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Federal Non-Discrimination Law on Sex & Gender…Compared to Law on Race & Ethnicity[1]

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This document provides an overview of the key distinctions between federal non-discrimination law standards that apply to policies that consider individuals' sex- and gender[1] when conferring opportunities and benefits ("gender-conscious") and such standards that apply to policies that similarly consider individuals' race and ethnicity[2] ("race-conscious"). It synthesizes important developments and trends in the murkier former regime, with practical guidance on how to navigate the uncertainty in light of caselaw trends and operational considerations. It also illustrates the relative clarity in the latter regime. This document complements the 5-Step Design Guides for faculty and students, https://www.aaas.org/programs/diversity-and-law, which aid institutions of higher education (IHEs) in their design of diversity, equity, and employment equal opportunity ("EEO") policies for impact and sustainability.

Overview

Federal non-discrimination law articulates different standards that must be met to justify gender-conscious policies, as compared to race-conscious policies. Consider the following overarching questions and top-line answers, which this document further interrogates with a focus on how IHEs might operationalize the applicable legal standards, while advancing their gender-focused diversity, equity and EEO aims:

(1) Is there is an intended meaningful difference between the federal law standard for gender-conscious policies as compared to the standard for race- conscious policies? *Likely, yes. And, if so, both apply, but separately, to women of color.*

(2) Have the courts defined the difference well enough to have any effect in practice? *While distinct labels and phrasing are articulated for the standards that apply to gender-conscious and race-conscious policies, the difference is somewhat ambiguous. Some parts of the country are subject to federal appeals court rulings that find no meaningful difference; others to court rulings that profess a difference but are not clear about its degree.*

To synthesize the state of the law, with practical guidance regarding recent developments and emerging trends, this document has three Parts:

Part 1: Baselines—which provides a top-line summary of relevant federal nondiscrimination law baselines and bottom-line guidance, without too much meandering through the complex and confusing legal landscape. Some readers may find what they need here and in Part 3's Takeaways, without more.

Part 2: Deeper Dive—which, with some unavoidable restatement of the basics, interrogates the twists and turns of the legal landscape, with U.S. Supreme Court and first level federal appeals court interpretations of gender and race standards in education, contracting and employment contexts. Decisions in all of these realms exert some influence on the analysis in any one realm, so they are addressed together, revealing some unavoidable ambiguity. Robust end notes cite key cases.

Part 3: Takeaways—which amplify the practical bottom-line guidance of Part 1, with a particular focus on science, technology, engineering, mathematics, and medical fields (STEMM) but with useful takeaways for all fields of higher education.

Part 1: Baselines

The U.S. Supreme Court has articulated different legal standards regarding the rigor of evidence of need and the precision of design that are required to justify gender-conscious policies as compared to race-conscious policies. The articulated difference applies in the student education context. It also applies in limited circumstances in the faculty-staff employment context; a federal statute applies the same standard to gender- and race-consciousness in employment in most circumstances. The Court has identified yet another difference in the standards for gender- and race-conscious policies, though. It has indicated that different standards apply to public and private IHEs in the employment context because public IHEs are subject to U.S. Constitutional standards and all IHEs are subject to somewhat different standards under a federal statute and executive orders. However, as addressed in greater detail below, the Court has not fully explored or defined the degree of any of these differences. The Supreme Court's opinions on gender in the education context are quite dated, whereas its opinions on race are relatively recent, even as both remain binding law. Also, the body of law around the standard that applies to gender consciousness is not clear and coherent. We end up having to consider Supreme Court and first level federal appeals court rulings in education, employment, and public contracting contexts for cross-context influence on interpretation of the standards. The lack of clarity around the applicable standard may influence gender-conscious policy design.

Differences in gender and race standards—and in standards that apply to public and private IHEs in the employment context, but not in the student education context. The same federal non-discrimination standards apply to public and private IHEs in the student realm because equal protection standards under the U.S. Constitution have been embedded in the relevant federal statutes that apply to public and private IHEs that receive federal funding—Title VI of the Civil Rights Act of 1964 for race and Title IX of the Education Amendments of 1972 for gender. "Strict" scrutiny standards apply to race-consciousness and "intermediate" or "heightened" scrutiny standards apply to gender-consciousness when conferring benefits or opportunities.[3] See, **Brief Legal Overview,** https://www.aaas.org/programs/diversity-and-law.

However, the Supreme Court has indicated that the main federal non-discrimination in employment statute, Title VII of the Civil Rights Act of 1964, may apply an exacting, but not quite as strict standard to private and public institutions as employers—when compared with the Constitution's equal protection standards that apply only to public institutions (and apply to them in all of their roles).[4] Title VII prohibits both race and gender discrimination in equal measure in most employment situations, requiring the same demonstrated need for identity-conscious affirmative action to remedy underutilization or presumed discrimination, whether based on race or gender. This single standard for gender and race at least approaches the strict standard for race-consciousness under the Constitution because Title VII requires use of neutral policies (barrier removal, inclusive outreach, and neutral criteria) to avoid unduly burdening those whose gender or race is not targeted for remedial affirmative action.[5] There may be a minor difference in Title VII's and the Constitution's required rigor around the definition of what is neutral or whether neutral policies alone would suffice, though the difference is not yet fully defined. Consequently, private IHEs are subject to an equally exacting standard for their gender- and race-conscious employment policies—though that standard may not be quite the strictest one of "last resort." Public institutions that are subject to both the Constitution and Title VII, however, are subject to the Constitution's strictest standard when race is at issue in employment. Public IHEs are subject to whatever gender standard is higher (which is unclear)—Title VII's single standard for gender and race or the U.S. Constitution Equal Protection Clause's "heightened" or "intermediate" standard for gender.[6]

Split in appeals court interpretations of standards applicable to gender and race. Contributing to these murky waters, first level federal appeals (circuit) courts and trial (district) courts that have interpreted the Supreme Court's decisions are split as to whether there is a meaningful difference in the standards for gender- and race-consciousness in various contexts. Consequently, IHEs in different parts of the country are subject to

different standards.[7] IHEs in states whose federal courts do not recognize a meaningful difference between the standards, have no choice but to apply the strict standards to both race and gender in student education and faculty-staff employment contexts—unless and until the Supreme Court clarifies its prior decisions and rules otherwise. IHEs in states whose federal courts do recognize a difference or have not ruled on the question at all are left with some uncertainty as to the measure of difference. (In the employment context, the difference in standards that apply to public and private IHEs will also come into play.)

A few things are clear, even as we navigate the murkiness and complexity of the legal landscape. First, the standards for both gender- and race-conscious policies are exacting. Second, legally recognized aims are required for gender-conscious policies, as well as for race-conscious policies. Under both the Constitution and federal non-discrimination in education statutes, the Court recognizes the aim of educational benefits of diversity for all students. It also recognizes the aim of remedying an IHE's own discrimination with present effects. In the employment context, the Court recognizes the aim of remedying an IHE's own discrimination or inadequate EEO under the Constitution, Title VII and executive orders (though the threshold for what is inadequate EEO may be higher under the Constitution, as compared to some measures of inadequate EEO under the statute and executive orders). Gender and race stereotyping and the aim of remedying general societal discrimination using gender- or race-conscious policies are prohibited in both realms. Third, both gender and race standards apply to women of color and other gender-race intersectional identities. But the standards for gender and race must be applied and satisfied separately because the law does not provide a distinct standard for intersectional identities. See **Brief Legal Overview** and **Key Definitions**, https://www.aaas.org/programs/diversity-and-law.

Deciding wise action that will advance gender diversity and equity interests, without undue legal risk, requires a consideration of:

- the uncertainty of the legal standards that apply to gender-consciousness,
- the fact that the strict standards for race and intermediate or heightened standards for gender are both exacting (and whether or not there is some degree of difference between them, it would likely be hard to define and operationalize in practice),
- the challenges posed by the Supreme Court (whose majority is led by justices whose opinions express skepticism at best on identity-conscious conferral of opportunities and benefits), and
- the importance of avoiding creation of more restrictive law, which can be expected when bad facts (i.e., an IHE's failure to satisfy existing legal standards) are the context for new court decisions.

As addressed more fully in Part 3-Takeaways, IHEs may find it most feasible operationally, as well as legally prudent, to design gender-conscious policies in education and employment to meet or nearly meet strict scrutiny standards. In any event, it is also wise to reserve what we think is the correct position: that the Supreme Court has established an exacting, but somewhat less exacting, standard for gender-conscious policies than for race-conscious ones.

A reader who does not want to dive deeper into the murkiness, nuances and complexity of the principles and rationales addressed in this Part 1 may want to skip Part 2 and proceed to the Takeaways in Part 3.

Part 2: A Deeper Dive

Gender exceptions to the non-discrimination mandate. As noted in the Overview, it is clear that a high bar is imposed by both strict and heightened standards, requiring evidence of need to consider race or gender to achieve aims of legally sufficient significance, and prohibiting identity status-based stereotyping of interests, abilities, and roles.[8] However, unlike race, federal non-discrimination law recognizes differences between the sexes that may be legitimately relevant to an individual's qualifications in highly limited circumstances, e.g., where variation in individual physical ability and interest are not relevant, but biological and physiological differences are relevant. In those limited circumstances, non-discrimination law provides limited exceptions to its general mandate against differential treatment of individuals on the basis of "sex."[9] It is undecided how such biological and physiological exceptions apply to transgender people, but the science and sound legal arguments would support treating transgender people according to their gender identity.[10] No such biological or physiological exception applies to race, nor should it.

Non-discrimination in education. Considering the Supreme Court's rulings in the student education context, it is clear that the strict standard applies to race-consciousness by public and private IHEs, requiring "compelling" educational aims benefiting *all* students. The Court requires ongoing evaluation of evidence demonstrating that race-consciousness is necessary—i.e., that its use is a narrowly (precisely) tailored means of creating a sufficiently broadly diverse setting where specific, beneficial educational experiences and outcomes can occur.[11] In its student admission cases, the Court has ruled that the "intermediate" or "heightened" standard for gender requires an "exceedingly persuasive justification," an "important" aim and evidence of a "substantial relationship" between considering individuals' gender and achieving that aim. However, the differences in weight of evidence of need for consideration of individuals' gender or race in conferring opportunities and benefits and in the degree of precision of means are not well-defined.[12]

Cross-context and federal appeals court influences. Considering the public contracting, public employment and education decisions of the first-level federal appeals courts that cover different geographical regions of the country (called federal circuits), does not result in a coherent interpretation of the Supreme Court's gender standard. Federal appeals courts may interpret Supreme Court decisions differently. A federal appeals court's decisions bind the IHEs in its federal circuit until the Supreme Court rules and further clarifies any ambiguity in its prior decisions. A clarifying Supreme Court decision then has the effect of overruling any inconsistent federal appeals court's interpretation.

The Supreme Court has been clear that strict standards apply to race-consciousness in education and public contracting, and heightened standards apply to gender-consciousness in education. However, the Court has been less clear about race- and gender-consciousness in the employment context and gender-consciousness in the public contracting context. Federal appeals courts around the country have rendered conflicting opinions across these contexts as to whether there is a material difference between the strict ("last resort") standard for race-consciousness and an "exceedingly persuasive justification" under the intermediate or heightened standard for gender-consciousness.[13] A majority of the federal appeals courts that have addressed the question in education, employment and public contracting, have interpreted the standard for gender to be exacting, but somewhat less than a last resort. However, several federal appeals courts have interpreted the standards for gender and race to be similar;[14] and others have not addressed the question at all.

This split in the lower federal court opinions creates some ambiguity in the effect of the Supreme Court's addition of the "exceedingly persuasive justification" descriptor to its gender opinions. However, we think that, whatever the difference is in the degree of evidence required to establish the need for race- and gender-consciousness, the right interpretation of Supreme Court rulings is that they do preserve a difference. In addition to recognizing some biological and physiological differences in the sexes, the Supreme Court used the

"exceedingly persuasive" descriptor as a general characterization of its longstanding intermediate standard for gender-consciousness, while continuing to define that standard, with specificity, as it consistently has done in the past (i.e., that gender consciousness must bear a substantial relationship to an important interest). It appears that the exceedingly persuasive amplification is provided to make the point that the standard for gender is not as strict as the standard for race, but it is still a high bar to meet.[15]

Special considerations regarding societal and market inequities in employment and public contracting. The Supreme Court has ruled that the aim of any race-conscious employment affirmative action by a public or private IHE must relate to remedying the IHE's own discrimination or a manifest imbalance or underutilization of a racial or gender group in the IHE's relevant workforce as compared with the group's availability in the relevant labor market. The aim may not be to remedy general societal inequity and, generally, may not be to remedy inequity in a specific industry or labor market. (There is a possible exception in the government contracting or employment context when the government has at least passively participated in creating the inequity.)[16]

Some lower federal court decisions sustain a state or local government's consideration of gender, *but not race,* in conferring contracting or employment opportunities to remedy discrimination in an industry or labor market. These cases do not concern remedying general societal inequity, but rather address evidence of discrimination in a specific industry or market. There is a split among the federal appeals courts on the issue of whether a local government must have been involved, whether actively or passively, in the discrimination in a local industry or labor market in order to use gender-conscious set-asides or preferences in government contracting as the remedy under the intermediate standard.[17] These cases involve only remedial actions by state or local governments, not by individual educational institutions. They speak to government tax and contracting systems that affect the markets. It is unclear whether their holdings would apply more broadly to IHEs (public or private).

State law standards. Several state courts also apply strict scrutiny to sex-based classifications established under state constitutional equal protection guarantees or equal rights amendments. Strict scrutiny in these cases has been justified by the notion that the enactment of these types of clauses in a state constitution reflect an intent to raise the bar for justifying sex-based discrimination; by interpreting state constitutional provisions to confer suspect status on both race and sex classifications;[18] or by pointing to the immutability of sex (which may be open to dispute) or to historical discrimination against women.[19]

Part 3: Takeaways

What sense can we make of this murky and developing law to operationalize sound and effective gender-conscious policies that advance gender diversity, equity and EEO? Consider these key takeaways.

Awareness of and adherence to governing law. IHEs must adhere to the U.S. Supreme Court's decisions on gender non-discrimination—as interpreted by their federal judicial circuit's rulings (if any), until the Supreme Court provides a clarifying ruling. IHEs must also adhere to any gender non-discrimination law of their states. In some cases, state law may impose stricter non-discrimination requirements than are imposed by federal law.[20] IHEs located in states or federal judicial circuits that do not recognize a material difference in the legal standards that apply to individual race- and gender-consciousness in providing benefits and opportunities must design and implement their gender-conscious educational diversity and equal employment opportunity programs to meet the strict standard that also applies to race. IHEs located in federal judicial circuits that do recognize a difference (and whose states do as well) have a choice.[21] They may rely on their federal circuit's interpretation and design to its lesser (though still high) standard for gender-consciousness if it is clear; or they may design their gender-conscious policies to a higher standard that is closer to strict scrutiny, but is not quite as rigorous, for feasibility and legal prudence reasons.

IHEs whose federal circuit has not ruled on the standard that applies to gender-consciousness and whose state laws are not implicated, have only the Supreme Court's decisions to guide them. Although we interpret the U.S. Supreme Court's decisions to have preserved a difference between the nondiscrimination standards relevant to gender- and race- consciousness, the Court has not given clear guidance on how that difference manifests in practical, operational terms. Considering other federal circuits' interpretations of the difference in standards may inform an IHE's interpretation of Supreme Court requirements and may be considered by, but are not binding on, an IHE's own federal circuit if its appeals court is asked to decide.

In any event, it is also wise to reserve what we think is the correct position: that the Supreme Court has established an exacting, but somewhat less exacting, standard for gender-conscious policies than race-conscious ones. An IHE may reserve the distinction, e.g., in an overarching diversity policy that overlays all diversity-aimed policies, noting that, notwithstanding any similarity in the IHE's design of race and gender-conscious policies, the Supreme Court applies an intermediate legal standard to gender. This may be helpful to IHEs when they assemble and evaluate evidence of the need for limited individually gender-conscious policies, as required, but do not have the weightiest evidence of need (e.g., neutral policies are used to avoid or limit identity-conscious ones, but efforts to identify neutral policies fall short of demonstrating that gender consciousness is the "last resort").

Practical considerations regarding risk tolerance. As a practical matter, the conflicts in federal judicial circuits may have less effect than their rulings suggest about whether there is a difference in applicable standards for individual race- and gender- consciousness. Both standards are exacting, setting a high bar for evidence of need for race- and gender-consciousness and assurance that the policy design is not overbroad in such considerations as a means of achieving a legally sufficient aim. In practice, parsing the differences in standards that apply to gender as opposed to race may be difficult when trying to apply the evidentiary and tailoring requirements to the facts of a particular situation. Considering that practical reality, as well as the lack of clarity and coherence in court interpretations and other challenges of the legal landscape, may lead IHEs to err on the side of designing for more evidence of need and precision. Each IHE must decide its own risk tolerance in relation to the rewards it will (or won't) realize from a policy. In any event, it is a good practice to always reserve the position that there is a meaningful difference between the strict legal standard that applies to race

and the intermediate or heightened legal standard that applies to gender under the Supreme Court's decisions.[22]

Considerations in the design of gender-conscious policies. Limited gender-conscious policies should be justified when evidence demonstrates a need for greater gender diversity in the student body of a STEMM or other field with a sufficient evidence base. If an authentic educational diversity aim is being advanced, evidence of the student experience is required, comparing actual to desired diversity-associated experience and outcomes for all students. Evaluation of the impact of neutral policies is also required to demonstrate that they are not adequate alone to create sufficient gender aspects of broad student body diversity to address the diversity-associated educational need.[23] Whether an IHE's history of gender discrimination and strong evidence of continuing effects would be enough to justify considering an individual's gender in conferring educational opportunities and benefits under an intermediate standard is unclear. Similar approaches to racial discrimination have been used and successful to remedy *de jure* segregation, but not typically in other contexts.[24] And the lack of clarity around the meaning of the intermediate or heightened standard for gender, as compared with the strict standard for race, looms large here.

Limited gender-conscious policies may be justified in the faculty and other employment contexts in rare circumstances when there is evidence of legally defined persistent and substantial underutilization or presumed discrimination and sustained use of neutral policies have proven inadequate alone to remedy that inadequate equal employment opportunity.[25] Such policies may also be sustainable in rare situations when biology or physiology provides a qualification-related, legally-recognized justification.[26] In any event, in a number of STEMM fields, as well as some others that pose high barriers, neutral policies are particularly important. Underutilization or presumed discrimination may not exist due to limited representation of women in the available qualified recruitment pool, evidencing pathways and climate issues. In those fields, neutral strategies may be the only option.

IHEs may find it most feasible operationally, as well as legally prudent, to design gender-conscious policies in education and employment to meet or nearly meet the strict standards that clearly apply to race-conscious policies in education and contracting. A single standard applies to race and gender in employment because the main federal employment statute, Title VII, imposes nondiscrimination imperatives on both equally. Title VII's standard at least approaches the strict standard because it requires use of neutral policies (barrier removal, inclusive outreach, and neutral criteria) to avoid unduly burdening those whose race or gender is not targeted for remedial affirmative action. However, there may be a minor difference in rigor around the definition of what is neutral or whether neutral policies alone would suffice (as yet not fully defined).[27]

Beyond the constraints of federal law--barrier removal. Institutional leaders navigating the complexities of federal nondiscrimination law should remember that much can be done to identify and remove barriers to access and opportunity without triggering exacting legal standards.[28] Among other strategies, focusing on building a more welcoming and inclusive community and associated climate and culture in STEMM and other academia; pursuing targeted, inclusive outreach; and considering and using neutral criteria that also enhance gender diversity should not trigger exacting legal standards. See **5-Step Design Guide-Faculty**, **5-Step Design Guide-Students**, **Neutral Strategies Guide-Faculty**, **Neutral Strategies Guide-Students**, https://www.aaas.org/programs/diversity-and-law.

[1] We 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 LBGTQ+ people 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).

The Supreme Court established this interpretation of "sex" in the context of Title VII, the main federal non-discrimination in employment law. *See Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding "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 law on the basis of sex. *See* U.S. Department of Education, *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*, (June 22, 20121). 86 FR 32637. First level federal appeals courts in a number of geographically delineated federal circuits around the country have also protected transgender students from sex discrimination under Title IX, the U.S. Constitution's 14th Amendment's Equal Protection Clause and other rationales. See **Definition of Sex Under Federal Non-Discrimination Law**, https://www.aaas.org/programs/diversity-and-law, 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.

[2] Race and ethnicity are distinct identities. However, federal non-discrimination law treats them in the same manner, and we use "race" to encompass both throughout this guide for brevity.

[3] For public and private IHEs' race-conscious policies, to which strict scrutiny applies in the student education context*: see Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. University of Texas at Austin,* 136 S. Ct. 2198 (2016) (*Fisher II*). For public and private IHEs' gender-conscious policies, to which intermediate or heightened scrutiny applies in the student context: *see United States v. Virginia*, 518 U.S. 515, 531 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

[4] 42 U.S.C. 2000e. The Equal Protection Clause of the U.S. Constitution imposes strict scrutiny on any race-conscious policy. *See Adarand Constructors, Inc., v. Pena,* 515 U.S. 200, 226 (1995) (any intentional use of race, whether for malicious or benign motives, is subject to the most careful, strict judicial scrutiny. Accordingly, the record need not contain evidence of "bad faith, ill will or any evil motive on the part of the [recipient]."). The Equal Protection Clause imposes an intermediate standard on gender-conscious policies. *See Virginia,* 518 U.S. 515, and *Hogan,* 458 U.S. 718. *See also, infra,* notes 5, 11. Equal protection standards apply only to public IHEs in the employment context. Title VII applies to both private and public IHEs and imposes the same standards on race- and gender-consciousness in most circumstances. It is unclear how that single standard compares to the equal protection standards for race and gender. Any difference between the intermediate and strict standards would apply only to public IHEs that are subject to the Equal Protection Clause. The distinction would make a difference for public IHEs only if and to the extent that the Equal Protection standards for race and gender are more exacting than Title VII's single standard for both (which is yet to be decided). *See infra,* note 5; *Steelworkers v. Weber,* 443 U.S. 193 (1979) (race under Title VII); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (race and sex under Title VII); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (race under Title VII and the Equal

Protection Clause). See also *Shea v. Kerry,* 796 F.3d 42 (D.C. Cir. 2015), *cert. denied*, 136 S.Ct. 1656, (2016) (interpreting the Supreme Court's decisions under Title VII).

[5] 42 U.S.C. 2000e (generally applying the same standards to prohibit race and gender discrimination). As applied by the agencies that implement Title VII (the Equal Employment Opportunity Commission) and complementary Executive Orders 11246, 11375, 13672 that apply to federal contractors as employers (the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP)), the standards are the same for race and gender.

Race- and gender-conscious policies undertaken by a public IHE or agency under Title VII must satisfy the statutory standards—as well as U.S. Constitutional standards under the Equal Protection Clause, which are strict for race and intermediate for gender. *See supra,* note 4; *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 492-498 (1989)(race); *Wygant*, 476 U.S. at 280. The Supreme Court has indicated, but not definitively ruled, on the extent to which the strict equal protection standard for race exceeds the single standard that applies to race and gender under Title VII in most circumstances. *See* Licht, Stuart "Analyzing Racial Classifications in Employment Discrimination Litigation," 52 U.S. Attorneys' Bulletin 10, 11 (May 2004); *Johnson*, 480 U.S. at 632-34, 642 (distinctions between" manifest imbalance" justification for voluntary affirmative action under Title VII and actual discrimination justification for consideration of race and sex under the Equal Protection Clause); *Ricci v. DeStefano*, 557 U.S. 557, 594-96 (2009) (Scalia concurring, raised the issue of differences in Equal Protection Clause and Title VII standards: "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?" However, the Court did not address the question.).

The standard under Title VII for race- and gender-consciousness at least approaches strict scrutiny, even if it is a somewhat less rigorous version, because similar factors are considered. *See, e.g., Johnson*, 480 U.S. at 632-34, 642 (1987) (Supreme Court upheld the consideration of race and gender, emphasizing that such identities were considered among many other factors, without a set-aside, in affirmative action in promotion decisions to achieve equal opportunity goals where there was a substantial ("manifest") imbalance of women and minorities in a skilled role in the employer's workforce, considering their availability in a trainable cohort of women and minorities in the general labor pool in the area). *Shea v. Kerry*, 796 F.3d 42, *see supra*, note 4, the federal appeals court considered and found justification for a race-conscious affirmative action plan, after recognizing robust evidence of likely persistent racial discrimination in the foreign service, whose mid- and senior- level ranks were "overwhelmingly white" for many years. The court found that the resulting manifest imbalance of people of color in the foreign service was not remedied after years of trying race-neutral alternatives. The federal appeals court considered the Supreme Court's decision in *Weber,* which had upheld an affirmative action plan that temporarily reserved a portion of training program seats for black general laborers who had been systematically excluded from training opportunities for skilled positions for many years by an employer and labor union, resulting in a longstanding "manifest imbalance" of black skilled laborers in the employer's workforce. The federal appeals court particularly relied on the Supreme Court's decision in *Johnson* (1987)*,* which had allowed consideration of gender, as a "plus factor" among other factors considered—notably without any set-asides for women—in deciding promotions, where there was a longstanding "striking gender imbalance" in the representation of women in the county's skilled craft workforce (i.e., no women) as compared with their availability in the relevant labor market, indicating a discriminatory, not a benign, motivation. Thus, the federal appeals court upheld the State Department's affirmative action plan's provisions aimed at addressing a longstanding and "overwhelming" imbalance of people of color in mid- and senior- level foreign service positions, which were overwhelmingly populated by white people, mostly men.

In support of its ruling, the court cited a Congressional act and hearings, which found this overwhelming imbalance to exist and to evidence discrimination and require remediation. The court also cited a General Accountability Office's report, further evidencing the issue. The court made a point of emphasizing that the imbalance and apparent discrimination had not been successfully addressed over a period of years using race-neutral alternatives (targeted, inclusive outreach and recruitment efforts). It noted that when those neutral efforts proved insufficient, the State Department's subsequent affirmative action plan combined a race-neutral process for waivers from an internal rule that generally requires mid- and upper- level diplomatic positions to be filled by internal promotions, and a temporary automatic grant of such waivers to applicants of color. The plan thereby allowed people of color to be hired directly into mid-level positions without applying for a waiver, but still provided for others also to be hired into mid-level positions, albeit via the waiver process. The federal appeals court also held: (a) that it is the plaintiff's burden to plead facts showing differential treatment of individuals on the basis of race or gender; and (b) then the burden shifts to the

defendant to provide evidence of a nondiscriminatory reason for the differential treatment, including a valid affirmative action plan—one with data establishing discrimination or a manifest imbalance, and action that does not unduly burden others; and (c) that avoidance of undue burden on those who are not the focus of race- or gender- conscious affirmative action is demonstrated, in part, by evidence that neutral alternatives were considered and used and that resort to conscious policies occurred only when neutral policies proved inadequate; and (d) then the burden shifts back to the plaintiff to demonstrate that the nondiscriminatory reason "is pretextual and the plan is invalid," quoting *Johnson,* including by refuting data establishing the remedial basis for affirmative action or demonstrating undue burden.

[6] *See* id.

[7] *See supra,* note 14.

First level federal appeals courts covering the 11th Circuit (Alabama, Florida and Georgia); 10th Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming); 9th Circuit (Alaska, Arizona, California, Hawaii, Idaho, Guam, Montana, Nevada, Oregon, and Washington); 3rd Circuit (Pennsylvania, New Jersey, and Delaware); and 1st Circuit (Massachusetts, Rhode Island, New Hampshire, Maine, and Puerto Rico) interpret the Supreme Court to recognize some difference in the weight of evidence required to demonstrate need for gender vs. race consciousness. IHEs in these states must have evidence of substantial need (not mere opinion), but individual gender-consciousness need not be the "last resort," as is required for individual race-consciousness.

Federal appeals courts covering the **6th Circuit** (Kentucky, Michigan, Ohio and Tennessee); **7th Circuit** (Wisconsin, Illinois, and Indiana); and the **District of Columbia Circuit** (the District of Columbia, as well as all states on certain special federal issues, e.g., patents and customs), do not recognize a meaningful difference between the evidentiary standards for gender and race- consciousness, essentially requiring race's strict standards to apply to race and gender- conscious policies.

The rest of the federal circuits' appeals courts have not ruled on the issue at all, leaving uncertainty in the states they cover.

[8]To justify individual race-consciousness in education and public contracting, strict scrutiny standards apply, and a similar standard applies in employment to race *and* gender to avoid undue burdens on identities not targeted for the benefit. *See supra,* note 3 (education); *City of Richmond v. J.A. Croson Co,* 488 U.S. 469 (1989) and *Adarand Constructors v. Pena,* 515 U.S. 200 (1995) (strict scrutiny applies to all race-conscious contracting and other policies of state and federal entities under the Equal Protection Clause of the Fourteenth and Fifth Amendments to the U.S. Constitution); *Johnson v. Transp. Agency*, 480 U.S. *616, 632-34, 642 (1987)* (for race- and sex-consciousness in employment, requiring evidence of a "conspicuous" manifest imbalance of people of color and women in an employer's workforce, measured in comparison to their availability in the qualified labor pool from which the employer could recruit, and a design that does not unduly burden others, including by assuring that race or sex is considered on a case-by-case basis and is only one of a number of factors considered in assessing individuals)*; Shea v. Kerry,* 796 F.3d 42 (applying Supreme Court decisions, including *Johnson*, that analyze Title VII—the court imposed a standard which, in effect, is similar to strict scrutiny in order to avoid undue burdens of identity-conscious affirmative action in employment—upholding such action when there is a persistent

manifest imbalance of a race or gender in an employer's relevant workforce, the employer demonstrates sustained use of neutral strategies but they prove to be an inadequate remedy, and people of all identities have the ability to compete for opportunities); *Ricci v. DeStefano*, 557 U.S. 557, 594-96 (2009)(Scalia, J., concurring)(Title VII, is not coextensive with the Equal Protection Clause, and may apply a somewhat less strict standard on race-consciousness by private and public 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).

To justify individual gender-consciousness in education and public contracting, intermediate or heightened standards that provide an "exceedingly persuasive justification" apply. *United States v. Virginia*, 518 U.S. 515, 532 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (articulating this standard for gender in admissions, but widely applied to guide gender-consciousness). The Court hasn't precisely defined what intermediate or heightened scrutiny means, though, in relation to strict scrutiny. In employment, Title VII protects against discrimination and inadequate equal opportunity on the basis of race and gender equally, as addressed above; so whatever standard applies to race also applies to gender, with limited exceptions for gender that are rarely applicable at IHEs.

[9] 42 USC §2000e-2(e); 29 C.F.R. § 1604.1-2. 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 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) ("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, the Court of Appeals for the Fifth Circuit 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, the same court stated 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 ("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, 22 EPD ¶30,839 (5th Cir. 1980), *cert. denied*, 449 U.S. 891, 24 EPD ¶31,256 (1980).

[10] *Cf. Joel Doe, et al. v. Boyertown Area School District*, 897 F.3d 518 (3rd Cir. 2018) (denying a preliminary injunction that sought on constitutionally protected bodily privacy grounds to enjoin the School District from applying its policy to allow students to use bathrooms aligned with their gender identities, noting that—if strict scrutiny applies—the district's protection of transgender students against established severe psychological and other harm when they are denied use of facilities aligned with their identities is a compelling interest; the district's policy is narrowly tailored; a constitutionally protected privacy interest for other students is absent where single user bathrooms are available for all students' use for privacy reasons, without stigma; (petition for certiorari docketed in Supreme Court at 18-658) cert. denied, 139 S. Ct. 2636 (2019); *see also Whitaker et. al. v. Kenosha Unified School District No. 1*, 858 F.3d 1034, 1047-52 (7th Cir. 2017) (while declining to conclude that "transgender status is per se entitled to heightened scrutiny" applicable to differential treatment of individuals on the basis of "sex," the court, in effect, applied that standard in upholding a preliminary injunction preventing a school district from enforcing a policy restricting a transgender boy from using school facilities aligned with his gender because the district failed to demonstrate a "genuine, but also 'exceedingly persuasive'" justification for punishing transgender students for "fail[ing] to conform to the sex-based stereotypes associated with their assigned sex at birth); The American Academy of Pediatrics at https://pediatrics.aappublications.org/content/pediatrics/132/1/198.full.pdf (citing the effects of homophobia and heterosexism can contribute to health disparities in mental health with higher rates of depression and suicidal ideation, higher rates of substance abuse, and more sexually transmitted and HIV infections).

[11] *See Bakke*, 438 U.S. 265; *Grutter*, 539 U.S. 306; *Fisher I*, 570 U.S. 297; *Fisher II,* 136 S. Ct. 2198; *Adarand*, 515 U.S. 200.

The *Fisher I, Fisher II* and *Adarand* Courts emphasized that strict scrutiny applies whenever an individual's race is considered in decision-making on opportunities and benefits. While the holdings of *Fisher I* and *Fisher II* apply only to race in college admissions and the holding of *Adarand* (which is cited in the admissions cases) applies to public contracting, they strongly indicate that the same equal protection principles would apply when race or ethnicity of individuals is considered in conferring opportunities and benefits in other policies of IHEs.

A distinct justification for consideration of race in the context of educational programs with increasing rarity is the need to remedy the present effects of an IHE's own discrimination. The main Supreme Court cases concern school desegregation and assignment programs. A first-level federal appeals court decision concerns an unsuccessful attempt to justify a race-exclusive scholarship program as a remedy for the institution's legacy of discrimination. *See Parents Involved in Community Schools v. Seattle School District 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 n. 14 (1977); *Freeman v. Pitts,* 503 U.S. 467, 495-96 (1992); *Board of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 248 (1991); *Podberesky v. Kirwin,* 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) (Univ. of Maryland's reliance on a remedial argument tied to its own prior discrimination is rejected as insufficient to justify the Banneker Scholarship program, which was exclusively for African Americans, where the court found evidence of current effects of any discrimination to be lacking). Remedying general societal discrimination, however, is not a justification for race- or gender- consciousness in education programs. *See Bakke*, 438 U.S. at 310.

[12]*See United States v. Virginia*, 518 U.S. 515, 531 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). In *Virginia*, the Supreme Court ruled that the exclusion of women from the Virginia Military Institute (VMI) (an institution designed through an "adversative" education to prepare men to be citizen-soldiers) violated the Equal Protection Clause, that the state's effort to establish a parallel institution for women in response to the litigation did not provide a comparable opportunity for women, and that the state's assertion that these institutions could be justified by an interest in providing the benefits of single sex education was not in fact the state's purpose. In *Hogan*, the Court held that the exclusion of men from the Mississippi University for Women School of Nursing violated the Equal Protection Clause and tended to perpetuate the stereotyped view of nursing as a profession for women. These cases were significant in holding that the states had failed to provide an "exceedingly persuasive justification" for the exclusion of women or men, while at the same time articulating the longstanding intermediate standard that requires an important government aim and a demonstration that gender-consciousness is substantially related (needed) to achieving that aim. The decisions found that the state had failed to show at the least that its policies were substantially related to an important government interest. The decisions resulted in some ambiguity and interrogation in lower federal court opinions, as well as commentaries, on whether the requirement of an "exceedingly persuasive justification" is equivalent to strict scrutiny or at least amounts to an enhanced intermediate standard of review—or whether the Court was just emphasizing that the intermediate standard still establishes a high bar of evidence of the need for gender-consciousness (rigorous data demonstrating the importance of and need for greater gender diversity and the use of neutral policies to limit reliance on identity-consciousness). *See also, supra,* note 7 and accompanying text.

[13] *See supra,* notes 7, 11-12; *infra* note 14 ("exceedingly persuasive justification" for gender-consciousness and strict scrutiny for race-consciousness).

[14] *See, supra,* note 7. The Sixth, Seventh, and Federal Circuits have indicated or come close to concluding that the Supreme Court in *Virginia* further elevated the level of review and associated required evidence of need for gender classifications, appearing to eliminate any material difference between intermediate and strict standards. *See Brunet v. City of Columbus*, 1 F.3d 390, (6th Cir. 1992) (in the public employment context interpreting the Supreme Court's decision in *Croson*, to require that strict scrutiny be applied to all affirmative action programs, including those related to gender); *Nabozny v. Podlesny,* 92 F.3d 446 n.6 (7th Cir. 1996) (in the student education context noting that the standard is different from the traditional intermediate formulation, so implying it may be stricter, while not explicitly stating it is further heightened); *Berkley v. United States*, 287 F.3d 1076, 1085 (Fed. Cir. 2002) (in a military employment case reasoning that if plaintiffs could show preferential treatment, strict scrutiny would apply both to race and gender classifications).

In contrast, the First, Third, Ninth, Tenth and Eleventh Circuits have interpreted the Supreme Court's decisions to establish a difference between the intermediate standard for gender and strict standard for race. In a decision that

provides an in-depth analysis, *Engineering Contractors Ass'n of South Florida Inc. v. Metropolitan Dade County*, 122 F. 3d 895 (11th Cir. 1997), *cert. denied, 523 U.S. 1004 (1998)*, the federal appeals court in a public contracting case reasoned and held as follows: Under intermediate scrutiny, a local government must demonstrate past discrimination against women. However, unlike strict scrutiny, discrimination on the part of the government is not required to satisfy intermediate scrutiny. A showing of discrimination in the relevant economic sector suffices. *But see* note 17, *infra*, for opinions in the Sixth and Seventh Circuits holding that under the intermediate scrutiny standard, governmental preferences for women in employment or contracting are only authorized if the government agency was itself involved actively or passively in the discrimination that is evident in an economic sector. In addition, a court's review of the evidence is "not to be directed toward mandating that gender-conscious affirmative action is used only as a "last resort," but rather to ensure it is adequately supported by sufficient factual evidence rather than based on stereotypes. This standard is "less stringent than the 'strong basis in evidence'" required to pass muster under strict scrutiny which applies to race-consciousness. While the relevant standard was not entirely clear "at first blush," the federal district (trial) court properly applied traditional intermediate scrutiny to the gender-conscious plan at issue. *See also Cohen v. Brown Univ.* 101 F.3d 155, 183-184 and n.22 (1st Cir. 1996) (The court distinguished *Adarand* based on facts that it involved review of a legislative affirmative action scheme, did not discuss gender-based discrimination, and did not dictate the level of scrutiny based on 20 years of Supreme Court precedent, among other things. The court stated that "[u]nder intermediate scrutiny, the burden of demonstrating an exceedingly persuasive justification for a government-imposed, gender-conscious classification is met by showing that the classification serves important governmental objectives, and that the means employed are substantially related to the achievement of those objectives."); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990, 1000-01 (3d Cir. 1993) (In a decision applying intermediate scrutiny to a challenge against gender preference in awarding city contracts to women-owned businesses, the court noted that few cases had considered the evidentiary burden that must be met to satisfy intermediate scrutiny; that, while the Supreme Court had not ruled on the necessity of statistical evidence of discrimination, a city must be able to rely on less evidence in enacting a gender preference than a racial preference; and that a proponent of such a program must show that it is the product of analysis rather than a stereotyped reaction based on habit; and then applying intermediate scrutiny as so interpreted, the court invalidated the preference in the case at hand based on the insufficiency of the evidence provided of discrimination—there was an absence of statistical evidence and limited anecdotal evidence of discrimination); *Coral Construction Co. v. King County*, 941 F.2d 910, 930 (9th Cir. 1991) *reversed on other grounds Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019) (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 Equal Protection Clause 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); *Concrete Works Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994) (applying the intermediate scrutiny standard); *Associated Utility Contractors of Md. v. Mayor*, 83 F. Supp. 2d 613 (D.Md. 2000) (holding that intermediate scrutiny applied to a Baltimore City Ordinance establishing set-aside contracting goals for women-owned enterprises, the court opined that no formula existed for the amount of evidence required to justify the set-asides, but that the City should be able to rely on less evidence than required for a racial preference and that the City needed to provide probative evidence in support of the set-aide and the discrimination it remedied).

[15]*See, e.g., Virginia*, 518 U.S. at 532; *see also Engineering Contractors,* 122 F. 3d at 907-908 (noting that the Supreme Court's use of "exceedingly persuasive justification" suggests a "more intense" level of scrutiny than traditional intermediate scrutiny; but it also "expressly disclaimed 'equating gender classifications, for all purposes, to classifications based on race or national origin'"; further noting that even if the language weakened binding case law on the intermediate standard, it did not overrule traditional intermediate scrutiny that the federal circuit courts are bound to follow).

[16] *See,* e.g., *Adarand*, 515 U.S. at 236 ("requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications [an examination between classification and justification]"); *Croson,* 488 U.S. at 492 (1989) (affirmative action is justified to remedy the effects of a public employer's own discrimination or to dismantle a system of discrimination in which the public entity has been a "passive participant," neither of which was found); *Wygant,* 476 U.S. at 286 (inadequate evidence of the employer's own discrimination to justify protecting minorities from layoffs; remedying societal discrimination is not a justification); *Bakke*, 438 U.S. 265; *Fisher I*, 570 U.S. 297; *Fisher II,* 136 S. Ct. 2198 (remedying societal inequities does not justify race-consciousness). *See infra,* note 17 (discussing the possibility of

gender-conscious action by government to address gender, but not racial, discrimination in economic sectors and labor markets).

[17] Several federal appeals courts have taken the position that, unlike strict scrutiny, intermediate scrutiny does not require that a local government participate actively or passively in discrimination in order to redress discrimination evident in an economic sector through gender-conscious measures. That includes the Third, Ninth and Eleventh Circuits. *See Contractors Ass'n v. City of Philadelphia,* 6 F.3d 990, 1000-01 (3d Cir. 1993) (holding, nevertheless, that the provision of only limited anecdotal evidence of discrimination is insufficient to justify preferences for women-owned businesses); *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 Equal Protection Clause 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); *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895 (1997), *cert denied*, 118 S. Ct. 1186 (1998) (a case involving preferences in awarding local government construction projects for enterprises owned and controlled by blacks, Hispanics, and women).

In contrast, the Seventh and Sixth Circuits have held that the local government must have been actively or passively involved in the discrimination in an economic sector in order to redress it through gender-conscious preferences under intermediate scrutiny. *See Builders Ass'n of Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001); *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); *Brunet v. City of Columbus*, 1 F.3d 390, 404 (6th Cir. 1993) (in which the Sixth Circuit adopted the view that strict scrutiny applies to gender-based affirmative action). *See also supra,* note 14.

[18]State courts in California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Mexico, and West Virginia have found that strict scrutiny applies to "sex" classifications on the theory that state constitutional provisions make "sex" a suspect classification. *See* Amanda Fretto & Zach Perez, *Equal Protection*, 12 Geo.J.Gender & Law, 281, 311-314 (2011).

[19] *See, e.g., Arp v. Workers' Comp Appeals Bd*, 563 P.2d 849, 855 (Cal. 1977) (applying strict scrutiny to denial of presumptive dependency to widower of an employee, for workers' compensation, even though the presumption was granted to similarly situated widows); *Page v. Welfare Comm'r*, 365 A.2d 1118, 1122 (Conn. 1976) (applying strict scrutiny to distinction between husband and wife in computing duties to contribute to the support of parents); *Estate of Hicks*, 675 N.E. 2d 89, 93 (Ill. 1996) (finding equal protection violation under strict scrutiny test for a statute that permitted only a mother and her descendants to inherit from an intestate child born out-of-wedlock).

[20] *See* **State Law Bans Guide**, https://www.aaas.org/programs/diversity-and-law.

[21] *See supra,* notes 7, 14.

[22]*See* **Brief Overview of Law**, https://www.aaas.org/programs/diversity-and-law; *supra,* notes 3-4. *See also, supra,* note 5.

[23] The Supreme Court has not considered an educational diversity aim in the higher education cases on gender-consciousness. However, the Court considered asserted educational aims and found evidence of any such authentic aims to be lacking and perpetuation of stereotyping to be present. *See, Virginia, 518 U.S.* 515; *Hogan,* 458 U.S. 718; *supra*, note 12. We cannot guarantee the outcome of a future case. However, in those STEMM fields where women (or, e.g., in nursing, men) are poorly represented, educational diversity rationales endorsed by the Court in its race-conscious admission cases should apply. Those cases articulate the importance of broad student body diversity to realizing compelling educational outcomes for all students—and such diversity would have to include gender. *See Bakke*, 438 U.S. 265; *Grutter*, 539 U.S. 306; *Fisher I*, 570 U.S. 297; *Fisher II,* 136 S. Ct. 2198.

[24] A remedial justification, i.e., to remedy an IHE's own discrimination with strong evidence of current effects, also exists but is rarely used or successful–typically this approach has been used to address *de jure* segregation. *See Swann v. Charlotte-Mecklenburg Bd. of Ed*., 402 U.S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis."); *Brown v. Bd. of Educ*., 347 U.S. 483 (1954). This remedial justification hasn't typically been successful in other situations. *See supra,* note 11 (*Podbersky)*. *See, also,* **Brief Overview of Law** and **Design Guide-Students**, https://www.aaas.org/programs/diversity-and-law.

[25] The federal definition of "underutilization" is any less representation of a race or gender in an IHE's relevant workforce than would be expected, considering the available and already qualified labor pool in the recruitment market from which the IHE could reasonably recruit for a position. *See* 41 C.F.R. Part 60-20. *See also* OFCCP's Federal Contract Compliance Manual (Oct. 2014). A contractor may use a variety of methods to determine what constitutes "underutilization" of a racial or sex group, including: (1) any numerical difference between incumbency of the group in an employer's relevant workforce and its availability in the available and qualified labor pool, (2) a numerical difference of one person or more, comparing such representation, (3) incumbency of the group in an employer's relevant workforce that is less than 80% of its availability in the available and qualified labor pool, (4) a disparity between the actual representation and expected representation of the group in the employer's relevant workforce that is statistically significant – namely 2.00 or more standard deviations (which also raises the specter of presumed discrimination). *See also* U.S. Dep't of Labor, OFCCP *Technical Assistance Guide for Federal Supply and Service Contractors* (Aug. 2009), at 21-22. Applied broadly and in good faith, any of these approaches to underutilization or presumed discrimination should arguably afford educational institutions opportunities to engage in remedial affirmative action under OFCCP regulations. The less than 80% test is most commonly used to measure underutilization. The Supreme Court articulates a likely similar concept to the 80% test's measure of underutilization, a "manifest imbalance" in the representation of a racial or sex group in an employer's relevant workforce, as compared to the group's availability in the qualified labor pool. This is a substantial imbalance that evidences an employer's failure to provide EEO, which may (but will not necessarily) justify an identity-conscious remedy under Title VII, but is not so great as to rise to the level of presumed discrimination (a two or more standard deviations disparity). *See Johnson,* 480 U.S. 616 (consideration of race and sex as one of many factors in promotion decisions to address a manifest imbalance); *see also, Shea,* 796 F.3d at 57-60 (interpreting Supreme Court decisions, upholding removal of a barrier to people of color at the entry point to a hiring process in the State Department where the rigor of substantive hiring criteria is the same for all applicants and there is a manifest imbalance with robust evidence of longstanding, persistent exclusion of people of color, which had not been successfully remedied by neutral efforts over a period of years). The extent to which a court would uphold some of OFCCP's measures of underutilization, however, and the extent to which they differ from the court-articulated concept of "manifest imbalance" is undecided. *See also,* **Brief Overview of Law** and **Design Guide-Faculty**, https://www.aaas.org/programs/diversity-and-law.

[26]*See supra,* note 9 (42 U.S.C § 2000e-2(e); 29 C.F.R. § 1604.1-2 and Title VII's bona fide occupational qualification (BFOQ) exception that in rare circumstances applies to gender, but never to race).

[27] *See supra,* notes 4-7, 14 and accompanying text; **Brief Legal Overview, Key Definitions, 5-Step Design Guide-Faculty,** https://www.aaas.org/programs/diversity-and-law. Any difference in Title VII's single standard for gender and race and the Equal Protection Clause's standards of strict scrutiny for race and intermediate scrutiny for gender would apply only to private IHEs. The distinction would make a difference to public IHEs only if both Equal Protection Standards (for race and gender) exceed Title VII's single standard that applies to gender and race for public and private employers. Public IHEs are subject to the Equal Protection Clause and private IHEs are not.

[28] A global network of gender equity programs focused on identifying and accountably removing barriers to full participation of talent in STEMM fields includes the AAAS SEA Change program at https://seachange.aaas.org/, the United Kingdom's Athena Swan program at https://www.ecu.ac.uk/equality-charters/athena-swan/ and Australia's SAGE program at https://www.sciencegenderequity.org.au/. SEA Change is the broadest program, promoting and facilitating the removal of barriers to full participation of all talent in STEMM academic careers and higher education, including inequity based on race, ethnicity, gender, gender identity and expression, sexual orientation, disability and other identities that are targeted for bias.