



Diversity and the Law: 2021

Brief Legal Overview¹

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This document provides a brief overview of federal non-discrimination laws that establish design parameters for student, faculty and staff diversity, equity, and inclusion (DEI)- related policies, with practical guidance on:

- ◆ *Points of alignment and difference between distinct legal regimes for ²education and employment;*
- ◆ *Evidentiary foundations that must be established to justify the consideration of race, ethnicity and sex/gender of individuals when conferring benefits and opportunities.*

Key: **Blue Heading**—Section addresses Student and Faculty/Staff DEI efforts.

Green Heading—Section addresses on Student DEI efforts.

Purple Heading—Section addresses Faculty/Staff DEI efforts.

Federal Law’s Nondiscrimination Mandate and Exacting Standards for Exceptions

Federal Non-Discrimination Mandate: Federal equal protection and opportunity principles generally prohibit public and private IHEs that receive federal funding from discriminating against individuals or treating them differently on the basis of their race, ethnicity/national origin³ or sex. More specifically, federal non-discrimination law generally prohibits IHEs from considering an individual’s race or sex when deciding who does or does not receive an educational or employment opportunity or benefit. Federal law generally permits most other criteria for differential treatment of individuals (e.g., socio-economic status, geographical background, particular expertise, experience, or talent), without significant probing or judgment of their wisdom or necessity.¹

“Sex” generally includes sexual orientation, gender identity, and gender expression, at least insofar as:

- ◆ Differential treatment is against an individual for not conforming to sex stereotypes (e.g., a woman dresses, or is “too aggressive,” or otherwise appears or behaves in ways that are not stereotypically “feminine”) and
- ◆ Using the Supreme Court’s binary frame, under employment as well as education non-discrimination policies , when LGBTQ+ individuals are treated differently than those of another “biological” sex would be treated in the same circumstance (e.g., a man suffers adverse treatment in employment or education policies or practices for having a romantic relationship with a man, when a women would not suffer such treatment if she were to have such relationship with a man).⁴ We use the term “gender” to mean the broadest definition of “sex” permitted by

² Even when federal law would allow limited race, ethnicity, and sex/gender- conscious policies, nine states have enacted bans to “preferences” for these identities in public education, employment and contracting. They are: Arizona, California, Florida, Idaho , Michigan, Nebraska, New Hampshire, Oklahoma , and Washington. Only race, ethnicity, and sex/gender “neutral” (non-preferential) policies, as determined by each state’s law, are permitted in public institutions of higher education (IHE) in these jurisdictions. See **State Law Bans Guide** at <https://www.aaas.org/programs/diversity-and-law>.

³ Race and ethnicity are distinct identities. However, federal nondiscrimination law treats them in the same manner, and we use “race” to encompass both throughout this guide for brevity.

⁴We use the term “gender” throughout this resource to mean the broadest definition of “sex” permitted by law in the circumstance. Federal non-discrimination laws in both the student/education and faculty/employment contexts use the term, “sex,” which generally is interpreted to include sexual orientation, gender identity, and gender expression, at least insofar as:

- differential treatment against an individual is for not conforming to sex stereotypes (e.g., a woman dresses, or is “too aggressive,” or otherwise appears or behaves in ways that are not stereotypically “feminine”) and
- using the Supreme Court’s binary frame, when LGBTQ+ individuals are treated differently than those of another “biological” sex would be treated in the same circumstance (e.g., a man suffers adverse treatment in employment or education policies or practices

law in the circumstance.

Important Distinction Between Aims and Means: An IHE’s mission may include advancing any race or gender- focused DEI interests that it values (aims), without intrusion of federal nondiscrimination law (and likely without running afoul of most state law bans).

- ◆ It is when the **means** to achieve those **aims** involve consideration of *individuals’* race or gender that the exacting standards of federal non-discrimination law, governing both aims *and* the means to achieve them, apply.

Exceptions to Nondiscrimination Mandate: While courts are skeptical whenever individuals are treated differently on the basis of their race or gender, federal law allows some exceptions to its non-discrimination mandate, provided that rigorously applied, exacting legal conditions are satisfied. The exceptions permit (but do not require) limited consideration of an individual’s race or gender when conferring educational or employment opportunities and benefits if two requirements of “strict scrutiny” for race —or “intermediate” or “heightened scrutiny” for gender—are met:

- ◆ First, legally-recognized **aims** of sufficient importance, specificity, and measurability must be articulated. Aims may not perpetuate identity status-based stereotyping. There should be an intention to achieve the aims at some point, at which time identity considerations will no longer be necessary; and progress should be measured toward that end.
- ◆ Second, the **means** to achieve those aims must be grounded in evidence (not mere opinion) that identity-status consideration is “necessary” and there is precision in both design and implementation of the policy (i.e., it is not overbroad) to achieve the legally sufficient aims.ⁱⁱ

Specifically:

- ❖ There must be sufficient evidence (not merely an IHE’s opinion) of the need for a race or gender- conscious policy (see below on evidence of need);
- ❖ Those who are not members of the chosen race or gender must not be unduly burdened. That requires as limited reliance on race as possible, and similarly limited reliance on gender, with feasible neutral policies employed to minimize or avoid the need for identity-conscious action; and
- ❖ There must be ongoing, periodic evaluation of aims and means to assure that race and gender are not considered to a greater extent or for a longer period than is justified by the evidence of need. (In the student *and* faculty/staff context, this is best done collaboratively by multiple offices that have a combination of relevant institutional knowledge, operational responsibility, and advisory expertise.) In the employment context, an IHE, as a federal contractor, also must prepare and update an Affirmative Action Plan as a key data source to identify where good faith efforts are required to address an “underutilization” or “presumed discrimination” of a race or gender group.

for having a romantic relationship with a man, when a women would not suffer such treatment if she were to have such relationship with a man).

The Supreme Court has established this interpretation of “sex” in the context of Title VII, the main federal non-discrimination in employment law. *Bostock v. Clayton County*, 140 S.Ct.731 (2020) (The Court held: “Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their [binary or biological] sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.”) While the Supreme Court explicitly reserved the issue, the U.S. Department of Education has applied the Court’s rationale and underlying principles to Title IX, the federal non-discrimination on the basis of sex . *Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 FR 32637 (June 22, 2021). First level federal appeals courts in a number of geographically delineated federal circuits around the country have also protected transgender students from sex discrimination, relying on Title IX, the U.S. Constitution’s 14th Amendment Equal Protection Clause [EPC] and other rationales. See the Project’s **Definition of Sex Under Federal Non-discrimination Law**, AAAS Link, for elaboration and additional citations. Many IHEs have mission-driven diversity and equity interests in the broadest definition of sex. We use the term “gender” to mean the broadest definition of “sex” permitted by law in the circumstance.

Where actual discrimination exists, it must be remedied. IHEs are required to consider the availability and sufficiency of neutral policies, and to maximize their use, to remedy these failures to provide employment equal opportunity to avoid over-burdening those of racial and gender groups that are not targeted for the remedy.ⁱⁱⁱ

Distinctions in the Rigor of Evidence of Need that is Required to Justify Race vs. Gender-Conscious

Policy: Federal non-discrimination law does recognize limited inherent biological and physiological differences between binary sexes that are not based on stereotypes about the capabilities, interests or proper role of a sex; whereas the law has rejected inherent differences based on race.^{iv} Thus, the extent of evidence required to justify a race-conscious policy (evidence that considering such identity is a “last resort,” and is precisely tailored to achieving a Supreme Court-recognized, compelling interest) is greater than that required to justify a gender-conscious policy (evidence that considering such identity has an “exceedingly persuasive justification” and is substantially related to an important interest). However, the difference in the standards for race and gender, while declared, has not been fully explored by the Supreme Court and may be hard to operationalize. In fact, lower federal appeals courts are split on whether the Supreme Court has established a meaningful difference, making IHEs in different regions of the country subject to different interpretations, until the Supreme Court issues a clarifying decision. IHEs in states whose federal appeals courts do *not* recognize a material difference must satisfy the stricter standard for race, as well as for gender. Elsewhere, for now, there exists uncertainty as to how much evidence of need to consider an individual’s gender is enough. Also if both the race *and* gender of an individual is considered (e.g., regarding a woman of color) when conferring benefits or opportunities, both standards apply, but separately—one applies to the necessity of considering race, and the other to the necessity of considering gender. See **Federal Non-Discrimination Law on Sex & Gender** at <https://www.aaas.org/programs/diversity-and-law>.

It is wise to avoid the creation of worse law, which may ultimately affect many IHEs. That is an expected outcome if an unsympathetic court is presented with bad facts (i.e., an IHE’s failure to satisfy existing law) as a context for making a new decision. The Supreme Court’s composition creates a challenging legal landscape, now and for the foreseeable future, and there is some ambiguity as to existence and extent in practice of a meaningful difference in the governing standards for evidence of need to support gender- and race- conscious policies. Accordingly, it may be prudent and most feasible to design both policies to meet the stricter standard for race, while expressly reserving the position that a less strict, though still high, standard applies to gender.

Different Aims Are Required in Education and Employment to Justify Exceptions: IHEs have a strong interest in both student body and faculty diversity and equity, as well as faculty employment equal opportunity. However, the legal regimes that govern the design of student educational diversity policies and of faculty and staff employment equal opportunity and diversity programs are different, requiring different *aims* to justify race and gender- conscious *means*.

Student/Education Aim: In student education programs, the legally sufficient aim is grounded in a universally beneficial education rationale: the specific, measurable beneficial educational experiences and outcomes for *all* students (and, through them, society-at-large) that are associated with broad student body diversity (including but not limited to racial and gender diversity).^v This forward-looking, universally beneficial educational diversity interest is notably distinct from backward-looking, remedial equity or “affirmative action” interests.^{vi}

Faculty/Staff Employment Aim: In contrast, in employment of faculty and staff, the legally sufficient aim is grounded in a remedial employment equal opportunity rationale: remedying an IHE’s own discrimination in employment (re: opportunities, benefits, terms and conditions) or legally defined “underutilization,” “presumed discrimination,” or other failure to provide employment equal opportunity

on the basis of race or gender.^{vii}

Distinguishing Permissible Educational and Employment Aims from Impermissible Aims of Racial Balancing and Remedying General Societal Inequity: The Supreme Court has constructed a subtle, but important, distinction between:

(1) a *legally impermissible aim*—i.e., racial balancing (e.g., mirroring at the IHE or in a discipline, the racial composition of the general local, state or national population, setting numerical caps by race, or fixed numerical targets or quotas by race) or righting general societal race-based wrongs^{viii}—as a justification for individual race-conscious decision-making (with similar concepts applicable to gender);^{ix} and

(2) awareness of population demographics and issues of race- and gender- based inequities in society or in a particular field, as a *legally permissible context for the subject matter focus* of educational and employment programs (without considering any individual’s race or gender to determine participation).

Federal non-discrimination law generally does not regulate the subject content of initiatives; such law regulates the race and gender- conscious criteria for who may participate or benefit. Societal demographics and issues of race and gender in society and STEM or other fields may be critical context for educational and faculty employment programs, as high-quality STEM education, teaching and research require broad diversity and the perspectives it brings to push the boundaries of science and identify and satisfy needs of a diverse and global society. Indeed, while there is no case directly on point, strong arguments support the position that IHEs may favor and invest in faculty and students, of any race or gender (*i.e., irrespective of such identity*), who have deep knowledge—combined with an ability and passion to elevate others’ understanding—of issues of race and gender in science and other fields or society at large; or whose research focuses on, e.g., eliminating race- and gender-based health, environmental, or engineering disparities; or who use pedagogy that is effective and welcoming for a diverse student body; or who demonstrate a commitment to advancing a more racially and otherwise just and inclusive society that well-serves all people. Awareness of societal demographics, as well as demographics of the available and qualified labor pool in STEM or other fields, also are important foundations for equal opportunity-enhancing employment goals. The limitations imposed by exacting federal legal standards arise when the *means* to achieve these goals include consideration of an *individual’s* race or gender.

Requirement for Evidence of Need for Identity-Conscious Means—Student Education Context: Where educational diversity is the aim, 40 years of Supreme Court precedent holds that federal law permits limited race-conscious policies, but only when there is sufficient evidence of the need for such means.^x To demonstrate need, an IHE should provide evidence of the following:

- ◆ Existing levels of diversity, in related discipline clusters (where students interact) as well as IHE-wide, are not adequate to create a sufficiently diverse setting where specific, measurable educational aims (beneficial student experiences and outcomes) associated with diversity can be realized. This involves first assessing evidence of the current student experience (e.g., via course evaluations, town halls, surveys, evaluations from student participation in student groups, sports, and activities, etc.). Are some students feeling marginalized and able to participate only as representatives of their racial or gender group—or do all students feel welcome and able to fully participate as individuals? Do all students have opportunities to engage meaningfully in learning, work, living, and social experiences in diverse settings?
- ◆ The IHE is making good use of existing diversity to produce beneficial educational experiences for all students (e.g., through the content of curriculum; use of effective pedagogy for a broadly diverse student body; and/or the creation of diverse student groups in residential units, project and seminar groups, and co-curricular activities, etc.).
 - If the quality of student experience associated with diversity is not what is sought, and

the IHE is making good use of existing levels of compositional diversity to create a setting for that experience, then current levels of compositional diversity need to be increased. How much will depend on an ongoing, systematic assessment of the student experience, not on a numerical goal.

- ◆ The IHE has identified and is using Supreme Court-labeled “workable neutral” policies to increase diversity but neutral policies are insufficient alone; limited race or gender-conscious policies are also needed. See the Project’s **Key Definitions** and **Neutral Strategies Guide-Students** at <https://www.aaas.org/programs/diversity-and-law>. That requires data (on the impact of neutral policies in use and modeling the impact of potentially feasible neutral policies that could be used), showing that workable neutral policies would not create adequate compositional diversity as a setting for the desired beneficial educational experiences. Explaining and documenting why some neutral policies are rejected as “unworkable” (with more than bare opinion) are also good practices.
- ◆ Any race or gender-conscious policies that are used are effective (as ineffective policies, by definition, are not necessary.)

Requirement for Evidence of Need for Conscious Means—Employment Context: Race or gender-conscious affirmative action is permitted under federal non-discrimination in employment law only if there is legally sufficient evidence of the need for such means to remedy actual discrimination or persistent and substantial underutilization or presumed discrimination, without unduly burdening others. Underutilization is a lack of equal opportunity, commonly measured by the 80% disparity test, comparing representation of racial, ethnic and sex groups in the relevant workforce and in the recruitment pool; presumed discrimination requires the same comparison but uses a two or more standard deviations test. This evidence and its evaluation should be documented in an annual affirmative action plan satisfying Office of Federal Contract Compliance (OFCCP) regulations for federal contractors. Evidence that sustained use of “neutral” policies has proven insufficient to remedy a legally recognized, persistent, and substantial underutilization or presumed discrimination is required to avoid over-burdening those who are not targeted for identity-conscious affirmative action benefits. See the Project’s **Key Definitions; Amplification of Underutilization; and Neutral Strategies Guide-Faculty** at <https://www.aaas.org/programs/diversity-and-law>. In addition to remedying a wrong, it is also a good practice, but only as a supplementary rationale, to recognize and document the importance of diversity in the faculty and student body^{xi} to beneficial educational experiences for all students (educational diversity interests), as evidenced by student and faculty feedback. However, a legally recognized remedial condition for race and gender-conscious affirmative action in employment is required as the fundamental justification.^{xii}

Particular Challenge in STEMM Employment: A problem with federal employment law’s definitions of presumed discrimination and underutilization, as they apply to STEMM fields, is that the law compares (on a percentage basis) the representation of a race or gender in an IHE’s own workforce, in a particular discipline and type and level of position, with that group’s representation in the available, qualified labor pool from which the IHE could recruit for the position. Where representation is poor in the labor pool for relevant disciplines, similarly poor representation in those disciplines at the IHE does not provide a remedial justification for race or gender-conscious affirmative action. There are pathways and likely climate and culture problems.

Capacity-building Programs to Address Artificially Limited Labor Pools: Policies such as guest lecture and visiting opportunities, limited-time research experiences, teaching support, and training opportunities, and other temporary measures (that are time-limited, not regular positions) may help to build the capacity and competitiveness for employment and promotion of individuals of certain underutilized races and gender in STEMM and other fields where a labor pool is “artificially limited.” Design these programs using a sequential approach (see the **Big Picture Fundamentals & Staircase Diagram—Faculty** <https://www.aaas.org/programs/diversity-and-law>)—considering and employing neutral outreach, barrier

removal and criteria first. If such design is insufficient and race or gender-conscious policies are needed, the following strategy may be worthy of consideration, but requires collaboration with your IHE's legal counsel.

Section 1608.3(c) of the Equal Employment Opportunity Commission's (EEOC) regulations, which implement the main federal nondiscrimination in employment law, Title VII, provides support of affirmative action to address artificially limited labor pools. It provides: "(c)...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: (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...; (4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures."^{xiii} Having an EEOC guideline endorsing training programs to address artificially limited labor pools is particularly important because Title VII includes a provision that affirmative action taken in good faith reliance on and conformance with a "written interpretation or opinion of the [EEOC]" shields an employer from liability under the statute.^{xiv}

In fields such as many STEM disciplines, where there are limited numbers of people of color or women in the available and already qualified labor pool, underutilization (and a similar court concept, "manifest imbalance") often can't be shown, and presumed discrimination is even rarer. However, there may be a "trainable cohort" of graduate students, post-doctoral associates, and adjunct or junior faculty at an IHE who could be prepared to compete successfully for tenure-track positions and tenure. Arguably, with appropriate evidence that an IHE historically created barriers and limited access to preparation for certain disciplines for women and people of color (even as other IHEs did, though systemic issue is not a requirement for an IHE to remedy an artificially limited labor pool it helped to create), targeted, appropriately designed and implemented capacity-building programs may arguably be supportable under EEOC regulations and Supreme Court precedent.^{xv} Such programs might include certain time-limited assistantships, post-doctoral appointments, mentoring programs, and visiting appointments (not regular positions), involving consideration (but not exclusive criteria) of applicants' race and gender. Enabling others in need of capacity-building to compete for participation in such programs is important.

However, the concept of an artificially limited labor pool has not been applied by the Supreme Court or, to our knowledge, the EEOC, in a higher education setting. The Supreme Court case on which the EEOC regulation is based involved the formality of a union's exclusionary practices and a remedial plan in a collective bargaining agreement. Institution-specific analysis, documented evidence of an IHE's own prior exclusionary practices and their current effects, and legal advice are warranted before relying on an artificially limited labor pool rationale to support race or gender conscious capacity building policies.^{xvi} Public IHEs that are subject to Constitutional equal protection standards for justification of race and gender consciousness, which are potentially stricter than the exacting standards imposed by Title VII on public and private IHEs, are well-advised to pursue neutral capacity-building programs before considering identity-conscious programs.^{xvii} In the current legal landscape that is a wise course for public and private IHEs.

Treatment of Graduate Student Assistants and Post-Docs: A complex question, without a clear answer, concerns whether graduate student research and teaching assistants and post-doctoral associates are classified as students, whose race and gender-conscious diversity policies are subject to the student/beneficial educational diversity legal regimes (Title VI for race and Title IX for gender)—or employees, whose race and gender-conscious diversity policies are subject to the employment/remedial equal employment opportunity legal regimes (Title VII and OFCCP).⁵ An individual may be treated as a student for some activities and as an employee for other activities

⁵ Faculty (and all employees) are also covered by Title IX (for gender), which overlaps with Title VII in the employment context.

at the IHE, with different legal regimes applying. Courts consider the totality of facts to answer the essential question of whether—in a particular activity—the IHE’s treatment of the individual demonstrates that their role is that of a student, satisfying a degree, certificate or credit-bearing education requirement or receiving an educational benefit and receiving financial aid—or is that of an employee, performing and being paid for a service. Advice from the IHE’s lawyers is important, and they will likely need to confer with other offices (e.g., registrar, payroll, and tax) to appropriately classify graduate assistants and post-docs. However, for purposes of federal non-discrimination law, this classification is important only if race or gender-conscious policies are being considered that affect graduate assistants and post-docs. If only neutral policies are used, the exacting standards of federal non-discrimination law should not apply, even though the IHE will need to classify graduate assistants and post-docs for purposes of other laws (e.g., tax and payroll) and to determine whether the IHE’s student or employee policies will apply to them. See the Project’s **Graduate Assistant and Post-Doctoral Associate DEI Guidance** at <https://www.aaas.org/programs/diversity-and-law>.^{xviii}

Conclusion

Importantly, inclusive barrier removal and neutral policies can be pursued to advance diversity and equity interests, even when a legal justification for race- and gender-conscious policies is lacking. These neutral policies may be particularly important for faculty and staff diversity efforts in STEMM fields where the paucity of people of color and women in the available qualified recruitment pool often results in there being no remedial justification for race- and gender-conscious affirmative action under the law.

Serious attention to inclusive barrier removal and neutral policies is not only required by law as part of building the required evidence base in the student-education and employment contexts, if any race-, and gender-conscious diversity policies are to be pursued; these policies also can be significant contributors to positive diversity and equity policy goals. Evidence often demonstrates that sole use of neutral policies is inadequate to address educational diversity aims for students.^{xix} A similar conclusion may be reached in the employment equal opportunity context, depending on the facts, field and IHE. When that is the case, supported by evidence, neutral policies and race and gender-conscious policies are “and”—not “or”—propositions.

ⁱ Action that is subject to a rational basis standard is upheld, on court review, so long as it is not illegal, arbitrary, or malevolent. See *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988) (noting that Supreme Court “previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny,” the Court applied a rational basis standard in reviewing a challenge to a North Dakota statute permitting some school districts, but not all, to charge a fee for bus transportation); see generally *Romer v. Evans*, 517 U.S. 620, 627 (1996); see *City of Cleburne, Tex v. Cleburne Living Center*, 473 U.S. 432, 470 (1985).

ⁱⁱ The strict scrutiny standard for race and ethnicity (as well as the slightly lesser but still stringent intermediate or heightened scrutiny standard for sex) are not inherently fatal to these factors under federal law. Exceptions to the nondiscrimination mandate may be justified under Title VII, the federal employment statute (prohibiting discrimination in employment on the basis of race, color, sex, religion and national origin) and executive orders that apply to federal contractors (prohibiting discrimination on the basis of race, ethnicity and sex). Exceptions may permit—but do not require—temporary race-, ethnicity- or sex- based affirmative action to remedy a “manifest imbalance” or underutilization of certain races, ethnicities or sexes in an employer’s workforce, if neutral barrier removal and other neutral policies are insufficient and those who are members of other races or gender are not unduly burdened. Also, Title VI (focused on prohibiting discrimination in education of students, but also specifically-funded faculty, on the basis of race and ethnicity) and Title IX (prohibiting discrimination in education programs, including students and employment of faculty and staff, on the basis of sex) do not require race-, ethnicity- or sex- conscious means to be used to advance educational diversity or equal employment opportunity. However, they are interpreted to permit such consideration with sufficient evidence of need (i.e., evidence of an important enough aim and avoidance of overburdening others by demonstrating the inadequacy of neutral means, flexible multifactor consideration of race, ethnicity or gender, periodic review to ensure identity-status is not considered to a greater extent or for a longer period than needed, and working toward an end point). See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *Steelworkers v. Weber*, 443 U.S. 193 (1979); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) (Fisher I); and *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016) (Fisher II). See also, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F. Supp. 3d 126 (D. Mass. 2019) *aff’d sub nom. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020)), *aff’d* 980 F.3d 157, *cert. docketed* No. 20-1199 (Mar. 1, 2021) (holding that the admission process served a compelling, permissible and substantial interest, and it was necessary and narrowly tailored to achieve diversity and the academic benefits that flowed from diversity).

ⁱⁱⁱ See *id.*

^{iv} 20 U.S.C. §§ 1681-1688 (Title IX); 42 U.S.C. § 2000e (Title VII); *United States v. Virginia*, 518 U.S. 515, 532 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 729 (1982); *Fisher I*; *Fisher II*; *Grutter* 529 U.S. (2003); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

Title VII provides an exception to its prohibition of discrimination based on sex, religion, or national origin. That exception, called the bona fide occupational qualification (BFOQ), recognizes that in some extremely rare instances a person's sex, religion, or national origin may be reasonably necessary to carrying out a particular job function in the normal operation of an employer's business. Race is not included in the statutory exception and cannot, under any circumstances, be considered a BFOQ for any job. The Equal Employment Opportunity Commission (EEOC) has stated in its Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.1 et seq. (1980), that the BFOQ exception should be interpreted narrowly. The U.S. Supreme Court upheld that position in *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977), where the Court noted: “We are persuaded by the restrictive language of §703, the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission that the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.” In *Diaz v. Pan American World Airways*, 442 F.2d 385, 388, (5th Cir., 1971) the court held that “discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.” In an earlier case, *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235, (5th Cir., 1969) the same court said that an employer could rely on the BFOQ exception only by proving “that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.” See also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Dothard* 433 U.S. at 333, (1977) (“But whatever the formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped

characterizations of the sexes.”); *Miller v. Texas State Board of Barber Examiners*, 615 F.2d 650 (5th Cir. 1980), *cert. denied*, 449 U.S. 891 (1980).

^vA number of sources of research substantiating the educational benefits of diversity in STEM and beyond are cited in, See e.g., *Taking a “Hands On” Approach to Diversity in Higher Education: A Critical-Dialogic Model for Effective Intergroup Interaction*, Sorensen, N., Nagda, B., Gurin P., and Maxwell, K., *Analyses of Social Issues and Public Policy*, Vol. 9, No. 1, pp. 3-35 (2009), (positing that higher education will be most influential when students encounter an educational environment that diverges from students’ prior experiences and when its diversity and complexity encourages active thinking and an intellectual interest in exploring new and different educational experiences); *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, Chang et al., *The Journal of Higher Education*, (2005), (indicating that one important conclusion that has emerged from research is that the vitality, stimulation, and educational potential of an institution are directly related to the composition of its student body, faculty, and staff), <https://cshe.berkeley.edu/sites/default/files/publications/rop.chang.2.05.pdf>; *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, Bowman, N. A., *Review of Educational Research*, 81(1), 29–68 (2011), <https://doi.org/10.3102/0034654310383047>; *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, Bowman, N. A., Brandenberger, J. W., Hill, P. L., & Lapsley, D. K., *Journal of College Student Development* 52(6), 729-239 (2011), [doi:10.1353/csd.2011.0075](https://doi.org/10.1353/csd.2011.0075); *Racial/cultural awareness workshops and post-college civic engagement: A propensity score matching approach*, Bowman, N. A., Denson, N., & Park, J. J., *American Educational Research Journal*, 53(6), 15561587, (2006), <https://doi.org/10.3102/0002831216670510>; *The educational benefits of sustaining cross-racial interaction among undergraduates*, Chang, M. J., Denson, N., Saenz, V., & Misa, K., *The Journal of Higher Education*, 77(3), 430-455 (2006), <https://doi.org/10.1080/00221546.2006.11778933>; *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, Denson, N., & Chang, M. J., *American Educational Research Journal*, 46(2), 322–353, (2009), <https://doi.org/10.3102/0002831208323278>; *A retrospective assessment of the educational benefits of interaction across racial boundaries*, Luo, J., & Jamieson-Drake, D., *Journal of College Student Development*, 50(1), 67-86, (2009), <https://doi.org/10.1353/csd.0.0052>; *Activating Diversity: The Impact of Student Race on Contributions to Course Discussions*, Pitt, R. N. & Packard, J., *The Sociological Quarterly*, 53(2), 295-320 (2012), <https://doi.org/10.1111/j.1533-8525.2012.01235.x>; *Estimating benefits from university-level diversity*, Wolfe, B. L., & Fletcher, J., *National Bureau of Economic Research*, (2013), <https://doi.org/10.3386/w18812>; *Bridging the Research to Practice Gap, Achieving Mission-Driven Diversity an Inclusion Goals, A Review of Research Findings and Policy Implications for Colleges and Universities*, Taylor, T.E., Milem, J.F., Coleman, A.L., *The Access and Diversity Collaborative of the College Board and EducationCounsel*, (March 2016), <https://educationcounsel.com/?publication=bridging-research-practice-gap-achieving-mission-driven-diversity-inclusion-goals>.

These benefits include enhanced cognitive development, creativity, teamwork, and productivity; breaking down stereotypes and encouraging cross-racial understanding; preparing for a workforce that can identify and serve the needs of a diverse and global society. These benefits are critical in STEM fields, which are creative and collaborative fields, and in which identifying and serving the needs of a broadly diverse society requires the perspectives and experiences of diverse learning and work environments.

^{vi} A distinct remedial justification may justify race- and ethnicity- conscious action to address an IHE’s own discrimination against students with evidence of current effects, but resort to that justification is increasingly rare. The main Supreme Court cases concern school desegregation and assignment programs. See *Parents Involved in Community Schs. v. Seattle Sch. Dist. et al.*, 551 U.S. 701, 720-21 (2007) (noting that defendants do not rely upon an interest in remedying the effects of past intentional discrimination— a compelling interest in evaluating the use of racial classification in the school context – as a reason for use of race in student assignment plan) (citing *Milliken v. Bradley*, 433 U.S. 267, 280(1977); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Board of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249-50 (1991)). Taking an unusual stance in higher education, the University of Maryland tried to justify its race-exclusive Banneker Scholarship program as a remedy for the institution’s own legacy of discrimination, and was unsuccessful; a first-level federal appeals court found the evidence of present effects of discrimination insufficient and the Supreme Court declined to hear the case. See *Podberesky v. Kirwin*, 38 F.3d 147 (4th Cir. 1994) (finding a lack of connection between past discrimination and present day impact) *cert. denied*, 514 U.S. 1128 (1995).

^{vii} *Wygant*, 476 U.S. (1986), *supra*, note ii at 282-84 (applying strict scrutiny and finding school board’s policy of extending preferential protection against layoffs based on consideration of race to be unconstitutional where layoffs “impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives” – and such a burden is “too intrusive.”); *Johnson 480 U.S. (1987) supra note ii* (where there was a manifest imbalance of women and

people of color in skilled positions in an employer's workforce, temporary, flexible consideration of sex and race as one of many factors in promotional decisions was upheld, with particular note as to the absence of a quota); *Taxman v. Piscataway Board of Education*, 91 F.3d 1547, 1564 (3rd Cir. 1996), cert. dismissed, 527 U.S. 1010 (1997) (in holding that educational faculty educational diversity could not justify a race-conscious layoff policy because "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.").

^{viii} *Fisher I*, at 311 (citing *Bakke*, 438 U.S. at 307; *Grutter*, 539 U.S. at 330; *Parents Involved* 551 U.S. at 732); *Fisher II*, at 222. See also *Adarand U.S. 515* at 220.

^{ix} While different than righting generalized societal discrimination, some first level federal appeals courts have upheld righting inequity within a particular industry or job market, even in the absence of discrimination by the state or local government. These include: in the Third Circuit – *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990, 1003 (3d Cir. 1993), holding nevertheless that the provision of only limited anecdotal evidence of discrimination was insufficient to justify preferences for women-owned businesses; the Ninth Circuit in *Coral Construction Co. v. King County*, 941 F.2d 910, 930 (9th Cir. 1991) (upholding the district court's summary judgment in favor of the County that its set-aside program for women-owned businesses does not violate the EPC under intermediate scrutiny, while applying strict scrutiny to the County's the racial set-aside program, finding the County's passive participation in exclusionary practices to be adequate but remanding the case to the district court for further analysis of the racial set-aside at the time of the contracts at issue, without considering the County's later amendment of its program to provide further studies); reversed on other grounds by *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019) (holding that government action to amend challenged action is generally enough to render a case moot and appropriate for dismissal, unless there is a reasonable expectation that it will restore the challenged action or one similar to it) and the Eleventh Circuit -- *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895 (1997), 118 S.Ct. 1186 (1998), a case involving preferences in awarding local government construction projects to black-, Hispanic, and women-owned businesses.

In contrast, the Seventh Circuit Court of Appeals has held that the local government must have been actively or passively involved in the discrimination in order to redress it through gender-conscious preferences for women under intermediate scrutiny, in *Builders Ass'n of Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001), as has the Sixth Circuit, in *Michigan Road Builders Ass'n Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), summarily aff'd, 489 U.S. 1061 (1989), finding state set-asides for construction contracts unconstitutional under intermediate scrutiny for failure to provide evidence of state discrimination against women.

^x *Supra*, note ii; J. L. Keith, PURSUIT OF STUDENT BODY DIVERSITY IS DOABLE, BUT DO IT RIGHT! April 2019, available at <https://educationcounsel.com/?publication=pursuit-of-student-body-diversity-is-doable-but-do-it-right>

^{xi} *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 206 (D. Mass. 2019), aff'd sub nom. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020)), aff'd 980 F.3d 157, cert. docketed No. 20-1199 (Mar. 1, 2021) (the court recognized Harvard's explanation that a diverse student body enhances faculty perspectives and teaching, which inure to the benefit of all students. Similarly, IHEs may find that a diverse faculty enhances colleagues' and students' perspectives.)

^{xii} *Johnson v. Transp. Agency*, 480 U.S. 616, 632-34, 642 (1987) (Supreme Court upheld the consideration of race and sex as one among many factors in promotion decisions to achieve affirmative action plan goals where there was a manifest imbalance of women and minorities in a skilled role in the employer's workforce, using the trainable cohort of women and minorities in the general labor pool of the employer and in the area to determine the manifest imbalance—substantial underutilization); *Weber*, 443 U.S. at 209 (Supreme Court upheld reserving 50 percent of places in a skilled craft training program for trainable black workers at the plant under a collective bargaining agreement to build capacity in a traditionally segregated field where the union had excluded black laborers and their representation was not in line with the relevant labor pool, the local trainable labor market). Notwithstanding *Weber*, in light of *Johnson* and more recent caselaw interpreting strict and intermediate standards of review, quotas are unlikely to be upheld in the absence of the strongest evidence of need. See also, J. L. Keith, *Enhancing Faculty Diversity: Policy Perspectives, Law and Strategies* (Nat'l. Ass'n. College and Univ. Attys, 2019), <https://educationcounsel.com/?publication=enhancing-faculty-diversity-policy-law-and-strategy-perspectives>.

^{xiii} 29 C.F.R. Part 1608, 1608(3)(c) (2008).

^{xiv} See 42 U.S.C. § 2000e-12(b); see also *Ricci*, 557 U.S. at 631 n. 9. (Ginsburg, J., dissenting) (referencing this Title VII provision and the EEOC's affirmative action guidelines).

^{xv} The concept of a “trainable cohort” as part of EEOC-sanctioned and OFCCP- required affirmative action arises out of *Weber*, 443 U.S. 193. *Weber* upheld as permissible, voluntary affirmative action, under Title VII, a temporary plan in a collective bargaining agreement that reserved 50 percent of the positions in an on-the-job craft training program for African-American general production laborers at an aluminum factory, where African-Americans were historically excluded from skilled craft positions. The training program trained unskilled general production workers of all races at the plant for craft positions, so employees of other races also had training opportunities. The participants in the program were selected by seniority, with adjustments made to ensure that 50 percent of the positions went to African-American workers until the percentage of African-American skilled craft workers at the plant “approximated” or was “commensurate” with the percentage of African-Americans in the applicable labor market (the local market of trainable general laborers). The Court looked at the representation of African-Americans in skilled craft positions at the plant and found that only 1.83 percent of these positions were held by African-Americans. The Court found that African Americans comprised 39 percent of the applicable labor market from which the plant recruited general laborers. The company and a labor union had previously required prior experience for skilled craft positions (requiring greater expertise than needed for general labor), which had the effect of excluding all but a very few African-Americans from these positions because the union had long excluded African Americans from membership and deprived them of the requisite experience. However, the company had ample representation of African-Americans in their workforce of trainable general production laborers. This case held that voluntary affirmative action, through employee training programs to break down barriers of historic exclusion in skilled jobs by building capacity of trainable African-American workers and opening opportunities for them to compete for these jobs—without foreclosing opportunities for others to obtain training and also compete for jobs—further the purposes of Title VII. *Weber* continues to have precedential effect, although the propriety of racial or gender- based quotas in voluntary employee training programs under Title VII is unclear in light of more recent case law disfavoring quotas under Title VII and equal protection principles. See *Johnson* 480 U.S. (1987); *Texas Dep’t of Hous. & Cmty. Affs. V. Inclusive Communities Project, Inc.*, 576 U.S. 519, 522 (2015) (“[r]emedial orders that impose racial targets or quotas might raise difficult constitutional questions”); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, (1989) (holding that the City’s plan to award construction contracts to at least 30% of the dollar amount of each contract to one or more “Minority Business Enterprise” as unlawful because it denied certain citizens the opportunity to compete for the public contracts solely based on their race); *Adarand*, 515 U.S. (1995) (established that any intentional use of race, whether for malicious or benign motives, is subject to the most careful judicial scrutiny), *Parents Involved in Community Schs.* 551 U.S. (2007) (holding that the compelling interest of diversity in higher education could not justify districts’ use of racial classifications in student assignments); *C.f., Ricci v. DeStefano*, 557 U.S. 557 (2009) (striking down an employer’s refusal to certify the results of a facially neutral examination that determines promotion after the results showed an adverse disparate impact on employees of color; intentional discrimination on the basis of race—i.e., refusing to recognize the positive scores of white test-takers—even when intended to avoid unintentional disparate impact—is not legally sustainable without certainty of need); *Wygant* 476 U.S. at 286 (1986) (race conscious layoff policy is not narrowly tailored under applicable strict scrutiny standards because it is overly intrusive on and over-burdens already-employed individuals of other races—as distinguished from considering race when necessary in hiring decisions about individuals who are not yet employed).

^{xvi} *Id.*

^{xvii} *Johnson* 480 U.S. (1987)(indicating that the EPC imposes a stricter evidentiary base for the need to take race-conscious affirmative action than Title VII does; Title VII permits voluntary affirmative action to address unintentional racial and gender disparities, whereas the EPC permits race- and gender- conscious remedies only to address intentional discrimination); *Ricci* 557 U.S. at 627 (2009) (while relying on *Johnson* held that an employer’s reasonable effort to comply with Title VII’s disparate impact provision is not discriminatory). “[i]n construing Title VII, I note preliminarily, equal protection doctrine is of limited utility. The EPC, this Court has held, prohibits only intentional discrimination; it does not have a disparate-impact component.”) Scalia, J, concurring in *Ricci* (Title VII, is **not** coextensive with the EPC, and may apply a somewhat less strict standard on race and gender- consciousness by public and private IHEs as employers, than the EPC applies to race-consciousness by public IHEs as employers—although any difference has not yet been fully defined by the Court).

^{xviii} An agency or court also might look to, e.g., the IRS’ tax treatment of post-doc awards (see, e.g., I.R.C. § 117 and IRS Publication 520, “Scholarships and Fellowships”); and Dept. of Labor/FLSA treatment of graduate students, externs, and residents. See, e.g., DOL Field Operations Handbook at paragraphs 10618-620 and 10624 (1993). This list is excerpted from 11

the American Association for the Advancement of Science, *Navigating a Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education*, Burgoyne, R., et al. (2010), <http://php.aaas.org/programs/centers/capacity/publications/complexlandscape/PDFs/LawDiversityBook.pdf>.

There is no private right of action for disparate impact claims under Titles VI and IX (education); there is under Title VII (employment). See, *Alexander vs. Sandoval*, 532 U.S. 275 (2001); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The U.S. Department of Justice may assert disparate impact claims under all of these statutes. See, e.g., 28 C.F.R. § 42.104(b)(2) (DOJ regulations). The disparate impact regulations seek to ensure that programs accepting federal money are not administered in a way that perpetuates the repercussions of past discrimination. As the Supreme Court has explained, even benignly-motivated policies that appear neutral on their face, but are enforced in way that treat people differently, may be traceable to the nation's long history of invidious race discrimination in employment, education, housing, and many other areas. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971); *City of Rome v. United States*, 446 U.S. 156, 176–77 (1980), *superseded by statute in Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, (2009).

^{xix} See the Project's **Neutral Strategies Guide-Students** and **Neutral Strategies Guide Faculty** at

<https://www.aaas.org/programs/diversity-and-law>;

The Playbook: Understanding the Role of Race Neutral Strategies in Advancing Higher Education Diversity Goals, Coleman, A.L., Keith Lewis, J., Webb, E., 2nd Ed., (College Board and EducationCounsel 2019),

<https://professionals.collegeboard.org/pdf/playbook-understanding-race-neutral-strategies.pdf>.