. Consequently, private institutions that receive federal funds are effectively subject to the same restrictions as those that arise under the Equal Protection Clause when Title VI or IX applies.<sup>120</sup>

**a. Race: Strict Scrutiny Analysis.** When the government classifies individuals based on race, courts will apply strict scrutiny to the classification under the Equal Protection Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution. Thus, an affirmative action program implemented by a public institution must be narrowly tailored to promote a compelling state interest. Remedying the present effects of the institution's own past discrimination is a compelling interest sufficient to support a race based classification under the Equal Protection Clause of the 14<sup>th</sup> Amendment.<sup>121</sup>

In *Wygant v. Jackson Board of Education*,<sup>122</sup> the Supreme Court considered for the first time whether racial preferences are appropriate in the employment context. The Court applied strict scrutiny to an affirmative action plan that protected minorities from layoffs. In examining the interests asserted by the Board of Education, the Court held that there was insufficient evidence that remedial action was necessary to remedy prior discrimination, as there was no evidence that the Board had engaged in prior discriminatory hiring practices.<sup>123</sup> The Court declared that "societal discrimination alone is insufficient to justify a racial classification."<sup>124</sup> The Court also rejected the lower courts' reasoning that providing minority role models for minority students is a valid basis for using racial classifications in the layoff context.<sup>125</sup> The Court stated that the Board's goal of linking the percentage of minority teachers to the percentage of minority students had no logical stopping point.<sup>126</sup>

The Court expanded on the permissible contours of prior discrimination as a compelling interest in *Richmond v. J.A. Croson*,<sup>127</sup> where it held that a public entity can assert remediation as a compelling interest when its race-conscious affirmative action program was designed either to

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<sup>120</sup> Most colleges and universities are not subject to the Fifth Amendment, which imposes an equal protection requirement on federal governmental entities, but Fifth Amendment case precedent is nonetheless relevant. Equal protection claims under the 14<sup>th</sup> Amendment are "indistinguishable" from equal protection claims under the Fifth Amendment. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995).

<sup>121</sup> *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492, 503-04 (1989).

<sup>122</sup> 476 U.S. 267 (1986).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 274.

<sup>125</sup> The case did not consider the educational benefits of racial diversity among faculty in higher education, an issue as to which Justice O'Connor specifically reserved judgment in her concurring opinion. *Id.* at 288. *Wygant* struck down the role model theory as a rationale for race-based layoffs, but it did not foreclose evidence of the educational significance of role models and the dynamic in which they function for other (non-layoff) purposes.

<sup>126</sup> *Id.* at 274.

<sup>127</sup> 488 U.S. 469.

(1) remedy the public entity's own discriminatory practices or (2) dismantle a system of discrimination in which the entity has been a 'passive participant.' A public entity has been a passive participant when a system of discrimination exists and public dollars perpetuated that system of discrimination.<sup>128</sup> The Court ultimately struck down the plan in *Croson*, finding that there was no direct evidence of race discrimination on the part of the city in letting contracts, or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors.<sup>129</sup>

Assuming that an institution demonstrates a compelling interest in implementing a race-conscious program, the institution must also narrowly tailor that program in order to survive the strict scrutiny analysis.<sup>130</sup> (See Section IV.C, *supra*.) In *Wygant*, the Court held that the race-conscious layoff provision was not a narrowly tailored remedy because it imposed the entire burden of the remedy on specific individuals, those laid off, rather than diffusing the burden.<sup>131</sup> The Court noted that race-conscious hiring, which forecloses only one of several opportunities, is less burdensome and thus potentially more narrowly tailored than layoff schemes, which impose the entire burden of achieving racial equality on particular individuals, often resulting in "serious disruption" of their lives.<sup>132</sup>

In *Croson*, the Supreme Court held that narrow tailoring requires the consideration of race-neutral means to increase minority participation, and that rigid numerical quotas will not be considered a narrowly tailored remedy.<sup>133</sup> The Court indicated that quotas and other race-exclusive approaches preclude the individual treatment of candidates and instead make the color of an applicant's skin the controlling consideration.<sup>134</sup>

In conclusion, the cases as a whole indicate that although the courts will apply strict scrutiny to any race-conscious programs challenged as violating the Equal Protection Clause of the 14<sup>th</sup> Amendment, such programs can withstand strict scrutiny when (1) the institution can articulate a compelling interest, and (2) the programs are narrowly tailored so as not to unnecessarily

<sup>128</sup> See *Croson*, 488 U.S. at 492. Institutions of higher education may be able to demonstrate passive participation in the creation of pipeline problems for STEM higher education, as discussed below, but it would be important to have adequate supporting evidence.

<sup>129</sup> The affirmative action plan in *Croson* required prime contractors for city construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more minority-owned businesses. The City of Richmond adopted its affirmative action program because, although it was over 50% black in population, less than 0.67% of its prime construction contracts went to black contractors. The Court held that the 14th Amendment requires states to show with particularity that the discrimination which they seek to remedy existed within their own legislative jurisdictions. The Court held that the City of Richmond had made only an "amorphous claim that there has been past discrimination in a particular industry," and thus did not have a compelling justification for the affirmative action plan. The Court also held that the plan was not narrowly tailored because the City had failed to consider the use of race-neutral alternatives, and had employed a quota which had no basis other than aiming to achieve racial balancing.

<sup>130</sup> *Wygant*, 476 U.S. 279 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980)).

<sup>131</sup> *Id.* at 282-83.

<sup>132</sup> *Id.* at 283-84.

<sup>133</sup> *Croson*, 488 U.S. at 507.

<sup>134</sup> *Id.*

trammel upon the rights of non-minorities. Remedying the institution's own past discrimination or a "manifest imbalance" in the applicable workforce is a compelling interest. Other compelling interests (*e.g.*, educational benefits of diversity or operational necessity in higher education) may also be recognized, although they have not been tested in the employment context in the Supreme Court. It is also clear that, in assessing narrow tailoring, the courts will consider whether there are race- or gender-neutral means to increase minority and women (or male) participation that could be used in lieu of, or to reduce the burdens of, the race- or gender-conscious approach. Courts will also consider whether race and gender are factors among many rather than exclusive prerequisites.

***b. Gender: Intermediate Scrutiny Analysis.*** Major legal challenges to diversity efforts in higher education have focused on race and have arisen largely in the context of admissions. Gender is also an important element of diversity, however. As a general matter, women both outnumber and academically outperform men, although in some fields, including STEM, women are underrepresented relative to their overall numbers in undergraduate institutions and the general population.

Many colleges and universities are focusing on recruiting males for their undergraduate student bodies, as they are presently less well represented. In higher educational employment of faculty, however, women continue to be underrepresented, especially in STEM fields, and women are underrepresented among students in many STEM disciplines. Extending *Bakke/Grutter's* diversity rationale to faculty, the 14<sup>th</sup> Amendment's Equal Protection clause should allow gender-conscious efforts to achieve the educational benefits of diversity in STEM disciplines. (Title VII, discussed below, likely still applies in some fashion, however.)

Until 1971, the 14th Amendment had not been held to address gender discrimination. In *Reed v. Reed*,<sup>135</sup> the Court struck down an Idaho statute that preferred males over females to administer decedents' estates. The Court concluded that the state statute did not bear "a rational relationship to [the] state objective that is sought to be advanced by the operation of [the statute]."<sup>136</sup> And, as Justice Ginsburg later observed, "[w]ithout equating gender classifications, for all purposes, to classifications based on race or national origin, the Court in post-*Reed* decisions has carefully inspected official action that closes a door to women (or to men)."<sup>137</sup>

The Court has adopted a standard of intermediate scrutiny with respect to gender-based classifications. Under "intermediate scrutiny," a governmental actor making gender-based decisions must demonstrate an important governmental objective. In the words of the Court in the VMI case, there must be an "exceedingly persuasive justification" for gender-based governmental action.<sup>138</sup> This standard is somewhat lower than that which applies to race-based classifications. In theory, then, it should be easier to sustain gender-based affirmative action or

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<sup>135</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>136</sup> *Id.* at 73.

<sup>137</sup> *United States v. Virginia*, 518 U.S. 515, 532 (1996) (invalidating VMI's all-male admissions policy).

<sup>138</sup> *Id.* at 531 (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 and n.6 (1994), and *Mississippi Univ. Women v. Hogan*, 458 U.S. 718, 724 (1982)).

diversity efforts than race-based. But the context of a given case might make the challenged action more difficult to defend even if a lower standard is applied.

## 2. *Title VI (42 U.S.C. § 2000d)*

Title VI prohibits discrimination on the basis of race, color and national origin by recipients of federal funds:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>139</sup>

Title VI applies with respect to all aspects of an institution's operations. However, for the most part, Title VI restricts claims of employment discrimination to instances in which the "primary objective" of the federal financial assistance is to provide employment.<sup>140</sup> (No such restriction applies with respect to employment claims brought under Title IX.) Thus, "where the primary purpose of the Federal assistance is to provide employment, the recipient may not discriminate on the basis of race, color or national origin against applicants for employment or employees in that program. For example, Title VI prohibits discrimination against applicants for or participants in 'work study' programs that receive Federal assistance."<sup>141</sup> The Department of Education's Title VI regulations also forbid employment discrimination in a second situation: "discrimination against employees or applicants for employment is prohibited by Title VI when the discriminatory practice results in discrimination against the program beneficiaries, usually the students."<sup>142</sup> Where faculty are critical to the delivery of educational programs and benefits to students, discrimination against faculty may be seen to carry through to students. When Title VI applies in the employment context, it "encompasses, but is not limited to, recruitment, advertising, employment, layoffs, firing, upgrading, demotions, transfers, rates of pay and other forms of compensation, and uses of facilities. The regulation applies to all employment decisions and actions made directly by the Department of Education's recipients, as well as those made indirectly through contractual arrangements or other relationships with organizations such as employment agencies, labor unions, organizations providing or administering fringe benefits, and organizations providing training and apprenticeship programs."<sup>143</sup>

As interpreted by the agencies and the courts, Title VI prohibits both intentional discrimination (disparate treatment) and the use of facially neutral procedures or practices that have the effect of subjecting individuals to discrimination based on their race, color or national origin (disparate impact). (Neutral policies that expand opportunities for some without excluding non-targeted individuals are generally regarded as inclusive and non-discriminatory under federal law.) The

<sup>139</sup> 42 U.S.C. § 2000d.

<sup>140</sup> See 42 U.S.C. § 2000d-3.

<sup>141</sup> U.S. Dept. of Education, Office for Civil Rights, "Non-discrimination in Employment Practices in Education," at 2 (Aug. 1991) ("ED Pamphlet").

<sup>142</sup> ED Pamphlet at 2. See 34 C.F.R. § 100.31(c)(3); see also 28 C.F.R. § 42.104(c)(2) (DOJ regulation).

<sup>143</sup> *Id.*

analysis of intentional discrimination claims under Title VI is similar to the analysis of disparate treatment under the Equal Protection Clause,<sup>144</sup> and can be proved through direct evidence of discriminatory motive or, in the absence of such evidence, using the Title VII burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*<sup>145</sup> (discussed below, in connection with Title VII). Title VI disparate impact claims are also analyzed using principles similar to those used under Title VII and require establishment of an "educational necessity" similar to Title VII's business necessity standard to justify disparate impacts. When an educational institution establishes that a broadly diverse faculty is necessary to achieve its First-Amendment protected educational mission, and establishes that many aspects of that broad diversity have been achieved, but not racial diversity, the necessity test should be satisfied to justify the disparate impact of an employment program that considers race as a factor for this purpose.

Significantly, although employment is not a primary focus of Title VI, the Department of Education has recognized the educational necessity of a diverse faculty:

The Secretary [of Education] believes that a college's academic freedom interest in a robust exchange of ideas also includes an interest in the existence of a diverse faculty and, more generally, in diversity of professors nationally, since scholars engage in the interchange of ideas with others in their field, and not merely with faculty at their particular school.<sup>146</sup>

Moreover, the Department of Education's Title VI regulations authorize "a recipient to take additional steps to make the benefits of Title VI fully available to racial and nationality groups previously subject to discrimination."<sup>147</sup> The regulations also recognize that affirmative steps may be needed, and appropriate, in situations where there has been no prior discrimination:

Even though an applicant or recipient has never used discriminatory policies ... [the] benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances an applicant or recipient may properly give special consideration to race, color or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.<sup>148</sup>

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<sup>144</sup> See *Alexander v. Choate* 469 U.S. 287, 293 (1985).

<sup>145</sup> 411 U.S. 792 (1973).

<sup>146</sup> 59 F.R. 8756, 8761 (1994).

<sup>147</sup> 34 C.F.R. § 100.5(h).

<sup>148</sup> 34 C.F.R. § 100.5(i).

Similarly, an Appendix to the regulations contains Guidelines that include a section on the "Employment of Faculty and Staff."<sup>149</sup> The Appendix states:

Recipients may not engage in any employment practice that discriminates on the basis of race, color or national origin *if* such discrimination tends to result in segregation, exclusion or other discrimination against students.<sup>150</sup>

\* \* \*

Recipients may not limit their recruitment for employees to schools, communities or companies disproportionately composed of persons of a particular race, color, national origin, sex, or handicap *except* for the purpose of overcoming the effects of past discrimination.<sup>151</sup>

Another subpart, entitled "The Effects of Past Discrimination," states:

Recipients must take steps to overcome the effects of past discrimination in the recruitment, hiring and assignment of faculty. Such steps may include the recruitment or assignment of qualified persons of a particular race, nation origin or sex, or who are handicapped.<sup>152</sup>

Taken as a group, these provisions suggest that a college or university receiving federal funds may give special attention to race or sex if it reasonably concludes that it is not adequately serving persons of that race or sex, and may undertake outreach and recruitment efforts to achieve adequate service to underserved groups even when the institution "has never used discriminatory policies." This is implicit recognition that, under Title VI, an educational institution may engage in outreach and recruitment activity to address a pipeline problem in minority communities not being adequately served.

### 3. *Title VII (42 U.S.C. § 2000e)*

Title VII prohibits employment discrimination on the basis of race, color, sex, religion, or national origin; covers hiring, firing, promotion, wages, job assignments, fringe benefits, and other terms and conditions of employment; and applies to private employers with 15 or more employees, and to all public employers. Thus, all educational institutions are subject to Title VII. Title VII applies only in the employment context. (In contrast, Titles VI and IX apply to all aspects of an institution's operations, including employment).

Under Title VII:

It [is] an unlawful employment practice for an employer

<sup>149</sup> The guidelines are applicable to vocational education programs. See 34 C.F.R. Part 100, App. B. Nevertheless, they provide some guidance on what may be appropriate in the college and university setting.

<sup>150</sup> *Id.*, App. B, at VIII.A (emphasis added).

<sup>151</sup> *Id.*, App. B, at VIII.B (emphasis added).

<sup>152</sup> *Id.*, App. B, at VIII.F.



(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>153</sup>

To succeed on a claim under this provision, which prohibits disparate treatment, a plaintiff must show that the employer intentionally discriminated on the basis of a protected trait. Under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*,<sup>154</sup> a plaintiff may prove that an employment practice was intentionally discriminatory by first making a *prima facie* case sufficient to support an inference of discrimination (e.g., that the plaintiff was a member of a protected class; that the plaintiff was eligible and applied for the position or program in question; that he or she was rejected; and that the defendant selected individuals outside the protected class, or the position or program remained open and the defendant continued to accept other applications). If a *prima facie* showing is made, the defendant may rebut that showing by offering a legitimate, non-discriminatory reason for the employment action. The plaintiff then has the ultimate burden of persuasion and must show that the employer's proffered reason is pretextual -- i.e., that the employer's true reason for the practice was discriminatory on the basis of race or gender (or other protected characteristics). Of course, "if a plaintiff is able to produce direct evidence of discrimination," he can prevail without using the *McDonnell Douglas* framework.<sup>155</sup>

Title VII expressly permits differential treatment on the basis of religion, sex, or national origin if those characteristics constitute a bona fide occupational qualification ("BFOQ"):

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise....<sup>156</sup>

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<sup>153</sup> 42 U.S.C. § 2000e-2(a).

<sup>154</sup> 411 U.S. 792, 802-05 (1973)

<sup>155</sup> *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

<sup>156</sup> 42 U.S.C. § 2000e-2(e)(1).

A race-based BFOQ was considered by Congress when the other BFOQ's were considered, but no such race-based BFOQ was included in the statute as enacted.

On the question of Title VII disparate impact claims, Title VII states that an "unlawful employment practice based on disparate impact is established" if

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party [proves that] an alternative employment practice [is available that has less disparate impact] and the respondent refuses to adopt such alternative employment practice.<sup>157</sup>

Title VII thus includes a "business necessity" defense with respect to disparate impact claims. In contrast, the "business necessity" defense is not available with respect to disparate treatment claims:

A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.<sup>158</sup>

Title VII does not "require" any employer to grant "preferential treatment" because of an "imbalance" in its workforce:

Nothing contained in this subchapter shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.<sup>159</sup>

(*See*, however, the requirements that apply under Executive Order 11246 to federal contractors, including colleges and universities, as discussed under "OFCCP", below).

<sup>157</sup> 42 U.S.C. § 2000e-2(k)(1)(A).

<sup>158</sup> 42 U.S.C. § 2000e-2(k)(2).

<sup>159</sup> 42 U.S.C. § 2000e-2(j).

Title VII also includes the following three provisions, which could be relevant in considering whether a particular diversity-related program would violate Title VII:

(d) Training programs

It shall be an unlawful employment practice for any employer ... to discriminate against any individual because of his or her race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

\* \* \*

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.<sup>160</sup>

"It is important to note that the constitutional standard for justifying racial preferences is more stringent than the Title VII standard."<sup>161</sup> It is also important to note that "[p]olicies that affect actual employment decisions, such as hiring, promotions, and layoffs, have been treated differently than policies that do not affect actual employment decisions, such as targeted recruitment and outreach designed to increase the pool of qualified applicants, and data collection and analysis conducted to ensure compliance with anti-discrimination laws."<sup>162</sup> Layoffs have been treated most strictly under the case law. Note that, while increasing the applicant pool has not generally been regarded as part of the employment decision-making process, selecting candidates to interview from the applicant pool has been regarded as part of that process.

Of particular significance for present purposes, Title VII includes a provision that shields from liability any person who "pleads and proves that the act complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [EEOC] ...." *See*

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<sup>160</sup> 42 U.S.C. § 2000e-2(d), (l), (m).

<sup>161</sup> S. Licht, "Analyzing Racial Classifications in Employment Discrimination Litigation," 52 U.S. Attorneys' Bulletin 10, 11 (May 2004).

<sup>162</sup> *Id.*

42 U.S.C. § 2000e-12(b). This provision is discussed further in the "Agency Guidance" section, below.

**Case law.** The Supreme Court has held that Title VII affords more room than the Constitution for "voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."<sup>163</sup> However, there are limits on such efforts.

***Ricci v. DeStefano.*** The Supreme Court recently revisited Title VII for the first time in over a decade, in a case that potentially implicated -- but did not overrule -- well-established Title VII case law. Decided in June 2009, *Ricci v. DeStefano* involved a challenge to New Haven, Connecticut's decision to abandon the results of a standardized test that it had administered for promotions within the fire department because of the disparate impact that the results would have had on black and Latino firefighters.<sup>164</sup> Seventy-seven candidates (43 white, 19 black and 15 Hispanic) tested for 8 vacancies as lieutenants; 34 passed (25 white, 6 black, 2 Hispanic). Ten were eligible for immediate promotion. Forty-one candidates (25 white, 8 black, 8 Hispanic) tested for 7 vacancies among the ranks of captain; 22 passed (16 white, 3 black, 3 Hispanic). Nine were eligible for immediate promotion. African Americans and Hispanics comprise nearly sixty per cent of New Haven's population, and there was a history of discrimination (unaddressed by the majority but cited by the dissenters) against minorities in the fire department that had been litigated and settled in the 1970's.

The City was concerned that its use of the test results would subject it to disparate impact liability. These concerns led the City to scrap the test results. No one was promoted. Litigation by 17 white and one Hispanic firefighter ensued. The federal trial court ruled in favor of New Haven, and a three-judge panel of the Second Circuit summarily affirmed. By a closely divided vote (7-6), the full Court of Appeals declined review and the case went to the Supreme Court. The Supreme Court reversed.

The Court began its legal analysis by noting that "Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')."<sup>165</sup> The Court then wrestled with what it saw to be a conflict between these two statutory bases of discrimination. As the Court framed the conflict, the City intentionally discriminated against white firefighters who scored well on the tests and were deprived of the opportunity to be promoted, in order to avoid the disparate effects of the promotion exam on minority firefighters who did not score as highly. A narrow majority of the Court sided with the white firefighters. New Haven argued that it abandoned the test results because of its belief that it might be sued by minority firefighters. The Court said that fear of such exposure is not enough; the City would have to show that there was a "strong basis in evidence" that it was in violation of the disparate impact provisions of Title VII. In other words, it would have to show that it would likely lose to minority plaintiffs because the test was not job-

<sup>163</sup> *Weber*, 443 U.S. at 204; *Johnson*, 480 U.S. at 628-29, 630 & n.8, 640, 642 (1987).

<sup>164</sup> *Ricci v. DeStefano*, 557 U.S. \_\_\_, 129 S. Ct. 2658 (June 29, 2009).

<sup>165</sup> *Id.*, 129 S. Ct. at 2672.

related or, even if job related, there were other measures that would have less of an adverse impact.

Justice Kennedy, the "swing vote" after the retirement of Justice O'Connor, wrote for the majority. The majority did not overturn *Griggs v. Duke Power Company*, the Court's 1971 precedent that established the disparate impact standard, nor did it rule, as Justice Scalia's concurrence urged, that Congress's 1991 codification of the *Griggs* standard may be unconstitutional. Nonetheless, Justice Kennedy's opinion may have made it more difficult for employers to avoid impacting minorities while navigating the narrow shoals between disparate impact and disparate treatment, at least when an employer abandons or changes an employment assessment or other criteria after the criteria have been finalized and utilized.

*Ricci* thus appears to expand the zone of protection afforded to non-minorities and males (or females if they are the majority in some fields) affected by race- or gender-conscious measures. In *Wygant*,<sup>166</sup> the Supreme Court effectively removed lay-off situations from the arena of affirmative action. White employees with seniority could not be terminated in order to protect minority teachers from the "last hired, first fired" phenomenon. The *Wygant* Court recognized the vested interest of white teachers with more seniority, who would lose if a minority teacher retention plan trumped traditional protections of collective bargaining agreement, when it distinguished hiring from layoff scenarios:

In cases involving general hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.<sup>167</sup>

After *Ricci*, an employer cannot abandon a qualification measure that has been used to rank identifiable candidates for promotion (or possibly to make other employment-related decisions, although the case did not go so far), unless it has a "strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."<sup>168</sup> It is unclear whether this same standard would apply if an employer takes such action to achieve diversity in its workforce, rather than to avoid disparate-impact liability -- the City disclaimed any reliance on the diversity rationale to justify its actions in *Ricci*,<sup>169</sup> and the Supreme Court did not consider the viability of this potential rationale in its opinion.

In all events, it is clear that *Ricci* did not overrule *Griggs* or any other Title VII precedent that undergirds disparate impact statutory, regulatory, or case law. *Ricci* resolved a Court-perceived conflict between disparate treatment and disparate impact provisions of Title VII in the context of an employer's use of an employment test; it is not an affirmative action case. Justice Kennedy, writing for the majority, rejected the argument that "under Title VII, avoiding

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<sup>166</sup> 476 U.S. 267 (1986).

<sup>167</sup> *Id.*, at 283-83.

<sup>168</sup> *Ricci*, 129 S. Ct. at 2677.

<sup>169</sup> *Ricci*, Tr. of Oral Argument, at 56-57 (Apr. 22, 2009).

unintentional discrimination cannot justify intentional discrimination."<sup>170</sup> Nor did the Court accept the argument that "an employer in fact must be in violation of the disparate impact provision before it can use compliance as a defense in a disparate treatment suit."<sup>171</sup> The Court made clear that it was not undercutting Congress's intent that employers should voluntarily comply with Title VII disparate impact standards. And the majority did not address the constitutional question framed by Justice Scalia in his concurrence: "Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"<sup>172</sup> In sum, *Ricci* did not upset existing law governing Title VII other than to hold that, where identifiable individuals have been determined to satisfy the criteria that applied when they went into an employment process (and thereby have an entitlement of sorts), "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe that it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."<sup>173</sup>

In a dissenting opinion in *Ricci*, Justices Ginsburg, Stevens, Souter and Breyer again noted that "[c]ontext matters" in assessing claims of race discrimination (quoting *Grutter*). They also noted that, "in Title VII cases involving race-conscious (or gender-conscious) affirmative-action plans, the Court has never proposed a strong-basis-in-evidence standard," and instead "simply examined the [government] employer's action for reasonableness...."<sup>174</sup>

***Other Supreme Court Opinions.*** Given *Ricci's* limited and context-specific holding, earlier Title VII cases continue to provide the more relevant guidance in this area. In *United Steelworkers of America v. Weber*,<sup>175</sup> the Supreme Court held that an affirmative action-based training program which reserved 50 per cent of the training positions on the basis of race did not violate Title VII. The employer, an aluminum manufacturer, had a manifest imbalance in its workforce relative to African American workers in higher skilled jobs. The Court concluded that it was not unlawful under Title VII for the employer to open training opportunities for African Americans to allow them to compete for jobs at the plant. The Court undertook a comprehensive analysis of the legislative history of the statute and determined that Title VII's goal of expanding employment opportunities for groups that had traditionally been denied such opportunities was consistent with affirmative action efforts by employers. The Court noted that Congress's primary concern in enacting the prohibition against racial discrimination in Title VII was with expanding employment opportunities for Blacks in occupations that had traditionally been closed to them.<sup>176</sup> The Court stated that the House Report which accompanied Title VII demonstrated that Congress did not intend to wholly prohibit private and voluntary affirmative action efforts as one

<sup>170</sup> *Id.*, 129 S. Ct. at 2674.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*, 129 S. Ct. at 2682 (concurring op. of Scalia, J.).

<sup>173</sup> *Id.*, 129 S. Ct. at 2677.

<sup>174</sup> *See* 129 S. Ct. at 2689, 2701 n.6 (dissenting op. of Ginsburg, J.) (citing *Johnson v. Transportation Agency*).

<sup>175</sup> 443 U.S. 193 (1979).

<sup>176</sup> *Id.* at 202-3 (discussing remarks of Senator Humphrey at 110 Cong. Rec. 6548 (1964)).

method of solving this problem.<sup>177</sup> Significantly, the Court also noted that Congress did not intend to prohibit the private sector from taking effective steps to accomplish the goal of eliminating, so far as possible, "the last vestiges" of discrimination in this country.<sup>178</sup>

The Supreme Court reaffirmed *Weber's* interpretation of Title VII in *Johnson v. Transportation Agency*,<sup>179</sup> which upheld a public employer's affirmative action program that gave a preference to gender as one factor in determining promotions. Recognizing the legitimacy of the Agency's long-term goal of attaining a workforce that mirrored in its major job classifications the percentage of women in the area labor market, the Court stated:

*Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation on its part.' Rather, it need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories. Our decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts.<sup>180</sup>

The *Johnson* Court looked to whether the affirmative action plan was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in traditionally segregated job categories.

In determining whether a manifest imbalance exists, employers should compare the percentage of minorities or women in the employer's workforce with their percentage in the relevant labor market or general population.<sup>181</sup> Where a job requires special training, such as a professional or research job, the comparison should be with those in the labor force who possess the relevant qualifications.<sup>182</sup> The Supreme Court has not specifically defined a "manifest imbalance," but has stated that the standard is not as high as it would be to establish a *prima facie* case for discrimination.<sup>183</sup>

When examining a race-conscious hiring plan under Title VII, the Supreme Court also looks to whether the plan creates "an absolute bar to the advancement of white employees."<sup>184</sup> This factor needs consideration in the context of faculty hiring at higher education institutions if vacancies or opportunities come up infrequently and such institutions are looking to fill only one position.<sup>185</sup> When pursuing hiring programs which take race and gender into consideration,

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<sup>177</sup> *Id.* at 203-4.

<sup>178</sup> *Id.* at 204.

<sup>179</sup> 480 U.S. 616 (1987).

<sup>180</sup> *Id.* at 629-30.

<sup>181</sup> *Id.* at 632.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *See Weber*, 443 U.S. at 208.

<sup>185</sup> William Kaplan & Barabara A. Lee, THE LAW OF HIGHER EDUCATION § 6.5 (4th Ed. 2006).

careful crafting is in order to ensure that such considerations do not wholly predetermine the outcome of the hiring decision even if they are factored in.

***Federal Appellate Decisions.*** Intermediate appellate courts have dealt with Title VII challenges to employment-related affirmative action programs in the education context, and have attempted to limit the reach of such programs. For example, in *Hill v. Ross*,<sup>186</sup> the Seventh Circuit held that a state university may not require that each department's faculty mirror the gender makeup of the pool of doctoral graduates in its discipline. The court found that such a policy is not narrowly tailored to remedy past sexual discrimination and violates Title VII. The suit was brought by a male psychology professor, recommended for a tenure-track position, whose appointment was blocked because a dean said that the department "needs 3.23 women to reach its target" of 62% women in the department. The appellate court held that race or gender could be used "only as factors in a more complex calculus, not as independently dispositive criteria."<sup>187</sup> The court held that the dean had used gender as the "sole basis" for the hiring decision, and thus a jury could conclude that the dean had created a quota system for hiring in the psychology department.<sup>188</sup>

In *Rudin v. Lincoln Land Community College*,<sup>189</sup> the Seventh Circuit denied summary judgment for the college on plaintiff's race and sex discrimination claims under Title VII. There, the college had implemented a race-conscious faculty hiring plan whereby a screening committee would review applications and recommend a pool of candidates to be interviewed.<sup>190</sup> The pool was then sent to an "Equal Opportunity Compliance Officer" for review who could then (1) proceed with the candidates selected by the committee, (2) add minority candidates to the pool, or (3) halt the screening process.<sup>191</sup> The officer's role was to "determine if there was sufficient diversity among the interviewees."<sup>192</sup> The court held that, under Title VII, the addition of minority candidates into the interview pool, when considered with other facts and circumstances of the case, constituted circumstantial evidence of racial discrimination sufficient to require a trial as to whether the college had a discriminatory motive when it chose to hire a minority candidate over a non-minority candidate.<sup>193</sup> The court noted that the college's stated policy explicitly favored minority over non-minority job applicants and that non-minority candidates were effectively allowed to bypass the first elimination.<sup>194</sup>

The foregoing practice should be distinguished from the practice of ensuring the adequacy of the outreach process used to build an applicant pool from which the candidate pool of those to be interviewed is derived. (See discussion of specific types of programs and approaches, below, for

<sup>186</sup> 183 F.3d 586 (7th Cir. 1999).

<sup>187</sup> *Id.* at 588-89.

<sup>188</sup> *Id.* at 588.

<sup>189</sup> 420 F.3d 712 (7th Cir. 2005).

<sup>190</sup> *Id.* at 716.

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

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 721.

<sup>194</sup> *Id.* at 722.



a more extensive treatment of this distinction.) An educational institution may engage in the broadest possible outreach to identify, notify and encourage qualified minority and women applicants in addition to other applicants to pursue faculty openings. Courts and administrative agencies have recognized that such activity is "pool expanding" inclusionary rather than exclusionary activity, and consistent with providing equal opportunity to all applicants. See *Duffy v. Wolle*, 123 F.3d 1026, 1039 (8<sup>th</sup> Cir. 1997); *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535, 1553 (M.D. Ala. 1995).

In *Taxman v. Piscataway Board of Education*,<sup>195</sup> the Third Circuit concluded that the language and legislative history of Title VII indicated a congressional intent to limit affirmative action only to remedial purposes, and struck down a school's affirmative action plan which made race a factor in selecting which of two qualified employees to lay off. The school articulated the purpose for the affirmative action plan as one of achieving racial diversity for education's sake and specifically disclaimed any remedial purpose.<sup>196</sup> The Third Circuit held that educational faculty diversity could not justify a race-conscious faculty termination decision under Title VII.<sup>197</sup> The Third Circuit also held that the affirmative action plan in *Taxman* unnecessarily trammelled the interests of nonminority employees because it established a program of an unlimited duration, to be resurrected when the Board of Education believed that the ratio between blacks and whites was skewed.<sup>198</sup> The court also noted that the harm imposed upon nonminority employees by the loss of their jobs is especially substantial where the nonminority employees are tenured.<sup>199</sup>

In conclusion, the Supreme Court has held that race-conscious hiring plans are valid under Title VII when they: (1) share Title VII's statutory goals of breaking down patterns of discrimination or opening employment opportunities to minorities or women that were once closed to them; (2) are designed to eliminate a manifest imbalance that reflects underrepresentation of minorities or women in traditionally segregated job categories (i.e., a significant disparity but something less than a statistically significant disparity of two or more orders of magnitude); and (3) avoid unnecessarily trammeling the interests of nonminority and male (or, if males are the minority in some fields, female) employees or applicants.<sup>200</sup> In training and, where justified, hiring decisions or promotions, the characteristics of workplace affirmative action plans that are permissible under Title VII may include the use of race or gender as a "'plus' factor" among several criteria in appropriate circumstances.<sup>201</sup> However, all such programs must satisfy the three requirements set forth by the Supreme Court in *Weber* and *Johnson* (i.e., they must mirror the purposes of

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<sup>195</sup> 91 F.3d 1547 (3rd Cir. 1996), *cert. dismissed*, 527 U.S. 1010 (1997).

<sup>196</sup> *Id.* at 1558.

<sup>197</sup> *But see Univ. & Cmty. Coll. Sys. of Nevada v. Farmer*, 930 P.2d 730 (Nev. 1997), *cert. denied*, 523 U.S. 1004 (1998).

<sup>198</sup> *Taxman*, 91 F.3d at 1564.

<sup>199</sup> *Id.* In a brief filed in the Supreme Court on a petition for certiorari in *Taxman*, the Solicitor General argued that the appellate holding in *Taxman* was erroneous in key respects, as discussed *infra* in Appendix III to this guide.

<sup>200</sup> See *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 628-31; see also *Humphries v. Pulaski Cty. Special School Dist.*, 580 F.3d 688, 695-96 (8th Cir. 2009); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676 (4th Cir. 1996).

<sup>201</sup> See *Johnson*, 480 U.S. at 657.

Title VII, they must not unnecessarily trammel the interests of non-minority or male employees, and they must be temporary measures). Plans involving "preferential hiring" (or preferential decisions concerning training and capacity-expanding programs), rather than "preferential layoffs or terminations," are more likely to be upheld,<sup>202</sup> because "while hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals."<sup>203</sup> The Supreme Court has favored temporary affirmative action plans that seek to attain, rather than maintain, a "permanent racial and sexual balance."<sup>204</sup> Further, in light of *Ricci*, it is important to identify the relevant criteria up front, and not change them on the basis of race or gender later in the process, unless there is a strong basis in the evidence to believe that, absent such a race- or gender-conscious change, the employer would be subject to disparate impact liability.

**Agency Guidance.** The EEOC's Title VII regulations include guidelines on affirmative action:

1608.1 Statement of purpose.

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Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII. Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity.

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1608.3 Circumstances under which voluntary affirmative action is appropriate.

(a) Adverse effect.... Employers ... may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) Effects of prior discriminatory practices. Employers ... may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) Limited labor pool. Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers ... may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

<sup>202</sup> *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 638 (approving the affirmative action plans in part because neither plan required discharging nonminority employees).

<sup>203</sup> *Taxman*, 91 F.3d at 1564 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986)).

<sup>204</sup> *Johnson*, 480 U.S. at 640.

- (1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;
- (2) Extensive and focused recruiting activity;
- (3) Elimination of the adverse impact caused by invalidated selection criteria (*see* sections 3 and 6, Uniform Guidelines on Employee Selection Procedures ....);
- (4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

29 C.F.R. Part 1608 (2008). These guidelines are particularly important because of the following provision in Title VII:

In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of ... the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission....

42 U.S.C. § 2000e-12(b). An institution can rely upon this provision and the EEOC's "written interpretation" of affirmative action principles as a defense to a Title VII challenge to a diversity-related program, provided it has complied with the applicable procedural requirements that are set-forth in the EEOC regulations. *See also Ricci v. DeStefano*, 129 S. Ct. at 2703 n.9 (Ginsburg, J., dissenting)(referencing this Title VII provision and the EEOC's affirmative action guidelines).

In April 2006, the EEOC issued a new Compliance Manual that included a subsection on diversity and affirmative action:

### **DIVERSITY AND AFFIRMATIVE ACTION**

\* \* \*

Title VII permits diversity efforts designed to open up opportunities to everyone. For example, if an employer notices that African Americans are not applying for jobs in the numbers that would be expected given their availability in the labor force, the employer could adopt strategies to expand the applicant pool of qualified African Americans such as recruiting at schools with high African American enrollment. Similarly, an employer that is changing its hiring practices can take steps to ensure that the practice it selects minimizes the disparate impact on any racial group.... A need for diversity efforts may [also] be prompted by a change in the population's racial demographics, which could reveal an underrepresentation of certain racial groups in the work force in comparison to the current labor pool.

Affirmative action, in contrast, "means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." Affirmative action under Title VII may be (1) court-ordered after a finding of discrimination, (2) negotiated as a remedy in consent decrees and

settlement agreements, or (3) conducted pursuant to government regulation. Also, employers may implement voluntary affirmative action plans in appropriate circumstances, such as to eliminate a manifest imbalance in a traditionally segregated job category. In examining whether such a voluntary affirmative action plan is legal under Title VII, courts consider whether the affirmative action plan involves a quota or inflexible goal, whether the plan is flexible enough so that each candidate competes against all other qualified candidates, whether the plan unnecessarily trammels the interests of third parties, and whether the action is temporary, *e.g.*, not designed to continue after the plan's goal has been met.

An affirmative action plan implemented by a public sector employer is subject to both Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution. Some federal courts have held that public law enforcement agencies may satisfy the Equal Protection Clause if an "operational need" justifies the employer's voluntary affirmative action efforts. In the higher education context, the Supreme Court decided in *Grutter v. Bollinger* that attaining a diverse student body can justify considering race as a factor in specific admissions decisions at colleges and universities without violating the Equal Protection Clause or Title VI of the Civil Rights Act of 1964. The Supreme Court has not yet ruled on whether an "operational need" or diversity rationale could justify voluntary affirmative action efforts under Title VII, but a number of legal scholars and practitioners have debated the issue.

The Commission encourages voluntary affirmative action and diversity efforts to improve opportunities for racial minorities in order to carry out the Congressional intent embodied in Title VII. Further, the Commission believes that "persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes" of the statute. However, employers are cautioned that very careful implementation of affirmative action and diversity programs is recommended to avoid the potential for running afoul of the law.<sup>205</sup>

This agency guidance provides a concise overview of the current Title VII landscape.

#### 4. *Title IX (20 U.S.C. §§ 1681-1688)*

Title IX prohibits sex/gender discrimination by "education" programs or activities that receive federal financial assistance:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>206</sup>

<sup>205</sup> EEOC, Directives Transmittal No. 915.003, Compliance Manual, "Race and Color Discrimination," at 15-31 - 15-34 (April 19, 2006) (citations omitted) (available at [www.eeoc.gov/policy/docs/race-color.html](http://www.eeoc.gov/policy/docs/race-color.html)).

<sup>206</sup> 20 U.S.C. § 1681.

Title IX applies to all aspects of "education programs or activities" that are operated by recipients of federal financial assistance, including admissions, treatment of and programs for participants, and employment.

Title IX was modeled after Title VI and much of the Title VI case law is applicable in Title IX cases. There are important differences between the statutes, however, and Title IX includes various statutory exemptions that are absent under Title VI. For example, Title IX expressly permits affirmative action to overcome the effects of conditions that result in limited participation in a program by persons of a particular sex, and requires appropriate remedial action if an agency finds that a recipient has discriminated against individuals on the basis of sex.<sup>207</sup> However, even if conduct is carved out of Title IX's general prohibition on sex discrimination, public entities also have a constitutional duty not to discriminate on the basis of sex.<sup>208</sup> Equal protection obligations still apply to public institutions even if Title IX has been satisfied.

Like Title VI, Title IX recognizes three general types of discrimination: (1) disparate treatment, (2) disparate impact, and (3) retaliation. The analysis of Title IX disparate treatment and disparate impact claims essentially tracks the analysis of such claims under Title VI, which is discussed above.

#### 5. *Executive Orders 11246 and 11375 and the OFCCP*

Executive Order 11246 (1965)<sup>209</sup> provides that federal contracts of a certain amount must contain provisions that prohibit discrimination on the basis of race, color, religion or national origin. (Executive Order 11375 (1967) added sex discrimination provisions to the provisions required in applicable federal contracts under Executive Order 11246.) It requires not only equal employment opportunity, but also affirmative action: federal contractors are required to develop, and update annually, an Affirmative Action Plan which includes goals and timetables for the increased utilization of minorities and women.

The Office of Federal Contract Compliance Programs ("OFCCP") has enforcement authority with respect to these Executive Orders. OFCCP is a division within the U.S. Department of Labor's Employment Standards Administration.

**Affirmative Action Requirements.** The OFCCP has summarized the applicable affirmative action requirements as follows:

Non-construction (service and supply) contractors with 50 or more employees and government contracts of \$50,000 or more are required, under Executive Order 11246, to develop and implement a written affirmative action program (AAP) for each establishment. The regulations define an AAP as a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The AAP is developed by the contractor (with technical

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<sup>207</sup> U.S. DOJ, "Title IX Legal Manual," at 11 (Jan. 11, 2001).

<sup>208</sup> See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (nursing school policy that excluded male applicants violated 14<sup>th</sup> Amendment notwithstanding the applicability of a Title IX exemption).

<sup>209</sup> Set out as a note in 42 U.S.C. § 2000e.

assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The AAP is kept on file and carried out by the contractor; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.

The AAP defines those areas, if any, in the contractor's workforce that reflect under-utilization of women and minorities. The regulations at 41 C.F.R. 60-2.11(b) define under-utilization as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. When determining availability of women and minorities, contractors consider, among other factors, the presence of minorities and women having requisite skills in an area in which the contractor can reasonably recruit.

Based on the utilization analyses under Executive Order 11246 and the availability of qualified individuals, the contractors establish goals to reduce or overcome the under-utilization. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to increase the pool of qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

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Executive Order numerical goals do not create set-asides for specific groups, nor are they designed to achieve proportional representation or equal results. Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. The Executive Order and the supporting regulations do not authorize OFCCP to penalize contractors for not meeting goals. The regulations at 41 C.F.R. 60-2.12(e), 60-2.30 and 60-2.15, specifically prohibit quota and preferential hiring and promotions under the guise of affirmative action numerical goals.<sup>210</sup>

Note that the OFCCP uses the phrase "underutilization" of women and minorities as the trigger for establishing "goals" and initiating "efforts" to increase the number of women and minorities in an employer's workforce.<sup>211</sup> OFCCP does not use the phrase "manifest imbalance," which is the term used by the Supreme Court in *United Steel Workers v. Weber*, 443 U.S. 193, (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), in upholding the affirmative action

<sup>210</sup> OFCCP, "Facts on Executive Order 11246 -- Affirmative Action," at ¶¶ C and D (Jan. 4, 2002) (available at [www.dol.gov/ofccp/regs/compliance/aa.htm](http://www.dol.gov/ofccp/regs/compliance/aa.htm)).

<sup>211</sup> Under current OFCCP procedures, a contractor may use a variety of methods to determine what constitutes "underutilization", including: (1) any numerical difference between incumbency and availability, (2) a numerical difference of one person or more, (3) minority or female incumbency that is less than 80% of availability (i.e., less than 80% of their representation in the available and qualified labor pool), (4) a disparity between the actual representation and expected representation for minorities and women that is statistically significant – namely -2.00 standard deviations or more. *See* 65 Fed. Reg. 68, 022, 68,033-34 (Nov. 13, 2000); *see also* U.S. Dep't of Labor, OFCCP, "Technical Assistance Guide for Federal Supply and Service Contractors," at 21-22 (Aug. 2009). Applied broadly and in good faith, any of these approaches to underutilization should afford educational institutions opportunities to engage in affirmative action that is as least as extensive as the affirmative action that is authorized under OFCCP regulations.

plans at issue in those cases relative to Title VII. The Supreme Court did not define "manifest imbalance" in either case, or indicate how much of an imbalance is necessary to create a manifest imbalance. However, the Court did state that a manifest imbalance could be found without the statistical disparity rising to the level of a *prima facie* pattern and practice case under Title VII. *Johnson*, 480 U.S. at 632.<sup>212</sup> A *prima facie* pattern and practice case is made under Title VII by showing a sufficient disparity between the minority composition of the applicable employer workforce and the qualified labor pool that a court can infer an intent to discriminate. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (utilizing a standard deviation analysis to analyze statistical disparities and suggesting that a standard deviation that exceeds two is sufficient to create an inference of discrimination); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (*prima facie* case made out by showing that the percentage of minorities in the employer's work force is significantly lower than the percentage of minorities in the general population). Thus, under the holding in *Johnson*, an affirmative action plan would be proper on the basis of a "manifest imbalance" if something less than a statistical disparity of at least two orders of magnitude is present. Whether this is a more demanding showing than the OFCCP's 80 percent "under-utilization" standard is unclear.<sup>213</sup>

## 6. Conclusion and Analysis

Under Title VII, EEOC's regulations and affirmative action guidelines (note particularly the April 2006 Agency Guidance on Diversity and Affirmative Action and 29 C.F.R. § 1608.3 and see Section VIII.A.3, *supra*), and the Equal Protection Clause (see Section VIII.A.1), affirmative action *may* be voluntarily taken by public and private institutions to remedy the present effects of the institution's prior discrimination, or when there is a manifest imbalance in the representation of minorities or women in the institution's faculty within a particular discipline as compared with their representation in the available qualified labor pool. (A manifest imbalance is significant, but something less than the two or more orders of magnitude that courts have found establish a *prima facie* case of discrimination.)

Some consideration of race or gender in hiring, awarding funding or other benefits of employment, promotion and tenure is permissible as part of a voluntary and reasonable

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<sup>212</sup> In a Management Directive issued in 1987 relating to the affirmative action plans of federal agencies, the EEOC defined "Manifest Imbalance" as "[r]epresentation of [protected] groups in a specific occupational grouping or grade level in the agency's work force that is substantially below its representation in the appropriate [civilian labor force]." EEO MD-714 at ¶ 10.m (Oct. 6, 1987). The Directive went on to say that agencies could "establish numerical objectives (goals) for each job category or major occupation group where there is a manifest imbalance or conspicuous absence of EEO Group(s) in the work force." *Id.* at ¶ 13.d. This Directive was superseded by EEOC Management Directive 715, which provides federal agencies with "policy guidance and standards for establishing and maintaining effective affirmative action programs of equal opportunity...." EEO MD-715 at 1 (Oct. 1, 2003). The new Directive does not use the phrase "manifest imbalance." Instead, it directs agencies to "identify any meaningful disparities" in their work forces by conducting a self-assessment that "compare[s] their internal participation rates with corresponding participation rates in the relevant civilian labor force...." *Id.* part A, at Section II. "Meaningful disparities" is not defined. The Directive also uses the term "statistical disparities," but, again, it does not define the term.

<sup>213</sup> See note 209, *supra*. On the general question of establishing a "manifest imbalance" in a given workforce, see K. Davis, "Wheel of Fortune: A Critique of the 'Manifest Imbalance' Requirement for Race-Conscious Affirmative Action Under Title VII," 43 Ga. L. Rev. 995 (Summer 2009); and Note, "Finding a 'Manifest Imbalance': the Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII," 87 Mich. L. Rev. 1986 (1989).

affirmative action program *to correct a manifest imbalance or to remedy prior discrimination*, provided that strict scrutiny is satisfied for Equal Protection purposes for public institutions and Title VII standards are satisfied for public and private institutions. It is a good practice to first consider race and gender in outreach and barrier removal, and if these are inadequate, in training and mentoring programs. If these steps are still inadequate, race or gender may be considered in those jurisdictions that legally allow such consideration in hiring using a narrowly tailored and Title VII-compliant approach. Under Title VII, following EEOC written guidance is a defense to claims of an unlawful employment practice, as discussed in Section VIII.A.3.

While permissible affirmative action may be voluntary under Title VII, institutions that receive federal contracts (*i.e.*, virtually all colleges and universities) are *required* by the OFCCP to prepare affirmative action plans and goals, which they must update annually, and to take affirmative steps in good faith to address any underutilization of women and minorities, a concept similar to manifest imbalance. Under OFCCP's regulations, *see* Section VIII.A.5, *supra*, affirmative action plans and goals, and associated good faith actions, *must* be made by federal contractors to remedy underutilization in the representation of minorities or women in the institution's faculty within a particular discipline as compared with their representation in the available qualified labor pool. Underutilization includes but is not limited to a manifest imbalance and other Title VII measures. More permissive measures of underutilization also apply under OFCCP. (*See* footnote 209, *supra*.) One of OFCCP's underutilization measures -- whether there is a representation of minorities or women in the institution's workforce in a particular discipline that is less than 80 percent of their representation in the available qualified pool -- is often used to measure underutilization and may generally align with notions of manifest imbalance under Title VII. OFCCP's requirements provide that the actual hiring and promotion decision "is to be made on a non-discriminatory basis." Consequently, when using OFCCP's more permissive measures of underutilization -- or when using any OFCCP measures in referendum or Executive Order states -- to justify consideration of race or gender, it may be prudent to focus on outreach, barrier removal, training/access, and mentoring, rather than considering race in the actual hiring or promotion decision.

In some fields, including many STEM fields, there may not be a manifest imbalance under Title VII, and there may not be underutilization as measured under the OFCCP 80 percent test, and minorities and women may not be otherwise underutilized under OFCCP requirements, even when minorities and women are not well represented (or they are not represented at all) in the faculty of a particular department at the institution. Instead, a "pipeline" problem may exist which has resulted in little or no representation of women or minorities in the qualified and available labor pool in the discipline. Thus, the absence of, or a very limited representation of, women or minorities in the discipline at the institution may not constitute a manifest imbalance or other underutilization as compared with their representation in the qualified and available labor pool. In such cases, it is helpful to determine whether there is an available pool of "trainable" minorities and women who, with better access to fellowships, mentoring and other access-enhancing programs, could acquire the additional preparation to compete more effectively for full faculty positions. In such circumstances, and possibly others, affirmative action may also mean taking an action to remedy a pipeline problem by providing opportunities for minorities and women to become better prepared to compete for faculty positions in the field, where minorities and women have been historically excluded at the institution or where the institution,



at least passively, participated in creation of the pipeline problem in a field that requires training. (See Section VIII.A.3 EEOC April 2006 Agency Guidance on Diversity and Affirmative Action and 29 C.F.R. § 1608.3(c), *supra*, addressing limited labor pools, and Section VIII.A.1, *supra*, discussing the *Weber* case regarding available trainable workers and training programs and the *Croson* case, strict scrutiny and passive participation in perpetuating discrimination.)

Under *Croson*, higher education employers, and especially state colleges and universities, may take steps to avoid being a "passive participant" in discrimination by others (*e.g.*, state educational systems or elementary and secondary schools). To do so, they would have to demonstrate, with a good evidentiary basis, that they need to consider race or gender in order to avoid being part of a system of racial or gender exclusion through their own financial or other support of entities that have excluded minorities or women.

The courts have not resolved whether the First Amendment-protected, compelling interest of an institution of higher education to deliver excellent education to all students, produce excellent research, and serve the nation's security and workforce needs, may allow race and gender to be considered -- in the Title VII context -- as one of many factors in a holistic assessment of the qualifications of a particular candidate for employment or a particular employment benefit, under a Title VI and Equal Protection Clause analytic model. The EEOC has acknowledged that this is possible, but has not taken a definitive position. (See April 2006 Agency Guidance on Diversity and Affirmative Action, Section VIII.A.3.) Such an approach would have to satisfy strict judicial scrutiny (at least in the case of race and intermediate heightened scrutiny in the case of gender) and be educationally mission-driven, and it would complement the remedial justification generally required under Title VII or OFCCP's 80 percent measure of underutilization. Where there would otherwise be an undue burden on others, race and gender would have to be factored flexibly in each decision, not uniformly for all members of the same race or gender and opportunities to compete would generally have to be provided to others. (See the sections on employment under Title VI and Title VII and obtain legal guidance.)

Where a manifest imbalance or passive participation in discrimination does not exist, there may still be underutilization as defined by OFCCP's more permissive measures, and an institution's compelling mission-driven need for broad diversity may combine with OFCCP's definition of underutilization to permit narrowly tailored affirmative action under OFCCP regulations, Equal Protection, and the First Amendment. Where a manifest imbalance or OFCCP's 80 percent measure are not being used and race is being considered in the hiring decision itself in non-referendum and Executive Order jurisdictions, there may need to be greater reliance on the extension of *Grutter* to faculty hiring (as discussed below), which logically should apply, but has not yet been reached by the U.S. Supreme Court.

In fields such as many STEM fields, in which minorities and women have been historically excluded, there is a severe pipeline problem, and the university and nation have a compelling interest in increasing the racial and gender diversity of the faculty at the university. Whether under Title VII and Equal Protection or OFCCP requirements, it may be possible to take race and gender into account or to recognize limited numbers of training positions (or other opportunities to increase preparedness) for such minorities and women as focused efforts within the context of more generally available programs. (For example, it may be possible to name some positions in training and mentoring programs for minorities and women without reserving a fixed number and to take race and gender into account in selection.) Such action provides better access and

helps to expand the pipeline where it has been artificially restricted. In academia, such training programs may include time-limited fellowship programs, summer and other time-limited research opportunities for graduate students and junior faculty, and the like. (See Section VIII.A.3, EEOC April 2006 Agency Guidance on Diversity and Affirmative Action, and 29 C.F.R. § 1608.3(c), *supra*, addressing limited labor pools; Section VIII.A.5, *supra*, on OFCCP requirements; and Section VIII.A.1, *supra*, discussing the *Weber* and *Croson* cases, strict scrutiny and passive participation in perpetuating discrimination. See also 42 U.S.C. § 2000e(d), which generally prohibits race and gender discrimination in "Training programs", quoted at Section VIII.A.3, *supra*, and the EEOC's regulatory implementation of Title VII, at 29 C.F.R. § 1608.3(c), which permits affirmative action through training programs where there is an artificially limited labor pool due to historic exclusion and the pool may be expanded.)

## B. Extending the *Grutter* Rationale to Faculty Hiring

The educational imperative for higher education institutions to remedy manifest imbalances, other underutilization, and pipeline problems through hiring and other employment programs for minority and female faculty members, may be justifiable under a Title VI, Equal Protection analysis, as a complement to reasonable Title VII or OFCCP affirmative action. (The easiest case is where there is a manifest imbalance under Title VII or the OFCCP 80 measure demonstrates underutilization. Additional justification may also exist where the institution actively or passively participated in the creation of the pipeline problem and can demonstrate its participation).

As discussed more fully in the section on student diversity, *Grutter* upheld the use of race as a factor in the admissions program of the University of Michigan Law School. *Grutter* did not address whether this rationale extends to faculty diversity. Scholars, lawyers and commentators have widely discussed the issue (see Appendix V), but there has been little guidance to date from the courts. The U.S. Supreme Court has left open the issue, with former Justice O'Connor acknowledging the possibility in *Wygant*. (The Nevada Supreme Court has endorsed the rationale in the context of faculty hiring, see *infra*. The Third Circuit has rejected this rationale, in the absence of a complementary Title VII remedial justification, and the Seventh Circuit has decided two higher education hiring cases adversely on Title VII bases. See "Federal Appellate Decisions," *supra*.)

Arguments for expanding the *Grutter* diversity rationale to the sphere of employment law are particularly compelling in the context of higher education. Justice O'Connor's opinion for the five-justice majority in *Grutter* affirmed Justice Powell's opinion in *Bakke* that student body diversity constitutes a compelling educational interest for institutions of higher education, rooted in First Amendment academic freedom. The same First Amendment right of academic freedom that the Court emphasized in *Bakke* arises in the context of faculty hiring. Indeed, the *Bakke* Court identified the "four essential freedoms" that constitute "academic freedom": the freedom of an institution to determine for itself, on academic grounds, *who may teach*, what may be taught, how it shall be taught, and who may be admitted to study.<sup>214</sup> Logic dictates that if an institution has a strong educational interest in selecting students that it believes will further its

<sup>214</sup> *Bakke*, 438 U.S. at 312 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., joined by Harlan, J., concurring in the result)) (emphasis added).

educational mission, and if diversity has a positive impact on the quality of education, an institution has a similarly strong interest in selecting its faculty to further the same ends. Faculty have at least as much impact as students in the classroom and laboratory dynamic and the learning process.<sup>215</sup>

Many of the arguments reaffirmed and expanded in *Grutter* apply to diversity in faculty hiring, as increased faculty diversity would contribute to the "robust exchange of ideas" in the classroom.<sup>216</sup> For example:

[A] student's stereotypical assumptions can be challenged effectively by exposure to an Asian-American art history professor who specializes in Western Renaissance art, even if the class discussions do not address issues of race and ethnicity. An African-American medieval historian or Hispanic professor of English literature can also challenge assumptions and subtle forms of prejudice precisely by defying stereotypes. If students enter college with preconceived notions of intellectual abilities and interests based on race or national origin, these prejudices can be overcome by exposure to individuals who provide living demonstrations of the falsity of race-based notions. Such direct personal experience might be the most effective teaching tool available.<sup>217</sup>

A racially diverse faculty would also promote cross-racial understanding and contribute to breaking down racial stereotypes, prepare students for "work and citizenship" in a global economy, and improve civic legitimacy by increasing the number of minorities in positions of business and political leadership.<sup>218</sup> The *Grutter* Court also noted that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."<sup>219</sup> While the Court noted that this benefit is a product of a diverse student body, it is equally the product of a diverse faculty. A diverse faculty can help create a network of future leaders in all academic disciplines. Moreover, in STEM fields, diverse faculties are part of the workforce whose research increases fundamental knowledge that is used by industry to create products supporting our nation's economic strength and national security.

At least one court has concluded that the interest in racial diversity in higher education, as outlined in *Bakke*, applies with equal force to a race-conscious hiring plan that aims to achieve diversity among the faculty of institutions of higher education. In *University and Community College System of Nevada v. Farmer*, the Nevada Supreme Court held that the University had a

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<sup>215</sup> Even prior to the *Grutter* decision, legal scholars argued that the *Bakke* opinion paved the way for race-conscious faculty hiring in institutions of higher education. See, e.g., Jonathan Alger, *When Color-Blind is Color-Bland: Ensuring Faculty Diversity in Higher Education*, 10 STAN. L. & POL'Y REV. 191 (1998-99).

<sup>216</sup> See *Bakke*, 438 U.S. at 312 ("[The] Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

<sup>217</sup> Alger, *supra* note 213, at 194.

<sup>218</sup> *Grutter*, 539 U.S. at 331. The ways in which racial and ethnic diversity among faculty and students in higher education serves important educational objectives such as the robust exchange of ideas has been well documented. See, e.g., Brief of *Amici Curiae* American Council on Education, et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>219</sup> 539 U.S. at 331.

compelling interest in fostering a culturally and ethnically diverse faculty.<sup>220</sup> The court held that the University's affirmative action plan, which allowed a department to hire an additional faculty member following the placement of a minority candidate, was constitutional. In so holding, the court stated: "We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court."<sup>221</sup> The court noted that a failure to attract minority faculty perpetuates the University's "white enclave" and limits student exposure to multi-cultural diversity.<sup>222</sup> The court also noted that the affirmative action plan was narrowly tailored to promote diversity and that the plan satisfied the *Bakke* command that race be only one of several factors in evaluating applicants.<sup>223</sup>

*Grutter* enumerated characteristics of admissions approaches which were constitutionally permissible. If applied to affirmative action in faculty employment, such characteristics would include: (1) using good outreach and barrier removal and considering workable neutral alternatives, if available; (2) if such actions and neutral criteria are not available or adequate, assigning a "plus" to the race or gender of a candidate when it contributes to the diversity of the discipline at the institution; (3) weighing race or gender as heavily, or even more heavily, than other qualities in assessing a particular individual if that individual contributes to the diversity of the faculty in the discipline, but not so much as to guarantee hiring or a similar employment benefit; (4) not giving race or gender equal weight for all members of a particular race or gender; (5) considering race or gender after weighing several additional qualities of the candidate, as long as the consideration of race or gender does not guarantee hiring or a similar employment benefit; (6) striving for a flexible "critical mass" or variable goal of minorities or women that breaks down stereotyping, promotes the expression of different perspectives, and thereby enhances learning and research; (7) conducting a full comparison of each and every candidate's qualities under the same criteria, including his or her race and gender, with those of other candidates; and (8) periodic review of the demographic composition to evaluate the status of goals or critical masses.<sup>224</sup>

Thus, the reasoning in *Grutter* provides multiple bases for asserting that the same notions of academic freedom that apply to the admission of students apply to the employment of faculty in colleges and universities. The overarching goal of colleges and universities implementing race- or gender-conscious hiring plans should be the careful identification of their particular compelling educational or national service interest, and the implementation of initiatives that are narrowly tailored so as not to unduly burden nonminority or male job candidates.<sup>225</sup> Such an approach would have to satisfy strict judicial scrutiny (at least with respect to race) and be

<sup>220</sup> 930 P.2d 730 (Nev. 1997), *cert. denied*, 523 U.S. 1004 (1998).

<sup>221</sup> *Id.* at 735.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Grutter*, 539 U.S. 306.

<sup>225</sup> "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.... [It] does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id.* at 339. Gender-based decisions are subject to a lesser standard of review. *See Craig v. Boren*, 429 U.S. 190 (1976).

mission-driven. Race and gender would have to be factored flexibly, not uniformly for all members of the same race or gender, in each decision. It is also prudent to consider application of Title VII in such analyses and to seek expert counsel. Assuming that faculty diversity is recognized as a compelling educational interest, that interest should, at the very least, serve as complementary support for Title VII and OFCCP-sanctioned affirmative action, providing a basis for satisfying corresponding Equal Protection requirements.

### **C. Reasonable Affirmative Action Under Title VII, OFCCP and Title VI/Equal Protection**

Reasonable affirmative action under Title VII (and a narrowly tailored approach under Title VI and the Equal Protection Clause) means: (i) altering practices that have been barriers to underutilized racial minorities or women, undertaking targeted outreach to include such minorities and women in the applicant pool before that pool has been completed, and using neutral approaches; and (ii) if that proves inadequate to correct the imbalance (or provides insufficient diversity), taking race or gender into account in a reasonable way that is time-limited and does not overburden non-minorities (in jurisdictions that legally allow such consideration).

Reasonable affirmative action under Title VII and OFCCP (and, to the extent applicable, diversity efforts under Title VI and the Equal Protection Clause), should be aimed at remedying discrimination, a manifest imbalance, or significant underutilization and achieving mission-critical diversity, and should not extend beyond the necessary time period or be overly broad. It is a good practice to identify workable race- and gender-neutral alternatives and approaches that break down barriers or constitute outreach (as distinguished from employment benefits) and to use them first if they are available. It is also a good practice to consider race or gender first in training, mentoring and other access-building programs. Race or gender may be used under Title VII, if justified (and if legally permitted in a jurisdiction), in hiring and promotion decisions where there is the need to remedy an institution's own discrimination or its present effects or there is a manifest imbalance. All use of race and gender should be limited to the period of time in which the manifest imbalance, other significant underutilization or effect of discrimination exists under Title VII (or, to the extent applicable, the time in which inadequate representation exists under Title VI and is required to support the institution's mission), and such consideration is warranted. An employer should not discharge or lay off non-minorities or men to hire minorities or women; should not have quotas; and should not bar non-minorities or men from all opportunities to compete for positions or promotion; or otherwise unduly burden non-minorities or men. However, an employer should be able to take race or gender into account as a factor among many in determining which qualified applicants to include in the candidate pool to be interviewed, in hiring and in other employment decisions under Title VII (and Title VI and Equal Protection if they apply) if lesser efforts (*e.g.*, removing barriers, more effective targeted outreach to build a more diverse applicant pool, or neutral approaches) are inadequate to remedy the underutilization.

It is a good practice, particularly after the general analysis in *Ricci* (although it does not establish precedent for affirmative action in hiring), to consider and make changes in hiring processes or criteria in order to increase diversity among candidates or hires before commencement of a hiring process and before there are identifiable candidates. Consequently, it is a good practice to determine the adequacy of outreach to build an applicant pool before that pool is completed, not after an application deadline has passed.

Where possible, it is a good practice for actions and programs to be especially focused on recruiting, enlarging the applicant pool, and supporting and enhancing employment opportunities. In other words, it is a good practice for these efforts to be structured as targeted versions or subsets of broader programs, practices and measures, where such broader programs are used and available generally but have yielded inadequate results for minorities or women because more focus or resources are required. Still, there may be some instances where targeted and specially designed programs are necessary because they are the only reasonably effective means.

#### D. Post-Doctoral Fellows

The discussion above focuses on faculty members. It is also relevant, however, with respect to other individuals at colleges and universities who are treated as "employees" by the school, or who might be so characterized by a court. Schools sometimes treat postdoctoral fellows<sup>226</sup> as employees. The same may be true for graduate students, at least for some purposes.<sup>227</sup> In all events, there is a chance that the courts will view post-doctoral fellows and graduate students acting as research or teaching assistants as employees, at least when the conduct that is challenged in the lawsuit relates to teaching, research, or other activities for which the individual receives a stipend or other monetary consideration.<sup>228</sup> In contrast, courts are less likely to treat

<sup>226</sup> "Postdoctoral students or 'post docs' as they are frequently called are recently graduated Ph.D.'s who wish to acquire additional research experience before beginning their scientific careers in academe or industry.... Postdoctoral students typically identify a mentor and research area based on their past and current interests and technical expertise. Two or three year appointments are the norm for these positions. In some fields such as biology postgraduate students may pursue two or more postdoctoral fellowships before starting their own independent research careers. In other fields such as chemistry, postgraduates usually complete one postdoctoral fellowship before looking for full time employment. Although there are teaching postdoctoral fellowships, the majority of postdoctoral students spend most of their time working on one or more research projects with a strong interest in bringing their projects to full fruition -- presenting and publishing as much of their work as possible in the highest quality technical journals." See [www.webguru.neu.edu/research\\_team/postdoctoral\\_students](http://www.webguru.neu.edu/research_team/postdoctoral_students).

<sup>227</sup> "Students who have successfully completed their undergraduate study in science, technology, engineering and mathematics frequently continue their education for two or more years in order to obtain an advanced degree. There are two advanced degrees commonly awarded in this country, the Master of Arts (M.A.) or Master of Science (M.S.) degree and the Doctor of Philosophy (Ph.D.) degree. An important component of most M.S. and Ph.D. programs is the completion of a thesis or dissertation that documents the completion of an original research project. In the sciences and engineering students pursuing an advanced degree often receive financial support in the form of a teaching ... or a research assistantship. Students supported on a teaching assistantship receive a stipend in exchange for teaching one or more sections of a recitation or laboratory section of one or more courses each semester. Students supported on a research assistantship receive a stipend in exchange for performing research that is frequently related to their thesis research." See [www.webguru.neu.edu/research\\_team/graduate\\_students](http://www.webguru.neu.edu/research_team/graduate_students).

<sup>228</sup> See, e.g., *Seaton v. Univ. of Pennsylvania*, 2001 U.S. Dist. LEXIS 19780, \*\*23-26 (E.D. Pa. 2001) (noting that "courts have carefully delineated between graduate students' academic activities and employment activities, and deemed them to be employees only with respect to what they do in employment," and holding that plaintiff's Title VII claim was not actionable because it did not relate to his status as an employee); *Annett v. Univ. of Kansas*, 82 F. Supp. 2d 1230, 1237 (D. Kan. 2000) (allowing a professor's Title VII retaliation claim to proceed where the claim involved her opposition to certain graduate student financial support policies, and rejecting the school's argument that her opposition was not protected under Title VII because the "policies affect graduate students, not employees of the University"); *Ivan v. Kent State Univ.*, 863 F. Supp. 581, 585-86 (N.D. Ohio 1994) (holding a graduate student who lost her graduate assistant position was properly viewed as an employee under Title VII), *aff'd mem.*, 92 F.3d 1185 (6<sup>th</sup> Cir. 1996); *Mohankumar v. Kansas State Univ.*, 60 F. Supp. 2d 1153, 1160 (D. Kan. 1999) ("The

postdoctoral fellows or graduate students as employees when the basis for the challenged action is academic in nature, such as a dismissal from a program or school because of academic deficiencies.<sup>229</sup> This is especially true if the schools treat the individual more like a student than an employee in terms of administrative classification, characterization of any monetary payments, eligibility for benefits, purpose of activities, etc.

Courts will undertake a fact-based inquiry to determine whether a plaintiff should be viewed as an employee or a student with respect to the school conduct that is challenged in a given case. For example, in *Cuddeback v. Florida Bd. of Education*, the 11<sup>th</sup> Circuit applied an "economic realities test" in determining whether a graduate research assistant was an "employee" for purposes of Title VII:

[T]he fact that much of Cuddeback's work in Dr. Wang's lab was done for the purpose of satisfying the lab-work, publication, and dissertation requirements of her graduate program weighs in favor of treating her as a student rather than an employee. However, the following facts weigh in favor of treating Cuddeback as an employee for Title VII purposes: (1) she received a stipend and benefits for her work; (2) she received sick and annual leave; (3) a comprehensive collective bargaining agreement governed her employment relationship with the University; (4) the University provided the equipment and training; and (5) the decision not to renew her appointment was based on employment reasons, such as attendance and communication problems, rather than academic reasons.

Courts that have considered whether graduate students constitute employees for the purposes of Title VII have distinguished between their roles as employees and

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court will assume ... that by virtue of her agreement to teach classes ... in exchange for a stipend, plaintiff was an employee covered by Title VII and that the discontinuation of a stipend was either a refusal to hire her or a denial of a term or condition of her employment."); *see also United Faculty of Florida, Local 1847 v. Bd. of Regents, State Univ. Sys.*, 417 So.2d 1055, 1061 (Fla. App. 1982) (holding that "graduate assistants" are employees for collective bargaining purposes); *Regents of the Univ. of Michigan v. Empl. Rel. Comm'n*, 254 N.W.2d 218 (Mich. 1973) (holding that "interns, residents and post-doctoral fellows" were reasonably treated as employees for collective bargaining purposes, after noting that a portion of their compensation was withheld for federal and state tax purposes, they received "fringe benefits available only to regular [UM] employees," and they received W-2 forms).

<sup>229</sup> *See, e.g., Washington v. Jackson State Univ.*, 532 F. Supp. 2d 804, 811 (S.D. Miss. 2006) (rejecting graduate student's Title VII claim and holding that the stipend he received "was not payment of wages to an employee"); *Crue v. Aiken*, 204 F. Supp. 2d 1130, 1140 (C.D. Ill. 2002) (treating plaintiff as a student not an employee for purposes of her First Amendment claim: "the Court cannot find ... that a graduate student who accepts financial aid in the form of a stipend and in turn performs certain duties as a graduate assistant has forfeited all of her rights as student and becomes an employee in the same class as part-time faculty members who are not also students"), *aff'd*, 2004 U.S. App. LEXIS 10623 (7<sup>th</sup> Cir. 2004); *Bucklen v. Rensselaer Polytechnic Inst.*, 166 F. Supp. 2d 721, 725 (N.D.N.Y. 2001) ("Assuming *arguendo* that Plaintiff is an employee..., Plaintiff is nonetheless unable to state a claim under Title VII since he does not allege that Defendant took a discriminatory action with regard to his status as an employee. While the Court acknowledges the unique dual role of graduate students as potentially both students and employees, it cannot extend the parameters of Title VII to encompass purely academic decisions, such as testing and qualification of doctoral students, that have only a tangential effect on one's status as an employee."); *Pollack v. Rice Univ.*, 1982 U.S. Dist. LEXIS 12633, \*\*2-3 (S.D. Tex. 1982) (rejecting Title VII claim of individual who was denied admission to a graduate program because the individual was properly viewed as a student not an employee, and holding that Title VII does not "afford a cause of action to a plaintiff for religious discrimination in the admission to a scholastic program which entails the performance of services for remuneration, where the services are completely incidental to the scholastic program").

as students, and have typically refused to treat them as "employees" for Title VII purposes only where their academic requirements were truly central to the relationship with the institution. In this case, the court concluded that the plaintiff was properly viewed as an employee, and thus could pursue a gender discrimination claim under Title VII.

381 F.3d 1230, 1234-35 (11<sup>th</sup> Cir. 2004) (citations omitted).<sup>230</sup>

There are very few published opinions that involve employment-based discrimination claims asserted by postdoctoral fellows, and they are not very informative on the issue of "student vs. employee."<sup>231</sup> Guidance can be found, however, in the cases that involve graduate students. In addition, numerous court cases have considered whether medical residents are properly viewed as employees or as students. Residents have been characterized as students in some contexts even though they receive monetary payments (stipends) and perform services. For example, several courts have held that post-graduate medical residents may qualify as "students" for purposes of a statutory exception that exempts from FICA payroll taxes "students" who are "in the employ of a school, college or university" and "enrolled and regularly attending classes at such school, college or university."<sup>232</sup> There are also cases which have characterized medical residents as students, rather than employees, with respect to due process challenges that they asserted to their dismissal from a residency program.<sup>233</sup> But residents have also been treated as employees in some contexts.<sup>234</sup>

<sup>230</sup> See also *Stilley v. Univ. of Pittsburgh*, 968 F. Supp. 252, 261-62 (W.D. Pa. 1996) (finding that the plaintiff student was an employee with respect to her status as a researcher); *Ivan v. Kent State Univ.*, 863 F. Supp. at 585-86 (finding that a graduate student researcher was an employee where she had an employment contract, was paid biweekly, and had retirement benefits withheld); compare *Jacob-Mua v. Veneman*, 289 F. 3d 517, 520-21 (8<sup>th</sup> Cir. 2002) (holding that a volunteer graduate student researcher was not an employee because she was not financially compensated for her work).

<sup>231</sup> See, e.g., *Sizova v. Nat'l Inst. of Stds. & Technology*, 282 F.3d 1320, 1328-29 (10<sup>th</sup> Cir. 2002) (affirming summary judgment for a university which hosted a research fellow who sued the university and NIST under Title VII, on the grounds that NIST selected the fellowship recipient and supervised her work and thus was her employer, not the school, but treating the fellow as an employee); *Hankins v. Temple Univ.*, 829 F.2d 437 (3d Cir. 1987) (treating a plaintiff who was terminated from a fellowship program as an employee for purposes of her discrimination claims under Title VI, Title VII and Section 1981, without considering whether she should be treated as a student, but characterizing plaintiff as a student rather than an employee for purposes of her due process claim); *Brewer v. Bd. of Trustees of the Univ. of Illinois*, 407 F. Supp. 2d 946, 962-70 (C.D. Ill. 2005) (considering a Title VII discrimination claim asserted by a fellow who had a paid, one-quarter time research assistantship, and applying Title VII without suggesting that the plaintiff could be characterized as a student not an employee).

<sup>232</sup> See, e.g., *United States v. Memorial Sloan-Kettering Cancer Center*, 563 F.3d 19 (2d Cir. 2009); *United States v. Detroit Med. Center*, 557 F.3d 412 (6<sup>th</sup> Cir. 2009); *Minnesota v. Apfel*, 151 F.3d 742 (8<sup>th</sup> Cir. 1998).

<sup>233</sup> See, e.g., *Halverson v. Univ. of Utah Sch. of Medicine*, 2007 U.S. Dist. LEXIS 72974, \*\*27-38 (D. Utah 2007) ("it is clear that medical residents, like other medical students, are not considered to be employees and are entitled only to lesser due process than employees"); *Gul v. Center for Family Medicine*, 2009 S.D. LEXIS 16, \*23 (S.D. 2009) ("We agree that medical residents are students not employees. The fact that Dr. Gul received a stipend does not alter the fact that she was participating in an academic program in order to receive academic certification").

<sup>234</sup> See, e.g., *Lipsett v. Univ. of Puerto Rico*, 864, F.2d 881, (1<sup>st</sup> Cir. 1988) (evaluating a Title IX claim of a discriminatory discharge from a residency program, and holding that because the plaintiff was both a student and an employee, Title VII's substantive law should be applied to her Title IX claim); *Regents of the Univ. of Calif. v. Pub.*



The question of how to classify postdoctoral fellows and graduate students is one that institutions routinely confront for purposes of structuring their relationships with the fellows and graduate students. A broad range of administrative policies can be implicated by the classification, such as policies relating to compensation and withholdings, eligibility for benefits, intellectual property rights, and so forth. As a result, schools often have manuals or other policy statements in place that identify the various graduate and postdoctoral positions that exist at the school and the administrative implications of each category. For example, Purdue University appears to draw a bright-line distinction between graduate assistants and graduate fellows relative to their employment status and has manuals for both categories.<sup>235</sup>

The classification for postdoctoral fellows is often driven by the mechanism by which the fellows are paid. If they receive a salary from the institution, which is typically derived from a supervisor's grant or other funds, they are generally classified as an employee with the attendant right to participate in the school's benefit programs. If they receive a stipend, however, based upon independent funding from a fellowship or other external source, they are often not treated as employees, or at least not employees who are entitled to all the benefits provided by the school to its regular employees. Indeed, a range of classifications is possible.<sup>236</sup>

What bears noting for present purposes is that these administrative classifications will inevitably be considered by a court if it has to decide a discrimination claim involving a particular postdoctoral fellowship or graduate student program. If participants in a challenged program are viewed as employees, the framework for analyzing claims relating to that program will be the employment-related framework described above (*i.e.*, Title VII, possibly Title IX, OFCCP and Equal Protection). Otherwise, the student-related analysis described above will be applicable (*i.e.*, Title VI, possibly Title IX, and Equal Protection). As discussed earlier in Section VI above, Title VI and Equal Protection may be a better fit than Title VII and OFCCP for an institution's objectives if diversity efforts are based on an educational, not a remedial, rationale.

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*Emp. Rel. Bd.*, 41 Cal. 3d 601, 604 (Cal. 1986) (upholding agency determination that "housestaff, who are paid by the University while participating in residency programs ..., are 'employees'" for collective bargaining purposes).

<sup>235</sup> See Purdue University, *Graduate Student Employment Manual*, at 4 (May 2005; Updated Feb. 2009) ("The University makes assistantships and fellowships available as forms of financial aid to support graduate study. Employment is incident to graduate study. Graduate students who are employed by the University provide services (teaching, research, administrative/professional) that further the missions of the University while providing students with valuable professional experience and financial remuneration in the form of tuition remission and a salary. These students are considered employees and are subject to the policies and procedures outlined in this manual. Students who receive fellowships are not employees and are not obligated to provide services to the University. The purpose of fellowships is to recognize outstanding graduate students and to support their education. While there are broad policies and procedures covered in this document that may apply to fellowships, in general, these guidelines are intended to address graduate student employment. For more information about fellowships, see the *Purdue University Graduate School Fellowship Manual*, available on the Graduate School's Web site.").

<sup>236</sup> The National Postdoctoral Association has suggested, for example, that several different classifications have been used by institutions as part of strategies for offering health benefits to postdoctoral fellows: (1) "Classify all postdocs as students;" (2) "Create a new category for the postdoc that is not staff, employee or student;" (3) "Create multiple new postdoc categories based on funding source," (4) "Classify fellows and paid directs as employees by paying them a small salary;" (5) "Offer a small stipend to non-employee postdocs to cover insurance costs;" or (6) "Ignore funding source, and put all postdocs in the employee payroll." See [www.nationalpostdoc.org](http://www.nationalpostdoc.org) (click on the link for the PDO Toolkit, and go to "Providing Benefits for Postdocs").

In this regard, it should be noted that the U.S. Department of Justice has challenged certain diversity-based fellowship programs under Title VII. DOJ sued Southern Illinois University in 2006, alleging that the school was violating Title VII by operating various "paid fellowship programs [that were] open only to undergraduate, prospective graduate and doctoral students who are either of a specific race and/or national origin or who are female."<sup>237</sup> The lawsuit was resolved by way of a Consent Decree. Among other things, the Decree enjoined SIU from "setting aside, reserving or in any way restricting any paid fellowship positions ... on the basis of race, national origin or sex;" from establishing or maintaining "any paid fellowship positions in any fellowship programs that ... are set aside, reserved or in any way restricted on the basis of race, national origin or sex;" from failing to "consider, hire, employ, compensate and provide terms, conditions and privileges of employment to persons for any paid fellowship position without discriminating on the basis of race, national origin or sex in violation of Title VII;" and from limiting "recruitment for any paid fellowship positions to members of any particular groups on the basis of race, national origin or sex."<sup>238</sup> At a minimum, the SIU Consent Decree confirms that at least some diversity-based fellowship programs may be subject to challenge under Title VII (by the government or by private individuals).

The government's claims in the SIU case were not litigated, of course, and counter arguments can be made in support of such programs. Moreover, for some programs, an institution may be able to argue that Title VII does not apply because the program has a predominantly educational purpose and participants are not properly characterized as employees. If an institution treats a given fellowship as establishing a student rather than an employee relationship, and/or if an external funding source does so,<sup>239</sup> the institution can argue that any discrimination challenge to the program must be evaluated under Titles VI or IX (as applicable), or under the Constitution's Equal Protection Clause (in the case of state institutions).

Recognizing that other considerations will likely dictate how an institution structures its relationship with postdoctoral fellows or graduate student assistants, certain factors can nonetheless be identified that would improve an institution's ability to argue against the

<sup>237</sup> See *United States v. Bd. of Trustees of Southern Illinois Univ.*, Complaint at ¶ 7, No. 4:06-cv-04037 (S.D. Ill.) (filed Feb. 8, 2008, and available on PACER).

<sup>238</sup> *Id.*, Consent Decree at 4 (available on PACER).

<sup>239</sup> For example, under NIH policies, recipients of Kirschstein National Research Service Awards are not to be treated as employees of "either the Federal government or the sponsoring institution," and institutions "may not seek funds, or charge individual fellowship awards, for costs that normally would be associated with employee benefits (for example, FICA, workmen's compensation, and unemployment insurance)." *NIH Grants Policy Statement*, Part II: Terms and Conditions for Certain Types of Grants, Grantees, and Activities, "Employee Benefits" (Dec. 2003) (available at [www.grants.nih.gov](http://www.grants.nih.gov)). NRSA fellows are allowed to supplement their stipends, however, by way of "part-time employment," so long as the compensation is "supported by acceptable accounting records that reflect the employer-employee relationship agreement. Under these conditions, the funds provided as compensation (salary, fringe benefits, and/or tuition remission) for services rendered, such as teaching or laboratory assistance, ... are allowable charges to Federal grants...." *Id.*, "Supplementation of Stipends, Compensation, and Other Agreements." See also *Coordinating Officials' Guide, NSF Graduate Research Fellowships*, at D.13 ("Fellows are not in any sense salaried employees of the National Science Foundation nor of their affiliated institutions. Therefore, no funds will be deducted from the stipends [for tax purposes]; no W-2 Forms will be issued; and provision must be made by the Fellow for ... payment of all income taxes that may become due.").

application of Title VII to a discrimination challenge to a given fellowship or assistantship program:

1. The purpose of the program is clearly expressed to be educational and that is its predominant focus
2. Monetary payments are referred to as a scholarship, or as a stipend, and not as a "salary" or "wages"
3. The fellowship or assistantship is awarded at the time a postdoctoral or graduate student is admitted to the overall educational program and is characterized as support for pursuit of that program
4. No services are required in exchange for the monetary component(s) of the fellowship; rather, the monetary components are awarded to support participation in the program as a whole and any research or teaching requirements are educational prerequisites to complete the degree or earn the postdoctoral program certificate
5. Fellows and graduate students are enrolled/registered as a graduate or post-graduate student with the school's registrar; any research or teaching obligations are expressed as degree or certification requirements
6. Compensation paid to the fellow or assistant is not treated as an allowable "cost" under the OMB Circular A-21 provision which characterizes as allowable costs "tuition remission and other forms of compensation paid as, or in lieu of, wages to students performing necessary work" pursuant to a "bona fide employer-employee relationship between the student and the institution for the work performed"
7. Fellows and assistants are given a status other than "employee" in the institution's record-keeping systems
8. Payments are made by way of an "accounts payable" account or other non-wage account, instead of a "payroll" account
9. Fellows and assistants are not subject to employee tax withholdings and do not receive a W-2
10. Fellows and assistants are not unionized
11. Institutional IP policies do not characterize or treat fellows or assistants as employees
12. Fellows receive certificates of completion at the end of the program, reinforcing the educational nature and benefits of the fellowship; assistants receive academic credit for their assistantships
13. Institutional manuals and other policy statements clearly identify postdoctoral fellows and assistants as students
14. Award letters, letters of appointment, etc. state that fellows are not employees of the institution (or of any external funding agency) and that their program is educational, leading to a degree or academic certificate

This is not an exhaustive list, and there is no assurance that the existence of any one or more of these factors would tip the scale in favor of -- or against -- a "not an employee" finding.

It is clear that an individual whose relationship to the college or university is primarily that of a student does not lose his or her "student status" merely because that relationship includes some aspects of employment. Moreover, an individual may be characterized as both a student and an employee in his or her relationship with the institution, depending on the particular aspect of the relationship at issue.

Challenges may arise to a particular aspect of a program, or to the initial selection process for participation in a program. The list above illustrates the type of factors that a federal agency (*e.g.*, Department of Justice) or a court might look to in evaluating whether a given program, or some aspect of a program, is governed by and subject to challenge under Title VII because it essentially involves employment, or Title VI or IX because it essentially involves academic matters.<sup>240</sup> If an institution intends to rely on a diversity rationale, it is very helpful to make clear that a program exists primarily for educational, rather than employment, purposes when that is the case, even if elements of both may arguably exist. When there is a challenge to the selection of an individual to participate in a program, the predominant purpose and characteristics of the program are likely to drive which legal regime governs, although there is not much guidance from the courts. When a particular aspect of a program is challenged (*e.g.*, level of payment), both the predominant nature of the program and of the particular aspect challenged are likely to be considered.

In any event, no single factor will be determinative (although the SIU Consent Decree appears to focus on the fact that the fellows were "paid" for services), and every situation must be reviewed under the totality of the facts and with due emphasis on the inherently educational purpose of diversity-motivated programs.

### **E. Policy and Program Principles and Illustrations**

The legal overview set forth above provides guidance, but not complete clarity, as to the law that governs initiatives educational institutions may undertake to improve faculty diversity. The elements of each contemplated program by an institution should be analyzed to determine whether it is covered by constitutional, statutory or case law limitations, and if so, whether the program is properly tailored to withstand challenge.

This section discusses several possible programs. They are set forth here to facilitate review of the range of possibilities and issues which should be considered in crafting such programs. It is important to note that we have not sought to capture all legally sustainable approaches to diversity efforts on campus. Institutions have constructed and undoubtedly will construct additional approaches to achieving maximum diversity consistent with their educational missions and applicable law.

The absence of an approach -- or of a variation on an approach -- from this guide is not an indication that the approach or variation is legally unsustainable. Similarly, our discussion of various approaches is not intended to substitute for legal advice on the particular programs implemented by an institution. That analysis must be institution and context-specific and should be undertaken by the lawyers for the institution.

<sup>240</sup> Other relevant factors that an agency or court might look to include the tax treatment of fellowship awards by the IRS (*see, e.g.*, I.R.C. § 117 and IRS Publication 520, "Scholarships and Fellowships"); and the treatment of graduate students, externs, and residents by the DOL for FLSA purposes. *See, e.g.*, DOL Field Operations Handbook at paragraphs 10618-620 and 10624 (1993).

It is critical that Section A.6, Conclusion, above be reviewed before and in conjunction with the following program descriptions.

### **1. *In General: Importance of Relationship to Mission***

Each program described in this part is mission-driven and used where the institution has determined that achieving its educational, research and service mission in STEM (and other fields) requires a broadly diverse faculty and student body. Many aspects of broad diversity can be achieved in the faculty and student bodies through race and gender-neutral means. However, racial diversity is often the most difficult to achieve, and gender and socio-economic aspects of broad diversity are also difficult. Where that is the case, the efforts identified in this document can contribute to fulfilling missing aspects of broad diversity (such as the racial, gender or socio-economic aspects) or support overall efforts to achieve broad diversity. This section focuses on diversity of faculty. A diverse faculty, however, also engenders a diverse student body.

Note, as a threshold matter, that the awareness-raising and monitoring programs in 2.a. below, the outreach and barrier removal programs in 2.b. below and the neutral alternatives in 2.d below, generally do not trigger equal protection or Title VII restrictions and may be used in any jurisdiction. However, the affirmative action programs in 2.c. require careful application, particularly in jurisdictions where local law prohibits consideration of race and gender in employment. The federal requirement that federal contractors have an affirmative action plan in place and make good faith efforts to address an under-utilization issue may provide a basis for pursuing such programs in these jurisdictions (unless authentic neutral alternatives such as record of inclusive conduct and multi-cultural skills or socio-economic background satisfy the federal requirement), but do not justify consideration of race or gender in actual employment or promotion selection decisions.

### **2. *Specific Program Examples***

#### **a. *Awareness-Raising and Monitoring Programs***

##### Mission-related purpose; benefits to participants; institutional resources committed

These measures provide oversight, support and monitoring to foster the success of other diversity efforts (*e.g.*, efforts to increase and broaden the pool of applicants for faculty or postdoctoral positions and efforts to support the success of minority and female faculty and students once recruited). No direct individual benefits are conferred; these measures raise awareness and support other diversity efforts to fully realize all aspects of broad diversity. Institutional staffing and funding are (and legally may be) devoted to monitoring, reporting and training to oversee and assess effectiveness of diversity efforts.

1. *Web site.* The university maintains a Web site, providing diversity resources, posting diversity data, and otherwise providing a clearinghouse for diversity news and resources university-wide.

2. *Diversity Council.* The President appoints a diversity council to serve as policy and legal experts and to coordinate and monitor diversity efforts university-wide. The Council may collect data and report annually on progress, conduct faculty and student body surveys and focus groups,

champion new initiatives, and provide support, resources, training and expertise. The Council may be sponsored by and report to a Diversity Cabinet.

3. *Diversity Cabinet.* University officers and faculty senate committee chairs meet regularly (e.g., monthly or quarterly) to provide strategic direction and review progress on diversity efforts.

4. *Senior Administration Accountability.* The Board of Trustees establishes increasing racial and gender diversity of the faculty and student body (which are aspects of broad diversity that have eluded the institution) as long-term goals for the President, among a number of other goals including, but not limited to, diversity goals. There are no numerical goals, but the President's quantitative and qualitative progress are reviewed on an annual basis and the President, Cabinet and Faculty Senate periodically assess whether adequate progress has been made to meet the educational, research and service missions of the institution. The President's annual evaluation by the Trustees includes consideration of progress against these goals and all other goals; no one goal is determinative. The President similarly holds the Provost accountable for achieving, monitoring and reporting progress, the Provost holds the Deans accountable, the Deans hold the Department and major unit heads accountable, and the Department and unit heads hold search committees, program directors and admissions leadership accountable.

5. *Ad Hoc Committee.* An ad hoc committee is appointed by the President to evaluate the status of women or minorities at the University as compared with non-minorities and men. The committee identifies areas of inequity or quality of life concerns and makes recommendations on types and prioritization of efforts to address these issues.

6. *Faculty Hiring Toolkit and Search Committee Training.* The Provost's Office, with support from the Human Resources and General Counsel's Offices, creates a toolkit for faculty hiring that provides resources and training for search committees. All search committee members, or at least the Chair, may be required to complete training before serving. The toolkit and training include guidance on how to maximize outreach efforts. The toolkit also provides guidance on how to search for individuals who will bring a record of inclusive conduct and multi-cultural skills to the institution. Where and to the extent permissible, the toolkit provides guidance on how to take race and gender into account in outreach and/or hiring processes. It also describes how to make quality of life and community resources available to maximize diversity outcomes. The toolkit provides guidance on how to bring training to the search committee process through initial and periodic discussions and check-in concerning goals and approaches by the committee. The chair of the search committee is tasked by the department head or dean to lead efforts to incorporate broad diversity objectives in the search process and is sometimes supplemented by an expert diversity representative from the Provost's Office.

7. *Search Committee Plans.* Search Committees are required to develop a search plan that includes substantial outreach aimed at traditional candidates as well as those from groups that are not well represented at the institution. The plan also includes a process for articulating qualification requirements that capture necessary intellectual and scholarship standards, while not imposing unnecessarily restrictive requirements and preserving the flexibility to consider less traditional backgrounds without compromising on quality. Selection criteria are not changed once the application process begins and applicants can be identified. See Appendix VIII.

8. *Search Committee Accountability.* Search Committees are required to have the relevant Dean or Department head certify the adequacy of outreach efforts before the application process is closed and a list of candidates to be interviewed is completed. (Refer to Specific Program Examples, in Section VIII.D.2.b.5, pure outreach and barrier removal, *supra*, for a fuller description and explanation of certification of adequacy of outreach.)

**Commentary.** If implemented properly, these efforts merely raise awareness, monitor progress and areas needing improvement, and provide expert resources for other diversity efforts. Strict scrutiny and statutory prohibitions are not implicated. These efforts provide important data, expertise and assessment of effectiveness of other diversity efforts. Moreover, these activities are not involved in individual decision-making about hiring or the award of other benefits and thus should raise no question as to legal sustainability.

**Assessment of impact.** Effectiveness of these efforts may be measured as follows:

1. *Surveys and focus groups* are conducted of those who administer diversity programs, Deans, and Department heads.
2. *The President's annual evaluation* process for the Provost, Deans and Vice Presidents includes consideration of some of these efforts, as part of their overall evaluation. The Trustees' evaluation of the President annually includes consideration of some of these efforts, as part of the President's overall evaluation.
3. *Self assessments* may be conducted.
4. *Climate studies* assess the quality of the environment at the institution as a whole, in each of the colleges, and in particular units within colleges, for minorities and women. Input is collected on specific measures that would improve the climate.
5. *Surveys* are conducted to determine the availability of formal and informal mentoring to men and majority races as compared with women and minority races and their respective knowledge of the tenure and promotion and research award processes.
6. *Search committee training* is required for all individuals (or at least the Chairs) serving on faculty search committees, which includes awareness-raising about diversity and outreach in support of broad diversity. The adequacy of outreach efforts (process) must be certified by the Dean or unit head before the application process is completed and all candidates are identified for interviews. Outreach is inadequate if additional outreach means are reasonably available to achieve greater diversity in the applicant and potential candidate pools. (Refer to the next section on targeted outreach).

***b. Race and Gender-Targeted Outreach and Barrier Removal Efforts***

Mission-related purpose; benefits to participants; institutional resources committed

Outreach and the elimination of unnecessary barriers to employment create more opportunities for minorities and women to compete for positions at the University and to receive and accept offers. There is a distinction between outreach and breaking down barriers, on the one hand (which do not trigger Title VII prohibitions or strict scrutiny), and the employment process and

decisions (which may trigger such legal constraints), on the other. These programs address outreach and barrier removal, not employment or benefits associated with employment. The institution provides funding for general as well as targeted advertisements, personnel and other resources to contact prospects and individuals for referrals; for transportation and small honoraria for general as well as targeted lectures or other non-employment, relationship-building programs; for general as well as targeted recruitment travel (*e.g.*, to meetings of professional societies targeted to minorities and women); and for benefits programs that are available to all employees but that also remove barriers to the employment and success of minorities and women.

### **Outreach**

Outreach builds the pool of *applicants* from which *candidates* will be identified, interviewed and considered. Outreach opens opportunities for all potentially qualified individuals to apply and to compete to become candidates. Minorities and women, who are underrepresented in STEM careers or who have not traditionally pursued careers in a particular discipline, and whom the institution needs to achieve the breadth of diversity it requires for its education/research/service missions, are provided enhanced access and information about faculty opportunities through outreach efforts specifically targeted to them. (Enhancing access to women and minorities typically remedies previously inadequate access.) Minorities and women are actively encouraged to apply. Outreach targeted to minorities and women is critical where there is a pipeline problem (*i.e.*, they are insufficiently represented in the labor pool in a discipline). Outreach that is particularly effective with individuals of one group, making them feel welcome and encouraging their interest, is undertaken within the context of a broad array of outreach efforts that provide any interested and qualified individual an opportunity to learn about and apply for the position. The fact that the outreach process may vary based on race and/or gender does not mean that the employment process or decision-making similarly varies on these bases.

There is more flexibility in where to draw the line between outreach and conferring benefits in the employment process if minorities or women are underutilized in a discipline. Where underutilization exists in the representation of minorities or women in the institution's faculty within a particular discipline as compared to their representation in the available qualified pool, significant institutional resources may be provided to pursue the goal of elimination of underutilization. (Underutilization of minorities or women exists when there is a statistically meaningful under-representation in the relevant faculty discipline at the institution relative to the relevant labor pool from which the institution may hire or there is other evidence of underutilization. *See* the section on Title VII/OFCCP regulations.)

### **Barrier removal**

Breaking down barriers means removing unnecessarily rigid and restrictive prerequisites to employment that limit access by minorities and women. When unnecessarily restrictive qualifications are shed and flexibility to consider individual situations is possible, minorities and women, as well as individuals of other underserved groups, are better able to present a compelling employment application with a less traditional background.

### **Pure outreach and barrier removal**

1. *Targeted Advertising.* Advertise in outlets targeted to minorities or women in the field, as well as in those that are popular with traditional applicants.



2. *Targeted Organization Contacts.* Contact networks, listserves, and professional associations, and attend professional association conferences, that are popular with traditional applicants, as well as those that are targeted to minorities or women in the field.

3. *Personal Contacts Via Email, Letter, Telephone.* Contact senior faculty in the field to ask for nominations and referrals, and to ask specifically for nominations and referrals of qualified minorities and women. Include senior faculty in the field or related fields who are minorities or women. Use the tracking list and guest lecturer experiences (*see below*) to invite individual prospects to apply.

4. *Formally Track Individuals With Promise Throughout Their Careers.* Maintain a list of talented minorities and women in the field, both in academia and in research-oriented industry positions. (Usually, individuals with more traditional backgrounds who are academics in the field are known and apply without hesitation or are routinely recruited. If this is not the case in a particular field or respecting a promising prospect, track others too.) Lists may be developed at conferences, from reading publications, from reviewing research proposals, from tracking talented undergraduate and graduate students as they progress through their educational programs and in their junior and senior faculty careers. The Department head or Dean may assign an influential faculty member (with administrator assistance) to be the steward of this list with responsibility for eliciting support from the rest of the faculty. The Department head or Dean may periodically remind faculty members that they are expected to contribute and to ensure that the list is used by search committees when positions open.

5. *Outreach Plan and Certification of Adequacy of Outreach.* A search outreach plan is required for every search. (*See example in Appendix VIII*). Before closing an applicant pool (*i.e.*, those submitting applications) or candidate pool (*i.e.*, those selected from the pool to interview), a certification is required on the adequacy of a search committee's outreach efforts. The focus is on whether the *outreach* is adequate -- not whether the candidate pool itself (of individuals to be interviewed), is diverse enough. The outreach that has been undertaken is one data point. The diversity of the applicant and potential candidate pools are two additional data points as to whether outreach is sufficient. If all reasonably possible outreach has *not* been undertaken and the pool of applicants or the pool of potential candidates identified from individuals who apply is not broadly diverse, including minorities and women, then the outreach (not the diversity of applicants or candidates) may be inadequate and the search committee should be required to continue outreach before the applicant pool is closed and the potential candidate pool is finalized and interviews commence. In such event, the instruction to the search committee is to do additional targeted outreach to broaden the applicant pool and provide an opportunity to broaden the potential candidate pool, *not* to add minorities or women to the list of candidates to be interviewed. At this point, there has been no communication made to any applicant or member of the applicant or candidate pool that leads him or her to believe that the outreach period has been closed or that the candidate pool has been chosen, and in fact the process of defining these pools is not yet completed. It may be helpful to certify adequacy of outreach before any deadline for completing outreach occurs and to include in initial advertisements that a notice will be posted on a web page with the date when the application period is closed following completion of outreach.

If all reasonably possible outreach is undertaken and the pool of applicants and those with the potential to be interviewed do not include minorities and women, then it is reasonable to conclude that there is likely a significant deficit of qualified and available minorities and women (i.e., a severe "pipeline problem"), and interviews and the rest of the process proceeds.

It is critical that Deans and unit heads be well-informed of available resources for outreach and hold search committees accountable for undertaking all reasonably possible outreach. It is important that a committee or official at the institution have responsibility for keeping such hiring authorities and search committees well informed.

6. *Removing Unnecessarily Restrictive Qualifications, Without Affecting Quality.* To remove barriers to employment of minorities and women, the qualification prerequisites in position descriptions and advertisements, as well as in the minds of the search committee members, are challenged to ensure that they are not unnecessarily limiting and that they include sufficient flexibility to consider individual situations (e.g., non-traditional background, a justifiably longer period of development of scholarship, family obligations, training at more than a small group of institutions, etc.), while maintaining high standards for intellectual capacity, academic achievement and promise. This approach requires a close and individual assessment, rather than a reliance on generalizations. This review and establishment of qualification prerequisites is done before the relevant positions are advertised; changes in qualification prerequisites are not made once the hiring process has attracted applicants for the applicant pool. The same criteria are applied to all applicants and candidates, but they are sufficiently flexible to favorably consider non-traditional as well as traditional backgrounds.

7. *Relationship-Building Guest Lectures.* Be aware of opportunities posed when talented junior and senior minority and female faculty are invited to lecture in the department to build familiarity and a relationship. When opportunities arise, extend a personal invitation to apply to minorities and women of interest. Senior guest lecturers are not only prospects for appropriate positions, but also may be sources of nominations when junior positions open. The funding provided is limited to travel and a small honorarium, and the lecture does not constitute even a temporary position. (This assumes travel and a small honorarium are also provided when others guest lecture.) Where awareness is raised to recognize the opportunity provided by guest lecturers for future recruiting data are kept to demonstrate that men and non-minorities are frequent guest lecturers, and targeted organized efforts are made to also invite women and minorities who have not been as frequently invited, this is also pure outreach.

8. *Improving Climate for Women and Minorities Through Benefits, Flexibility and Relocation Programs.* Have and communicate the availability of family leave, career support for dual-career couples, work schedule and other programs that provide flexibility and support for all faculty, but that have particular importance to women or minorities, and break down barriers to their pursuit of success in academic careers, particularly at research universities. These measures will also increase the likelihood that individuals will accept offers of employment.

Examples of these climate-enhancing measures that are available to all faculty, regardless of race or gender, are: a) offer employment counseling and assistance to help spouses and domestic partners of new faculty to find a position in the area; b) offer adjunct faculty and lecturer roles for spouses and domestic partners; c) form a consortium of regional businesses and academic

institutions to provide a Web site with available positions and networking opportunities in the area; d) offer participation in a regional recruiting organization; e) offer programs that provide family leave and flexible schedules for any faculty member who needs to care for infants or ill children, or ill spouse or parents; f) provide health insurance and possibly other benefits to domestic partners. These programs have been particularly helpful to women, but as gender roles evolve, they are increasingly important to many relocating faculty, regardless of gender or gender orientation.

**Commentary.** Where a college or university seeks to increase the diversity of its faculty, breaking down barriers to the employment of minorities and women and improving outreach are legally permitted and are a good first step. This is true whether the aim is to remedy the present effects of the institution's own prior racial or gender discrimination or the institution's passive participation in discrimination by others; to achieve its compelling educational interests; to remedy a manifest imbalance or underutilization of minorities or women in its workforce; or to attract minorities and women who are not effectively reached by other means.<sup>241</sup> Such efforts may avoid or limit the need for affirmative action in the actual employment process or in connection with awarding significant benefits of employment. Outreach and barrier removal need only satisfy the "rational basis" standard of judicial review. Under this standard, an outreach and barrier removal program need only avoid being arbitrary and capricious. That standard will clearly be met if there is any relationship between the institution's mission and fostering an environment of inclusiveness for a broad range of individuals.

This approach does not disparately burden non-minorities and men as long as they have (a) access to information about available positions, even if through different means of communication than are used to target minorities and women, and (b) non-minorities and men have opportunities to compete for employment in the same pool and to receive the same employment benefits, under the same criteria as apply to minorities and women. Funding and staff resources may be provided for outreach efforts that target only minorities and women, as long as there are also resources to continue other general outreach efforts that reach more traditional candidates. Resources may be provided for programs that benefit all employees even if they are essential to the success of women or minorities.

### **Additional Variations/Examples of Outreach and Barrier Removal**

1. *Provide Community-Building Opportunities For Minority and Female Junior Faculty and Graduate Students To Support Their Pursuit of Faculty Appointments and Tenure.* Facilitate creation of peer communities for minority, female and other under-served (e.g., disabled) graduate students, post-doctoral fellows and junior faculty members to foster their retention and access to the larger campus community. These groups are organized for minorities, women and other under-served individuals to support their success, as necessary to achieve mission-critical broad diversity. Minimal funding is provided for refreshments and minimal ancillary administrative support is provided.

Minorities, women and certain other under-served individuals are not well represented at the institution and would otherwise be isolated and impaired in accessing community-building opportunities. The institution has determined that others build community more easily. It is

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<sup>241</sup> *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997); *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535 (M.D. Ala. 1995).

prudent to periodically evaluate the need and effectiveness of the practice, which is used as long as the need exists.

2. *Inspire Minority and Female Students and Faculty and Build Relationships Through Short Visits By Alumni Faculty.* Invite talented minority and female faculty from this institution or other institutions who are alumni of this institution to visit for a weekend to speak and meet with undergraduates, graduate students and junior faculty. (This approach need not be limited to alumni visitors.) Travel costs are funded and possibly a small honorarium is provided to visitors; an annual event recognizes the commitment of mentors from this institution. The purpose of the program is to inspire this institution's minority and female students and junior faculty to pursue STEM academic and other careers at this institution and at other institutions nationally. An ancillary benefit may be building relationships with individuals who are minorities and women and may be recruited for faculty positions in the future.

Attendance at the program is open to any interested faculty or student of the department, regardless of race or gender. The stated and advertised purpose of the program would be to inspire minorities and women to pursue academic and other careers in STEM disciplines and to stress the importance of their doing so. The program is part of the institution's larger program in which speakers are invited without regard to race or gender; this is a focused complement of a general program of recruitment and outreach for all qualified individuals, where special attention is needed to reach minorities and women.

3. *Mentor Minority and Female Junior Faculty and Graduate Students to Support Their Pursuit of Faculty Appointments and Tenure.* Create a formal advising and mentoring program, staffed by senior faculty, peers, and administrators to provide advice, career counseling, and emotional and professional support to minority and female graduate students and junior faculty to help them better prepare to compete for faculty appointments and tenure. (If there are other demonstrably under-served groups that do not have access to mentoring, such as disabled or low-income individuals, the program is open to them as well.) Practical, political, discipline-centric, and social advice and support are provided. Occasional informal, inexpensive get-togethers and meals are offered. An annual reception at the department, college or Provost's or President's residence may be provided to acknowledge participants.

Minorities and women are not well represented at the institution and would otherwise be isolated. The institution collects data (e.g., via junior faculty and graduate student surveys) demonstrating that minorities and women have difficulty accessing mentoring opportunities and are less familiar than their majority and male peers with the faculty appointment and tenure processes. This program is necessary to achieve mission-critical broad diversity. The effectiveness and need for this program are evaluated periodically and the program is used as long as the need exists.

If there are focus groups for minorities and women -- with an undetermined and variable number of places assigned to them -- within a larger mentoring program that is open to all who may need such assistance (e.g., based on first in family to pursue a STEM or any academic career or other disadvantage criteria), and if the institution can demonstrate the availability of mentoring for others, then this program is likely to be regarded as barrier removal -- inclusive, not discriminatory -- and, with institution- and jurisdiction-specific analysis and consultation with counsel, may be suitable even for referendum and Executive Order states.

If this is a distinct program, but minimal resources are provided and comparable opportunities exist for anyone in need, this program also may be regarded as inclusive, not discriminatory, but advice of counsel is important and jurisdictions may differ.

**Commentary.** If these efforts are a subset of an overall program available to faculty without regard to race and gender, and merely highlight availability of the same benefits to minorities and women, they should remain in the "barrier removal" inclusive category of efforts and pass muster even in referendum states. At some point, *e.g.*, where significant funding or benefits are provided only for minorities or women, and non-minorities or men are appreciably burdened, activities designed to improve outreach or break down barriers will require greater justification to survive legal challenge. In all events, these programs are more sustainable where there is evidence that existing programs open to all do not provide meaningful or sufficient opportunity to minorities and women.

Refer to Race and Gender Affirmative Action programs, below, if the institution desires to, or due to limited resources must, devote significant funding or benefits only or very predominantly to minorities and/or women (*e.g.*, if programs similar to the additional examples in 2-3 above are available only to minorities and women). Additional analysis and justification are warranted; however, these capacity-building programs are easier to justify than some others.

### **Assessment of Impact**

1. *Accountability.* The President and Provost hold all Deans, who hold all academic/research unit heads, who hold all search committees, accountable for excellent outreach.
2. *Informal surveys* may be kept to determine important factors in decisions of minorities and women on whether or not to apply or accept an offer.
3. *Data* are collected to track increases in racial, ethnic, gender and socio-economic diversity of candidate pools and successful hires.
4. *Surveys and data collection* may be kept on opportunities available (informal and formal) to nonminorities and men as compared to minorities and women and to demonstrate that women and minorities are less well informed and prepared regarding tenure, promotion and research support.
5. *Regression analysis* is done to show that minorities and women are statistically less likely to be hired, to be promoted or to receive tenure.

*c. Affirmative Action To Address Underutilization or a Manifest Imbalance in the Faculty Workforce, To Remedy Present Effects of Institution's Own Prior Discrimination, or to Address a Pipeline Problem Where a Compelling Need Exists, There is a Trainable Cohort and the Pool is Artificially Restricted.*

Mission-related purpose; benefits to participants; institutional resources committed.

These programs require additional legal advice and assistance and a careful assessment of remedial justification, complemented by compelling educational interests under *Grutter*.

Establish research assistantships, fellowships, research funding supplements, clustered summer or academic year research opportunities with multi-year cohorts of participants and senior faculty sponsors, where race and gender are criteria *among others* considered in selection (*e.g.*, promise, accomplishments, personal qualities for success in STEM fields, other disadvantage criteria), where factual and legal justification exist, and where the jurisdiction permits such consideration. These programs may be structured for junior faculty, post-doctoral fellows, graduate students, and undergraduates.

These programs involve conferring significant benefits and require justification.

These programs further the achievement of missing aspects of mission-critical broad faculty and student diversity. They are time-limited, capacity-building programs aimed, in the employment context, at remedying prior discrimination or a manifest imbalance in the workforce of a particular discipline (a significant disparity, but somewhat less than the 2 or more orders of magnitude that the Supreme Court has found constitutes a *prima facie* case of discrimination) or other substantial underutilization (*e.g.*, the OFCCP 80 percent measure, *see* 65 Fed. Reg. 68,022, 68,033-34 (Nov. 13, 2008); U.S. Dept. of Labor, OFCCP, "Technical Assistance Guide for Federal Supply and Service Contractors," at 21-22 (Aug. 2009); and 41 C.F.R. §§ 60-2.10-2.17 (collectively "OFCCP Guide").) The programs also further the institution's compelling educational interests and mission.

There is a pipeline problem if the qualified faculty pool in the discipline is artificially restricted by a history of exclusion at the institution, and generally in relevant educational programs and the workforce (so that little or no representation of women or minorities in a discipline at the institution does not constitute a manifest imbalance or other underutilization when compared with their representation in the qualified available pool). In such event, training or other capacity-building programs such as these may expand the qualified pool, where targeted outreach, barrier removal and race- and gender-neutral efforts are inadequate. The EEOC has recognized this justification when needed and appropriately structured, *see* 29 C.F.R. §§ 1608, 1608.3(c), and following EEOC's guidance is a defense to claims of discrimination, 42 U.S.C. § 2000e-12(b).

These programs rely on a remedial justification under Title VII and OFCCP guidelines and, if narrowly tailored, may be further supported by extension of *Grutter*/Title VI/Equal Protection analysis to faculty programs, fellowships, and research assistantships. The *Grutter* rationale is a logical underpinning for faculty diversity efforts and is recognized as a possibility by EEOC in its April 2006 agency guidance/compliance manual, but has not been addressed by the Supreme Court or definitively acknowledged by EEOC. Although they have not yet done so, if the Court -- or EEOC -- were to definitively recognize a compelling educational need and First Amendment protected interest in a broadly diverse faculty as consistent with the purposes of Title VII, that may provide an independent justification for these programs under Title VII. Alternatively, such Court or EEOC recognition of a compelling educational need for a diverse faculty might combine with a lesser remedial justification (*e.g.*, based on one of the more liberal OFCCP underutilization tests, *see* OFCCP Guide) to suffice under Title VII.

If an assistantship is structured as an educational program (or if *Grutter* is an additional justification for an employment program -- or if a public institution is involved in an employment program so that Equal Protection applies in any event), the program would be subject to the

requirements of *Grutter* for strict judicial scrutiny and narrow tailoring. (This means the program is tied to a compelling mission-driven interest; race and, possibly, gender are used only to the extent necessary to achieve that interest and are applied in a flexible manner that does not assign the same weight to race or gender for all applicants of the same race and gender; all candidates are evaluated under the same criteria; and the program is effective, time-limited to the period in which the need exists, and evaluated periodically).

(i) *Considering Race And Gender As One Of Many Factors In Employment Benefits, But Not For Layoffs*

Where a manifest imbalance or substantial underutilization at the institution exists, or there is a pipeline problem where there is an artificially restricted pool and, through training or other capacity-building the pool can be expanded, and where targeted outreach and barrier removal, and race- or gender-neutral efforts have proven to be inadequate, race and gender may be taken into account as factors among many in holistic reviews of each candidate for a special program or benefit (*e.g.*, research space, start-up resources for equipment, post-doctoral fellows and graduate student assistants, and research supplements). Race and gender are not considered in determining whom to lay off from existing positions. Men and non-minorities are not barred from competing for special programs and benefits.

(ii) *Mentor And Provide Community-Building Opportunities For Minority And Female Junior Faculty And Graduate Students To Support Their Pursuit Of Faculty Appointments And Tenure*

Create a formal advising and mentoring program, staffed by senior faculty, peers, and administrators, to provide advice, career counseling, and emotional and professional support to minority and female graduate students, post-doctoral fellows, and junior faculty to help them better prepare to compete for faculty appointments and tenure. Practical, political, discipline-centric, and social advice and support are provided. Occasional informal get-togethers and meals are offered. An annual reception at the department, college or Provost's or President's residence may be provided to acknowledge the participants.

This is a time-limited capacity-building program aimed at remedying prior discrimination or a manifest imbalance in the workforce or other substantial underutilization issue (*e.g.*, the OFCCP 80 percent measure), or a pipeline problem where there is an artificially restricted pool and, through training or other capacity-building, the pool can be expanded and where targeted outreach, barrier removal and race- and gender-neutral efforts are inadequate. (*See* Sections VIII.A.1, 3, 5 and 6, *supra.*) This is a focused program that complements and exists within the context of other, generally available programs. The institution documents through data, surveys and/or focus groups that minorities and women have limited representation and may be relatively isolated, making their access more difficult to the formal or informal mentoring that is generally available to others.

(iii) *Relationship And Capacity Building Through Visiting Faculty And Post-doctoral Fellowships, And Graduate Research Assistantships*

Invite talented recent minority or female PhDs and junior and senior minority and female faculty to be post-doctoral fellows or visiting faculty in the department to build familiarity and relationships. Build capacity beginning in graduate school by providing some graduate research

assistantships to minorities and women. These programs demonstrate to minorities and women that they are welcome. They are time-limited positions that build capacity and relationships to help participants compete more effectively for permanent positions. These positions are focused, complementary efforts within the context of similar, generally available post-doctoral fellowships, visiting opportunities, and assistantships. (See Sections VIII.A.6 and B, *supra*). When a position opens, extend a personal invitation to apply to minorities and women of interest. Senior visiting faculty are not only prospects for appropriate positions, but also may be sources of nominations when junior positions open.

These are time-limited capacity-building programs aimed at righting discrimination, a manifest imbalance or underutilization, or a pipeline problem where there is an artificially restricted pool and, through capacity building, the pool can be expanded and where targeted outreach, barrier removal and race- and gender-neutral efforts are inadequate. The problem arises from minorities and women being historically excluded from STEM academic and other careers. (See Sections VIII.A.1, 3, 5, and 6 and Sections VIII.B and C, *supra*.) The institution documents through data, surveys and/or focus groups that minorities and women have limited representation and are relatively isolated, making their access more difficult to the formal or informal visiting opportunities and assistantships that are generally available to others.

#### (iv) *Research Funding Supplements*

Race and/or gender is considered as a factor among many in providing research funding to junior minority and women faculty to help them succeed in the first several years of their career, or through tenure. This is a time-limited benefit for the first several years of their career and is a start-up/training supplement for individuals who satisfy certain disadvantage criteria that pose barriers to success, including women and minorities where they have limited representation. This benefit enhances preparedness for tenure. The program remedies discrimination, a manifest imbalance or substantial underutilization at the institution or a pipeline problem where there is an artificially restricted pool and, through capacity building, the pool can be expanded and where targeted outreach, barrier removal and race- and gender-neutral efforts are inadequate. (See Sections VIII.A.1, 3, 5 and 6, *supra*.) Such support is narrowly tailored, has a remedial purpose and is finite in duration.

#### (v) *Clustering Minority Or Women Fellows, Research Assistants, Or Junior Faculty*

A group of minorities or women (only) are selected to work together in a cluster as graduate assistants or fellows or in a junior faculty program to create a community of social and professional support to enhance retention and foster access to the larger campus community. Senior academic administration offers full or partial funding and must ultimately approve the selected cohort. This is a limited-in-time training program that builds capacity. It is aimed at righting discrimination, a manifest imbalance or substantial underutilization, or a pipeline problem where there is an artificially restricted pool and, through capacity building, the pool can be expanded and where targeted outreach, barrier removal, and race and general neutral efforts are inadequate. Minorities and women have been historically excluded from STEM academic and other careers. (See Sections VIII.A.1, 3, 5 and 6, and Sections VIII.B and C, *supra*.) The institution documents through data, surveys and/or focus groups that minorities and women have limited representation and are relatively isolated, making their access more difficult to the formal



or informal fellowships, assistantships and professional development opportunities that are generally available to others. These positions complement and are available within the context of generally available fellowships, research assistantships, and junior faculty opportunities. (*See* Sections VIII.A.6 and B, *supra.*)

(vi) *Hiring Generally*

Where there is compelling educational need combined with a manifest imbalance in the institution's workforce, and where lesser efforts (outreach, barrier removal and neutral approaches) are inadequate, race and gender are taken into account under Title VII in holistic reviews of individuals to determine whether they should be on the list of candidates to be interviewed and/or whether a particular candidate should be hired or promoted. Race and gender are considered flexibly, are not weighed equally for all members of the same race or gender, and are not the only "plus" factor that may tip the balance for a particular applicant or candidate. Each candidate is evaluated under all of the same criteria. Men and non-minorities are not barred from competing for positions or promotions. (OFCCP guidelines require the actual hiring decision to be made on a non-discriminatory basis and do not support race- or gender-conscious hiring or promotion decisions.) *See* Sections VIII.A.1, 3, 5 and 6 and Sections VIII.B and C, *supra*, and consult counsel first to appropriately identify the justification and to design and implement the approach.

(vii) *Target of Opportunity Hiring*

[1] Unit-wide benefits (*e.g.*, administrative support, equipment, graduate assistants, funding) are provided to those units that make exemplary progress in increasing faculty and/or student diversity. These benefits are not provided particularly to any individual (*i.e.*, a person hired, a member or chair of a search committee), but inure to the benefit of the whole or a significant portion of the unit.

[2] Funding for a cluster of positions in multiple and flexibly defined disciplines is provided by the Provost/Dean to simultaneously hire several faculty who are less traditional in their individual disciplines or interactions with other disciplines. Race and gender are not factors, but the flexibility of discipline definitions, openness to non-traditional backgrounds, and simultaneous availability of multiple positions increase the potential for competitiveness of minorities and women within the cluster. Record of inclusive conduct and multi-cultural skills may also be a consideration.

[3] Funding/position is provided by the Provost/Dean to hire faculty who especially advance priority objectives of the institution: *e.g.*, Nobel and other top prize winners; National Academy members; those (of any race or gender) who are otherwise exemplary even among the usual high standards of the institution; those (of any race or gender) with proven records of exemplary inclusive conduct providing multi-cultural opportunities in teaching, research and/or mentoring (*i.e.*, mission-critical behavior).

[4] After a unit makes a decision to hire, without knowledge of whether or not target of opportunity funding will be provided, it may apply to the Provost/Dean for target of opportunity

funding if the individual hired especially advances priority objectives of the institution: *e.g.*, Nobel and other top prize winners; National Academy members; those (of any race or gender) who are otherwise exemplary even among the usual high standards of the institution; those (of any race or gender) with proven records of exemplary inclusive conduct providing multi-cultural opportunities in teaching, research and/or mentoring (i.e., mission-critical behavior); missing aspects of broadly defined diversity. There is no guarantee of funding and funding is not part of the hiring decision. Funding provided after the fact is not paid to the target of opportunity candidate, but increases the pool of funding available for all hiring.

The institution maintains a written protocol setting forth hiring procedures which, among other things, include target of opportunity hiring as an essential, although not regular, tool for obtaining faculty who possess assets and characteristics that specially advance institutional mission. The hiring protocol makes clear that in any given search the target of opportunity option may be utilized if circumstances warrant, or a special position may be created to hire a particular individual. Target of opportunity hiring affords the institution resources and flexibility to move expeditiously to hire faculty who, for a variety of reasons, would otherwise be beyond reach. Processes and criteria are not changed once a hiring process commences and individual candidates are identifiable, as the policy pre-dates the particular hiring and overlays the process.

*The EEOC's affirmative action guidelines recognize that voluntary affirmative action may be appropriate to address an "actual or potential adverse impact" that is likely to "result from existing or contemplated practices;" to "correct the effects of prior discriminatory practices;" and to address an "artificially limited" labor pool that has resulted "[b]ecause of historic restrictions by employers." If neutral approaches (e.g., multi-cultural skills and conduct), outreach and barrier removal are inadequate to remedy the underutilization or discriminatory effects, reasonable, not overly burdensome consideration of race or gender may be permissible as part of affirmative action plans and efforts under Title VII and EEOC rules. In addition, OFCCP rules require an affirmative action plan and good faith steps to remedy a federal contractor's underutilization of minorities and women (although OFCCP rules also provide that the actual hiring or promotion decision must be made on a non-discriminatory basis).*

#### ***d. Inclusive Conduct and Multi-cultural Skills and Other Race and Gender-Neutral Approaches***

See Sections V.B and C on inclusive conduct and multi-cultural skills and other race- and gender-neutral approaches to achieving authentic mission-critical educational objectives apart from (but also possibly contributing to) racial and gender diversity.

### ***3. Assessment of Impact***

The following measures are implemented to assess the effect of these programs:

1) *Data are collected annually to identify any underutilization or manifest imbalance in the representation of minorities and women in the faculty of each discipline at the institution, as compared with their representation in the qualified, available pool. Where a manifest imbalance*

or underutilization is found, a remedial affirmative action plan is developed. Where a pipeline problem is found, it too is documented and an assessment may be made of whether the pool is artificially limited due to a history of exclusion, but could be expanded through training and other capacity building for individuals who would then be better able to compete.

2) *Data are collected to track remediation of any underutilization or manifest imbalance found.*

3) *Data are collected to track the representation of minorities and women in each department and major unit.*

4) *Surveys and focus groups* periodically assess the effect on education (including breaking down stereotypes), research and mentoring of minority and female faculty members. The effect on recruitment of, and acceptance of offers by, minorities and women are also assessed.

## IX. AVAILABILITY OF BROADER DISCRETION WHEN JUSTIFIED

### A. Congress' Broader 14<sup>th</sup> Amendment, Section 5 Authority

The Supreme Court has recognized that Congress has greater latitude in taking race into account than state or local governments. In *Fullilove v. Klutznick*,<sup>242</sup> the Supreme Court found constitutional a Congressional program which required that 10% of federal construction grants be set aside and awarded to minority business enterprises. The Court held that Congress had been granted unique remedial powers under Section 5 of the 14th Amendment to enforce the equal protection guarantees of that Amendment, and that Congress could exercise that power where the legislative history had reflected a nationwide history of systemic discrimination against minorities seeking federal construction grants.<sup>243</sup> In *Croson*, *supra*, the Supreme Court distinguished the local ordinance at issue there from the set aside program in *Fullilove* established by Congress under its broader powers granted under Section 5 of the 14th Amendment, noting that a factor in the result in *Fullilove* was the Court's obligation to provide greater deference to the actions of the Congress, a co-equal branch of government.<sup>244</sup> Under *Adarand*, *supra*, strict scrutiny also applies to federal action. However, Section 5 may provide the necessary justification to survive strict scrutiny with a narrowly tailored approach.<sup>245</sup>

*Fullilove* and *Croson* suggest that Congress could adopt legislation enabling the National Science Foundation, National Institute of Health and other STEM research funding agencies to pursue more aggressively programs directly aimed at increasing the number of minority and female faculty and students in STEM fields. This is consistent with Congress' enactment of the Science and Engineering Equal Opportunity Act of 1981 ("SEEOA"), which gives the NSF "standing authority" to encourage full participation of women, minorities and other groups currently underrepresented in scientific, engineering, and professional fields." The legislation also established the Committee on Equal Opportunities in Science and Engineering ("CEOSE") to advise the NSF concerning options for achieving full participation of minorities and women in those fields. Under this legislation, the NSF has provided fellowship grants through the Minority Postdoctoral Research Fellowship Program ("MPRF") to assist underrepresented minorities in preparing to compete for positions in academia and in industry. In its 2004 Report to Congress, the CEOSE reported on the MPRF's progress: from 1990 to 2002, 75% of the former fellows surveyed were employed at institutions of higher learning, mainly doctorate-level research universities. A large majority (80%) said the MPRF enabled them to develop professional experience they would not have otherwise developed and helped them to enhance their research skills and focus their research interests. This experience is an indication that affirmative action to include underrepresented minorities and women can make a real difference. In its most recent 2005-2006 Biennial Report to Congress, the CEOSE stated that it would refocus its priorities to include "institutional transformation," such that colleges and universities would become more

<sup>242</sup> 448 U.S. 448 (1980).

<sup>243</sup> *Id.* at 458-67.

<sup>244</sup> *Id.* at 488.

<sup>245</sup> See also *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress overstepped its Section 5 authority in passing parts of the Violence Against Women Act of 1994, including its creation of a federal civil remedy to victims of gender-based violence).

inviting to, supportive of, and enabling of students and faculty from underrepresented groups both academically and socially.

The Supreme Court's holding in *City of Boerne v. Flores*<sup>246</sup> affects the analysis of the extent of Congress' authority under Section 5 of the 14th Amendment. If Congress chose to adopt additional legislation it would be on its strongest ground if it rested such legislation on hearings and findings that demonstrated nationwide problems in access to STEM fields resulting from discrimination against women and minorities, or another compelling governmental interest necessitating faculty and students in STEM fields. Use of the *Grutter* diversity rationale respecting students and an extension of the *Grutter* diversity rationale to faculty might suffice, as might a finding linking diverse faculty and students to the looming crisis in national security and world competitiveness as a result of shifting demographics and severe underrepresentation of minorities and, in many disciplines, women, in STEM fields. There are other fields in which Section 5 may apply if supported by a strong evidentiary foundation.

## **B. Private Foundations**

In cases where higher education institutions are directly involved in the administration of private, externally funded programs (such as scholarship programs or research funding supplements), they are likely to be subject to strict scrutiny liability for those private practices, given the institutional role in actively supporting those programs. By contrast, in cases in which the program is funded from a completely separate entity and the institution of higher education may act only as a pass-through of the separate entity's funding and program information, federal non-discrimination issues are not likely to be implicated, as a general rule.

Where the practices may fall between those two extremes, well-developed federal regulatory principles establish that institutions of higher education must satisfy relevant federal standards (under Title VI or Title IX, depending on the preference at issue) with respect to privately endowed aid in cases in which they administer or "significantly assist" in the administration of those funds. Thus, in cases where institutions of higher education that are recipients of federal funds provide administrative support (such as selection guidance) to separate private entities that fund certain scholarship recipients, they must be able to justify their participation in any such race-conscious program under Title VI legal principles.

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<sup>246</sup> 521 U.S. 507 (1997). Under the authority granted to it by Section 5 of the 14th Amendment, Congress has broad enforcement power and can legislate beyond simply providing remedies for the constitutional violation. Congress can enact statutes with criminal and civil penalties. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). So far, the Supreme Court has not disturbed its holdings on congressional authority under the post-Civil War Reconstruction amendments to legislate against racial discrimination. In *City of Boerne*, however the Court struck down the Religious Freedom Restoration Act (RFRA), which it found was not sufficiently congruent and proportional to the problem it was enacted to address. RFRA was not a race case, and there is a strong argument that when Congress acts to address racial discrimination, it is at the height of its 14th Amendment powers. The *Boerne* Court did not overrule *Morgan's* interpretation of the broad power granted to Congress under the enforcement clause of the 14th Amendment; however, the Court did make clear there are limits to those powers. Consequently, when Congress acts pursuant to its Section 5 authority, it is on the most firm ground when it has a record that demonstrates "congruence" and "proportionality," regardless of *Morgan's* vitality.

More specifically, Title VI prohibits discrimination "directly or through contractual or other arrangements" and "in the administration" of financial aid programs. As applied by the U.S. Department of Education's Office for Civil Rights, potential Title VI liability (and, consequently, the application of strict scrutiny) extends to situations in which higher education institutions fund, administer, or significantly assist in the administration of private financial aid. In such cases, that action will likely be deemed to be "within the operations of the college" and, therefore, subject to strict scrutiny.<sup>247</sup>

U.S. Department of Education regulations highlight the kinds of practices that are likely to subject higher education institutions to potential liability pursuant to strict scrutiny for the operation of private race-, ethnicity-, or gender-conscious scholarships. These include:

- Institutional assistance in setting criteria for the selection of students eligible for private scholarships;
- Institutional assistance in selecting qualifying students for private scholarships; and
- Institutional assistance in supporting the external funder through advertising or promotion (beyond the general assistance provided to any outside entity that seeks to advertise its scholarship programs).

PREFACE AND  
OVERVIEWHISTORICAL  
CONTEXTCOMPELLING  
CASE FOR  
DIVERSITYKEY  
DEFINITIONSRACE/GENDER-  
NEUTRAL  
ALTERNATIVESRELEVANT  
STATE LAWSSTUDENT  
DIVERSITYFACULTY  
DIVERSITYBROADER  
DISCRETION

ENFORCEMENT

<sup>247</sup> The Office for Civil Rights has also confirmed that "individuals or organizations not receiving Federal funds are not subject to Title VI." See U.S. Department of Education's 1994 Title VI Final Policy Guidance (Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964 (Feb. 23, 1994)) at n.12; see also *In re Northern Virginia Community College*, Case No. 03962088 (Aug. 1, 1997) (approving the transfer of the "administration and award" of race-conscious scholarships to a private entity, where the higher education institution also "returned the funds for the scholarships to the [external] donors.") It is important to note, however, that "OCR may examine the relationship among potential 'external' funders or administrators to ensure that they are, in fact, separate from the higher education institution. In one case, OCR rejected as 'not a good choice' a proposal by a college to allow a separate foundation to administer race-conscious scholarships that were funded from another external source. OCR indicated that the college's 'extensive ties' to the foundation were problematic and would raise Title VI concerns." *In re Northern Virginia Community College*, *supra*. An example of such impermissible close ties would be where the college's Student Financial Aid Committee selected the scholarship recipients for the external, private foundation.



## X. ENFORCEMENT

Several federal agencies have authority to enforce civil rights laws, and some of the agencies have overlapping authority. As a general rule, the U.S. Department of Education Office for Civil Rights has been delegated authority from other agencies to enforce civil rights laws -- including Title VI (race/educational programs and employment) and Title IX (gender/educational programs and employment) -- as they relate to educational institutions, whether in connection with their educational programs for students or employment of faculty or students. The U.S. Department of Justice has authority to enforce civil rights laws dealing with race or national origin, and it has the option to intervene in cases bringing claims under Title VI, Title VII (employment), and Title IX where the government has an interest in the issues being litigated. The Equal Employment Opportunity Commission has enforcement authority under Title VII, and the Office of Federal Contract Compliance Programs has authority to enforce certain Executive Orders dealing with the employment conduct of federal contractors. Accordingly, understanding the enforcement of the civil rights laws requires a basic understanding of which agencies have authority and jurisdiction over certain claims.

### A. U.S. Department of Education Office for Civil Rights Under Title VI and Title IX: Educational Programs and Employment

The U.S. Department of Education's Office for Civil Rights ("OCR") is a law enforcement agency, charged with the responsibility of ensuring that recipients of federal funds do not engage in discriminatory conduct. OCR enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; discrimination on the basis of gender is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and discrimination on the basis of age is prohibited by the Age Discrimination Act of 1975. OCR also has enforcement responsibilities under Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public entities, whether or not they receive federal financial assistance.<sup>248</sup> Most federal agencies have delegated certain compliance responsibilities pursuant to Title VI, Title IX, and other civil rights laws to the Department of Education to the extent they relate to educational institutions. As a result, the Department of Education is the lead agency for Title VI and Title IX compliance.<sup>249</sup>

The civil rights laws enforced by OCR extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums, as well as all private institutions that receive U.S. Department of Education funds and other agencies' funds through delegations to the Department of Education. Areas covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and

<sup>248</sup> See generally [www.ed.gov/about/offices/list/ocr/index.html](http://www.ed.gov/about/offices/list/ocr/index.html) for a comprehensive description of OCR's mission and scope of authority. See Appendix I, *infra*, for a summary of these laws and their application.

<sup>249</sup> 45 Fed. Reg. 54793 (Aug. 18, 1980).



guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment.

OCR investigates complaints filed by individuals and also conducts compliance reviews of institutions that OCR selects. When an individual complaint involves a claim of employment discrimination under Title VI or Title IX, the Department of Education generally refers the complaint to the Equal Employment Opportunity Commission ("EEOC").<sup>250</sup> Refer to Appendix 1 for a fuller discussion of the enforcement process. OCR itself handles complaints involving claims of discrimination in non-employment educational programs.

OCR is obligated by law to investigate, and resolve where possible, complaints filed with OCR that state a claim under various nondiscrimination laws.<sup>251</sup> There is no "standing" requirement.<sup>252</sup> OCR may also initiate investigations known as compliance reviews, which are agency-initiated investigations typically based on information suggesting potential noncompliance by a recipient of federal funds.

In the event that OCR determines there is sufficient evidence to conclude that a recipient is not in compliance with federal law, OCR may: (1) enter into a voluntary resolution agreement with the recipient, stipulating terms pursuant to which legal compliance will be achieved; or (2) issue a letter of findings, which may precede the initiation of enforcement proceedings. OCR is obligated by federal law to attempt a voluntary resolution when issues of non-compliance are found before proceeding to more formal enforcement steps.

(Detailed procedures for evaluating, investigating, and resolving complaints, conducting compliance reviews, and initiating enforcement are contained in OCR's Case Processing Manual at [www.ed.gov/about/offices/list/ocr/docs/ocrcpm.html](http://www.ed.gov/about/offices/list/ocr/docs/ocrcpm.html).)

OCR has two basic avenues for enforcement if it finds non-compliance with Title VI or Title IX: (1) suspend or terminate federal funds to the institution, and/or refuse to provide prospective financial assistance to the institution; or (2) refer the matter to the Department of Justice with a recommendation that enforcement litigation be filed against the institution.<sup>253</sup> Termination of or a refusal to grant federal financial assistance may be effected only after notice, an opportunity for a hearing on the record, an opportunity to appeal that decision to a review board and the Secretary of Education, and filing of a report with the House and Senate Committees with jurisdiction over the program involved.<sup>254</sup>

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<sup>250</sup> See generally 28 C.F.R. §§ 42.601 - 42.613 and discussion of Title VII, *supra*.

<sup>251</sup> The Office for Civil Rights in recent years has received on average 5000-6000 complaints of discrimination a year, the great preponderance involving allegations of discrimination based on disability.

<sup>252</sup> 34 C.F.R. § 100.7

<sup>253</sup> See 34 C.F.R. § 100.8.

<sup>254</sup> See 34 C.F.R. §§ 100.8-11; 34 C.F.R. Part 101. The regulations also prescribe procedural steps that must be followed by OCR before a matter may be referred to the Department of Justice. 34 C.F.R. § 100.8(d).

Although the Civil Rights Restoration Act redefined the terms "program or activity" for purposes of coverage under Title VI, Title IX, and other civil rights statutes to refer generally to all operations of an institution that receives federal financial assistance, it did not revise the so-called pinpoint provision in these laws that limits the effect of fund termination by providing that it "shall be limited to the particular political entity, or part thereof, or other recipient as to whom a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . . ." <sup>255</sup> "The procedural limitations placed on the exercise of such power were designed to insure that termination would be pinpointed . . . to a particular program that is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the [overall operation of an educational institution] that it thereby becomes discriminatory." <sup>256</sup>

In at least one respect, the Office for Civil Rights' jurisdiction over substantive issues of discrimination based on race, national origin and gender may be broader in scope than that of a court. That is because U.S. Department of Education regulations based on Titles VI and IX bar not only intentional discrimination, but also the use of criteria or methods of administration that have the effect of subjecting individuals to "disparate impact" discrimination in the absence of an educational necessity. <sup>257</sup>

## **B. Private Rights of Action Under Titles VI and IX: Educational Programs and Employment**

In addition to agencies' enforcement of Titles VI and IX, private individuals (aggrieved students regarding educational programs and student and faculty regarding employment) can also assert Title VI and IX claims. The most common form of relief obtained through a private right of action is an injunction, but monetary damages can also be recovered for intentional discrimination under Title IX. <sup>258</sup> States do not enjoy Eleventh Amendment immunity from monetary liability under Title IX. <sup>259</sup>

The courts have generally held that Title VII's *substantive* standards apply when evaluating claims of employment discrimination under Title IX. <sup>260</sup> DOJ has taken the same view with

<sup>255</sup> 42 U.S.C. § 2000d-1; see S. Rep. No. 64 at 20, reprinted in 1988 U.S.C.C.A.N. at 22.

<sup>256</sup> *Board of Pub. Instruction v. Finch*, 414 F.2d 1068, 1075 (5<sup>th</sup> Cir. 1969).

<sup>257</sup> 34 C.F.R. § 100.3(b)(2). In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Supreme Court ruled that Title VI disparate impact regulations do not afford private litigants a remedy in federal court. However, this decision does not affect the authority or jurisdiction of the U.S. Department of Justice or the U.S. Department of Education's Office for Civil Rights to enforce these regulations. Additionally, some courts have held that a private right of action alleging disparate impact against public actors may be sustained under 42 U.S.C. § 1983 (prohibiting any person acting under color of state law from violating federal laws). See, e.g., *White v. Engler*, 188 F. Supp. 2d 730 (E.D. Mich. 2001). But see *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3<sup>rd</sup> Cir. 2001).

<sup>258</sup> See *Franklin v. Gwinnett City Pub. Sch.*, 503 U.S. 60, 75 n.8 (1990).

<sup>259</sup> See 42 U.S.C. § 2000d-7.

<sup>260</sup> See, e.g., *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8<sup>th</sup> Cir. 1997) ("[W]hen a plaintiff complains of discrimination with regard to conditions of employment in an institution of higher learning, the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case.")

respect to agency investigations.<sup>261</sup> The same is not true with respect to the *procedural* requirements for cases brought by private individuals:

The Supreme Court has yet to explicitly decide whether the far more detailed and comprehensive procedural requirements of Title VII are applicable to claims of employment discrimination brought under Title IX. The lower courts that have faced this question are divided. One view treats Title IX as an independent basis for finding discrimination based on the substantive standards of Title VII, but divorced from its administrative requirements. Under this view, complainants filing complaints under Title IX are not subject to Title VII's filing deadlines, exhaustion of administrative remedy requirements, and state referral requirements, but are still governed by Title VII's substantive standards. The other view is that the more focused and detailed enforcement scheme of Title VII preempts Title IX in the area of employment discrimination. Under this view, employees of federally assisted education programs operated by recipients of federal financial assistance have only a Title VII remedy for sex-based employment discrimination.

The Department takes the position that Title IX and Title VII are separate enforcement mechanisms. Individuals can use both statutes to attack the same violations.<sup>262</sup>

As noted above, Title IX generally tracks Title VII's substantive analysis. Title VII provides that sex may constitute a bona fide occupational qualification, and the Title IX common agency rule likewise reflects such a BFOQ exception:

A recipient may take action otherwise prohibited ... provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students or other persons....<sup>263</sup>

DOJ has cautioned that "BFOQ's are very narrow exceptions."<sup>264</sup>

A "common rule" has been adopted by numerous federal agencies to address the enforcement of Title IX. See "Nondiscrimination of the Basis of Sex in Education Programs or Activities

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<sup>261</sup> See U.S. DOJ, "Title IX Legal Manual," at 39 ("In conducting an investigation alleging employment discrimination [under Title IX], agencies shall consider Title VII case law and EEOC Guidelines, 29 C.F.R. parts 1604-1607, unless inapplicable, in determining whether a recipient ... has engaged in an unlawful employment practice").

<sup>262</sup> U.S. DOJ, "Title IX Legal Manual," at 39 (citations omitted).

<sup>263</sup> 34 C.F.R. § 106.61.

<sup>264</sup> U.S. DOJ, "Title IX Legal Manual," at 41 (citing *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991)).

Receiving Federal Financial Assistance," 65 Fed. Reg. 52857 (Aug. 30, 2000) (also available at [www.justice.gov/crt/coord/t9final.php](http://www.justice.gov/crt/coord/t9final.php)). Among other things, these common regulations *require* gender-based recruitment in the remedial context: "Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination." *See id.* at 52873 (§.510); *see also, e.g.*, 45 C.F.R. § 86.53(a) (HHS version of common rule).

### C. U.S. Department of Justice Under Title VI and Title IX: Educational Programs and Employment

The U.S. Department of Justice has several authorities for enforcement against discrimination based on race or national origin, through the initiation of, or intervention in, court litigation:

- The U.S. Department of Justice may enforce against possible discrimination based on referrals by the U.S. Department of Education under Title VI of the Civil Rights Act in connection with educational programs or covered employment. DOJ generally seeks to settle these cases prior to filing litigation, and its enforcement guidelines include alternative administrative options for seeking resolution. *See* 28 C.F.R. § 50.3.
- Under Title VI of the Civil Rights Act of 1964, DOJ may file or intervene in litigation if (among other things) the Department receives a written complaint that an individual has been denied admission, financial aid, or other educational benefit, or was not permitted to continue to attend a public college because of race, color, religion, sex, or national origin; the Department believes the complaint is meritorious, gives notice of the complaint to the college authority, and is satisfied that the college has had reasonable time to correct the condition alleged in the complaint; and the complainant is unable, in the Department's judgment, to maintain appropriate legal proceedings for relief. *See* 42 U.S.C. § 2000c-6.
- DOJ may file or intervene in litigation under Title IX alleging gender discrimination (whether in educational programs or employment) or denial of equal protection of the laws under the 14th Amendment of the Constitution based on race, color, religion, sex, or national origin; or in lawsuits brought under the statutes it administers or where the government has an interest or where a claim or defense has been raised based on a statute or regulation administered by a federal agency. DOJ also may file an *amicus curiae* ("friend of the court") brief or otherwise participate as an *amicus* in cases relating to enforcement of the civil rights laws.

### D. Equal Employment Opportunity Commission: Employment

The Equal Employment Opportunity Commission ("EEOC") has enforcement authority under Title VII, and can initiate litigation directly or by way of a referral to DOJ.<sup>265</sup> Private individuals can also assert Title VII claims. The remedies available for Title VII violations include:

- Back pay for up to two years
- An order to hire, promote, or reinstate (courts have also ordered the demotion of someone whose promotion was the product of discrimination)

<sup>265</sup> *See* 42 U.S.C. § 2000e-5.

- Front pay (an equitable remedy and a substitute for reinstatement when reinstatement is unavailable)
- Other actions to make an individual "whole"
- Compensatory damages including various non-pecuniary losses (*e.g.*, emotional suffering) -- but available only in disparate treatment and not in disparate impact cases
- Punitive damages -- but available only in disparate treatment and not in disparate impact cases; requires a showing of malice or reckless indifference; cannot be awarded against federal, state or local governments
- Attorneys' fees and court costs "may" be allowed, to the "prevailing party"<sup>266</sup>

In addition to pursuing a complaint involving a limited number of specific individuals, the EEOC has the authority under Title VII to file a complaint which alleges a "pattern or practice" of discrimination involving a broad class of individuals. *See* 42 U.S.C. § 2000e-6.

### **E. Office of Federal Contract Compliance Programs: Employment**

Enforcement of Executive Order 11246 can take the form of an administrative procedure or a referral by the Office of Federal Contract Compliance Programs ("OFCCP") to the EEOC or DOJ to initiate judicial proceedings. The jurisdictions of the EEOC and OFCCP sometimes overlap, and the agencies have entered into a Memorandum of Understanding to coordinate their enforcement roles.

OFCCP investigates violations of these Executive Orders through compliance evaluations or in response to complaints.<sup>267</sup> If a violation is found, OFCCP typically asks the federal contractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP can initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor, or it can refer the matter to the EEOC or to the DOJ. OFCCP can pursue (or refer) "individual" discrimination complaints, as well as "pattern and practice" discrimination complaints.

If OFCCP files an administrative complaint, an ALJ hears the case and recommends a decision. If the contractor is dissatisfied with the ALJ's decision, it may appeal to the DOL's Administrative Review Board. The Board issues the final decision in all cases, even if there is no appeal.

If the Board finds a violation, it will order the contractor to provide appropriate relief, which may include back pay and restoration of employment status and benefits for the victim(s) of discrimination. Violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, debarment, and/or other sanctions. Contractors can appeal Board decisions to the federal courts.

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<sup>266</sup> *See* 42 U.S.C. §§ 2000e-5(g), 5(k); 29 C.F.R. Parts 1600, 1604, 1691.

<sup>267</sup> *See* 41 C.F.R. Part 60; *see generally* [www.dol.gov/ofccp/regs/compliance/ca\\_11246.htm](http://www.dol.gov/ofccp/regs/compliance/ca_11246.htm)

## APPENDIX I: Relevant Constitutional, Statutory, and Regulatory Authority

### 1. Equal Protection Clause (U.S. Constitution, 14th Amendment)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Public institutions are subject to Constitutional restrictions; private institutions are not. However, because Title VI has been held to be coextensive with the Equal Protection Clause, private institutions that receive federal funds are effectively subject to the same restrictions as those that arise under the Equal Protection Clause.

Most colleges and universities are not subject to the Fifth Amendment, which imposes an equal protection requirement on federal governmental entities, but Fifth Amendment case precedent is nonetheless relevant. Equal protection claims under the 14<sup>th</sup> Amendment are “indistinguishable” from equal protection claims under the Fifth Amendment. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995).

### 2. Civil Rights Restoration Act of 1987 (“CRRA”) (20 U.S.C. § 1687; 29 U.S.C. § 794, 42 U.S.C. § 2000d-4a, and 42 U.S.C. § 6101)

Provides that, if any part of an institution, agency or corporation receives federal financial assistance, the following non-discrimination laws apply to the entire institution, agency or corporation, and not just to the department or division that received the funds: Title VI, Title IX, the Age Discrimination Act, and Section 504 of the Rehabilitation Act.

The CRRA includes a definition of “program or activity” that applies specifically in the educational context:

For the purposes of this subchapter, the term ‘program or activity’ and the term ‘program’ mean all of the operations of—

\* \* \*

(A) a college, university, or other postsecondary institution, or a public system of education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

\* \* \*

any part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a(2).

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Jurisdiction under these statutes consequently applies to all activities and programs of an institution of higher education that receives federal funding. However, enforcement through loss of federal funding requires the violation of an act to have a nexus to the federal funds at risk (referred to as the “pinpoint provision”).<sup>268</sup>

Regulations:

Conforming amendments to the applicable nondiscrimination regulations can be found at 65 Fed. Reg. 68049 (Nov. 13, 2000) (Dep’t of Education) and 68 Fed. Reg. 51333 (Aug. 26, 2003) (numerous other federal agencies).

**3. Title VI (42.U.S.C. § 2000d)**

Prohibits discrimination on the basis of race, color and national origin by recipients of federal funds:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

Title VI applies with respect to all aspects of an institution’s operations. However, Title VI restricts claims of employment discrimination to instances in which the “primary objective” of the financial assistance is to provide employment. *See* 42 U.S.C. § 2000d-3. (No such restriction applies with respect to employment claims brought under Title IX.) Thus, “where the primary purpose of the Federal assistance is to provide employment, the recipient may not discriminate on the basis of race, color or national origin against applicants for employment or employees in that program. For example, Title VI prohibits discrimination against applicants for or participants in ‘work study’ programs that receive Federal assistance.” Office for Civil Rights, U.S. Dept. of Education (“ED”), *Non-discrimination in Employment Practices in Education 2* (1991) (“ED Pamphlet”).<sup>269</sup> When Title VI applies in the employment context, it “encompasses, but is not limited to, recruitment, advertising, employment, layoffs, firing, upgrading, demotions, transfers, rates of pay and other forms of compensation, and uses of facilities. The regulation applies to all employment decisions and actions made directly by ED recipients, as well as those made indirectly through contractual arrangements or other relationships with organizations such as employment agencies, labor unions, organizations

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<sup>268</sup> The “pinpoint provision” is discussed further *infra* at p. 7, in the section addressing Title VI.

<sup>269</sup> ED’s Title VI regulations also forbid employment discrimination in a second situation: “where the primary purpose of the Federal assistance is not to provide employment, discrimination against employees or applicants for employment is prohibited by Title VI when the discriminatory practice results in discrimination against the program beneficiaries, usually students.” ED Pamphlet, *supra*, at 2; *see also* 34 C.F.R. § 100.3(c)(3) (ED regulation); 28 C.F.R. § 42.104(c)(2) (DOJ regulation).

providing or administering fringe benefits, and organizations providing training and apprenticeship programs.” *Id.*

As interpreted by the agencies and the courts, Title VI prohibits both intentional discrimination (disparate treatment) and the use of facially neutral procedures or practices that have the effect of subjecting individuals to discrimination based on their race, color or national origin (disparate impact). The analysis of intentional discrimination claims under Title VI is similar to the analysis of disparate treatment under the Equal Protection Clause, *Alexander v. Choate*, 469 U.S. 287, 293 (1985), and can be proved through direct evidence of discriminatory motive or, in the absence of such evidence, using the Title VII burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (discussed below, in connection with Title VII). Title VI disparate impact claims are also analyzed using principles similar to those used under Title VII:

To establish discrimination under a disparate impact scheme, the investigating agency [or court] must first ascertain whether the recipient utilized a facially neutral practice that had a disparate impact on a group protected by Title VI. The agency must show a causal connection between the facially neutral policy and the disproportionate and adverse impact on a protected Title VI group. . . .

If the evidence establishes a *prima facie* case, the investigating agency [or court] must then determine whether the recipient can articulate a ‘substantial legitimate justification’ for the challenged practice. ‘Substantial legitimate justification’ is similar to the Title VII concept of ‘business necessity,’ which involves showing that the policy or practice in question is related to performance on the job.

To prove a ‘substantial legitimate justification,’ the recipient must show that the challenged policy was ‘necessary to meeting a goal that was legitimate, important, and integral to the [recipient’s] institutional mission.’ The justification must bear a ‘manifest demonstrable relationship’ to the challenged policy. . . . *See, e.g., Elston [v. Talladega County Bd. of Educ.]*, 997 F.2d 1394, 1413 (11<sup>th</sup> Cir. 1993)] (In an education context, the practice must be demonstrably necessary to meeting an important educational goal, *i.e.* there must be an ‘educational necessity’ for the practice). If the recipient can make such a showing, the inquiry must focus on whether there are any ‘equally effective alternative practices’ that would result in less racial disproportionality or whether the justification proffered by the recipient is actually a pretext for discrimination.

U.S. DOJ, *Title VI Legal Manual* 49-52 (2001) (citations omitted), *available at* [www.usdoj.gov/crt/cor/coord/vimanual.php](http://www.usdoj.gov/crt/cor/coord/vimanual.php) (last visited July 28, 2009).

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### Enforcement:

The U.S. Department of Education (“ED”) has enforcement authority under Title VI as it applies to programs and activities funded by ED.<sup>270</sup> ED’s Office for Civil Rights investigates complaints filed by individuals and also conducts compliance reviews of institutions that OCR selects.<sup>271</sup>

If an investigation discloses a violation of Title VI, OCR attempts to obtain voluntary compliance. If it cannot do so, OCR may initiate an enforcement action, either by referring the case to DOJ for court action, or by initiating proceedings before an administrative law judge (“ALJ”), to terminate federal funding. Terminations are made only after the recipient has had an opportunity for a hearing before an ALJ and exhausted (or not exercised) its appeals.

The primary means of enforcing compliance with Title VI, however, is through voluntary agreements between the enforcing agency and the recipient of the federal financial assistance. The relief provided through such voluntary settlements can include an agreement to discontinue certain conduct, as well as back pay in employment cases or compensatory damages in nonemployment cases. The agency is required by statute to pursue voluntary compliance before terminating or refusing to grant financial assistance, and before referring a matter to DOJ to initiate legal proceedings. 42 U.S.C. § 2000d-1. Funding suspension or termination is a means of last resort.

If voluntary compliance efforts do not succeed, four procedural requirements must be met before an agency may deny or terminate federal funds to an applicant/recipient:

- 1) the agency must notify the recipient that it is not in compliance with the statute and that voluntary compliance cannot be achieved;
- 2) after an opportunity for a hearing on the record, the ‘responsible Department official’ must make an express finding of failure to comply;
- 3) the head of the agency must approve the decision to suspend or terminate funds; and
- 4) the head of the agency must file a report with the House and Senate legislative committees having jurisdiction over the programs involved and wait 30 days before terminating funds.

U.S. DOJ, *Title VI Legal Manual*, at 79.<sup>272</sup>

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<sup>270</sup> More than 25 federal agencies have statutes, regulations, and/or guidance statements that impose civil rights obligations upon recipients of federal financial assistance from those agencies. Although this appendix does not include citations to all such legal authorities, they should not be overlooked.

<sup>271</sup> When an individual complaint involves a claim of employment discrimination under Title VI (or Title IX), ED generally refers the complaint to the Equal Employment Opportunity Commission (“EEOC”). *See generally* 28 C.F.R. §§ 42.601-42.613.

<sup>272</sup> *See also* 42 U.S.C. § 2000d-1; 34 C.F.R. § 100.6; 28 C.F.R. § 42.601 *et. seq.*

Given the severity of the sanction, on the one hand, and these procedural hurdles, on the other hand, it is not surprising that fund termination or suspension is a rare occurrence.

Moreover, when it does occur, the termination or suspension must be “limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found. . . .” 42 U.S.C. § 2000d-1. This so-called “pinpoint provision” was not modified by the Civil Rights Restoration Act of 1987, which addresses the interpretation of “program or activity” only for purposes of establishing coverage under Title VI and related statutes, and not for purposes of enforcing compliance with those statutes.<sup>273</sup> Consequently, where a Title VI or IX violation occurs in a program (e.g., a summer program for high school students) that is supported by private, not federal, funds, the available remedy should not include loss of federal funds, unless discrimination in that program “infects” a federally funding program.

Private individuals can also assert certain Title VI claims. The Supreme Court has held that there is a private right of action under Title VI as to disparate treatment claims, but not disparate impact claims. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). The relief available in such cases includes injunctive relief as well as “monetary damages.” *See Franklin v. Gwinnett Pub. Sch.*, 503 U.S. 60, 72-76 (1992). States do not have Eleventh Amendment Immunity under Title VI (or under Title IX). *See* 42 U.S.C. § 2000d-7.

#### Regulations:

DOJ Title VI Regulations: 28 C.F.R. Part 42

DOJ Title VI Coordination Regulations: 28 C.F.R. § 42.401 *et seq.*

DOJ Title VI Enforcement Guidelines: 28 C.F.R. § 50.3

EEOC Title VI Regulations: 29 C.F.R. Part 1691

ED Title VI Regulations: 34 C.F.R. § 100.1 *et seq.*

<sup>273</sup> As discussed above, the CRRA provides that Title VI, Title IX, the Age Discrimination Act, and Section 504 of the Rehabilitation Act apply to all of the operations of an institution if any part of the institution receives federal financial assistance. The statute thus superseded the Supreme Court’s decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), in which the Court held that Title IX applied to a private school whose students had received federally funded scholarships, but held that the regulation would only apply to the institution’s financial aid department and not to the school as a whole. The ED’s civil rights regulations, when originally issued and implemented, were interpreted by the ED to mean that acceptance of federal assistance by a school resulted in broad institutional coverage. Following the Supreme Court’s decision in *Grove City College*, the ED changed its interpretation, but not the language, of these regulations to be consistent with the Court’s restrictive view. When the CRRA was enacted, the ED reinstated its broad interpretation to be consistent with the CRRA, again without changing the language of the regulations. Thus in 2000, the ED amended language of the regulations to be consistent with the CRRA. The regulations now define “program or activity” or “program” as it is defined in the CRRA for the purpose of establishing coverage, but not for the imposition of penalties, which would apply only to that depart of the institution specifically involved. *See* Conforming Amendments to the Regulations Governing Nondiscrimination Under the Civil Rights Restoration Act of 1987, 34 C.F.R. pts. 100, 104, 106, and 110 (2008), available at <http://www.ed.gov/about/offices/list/ocr/docs/edlite-restorationactregs.html> (last visited July 28, 2009).

*See generally:* U.S. DOJ, Civil Rights Division, Coordination and Review Section, Title VI of the Civil Rights Act of 1964, [www.usdoj.gov/crt/cor/coord/titlevi.php](http://www.usdoj.gov/crt/cor/coord/titlevi.php) (last visited July 28, 2009).

#### 4. Title VII (42 U.S.C. § 2000e)

Prohibits employment discrimination on the basis of race, color, sex, religion, or national origin; covers hiring, firing, promotion, wages, job assignments, fringe benefits, and other terms and conditions of employment; applies to private employers with 15 or more employees, and to public employers. Title VII applies only in the employment context. In contrast, Titles VI and IX apply to all aspects of an institution's operations (including employment).

Under Title VII:

It [is] an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

To succeed on a claim under this provision, which prohibits disparate treatment, a plaintiff must show that the employer intentionally discriminated on the basis of a protected trait. Under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), a plaintiff may prove that an employment practice was intentionally discriminatory by first making a *prima facie* case sufficient to support an inference of discrimination (*e.g.*, that the plaintiff was a member of a protected class; that the plaintiff was eligible and applied for the position or program in question; that he or she was rejected; and that the defendant selected individuals outside the protected class, or the position or program remained open and the defendant continued to accept other applications). If a *prima facie* showing is made, the defendant may rebut that showing by offering a legitimate, non-discriminatory reason for the employment action. The plaintiff then has the ultimate burden of persuasion and must show that the employer's proffered reason is pretextual—*i.e.*, that the employer's true reason for the practice was racially discriminatory. Of course, "if a plaintiff is able to produce direct evidence of discrimination," he can prevail without using the *McDonnell Douglas* framework. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

Title VII expressly permits differential treatment on the basis of religion, sex, or national origin if those characteristics constitute a bona fide occupational qualification ("BFOQ"):

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

42 U.S.C. § 2000e-2(e)(1). A race-based BFOQ was considered by Congress when the other BFOQ's were considered, but no such race-based BFOQ was included in the statute as enacted. *See* 110 Cong. Rec. 2563 (1964) (amendment that would have added race to the list of potential BFOQ characteristics was defeated); Bryan W. Leach, “*Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*,” 113 YALE L.J. 1093, 1094-95 (2004).

Title VII includes a provision which states that Title VII does not “require” any employer to grant “preferential treatment” because of an “imbalance” in its workforce:

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer. . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j). *But see* discussion of OFCCP regulations *infra*, requiring federal contractors (which would include virtually all universities) to take certain actions to address “under-utilization” of women and minorities in their workforces.

On the question of Title VII disparate impact claims, Title VII states that an “unlawful employment practice based on disparate impact is established” only if:

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the

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challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party [proves that] an alternative employment practice [is available that has less disparate impact] and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1)(A). Title VII further provides that the “business necessity” defense is not available with respect to disparate treatment claims: “A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.” 42 U.S.C. § 2000e-2(k)(2).

Title VII also includes the following three provisions, which could be relevant in considering whether a particular diversity-related program would violate Title VII:

(d) Training programs

It shall be an unlawful employment practice for any employer ... to discriminate against any individual because of his race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

\* \* \*

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2.

The clear Congressional intent of Title VII was to encourage voluntary compliance to remedy discrimination in the workplace. However, employers who employ affirmative action plans in voluntary compliance with Title VII may be vulnerable to claims of reverse discrimination. The Equal Employment Opportunity Commission (“EEOC”) has issued Guidelines to “clarify and harmonize principles of Title VII.” *See* EEOC Guidelines on Affirmative Action, 29 C.F.R. § 1608.1(a). The Guidelines identify circumstances under which

voluntary affirmative action is appropriate and provide guidance for employers establishing affirmative action plans. *See generally id.* §§ 1608.3-1608.4; *see also* EEOC, *EEOC Compliance Manual*, Section 15 (“Race & Color Discrimination”), at 15-31 (“Diversity and Affirmative Action”) (April 19, 2006), *available at* <http://www.eeoc.gov/policy/docs/race-color.html>.

The EEOC affirmative action guidelines are of particular significance in light of the following statutory provision in Title VII:

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of ... the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission.... Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that ... after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect....

42 U.S.C. § 2000e-12(b).

“It is important to note that the constitutional standard for justifying racial preferences is more stringent than the Title VII standard.” Stuart Licht, *Analyzing Racial Classifications in Employment Discrimination Litigation*, 52 U.S. Attorneys’ Bulletin 10, 11 (May 2004). It is also important to note that “[p]olicies that affect actual employment decisions, such as hiring, promotions, and layoffs, have been treated differently than policies that do not affect actual employment decisions, such as targeted recruitment and outreach designed to increase the pool of qualified applicants, and data collection and analysis conducted to ensure compliance with anti-discrimination laws.” *Id.*

### Enforcement:

The EEOC has enforcement authority under Title VII, and can initiate litigation directly or by way of a referral to DOJ. *See* 42 U.S.C. § 2000e-5. Private individuals can also assert Title VII claims. The remedies available for Title VII violations include:

- Back pay for up to two years
- An order to hire, promote, or reinstate (courts have also ordered the demotion of someone whose promotion was the product of discrimination)
- Front pay (an equitable remedy and a substitute for reinstatement when reinstatement is unavailable)

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- Other actions to make an individual “whole”
- Compensatory damages including various non-pecuniary losses (*e.g.*, emotional suffering) -- but available only in disparate treatment and not in disparate impact cases
- Punitive damages -- but available only in disparate treatment and not in disparate impact cases; requires a showing of malice or reckless indifference; cannot be awarded against federal, state or local governments
- Attorneys’ fees and court costs (“may” be allowed to the “prevailing party”)

*See* 42 U.S.C. §§ 1981a(a)(1), (b); 2000e-5(g), 5(k).

Regulations:

EEOC Title VII Regulations: 29 C.F.R. Parts 1600, 1604, 1608, 1691

*See generally* EEOC Laws, Regulations and Policy Guidance, [www.eeoc.gov/policy/index.html](http://www.eeoc.gov/policy/index.html) (last visited July 28, 2009).

**5. Title IX (20 U.S.C. §§ 1681-1688)**

Prohibits sex/gender discrimination by “education” programs or activities that receive federal financial assistance:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681.

Title IX applies to all aspects of “education programs or activities” that are operated by recipients of federal financial assistance, including admissions, treatment of participants, and employment. Moreover, Title IX is not limited in its application to colleges, universities, and elementary and secondary schools. It applies to “any education or training program operated by a recipient of federal financial assistance. For example, Title IX would cover such diverse activities as a forestry workshop run by a state park receiving funds from the Department of Interior . . . [or] state and local courses funded by the Federal Emergency Management Agency in planning how to deal with disasters . . . .” U.S. DOJ, *Title IX Legal Manual*, at 6 (2001).

Title IX was modeled after Title VI and much of the Title VI case law is applicable in Title IX cases. There are important differences between the statutes, however. Title IX includes various statutory exemptions that are absent under Title VI. For example, Title IX does not cover single-sex admissions policies of elementary, secondary, or private undergraduate schools. 20 U.S.C. § 1681(a)(1); U.S. DOJ, *Title IX Legal Manual*, at 7. The Title IX regulations (like Title VI regulations) provide additional exemptions of possible relevance to the present analysis, including one that permits affirmative action to overcome the effects of conditions that result in

limited participation in a program by persons of a particular sex, and one that requires appropriate remedial action if an agency finds that a recipient has discriminated against individuals on the basis of sex. 34 C.F.R. § 106.3. Remember, however, that even if conduct is carved out of Title IX’s general prohibition on sex discrimination, public entities also have a constitutional duty not to discriminate on the basis of sex. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982) (nursing school policy that excluded male applicants violated 14th Amendment notwithstanding the applicability of a Title IX exemption).

Like Title VI, Title IX recognizes three general types of discrimination: (1) disparate treatment, (2) disparate impact, and (3) retaliation. The analysis of Title IX disparate treatment and disparate impact claims essentially tracks the analysis of such claims under Title VI, which is discussed above.

### Enforcement:

The U.S. Department of Education has enforcement authority under Title IX with respect to entities receiving financial assistance from ED; other agencies have enforcement authority with respect to their funding. *See* Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance, 28 C.F.R. §§ 42.601-42.613 (DOJ); 29 C.F.R. §§ 1691.1-1691.13 (EEOC). Agency enforcement includes the investigation of individual complaints, as well as compliance reviews of institutions selected by the agency. Private individuals can also assert Title IX claims. The most common form of relief obtained through a private right of action is an injunction, but monetary damages can also be recovered for intentional discrimination under Title IX. *See Franklin v. Gwinnett City Pub. Sch.*, 503 U.S. 60, 75 n.8 (1992). States do not enjoy Eleventh Amendment immunity from monetary liability under Title IX. 42 U.S.C. § 2000d-7. The courts have generally held that Title VII’s **substantive** standards apply when evaluating claims of employment discrimination under Title IX. *See, e.g., Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996) (“when a plaintiff complains of discrimination with regard to conditions of employment in an institution of higher learning, the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case”). DOJ has taken the same view with respect to agency investigations. *See* U.S. DOJ, “Title IX Legal Manual,” at 39 (Jan. 11, 2001) (“In conducting investigations alleging employment discrimination [under Title IX], agencies shall consider Title VII case law and EEOC Guidelines, 29 C.F.R. parts 1604-1607, unless inapplicable, in determining whether a recipient . . . has engaged in an unlawful employment practice”).

The same is not true with respect to the **procedural** requirements for cases brought by private individuals:

The Supreme Court has yet to explicitly decide whether the far more detailed and comprehensive procedural requirements of Title VII are applicable to claims of employment discrimination brought under Title IX. The lower courts that have faced this question are divided. One view treats Title IX as an independent basis for finding discrimination based on the substantive standards of Title VII, but divorced from its administrative requirements. Under this view, complainants filing complaints under Title IX are not subject to Title VII’s filing deadlines,



exhaustion of administrative remedy requirements, and state referral requirements, but are still governed by Title VII's substantive standards. The other view is that the more focused and detailed enforcement scheme of Title VII preempts Title IX in the area of employment discrimination. Under this view, employees of federally assisted education programs operated by recipients of federal financial assistance have only a Title VII remedy for sex-based employment discrimination.

The Department takes the position that Title IX and Title VII are separate enforcement mechanisms. Individuals can use both statutes to attack the same violations.

U.S. DOJ, *Title IX Legal Manual*, at 39 (citations omitted).

As noted above, Title IX generally tracks Title VII's substantive analysis. Title VII provides that sex may constitute a bona fide occupational qualification, and the Title IX common agency rule likewise reflects such a BFOQ exception:

A recipient may take action otherwise prohibited . . . provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students or other persons . . . .

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Common Rule, 65 Fed. Reg. 52857, 52874 § .550 (Aug. 30, 2000) [hereinafter Final Common Rule]; *see also* 34 C.F.R. § 106.61 (Department of Education regulation regarding BFOQ).

DOJ has cautioned that "BFOQ's are very narrow exceptions." U.S. DOJ, *Title IX Legal Manual*, at 41 (citing *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991)).

The Title IX common rule contains a general prohibition on providing or denying "aid, benefits, or services" on the basis of sex, as well as specific prohibitions relating to such areas as housing, course offerings, counseling or guidance materials for students or applicants, financial assistance, employment assistance, and textbooks and curriculum materials. Final Common Rule at 52870-73 §§ .400; .405; .415; .425; .430; .435; .455; *see also* 34 C.F.R. §§ 106.31(b); 106.32; 160.34; 106.36-.38; 106.42 (Department of Education regulations regarding same). But it also endorses affirmative action programs, and it does so using language that arguably imposes a less stringent standard than required under Title VII's "manifest imbalance" or OFCCP's "underutilization" analyses discussed below. Specifically, the Title IX common rule provides: "In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex." Final Common Rule at 52866 § 110.

As with Title VI, the primary means of enforcement under Title IX is through voluntary agreements with funding recipients, and termination of funding is a last resort that can occur only after numerous procedural requirements have been met. *See* discussion of Title VI enforcement, above. Likewise, if funding is terminated, the termination is limited in its effect to the particular program or part thereof in which noncompliance was found. 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682.

Regulations:

DOJ Title IX Regulations: 28 C.F.R. § 54.100 *et seq.*

ED Title IX Regulations: 34 C.F.R. § 106.1 *et seq.*

NSF Title IX Regulations: 45 C.F.R. Parts 611 (enforcement) and 618

Other agencies also have Title IX regulations

*See generally:* U.S. DOJ, Civil Rights Division, Coordination and Review Section, Title IX of the Education Amendments of 1972, [www.usdoj.gov/crt/cor/coord/titleix.php](http://www.usdoj.gov/crt/cor/coord/titleix.php) (last visited July 28, 2009).

**6. Section 1981 (42 U.S.C. § 1981)**

Prohibits discrimination on the basis of race in the making and enforcement of contracts, including employment contracts; covers the making, performance, modification and termination of contracts, as well as the benefits, privileges, terms and conditions of the contractual relationship. All institutions are subject to Section 1981.

Section 1981 can be very significant in a given case because it does not impose the various administrative and procedural requirements that apply under Title VII, it has a longer limitations period (4 years), and it does not cap recoverable damages. *See, e.g., CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008).

**7. Section 1983 (42 U.S.C. § 1983)**

Provides additional remedies for individuals whose civil rights are violated by individuals acting under “color of law”—*i.e.*, by individuals acting as a government official or representative.

Public institutions are subject to Section 1983; private institutions are not.

Statute of limitations determined by state limitations for personal injury claims.

**8. Section 1985(3) (42 U.S.C. § 1985(3))**

Provides cause of action for conspiracies to deprive any persons or class of persons of equal protection of the laws or of equal privileges and immunities under the laws.

**9. Section 1988 (42 U.S.C. § 1988)**

Authorizes courts to award attorneys' fees to prevailing parties in actions brought to enforce various civil rights laws, including Titles VI and IX and Sections 1981 and 1983.

**10. Federal Executive Orders**

**Executive Order 11246 (1965) (set out as a note in 42 U.S.C. § 2000e):** Provides that federal contracts of a certain amount (over \$10,000) must contain provisions that prohibit discrimination on the basis of race, color, religion or national origin; requires both equal employment opportunity and affirmative action: federal contractors are required to develop, and update annually, an Affirmative Action Plan which includes goals and timetables for the increased utilization of minorities and women (by virtue of Executive Order 11375, discussed below).

**Executive Order 11375 (1967):** Added sex discrimination provisions to the provisions required in applicable federal contracts under Executive Order 11246.

The Office of Federal Contract Compliance Programs ("OFCCP") has enforcement authority with respect to these Executive Orders. OFCCP is a division within the U.S. Department of Labor.

Affirmative Action Requirements:

The OFCCP has summarized the applicable affirmative action requirements as follows:

Non-construction (service and supply) contractors with 50 or more employees and government contracts of \$50,000 or more are required, under Executive Order 11246, to develop and implement a written affirmative action program (AAP) for each establishment. The regulations define an AAP as a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The AAP is developed by the contractor (with technical assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The AAP is kept on file and carried out by the contractor; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.

The AAP defines those areas, if any, in the contractor's workforce that reflect under-utilization of women and minorities. The regulations at 41 C.F.R. 60-2.11(b) define under-utilization as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. When determining availability of women and minorities, contractors consider, among other factors, the presence of minorities and women having requisite skills in an area in which the contractor can reasonably recruit.

Based on the utilization analyses under Executive Order 11246 and the availability of qualified individuals, the contractors establish goals to reduce or overcome the under-utilization. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to increase the pool of

qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

\* \* \*

Executive Order numerical goals do not create set-asides for specific groups, nor are they designed to achieve proportional representation or equal results. Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. The Executive Order and the supporting regulations do not authorize OFCCP to penalize contractors for not meeting goals. The regulations at 41 C.F.R. 60-2.12(e), 60-2.30 and 60-2.15, specifically prohibit quota and preferential hiring and promotions under the guise of affirmative action numerical goals.

OFCCP, Facts on Executive Order 11246—Affirmative Action, at ¶¶ C and D (Jan. 4, 2002), available at [www.dol.gov/ofccp/regs/compliance/aa.htm](http://www.dol.gov/ofccp/regs/compliance/aa.htm) (last visited July 28, 2009).

The OFCCP regulations require contractors to perform quantitative analyses to evaluate the composition of their workforces compared to the composition of the relevant labor pools and to use that information to address any identified under-utilization of women or minorities in their workforces. *See generally* 41 C.F.R. §§ 60-2.10-60-2.17. While the regulations identify specific considerations the contractors should use in conducting their analyses, they do not define specific percentages or discrepancies as *per se* under-utilization. Instead, the key question is whether the percentage of women or minorities is less than would be expected. Specifically, section 60-2.15 provides:

(a) The contractor must compare the percentage of minorities and women in each job group determined pursuant to Sec. 60-2.13 with the availability for those job groups determined pursuant to Sec. 60-2.14.

(b) When the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group, the contractor must establish a placement goal in accordance with Sec. 60-2.16.

The OFCCP regulations identify four principles in establishing placement goals:

(1) Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

(2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, or national origin.

(3) Placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.

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(4) Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

41 C.F.R. § 60-2.16(e).

Note that the OFCCP regulations use the phrase “under-utilization” of women and minorities as the trigger for establishing “goals” and initiating “efforts” to increase the number of women and minorities in an employer’s workforce. *See generally* 41 C.F.R. §§ 60-2.10-2.17. OFCCP does not use the phrase “manifest imbalance,” which is the term used by the Supreme Court in *United Steel Workers v. Weber*, 443 U.S. 193, 208 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616, 631-632 (1987), in upholding the affirmative action plans at issue in those cases. The Supreme Court did not define “manifest imbalance” in either case, or indicate how much of an imbalance is necessary to create a manifest imbalance. However, the Court did state that a manifest imbalance could be found without the statistical disparity rising to the level of a *prima facie* pattern and practice case under Title VII. *Johnson*, 480 U.S. at 632.<sup>274</sup> A *prima facie* pattern and practice case is made under Title VII by showing such a gross disparity between the minority composition of the applicable employer work force and the qualified labor pool that a court can infer an intent to discriminate. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (utilizing a standard deviation analysis to analyze statistical disparities and suggesting that a standard deviation that exceeds two is sufficient to create an inference of discrimination); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (*prima facie* case made out by showing that the percentage of minorities in the employer’s work force is significantly lower than the percentage of minorities in the general population). Thus, under the holding in *Johnson*, an affirmative action plan would be proper if something less than a gross statistical disparity is present. Whether this is a more demanding showing than the OFCCP’s “under-utilization” standard is unclear. On the general question of establishing a “manifest imbalance” in a given workforce, *see* Kenneth R. Davis, *Wheel of Fortune: A Critique of the “Manifest Imbalance” Requirement for Race-Conscious Affirmative Action Under Title VII*, 43 Ga. L. Rev. 993 (2009); David D. Meyer, Note, *Finding a “Manifest Imbalance”: the Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII*, 87 Mich. L. Rev. 1986 (1989).

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<sup>274</sup> In a Management Directive issued in 1987 relating to the affirmative action plans of federal agencies, the EEOC defined “manifest imbalance” as “[r]epresentation of [protected] groups in a specific occupational grouping or grade level in the agency’s work force that is substantially below its representation in the appropriate [civilian labor force].” EEOC, Equal Employment Opportunity Management Directive EEO MD-714 at ¶ 10.m (Oct. 6, 1967). The Directive went on to say that agencies could “establish numerical objectives (goals) for each job category or major occupation group where there is a manifest imbalance or conspicuous absence of EEO Group(s) in the work force.” *Id.* at ¶ 13.d. This Directive was superseded by EEOC Management Directive 715, which provides federal agencies with “policy guidance and standards for establishing and maintaining effective affirmative action programs of equal employment opportunity. . . .” EEO MD-715 at 1 (Oct. 1, 2003). The new Directive does not use the phrase “manifest imbalance.” Instead, it directs agencies to “identify any meaningful disparities” in their work forces by conducting a self-assessment that “compare[s] their internal participation rates with corresponding participation rates in the relevant civilian labor force . . . .” *Id.* part A, at Section II. “Meaningful disparities” is not defined. The Directive also uses the term “statistical disparities,” but, again, it does not define the term.

Enforcement:

Enforcement can take the form of an administrative procedure or a referral by the OFCCP to the EEOC or DOJ to initiate judicial proceedings. The jurisdictions of the EEOC and OFCCP sometimes overlap, and the agencies have entered into a Memorandum of Understanding to coordinate their enforcement roles.

OFCCP investigates violations of these Executive Orders through compliance evaluations or in response to complaints. If a violation is found, OFCCP typically asks the federal contractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP can initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor, or it can refer the matter to the EEOC or to the DOJ.

If OFCCP files an administrative complaint, an ALJ hears the case and recommends a decision. If the contractor is dissatisfied with the ALJ's decision, it may appeal to the DOL's Administrative Review Board. The Board issues the final decision in all cases, even if there is no appeal.

If the Board finds a violation, it will order the contractor to provide appropriate relief, which may include back pay and restoration of employment status and benefits for the victim(s) of discrimination. Violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, debarment, and/or other sanctions. Contractors can appeal Board decisions to the federal courts.

Regulations:

OFCCP Regulations: 41 C.F.R. Part 60

*See generally:* OFCCP, Compliance Assistance—Executive Order 11246, [www.dol.gov/ofccp/regs/compliance/ca\\_11246.htm](http://www.dol.gov/ofccp/regs/compliance/ca_11246.htm) (last visited July 28, 2009).

**11. State Laws**

Most states also have anti-discrimination laws. Many of these laws are similar to the federal laws, but some are broader in scope. State constitutions might also be relevant.

As one example, Pennsylvania has a Human Relations Act which prohibits employment discrimination based on “race, color, religious creed, ancestry, age, sex, national origin, handicap or disability,” 43 Pa. Stat. Ann. §§ 952; it also has a Fair Educational Opportunities Act, which states that “all persons shall have equal opportunities for education regardless of their race, religion, color, ancestry, national origin, sex, handicap or disability. 24 Pa. Stat. Ann. § 5002(a).”

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## APPENDIX II: Key Legal Opinions Involving Student Diversity

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*Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003)

Policies at Issue: Consideration of race in postsecondary student admissions

### A. Relevant Background Facts

The University of Michigan used admissions policies for admitting students to its undergraduate school and to its law school that considered race, ethnicity, and other factors in order to enroll a diverse student body that would contribute to the educational mission of the schools. The law school admissions process at issue in *Grutter* involved an individualized, holistic review of each applicant's file that considered both academic criteria (grades, LSAT scores) and other criteria that were important to the law school's educational goals (such as work experience, leadership and service, letters of recommendation, and life experiences, including whether the applicant was an underrepresented minority, defined by the University as African-Americans, Hispanics, and Native Americans). The Law School's admissions policy was designed to achieve a "critical mass" of underrepresented minority students to ensure meaningful interactions among students of different racial backgrounds that would enhance the quality of education provided by the School.

In 1998 and the years following, the undergraduate admissions policy provided for individual review and evaluation of all applicants, but the review was characterized by an index system in which (in 1999 and 2000) race and ethnicity (in addition to two other criteria) were awarded 20 points out of a possible maximum of 150 points. A maximum of 110 points could be awarded for academic performance, including grades and test scores, and a maximum of 40 points out of 150 points could be awarded based on non-academic factors, including residence, alumni relationships, personal experience and leadership, with 20 points automatically assigned for underrepresented minority students, students attending predominantly minority or disadvantaged high schools, and athletes. This index system resulted in the admission of virtually every qualified applicant who was an underrepresented minority

### B. Relevant Legal Issues

The key issues for the Court included: (1) Whether a higher education institution's mission-driven interest in enrolling a diverse student body to secure the educational benefits of diversity is a compelling interest under the strict scrutiny test applied to consideration of race and national origin in the conferral of benefits under the Equal Protection Clause of the 14<sup>th</sup> Amendment to the Constitution and Title VI of the Civil Rights Act of 1964; and (2) Whether the admissions programs at the Law School and Undergraduate School were narrowly tailored to achieve that goal.

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### C. Holding

The Court concluded that the educational benefits of diversity are a “compelling interest” that can justify the limited use of race in higher education admissions. Then, with respect to the means of achieving that interest, the Court approved (in the law school setting) the individualized, holistic review of applicants, where race is one factor among many considered; and struck down (in the undergraduate setting) as overly mechanical and rigid the process of awarding 20 out of 150 possible admissions points based on the status of students as “underrepresented minority students.”

### D. Significance

These cases resolved the long-simmering issue of whether Justice Powell’s opinion in the *Bakke* case represented the law of the land, affirming and expanding upon the principles laid out by Justice Powell in *Bakke*, in holding that a university’s interest in promoting the educational benefits of diversity can be sufficiently compelling to justify consideration of race and ethnicity in admissions decisions.

The federal requirement that race- and ethnicity-conscious policies be sufficiently flexible was, in the context of the University of Michigan’s goal of achieving the educational benefits of diversity, the single most important factor distinguishing the Court’s acceptance of the University of Michigan Law School’s admissions policy from its rejection of the undergraduate admissions policy. Building on Justice Powell’s *Bakke* opinion, the Court focused its inquiry into the flexibility of the admissions programs on two elements: (1) Whether the use of race or ethnicity ensured competitive consideration among all students (thereby not operating as an impermissible quota, insulating certain students from competition with others); and (2) whether the use of race or ethnicity ensured that each applicant was “evaluated as an individual and not in a way that [impermissibly] made an applicant’s race or ethnicity the defining feature of his or her application.”

The Court found that the law school considered the various diversity qualifications of each applicant, including race, on a “case-by-case basis” while the undergraduate program “relies on a selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant,” which operates to “by and large ... automatically determine[ ] the admissions decision for each applicant.” (O’Connor, J., concurring) (emphasis in original).

In its rejection of the University of Michigan’s undergraduate admissions program, in which 20 points (out of a possible total of 150) were “automatically” assigned to “every single applicant from an underrepresented minority group” (defined by the University of Michigan), the Court set forth several clearly impermissible characteristics of that point system:

- Certain applicants received an admissions advantage based on nothing more than their status as an underrepresented minority;

- The operation of the point system made “race a decisive factor for virtually every minimally qualified underrepresented minority applicant;” and
- The point system precluded meaningful comparisons and evaluations of how students’ “differing backgrounds, experiences, and characteristics” might benefit the institution.

Two other points are significant about the holding:

- The Court sustained the Law School’s objective of enrolling a critical mass of underrepresented minority students to achieve the educational benefits of diversity, and as not constituting a quota designed to assure admission or enrollment of specified percentages of students based on race or ethnicity. (Justice Kennedy dissented on this issue, opining that the Law School’s critical mass objectives functioned too much like a quota and that the Court inappropriately deferred to the University on this issue.)
- Justice O’Connor opinion for the Court in *Grutter* also recognized an interest in access and equal opportunity that at the least complements and supports the interest in the educational benefits of diversity as a compelling interest. Language in her opinion—stressing the importance of the accessibility of all public institutions, and particularly higher education institutions, to people of all races and ethnicities and the need to assure that paths to leadership be visibly open to talented and qualified persons of every race and ethnicity to realize the American dream—arguably provides a basis for asserting a distinct compelling interest in assuring equal access in future cases.

*Regents of the University of California v. Bakke*,  
438 U.S. 265 (1978)

Program at Issue: Medical school student admissions policies

### A. Relevant Background Facts

The University of California at Davis Medical School adopted an admissions program that reserved 16 of 100 places for entering students for underrepresented minority applicants and evaluated them under different standards than were used for other applicants.

### B. Relevant Legal Issue

Issues addressed by the Court included whether use of race in an admissions program to benefit underrepresented minorities was subject to strict scrutiny and, if so, whether such use addressed a compelling interest and was narrowly tailored to meet that interest.

### C. Holding

The Court held that the University’s admissions program was unconstitutional but did not rule out all use of race in higher education admissions. Six separate and splintered opinions were filed

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by the Justices, with no opinion commanding a majority of the Court. Justice Powell's opinion represented, in essence, a "compromise position" between two factions of the Court that were split four-to-four. Justice Powell joined with four Justices who concluded that the Constitution did not preclude all use of race in higher education admissions and he joined with four other justices who concluded that the admissions practices at issue in the case were unconstitutional. Given the split in the Court, there was a longstanding dispute in the lower courts and among legal scholars as to whether Justice Powell's opinion represented the law of the case as a binding precedent. That dispute was rendered moot by the Court's decision in the *Grutter* case.

Justice Powell's opinion found that institutions of higher education can use race or national origin, as one factor among many, in admissions and financial aid decisions to promote the educational benefits of a diverse student body, which constituted a compelling interest. His opinion cited affirmatively to and attached an appendix on the "Harvard Plan," which involved a holistic review of applicants in which race was one of multiple considerations to achieve a diverse student body in support of the educational mission of the school. The Harvard Plan established that admissions decisions involved both evaluation of the student and how to create the desired educational experience for all students; involved an initial screening to identify academically qualified students, followed by an evaluation under expanded criteria, including those associated with diversity goals; flexible consideration of race among other factors; and did not function to virtually guarantee admissions to all qualified minority applicants.

Justice Powell's opinion in *Bakke* also rejected other asserted interests as a basis for use of race in admissions:

- Societal discrimination, which would be unlimited in reach and time.
- Racial balancing, which constitute little more than discrimination for its own sake.

His opinion also held that the University's asserted interest in considering race to improve healthcare services to underserved communities may be a compelling interest to support use of race in admissions, but that evidence was lacking in the case to support that need or that the admissions program was geared to promote that goal.

#### **D. Significance**

Justice Powell's opinion in *Bakke* established the legal and practical foundation for limited consideration of race among other factors in postsecondary admissions and other enrollment management decisions in the years following the decision up to the Court's decisions in the *Grutter* and *Gratz* cases. The opinion also provided the core analysis adopted by the Court in the *Grutter* and *Gratz* cases.

*Smith v. University of Washington Law School*,  
392 F.3d 367 (9th Cir. 2004)

Program at Issue: Use of race in law school student admissions

## A. Relevant Background Facts

The University of Washington Law School used a law school admissions process by which candidates were designated—based on an index score as well as race and ethnicity and non-racial diversity factors such as cultural background, accomplishments, and career goals—as “presumptive admits” or “presumptive denials” before their applications for admission were further reviewed, with a limited number being referred to committee for further evaluation.

All applicants were measured against each other in determining the presumptive admits, taking into account all the ways that an applicant might contribute to a diverse educational environment. Evidence showed that the law school accepted non-minority applicants with grades and test scores lower than underrepresented minority applicants who were rejected.

Other features of the law school’s program included:

- using an “ethnicity substantiation letter” sent to self-identified racial and ethnic minorities with the goal of obtaining additional information about “whether the applicant’s race or ethnicity should be considered a plus factor.”
- providing Asian Americans “a slight plus for racial diversity” even where they “might have comprised 7 to 9 percent of the class in the relevant years in the absence of a racial or ethnic plus.”
- pulling and evaluating “minority files” from a pool of “discretionary” applicants (as judged by index scores) on an expedited basis to permit the Law School to “mak[e] an early decision on minority candidates who were extremely well qualified based solely on their high index scores.”
- practices that resulted in “predominantly white” applicants being referred to the admissions committee for review, rather than (in numbers comparable to minority applicants) being automatically admitted.

## B. Relevant Legal Issue

The issue before the court was whether the University of Washington Law School’s use of race satisfied strict scrutiny, consistent with the Supreme Court’s decision in *Grutter*.

## C. Holding

The court found that the Law School’s program addressed a compelling interest in the educational benefits of diversity and was narrowly tailored to meet that goal.

The court also upheld the ethnicity substantiation letters as a practice “designed to be sufficiently flexible to give more weight to those minority candidates who had more to contribute to the diversity of the classroom” and need not have been extended to all applicants (given their

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opportunity to supplement their files “on their own initiative”); deferred to the University’s judgment on the plus factor for Asian Americans, noting that the *Grutter* Court “explicitly refrained from setting a cap on what could constitute critical mass;” upheld the practice of expediting review of minority candidates as a step to achieve the compelling interest in diversity by taking steps to increase the prospects of actually enrolling qualified minority applicants; and found that none of the favorable admissions decisions by the referring admissions officer were “based solely on race” and that the Law School used a “system of checks and balances” in which such decisions were reviewed and debated in the event that the Admissions Committee chairperson recommended admission for “less academically promising applicants.”

#### **D. Significance**

This case is the first significant court decision applying the Supreme Court’s *Grutter* decision to admissions policies of other postsecondary institutions. It simply provides an example of how postsecondary schools may reasonably apply the *Grutter* precedent and frame appropriate processes that are needed to enroll a diverse student body.

*Podberesky v. Kirwan*,  
38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995)

Program at Issue: Race-exclusive postsecondary scholarships for African-American students

#### **A. Relevant Background Facts**

The University of Maryland established a race-exclusive merit scholarship program for African-American students designed to remedy the present effects of past discrimination. The University contended that the scholarships were needed to redress current conditions that were caused by past discrimination, including poor reputation in the African American community; a racially hostile campus climate; underrepresentation of African Americans; and low retention and graduation rates among African Americans. Plaintiff was an Hispanic student who did not meet the higher academic criteria for a separate merit-based scholarship program that was not restricted to African-Americans.

#### **B. Relevant Legal Issue**

The issue before the court was whether there was an adequate remedial basis for the race exclusive scholarship program.

#### **C. Holding**

The court, citing the principle that racial and ethnic distinctions are inherently suspect, found that the University had failed to meet its burden to provide a strong basis in evidence that the present effects it identified were caused by the University’s own prior discrimination and that the scholarship program was designed to cure those present effects and to prove that its remedial

measures were narrowly tailored to meet its remedial goal. The court also found that the scholarship program was not limited to its stated goals: students eligible for the program included individuals who had not suffered discrimination (the Court noted that the program was targeted to high achieving students, not the group of students against whom the University had discriminated in the past) and students from other states. The court also found that the University had failed to try, without success, any race neutral solutions to the stated problems.

#### D. Significance

While *Podberesky* is one of the few cases to address the consideration of race in financial aid, the University did not base the program on the educational benefits of diversity. The issue of those benefits as a compelling interest was simply not an issue in the case. The case does stand for the proposition that institutions that use race to confer benefits such as admissions or financial aid as a remedy for past discrimination need to be able to show a clear nexus between such use and conditions that are caused by past discrimination.

*Parents Involved in Community Schools v. Seattle School District No. 1*,  
551 U.S. 701 (2007)

Program at Issue: Use of race in assigning students under K-12 school choice programs.

#### A. Relevant Background Facts

This case involved consolidated cases relating to school choice programs of two elementary and secondary school districts in Seattle, Washington and Jefferson County, Kentucky. The Seattle program invalidated by the Court involved an “open choice” plan for its ten high schools whereby prospective 9th grade students could choose to attend any high school in the district if space was available. Under the plan, if a school was oversubscribed—and half of them typically were—students were assigned according to a series of four tiebreakers, including a priority for students with a sibling in the school and an “integration tiebreaker,” applicable to white and nonwhite students, triggered when a high school was racially imbalanced, which was defined to mean that the school was not within 10 percentage points of the district’s overall white/nonwhite racial balance.<sup>275</sup> This tiebreaker in effect focused on whether assignment of a student to an oversubscribed, racially imbalanced high school would bring the school closer to a 59% nonwhite / 41% white balance.

Similarly, the Jefferson County plan involved a voluntary school choice plan that considered a student's race (along with other factors) in determining at which school a student would be placed. The plan designated students as “black” or “other” and established that all schools needed a black student enrollment between 15% and 50%—a range based on the overall

<sup>275</sup> In each school the District sought white enrollment of between 31 and 51 percent and non-white enrollment of between 49 and 69%, each within 10% of overall district demographics.

demographics of the public school population in the County. Students were assigned to their local school or to another magnet or other school of the student's choice unless it exceeded capacity or hovered at the extreme ends of the racial guidelines.

## **B. Relevant Legal Issue**

The issues presented in both cases related to whether the Supreme Court's *Grutter* postsecondary analysis of a compelling interest in diversity applied to elementary and secondary schools, where there is not an application review process that involves a holistic review of individual student applications similar to that at the postsecondary level, and whether the programs were narrowly tailored to achieve that interest.

## **C. Holding**

In a series of splintered opinions, the Court struck down both programs, concluding that the interests advanced by both districts did not track previously recognized "compelling interests" and that the districts had not established the necessity of their respective uses of race to achieve their goals (in particular, by showing demonstrable impact of their race-conscious policies toward the achievement of their goals).

The Court's decision was a multi-faceted, fractured 4-1-4 decision, with Justice Kennedy serving as the swing vote. Justice Kennedy joined the four more "conservative" justices (Chief Justice Roberts along with Justices Scalia, Thomas, and Alito) in what was actually a narrow holding. The Court struck down the specific student assignment policies because they were not "narrowly tailored" to achieve their specified goals, in part because the districts failed to show that they could not have used race-neutral alternatives. Justice Kennedy sided with the four more "liberal," dissenting justices (Justices Breyer, Stevens, Souter, and Ginsburg) in recognizing that a school district has compelling interests in achieving a diverse student population and avoiding the harms of racial isolation—interests that can be pursued through appropriate race-conscious means.

Despite the school districts' asserted interests in the educational benefits of diversity and avoiding the harms of racial isolation, the Court concluded that the previously recognized interests that could justify the use of race—remedying the effects of past discrimination and pursuing educational benefits associated with diversity in postsecondary education—were not bases for (and therefore supportive of) the district plans. Neither of these interests was implicated in these cases because (1) the cases did not involve remedies to current effects of *de jure* (imposed by law) segregation and (2) the programs at issue did not involve a truly holistic review of individual students based on a range of factors but made race determinative of many student assignments and defined diversity in simple black and white or white and nonwhite terms.

The Court also ruled that the student assignment policies were not narrowly tailored because the districts did not prove (1) that the use of race was necessary to achieve the enumerated goals and (2) that they had fully considered race-neutral alternatives. On the former point, the Court ruled

that the district policies were not “necessary” means toward diversity goals inasmuch as they had a “minimal effect” on student assignments, “suggesting that other means would be effective.” Elaborating in a way seldom, if ever, previously emphasized in its discrimination-in-education cases, the Court compared the limited impact of the district policies—as described above—with the University of Michigan race-conscious law school policy in *Grutter* that was “indispensable” in more than tripling minority representation at the law school, from 4 to 14.5%. On the question of race-neutral alternatives, the Court found that in Seattle, several race-neutral alternatives were rejected “with little or no consideration,” and that Jefferson County “failed to present any evidence that it considered alternatives.”

Justice Kennedy issued a separate opinion reflecting clear agreement—as well as strong disagreement—with several of the major points of the Roberts opinion. In Justice Kennedy’s words, the portion of the Chief Justice’s opinion that he declined to join was “too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”

Specifically, five justices—Justices Breyer, Ginsburg, Souter, and Stevens in dissent, along with Justice Kennedy—agreed that K-12 public schools have potentially compelling interests that can be pursued through appropriate race-conscious means, including interests in promoting diversity and in avoiding racial isolation. Justice Kennedy, acting as the apparent swing vote on this issue on behalf of a Court majority, said in his concurrence:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here [in these specific policies], is to classify every student on the basis of race and to assign each of them to schools based on that classification . . . . Even so, measures other than differential treatment based on racial typing of individuals must first be exhausted. The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.

#### **D. Significance**

In their separate opinions, all nine Justices affirmed the Court’s decision in *Grutter* that the educational benefits of diversity are a compelling interest that justifies limited use of race in admissions and presumably other enrollment decisions. In addition, this is the first time that five justices have recognized the possibility of such a compelling interest in the K-12 education context. Furthermore, Justice Kennedy, as the new swing vote on these issues, recognizes

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avoidance of the harms of racial isolation as a possible compelling interest, perhaps building on the theme raised in Justice O'Connor's *Grutz* decision related to equal opportunity interests.

At the same time, the case makes clear that the Court will use a very high bar on the issue of narrow tailoring and the necessity for using race in admissions and student assignments.

## APPENDIX III: Key Legal Opinions Involving Employment

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### 1. Consideration of Race to Remedy Prior Discrimination

*Wygant v. Jackson Board of Education*,  
476 U.S. 267 (1986)

Plan/Action at Issue: Layoff; public school teachers

#### A. Relevant Background Facts

The Jackson Board of Education and a teachers' union approved a new provision to a collective bargaining agreement to protect employees who were members of certain minority groups against layoffs. The provision provided that teachers would be laid off in order of reverse seniority, but it specifically limited the proportional percentage of minority teachers that could be laid off.

When layoffs became necessary, however, the Board realized that following the policy would result in laying off tenured, non-minority teachers while retaining minority teachers on probationary status. The Board opted not to follow the policy, and instead laid off probationary minority teachers. The union and the teachers filed suit, alleging violations of the Equal Protection Clause and Title VII. A state court ruled in favor of the plaintiffs. After that decision, the Board followed the policy and subsequently laid off non-minority teachers while retaining minority teachers with less seniority.

The laid off non-minority teachers sued the Board in federal court, alleging violations of the Equal Protection Clause, Title VII, and Section 1983. The district court granted summary judgment for the Board. The court determined that the lack of minority representation on the faculty was the result of societal racial discrimination, not discriminatory hiring practices by the Board. But it found that “the racial preferences granted by the Board need not be grounded on a finding of prior discrimination. Instead, . . . the racial preferences were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing ‘role models’ for minority schoolchildren.” 476 U.S. at 272. The Sixth Circuit affirmed the lower court’s decision, adopting much of the reasoning and language of the lower court.

#### B. Relevant Legal Issue

Did the layoff provision in the collective bargaining agreement violate the Equal Protection Clause? Specifically, (1) was the “role model” theory a constitutional basis for a race-conscious layoff provision that sought to remedy societal discrimination; and (2) in the absence of particularized findings of prior racial discrimination by the school district, was the race-conscious layoff provision supported by a compelling state purpose and narrowly tailored to meet that purpose?

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### C. Holding

The Supreme Court reversed the holdings of the Sixth Circuit.

(1) The Court explicitly rejected the lower court’s reasoning that the role model theory—providing minority role models for minority students—is a valid basis for using racial classifications. The lower court upheld the provision as a valid attempt to alleviate the effects of societal discrimination. But the Supreme Court explained: “This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.” *Id.* at 274. The Court noted that the Board’s attempt to alleviate the effects of societal discrimination by linking the percentage of minority teachers to the percentage of minority students has no stopping point. Taken to its logical extreme, the Court said it would result in the very system that was rejected by the Court in *Brown v. Board of Education*.

(2) The Court determined that there was insufficient evidence that remedial action was necessary to remedy prior discrimination by the Board; therefore, the layoff provision was not supported by a compelling state purpose. The Court found no evidence of prior discriminatory hiring practices. *Id.* at 279. Even assuming such compelling purpose existed, however, the race-conscious layoff provision was not a narrowly-tailored remedy because it imposed the entire burden of the remedy on specific individuals (those laid off), rather than diffusing the burden. *Id.* at 282-83. The Court distinguished hiring remedies—where a broad group of individuals may be denied a future employment opportunity—from layoff remedies—where the lives of specific individuals will be seriously disrupted. *Id.* at 283-84. The Court held that the burden imposed on those being laid off was “too intrusive,” and the remedy—even for a compelling purpose—was “not sufficiently narrowly tailored.” *Id.* at 283.

### D. Significance

In *Wygant*, the Court considered for the first time whether and under what circumstances racial preferences are appropriate in the employment context. In this plurality opinion, the Court applied strict scrutiny, explaining that racial classifications are inherently suspect and that “the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.” *Id.* at 273.

The plurality unequivocally found: (1) remedying societal discrimination is not a legitimate justification for racial preferences; (2) promoting role models for racial minorities is also not a legitimate justification for racial preferences; and (3) tying employment goals to the racial makeup of the student body is not a narrowly tailored remedy for any particularized, prior discriminatory hiring practices because there is no logical connection between the two.

Yet the concurring and dissenting opinions suggested that promoting diversity within a faculty is a valid interest surviving constitutional review. In her concurring opinion, Justice O’Connor noted: “. . . a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the context of higher education, to support the use of racial

considerations in furthering that interest.” *Id.* at 286. Justice O’Connor agreed with the plurality’s assessment that using the “role model” theory to justify the conclusion that the plan at issue had a legitimate remedial purpose was in error. But she cautioned that providing role models is different than promoting racial diversity, and she suggested that promoting racial diversity could justify race-conscious decisions. *Id.* at 278.

Justice Stevens went even further in his dissent. Explaining that race-consciousness can be part of sound governmental decisionmaking, consistent with the Equal Protection Clause, Justice Stevens opined:

In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous ‘melting pot’ do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only ‘skin deep;’ it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

*Id.* at 315. He went on to distinguish between decisions that exclude minorities and those that include them, explaining:

. . . the fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not.

*Id.* at 316.

***City of Richmond v. J.A. Croson Co.***,  
488 U.S. 469 (1989)

Plan/Action at Issue: Set aside; minority contractors

### **A. Relevant Background Facts**

The Richmond City Council adopted a set-aside plan requiring prime contractors to whom the City awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more Minority Business Enterprises (“MBEs”). The plan

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defined an MBE as a business at least 51 percent of which is owned or controlled by minority group members. The 30 percent set aside did not apply to minority-owned prime contractors.

The Council claimed that the plan was remedial in nature and that it was enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects. The plan was adopted after public hearing, but there was no direct evidence of racial discrimination on the part of the City in letting contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors.

After the plan was adopted, the City issued an invitation to bid on a project at the city jail. The only original bidder on the contract had trouble fulfilling the 30 percent set-aside requirement. While he was requesting a waiver from the City, a local MBE submitted a bid after the deadline for prime bids. The City ultimately decided to rebid the contract, and the original bidder, J.A. Croson Company, sued the City, arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case.

## **B. Relevant Legal Issue**

Did the minority set-aside program adopted by the City violate the Equal Protection Clause? Specifically, did the City act with a compelling interest to remedy past discrimination by apportioning contracting opportunities on the basis of race?

## **C. Holding**

In this opinion, the Supreme Court considered the applicability of two prior decisions—*Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding the constitutionality of a federal set-aside program) and *Wygant* (rejecting the constitutionality of a school board's race-conscious layoff provision).

The Court held that the minority set-aside program at issue here violated the Equal Protection Clause. The City failed to point to any identified discrimination in the Richmond construction industry and therefore failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. 488 U.S. at 505. The Court distinguished *Fullilove* as dealing with the broad remedial powers of Congress to address a nationwide history of past discrimination. *Id.* at 487-91. By contrast, states and their political subdivisions cannot fashion remedies to address societal discrimination. *Id.* at 499. States may take remedial action when they have "evidence that their own spending practices are exacerbating a pattern of prior discrimination," and they must identify that discrimination with some specificity before employing race-conscious relief. *Id.* at 504-09. The Court explained, however, that its decision in this case did not preclude "a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." *Id.* at 509.

## **D. Significance**

This case is important because it established that all race-conscious action by state and local governments is subject to strict scrutiny. The Court reaffirmed its view in *Wygant* that "[t]he standard of review under the Equal Protection Clause is not dependent on the race of those

burdened or benefited by a particular classification.” *Id.* at 494. The opinion was limited, however, because the Court was not presented the opportunity to determine the appropriate legal standard under which racial classifications imposed by federal programs should be analyzed. As a result, the Supreme Court made a distinction between the broad remedial powers of Congress to address societal discrimination and the more limited powers of state and local governments to remedy the effects of identified prior discrimination. The Court later rejected that distinction in *Adarand*, where it held that strict scrutiny applies to all racial classifications, regardless of which level of government imposes them.

***Adarand Constructors, Inc. v. Pena***,  
515 U.S. 200 (1995)

Plan/Action at Issue: Additional compensation for socially and economically disadvantaged contractors

### **A. Relevant Background Facts**

A highway construction company challenged the constitutionality of provisions in federal agency contracts that granted additional compensation to prime contractors that hired subcontractors that were certified as small businesses owned and controlled by “socially or economically disadvantaged individuals.” To determine whether individuals were socially or economically disadvantaged, the government relied on statutes that used race-based presumptions.

Adarand submitted the lowest bid on a subcontract, but it lost the contract to a company that was certified as a small business owned and controlled by “socially or economically disadvantaged individuals.” Adarand filed suit, arguing that the race-based presumptions in the statute violated the Fifth Amendment’s guarantee that no one will be denied equal protection of the laws.

### **B. Relevant Legal Issue**

Under what legal standard should courts review governmental classifications based on race?

### **C. Holding**

After detailed consideration of the Court’s precedent, the Supreme Court concluded that analysis of equal protection claims under the Fifth Amendment is the same as that under the Fourteenth Amendment. The Court remanded the case to the Tenth Circuit after defining the appropriate legal standard under which courts should review governmental classifications based on race.

The Supreme Court held: “All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed . . . under strict scrutiny.” 515 U.S. at 227. Racial

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classifications are constitutional only if they are narrowly tailored to meet compelling governmental interests.

The Tenth Circuit had upheld the race-based presumptions after applying intermediate scrutiny analysis—which requires a “significant” rather than “compelling” government purpose. Holding that strict scrutiny was required, the Supreme Court remanded the case for the lower courts to review under strict scrutiny. The Supreme Court explained that the Tenth Circuit did not address the issue of narrow tailoring by considering whether there were “race-neutral means to increase minority business participation in government contracting” or whether the program was sufficiently limited in duration to ensure that it “will not last longer than the discriminatory effects it is designed to eliminate.” *Id.* at 237-38 (quoting *Croson*, 488 U.S. at 507 and *Fullilove*, 448 U.S. 448, 513 (1980)).

#### **D. Significance**

This case is significant in that the majority of the Court concluded that all racial classifications must be reviewed under strict scrutiny. The majority opinion was authored by Justice O’Connor and joined by then-Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia (in relevant part). Prior to reaching this significant holding, Justice O’Connor detailed the history of the Court’s jurisprudence, noting the gaps that its prior decisions left because of the Court’s failure to produce majority opinions, particularly in key decisions such as *Bakke* (“racial and ethnic distinctions . . . call for the most exacting judicial examination”), *Fullilove* (“racial or ethnic criteria must necessarily receive a most searching examination”), and *Wygant* (applying strict scrutiny). Underscoring its announcement that strict scrutiny applies to all racial classifications, the Court expressly overruled its decision in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), where it held that “benign” federal racial classifications need only survive intermediate scrutiny.

Justices Stevens, Souter, and Ginsburg each authored their own dissenting opinions, and they all joined in each other’s dissents. In his dissent, Justice Stevens echoed his dissent in *Wygant*, distinguishing between “state action that imposes burdens on a disfavored few and state action that benefits few in spite of its adverse effect on the many.” *Id.* at 246. In *Wygant* and again here, Justice Stevens argued that race is not always irrelevant to governmental decisionmaking and suggested that an interest in diversity is sufficient to justify a racial classification. Addressing head-on the majority’s announcement that *Metro Broadcasting* was overruled, Justice Stevens explained that the interest in diversity had been mentioned previously in *Bakke* and in Justice O’Connor’s and his own dissents in *Wygant*.

But it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting*, of course, answered that question in the affirmative. The majority today overrules *Metro Broadcasting* only insofar as it is ‘inconsistent with the holding’ that strict scrutiny applies to ‘benign’ racial classifications promulgated by the Federal Government. The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court’s holding today—indeed, the question is not remotely presented in this case—and I do not

take the Court’s opinion to diminish that aspect of our decision in *Metro Broadcasting*.

*Id.* at 257-58.

***Rothe Development Corp. v. Department of Defense***,  
545 F.3d 1023 (Fed. Cir. 2008)

Plan/Action at Issue: Set-aside; socially and economically disadvantaged contractors

Congress enacted (and reenacted several times) a statute (10 U.S.C. § 2323) which, in relevant part, set a goal that five percent of federal defense contracting dollars for each year be awarded to certain entities, including small businesses owned or controlled by “socially and economically disadvantaged individuals (as defined by . . . the Small Business Act) . . .” The Small Business Act presumed that African-Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities were “socially and economically disadvantaged individuals.”

Rothe Development Corporation (“Rothe”), owned by a white woman, lost a bid for a Department of Defense (“DOD”) contract to a company owned by a Korean-American couple, as a result of the statute. Rothe challenged the statute as facially unconstitutional. Applying strict scrutiny, the district court granted summary judgment to DOD, finding that “Congress sought to further a compelling interest supported by a ‘strong basis in evidence,’ and that the statute was narrowly tailored to that interest.” 545 F.3d at 1033. Rothe appealed.

The Federal Circuit held that the statute violated the equal protection component of the Fifth Amendment. Like the lower court, the Federal Circuit applied strict scrutiny because the statute authorized DOD to afford preferential treatment on the basis of race. But the appellate court found that there was not a strong basis in evidence (compelling interest) to justify race-based remedial action. In so holding, the court took a hard look at the statistical evidence before Congress at the time it enacted (and reenacted the statute). Specifically, it looked at the six disparity studies conducted of one state, two counties, and three cities, that Congress considered and the district court determined were sufficient to demonstrate a compelling interest for race-based preferences. Debunking the methodology used in those studies—particularly accounting for the qualifications of the pool of available minority contractors and the capacity of those contractors to bid on multiple contracts simultaneously—the court concluded: “the defects we have noted detract dramatically from the probative value of these six studies, and, in conjunction with their limited geographic coverage, render the studies insufficient to form the statistical core of the ‘strong basis in evidence’ required to uphold the statute.” *Id.* at 1045. The court cautioned, however, that it was not making any blanket statements about the reliability of disparity studies. It emphasized that “there is no precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark” and that the sufficiency of evidence to justify government action “must be evaluated on a case-by-case basis.” *Id.* at 1049. Finding that there was no compelling interest for the government program, the court did not reach a decision on whether it was narrowly tailored.

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This case is important because following the Supreme Court's lead in *Croson* and *Adarand*, the Federal Circuit confirmed that strict scrutiny applies to government programs that confer benefits to groups defined in racially-neutral terms—such “socially and economically disadvantaged”—at least where those terms are defined as including certain racial or ethnic groups.

***Sherbrooke Turf, Inc. v. Minnesota Department of Transportation***,  
345 F.3d 964 (8th Cir. 2003)

Plan/Action at Issue: Set-aside; socially and economically disadvantaged contractors

Plaintiffs challenged a federal program, as implemented in Minnesota and Nebraska, that required ten percent of federal highway construction funds to be paid to small businesses owned and controlled by “socially and economically disadvantaged individuals,” as defined by the Small Business Act. Based on the holdings in *Croson* and *Adarand*, the government conceded that the program should be analyzed under strict scrutiny because “the statute employs a race-based rebuttable presumption to define a class of beneficiaries and authorizes the use of race-conscious remedial measures.” 345 F.3d at 969. The district court upheld the program, and the Eighth Circuit affirmed.

Recognizing that Congress had spent decades compiling evidence of racial discrimination in government highway contracting, the court concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary. Therefore, Congress had a compelling interest in enacting the program. The court rejected plaintiffs’ argument that the states needed to independently meet the strict scrutiny evidentiary standard and held that a state’s implementation of the program is relevant to the narrow tailoring component of the analysis. The court then held that the states’ implementation of the program, consistent with the implementing regulations, was sufficiently narrowly tailored to withstand strict scrutiny.

***Hayden v. County of Nassau***,  
180 F.3d 42 (2d Cir. 1999)

Plan/Action at Issue: Hiring; police entrance exam

A class of applicants who took a police officers’ entrance exam sued the County alleging violations of the Equal Protection Clause and Title VII, among other claims. The exam was redesigned pursuant to several consent decrees entered into after the Department of Justice sued the County for discriminating against blacks, Latinos, and female applicants in hiring. The lower court dismissed the plaintiffs’ claims finding that “although [the exam] was designed with race in mind, [it] was administered and scored in a race-neutral fashion.” 180 F.3d at 46.

The Second Circuit affirmed the dismissal, after distinguishing *Bakke*, *Croson*, and *Adarand*:

Our reading of those cases suggests that they are concerned with *select* affirmative action tools, such as quota systems, set-aside programs, and differential scoring cutoffs, which utilize express racial classifications and which prevent non-minorities from competing for specific slots or contracts. . . . Here, unlike in the above cited cases, although Nassau County was necessarily conscious of race in redesigning its entrance exam, it treated all persons equally in the administration of the exam.

*Id.* at 49. The Second Circuit concluded that the race-neutral efforts to remedy the racially disproportionate effects of the entrance exam did not violate the Equal Protection Clause or Title VII because they did not discriminate against non-minorities. *Id.* at 54-55.

## 2. Consideration of Race to Address a Manifest Imbalance in Applicable Workforce

*Steelworkers v. Weber*,  
443 U.S. 193 (1979)

Plan/Action at Issue: Hiring; craft training program

### A. Relevant Background Facts

As part of a collective bargaining agreement, a union and private employer agreed on an affirmative action plan that reserved 50 percent of openings in a craft training program for black employees until the percentage of black craft workers in the plant was commensurate with the percentage of the black local labor force. White employees challenged the program's validity under Title VII, alleging that junior black employees received training in preference to senior white employees. The district court held that the plan violated Title VII. A divided panel on the Fifth Circuit affirmed, holding that all employment preferences based on race, including those incidental to affirmative action plans, violated Title VII's prohibition against racial discrimination in employment.

### B. Relevant Legal Issue

Did Title VII forbid a private employer from voluntarily implementing an affirmative action plan designed to eliminate manifest racial imbalances in traditionally segregated job categories?

### C. Holding

The Supreme Court reversed the Fifth Circuit's decision. It held that the voluntary race-conscious efforts of the employer's training program did not violate Title VII's prohibition against racial discrimination. The Court stated that an interpretation of Title VII that "forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected." 443 U.S. at 202. The Court upheld the plan because its "purposes . . . mirror[ed] those of the statute," which included breaking down patterns of racial hierarchy in occupations that have been traditionally segregated. *Id.* at 208. Further, the plan neither "unnecessarily trammel[ed] the interests of white employees" nor

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“create[d] an absolute bar to the[ir] advancement.” *Id.* Finally, the plan was a temporary measure designed to eliminate a manifest racial imbalance, not to maintain a racial balance.

#### **D. Significance**

*Weber* is important in that the Court established the precedent that Title VII’s prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans. To the contrary, a plan should be upheld under Title VII where its purpose mirrors that of Title VII, it does not unnecessarily trammel the rights of those outside the group it is designed to protect, and it is a temporary measure designed to eliminate a manifest imbalance. Courts consistently rely on the framework established in *Weber* in assessing the validity of affirmative action plans designed to remedy manifest imbalances.

*Johnson v. Transportation Agency, Santa Clara County*,  
480 U.S. 616 (1987)

Plan/Action at Issue: Promotion; transportation agency

#### **A. Relevant Background Facts**

The Santa Clara County Transportation Agency (“Agency”) promulgated an affirmative action plan for promoting its employees. The plan did not set aside a specific number of positions for minorities or women, but authorized the Agency to consider race or sex as one factor when evaluating qualified candidates. The plan did not contain an explicit end date, but rather created long-term and short-term goals to attain a balanced work force. When the Agency announced a vacancy for a road dispatcher position, seven applicants were deemed eligible for promotion, including Joyce (female) and Johnson (male). Ultimately, Joyce received the promotion.

Johnson sued, alleging sex discrimination in violation of Title VII. The district court found that the Agency’s plan was invalid under *Weber* because the plan was not temporary. The Ninth Circuit reversed, holding that: (1) the absence of an express end date was not dispositive; (2) the consideration of Joyce’s sex was lawful; and (3) the plan was adopted to address a conspicuous imbalance in the Agency’s work force, and neither trammelled the rights of other employees nor created a bar to their advancement. 480 U.S. at 626.

#### **B. Relevant Legal Issue**

Did the Agency’s voluntary affirmative action plan violate Title VII? Specifically, (1) was the consideration of Joyce’s sex justified because of a “manifest imbalance” reflecting the underrepresentation of women in a “traditionally segregated job category;” and (2) did Joyce’s promotion “unnecessarily trammel the rights” of male employees or create an “absolute bar to the[ir] advancement?”

### C. Holding

The Supreme Court affirmed the Ninth Circuit’s decision. The Court held that the Agency appropriately considered Joyce’s sex as one factor when promoting her. The Court found that the Agency implemented its plan to overcome a conspicuous imbalance in certain job categories and to attain a balanced work force. The plan was a moderate, flexible, case-by-case approach. Accordingly, the Court held that the plan was “fully consistent with Title VII, for it embodie[d] the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.” *Id.* at 642.

(1) The Court found that Joyce’s promotion was appropriately undertaken to remedy underrepresentation in a “traditionally segregated job category.”

The Court held that to determine whether a manifest imbalance exists that justifies taking race or sex into account for filling a job that requires special training, it is appropriate to compare the percentage of minorities or women in the employer’s work force to those in the general labor force who possess the relevant qualifications. *Id.* at 632. The Court reasoned that requiring that the manifest imbalance be related to the traditionally segregated job category ensures that the purposes of Title VII are met without unduly infringing on the interests of other employees. Importantly, however, the Court stated that “[a] manifest imbalance need not be such that it would support a *prima facie* case against the employer,” distinguishing the requirements of Title VII from the stricter requirements of the Equal Protection Clause, at least for voluntarily adopted affirmative action plans. *Id.*

Here, the Agency’s plan acknowledged that limited opportunities had existed in the past for women to find jobs in certain classifications. *Id.* at 634. In order to measure progress in eliminating underrepresentation, the Agency set a long-term goal of attaining a work force that mirrored in its major job classifications the percentage of women in the area labor market. It also directed that annual short-term goals be formulated. The Court upheld the plan because it directed that numerous factors be considered in making hiring decisions, including the specific qualifications of female applicants for particular jobs, rather than authorizing blind hiring by the numbers.

(2) The Court found that promoting Joyce neither “trammled the rights” of male employees nor “created a bar to their advancement.”

The Court discussed three points to support its conclusion. First, the Agency’s plan did not set aside a specific number of positions for women, but rather authorized the consideration of sex as one factor when evaluating qualified applicants, requiring women to compete with all other applicants. Second, Johnson neither had an “absolute entitlement” to the position nor a “legitimate, firmly rooted expectation” for it. *Id.* at 638. Finally, the Agency’s plan was intended to “attain a balanced work force, not maintain one.” *Id.* at 639. The Court noted that express assurance that a program is only temporary might be necessary if the program has quotas, in order to minimize intrusion on the expectations of other employees and to ensure that the plan is not being used to maintain a permanent racial and sexual balance. However, here, the

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Agency took “a moderate, gradual approach to eliminating the imbalance in its work force,” alleviating the need to express an end date.

#### **D. Significance**

In *Johnson* the Court applied and refined the Title VII scrutiny detailed in *Weber*—an affirmative action plan does not violate Title VII if it is designed to eliminate a manifest imbalance; it does not unnecessarily trammel on the rights of those outside the group it is designed to protect, it cannot create an absolute bar to advancement, and remedial action cannot be designed to do more than attain, rather than maintain, a balance. The Court also reaffirmed the importance of voluntary affirmative action on the part of employers. And, significantly, the Court distinguished Title VII scrutiny from that required under the Equal Protection Clause, which requires evidence of actual discrimination. This distinction enables employers to voluntarily adopt affirmative action plans without admitting past discrimination and without compiling evidence that could be used to subject them to discrimination law suits. Cases since *Johnson* have relied on this distinction.

***Humphries v. Pulaski County Special School District***,  
580 F.3d 688 (8<sup>th</sup> Cir. 2009)

Plan/Action at Issue: Promotion; public school district

A white female who had been passed over for multiple promotions sued her school district employer under Title VII and a state civil rights statute, claiming that the district unlawfully used race in its hiring practices. The district defended on the grounds that its affirmative action policies were promulgated in response to various desegregation orders, and were also justified as being necessary to address a manifest imbalance in the relevant job positions (school administrators). The district court granted summary judgment for the school district. The court of appeals reversed, finding genuine issues of material fact.

As an initial matter, the Eighth Circuit joined its “sister courts in concluding that evidence that an employer followed an affirmative action plan in taking a challenged adverse employment action may constitute direct evidence of unlawful discrimination. If the employer defends by asserting that it acted pursuant to a valid affirmative action plan, the question then becomes whether the affirmative action plan is valid under Title VII and the Equal Protection Clause.” 580 F.3d at 694. “An affirmative action policy is valid,” said the court, “if the policy is remedial and narrowly tailored to meet the goal of remedying the effects of past discrimination.” *Id.* at 695. “A policy may be considered remedial if the employer has identified a ‘manifest imbalance’ in the work force,” or if the policy was “implemented ‘in adherence to a court order, whether entered by consent or after litigation.’ But a policy may not ‘unnecessarily trammel’ the right of non-minorities, and it must be ‘intended to attain a balance, not to maintain one.’” *Id.* at 695-96 (citations omitted). Here, the court of appeals concluded that there were genuine issues of material fact related to whether the school district’s affirmative action policies “addressed a manifest racial imbalance in the workforce,” and whether the district was “impermissibly maintaining, rather than attaining, a racial balance.” *Id.* at 696.

***Rudin v. Lincoln Land Community College***,  
420 F.3d 712 (7th Cir. 2005)

Plan/Action at Issue: Hiring; community college faculty

Rudin, a white female, applied for a full-time, tenure-track position at a community college. A screening committee reviewed the applications and selected candidates for interviews, including Rudin. The list of selected candidates was sent to the College’s Equal Opportunity Compliance Officer, whose role was to “determine if there was sufficient diversity among the interviewees.” 420 F.3d at 716. At this point, Hudson, an African-American male who had applied but had not been selected for an interview, was added to the list of interviewees. Ultimately, Hudson was offered the teaching position. Rudin filed a complaint in federal court, advancing two Title VII claims: race discrimination and sex discrimination. The district court granted summary judgment for the College on both claims. On appeal, the court considered whether Rudin put forth sufficient evidence to survive summary judgment on her claims that her employer discriminated against her on the basis of her race and sex. The Seventh Circuit reversed the district court’s award of summary judgment on both claims.

With regard to Rudin’s race claim, the court noted that the College had argued below that its “race-conscious hiring process was a permissible way of increasing diversity in its faculty.” *Id.* at 721 (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)). However, on appeal, the College made no such argument. Instead, it simply argued that the practice of inserting minority candidates into the interview pool did not show that race was a consideration in the employment decision at issue.

Rudin supported her intentional discrimination claim by proffering evidence of discriminatory motive. A plaintiff can avoid summary judgment in such a case by relying on either direct or circumstantial evidence to show discriminatory motive. Here, the court found that, while not sufficient in itself to support a finding of racial discrimination, “the practice of including a racial minority in the candidate pool, *when considered with other factors in the case*, can constitute circumstantial evidence of race discrimination.” *Id.* at 722 (emphasis in original). The court summarized the other factors present in this case: “Hudson’s name was inserted into the interview pool according to a stated policy . . . that explicitly favored minority over non-minority job applicants.” The court reasoned, “he was not simply placed in the general applicant pool; he was allowed to bypass the first elimination.” *Id.* The court found additional evidence of intentional discrimination, including statements about administrative pressure to hire a minority candidate; failure of the College to follow its own internal hiring procedures; and inconsistencies in the College’s proffered justification for the hiring decision.

On the sex discrimination claim, the College conceded that Rudin had established a *prima facie* case, and the court found that the College proffered a legitimate, non-discriminatory reason for its hiring decision. Accordingly, to survive summary judgment, Rudin had to put forth sufficient evidence from which a rational factfinder could infer that the College lied about its reasons for hiring Hudson over her. The court found that Rudin provided enough facts to

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create the inference of pretext, specifically that the College's justification for not offering Rudin the position changed over time and that the College failed to follow its own hiring policies.

***Rudebusch v. Hughes,***  
313 F.3d 506 (9th Cir. 2002)

Plan/Action at Issue: Salary; one-time pay adjustment for women and minority faculty

Northern Arizona University instituted a one-time base pay adjustment for women and minority faculty after finding apparent overall pay inequity. A class of white male professors sued the University under Title VII, alleging that the University failed to consider their eligibility for pay adjustments. They alleged that they, too, were entitled to adjustments because their pay fell below the assessed mean salary that was used as a baseline for the pay adjustments given to the female and minority faculty.

In this case, the Ninth Circuit examined for the first time the Title VII parameters for analysis of pay equity adjustments. In doing so, it relied on the Supreme Court's framework in *Johnson*. First, it acknowledged that the aggrieved professors did not challenge on appeal the jury's finding that the University implemented the pay adjustments to address a manifest imbalance with respect to the pay of minority and women professors. Assuming as true that a manifest imbalance existed, the court then turned to the question of whether the pay adjustments unnecessarily trammelled on the rights of the white male professors. The court determined that the one-time adjustment was not "an absolute bar" to their advancement, they retained their positions at the same salary, and they were eligible for future promotions. The court explained:

One thing is clear in this case: Whatever the reason, white male faculty who were earning less than their predicted salaries were not doing so because of their race or sex, or at least they have not demonstrated as much. Despite this reality, *Rudebusch* would have us hold that anytime an employer attempts to address a manifest imbalance in the pay equity context, it must simultaneously consider the unrelated concerns of those employees who have not demonstrated such a legally cognizable imbalance. Such logic would all but eliminate employer efforts to attain pay equity as required by law.

313 F.3d at 522-23. Yet, the court stopped short of upholding the lower court's summary judgment in favor of the University. Instead, the Ninth Circuit remanded the case for the fact-finder to determine whether the pay adjustments were more than remedial. Consistent with *Weber* and *Johnson*, the adjustments would be valid under Title VII only the extent they were designed to "attain" a balance and they did not overcompensate the women and minority faculty members.

***Maitland v. University of Minnesota,***  
155 F.3d 1013 (8th Cir. 1998)

Plan/Action at Issue: Salary; pay adjustment for female faculty

Maitland, a male faculty member at the University of Minnesota, filed a reverse discrimination suit, alleging that salary increases paid to female faculty at the University pursuant to a consent decree violated his equal protection rights and Title VII. Prior to entering into the consent decree, each side to the underlying dispute prepared a statistical pay study. The results of the studies differed because the parties disagreed on the relevance of certain variables. The results of the plaintiffs' study showed a disparity between male and female salaries roughly between four and ten percent, while the results of the University's study showed results around two percent. The parties relied on a compromise model—showing salary disparities around six percent—upon which they based the affirmative action salary plan set forth in the consent decree. In his suit against the University, Maitland argued that the University discriminated against him by implementing salary increases for women when there was no salary disparity that required remediation.

On an appeal of a grant of summary judgment in favor of the University, the Eighth Circuit considered whether there was undisputed evidence that there was a “manifest” (Title VII) or “conspicuous” (equal protection) imbalance in the salaries of male and female faculty at the time the affirmative action salary plan was implemented. The court relied on the standard set forth in *Weber* and *Johnson*—that consideration of gender in an affirmative action plan is improper unless it is justified by a “manifest imbalance” that reflects an underrepresentation of women in traditionally segregated job categories, that the plan does not unnecessarily trammel on the rights of male employees, and that the plan was intended to attain, not maintain a balance in the workforce. The court concluded that because there were three comparative salary studies reaching different results (one of which might not be statistically significant) the relevant evidence regarding whether there was a manifest imbalance in salaries was far from undisputed. The court explained that the finder of fact must be able to consider the variables that have been excluded, hear the reasons for the exclusions, and determine what weight to accord the results of the studies. Accordingly, the Eighth Circuit reversed the lower court's grant of summary judgment for the University.

***Smith v. Virginia Commonwealth University***,  
84 F.3d 672 (4th Cir. 1996)

Plan/Action at Issue: Salary; pay adjustment for female faculty

Five male professors sued the University alleging that pay increases for female faculty members violated Title VII. The pay increases were given after a salary equity study was completed. The Salary Equity Study Committee used a multiple regression analysis, but it excluded several performance factors, such as teaching quality; quantity and quality of publications; and quantity and quality of research. The plaintiffs contended that excluding these factors, among others, called into question the validity of the study's results. The University relied solely on the results of the multiple regression analysis to determine manifest imbalance in pay between male and female faculty members and in granting the pay increases to the female faculty.

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The lower court granted summary judgment in favor of the University, and the male professors appealed. Relying on *Weber* and *Johnson*, the Fourth Circuit considered whether there was a manifest imbalance that justified the pay increases. The court reversed the grant of summary judgment: “Given the number of important variables omitted from the multiple regression analysis, and the evidence presented by the appellants that these variables are crucial, a dispute of material fact remains as to the validity of the study to establish manifest imbalance.” 84 F.3d at 677.

***Honadle v. University of Vermont & State Agricultural College***,  
56 F. Supp. 2d 419 (D. Vt. 1999)

Plan/Action at Issue: Promotion; state college

Honadle, a white female professor, brought a reverse discrimination suit under Title VII and the Equal Protection Clause when Halbrecht, a Chinese-born female professor, was promoted to a department chair position over her. The court considered the validity of the University’s affirmative action plan under Title VII and the Equal Protection Clause.

#### *Title VII*

The court held that the University’s affirmative action plan, which included employment goals to correct the underutilization of women and minorities, was valid under Title VII. The University’s affirmative action plan included a Minority Faculty Incentive Fund (“MFIF”) that provided financial incentives to departments that increased minority hiring for tenure-track faculty positions. But the MFIF funds were not intended to influence hiring decisions. Upholding the University’s affirmative action plan under Title VII, the court found that the University presented sufficient evidence of a manifest imbalance and that the plan did not unnecessarily trammel on the rights of non-minorities. The court noted that the awards were limited and that the incentive funds would not be available for job groups that no longer showed underrepresentation.

Importantly, this case helps define what constitutes a “manifest imbalance.” The court explained that under OFCCP regulations, government contractors can identify underutilization of minorities or women by analyzing the difference between the actual and the estimated available number of employees under a standard deviation test or the 80 percent rule, where actual employees must be at least 80 percent of the estimated available employees. 56 F. Supp. 2d at 421-22. Under a standard deviation test, the court observed, “[a] difference between an expected and an observed value greater than two or three standard deviations would support a prima facie case of discrimination. But an employer may, consistent with Title VII, adopt an affirmative action plan where the disparity is not so striking.” *Id.* at 426. Here, the court found manifest imbalance where the underrepresentation was “above or near the two standard deviation level.” *Id.*

### *Equal Protection*

The court found that a public University could be “racially conscious” by compiling “statistics on the racial and ethnic makeup of its faculty and encouraging broader recruiting of . . . minorities, without triggering the Equal Protection Clause’s strict scrutiny review.” *Id.* at 428. The court also found that the MFIF did not “have the purpose of creating an inducement to hire” minorities. *Id.* However, the court distinguished the requirements under Title VII and equal protection analysis: “Although an affirmative action plan may be justified under Title VII by statistical evidence of ‘manifest imbalance’ in the workforce, [citing *Johnson*], evidence of ‘gross statistical disparities’ is required to withstand an equal protection challenge [citing *Croson*].” *Id.* at 429. The court determined that the two standard deviation difference that was sufficient to withstand a Title VII challenge did not demonstrate the gross statistical disparity, standing alone, needed to survive an equal protection challenge. Moreover, the University “articulated no other purpose asserted to be compelling, such as encouraging diversity or ensuring equal opportunity.” *Id.* at 429. Accordingly, the court held that if the jury determined that MFIF funds influenced its decision to hire Halbrendt, the affirmative action plan would not withstand strict scrutiny review.

***Sharkey v. Dixie Electric Membership Corp.,***  
262 Fed. Appx. 598 (5th Cir. 2008)

Plan/Action at Issue: Hiring; electric company

Sharkey, a white male, brought a reverse discrimination suit under Title VII, alleging that the Dixie Electric Membership Corporation (“DEMCO”) engaged in discriminatory hiring practices when it hired McCray (African-American) over other candidates. DEMCO had adopted affirmative action plans since 1984, and each year it evaluated and updated its minority hiring and placement goals. Pursuant to the plan at issue, the number of minorities in the job category for which Sharkey applied was underutilized by over 33 percent, as compared to available minorities with the requisite skills in the recruitment area. The district court granted summary judgment for DEMCO, finding DEMCO presented a legitimate, nondiscriminatory rationale for hiring the African-American employee over other candidates pursuant to the affirmative action plan, and that Sharkey did not satisfy his burden of proving that the plan was invalid and that it was a pretext for race-based discrimination.

The Fifth Circuit affirmed. On appeal, as on summary judgment, DEMCO argued that it presented a legitimate, nondiscriminatory rationale for hiring McCray pursuant to its internal hiring procedures, including consideration of the affirmative action plan. Relying on *Weber*, the court explained: “[W]e have no difficulty concluding that the subject [plan] is valid, and thus can serve as DEMCO’s legitimate, nondiscriminatory rationale for hiring McCray over other white candidates.” 262 Fed. Appx. at 604.

Sharkey did not argue on appeal that there was no manifest imbalance in DEMCO’s workforce. Rather, he argued that the plan violated the *Weber* test because it was an absolute bar to employment for white applicants and it was not temporary in nature. The court rejected both claims. The court found that the plan was not an absolute bar to the advancement of whites and

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did not unnecessarily trammel their interests because the uncontroverted evidence established that the application and hiring process was not discriminatory (employee selection considered an applicant's background, education, training, experience; applicants had to score "medium" or "high" on certain test before being selected for an interview; the race of candidates did not appear their applications and it was unknown to DEMCO prior to a candidate's interview; DEMCO selected several applicants for interviews—both white and African-American—but Sharkey was not selected; McCray was chosen for the a variety of reasons including his background, education, and prior work experience at DEMCO). Consideration of McCray's race was simply a plus factor among others and was permissible under Title VII. The court also found that Sharkey failed to create a genuine issue of material fact as to whether the plan was anything more than a temporary measure designed to eliminate a manifest racial imbalance in DEMCO's workforce.

***Schurr v. Resorts International Hotel, Inc.***,  
196 F.3d 486 (3d Cir. 1999)

Plan/Action at Issue: Hiring; hotel

Schurr, a white male, brought this action against a hotel/casino. Schurr alleged that race was the determining factor in the employer casino's decision not to offer him a job that was filled by an equally qualified minority candidate. Schurr contended that the casino's affirmative action plan was invalid under Title VII. The district court granted summary judgment to the hotel/casino. The Third Circuit considered whether it was appropriate to take race into account in a hiring decision when there was no showing of or reference to a manifest racial imbalance in the pertinent job category or industry.

The Third Circuit reversed the district court's award of summary judgment and held that the employer hotel's affirmative action plan was invalid under Title VII. It relied on the two-prong test, derived from *Weber*, to determine whether an affirmative action plan: (1) had "purposes that mirror[ed] those of the statute," and (2) "unnecessarily trammel[ed] the interests of the [non-minority] employees." 196 F.3d at 497. To answer the first question, the court relied on the rule it announced in *Taxman*: "Unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and therefore, cannot satisfy the first prong of the *Weber* test." *Id.* (quoting *Taxman*, 91 F.3d at 1556). To be characterized as remedial, the court held, the plan must be designed to correct a "manifest imbalance in traditionally segregated job categories." *Id.* (quoting *Weber*, 443 U.S. at 207). The court found that there was no reference to or showing of past or present discrimination in the casino industry. Therefore, the plan was invalid under the first prong of *Weber*, and violated Title VII.

### **3. Consideration of Race to Obtain Greater Employee Diversity**

#### **a. Diversity in the Education Context**

***Taxman v. Board of Education of the Township of Piscataway***,  
91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997)

Plan/Action at Issue: Layoff; individual public high school teacher

### A. Relevant Background Facts

The Board of Education of Piscataway relied on an affirmative action plan to lay off a white teacher instead of a black teacher with equal seniority. The affirmative action plan was adopted to provide equal educational opportunities for students and equal employment opportunities for employees and prospective employees. It was not adopted to remedy the results of any prior discrimination or any identified underrepresentation of minorities in the Piscataway school system. The plan provided, in relevant part, that the most qualified candidate would always be recommended for a position, but where candidates had equal qualifications, the candidate meeting the criteria of the affirmative action program would be recommended.

The Board had to lay off one teacher, and it faced the rare situation of two teachers with identical seniority. One was white (Taxman) and one was black. The Board decided to invoke the affirmative action policy to break the tie and laid off the white teacher. She filed a charge of discrimination with the EEOC, and the United States sued the Board in federal court asserting claims under Title VII. Taxman joined the lawsuit.

### B. Relevant Legal Issue

Did Title VII permit an employer with a racially balanced work force to grant a non-remedial racial preference in order to promote racial diversity?

### C. Holding

The Third Circuit explicitly rejected diversity, standing alone, as a valid reason to deviate from the antidiscrimination mandate of Title VII. The court described the two purposes of Title VII: (1) to end discrimination and (2) to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nation's work force (manifest imbalance). By contrast, the court said, "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." 91 F.3d at 1558.

The court struck down the Board's affirmative action policy because it did not satisfy either prong of the test articulated by the Supreme Court in *Weber*. First, the plan's purpose did not mirror the purpose of Title VII. The Board admitted that the purpose of the plan was not remedial in nature and that there was no evidence of a manifest imbalance among faculty in the individual school or in the school district as a whole. Rather, its purpose was the pursuit of racial diversity.

Second the court concluded that the plan unnecessarily trammled nonminority interests. In so holding, the court considered three factors: structure of the plan, duration of the plan, and the plan's applicability to layoff decisions. Structure: The plan was found to lack definition and structure. By contrast, affirmative action plans that have been upheld had defined objectives and benchmarks to ensure decisions met each plan's purpose. Duration: The plan was of unlimited duration. By contrast, valid affirmative action plans "are 'temporary' measures that seek to

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‘attain,’ not ‘maintain’ a ‘permanent racial . . . balance.’” *Id.* at 1564 (quoting *Johnson*, 480 U.S. at 639-40). Layoffs: Invoking the plan resulted in the layoff of a nonminority, tenured employee. Applying the Supreme Court’s decision in *Wygant*, the court explained that “the harm imposed upon a nonminority employee by the loss of his or her job is so substantial and the cost so severe that the Board’s goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion.” *Id.*

The Third Circuit held that promoting racial diversity, absent a history of past discrimination, was insufficient justification for laying off the white teacher because of her race and violated Title VII.

#### **D. Significance**

In this case, the Third Circuit definitively stated that diversity, standing alone, is not a valid reason to implement race-conscious decisions. Then Judge, now Supreme Court Justice Alito sat on the Third Circuit panel and sided with the majority. This case is also important because prior to granting certiorari, the Supreme Court invited the Solicitor General to express his views on the legal issues presented in the case. The United States submitted an amicus brief to the Supreme Court, arguing that diversity is, indeed, a valid justification for race-conscious decisions.

The Solicitor General first argued that the writ of certiorari should have been denied because the case was not representative of the typical non-remedial affirmative action policy because the school district implemented the policy to foster diversity in a single department of a high school and because it used race in a layoff decision. Accordingly, the Solicitor General argued that the Court should wait for a case that presented the question of the validity of non-remedial affirmative action in a more typical Title VII context.

Significantly, however, the Solicitor General went on to argue that non-remedial affirmative action could be upheld if it survived strict scrutiny analysis. He made the following key arguments in response to the question of “whether Title VII prohibits race-conscious affirmative action in employment that is designed to foster diversity in the faculty of [an educational institution]:”

(1) Following the Court’s decision in *Adarand*, the Department of Justice issued an extensive memorandum to federal agencies offering three important guiding principles for applying strict scrutiny to non-remedial affirmative action:

First, to the extent affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective, beyond the mere achievement of diversity itself. Second, in some settings, in order to perform its mission, a government entity may have a compelling need for a diverse workforce that justifies the use of racial considerations. And third, to justify the use of race, there must be a convincing factual basis for the conclusion that the use of race is needed to promote the government’s mission; a broad assertion of operational need is insufficient. If those prerequisites are satisfied, narrowly tailored, non-

remedial affirmative action can be constitutional. . . . In our view, affirmative action that satisfies the three prerequisites set forth above and is narrowly tailored to further a compelling institutional mission also complies with Title VII.

Brief for the United States as Amicus Curiae, *Piscataway Twp. Bd. Ed. v. Taxman*, 519 U.S. 1089 (1997) (No. 96-679), 1997 WL 33561365, at \*9 (citations omitted).

(2) Citing *Jacobson*, *Zaslowsky*, *Bakke*, and Justice’s Stevens’ dissent in *Wygant*, the Solicitor General argued:

Courts of appeals have [] held that a school district may constitutionally seek to provide a racially diverse faculty at each of its schools by using race as a factor in deciding the particular school to which a teacher is assigned. Such policies can serve multiple educational objectives: A faculty composed of persons with different backgrounds and experiences is likely to offer a wider array of educational perspectives. Children in the minority at a school may feel more welcome and able to learn when the staff is racially diverse. And exposing students to a diverse faculty on a daily basis can dispel stereotypes and misconceptions and foster mutual understanding and respect in a much more powerful and lasting way than imparting those lessons through words alone.

*Id.* at \*12 (citations omitted).

(3) Arguing that “non-remedial affirmative action that satisfies constitutional standards also mirrors a purpose of Title VII,” the Solicitor General observed that in the legislative history of the 1972 amendments to Title VII:

Congress concluded that the exclusion of minority teachers from educational institutions profoundly affects the education of children: It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

*Id.* at 15 (citations omitted).

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***Hill v. Ross,***  
183 F.3d 586 (7th Cir. 1999)

Plan/Action at Issue: Hiring; university faculty

University of Wisconsin blocked the hiring of Hill (male) to a tenure-track position in its clinical psychology department because the dean of the college wanted the department to hire a woman instead to meet the department's hiring goals pursuant to the University's affirmative action plan, which was implemented to find and assist members of underrepresented groups and not to remedy any past discrimination.

The lower court granted summary judgment for the University, holding that the decision was supported by a valid affirmative action plan. The Seventh Circuit reversed, finding that a reasonable jury could decide that: (1) the dean used Hill's sex as the sole basis for denying him the position, rather than one factor among many; (2) the dean's decision was not mandated by the affirmative action plan because the dean cared only about the results of the hiring process—hiring more women—rather than the openness of the outreach and recruitment process; and (3) the University failed to provide any “exceedingly persuasive” justification for its race-based decision, as it is required to do to survive constitutional scrutiny.

***University and Community College System of Nevada v. Farmer,***  
930 P.2d 730 (Nev. 1997), *cert. denied*, 523 U.S. 1004 (1998)

Plan/Action at Issue: Hiring; community college faculty

The Nevada University system instituted a “minority bonus policy” by which a University department could hire an additional faculty member after the initial placement of a minority candidate. This policy was an unwritten amendment to the University's affirmative action policy. The University hired black male candidate into its sociology department. The plaintiff in this case (Farmer) was another finalist for that position. Farmer was hired into the department one year later, taking the additional position created by the minority bonus policy. She sued the University, alleging race and gender discrimination under Title VII, among other claims. A jury returned a verdict in Farmer's favor and the University appealed. The Nevada Supreme Court considered whether University's affirmative action plan survived strict scrutiny. Specifically, did the University have a compelling interest in implementing the plan to increase faculty diversity, and was it narrowly tailored to achieve its goal?

The Nevada Supreme Court upheld the affirmative action plan as constitutional. Relying on the Supreme Court's reasoning in *Bakke*, it held that the University had a compelling interest in fostering a culturally and ethnically diverse faculty. The court explained: “We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court.” 930 P.2d at 735. The court noted that a failure to attract minority faculty perpetuates the University's “white enclave” and “limits student exposure to multicultural diversity.” *Id.* at 97-

98. The court also determined that the minority bonus policy was “narrowly tailored to accelerate racial and gender diversity.” *Id.* at 98.

***Jacobson v. Cincinnati Board of Education,***  
961 F.2d 100 (6th Cir.), *cert. denied*, 506 U.S. 830 (1992)

Plan/Action at Issue: Transfers; public school teachers

Plaintiffs, teachers and a teachers’ union, sued the Board of Education, alleging that its teacher transfer policy violated the Equal Protection Clause. The policy, adopted in 1970, was designed to ensure that the teaching staff at each school reflected the racial balance of the teaching staff of the entire school system. To achieve that balance, the policy restricted the voluntary transfer of some teachers and required reassignment of others.

The Sixth Circuit reasoned that *intermediate* scrutiny was the proper legal standard because while the Board’s transfer decisions were “race conscious,” the policy was race neutral because it applied equally to black and white teachers. 961 F.2d at 102. Applying intermediate scrutiny, the court held that the policy was substantially related to an important government interest. *Id.* at 103. In so holding, the court relied on the Supreme Court’s recognition in *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969), “that the attainment of an integrated teaching staff is a legitimate concern in achieving a school system free of racial discrimination.” *Id.* at 102.

***Zaslowsky v. Board of Education,***  
610 F.2d 661 (9th Cir. 1979)

Plan/Action at Issue: Transfers; public school teachers

A class of approximately 25,000 teachers sued the Board of Education, alleging that a faculty integration plan violated the Equal Protection Clause and 42 U.S.C. § 1981. The goal of the plan was to ensure that the teaching staff at each school reflected the racial balance of the teaching staff of the entire school system, plus or minus ten percent. The plan would achieve that goal by first using voluntary transfers and then mandating transfers, if necessary. The Board implemented the plan in response to pressure from the Office of Civil Rights of the Department of Health, Education, and Welfare, which alleged that the Board’s voluntary plan that was already in place violated Title VI of the Civil Rights Act and that the racial composition of the students and faculty that existed at that time raised a presumption that the school district was assigning teachers in a discriminatory manner. 610 F.2d at 662.

The Ninth Circuit upheld the plan, explaining that its focus “was to enhance the educational opportunities available to the students by achieving better racial balance in the teaching faculty throughout the district,” an objective “well recognized and approved by the

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Supreme Court” in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *Id.* at 664.

**b. Diversity in Other Contexts**

*Lomack v. City of Newark*,  
463 F.3d 303 (3d Cir. 2006)

Plan/Action at Issue: Transfers; firefighters

Recognizing that many of its firefighting companies were racially homogeneous, a city fire department implemented a race-based transfer and assignment policy to diversify the companies. Many firefighters were involuntarily transferred based solely on their race. The City acknowledged that there was no history of discrimination. After firefighters and their unions filed suit against the City, the City articulated three “compelling interests” for implementing its diversity policy: (1) to eliminate *de facto* discrimination, (2) to secure the educational, sociological, and job performance benefits of diverse fire companies, and (3) to comply with a consent decree that was more than 20 years old. The Third Circuit considered whether the City’s race-based transfer and assignment policy within its fire companies violated the Equal Protection Clause when any existing racial imbalance was not the result of past intentional discrimination by the City. Specifically, was securing the educational, sociological, and job performance benefits of a diverse firefighting company a compelling interest that justified a transfer and assignment policy employing racial classifications?

The Third Circuit held that the race-based transfer and assignment policy violated the Equal Protection Clause because none of the three interests asserted by the City were sufficiently compelling for the program to survive strict scrutiny. The court held that there was no remedial justification for the policy and rejected the City’s contention that using racial classifications to eliminate unintentional *de facto* segregation was appropriate. The court also held that the holding in *Grutter*—that the educational benefits of diversity are compelling—does not apply in this context. In so holding, the court explained, “*Grutter* does not stand for the proposition that the educational benefits of diversity are *always* a compelling interest, regardless of the context. Rather, it stands for the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate.” 463 F.3d at 310. Because the mission of the fire department was to fight fires, not to educate, the diversity argument was not sufficiently compelling.

***Petit v. City of Chicago***,  
352 F.3d 1111 (7th Cir. 2003), *cert. denied*, 541 U.S. 1074 (2004)

Plan/Action at Issue: Promotions; police exam

The City relied on an examination as the basis for promotions of patrol officers to the rank of sergeant. The raw scores were standardized for race and ethnicity. Based on the exam results, the City promoted 402 candidates. Non-minority patrol officers who were not promoted sued the City alleging that the promotions violated their rights under the Equal Protection Clause. The City defended by arguing that it had a compelling interest in a diversified police force. On appeal, the Seventh Circuit considered whether the City's use of a test, standardized for race and ethnicity, to make promotion decisions violated the Equal Protection Clause. Specifically, was there a compelling need to have a diversified police force, and if so, were the procedures narrowly tailored to meet that goal?

The Seventh Circuit held that the City's actions survived strict scrutiny. First, relying on the reasoning in *Grutter*, the court determined that the City had a compelling interest in a diversified police force and that such diversity met an operational need of the police department. The court explained that diversity in a large metropolitan police force, charged with protecting a racially and ethnically divided major American city like Chicago, is "even more compelling" than diversity in the educational setting. The court deferred to the views of criminal justice experts and police executives regarding the necessity of the affirmative action plan (*e.g.*, when police officers are supervised by minorities, fears that the department was hostile to the minority community declined; and visible presence of minorities in supervisory positions was critical to effective policing in a racially diverse city because it helped earn the trust of the community).

Second, the court determined that the City's procedure of making promotion decisions based on the results of a test that was standardized for race and ethnicity was narrowly tailored to meet the goal of achieving a racially diverse police force.

Other cases have relied on *Petit* for the proposition that diversity is a compelling interest in law enforcement. For example in *Alexander v. City of Milwaukee*, 474 F.3d 437 (7th Cir. 2007), the parties agreed that the City had a compelling interest in a diversified police force. The court held in that case, however, that the race-conscious promotion policy was not sufficiently narrowly tailored to survive strict scrutiny.

***Klawitter v. City of Trenton***,  
928 A.2d 900 (N.J. Super. Ct. App. Div. 2007)

Plan/Action at Issue: Promotions; individual police officer

A white detective sued the City, claiming reverse discrimination under New Jersey's Law Against Discrimination, after she was denied a promotion in favor of an African-American officer who had identical seniority and comparable or better qualifications. The appellate court upheld the jury verdict in favor of the white officer, finding that there was sufficient evidence to support the jury's verdict that race was a determinative factor in the City's decision. The court

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determined that the City did not have an affirmative action plan in place and held that “race can be considered in an employment decision only pursuant to and in accordance with an established affirmative action plan.” 928 A.2d at 918.

#### **4. Consideration of Race in Outreach Efforts**

*Shuford v. Alabama State Board of Education*,  
897 F. Supp. 1535 (M.D. Ala. 1995)

Plan/Action at Issue: Outreach/hiring; state postsecondary educational system

##### **A. Relevant Background Facts**

This case involved reviewing the constitutionality of a consent decree in a class-action lawsuit brought by a class of African-American employees, and later joined by a class of women employees, against the Alabama State Board of Education. The decree sought to increase the pool of qualified applicants through recruitment.

##### **B. Relevant Legal Issue**

Was an affirmative action plan designed to increase the number of women and minorities in the pool of qualified applicants, but where neither race nor sex was a determination factor in hiring decisions, valid under the Equal Protection Clause and Title VII?

##### **C. Holding**

The court began its analysis by distinguishing between “inclusionary” and “exclusionary” affirmative action techniques, but noted that other courts had not explicitly analyzed affirmative action in that way. The court characterized inclusionary techniques as those that ensure that the pool of qualified candidates is as large as possible, increasing competition; whereas exclusionary techniques usually select some applicants over others from the pool. The key consideration in determining the validity of a program under the Equal Protection Clause, however, is its adverse effects on third parties. 897 F. Supp. at 1551. The court reasoned, “inclusive techniques impose no or slight adverse effects on third parties and are easier to justify than exclusion, which has significant potential to cause adverse consequences.” *Id.* at 1552. The court found that inclusionary techniques are both proper and desirable, and do not require traditional Equal Protection and Title VII analysis. However, exclusionary techniques that involve the selection process must survive traditional analysis under the Equal Protection Clause and Title VII.

The court concluded that the decree at issue in this case was inclusive, finding that the employment goals were neither quotas—setting aside or reserving jobs for women and minorities, nor selection goals—creating preferences of women or minorities. The court held that employment goals detailed in the decree required inclusive, sex-conscious techniques like recruitment and merely increased competition. Accordingly, the court found that traditional constitutional analysis was not necessary to determine that the legality of the decree. *Id.* at 1556

(explaining that only the sex-conscious provision of the decree that set a quota for the recruitment and selection committees necessitated traditional analysis).

Nonetheless, the court considered the legality of the decree under traditional constitutional analysis. In reviewing the constitutionality of the decree under Title VII and the Equal Protection Clause, the court noted that classifications based on race must survive strict scrutiny, while classifications based on sex must survive only intermediate scrutiny. With regard to the sex-conscious provisions, the court held that the remedies embodied in the decree were “substantially related to the goal of eradicating sex discrimination,” and did not unnecessarily trammel on the rights of men. *Id.* at 1567. Accordingly, the sex-conscious provisions of the decree were valid under both the Equal Protection Clause and Title VII. With regard to the race-conscious provisions of the decree, the court held that they were narrowly tailored to meet the compelling interest of remedying discrimination in the postsecondary educational system. The court found that the decree provided justified reforms to rectify the effects of discrimination against women and minorities in Alabama.

#### D. Significance

This case is significant in that it deals with outreach efforts that broaden the pool of qualified applicants, rather than affirmative action in hiring decisions. The court detailed the distinction between inclusive and exclusive affirmative action techniques, a distinction that was suggested as early as 1986 by Justice Stevens in his dissent in *Wygant*, 416 U.S. at 316, but had never been adopted as acceptable analysis of the legality of affirmative action plans. The court suggested that plans that are inclusive and that do not adversely affect third parties are legal and need not be subject to traditional analysis. The court considered the affirmative action plan under traditional constitutional analysis, however, recognizing that “relying on the distinction between inclusion and exclusion at all is a deviation from general affirmative-action case law.” 897 F. Supp. at 1556. The court found that a plan survives strict scrutiny and is consistent with Title VII where, as here, it is conscious of race or sex in its efforts to broaden the applicant pool and therefore increases competition among applicants, but where neither race nor sex is a factor in the selection of specific applicants.

***Duffy v. Wolle***,  
123 F.3d 1026 (8th Cir. 1997)

Plan/Action at Issue: Hiring; individual probation officer

A panel of three United States District Judges appointed a female applicant to a vacant Chief United States Probation Officer position over a male applicant (Duffy). At the suggestion of the Administrative Office of the United States Courts, the vacant position was advertised in a publication that was circulated nationwide to all probation officers to reach a “diverse pool of applicants.” Duffy sued, alleging reverse discrimination. The lower court granted summary judgment for the panel, and the Eight Circuit affirmed. The court determined, in relevant part, that the Administrative Office’s interest in obtaining a diverse pool of applicants did not support

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a finding that the panel's proffered non-discriminatory reasons for hiring the female candidate were in fact a pretext for intentional discrimination. 123 F.3d at 1038-39.

The court explained: "An employer's affirmative efforts to recruit minority, female applicants does not constitute discrimination. An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. This not only allows employers to obtain the best possible employees, but it is an excellent way to avoid lawsuits. The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, is not an appropriate objection, and does not state a cognizable harm." *Id.* at 1039 (internal citations omitted).

*Sussman v. Tanoue*,  
39 F. Supp. 2d 13 (D.D.C. 1999)

Plan/Action at Issue: Promotion; individual FDIC employees

Plaintiffs, white males, alleged that an affirmative action program of the Federal Deposit Insurance Company ("FDIC") was discriminatory because it called for quotas for women and minorities at the expense of white males. The court ruled for the defendants.

Through its affirmative action plan, the FDIC had collected data about the racial and gender make-up of its workforce, noted dramatic disparities relative to the general labor force, and made efforts to reduce those disparities through monitoring hiring practices and eliminating artificial barriers. Notably, the program did not give the FDIC's Affirmative Employment and Counseling Section, the section charged with overseeing the program, the authority over the hiring process. The court found that "the FDIC had taken steps to ensure that no person [was] denied equal employment opportunity with the agency, but the agency d[id] not give any specific group or person a preference in hiring." 39 F. Supp. 2d at 25.

Relying on *Duffy, Shufford*, and other case law, the court noted that "[c]ourts have consistently declined to apply strict scrutiny to outreach efforts to minorities which do not accompany actual preferences." *Id.* The court drew a careful distinction between those cases and *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), where the D.C. Circuit held that FCC regulations that provided strong incentives for radio stations to grant racial preferences in hiring were subject to strict scrutiny. The court explained that in *Lutheran Church*, the FCC regulations put pressure on stations to make race-based hiring decisions. By contrast, "the program in this case falls within the category of programs, those conscious of race but devoid of ultimate preferences, which have been consistently upheld by courts." 39 F. Supp. 2d at 27. Accordingly, the court held that the FDIC's affirmative action plan did not need to be examined under strict scrutiny and that it was legal under both Title VII and the Equal Protection Clause.

***MD/DC/DE Broadcasters Association v. FCC,***  
236 F.3d 13 (D.C. Cir. 2001)

Plan/Action at Issue: Outreach/recruitment; radio broadcasters

Broadcasters challenged a FCC rule requiring licensees to achieve a broad outreach in their recruiting efforts, arguing that the rule violated the equal protection component of the Fifth Amendment. The court held that the strict scrutiny standard of review applied in the context of determining constitutionality of those affirmative action outreach efforts. Specifically, the court determined that a government mandate for recruitment targeted at minorities constituted a racial classification that subjected persons of different races to unequal treatment. Here, for example, the FCC rule made it less likely that non-minorities would receive notification of job openings solely because of their race.

In so holding, the court questioned the ruling by Eleventh Circuit in *Allen v. Alabama State Board of Education*, 164 F.3d 1347 (11th Cir. 1999), *vacated*, 216 F.3d 1263 (11th Cir. 2000), that strict scrutiny is inapplicable in affirmative outreach situations where “the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race broadening the pool of applicants, but disadvantaging no one.” 236 F.3d at 20 (quoting *Allen*, 164 F.3d at 1352). The court expressly disagreed with the Eleventh Circuit’s conclusion that preferential recruiting “disadvantages no one.” *Id.* (quoting *Allen*, 164 F.3d at 1352). Holding that the FCC’s rule was subject to review under strict scrutiny, the court explained: “that the most qualified applicant from among those recruited will presumably get the job does not mean that people are being treated equally—that is, without regard to their race—in the qualifying round.” *Id.* at 21.

Relying on its holding in *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998), the court explained that promoting “programming diversity” is not a compelling interest and questioned whether the FCC had a compelling interest for the rule at issue. The court held that the FCC rule did not survive strict scrutiny, regardless of any purported compelling interest, because its “sweeping” requirements were not narrowly tailored to meet a compelling interest. 236 F.3d at 22.

In this case, the D.C. Circuit held that outreach efforts targeted solely at recruiting minorities are subject to strict scrutiny review. Notably, however, the court did not examine the distinction made by the District Court in *Sussman* between outreach plans that create pressure to make race-based hiring decisions and those that do not, and it made no mention of the Eighth Circuit’s decision in *Duffy*. The Supreme Court has not yet had the opportunity to weigh in and resolve what seems to be an emerging split among the circuit courts on what standard of review is applicable to outreach efforts.

***Hammer v. Ashcroft,***  
383 F.3d 722 (8th Cir. 2004)

Plan/Action at Issue: Promotion, individual corrections officer

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Hammer, a white male, filed suit alleging race and age discrimination when he was twice denied a promotion in favor of first an African-American and then a man six years younger than him. The Eighth Circuit affirmed the lower court's grant of summary judgment against Hammer on both claims. The court relied on its holding in *Duffy*—that inclusive recruitment efforts do not constitute discrimination—to reject Hammer's race claim.

## 5. Consideration of Race to Avoid Disparate Impact Liability

### ***Ricci v. Destefano (Firefighters)***

129 S. Ct. 2658 (2009), *reversing* 530 F.3d 87 (2d Cir. 2008) and 554 F. Supp. 2d 142 (D. Conn. 2006)

Plan/Action at Issue: Promotions; firefighter exam

### A. Relevant Background Facts

The New Haven Fire Department administered oral and written examinations for promotion to Lieutenant and Captain. Pursuant to merit selection rules mandated by local law and the results of the exam, certain firefighters qualified for the opportunity to be promoted. For promotion to lieutenant, 34 out of 77 examinees passed the exam (25 white, 6 black, and 3 Hispanic), but only 10 white firefighters were eligible for promotion. For promotion to captain, 22 out of 41 examinees passed the exam (16 white, 3 black, and 3 Hispanic), but only 9 were eligible for promotion (7 white and 2 Hispanic). The City of New Haven ("City") determined that the test results yielded a racially disparate impact and ultimately decided not to certify the test results. Without certification, the promotion process could not proceed, and the City did not make any promotions.

The white and Hispanic firefighters who took the exam, and who were allegedly passed over for promotion, filed suit alleging violations of Title VII and the Equal Protection Clause. At trial, the plaintiffs argued that the City inappropriately relied on race in deciding not to certify the test results. With regard to Title VII, plaintiffs claimed that the City's admitted desire to comply with Title VII's anti-disparate-impact requirements was a pretext for intentional discrimination against plaintiffs—that the City's diversity rationale was prohibited as reverse discrimination under Title VII. 554 F. Supp. 2d at 151, 157-58. Although the City did not conduct a validity study of the test prior to rejecting its results, it did determine that the racial disparity in the results showed an adverse impact under the EEOC's guidelines. *Id.* at 153-54. Nonetheless, plaintiffs asserted that the City's failure to conduct the validity study or explore other alternatives was a violation of Title VII. Plaintiffs also argued that the City violated the Equal Protection Clause by either applying a race-based classification system for promotion or employing a neutral system in a discriminatory manner.

The District Court heard arguments on cross motions for summary judgment. The District Court awarded summary judgment to the City, determining that the City's decision not to certify the test results was not in violation of either Title VII or the Equal Protection Clause. The lower court determined that intent to remedy disparate impact of the exam "is not equivalent to an intent to discriminate against non-minority applicants." *Id.* at 158-59. Although the City

considered race in deciding not to certify the test results, the result was race neutral because all the test results were discarded and no one was promoted. The Second Circuit affirmed. The Supreme Court reversed.

## B. Relevant Legal Issue

Was the City’s decision to reject the test results and not promote any firefighters a violation of Title VII and the Equal Protection Clause? Specifically, where a promotion process was race neutral but yielded unintended, racially disproportionate results, did the City’s decision to reject the results—because it hoped to achieve racial proportionality in promotions—run afoul of Title VII and the Equal Protection Clause?

## C. Holding

The Supreme Court reversed the holding of the district court and the Second Circuit. Justice Kennedy delivered the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. The Court noted that, “however well intentioned or benevolent it might have seemed,” the City’s decision not to certify the results was based on race. 129 S. Ct. 2674. In this context, the Court articulated the issue before it as “whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination.” *Id.*

The majority of the Court held that, “under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.” *Id.* at 2677. The Court reasoned that “fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.” *Id.* at 2681. The majority further held that summary judgment for the City was inappropriate because the City “lacked a strong basis in evidence to believe it would face disparate-impact liability of it certified the examination results.” *Id.*

The Court recognized that the racial adverse impact was “significant” and that the City faced a *prima facie* case of disparate-impact liability because of the small number of minority firefighters (compared to white firefighters) who were eligible for promotion. *Id.* at 2677-78. But the majority concluded that “a *prima facie* case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity, and nothing more—is far from a strong basis in evidence” that the City would have been liable for disparate-impact discrimination had it certified the test results. *Id.* at 2678. The Court reasoned that a *prima facie* case of disparate impact liability is not—by itself—a strong basis in evidence of liability because the City would only be liable if evidence showed that the test was not job related and consistent with business necessity or if there was an equally valid but less discriminatory alternative that the City knew about but failed to adopt. *Id.* The majority found no such evidence in the record.

Although the firefighters alleged violations of both Title VII and the Equal Protection Clause, the Court reached its decision only on Title VII grounds. *Id.* at 2681.

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Justices Scalia and Alito wrote separate concurring opinions.

*Dissent*

Justice Ginsburg authored the dissenting opinion, which was joined by Justices Stevens, Souter, and Breyer. Justice Ginsburg disagreed with the majority's determination that Title VII's disparate-treatment and disparate-impact provision conflict:

Standing on equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity.

Yet the Court today sets at odds the statute's core directives. When an employer changes an employment practice in an effort to comply with Title VII's disparate-impact provision, the Court reasons, it acts "because of race"—something Title VII's disparate-treatment provision generally forbids. This characterization of an employer's compliance-directed action shows little attention to Congress' design or to [the Supreme Court's] line of cases Congress recognized as path-marking.

*Id.* at 2699 (citation omitted).

Justice Ginsburg criticized the Court's adoption of the strong-basis-in-evidence standard from equal protection jurisprudence because the Equal Protection Clause prohibits only intentional discrimination and does not have a disparate-impact component. *Id.* at 2700. "Title VII, in contrast, aims to eliminate all forms of employment discrimination, unintentional as well as deliberate." *Id.*

She explained that the majority's holding also conflicts with "a dominant Title VII theme . . . that the statute should not be read to thwart efforts at voluntary compliance." *Id.* at 2701 (citations omitted). She reasoned that the Court's holding will require employers to establish a "provable, actual violation" against themselves before taking voluntary action to comply with the disparate-impact provision of Title VII, a standard that, in her view, is contrary to settled law and the purpose of the statute. *Id.* And she noted that even in cases applying the strong-basis-in-evidence standard, the Court has never before suggested that anything beyond a *prima facie* case would have been required to justify voluntary action consistent with Title VII's disparate-impact proscription. *Id.* at 2702 n.7.

Reading Title VII's disparate-treatment and disparate-impact proscriptions as complementary, and in keeping with the purpose of the statute -- ending workplace discrimination -- Justice Ginsburg offered an alternative analysis:

[A] employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity.

*Id.* at 2699. Justice Ginsburg reasoned that, here, the City “had ample cause to believe its selection process was flawed and not justified by business necessity.” *Id.* at 2703-07

**D. Significance**

Because the Court decided this case under Title VII, the holding applies to both public and private entities. In adopting the strong-basis-in-evidence standard, the Court arguably raised the bar for employers who wish to act voluntarily to eliminate unintentional discrimination resulting from race-neutral selection devices.

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## APPENDIX IV: Diversity Considerations as They Relate to the First Amendment and Academic Freedom

Colleges and universities, whose three-pronged educational missions embrace providing excellent educational experiences for all students, producing excellent research to increase and disseminate knowledge, and serving the nation's needs for a well-prepared citizenry and workforce, have a compelling interest in creating a broadly diverse student body<sup>276</sup> and faculty.<sup>277</sup> Public colleges and universities play a special role in society by providing otherwise unavailable broadly affordable access to higher education.<sup>278</sup> Many public and private institutions of higher education require a broadly diverse community in order to provide excellent educational experiences and deliver excellent research in a global, multicultural and diverse society.<sup>279</sup> A broadly diverse academic community is fundamental to higher education's endeavor to best serve all students, and to contribute to solutions that will enable our nation and society-at-large to progress and prosper. Many institutions' faculties have found and embraced this necessity.

Neither free speech interests protected by the First Amendment to the U.S. Constitution that apply in public educational institutions,<sup>280</sup> nor principles of academic freedom that apply in most public and private institutions of higher education, are offended when the institution appropriately considers whether a faculty member's *conduct* in class, the research laboratory or advising activities furthers the institution's educational mission-driven diversity objectives when making hiring, promotion or tenure decisions. This consideration does not judge the faculty member's viewpoint or the content of speech, nor does it depend on the faculty member's race or

<sup>276</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 325, 330-32, 338-39 (2003).

<sup>277</sup> See *Univ. and Comm. College Sys. of Nev. v. Farmer*, 930 P.2d 730, 735 (Nev. 1997) (faculty diversity is a compelling interest in a manner similar to student body diversity in higher education that may justify consideration of race in faculty hiring), *cert. denied*, 523 U.S. 1004 (1998); *cf. Rudin v. Lincoln Land Comm. College*, 420 F.3d 712, 721 (7th Cir. 2005) (district court granted summary judgment for college, which argued that compelling diversity interests justified consideration of race in a faculty hiring, but diversity argument not made on appeal).

<sup>278</sup> See *Grutter*, 539 U.S. at 331-32.

<sup>279</sup> This is particularly the case in science, technology, engineering and mathematics ("STEM") fields because STEM fields are critical to the economic strength and security of the nation. In light of national demographics, which demonstrate that African Americans, Hispanics and Native Americans and women are severely underrepresented in STEM higher education and careers, while their numbers are increasing in the college age and total U.S. populations, there is a national imperative to increase the racial and gender diversity of STEM higher education, business and industry in a short time. Other underrepresented groups include students who are first-generation college-goers. If higher education fails to meet this national need, the nation's leadership in higher education, innovation and the global economy, as well as our national security, may be expected to decline. See Volume I, *supra*; see also Arthur L. Coleman, Scott R. Palmer, Jennifer Rippner, and Richard W. Riley, *A 21<sup>st</sup>-Century Imperative: Promoting Access and Diversity in Higher Education, A Policy Paper on Major Developments and Trends* (College Board and American Council on Education, October 2009).

<sup>280</sup> The First Amendment applies through the 14<sup>th</sup> Amendment to state institutions of higher education. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925); see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993).

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gender; it evaluates the effectiveness of the faculty member's workplace conduct. There are also certain circumstances in which reasonable regulation of speech is necessary and appropriate in an academic setting.

### Academic Freedom and Responsibility

Freedom to express ideas, however controversial and offensive, is a deeply held value, a veritable foundation of the intellectual freedom that defines great institutions of higher education, public and private.<sup>281</sup> This academic freedom, which extends to the institution itself as well as to faculty and students, is a fundamental policy governing academic life, quite apart from the law. A faculty member's academic freedom, as conferred by the institution as a matter of culture and policy, is recognized by most institutions of higher education, regardless of the as-yet to be fully defined extent to which it is also afforded legal protection under the First Amendment.

Academic freedom is accompanied by the countervailing policy of academic responsibility, which is also a foundation of academic culture and is embedded in many institutions' internal regulations and, indeed, in federal research funding agencies' requirements.<sup>282</sup> Members of the college and university community have the responsibility, in the exercise of their academic freedom, to act legally, ethically, and with academic honesty (e.g., in scholarship, research, test-taking, and grading); and to not unreasonably interfere with the ability of others in the academic community to participate fully in academic life. Faculty members have the responsibility to commit their primary effort to the fulfillment of their core mission-driven duties of teaching, research and service.

That one faculty member's or student's speech may offend another is not a breach of this responsibility; it is sometimes the necessary consequence of an open intellectual dialogue or debate. An institution may encourage its members to respect one another's right to express differing views, to communicate in a manner that will evidence that respect, and to communicate effectively (which often means with some modicum of diplomacy so that others may more willingly listen). However, there are times when an exchange of ideas will be highly offensive to some or even many in the academic community of a college or university.<sup>283</sup> At the same time,

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<sup>281</sup> See, e.g., YALE UNIV., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE 5 (1975) ("The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views."); COMMITTEE ON A CIVIL, SAFE, AND OPEN ENVIRONMENT, UNIVERSITY OF FLORIDA, FINAL REPORT (2008); NARRATIVE REPORT AND GENERAL RECOMMENDATIONS, TASK FORCE ON ASSEMBLY AND EXPRESSION, UNIVERSITY OF TEXAS AT AUSTIN (2002).

<sup>282</sup> See, e.g., YALE UNIV., *supra* note 281; AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS [hereinafter AAUP 1940 Statement] ("Institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole" and academic freedom in teaching and learning is accompanied by "duties correlative with [such] rights."); 42 C.F.R. §§ 50, 93 (Public Health Service, Office of Research Integrity regulations); 2 C.F.R. § 180.

<sup>283</sup> See, e.g., *supra* note 281.

making statements that are offensive is one thing, and creating an environment in the classroom, research laboratory, or office that undermines the core mission of the institution—or are so hostile to another that s/he cannot, as a reasonable person, be expected to work there—is another matter entirely and would offend the responsibility that accompanies academic freedom.

### First Amendment Protections

While the legal boundaries of academic freedom have not been fully drawn, the Supreme Court has clearly held that the academic freedom of an *institution* of higher education is protected by the First Amendment to the U.S. Constitution. The U.S. Supreme Court has recognized the special and fundamental role of colleges and universities in the preparation of future generations to fully participate as citizens and leaders in our democratic society, as well as their fundamental role in the creation of a well-prepared workforce in support of our economic strength and national security.<sup>284</sup> The Court has recognized that, if institutions of higher education are to fulfill these critical roles in our society, then as long as such institutions operate within Constitutional and legal boundaries, they have a First Amendment-protected interest in exercising their discretion as to academic matters.<sup>285</sup>

Justice Powell’s plurality opinion in *Regents of the University of California v. Bakke*<sup>286</sup> recognizes a university’s academic freedom as “a special concern of the First Amendment” and quotes Justice Frankfurter’s concurring opinion in *Sweezy v. New Hampshire*<sup>287</sup> for the essential elements of that freedom. Justice Frankfurter acknowledges that the government must refrain from interfering in the “intellectual life of a university” and that there are “‘four essential freedoms’ of a university to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>288</sup> While the case was decided on due process, not First Amendment, grounds,<sup>289</sup> Justice Frankfurter’s articulation of

<sup>284</sup> *Grutter*, 539 U.S. at 331-32; *Widmar v. Vincent*, 454 U.S. 263, 278-79 n.2 (1981) (Stevens, J., concurring); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (The Court held that the New Hampshire Attorney General, acting as agent for the state legislature, could not, on due process grounds, compel a citizen who is a professor to testify as to the content of his class lectures. The offending questions sought to determine the professor’s personal viewpoint on socialism. While not basing its ultimate decision on the First Amendment, the Court recognized important First Amendment protected interests in academic freedom, stating, “The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.”).

<sup>285</sup> *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking [sic] by the academy itself.” (citation omitted)); Arthur L. Coleman and Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 1 (Summer 1996).

<sup>286</sup> *Bakke*, 438 U.S. at 312.

<sup>287</sup> *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)

<sup>288</sup> *Id.* (quoting from senior scholars at the University of Cape Town and University of the Witwatersrand, South Africa); *Grutter*, 539 U.S. at 363; *Bakke*, 438 U.S. at 312.

<sup>289</sup> *Sweezy*, 354 U.S. at 254-55.

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the important relationship of academic freedom and the First Amendment forms the basis of later decisions that depend on recognition of a college' or university's First Amendment-protected interests in that freedom.

Justice O'Connor's majority opinion in the University of Michigan law school admissions case, *Grutter v. Bollinger*,<sup>290</sup> leaves no doubt that the Supreme Court has in fact recognized that institutions of higher education have an important First Amendment-protected interest in exercising academic discretion. It is this First Amendment interest upon which Justice O'Connor relies to find a context in which the Court will recognize the compelling educational interest in a broadly diverse student body that can survive strict judicial scrutiny on Equal Protection grounds and justify the consideration of race in student admissions decisions.<sup>291</sup> The Court's binding endorsement of this interest as being within the First Amendment's ambit represents one of the greatest victories for higher education and the nation.

For important societal reasons wrapped up in the role of higher education in our society, as well as the roles of faculties and students in higher education, the government must also refrain from regulating the intellectual freedom of individual faculty and students to freely explore and debate their ideas in the context of public higher education.<sup>292</sup> The Supreme Court has observed the importance of faculties and students to the achievement of the institution's compelling educational mission, as well as the importance of ensuring freedom from government intrusion on the academic discretion of faculties and students.<sup>293</sup> However, while the Court has clearly recognized the institution's First Amendment-protected academic discretion to decide "who may teach, what may be taught, how it shall be taught . . . ,"<sup>294</sup> the Supreme Court has never squarely decided the extent of any First Amendment-protected academic freedom of a faculty member, or whether any such individual interest could prevail when in conflict with that of the institution.<sup>295</sup>

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<sup>290</sup> *Grutter*, 539 U.S. at 331-32. The most recent articulation is in *Parents Involved In Comm. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2753-54, 2792-95 (2007) (Kennedy, J., concurring) (Chief Justice Roberts, writing for the Court, states that "we have recognized as compelling for purposes of strict scrutiny...the interest in diversity in higher education upheld in *Grutter*" and in so doing, "relied upon considerations [i.e., expansive free speech rights] unique to institutions of higher education" and Justice Kennedy's needed concurrence in the result, distinguishing his view of diversity as being a compelling educational goal at all educational levels in a nation whose history includes segregation and where *de facto* segregation is still present).

<sup>291</sup> See *Grutter*, 539 U.S., at 329, 331-32.

<sup>292</sup> *Sweezy*, 354 U.S. at 250 (stating that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." The case involved forced testimony of a citizen, who is a college professor, concerning the content of his lectures as they relate to his beliefs regarding socialism).

<sup>293</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy*, 354 U.S. at 250 (stating that were the government to "impose any strait jacket upon the intellectual leaders in our colleges and universities [that] would imperil the future of our Nation").

<sup>294</sup> *Sweezy*, 354 U.S. at 263; see *Grutter*, 539 U.S. at 331-32.

<sup>295</sup> See *Grutter*, 539 U.S. at 331-32 (institution's First Amendment protected academic freedom to determine that broad student body diversity is a compelling need in order to achieve its educational mission); *Ewing*, 474 U.S. at 226, n.12 (stating that the academy itself has autonomous authority to make academic decisions and academic

The former General Counsel of the American Association of University Professors (“AAUP”) has opined that faculty members have or should have their own legally protected right to academic freedom independent from that which the institution holds.<sup>296</sup> The AAUP clarifies the dimensions of that freedom by recognizing the importance of both academic freedom and corresponding academic responsibility. Even in recognizing the faculty member’s right to speak as an individual citizen without institutional censorship,<sup>297</sup> the AAUP recognizes that, at least in clear circumstances, the institution may find “extramural utterances” of a faculty member to be so at odds with the faculty member’s duties as to justify initiation of disciplinary action.<sup>298</sup> The Fourth Circuit, the Third Circuit, and a concurring opinion in the D.C. Circuit have rejected the notion of independent, legally protected academic freedom of faculty members.<sup>299</sup> The Seventh Circuit has recognized both the faculty member’s and the institution’s academic freedom, while

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freedom depends on the exercise of that authority, although this may seem inconsistent with individual academic freedom); *Bakke*, 438 U.S. at 312 (institution’s First Amendment protected academic freedom to determine that broad student body diversity is necessary may be a compelling interest in student admissions, but the means of achieving that interest must be narrowly tailored); *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (noting that, if the Supreme Court “constitutionalized a right of academic freedom,” it has recognized the right of the institution, not that of the individual).

<sup>296</sup> See David M. Rabban, ACADEMIC FREEDOM, INDIVIDUAL OR INSTITUTIONAL?, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 2001.

<sup>297</sup> As discussed in this article, the rights of an individual when acting as a citizen are broader than the rights of an individual when acting as a public employee. See *infra* notes 310-320 and accompanying text.

<sup>298</sup> See AAUP 1940 Statement, *supra* note 282, at 3 (“Institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition . . . [which] carries with it duties correlative with rights.” While faculty “are citizens, members of a learned profession, and officers of an educational institution,” and they “should be free from institutional censorship or discipline” when they speak as citizens, “their special position in the community imposes special obligations” for them to “at all times be accurate, . . . exercise appropriate restraint, . . . show respect for the opinions of others, and . . . make every effort to indicate that they are not speaking for the institution.” If the institution’s administration feels that a faculty member has failed to fulfill this responsibility and “believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher’s fitness for his or her position,” it may engage the disciplinary process.)

<sup>299</sup> *Emergency Coalition to Defend Educ. Travel v. U.S. Treasury*, 545 F.3d 4, 12-14 (D.C. Cir. 2008) (holding that, when a coalition of professors challenged the trade embargo by the U.S. of Cuba, which limits academic travel to Cuba, as violative of their First Amendment-protected academic freedom, the foreign policy interests of the U.S. are a compelling interest, and any First Amendment right to academic freedom was not infringed); *id.* at 18 (Silberman, J., concurring) (arguing that any First Amendment interest inures to the universities, not to the individual professors); *Brown v. Armenti*, 247 F.3d 69, 74-78 (3d Cir. 2001); *Urofsky*, 216 F.3d at 412 (upholding a state statute barring use of state computers for sexually explicit material, but allowing a university’s leader to provide exceptions for bona fide research, the court found that if academic freedom is a constitutional right, it attaches to the institution, not to the professor individually); *Edwards v. Ca. Univ. of Pa.*, 156 F.3d 488, 491-92 (3d Cir. 1998) (First Amendment does not restrict university’s right to control curriculum and to establish related policy); RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 17:31.50, at 2-4 (2009); *cf. Burt v. Gates*, 502 F.3d 183, 189-91 (2d Cir. 2007) (Yale law school professors unsuccessfully sought independent First Amendment-protected academic freedom not to be forced to associate with military recruiters on the same terms as other recruiters, due to a fundamental disagreement with the military’s policies on homosexuality, when the Supreme Court had rejected universities’ rights in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006)).



weighing the institution's interest more in circumstances where the faculty member may exercise his right in an alternative manner.<sup>300</sup>

Whatever the dimensions of a faculty member's academic freedom are, consideration of a faculty member's personal social-political *viewpoint* in a tenure or promotion decision likely would violate First Amendment interests (if involving a public institution) and academic freedom principles. However, the effectiveness of the faculty member's conduct in fostering productive collaborations among broadly diverse students, junior faculty and peers in the classroom and research laboratory concerns conduct in a critical work-related function—not his or her personal viewpoints. And these considerations are appropriate for any government employer and do not offend the Constitution or academic freedom.

### General First Amendment Concepts

Without fully addressing the complex universe of the First Amendment, there are some important concepts to keep in mind. Different First Amendment interests may attach in different activities and locales on campus. This is another constitutional regime in which context matters, as it does in applying the compelling diversity rationale to admissions.<sup>301</sup>

The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In U.S. Supreme Court jurisprudence, there is a hierarchy of First Amendment-protected speech interests, with political/social-political and religious speech at the apex.<sup>302</sup> Expressions of viewpoint about race and gender would generally fall under political and, possibly, religious speech. With limited exceptions, the *content* (i.e., language used, subjects addressed, viewpoint expressed) of such speech may not be regulated by the government (including public colleges and universities), unless the regulation satisfies the standard of strict judicial review. There must be a compelling government interest that requires the regulation, and the manner of regulation

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<sup>300</sup> *Piarowski v. Ill. Comm. Coll. Dist.*, 759 F.2d 625, 629-33 (7th Cir. 1985) (institution may compel relocation of administrator/faculty member's sexually explicit and racially offensive art work from a location in which the administration judged it to have an adverse effect on university interests, where faculty could exhibit the work elsewhere).

<sup>301</sup> *Cf. Grutter*, 539 U.S. at 327.

<sup>302</sup> *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) (holding that a school district's actions did not create a public forum and rejecting a First Amendment claim by a teacher's union when the district had forbidden them to use the intramural mail system but allowed another union to use it); *See Coleman and Alger*, *supra* note 18.

must also be narrowly tailored, not overbroad, to achieve that interest. The regulation may not limit more speech or burden speech more than is necessary to achieve the interest.<sup>303</sup>

Not all, even political and religious speech, is protected by the First Amendment, however. Certain defamatory speech is not protected and may be prohibited.<sup>304</sup> Also, speech that is likely to incite imminent unlawful or violent action or to create an imminent unsafe condition, speech that is aimed at violence against a particular person or persons (hate speech and fighting words), and obscene—not just profane—speech,<sup>305</sup> are not protected by the First Amendment and may be prohibited. Hate speech, including speech that is aimed at inciting violence against racial minorities, women, or persons based on their sexual orientation, is not protected and may be prosecuted.<sup>306</sup> Academic freedom, which is accompanied by academic responsibility, also would not be offended by the prohibition of such speech. However, expressing views that are offensive about minorities, women or others – without more – is not hate speech. Some faculty will have such personal views. While the institution need not embrace such views and may express a hope for understanding and inclusion, with limited exceptions individual faculty members may generally express their personal views in at least some campus settings, both as a matter of academic freedom policy and, for public institutions, as a matter of Constitutional law.

Where First Amendment-protected speech interests are involved, they are analyzed by the courts in the context of the forum (public or non-public) in which speech interests are exercised,<sup>307</sup> as well as whether the content (language, subject and viewpoint) of the speech, or only the time, place and manner of the speech, are being regulated.<sup>308</sup>

<sup>303</sup> There must be a compelling interest and a narrowly-tailored approach to regulate the content of protected speech. The regulation must avoid vagueness and make reasonably clear what content is and is not allowed to avoid a “chilling” effect on protected speech. The officials implementing the regulation must do so consistently and may not be given unbridled discretion in its application. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992); *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

<sup>304</sup> Defamatory speech (i.e., untrue, speech casting the professional or moral reputation of an individual or institution in a negative light) with actual malice by the press or about matters of public concern or public officials or figures, and untrue defamatory speech about private persons on subjects not of public concern, are not protected. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>305</sup> See *Miller v. California*, 413 U.S. 15, 24 (1973) (defining the test for unprotected obscene speech); *Cohen v. California*, 403 U.S. 15, 26 (1971) (“Fuck the Draft” on a jacket worn silently in political protest at a courthouse is not obscene speech and is protected); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words, “which by their very utterance inflict injury or tend to incite an immediate breach of the peace,” are not protected). Obscene speech is speech that appeals to a prurient—shameful or morbid—sexual interest as defined by local community standards, is patently offensive as defined by local community standards, and lacks serious redeeming artistic, literary, political, or scientific value as defined by national standards. See *Miller*, 413 U.S. at 24.

<sup>306</sup> See 18 U.S.C. § 245 (2007); see *Coleman and Alger*, *supra* note 18.

<sup>307</sup> *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802-03 (1985). *Traditional Public Fora* are those locations and other fora that have traditionally and historically been generally open to the public for assembly and free speech, such as public parks and sidewalks. *Id.* Whether a location is an open public forum depends on the traditional and historic use of the location for free speech, not whether the government presently intends to make the area open for this purpose. *Limited or Designated Public Fora* are those areas and other fora that are not traditional open public fora, but that

In nonpublic fora, such as classrooms, research laboratories and offices, more government regulation of speech is permitted under the First Amendment and only a rational basis standard of judicial review applies, requiring that the regulation have some reasonable relationship to a legitimate work-related purpose.<sup>309</sup> In the special context of a college or university, the culture of academic freedom influences, and tempers, the exercise of the institution's right to regulate speech.

### First Amendment And Employee Speech

Faculty members are employees. However, their special role at an institution of higher education, where they are academic officers and the intellectual leaders of the institution,<sup>310</sup> influences the weighing of the faculty/employee's and the institution/employer's First Amendment interests. While public employers have broad (albeit not limitless) *legal* discretion to regulate employee work-related speech and performance,<sup>311</sup> the culture and societal role of the higher education setting often result in greater accommodation of individual faculty freedom than public employees would have in some other settings. However, consideration of whether a faculty member's *conduct* in the classroom, in the research laboratory, or in fulfilling advising and other service responsibilities meets the high standards of inclusion established by an

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the government intends to, and purposefully does, make available to the public generally or to a category of people (e.g., all students or all members of the campus community) for assembly and free speech, sometimes relating to particular purposes or topics (e.g., an open microphone for public questions at the time and in accordance with the protocols established at an open forum for students on the Iraq war). A limited or designated public forum is treated as a traditional open public forum for the category of people and purposes and the time period for which the government has made the area available. *Cornelius*, 473 U.S. at 802-03; *Perry Educ. Ass'n*, 460 U.S. at 45-46.

<sup>308</sup> While regulation of the content of speech (subject, language and viewpoint) in public fora must generally satisfy strict judicial scrutiny and will be upheld only when justified by a compelling interest and a narrowly tailored approach, even the most protected First Amendment interests (political and religious speech) exercised in the most protected fora for speech (open public fora), may be subject to reasonable time, place and manner limitations. *Cornelius*, 437 U.S. at 818 (Blackmun, J., dissenting). An intermediate standard of judicial review applies to determine the propriety of time, place and manner restrictions in any public or designated public forum. Such regulations must be imposed without regard to the content of the speech and must serve an important government interest (e.g., safety, efficient use of limited public resources, ability to schedule use and sharing of resources, and protection of other activities through noise, sanitation, or other legitimate controls). *See id.* These restrictions must be reasonably narrowly designed—even if not the least restrictive and most narrowly targeted approach—to achieve the important government interest. Typically, in addition to being justified by an important purpose, there must be another time and place where the protected speech may be expressed, and the limitations must be applied consistently by officials who do not have unbridled discretion in their application. *Cornelius*, 437 U.S. at 802; *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry Educ. Ass'n*, 460 U.S. at 45-46.

<sup>309</sup> *See Perry Educ. Ass'n*, 460 U.S. at 49 (“Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.”); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum); *Justice for All v. Faulkner*, 410 F.3d 760, 765 (5th Cir. 2005).

<sup>310</sup> *See AAUP 1940 statement, supra* note 282, at 3; *supra* note 298 and accompanying text.

<sup>311</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 417-18 (2006).

institution of higher education to serve its mission, neither violates the First Amendment, nor prevailing principles of academic freedom.<sup>312</sup>

The U.S. Supreme Court has held that individuals do not “surrender all their First Amendment rights” by accepting public employment because they continue to be citizens.<sup>313</sup> However, the government, as an employer, has a much greater interest in regulating the speech of its employees, than the government has in regulating the speech of the general public.<sup>314</sup>

The deciding factor in whether a public employee has a First Amendment interest that *may* give rise to a right to speak in a manner at odds with an employer’s position, is whether the public employee is speaking in his or her capacity as an employee, or in his or her capacity as a citizen about a matter of public concern. A public employee who speaks in his or her capacity as an employee, or in his or her capacity as a private citizen on a matter of personal, not public, concern, “has no First Amendment cause of action based on his or her employer’s reaction to the speech,” assuming that the employer has a rational basis for its action.<sup>315</sup> Thus, public employers may regulate speech of their employees for any legitimate purpose when their employees are speaking in the performance of their employment duties and when their employees are speaking outside of their employment duties on subjects of personal, not public concern.

It is not the location that decides in what capacity an individual is speaking because an individual may speak as a citizen (not in the performance of his or her official employment-related duties), whether in or out of the workplace and during or after work hours. Similarly, an individual may speak in his or her capacity as an employee outside of the workplace and outside of work hours.<sup>316</sup> Neither does it matter whether the subject of the speech is a subject relevant to the individual’s job. The dispositive fact is whether public employees are speaking “pursuant to

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<sup>312</sup> See *Healy v. James*, 408 U.S. 169, 180, 189, 191 (1972) (a student group seeking recognition by the university has no constitutional right to violate “reasonable school rules governing conduct;” for in the special environment of a university, an agreement to conform with reasonable standards respecting conduct to serve the interests of the entire academic community, is a minimal requirement to impose on the acquisition of the privilege of recognition.) Regulations prohibiting discrimination in the university context are regulations of conduct, not viewpoint. See *Rumsfeld v. Forum for Academic & Inst’l Rights, Inc.*, 547 U.S. 47, 62 (2006). Even if the regulation of conduct imposes an incidental burden on viewpoint, the standard under *United States v. O’Brien*, 391 U.S. 367, 377 (1968) for such incidental effect is that the regulation be within the university’s constitutional power; that the regulation furthers an important government purpose; that such purpose be unrelated to suppression of speech; and that the incidental burden on expression be no greater than necessary. The interest served by a university’s nondiscrimination and multi-cultural policies is a compelling educational and national interest in inclusion grounded in the university’s mission and role in society and unrelated to suppression of expression; and providing educational opportunity to all without discrimination on the basis of race or gender could not be achieved without a policy of inclusion.

<sup>313</sup> *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County*, 391 U.S. 563, 568 (1968); see *Connick v. Myers*, 461 U.S. 138, 142 (1983).

<sup>314</sup> *Pickering*, 391 U.S. at 568.

<sup>315</sup> *Garcetti*, 547 U.S. at 418; *Connick*, 461 U.S. at 147, 154; *Pickering*, 391 U.S. at 568.

<sup>316</sup> *Garcetti*, 547 U.S. at 422-24.

their official [employment-related] duties.”<sup>317</sup> The Supreme Court has held that “when public employees make statements pursuant to their official job duties, the employees are not speaking as citizens for First Amendment protection,”<sup>318</sup> even when the subject of their speech is very much a matter of public concern.

A public employee retains the First Amendment interest to speak as a citizen on a matter of social, political or other public concern, as long as s/he is not so speaking in the performance of his or her employment-related duties.<sup>319</sup> However, this retained First Amendment interest is not absolute; it may give rise to a right to speak only if the employee-citizen’s speech interest outweighs the employer’s interest against disruption of the workplace. The public employee’s interest in speaking as a citizen on a particular matter of public concern must be balanced against the interests of the public employer to operate an efficient workplace for its public purposes, to maintain discipline among its employees, and to maintain trusting and confidential relationships between employees and their close supervisors and colleagues. If the employer’s interests in an efficient workplace outweigh those of the employee, the First Amendment is not violated by the employer’s regulation of an employee-citizen’s speech on a matter of public concern. Considerations weighed in this balancing of interests include whether the speech is aimed at anyone with whom the employee would normally come in contact in performing work, whether the speech threatens the ability of supervisors to maintain discipline or supervisors or coworkers to maintain harmony, and whether the employee has violated close relationships of trust and loyalty in the workplace.<sup>320</sup>

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<sup>317</sup> *Id.* at 421.

<sup>318</sup> *Id.*

<sup>319</sup> See *Rankin v. McPherson*, 483 U.S. 378, 381 (1987) (county employee’s comment about the attempted assassination of President Reagan, “if they go for him again, I hope they get him” is a matter of public concern); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413-17 (1979) (speech on racially discriminatory policy of a school district is a matter of public concern); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (speech relaying the principal’s memorandum about the dress and appearance of school teachers is a matter of public concern); *Perry v. Sindermann*, 408 U.S. 593 (1972) (speech regarding whether a college should be elevated to four-year status is a matter of public concern); *Pickering*, 391 U.S. at 571-73 (a school teacher’s letter criticizing school funding is a matter of public concern).

<sup>320</sup> Compare *Pickering*, 391 U.S. at 569-74 (teacher was not acting within the scope of her employment, but rather was acting as a citizen when she wrote an editorial to the newspaper criticizing the school board’s allocation of bond funds; although her letter was critical of her school system and included false statements adverse to the school system, her dismissal was a violation of her First Amendment rights because her interests as a citizen to speak about a matter of public concern outweigh the interests of her employer in efficient operation of the workplace, maintaining discipline and maintaining confidential relationships of trust with employees, where the teacher’s criticisms were not aimed at any supervisor or colleague with whom she would come into frequent contact in the performance of her job or with whom she had a close relationship of confidence and trust, and her criticism would not likely threaten discipline in the workplace), and *Garcetti*, 547 U.S. at 420-22 (when an Assistant District Attorney who is responsible for assessing the adequacy of an affidavit in support of a warrant criticized the sufficiency of the affidavit to his supervisors and, although they decided to proceed with the prosecution, wrote a memorandum criticizing the affidavit that resulted in discord with the sheriff’s office, this individual was acting as an employee within the scope of his employment and his actions amounted to insubordination; consequently, his First Amendment rights were not implicated when his employer took adverse employment action in reaction), with *Connick*, 461 U.S. at 141-143, 150-52 (prosecutor, who objects to being transferred and expresses her strong objections to her supervisors, prepares a questionnaire and distributes it to her fellow prosecutors soliciting their

## The University Employer and Faculty Speech

The college or university's purpose and role in society, and the nature and role of faculty members within the college or university, contribute to what an academic institution needs to operate efficiently for the realization of its public purpose.

Under the case law addressing a public employer's prerogatives,<sup>321</sup> a public higher education institution could, under the First Amendment, specify a particular curriculum and course materials to be used, or specific matters to be researched, by an employee. However, except in limited circumstances (for example, possibly, in certain introductory level or distance-learning courses, some courses taught by graduate students, some courses designed to fulfill specific minimum content requirements of a state education board, or a special department-funded course or research project), such requirements would be inconsistent with principles of academic freedom, at least, and are rarely imposed in four-year colleges and universities. In fact, faculty members are usually given broad discretion to choose course materials within the subject matter and level of course assigned to be taught, to express views about those subjects, and to choose research areas within the tenure department's discipline or multidisciplinary areas. (In the context of community colleges, more direction may be provided to faculty more often in order to fulfill the nature of these institutions' missions, courses and degree requirements.)

Even so, a faculty member of a public or a private institution of higher education who is assigned to teach physics, may not decide against teaching physics and instead teach poetry—if s/he does, s/he may be subject to discipline or, if s/he is untenured, s/he may not have an appointment renewed. (Of course, such a faculty member could elect to punctuate the course with poetry.) A faculty member who is employed by and seeks tenure in the physics department, must perform research that is in an area and of a caliber qualifying the faculty member for tenure in that department. There is considerable flexibility to foster creativity and, increasingly, interdisciplinary pursuits. However, if all of a physics faculty member's research is in poetry, without adding significant value to the discipline of physics, s/he will not likely be deemed qualified for continued appointment, promotion or tenure in the physics department. Multidisciplinary work may qualify for tenure, of course, depending on the facts.<sup>322</sup>

Race and gender are matters of public concern in our society, and the intellectual freedom of faculty members to explore controversial subjects is an important foundation of the First Amendment-protected academic freedom of an institution of higher education.<sup>323</sup> A public

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views about the transfer policy, office morale, the need for a grievance committee, and pressure to work on political campaigns, fomenting what her supervisors regarded as a "mini revolt" and resulting in her termination, may have been speaking on at least one matter of public concern [i.e., political pressure to work on campaigns]; however, her interests on this issue were out-weighed by her employer's interest in maintaining discipline and harmony in the workplace where the prosecutor had close working relationships with the supervisors and colleagues she involved in her actions and her employers are not obligated to wait until disruption in the workplace occurs to maintain discipline.)

<sup>321</sup> See *supra* notes 310-312 and accompanying text.

<sup>322</sup> See *supra* notes 311-313; *infra* note 54 and accompanying text.

<sup>323</sup> *Sweezy*, 354 U.S. at 250; see *supra* notes 5-24, 39, 43 and accompanying text.

institution may not under the First Amendment, and many private institutions would not under principles of academic freedom, make an adverse decision relating to employment, tenure or promotion on the basis of a faculty member's personal *viewpoints* on race or gender (or other matters of public concern), expressed in a manner that makes clear the faculty member is not speaking on behalf of the institution and at a time and in a capacity that is not at odds with the faculty member's work-related duties.<sup>324</sup> The fact that a faculty member's research and intellectual viewpoints are controversial, alone, should not affect decision-making if the academic quality of the work and its contributions to the field were judged to meet the institution's high standards, which typically take into account national and international peer review. (Different standards may apply in the community college setting.)

However, it is important to recognize the special nature and role of faculty members. While faculty members have freedom of intellectual inquiry and expression, they also have a responsibility to teach students and mentor junior faculty in a manner that enables full participation in the academic endeavor. Faculty members are the intellectual leaders of the college or university. If the college or university has determined that a broadly diverse, including racially and gender diverse, student body and faculty are essential to achieving the institution's core educational, research and service mission, speech at odds with this objective, at least in certain work-related activities involving close interactions with colleagues and students, may be at odds with a faculty member's responsibility.<sup>325</sup> At the same time, controversial or offensive views about race or gender held in good faith for purposes of intellectual inquiry, and not employed in a manner that excludes others from full participation in the academic endeavor of the institution, generally would not be at odds with a faculty member's employment and are likely to be protected at least by principles of academic freedom, and possibly by the First Amendment in public institutions depending on the facts and the reach of the First Amendment.<sup>326</sup>

Of course, a faculty member who expresses non-defamatory personal views about race and gender (or anything else) in a newspaper editorial, or in a public forum on a public institution's campus at a time when s/he is not required to be in class teaching or otherwise to be fulfilling employment obligations is generally free to do so. Under the First Amendment and principles of academic freedom only a compelling interest would generally allow the protected content of the faculty member's speech in such a setting to be regulated in even a narrowly tailored manner.<sup>327</sup> Such personal views may be unpopular, insensitive, offensive to many, or contrary to the institution's view of its mission.

A faculty member of a public institution likely would not have a First Amendment-protected interest in speaking about race or gender in a manner that is at odds with the institution's view, of course, if the faculty member's official role at the institution involves responsibility for diversity efforts (e.g., if the individual is an academic administrator in a

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<sup>324</sup> See *supra* notes 281, 310-320 and accompanying text.

<sup>325</sup> See *supra* notes 281-283, 310-320 and accompanying text.

<sup>326</sup> See *id.*

<sup>327</sup> See *supra* notes 307, 319-320 and accompanying text.

leadership role or is responsible for a diversity initiative). Even if this were not the case, if the particular comment's disruptive effect on the workplace outweighs the individual's interest as a citizen in expressing the viewpoint, the faculty member would not have a First Amendment-protected interest.<sup>328</sup> This could occur if the speech has little or no intellectual value and is merely vitriolic, it is at odds with the faculty member's duties to individuals with whom the faculty member normally interacts in the classroom or research laboratory, and it is likely to have a substantial disruptive effect on the harmony and operation of the classroom or research laboratory. Academic freedom principles and the role of faculty in a college or university may temper this analysis and help define both the work-related duties and the responsibilities of the faculty member, providing some more leeway to the faculty member than may be accorded to public employees in other settings. However, the overall analysis should be the same.

If the institution has determined the need for broad diversity—particularly if that need has been determined in a faculty process—then taking into account the faculty member's role in and responsibility to the institution and all members of its community, a college or university may be well within its rights to take action against a faculty member who spews racist or sexist speech against colleagues, supervisors or students, even in a public forum, in a manner that is substantially disruptive of the workplace and the faculty member's official role and duties in it.<sup>329</sup> Of course, the nature, openness and tolerance of controversy that is inherent in this particular workplace would color whether substantial disruption is truly threatened. The facts of a particular situation would matter very much in the analysis.

In almost all colleges and universities, academic freedom, at least, would protect a faculty member's ability to produce scholarship that expresses offensive views about race and gender (or other subjects). The product's academic value and quality, its contribution to the field, would be evaluated in the peer review process and in the faculty member's supervisor's regular review process. Even in a public context where the First Amendment applies, the right of the academy to make judgments about the value of the academic work product of faculty members is almost always upheld. The courts are loath to substitute their judgment for the subjective academic judgment of the academy.<sup>330</sup> The institution can make clear that the views are not the institution's views, while the interest of the faculty member to express the views is respected.

Similarly, most colleges and universities would probably interpret academic freedom to protect a faculty member's ability to express his or her offensive views about race and gender to some extent for didactic purposes in class or in a research laboratory. An offensive viewpoint that is not gratuitous (i.e., it is relevant to the work and is held in good faith in the process of intellectual exploration), would not necessarily be deemed to create a hostile environment, although it could depending on the facts. While only the rational basis standard would apply to a

<sup>328</sup> See *supra* notes 315-320 and accompanying text.

<sup>329</sup> See *supra* notes 298, 316-320 and accompanying text.

<sup>330</sup> See, e.g., *Ewing*, 474 U.S. at 226 n.12 (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking [sic] by the academy itself.” (citation omitted)); *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 349 (5th Cir. 2006); *Coats v. Pierre*, 890 F.2d 728, 733 (5th Cir. 1989); *Levi v. Univ. of Tex., San Antonio*, 840 F.2d 277, 280 (5th Cir. 1988).

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public institution's limitations on (at least gratuitous) speech in the performance of work in the classroom or research laboratory,<sup>331</sup> deeply held and fundamental values of academic freedom would likely provide some degree of didactic freedom, along with corresponding responsibility to avoid creating an environment that unnecessarily threatens the ability of all students to learn and fully participate.<sup>332</sup>

### The University Employer and Faculty Conduct

Regardless of the legally permissible extent of limitations on faculty work-related speech in public institutions, higher education institutions may make employment decisions that consider a faculty member's conduct to measure his or her contributions, absence of contributions, or harm to compelling broad diversity objectives (not only racial and gender diversity) as part of the tenure and promotion process. Regardless of personal viewpoint, an individual faculty member may not, through *conduct*, act in a discriminatory manner in violation of the institution's nondiscrimination policy,<sup>333</sup> nor through *conduct or speech* create a classroom or research environment that is so hostile as to make it unreasonable to expect some other members of the community (e.g., minorities, women and those with unpopular political viewpoints) to be able productively and collaboratively to learn, research and conduct their work.<sup>334</sup> A faculty member whose conduct advances inclusion, provides opportunities for the development of multi-cultural analysis and collaboration skills, and fosters the broad diversity the institution so vitally needs, may have these critical conduct-tied contributions factored favorably, among other factors considered, in the tenure and promotion process. (This is a race and gender-neutral, and viewpoint-neutral, consideration as any person may engage in such conduct and possess and contribute such skills.)

For example, an institution of higher education is within its rights to require a faculty member who (offensively to most) believes certain racial minorities are inferior and who may be undertaking research related to that view, nevertheless to include students in the faculty member's class and to provide the same educational opportunities and treatment to all students and junior faculty members, without regard to their race. The faculty member is employed by

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<sup>331</sup> See *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990); *Emergency Coalition*, 545 F.3d at 19 (D.C. Cir. 2008) (Silberman, J., concurring) (opining that a public university clearly may prohibit classroom speech espousing racial inferiority); *supra* notes 315-316 and accompanying text.

<sup>332</sup> See AAUP 1940 Statement, *supra* note 282, at 3, 5 ("Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject," meaning "not to discourage what is 'controversial'" but "to underscore the need for teachers to avoid persistently intruding material that has no relation to their subject."); *Coleman and Alger*, *supra* note 18; cf. *supra* note 299.

<sup>333</sup> See AAUP 1940 Statement, *supra* note 282, at 3, 5; cf. *Christian Legal Soc'y v. Kane*, 2006 WL 997217 (N.D. Cal. 2006), *aff'd*, 2009 WL 693391 (9th Cir. 2009), *petition for cert. filed sub nom. Christian Legal Soc'y v. Newton* (U.S. May 5, 2009) (law school group had no right to discriminate in the selection of members based on religion and sexual orientation).

<sup>334</sup> See *Garcetti*, 547 U.S. 410; *supra* note 298 and accompanying text; *supra* note 299; cf. *Truth v. Kent Sch. Dist.*, 542 F.3d 634 (9th Cir. 2008); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007); *Every Nation Campus Ministries v. Achtenberg*, 597 F. Supp. 2d 1075 (S.D. Cal. 2009); see *Coleman and Alger*, *supra* note 18.

the institution and may express his or her personal views, at least as a consequence of academic freedom principles, through his or her research and, within limitations permitted under the First Amendment, in public fora.<sup>335</sup> However, the faculty member's conduct—to allow students to join in a class or laboratory and to give them equal access to and treatment in learning—and the faculty member's in-class conduct and speech may be required to meet institutional nondiscrimination and educational standards tied to the institution's nondiscriminatory educational mission. The faculty member may have his or her views, but is paid to teach all students without regard to race, in furtherance of the institution's academic mission, and the institution is not required to employ, tenure or promote a faculty member who will not do so. Implementation of nondiscrimination policies by academic institutions in furtherance of their missions have been widely held to constitute regulation of conduct, not viewpoint. Rational basis scrutiny should apply in this workplace context.<sup>336</sup>

Applying inclusive conduct that provides opportunities to enhance broad collaborations and develop multi-cultural skills to teaching and supervision of research may be *workplace conduct* required by the institution of faculty members in order to achieve the institution's educational mission. Inclusive conduct means including and fostering participation of individuals of different cultures, socio-economic backgrounds, races, perspectives and experiences to provide opportunities to engender an increased understanding of and explore a broad range of individuals' ideas and problem-solving approaches. Multi-cultural skills include the demonstrated ability to utilize such understanding and broad perspectives in teaching, research and mentoring and to create an inclusive environment in which individuals of a range of experiences, perspectives and cultures, including different races and genders, can work productively and creatively together. Inclusive conduct and multi-cultural skills include breaking down stereotypes that may lead some to assume that all individuals of a particular race, ethnicity, gender, nationality, or socio-economic group share the same views, personal qualities, and experiences. This conduct is *inclusive and non-discriminatory action on the basis of race, gender, religion, age, sexual orientation, perspective, etc.* Even if a court were to determine that speech interests -- not only conduct -- were implicated when inclusion to foster multi-cultural skills is favored in teaching students in class or supervising or working with others in a research laboratory, such speech would be in the context of official duties to the institution or would satisfy constitutional standards for incidental effects, and its regulation would not offend the First Amendment. If the institution's core, academy-embraced mission fundamentally requires inclusion, consideration of this conduct also should not offend academic freedom any more than do the judgments made in the tenure process.

### Conclusion

Institutions of higher education are, by nature and of necessity, environments of open dialogue and exploration of ideas, some of which are offensive or controversial. The imperative for colleges and universities to encourage such freedom of exploration and expression is at the

<sup>335</sup> See *supra* notes 307-320 and accompanying text.

<sup>336</sup> See SMOLLA, *supra* note 299, at 6; *supra* notes 307-320 and accompanying text. Even if an incidental effect on speech were to result, the institution's compelling interest in such policy would meet the *O'Brien* standard. See *United States v. O'Brien*, 391 U.S. 367 (1968); *supra* note 312.

core of how such institutions advance knowledge and serve society. Equally at the core of higher education is the inclusion of broadly diverse students and faculties. Regulation of speech within this setting requires the soft touch of careful judgment and appreciation of context, but appropriately judicious parameters on individual speech that ensure the ability of all students and faculty members to reasonably and fully participate in the academic endeavor are critical. As a separate but associated matter, in an increasingly diverse and global society requiring conduct that fosters inclusion, collaboration and a broadly-defined diverse learning and research community is both essential to the success (and excellence) of higher education and the nation, and permissible under the First Amendment and principles of academic freedom.

## APPENDIX V: Additional Resource Materials

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### Other Legal Resources

U.S. EEOC, “*EEOC Compliance Manual*,” Section 15 (“Race & Color Discrimination”) (April 19, 2006) (available at <http://www.eeoc.gov/policy/docs/race-color.html>)

U.S. Dept. of Justice, “*Title VI Legal Manual*” (Jan. 11, 2001) (available at [www.usdoj.gov/crt/cor/coord/vimanual.php](http://www.usdoj.gov/crt/cor/coord/vimanual.php))

U.S. Dept. of Justice, “*Title IX Legal Manual*” (Jan. 11, 2001) (available at [www.usdoj.gov/crt/cor/coord/ixlegal/php](http://www.usdoj.gov/crt/cor/coord/ixlegal/php))

Office of the Attorney Gen’l of Maryland, “*Strengthening Diversity in Maryland Colleges and Universities: A Legal Roadmap*,” at Ch. 3 (“Faculty and Staff Diversity”) (March 2009)

UCLA Civil Rights Project, “*Charting the Future of College Affirmative Action: Legal Victories, Continuing Attacks, and New Research*” (July 23, 2007) (available at [www.civilrightsproject.ucla.edu](http://www.civilrightsproject.ucla.edu))

J. Feder, “*The Constitution and Racial Diversity in Elementary and Secondary Education: A Legal Analysis of Pending Supreme Court Cases*,” CRS Report for Congress, RL33965 (April 13, 2007) (available at [www.opencrs.com](http://www.opencrs.com))

J. Feder, “*Affirmative Action in Employment: A Legal Overview*,” CRS Report for Congress, RL30470 (Jan. 11, 2007) (available at [www.opencrs.com](http://www.opencrs.com))

A. Springer, “*How to Diversify the Faculty*,” American Association of University Professors (March 2006) (available at [www.aaup.org/AAUP/protect/legal/topics/howto-diversify.htm](http://www.aaup.org/AAUP/protect/legal/topics/howto-diversify.htm))

S. Licht, “*Analyzing Racial Classifications in Employment Discrimination Litigation*,” 52 U.S. Attorneys’ Bulletin 10 (May 2004)

Equal Justice Society, “*Preserving Diversity in Higher Education: A Manual on Admissions Policies and Procedures After the University of Michigan Decisions*,” Ch. VII (“Faculty and Staff Hiring”) (2004) (available at [www.equaljusticesociety.org](http://www.equaljusticesociety.org))

S. Malcom, D. Chubin & J. Jesse, “*Standing Our Ground: A Guidebook for STEM Educators in the Post-Michigan Era*” (Oct. 2004) (available at [www.aaas.org/standingourground/PDFs/Standing\\_Our\\_Ground.pdf](http://www.aaas.org/standingourground/PDFs/Standing_Our_Ground.pdf))

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A. L. Coleman, S. R. Palmer, J. Rippner & R. W. Riley, “*A 21st-Century Imperative: Promoting Access and Diversity in Higher Education*” (College Board, American Council on Education, and EducationCounsel, October 2009)

A. L. Coleman, S. R. Palmer, & S. Y. Winnick, “*Roadmap to Diversity: Key Legal and Educational Policy Foundations for Medical Schools*” (Association of American Medical Colleges 2008)

A. L. Coleman, S.R. Palmer & S. Y. Winnick, “*Echoes of Bakke: A Fractured Supreme Court Invalidates Two Race-Conscious K-12 Student Assignment Plans but Affirms the Compelling Interest in the Educational Benefits of Diversity*” (College Board, July 2007)

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## APPENDIX VI: Government, Diversity-Related, Journal, Media and Other Websites

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### Government Websites

EEOC: [www.eeoc.gov](http://www.eeoc.gov)

National Science Foundation: [www.nsf.gov](http://www.nsf.gov)

OFCCP: [www.dol.gov/esa/ofccp/](http://www.dol.gov/esa/ofccp/)

U.S. Department of Education: [www.ed.gov](http://www.ed.gov)

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## **Journal and Other Media Websites**

American Educational Research Journal: <http://aerj.aera.net/>

Bulletin of Science, Technology & Society: <http://bst.sagepub.com/>

Chemical & Engineering News: <http://pubs.acs.org/cen/>

The Chronicle of Higher Education: <http://chronicle.com/>

Diverse Issues in Higher Education: <http://www.diverseeducation.com/Advertising.asp>

Educational Evaluation and Policy Analysis: <http://eeпа.aera.net/>

Educational Researcher: <http://er.aera.net/>

Inside Higher Ed: <http://www.insidehighered.com/>

Journal of Educational and Behavioral Statistics: <http://jebs.aera.net/>

Journal of Science Education and Technology:  
<http://www.springer.com/education/science+education/journal/10956>

Journal of Women and Minorities in Science and Engineering:  
<http://www.begellhouse.com/journals/00551c876cc2f027.html>

Physics Today: <http://www.physicstoday.org/>

Review of Educational Research: <http://rer.aera.net/>

Review of Research in Education: <http://rre.aera.net/>

Science <http://www.sciencemag.org/>

Science Communication: <http://scx.sagepub.com/>

Teachers College Record: <http://www.tcrecord.org/>

## **Other Websites**

Alliance for Graduate Education and the Professoriate: [www.agep.us](http://www.agep.us)

American Association for the Advancement of Science: [www.aaas.org](http://www.aaas.org)

American Association of University Professors: [www.aaup.org](http://www.aaup.org)

American Association for the Advancement of Science Center for Advancing Science & Engineering Capacity: [www.aaascapacity.org](http://www.aaascapacity.org)

American Association of University Women: [www.aauw.org](http://www.aauw.org)

American Council of Engineering Companies: <http://www.acec.org>

American Institute of Physics: <http://www.aip.org/>

American Society for Engineering Education: [www.asee.org](http://www.asee.org)

Association for Women in Mathematics: <http://www.awm-math.org>

Benjamin Banneker Institute for Science and Technology:  
<http://www.thebannekerinstitute.org/>

Black Engineer: <http://www.blackengineer.com>

Black Engineer of the Year Awards Conference:  
<http://www.blackengineeroftheyear.org/v3/index.php>

California Council on Science and Technology (CCST): <http://www.ccst.us/>

Consortium of Social Science Association (COSSA): <http://www.cossa.org/>

Converge—Together Building Change (Harvard Medical School):  
<http://staging.convergeresearch.hms.harvard.edu/>

Diversity Web—An Interactive Resource Hub for Higher Education:  
<http://www.diversityweb.org/digest/vol110no2/galupo.cfm>

IEEE Women in Engineering: <http://www.ieee.org/web/membership/women/index.html>

The Leadership Alliance: <http://www.theleadershipalliance.org/matriarch/default.asp>

Making Science Make Sense: [http://www.bayerus.com/msms/Survey/survey\\_13.aspx](http://www.bayerus.com/msms/Survey/survey_13.aspx)

The National Academies' Government University Industry Research Roundtable:  
<http://www7.nationalacademies.org/guirr/>

National Association of Diversity Officers in Higher Education:  
<http://www.nadohe.org/conference.html>

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National Organization of Gay and Lesbian Scientific and Technical Professionals:  
[www.noglstp.org](http://www.noglstp.org)

National Women of Color Technology Awards Conference:  
<http://www.womenofcolor.net>

Understanding Interventions That Broaden Participation in Research Careers:  
[www.understandinginterventions.org](http://www.understandinginterventions.org)

ScienceCareers: <http://sciencecareers.sciencemag.org/>

## APPENDIX VII: Policy Papers, Op Ed Pieces, and Miscellaneous Publications

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ADVANCE Institutional Transformation Indicators Working Group, “*Toolkit for Reporting Progress Toward NSF ADVANCE: Institutional Transformational Goals*,” [www.cpst.org/diversity/toolkit1.pdf](http://www.cpst.org/diversity/toolkit1.pdf)

American Ass’n for Affirmative Action, “AAAA Media Tool Kit,” [www.affirmativeaction.org](http://www.affirmativeaction.org).

Bollinger, Lee C., “Why Diversity Matters,” *The Chronicle of Higher Education*, June 1, 2007: B20.

Chubin, Daryl, and Malcolm, Shirley, “*Making a Case for Diversity in STEM Fields*,” Oct. 6, 2008, [www.insidehighered.com/views/2008/10/06/chubin](http://www.insidehighered.com/views/2008/10/06/chubin)

Chubin, D.E., “Visible’ Diversity and the University,” *Diverse Issues in Higher Education*, July 23, 2009, [http://www.diverseeducation.com/artman/publish/article\\_12740.shtml](http://www.diverseeducation.com/artman/publish/article_12740.shtml)

Gallagher, Anne, and Trower, Cathy A., “The Demand for Diversity,” *The Chronicle of Higher Education*, Feb. 4, 2009, <http://chronicle.com/jobs/news/2009/02/200902041c.htm>

Haefele, M.B., “Is UC Opening the Door to Trouble?” *LA Times*, Aug. 19, 2009, [www.latimes.com/news/opinion/la-oe-haefele18-2009aug18,0,7132150,print.story](http://www.latimes.com/news/opinion/la-oe-haefele18-2009aug18,0,7132150,print.story)

Harris, David R., “Moving Beyond Affirmative Action,” [www.insidehighered.com](http://www.insidehighered.com), accessed Jan. 4, 2007.

Hebel, Sara, “Student Think Tank Offers 25 Ideas to Raise Socioeconomic Diversity of Enrollments,” *The Chronicle of Higher Education News Blog*, July 26, 2007.

Mangan, Katherine, and Paul Basken, “Law-School Accreditor Must Report on Its Diversity Standards to Education Dept.,” *The Chronicle of Higher Education*, July 2, 2007.

“New Paper Outlines Lessons Learned from Recent Supreme Court Decision on Affirmative Action in K-12 Schools,” American Council on Education, Sept. 11, 2007, [www.acenet.edu](http://www.acenet.edu).

Patterson, Orlando, “Race and Diversity in the Age of Obama,” *The New York Times*, Aug. 16, 2009, [www.nytimes.com/2009/08/16/books/review/Patterson-t.html?sp=Orlando](http://www.nytimes.com/2009/08/16/books/review/Patterson-t.html?sp=Orlando)

Schmidt, Peter, “Defense Department May Restrict US Service Academies’ Affirmative-Action Efforts,” *The Chronicle of Higher Education*, May 9, 2007.

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Schmidt, Peter, "Civil-Rights Panel Wants Law Schools Required to Disclose Key Affirmative-Action Data," *The Chronicle of Higher Education*, Aug. 28, 2007.

Sullivan, E. Thomas, "*The Importance of a Diverse Faculty*," University of Minnesota, Nov. 19, 2004.

Tapia, R.A., "Minority Students and Research Universities: How to Overcome the 'Mismatch'," *The Chronicle of Higher Education*, Mar. 27, 2009, <http://chronicle.com/article/Minority-StudentsResearch/18440>

## APPENDIX VIII: Professional Associations that Facilitate Student and Faculty Recruitment in STEM Disciplines, and Sample Institutional Outreach Plan Form

### Professional Associations that Facilitate Student and Faculty Recruitment

Academic Diversity Search Inc. <http://www.academicdiversitysearch.com/>  
 Affirmative Action Register <http://www.aarjobs.com>  
 Alliance for Graduate Education and the Professoriate: [www.agep.us](http://www.agep.us)  
[American Indian Science and Engineering Society \(AISES\) http://www.aises.org](http://www.aises.org)  
 American Youth Policy Forum (AYPF)  
[Association for Women in Science \(AWIS\) http://www.awis.org](http://www.awis.org)  
 American Association of University Women <http://www.aauw.org/About/career>  
 Catalyst—Expanding Opportunities for Women and Business <http://www.catalyst.org/>  
 DiversityInc. <http://www.diversityinc.com/>  
 Diverse Jobs <http://www.diversejobs.net/>  
 DiversityWeb <http://www.diversityweb.org/>  
 Hispanic Outlook in Higher Education <http://www.hispanicoutlook.com/>  
[Education Trust](#)  
[Educational Policy Institute](#)  
 Equal Opportunity Publications, Inc. <http://www.eop.com/>  
 Equal Opportunity/Diversity <http://www.hrs.iastate.edu/AAO/Outreach/Outreach.shtml>  
 Human Resource Services [http://www.hrs.iastate.edu/r&e/outreach\\_contents.shtml](http://www.hrs.iastate.edu/r&e/outreach_contents.shtml)  
[JustGarciaHill \(JGH\)](#)  
[Mathematics, Engineering, Science Achievement \(MESA\)](#)  
[MentorNet: The E-Mentoring Network for Diversity in Engineering and Science](#)  
[National Action Council for Minorities in Engineering \(NACME\)](#)  
[National Consortium for Continuous Improvement in Higher Education](#)  
[National Postdoctoral Association](#)  
 National Society of Black Engineers (NSBE) <http://national.nsbe.org/Default.aspx?tabid=106>  
 Pathways to Science: [www.pathwaystoscience.org](http://www.pathwaystoscience.org)  
[Professional Science Masters](#)  
[Society of Women Engineers \(SWE\) http://www.swe.org](http://www.swe.org)  
 Society of Hispanic Professional Engineers <http://oneshpe.shpe.org/wps/portal/national>  
 Society for Advancement of Chicanos and Native Americans in Science <http://www.sacnas.org>  
 Southern Regional Education Board <http://www.sreb.org/>  
[U.S. Commission on Civil Rights](#)  
[Women in Engineering ProActive Network \(WEPAN\)](#)  
 Women in Higher Education [http://www.wihe.com/\\$spindb.query.indexmain.wihe](http://www.wihe.com/$spindb.query.indexmain.wihe)

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For an example of institution-specific materials, see:

Hispanic-serving colleges/universities:

[http://www.psu.edu/dept/aaoffice/hispanic\\_universities.html](http://www.psu.edu/dept/aaoffice/hispanic_universities.html)

Historically/predominantly black colleges/universities:

[http://www.psu.edu/dept/aaoffice/aa\\_universities.html](http://www.psu.edu/dept/aaoffice/aa_universities.html)

Tribal-serving colleges/universities: [http://www.psu.edu/dept/aaoffice/tribal\\_universities.html](http://www.psu.edu/dept/aaoffice/tribal_universities.html)

Women's colleges/universities: [http://www.psu.edu/dept/aaoffice/women\\_universities.html](http://www.psu.edu/dept/aaoffice/women_universities.html)

Source: Penn State University Affirmative Action Office,

<http://www.psu.edu/dept/aaoffice/>

### Sample Institutional Outreach Plan Form

Following signoff on all applicable checklist categories, please email/send a copy of the completed form to the cognizant Dean for certification of adequacy before closing the application period or finalizing any list of candidates to be interviewed. Send copies to the

**Completion Checklist**

**1) Advertise in journals, organizations and websites.**

a) *General:* \_\_\_\_\_

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b) *Diversity Specific:*

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**2) Consult relevant publication lists and databases.**

a) *General:* \_\_\_\_\_

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b) *Diversity Specific:*

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**3) Consult with University faculty members (attach any letter/e-mail sent).**

a) *List Minority/Women Faculty:* \_\_\_\_\_

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b) *List Other Faculty:*

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Department Chair and Associate Provost.



**4) Contact colleagues elsewhere (attach any letter/e-mail sent).**

a) *List Minority/Women Faculty:*

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b) *List Other Faculty:*

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**5) Contact dept. alums and post docs (attach letter/e-mail sent).**

a) *List Minority/Women Alums:*

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b) *List Other Alums:*

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**6) Contact dept. chairs at relevant universities (attach any letter/e-mail sent).**

a) *Top URM Producers (including HBCUs, Hispanic-serving, Tribal):*

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b) *Other Universities:*

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**7) Other.**

a) *General:*

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b) *Diversity Specific:*

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## APPENDIX IX: Testimonials from U.S. Leaders in Support of Diversity in STEM Fields

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“Unless we maintain our edge in innovation through a strong science and technology enterprise, the best jobs may soon be found overseas, instead of in our communities.”

**Bart Gordon (D-TN)**  
**House Science & Technology Committee Chairman**

\* \* \* \* \*

“Universities are a key component of the innovation ecosystem, because they educate the workforce of the future — particularly in science and engineering. But universities must meet students where they are, getting them engaged in research, and multidisciplinary teams, working on the important problems of the day, and encouraging them to exploit their creativity not only in the commercial realm, but, also, through social entrepreneurship. . . .

The government has a somewhat different role to play. It should focus on skills training of workers for new enterprises, financial incentives for workers in transition, financial support for university-level students, and support for basic research in universities.

Many corporate executives and national studies have decried the lack of U.S. national investment in research, and in teaching young people mathematics and science. Many also agree that talent and ideas know no boundaries — that talent can and should be accessed globally, and that it is important to commercialize, and to diffuse and use inventions through business innovation — whatever their origin. Because talent and innovation are global, some corporations, especially multinationals, have created global research networks to tap talent, ideas, and markets — globally. Nonetheless, most also agree that in order to increase the technological sophistication of workers, and to support the overall development of human capital, it is important to develop indigenous talent, and to attract international talent — in order to create the intellectual cauldron from which innovation really springs.

In the U.S., our vital, valuable science and engineering workforce is threatened because our current cohort of scientists and engineers are retiring, and we are no longer producing sufficient numbers of new graduates to replace them. Although we continue to attract talented international scientists, engineers, and students, we are in an increasingly fierce global competition for this talent. We do not hold on to them as much as we did in the past, because other nations now have more educational and career opportunities for talented scientists and engineers — from everywhere.

Our own demographics have shifted. Our “new majority” now comprises young women and racial and ethnic groups traditionally underrepresented in advanced science and engineering schools. This is what I have called the “Quiet Crisis” — “quiet” because it unfolds so gradually, a “crisis” because a human capital deficit can hinder our national, even international, innovation capacity. If we are to develop indigenous talent, we, also, must develop and tap this resource.”

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**Shirley Ann Jackson**  
**President, Rensselaer Polytechnic Institute**  
**February 2009**

<http://www.rpi.edu/homepage/quietcrisis/ps021209-ceraweekplenary.html>

\* \* \* \* \*

“The National Academies’ *Gathering Storm* report offers twenty specific actions to help revise the current trends. The two highest priority actions are to graduate 10,000 new teachers each year with primary degrees in math or science, and to double real federal investment in fundamental research within seven years.

What has happened since these recommendations were made and the needed Authorizing legislation passed overwhelmingly in both the House and Senate? Well, a new research university was established with an opening day endowment equal to MIT’s after 142 years; next year over 200,000 students will study abroad, mostly pursuing science or engineering degrees, often under government-provided scholarships; government investment in R&D is set to increase by 25 percent; an initiative is underway to make the country a global nanotechnology hub; an additional \$10B is being devoted to K-12 education, with emphasis on math and science; the world’s most powerful particle accelerator will soon begin operation; a \$3B add-on to the nation’s research budget is being implemented; and a follow-on to the *Gathering Storm* study has been completed.

These actions are, of course, taking place in Saudi Arabia, China, the U.K., India, Brazil, Switzerland, Russia and Australia, respectively.

Meanwhile, in the United States, prior to the current economic crisis, one premier national laboratory announced the imposition of two-day a month “unpaid holidays” on its science staff; several laboratories began laying-off researchers; the U.S. portion of the international program to develop plentiful energy through nuclear fusion was reduced to “survival mode”; America’s firms continued to spend three times more on litigation than research; and many young would-be scientists presumably began reconsidering their careers.

. . . We cannot continue to live off past investments, investments such as those that were made when the need for a better educated populace led to the creation of Land Grant Institutions; when the collapsing economy in the Great Depression prompted a huge civil works program; when the aftermath of World War II led to the G.I. Bill; when the shock of Sputnik triggered significant reinvestment in education and science. Unfortunately, the threat we now face offers no sudden wake-up call: no Pearl Harbor, no Sputnik, no 9/11.

Today's young adult generation of Americans is the first in memory, perhaps in history, to be less well educated than their parents. Absent decisive action on our parts today’s children are likely to be the first ever to have a lower sustained standard of living than their parents. The

stimulus package now being addressed will hopefully help the present generations, but it needs to be accompanied by an investment on behalf of our children.”

**Norman R. Augustine**  
**Retired Chairman and Chief Executive Officer**  
**Lockheed Martin Corporation**  
**Testimony before Democratic Steering and Policy Committee**  
**U.S. House of Representatives**  
**January 7, 2009**  
[www.aau.edu/WorkArea/showcontent.aspx?id=8154](http://www.aau.edu/WorkArea/showcontent.aspx?id=8154)

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“Why should anyone care about the results in the *Rising Above the Gathering Storm* report? Because they reconfirm that in the many calls for immediate, strong, and broad action to address these problems, too little attention has been given to a solution near at hand. The answer to the problem lives next door, around the block, or across town. Increasing the presence of underrepresented minority Americans in the study of STEM disciplines must be a primary part of the ultimate solution to the problem of the United States’ endangered competitiveness. . . . Finally, we need to be mindful of the words of Supreme Court Justice Sandra Day O’Connor, who said, ‘In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be widely open to talented and qualified individuals of every race and ethnicity.’”

**John Brooks Slaughter**  
**President and CEO, NACME, Inc.**  
**January 2008**

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“Schools with a high proportion of minority students have the least qualified teachers and the fewest tools to work with. That has to change. It has to change not because we would like it to change, and not even because we want equal rights. It has to change because those children are the future of this country and its survival.... This is our war for today — right here on our shores — to educate our young people.”

**Eddie Bernice Johnson,**  
**U.S. Representative from Texas**  
**Rising Above the Gathering Storm: Two Years Later, 2009**  
[http://books.nap.edu/openbook.php?record\\_id=12537&page=9](http://books.nap.edu/openbook.php?record_id=12537&page=9)

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“The future is dependent on the education of the workforce, but we don't spend enough time investing in education, incentivizing investment. The lack of a research and development (R&D) tax credit is very revealing. Our government refuses to acknowledge that investing in R&D for the future is important.”

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**Craig Barrett**  
**Former Chief Executive Officer, Intel Corp.**  
**August 19, 2008**

<http://www.eschoolnews.com/news/top-news/index.cfm?i=55015>

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“My company looks at the STEM problem from a national security perspective. America did not win World War II because we were smarter, but because we had greater production capacity. In the Cold War, our adversaries could not compete with our intellectual capital. Today we are in a different environment, fighting a more challenging foe. Our advantage is all rooted in STEM. We need to battle to inspire youth to undertake these skills. Kids in other countries are making the sacrifice to study science and engineering. We need to leave no source of potential talent behind, but the talent pool of minorities is underutilized.”

**Ronald Sugar**  
**Chairman and CEO, Northrop Grumman**  
**January 2008**

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“We are incredibly concerned about the lack of attention to STEM. The pool of STEM talent we have from which to hire is simply not large enough. We are going to be an innovation society and we need STEM talent to achieve that. Diversity may be the trump card, though. We are going to run out of talent unless we get more women and underrepresented minorities going to college to study STEM.”

**Nicholas Donofrio**  
**Executive Vice President of Innovation and Technology, IBM**  
**January 2008**

\* \* \* \* \*

“We have a comparative advantage on the world stage. We still have the most innovative nation on this planet; we have a strong science and technology base built over many years; we have a free market and an entrepreneurial economy; and we built all this on a substrate of democracy and a diverse population. If we get our act together, nobody can beat us at this game. But that means we have to consciously as a nation invest in the things that will allow our people to build on our advantage.”

**Charles Vest**  
**President, National Academy of Engineering**  
**Rising Above the Gathering Storm: Two Years Later, 2009**  
[http://books.nap.edu/openbook.php?record\\_id=12537&page=19](http://books.nap.edu/openbook.php?record_id=12537&page=19)

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“A nation’s most strategic resource is the strength of its scientific workforce. It is imperative that the entire scientific community coalesce around a quantifiable and shared rationale for rebalancing the base domestic federal research budget beyond the one-time stimulus package.”

**Elias Zerhouni**  
**Former Director, National Institutes of Health**  
<http://www.sciencemag.org/cgi/content/summary/323/5917/983>

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“The annual Top 50 Companies for Diversity listing, now in its eighth year, is an editorial process, entirely driven by metrics obtained in a detailed survey. Companies ranked in the listing demonstrate consistent strength in four areas: CEO Commitment, Human Capital, Corporate and Organizational Communications, and Supplier Diversity. . . . The Top 50 hire 44 percent Blacks, Latinos, Asians and Native Americans, up from 33 percent five years ago. By comparison, the U.S. work force is 29 percent Black, Latino, Asian and Native American, the same level it was three years ago. Twenty-five percent of managers in the Top 50 are Black, Latino, Asian or Native American, compared with 19 percent five years ago. The U.S. work force has 17 percent managers from these groups, compared with 15 percent five years ago.

Although Top 50 companies employ only 5 percent of the U.S. work force, they employ 17 percent of the college-educated Black, Latino, Asian and Native American workers. Top 50 boards of directors are 23 percent Black, Latino, Asian and Native American, compared with 13 percent nationally. Top 50 boards are 22 percent female, compared with 15 percent nationally.

What's the difference globally, where representation by race/ethnicity isn't usually measured? Top 50 companies average 48 percent of their revenue outside the United States, compared with 38.5 percent five years ago. Almost 20 percent of the Top 50 refuse to do business in countries that don't have the same human-rights values. By comparison, only 5 percent of U.S.-based companies have strong global human-rights policies, according to Ethical Investment Research....

A total of 352 companies participated this year, up 10 percent from last year and up 100 percent since 2003. . . . The DiversityInc Top 50 Companies for Diversity list is determined entirely by a statistical analysis of responses to our 200-question survey. The survey is sent to any company requesting it that has more than 1,000 employees. There is no fee to enter and no requirement to advertise. . . .”

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**The Editors of Diversity Inc.**

**April 2008**

<http://www.diversityinc.com/public/3350.cfm>

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“Some people make the argument that education is an economic issue. Our students need to compete with students from other countries. And that’s all right with me. If we have to make that argument to get the public funds we need to rebuild our schools, we should do it. But to me, education is more fundamental than a question of American competitiveness or security. It is based on our shared social responsibility to make sure that every young person has an equal opportunity to be successful in life. That, in my mind, ought to be enough for us to make the changes our present conditions require.”

**William H. Gates, Sr.**

**Co-Chair, Bill and Melinda Gates Foundation, 2008**

<http://www.gatesfoundation.org/speeches-commentary/Pages/william-gates-sr-2008-education-forum-speech.aspx>