Handbook on Diversity and the Law

Navigating a Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education
Diversity and the Law: 2021

Handbook on Diversity and the Law, 2d ed.¹

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¹This Diversity and the Law: 2021 resource is funded by the Alfred P. Sloan Foundation (Grant No. G-2019-11443). It does not constitute legal advice, providing only general directional law-attentive guidance. Consult your own lawyer for institution-, fact- and jurisdiction- specific legal advice. The authors gratefully acknowledge the editorial contributions of Rachel Pereira of EducationCounsel, Malinda Reed of Nelson Mullins Riley & Scarborough.

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I. INTRODUCTION

This Handbook is a second edition of a resource that was published in 2011. It is a primary legal resource of the Diversity and the Law: 2021 project, undertaken by the American Association for the Advancement of Science and EducationCounsel, with support from the Alfred P. Sloan Foundation, which also supported the 2011 project. During the intervening decade, as issues of diversity, equity, and inclusion (DEI) have evolved, significant federal administrative and court activity has followed suit, with important developments and trends shaping the legal landscape for institutions of higher education on DEI issues.

Much of the U.S. Supreme Court’s jurisprudence and federal agency action relating to higher education DEI over the past 40 years has centered on higher education’s educational diversity interest and the parameters of its pursuit through race-conscious and race-neutral means. Recent developments reflect a renewed focus on gender-related employment equal opportunity (EEO) and education laws. This legal resource of longstanding and more recent federal constitutional and statutory law, along with relevant caselaw and administrative agency policy and enforcement action, is similarly focused. It addresses both the student education and the faculty employment realms and the different legal regimes that govern race and gender consciousness in each of them.

Federal law has evolved in many ways disconnected from higher education’s distinct but complementary societal equity interests—most notably as those issues have taken center stage in recent years. Reflective of those broader interests, the release of this Handbook complements a collection of 20 diversity and equity resources being published simultaneously. They include in-depth primary resources such as the Handbook, quick study and key issue resources, operational models, and tools, as well as a compendium of research reference materials that interrogate the benefits of educational diversity and the imperatives of racial and gender equity.

Collectively, these resources have one clear aim: to help equip institutional policymakers in many roles, and the lawyers who advise them, to partner with a focus on what can be done to accelerate attainment of diversity and equity in science, technology, engineering, mathematics and medical (STEMM) and other higher education in a manner that is both effective and legally sustainable. The guidance provided is attentive to what can be done now to advance a strong commitment to diversity and equity under existing federal law—and how to be positioned well for maintaining that commitment, whatever legal developments may ensue. See the Project’s Constellation of Resources, including the Research Charts, 5-Step Design Guides, Neutral Strategy Guides and more at https://www.aaas.org/programs/diversity-and-law.

The legal foundations addressed in this Handbook (and the practical intersecting law and policy guidance provided in the project’s 5-Step Design Guides and Neutral Strategies Guides for faculty and students) can inform institution-specific discussions and judgments about actions with impact and relative legal risk, to inform policy development.
Ultimately, these resources can support efforts to help policy and legal leaders reach a common understanding of wise action to sustain their institutions’ DEI commitment and advance associated goals.\(^2\)

Finally, nothing in this Handbook should be read to substitute for institution-specific legal advice on particular institutional policies and programs. That analysis should be context- and jurisdiction-specific—undertaken by the lawyers for the institution in collaboration with their academic colleagues.

**II. HISTORICAL CONTEXT**

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

Colleges and universities played a central role in opening opportunities to African Americans, Latinx, Native Americans, and other minority group members. They did not originally undertake that effort out of a concern for the educational benefits of broadly defined “diversity” as we now know it. In fact, if one were to scour the social, political, and judicial discourse of the time during which higher education first began to enroll significant numbers of minority students at historically white colleges and universities, there would be little focus on “diversity.” The doors to higher education were opened as part of an effort to counter the effects of years, decades, and centuries of exclusion and discrimination by specific institutions as well as society at large.\(^3\) While there was an increase in minority enrollment in higher education during the civil rights movement, much of the imperative came after the assassination of Dr. Martin Luther King, Jr. and the violence that wracked our cities in the late 1960’s. Colleges and universities were not thinking as much about the benefits of diversity in the classroom in the sixties and early seventies as they were about their part in addressing the massive inequality and exclusion


\(^3\) In 1960, 38.6% of black Americans graduated from high school, and 5.4% from college. Only 3.8% of black men and 6% of black women were professionals. The percentage of physicians who were black was 2.8%, the same as it had been in 1940. Of lawyers, 1.2% were black, as were 0.5% of engineers. There were only 265 black elected officials in the nation in 1965; of these, four were in Congress and there were no black senators. Four federal judges were black. See William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 2 (Princeton Univ. Press, 2d ed. 2008) (hereafter “*The Shape of the River*”). In 1965, barely 1% of all law students in the country were black; one-third of them attended black law schools. Barely 2% of all medical students were black; three-fourths of them attended two all-black medical schools. *Id.* at 5.
of black and brown people as a consequence of discrimination. Affirmative action in higher education began as a remedial imperative.\(^4\)

\textit{Bakke} changed all of that. If colleges and universities were not thinking of diversity prior to \textit{Bakke}, after it they were. Justice Powell’s 1978 opinion in \textit{Bakke} rested race-conscious efforts aimed at minority enrollment on First Amendment academic freedom principles and desired educational outcomes—and not on the (distinct but related) interest in equitable access for students of color.\(^5\) The educational interests were reaffirmed (and expanded upon) twenty-five years later by a Court majority in \textit{Grutter}, and were recognized again, forty-one years later, in \textit{Fisher II}.

In the interim, colleges and universities across the nation relied upon Justice Powell’s \textit{Bakke} opinion, although as time passed it began to fray as the result of a sustained attack on its viability. That attack was reflected at the appellate court level in \textit{Hopwood v. Texas and Johnson v. Board of Regents of the University of Georgia},\(^6\) in which the Fifth and the Eleventh Circuits held that diversity was not a compelling state interest and that \textit{Bakke} was not controlling because there was no majority rationale. \textit{Grutter} overruled \textit{Hopwood}

\(^4\) Institutions of higher education today came to also recognize their distinct interest in the critical educational benefits of diversity. In the early years of affirmative action in higher education, however, many universities probably were acting to address what the Supreme Court would come to call “societal discrimination.” In contemporary debates or discourse on race-conscious measures to achieve diversity in higher education, there is little to be gained by recounting the remedial imperative for societal discrimination, except historical accuracy. Remedial imperatives may still have some vitality for Congress under rarely tapped authority in Section 5 of the 14\textsuperscript{th} Amendment, however and for institutions that seek to remedy the present effects of their own discrimination or of others’ discrimination in which they can demonstrate they passively participated.

 Bowen and Bok note that in the early days, “[a] few universities said that they were acting out of a desire to rectify past racial injustices.” They primarily focus, however, on the following important reasons why institutions of higher education pursue diversity efforts today: (1) a desire to enrich the education of all students by including race as another element in assembling a diverse student body, and (2) action on a “perceive[ed]” and “widely recognized need for more members of minority groups in business, government, and the professions” so that “minority students would have a special opportunity to become leaders in all walks of life.” Bowen, supra note 3, at 7.

\(^5\) Justice O’Connor’s opinion for the majority in \textit{Grutter} highlights these distinctions. She stated that “[t]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.... Effective participation by members of all racial and ethnic groups in the civic life of our nation is essential if the dream of one nation, indivisible, is to be realized.” 539 U.S. 301 (2003) at 331-32. This language arguably provides the basis for an independent compelling interest which recognizes the importance of access to higher education for minority students. It at least expands the scope of educational benefits that flow from diversity beyond educating all students and encompasses the service mission of the institution. What is no longer arguable, however, is that “diversity is a compelling state interest that can justify the use of race in university admissions;” as a result, “the Equal Protection Clause does not prohibit the ... narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.” \textit{Id.} at 325, 343. That interest belongs to the university.

\(^6\) \textit{Hopwood I}, 78 F.3d 932 (5th Cir. 1996); \textit{Hopwood II}, 236 F.3d 932 (5th Cir. 2000); \textit{Johnson}, 263 F.3d 1234 (11th Cir. 2001).
and Johnson and put to rest the controversy over Bakke’s vitality. Grutter, together with Fisher I and Fisher II, now provide firm judicial precedent in support of educational benefits of broad student body diversity for all students that ultimately contribute to educational outcomes, the workforce, innovation, the military, the economy, democracy, and more.

Although institutions of higher education serve a critical role in addressing systemic inequities in society, educational diversity should be universally embraced, regardless of one’s political viewpoint of social justice. The children of color who comprise a majority of children under 18 years of age are the intellectual future of our society. The nation’s demographic trends demand a society in which our educational system, the academy, and industry welcome all talent, including people of color, women, LGBTQ+ individuals and those with such intersecting identities. Otherwise, our economic strength and national security will decline.

Industry, government, and higher education must communicate this reality more effectively or misunderstanding of this national imperative will persist and it will be more difficult to succeed in the diversity efforts on which our nation’s and our citizens’ futures depend.

Colleges and universities, then, are at the center of the debates over “affirmative action” and diversity, which in turn have a significant impact on the nation’s economic strength and national security. Higher education, particularly in STEMM fields, plays a critical role by increasing basic knowledge and generating a well-trained workforce on which industry and government depend. Whatever one’s politics may be, for the good and prosperity of everyone in society, higher education must prevail in its goal of increasing access for individuals with minoritized identities to education at all levels and in all fields, but particularly in STEMM fields. Creating a welcoming climate where talent of all identities is included and can thrive is in everyone’s interest.

7 The Brookings Institute reports that a majority of the children in the U.S. under the age of 18 are children of color and a minority of that population are Non-Hispanic White based on analysis of the 2020 U.S. Census data. See Brookings Institute. (Aug. 2021). New 2020 census results show increased diversity countering decade-long declines in America’s white and youth populations. See https://www.brookings.edu/research/new-2020-census-results-show-increased-diversity-countering-decade-long-declines-in-americas-white-and-youth-populations/ (based on 2020 U.S. Census data, non-Hispanic White youth comprise 47.3%, Latino or Hispanic youths comprising 25.7% and Black youths at 13.2%; links to U.S. Census Bureau reports are included with other analyses that find the split to be closer to 50%).
Higher education in STEMM fields plays a critical role by increasing basic knowledge and generating a well-trained workforce on which industry and government depend. Whatever one’s politics may be, for the good and prosperity of all U.S. citizens and the nation, higher education must prevail in its goal of increasing access for individuals with minoritized identities at all levels and in all fields, including with a focus on STEMM fields. Creating a welcoming climate where talent of all identities is included and can thrive is in everyone’s interest.
III. **KEY DEFINITIONS**

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

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

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

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

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

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

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generate additional applicant interest are typically considered to be neutral so long as they do not confer material benefits to the exclusion of non-targeted individuals.\textsuperscript{10} (The law regarding inclusive outreach and recruitment policies is described in Section VII.C.4 below.)

\section*{B. Intentional and Disparate Impact Discrimination}

\subsection*{1. Intentional discrimination or disparate treatment}

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

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

\subsection*{2. Disparate impact}

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

There is a similar concept of disparate impact in participation of students and conferring benefits of educational programs. By federal regulation, Titles VI (respecting race) and IX (respecting gender) prohibit disparate impact discrimination in the absence of an educational necessity.\textsuperscript{11}

\section*{C. Strict, Intermediate and Rational Basis Scrutiny}

\subsection*{1. Strict scrutiny}

Strict scrutiny is a legal term of art, referring to the most rigorous standard of judicial review. It is applicable to policies that treat individuals differently on the basis of their race or ethnicity (“race-conscious” policies). Such race-conscious polices are “inherently suspect” under federal law, and to satisfy strict scrutiny and be upheld by a


\textsuperscript{11} Of note, the Supreme Court has held that there is a private right of action under Title VI as to disparate treatment claims but not disparate impact claims. See Alexander v. Sandoval, 532 U.S. 275, 293 (2001).
court, they must serve a “compelling interest” and be “narrowly tailored” to achieve that interest. This requirement is derived from federal constitutional principles (which apply to public higher education institutions) and identical principles of Title VI of the Civil Rights Act of 1964 (which apply to any recipient of federal funding, public or private).

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

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

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

(The Supreme Court generally applies strict scrutiny to state classifications based on alienage as well. However, rational basis review is likely to be applied to state classifications if and when the somewhat broad political function doctrine exception is met; and in the case of undocumented individuals.)

2. **Intermediate scrutiny** is also a legal term of art, referring to a standard of judicial review that is less demanding than “strict scrutiny” but significantly more demanding than the “rational basis” standard that is applicable to most non-race-, ethnicity-, and gender-conscious classifications under federal law. The standard for reviewing classifications based on gender are less settled than that for race and national origin. In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court found that
Virginia’s policy of limiting admissions to VMI violated the Equal Protection Clause. It indicated that state classifications based on gender were subject to “intermediate scrutiny” review, but that such classifications needed to have “an exceedingly persuasive justification.” The Supreme Court has not fully explored or defined the degree of difference in required evidence for gender- and race-consciousness. Further, Federal Circuit and District Courts are split as to whether there is a meaningful difference in the standards.\textsuperscript{12} For instance, the 6th Circuit Court of Appeals, (both before and after that case) has taken the position that strict scrutiny applies to gender and sex affirmative action classifications, and a small number of court decisions and legal commentaries have opined that language in the \textit{Virginia} case about an exceedingly persuasive justification has effectively raised the review standard for gender classifications to strict scrutiny. Similarly, several state courts have interpreted state constitutional provisions providing for equal rights or equal protection based on gender to require strict scrutiny review of gender classifications.

Regardless of the split, it is clear that a high bar is imposed by both standards, requiring evidence of need to consider race or gender to achieve interests of legally sufficient significance, and prohibiting identity status-based stereotyping of interests, abilities, and roles. However, unlike race, the law recognizes differences between the sexes that may be legitimately relevant to individuals’ qualifications in highly limited circumstances, e.g., where variation in individual physical ability and interests are not relevant, and biological and physiological differences are relevant.\textsuperscript{13} These differences are one rationale for a less strict standard of review.

Generally, and as explained further in sections below, “sex” under federal law appears to include sexual orientation, gender identity, and gender expression, at least insofar as discrimination is against an individual for failing to conform to sex stereotypes.\textsuperscript{14} The

\textsuperscript{12} The following states are covered by federal circuit courts that have preserved a difference between intermediate and strict scrutiny: Alabama, Florida, Georgia, Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island, Alaska, Arizona, California, Hawaii, Idaho, Delaware, New Jersey, Pennsylvania, and the Virgin Islands.

The following states are covered by federal circuit courts that have ruled intermediate scrutiny to be the same as or close to the same as strict scrutiny: Kentucky, Michigan, Ohio, Tennessee, Illinois, and Indiana, Wisconsin. (the federal circuit court of appeals has nation-wide jurisdiction on specific substantive areas).

\textsuperscript{13} Title IX (20 U.S.C. §§ 1681-1688); Title VII (42 U.S.C. § 20000e); \textit{Virginia}, 518 U.S. 515, 532 (1996); \textit{Mississippi University for Women v. Hogan}, 458 U.S. 718, 729 (1982);

\textsuperscript{14} See \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228 (1989) (finding Price Waterhouse’s failure to promote a woman to partner because she was insufficiently feminine constituted stereotyping based on gender and was a violation of Title VII, even if there were also other reasons for that decision); see also \textit{Grimm v. Gloucester County School Board}, 400 F.Supp.3d 444, (E.D.Va., 2019), aff’d 972 F.3d 586 (4th Cir. 2020), cert. denied 2021 WL 2637992 (2021) (under Title IX, discrimination on the basis of transgender status constituted gender stereotyping because, by definition, transgender persons do not conform to gender stereotypes); \textit{Whitaker et. al. v. Kenosha Unified School District No. 1}, 858 F.3d 1034, 47-52 (7th Cir. 2017) (while declining to conclude that “transgender status is per se entitled to heightened scrutiny,” the court upheld 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); Joel Doe, et al. v. Boyertown Area School District, 897 F.3d 518 (3rd Cir. 2018); 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; Title IX allows but does not require the provision of separate bathroom facilities; plaintiffs have not established sufficient facts of harm to find a hostile environment on the basis of sexual harassment under the facts; and citing with favor Whitaker’s sex stereotyping rationale in support of permitting use of bathrooms aligned with a student’s gender identity). See also Parents for Privacy v. Barr, 2020 WL 701730 (9th Cir. 2020) (upholding the dismissal of a challenge to a public high school’s Student Safety Plan -- which provided that a particular transgender student and any other transgender student who might make a similar request may use the boys’ locker room and bathroom with his peers at the high school, and also provided that staff would receive training and instruction regarding Title IX; the dismissal was based on failure to state a claim under Title IX where the plan treated all students equally and did not discriminate based on sex and that the normal use of privacy facilities does not constitute actionable sexual harassment under Title IX just because a person is transgender); Compare R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist., No. WD 80005, 2017 WL 3026757 (Mo. Ct. App. July 18, 2017), reh’g and/or transfer denied (Sept. 5, 2017), transferred to Mo. S.Ct., No. SC 96683, 2019 WL 925511 (Mo. Feb. 26, 2019) (upholding the dismissal of a case alleging sex discrimination against a transgender female to male student who was denied access to the boys’ locker room and bathroom “based on my sex and gender identity,” for failure to state a claim under Missouri law because the student did not allege sex stereotyping (i.e., that he was discriminated against for failure to conform to the traits of his sex), and Missouri law does not protect against discrimination on the basis of “gender-related traits” (female genitalia) and, in dicta, no Missouri court has extended the Missouri human rights statutes to sex stereotyping).

In this context, but not precisely on the issue of which standard of review in a non-discrimination claim would apply, the U.S. Supreme Court in Bostock v. Clayton County, 140 S.Ct. 1731 (2020) ruled that: “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.” The Court found that a Title VII violation occurs when, “but for” the plaintiffs’ biological sex, they would not have suffered the adverse employment action—even if there were other contributing factors for the action. Observing that Title VII used the word “sex” broadly, without including any exclusion from the definition, Justice Gorsuch applied the plain meaning of “sex” at the time of the statute’s enactment—which he indicated was only “biological” or “binary” sex. He reasoned: “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different [biological or binary] sex. Sex plays a necessary and undistinguishable role in the decision; exactly what Title VII forbids.” The Court also specifically limited the scope of its ruling, refusing in this case to extend its logic to questions of: sex-segregated bathrooms; locker rooms and dress codes under Title VII or any other laws; any interpretation of Title IX, which prohibits sex discrimination in education programs of federally funded IHEs; and the effect of First Amendment-protected free exercise of religion on claims involving sex discrimination.
Supreme Court has not squarely addressed the appropriate standard of review under the 14th Amendment’s Equal Protection Clause (or the Equal Protection concept implied in the 5th Amendment) applicable to policies or actions that treat individuals differently based on their sexual orientation or their transgender identity and expression. Among federal appellate and district courts, the cases are somewhat inconsistent on which of the three standards apply. For the most part, rational basis review has been traditionally applied by the courts, although two court decisions regarding Section 3 of DOMA indicated that the rational basis standard should be robustly applied to overturn policies that discriminate based on sex. Other cases apply intermediate scrutiny to policies that

15 In Baker v. Nelson, 409 U.S. 810 (1972), the U.S. Supreme Court summarily dismissed for want of a federal question an equal protection challenge to Minnesota’s refusal to recognize same-sex marriage. But case law on equal protection as it applies to sexual orientation and to transgender identification and expression, and in particular on same-sex marriage, has changed dramatically since then. In Romer v. Evans, 517 U.S. 620 (1996), the Court invalidated a Colorado state constitutional amendment that barred any city, town, or county in the state from recognizing gay or lesbian persons as a protected class entitling them to quota preferences, minority status, or claims of discrimination, because it discriminated on the basis of sexual orientation, but the Court did not analyze whether heightened scrutiny should apply, perhaps because it was unnecessary because the Court concluded that the law lacked a rational relationship to legitimate state interests. In United States v. Windsor, 570 U.S. 744 (2013), in a case brought by a New York woman challenging Section 3 of the Defense of Marriage Act (DOMA), which had the effect of denying her a spousal exemption from estate taxes in inheriting from her same-sex spouse, the Court ruled that DOMA violated basic due process and equal protection principles applicable to the federal government. The Court focused on the liberty interests of the plaintiff under due process and did not state what standard of review it was using to determine a denial of equal protection, but several other courts and commentators have suggested that the Windsor Court in practice applied a higher standard of review than rational basis. See also Wolf v. Walker, 986 F. Supp. 2d 982 (W.D. Wis. 2014); SmithKline Beecham Corp. v. Abbott Laboratories, 740 F. 3d 471, 480-81 (9th Cir. 2014).

16 In Robicheaux v. Caldwell, 2 F.Supp.3d 910 (E.D. 2014), a case challenging Louisiana’s ban on same-sex marriage and its non-recognition of same-sex marriages that were lawfully performed in other states, the court used rational basis review to uphold Louisiana’s law. Using rational basis review, the Court quoted from Romer v. Evans 517 U.S. 620, 632 (1996): “In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale seems tenuous.” The decision was subsequently set aside based on the U.S. Supreme Court’s ruling in Obergefell v. Hedges, 576 U.S. 644 (2015), ruling that a ban on single sex marriage violated the Due Process and Equal Protection Clauses of the 14th Amendment. The Obergefell case focused its analysis on liberty and the Due Process Clause and did not address what standard of review should be used under the Equal Protection Clause. By contrast, in Wolf v. Walker, 26 F. Supp. 3d 866 (W.D. Wis. 2014), the court, while noting that discrimination based on sexual orientation had all of the characteristics of a suspect class, ruled that the States of Wisconsin and Indiana had no rational basis for prohibiting same-sex marriage. Similarly, in Brown v. Tavaras, 63 F.3d at 967, 971, (10th Cir. 1995), the court ruled that a transgender plaintiff was not a member of a protected class for purposes of the Equal Protection Clause. The Brown court, however, noted that recent research indicating that sexual orientation is an issue beyond individual control may call for a reevaluation of this issue. The 9th Circuit Court of Appeals likewise ruled in Holloway v. Arthur Anderson & Co., 566 F.2d 659 (1977) overruled by, Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) that transgender identity and expression is not a suspect class and the rational basis standard of review applied to such classifications.

17 In Massachusetts v. U.S. Department of Health, 682 F.3d 1 (1st Cir. 2012), plaintiffs challenged Section 3 of DOMA, which denied federal economic and other benefits to same-sex couples lawfully married under state law and to their spouses. The U.S. Department of Justice initially filed a brief defending the challenged
discriminate based on sexual orientation or transgender identity and expression.\textsuperscript{18} Several cases have indicated that classifications based on transgender identity and expression are subject to intermediate scrutiny, at least where stereotyping is involved, and must have an exceedingly persuasive justification.\textsuperscript{19}

3. \textbf{Rational basis scrutiny} is a legal term of art that reflects the standard applicable to the provision of most non-race,-ethnicity and -gender-conscious benefits or opportunities conferred by public or private institutions (where, in the latter case, the institution is a recipient of federal funds). It also applies to federal alienage classifications, where the Court defers to the federal government’s power to regulate the conditions of entry and residence of non-citizens.\textsuperscript{20} It is the least rigorous standard of review, in which courts largely defer to decisions by educational institutions and others when preferences based on, e.g., socio-economic status, special skills and talents, particular life experiences, etc. are challenged.\textsuperscript{21} The burden of proof is on the challenger of the classification to

DOMA provisions, but thereafter altered its position, arguing that the equal protection claim should be assessed under a heightened scrutiny standard and that DOMA failed under that standard. The court declined to apply intermediate scrutiny, but found that the combination of equal protection and federalism concerns raised in the case required a “closer than usual review.” The court stated, “Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the impermissible justifications. And . . . in areas where state regulation has traditionally governed, the Court may require that the federal government interest in intervention be shown with special clarity.” \textit{id.} at 10. The court found that Section 3 of DOMA violated equal protection of the law, as embodied in the Due Process Clause of the 5\textsuperscript{th} Amendment. Similarly, in \textit{Dragovich v. U.S. Department of Treasury}, 872 F.Supp.2d 944 (N.D. Calif. 2012), another case challenging the constitutionality of section 3 of DOMA and the Internal Revenue Code for limiting participation of same-sex spouses in long-term care insurance programs maintained by the California Public Employees’ Retirement System, the court opined that Ninth Circuit law established that gay men and women do not constitute a suspect or quasi-suspect class and that policies that discriminate against them are subject to rational basis review. However, the Court analyzed DOMA to find that Congress’s restriction on the participation of same-sex spouses in state-maintained long-term care lacked any rational relationship to a legitimate government interest, but rather appeared to be motivated by anti-gay animus and held that the challenged restrictions violated equal protection.

\textsuperscript{18} See \textit{SmithKline Beechem Corp. v. Abbott Labs}, 740 F.3d 471 (9\textsuperscript{th} Cir. 2014), holding that equal protection bars discrimination based on sexual orientation in jury selection, based on the heightened scrutiny standard \textit{Wolf v. Walker}, supra n. 16, applying intermediate scrutiny to a Wisconsin law banning same-sex marriage; and \textit{Kerrigan v. Commissioner of Public Health}, 957 A.2d 407 (Conn. 2008), in which the Connecticut Supreme Court held that, “for the same reasons that classifications predicated on gender are considered quasi-suspect for purposes of the equal protection provisions of the United States constitution, sexual orientation constitutes a quasi-suspect classification for purposes of the equal protection provisions of the state constitution, and therefore our statutes discriminating against gay persons are subject to heightened or intermediate judicial scrutiny.”


\textsuperscript{21} See \textit{Kadrmas v. Dickins U.S. on Public Schools}, 487 U.S. 450, 458 (1988) (noting that The Supreme Court “previously rejected the suggestion that statutes having different effects on the wealthy and the poor
show that the institution was being “arbitrary and capricious” or had an “illegitimate or illegal” purpose. Programs using most non-race, - ethnicity, and -gender classifications are usually upheld by the courts.

D. Diversity Interests

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

The diversity goal sustained by the Supreme Court as a compelling government interest relates to the quality of the student experience and outcomes associated with but not exclusively about numbers or compositional diversity. Compositional diversity is relevant, however, as a setting where the educational benefits of diversity can occur. If an institution of higher education engages its existing student diversity through a range of enrollment management and educational policies to secure the benefits of diversity, but has not realized the quality of a diverse educational experience for its students, it may need to increase its compositional diversity. For example, in fields where there are few women or minorities represented in the student body – and those students feel isolated, marginalized, and obligated to represent their identity group, rather than feeling welcome and able to participate fully in the educational experience as individuals – and where all students lack the opportunity to engage in a diverse setting that includes women and minorities, the diversity rationale as a compelling interest for considering race or sex in admissions and financial aid would apply.

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); City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 470 (1985). Action that is subject to a rational basis standard is upheld, on review, so long as it is not illegal, arbitrary, or malevolent.

22 See, e.g., Grutter, 539 U.S. at 306; see also Arthur L. Coleman and Jamie Lewis Keith, Understanding Holistic Review in Higher Education Admissions, (“Higher education and mission and related policy statements . . . reflect the educational aims . . . and roles central to an institution’s investment and action. It is also important to be explicit about the relevance and importance of student body diversity to achieving such goals, with implications for the selection of entering students.”) (available at: https://professionals.collegeboard.org/pdf/understanding-holistic-review-he-admissions.pdf.)

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

The Supreme Court has not specifically addressed the diversity rationale (one way or the other) as a justification for consideration of individuals’ sex or gender in conferring educational benefits. However, the Court has endorsed the principle that an institution of higher education may determine that having a broadly diverse student body (including but not limited to race and ethnicity – so including gender and many other attributes, experiences, perspectives, and talents) is a compelling condition for providing desirable educational experiences and outcomes for all students.

Note that throughout this document, multiple facets of diversity are discussed -- frequently with reference to race, ethnicity, and gender. In many instances, relevant and detailed guidance exists with respect to race- and ethnicity-conscious programs, but not to gender-conscious programs. Thus, relevant omissions of discussions associated with gender stem likely from a dearth of substantial legal authority on point.

E. Remedial Interests

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

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

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

(See Section VI. for a more complete discussion of these concepts and how they may be used.)

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

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

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

   In the University of Michigan cases, critical mass was framed as “neither a rigid quota nor an amorphous concept defying definition.” Instead, it was defined as a “contextual benchmark that allows the Law School to exceed token numbers within its student body and to promote the robust exchange of ideas and views that is so central to the Law School’s mission.”  

   In the University of Michigan cases, the expert reports of Patricia Gurin and Stephen W. Raudenbush were most directly relevant to the critical mass issue.  

   Similarly, in its *Fisher II* decision, the Court explained that institutions need not specify the particular level of minority enrollment for obtaining the educational benefits of diversity. The decision suggests that the Court does not view “critical mass” as a “one-size-fits-all” bright line test for justifying use of race to achieve student body diversity, but rather gives some deference to institutions in defining what levels of minority enrollment are sufficient to achieve the educational benefits of diversity. Based on this decision, institutions may include numerical indicators of progress, but should not reduce their goals to “pure numbers,” which may suggest an intent to impose quotas. Rather, the institution should frame its diversity goals concretely and specifically, consistent with the

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25 Extensive background on the concept of critical mass and the ways in which federal courts have addressed the issue can be found in *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issue*, Ch. 4 (College Board, 2006).
institution’s mission, without reference to numbers only, but rather with reference to evidence-based academic judgments regarding educational outcomes sought by the institution.

2. **Racial, ethnic or gender balancing** is seeking to achieve a representation of a minority group or women in the student body or faculty that approximates their representation in the local community, state, or nation. The Supreme Court has made clear in a number of educational contexts that racial balancing is not a compelling interest and is not permissible for public institutions under the Equal Protection Clause of the U.S. Constitution. Racial balancing is also prohibited for private institutions that receive federal funding under Title VI, as is gender balancing under Title IX. Notably, the goal of achieving a “critical mass” of minorities and women in the student body and faculty in order to achieve the educational benefits of broadly defined (not just racial and gender) diversity is a different concept than racial or gender balancing.

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

G. **Underrepresented Students**

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

As a concept embodying the admissions process approved by the Supreme Court in *Grutter* and in *Fisher II, individualized, holistic review* refers to a process by which, with respect to each applicant’s file, “serious consideration” is given “to all the ways an applicant might contribute to a [broadly] diverse educational environment” that is needed to serve the institution’s mission-driven educational objectives. It is a process involving and applying the same criteria to “applicants of all races,” without an “automatic acceptance or rejection based on any single ‘soft’ variable” (for example, without any “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity”). Such a process is also “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight” in every case. All applicants are able to compete for all spots under the same criteria.

I. Inclusive Conduct and Multi-cultural Skills

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

Inclusive conduct and multi-cultural skills should be understood to relate to criteria associated with *workplace conduct* desired by some higher education institutions to achieve their educational mission. Notably, these criteria do not regulate viewpoint, diminish principles of academic freedom that apply in public and private institutions, or violate rights protected under the First Amendment that apply in public institutions.26

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26 Thus, in making various decisions, a higher education institution may consider whether a faculty member, regardless of his or her viewpoint on race or gender -- through his or her conduct in classroom, research, mentoring or other relevant activities -- has a record of successfully fostering participation by colleagues and students who have broadly diverse perspectives, experiences and backgrounds including, without limitation, racial minorities, women and people from low socio-economic backgrounds or with disabilities.
RACE- AND GENDER-NEUTRAL ALTERNATIVES

A. Neutral Alternatives In General

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

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

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

Individuals of any race or gender may possess or lack this attribute, which provides opportunities to enhance educational and research outcomes through broad and multi-cultural issue identification, collaboration, and problem-solving. This attribute is inclusive and non-discriminatory. See Appendix V for a related discussion of First Amendment and academic freedom.
approaches, depending on the demographics of their applicant pools that are competitive for admission.

Recent litigation in the student admissions context further illustrates the centrality and complexities of the question of race-neutral alternatives—an issue that should be central to any institutional evaluation of relevant DEI policies and practices.\textsuperscript{27}

B. Inclusive Conduct and Multicultural Skills as a Criterion

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

Inclusive conduct and multi-cultural skills refer to demonstrated success -- through conduct in classroom, research, mentoring and/or other work activities -- in including and fostering participation by individuals of different cultures, socio-economic backgrounds, races, genders, and life experiences in pursuit of increased understanding and exploration of a broad range of perspectives.\textsuperscript{28} This is not a proxy for any one viewpoint and focuses instead on the workplace conduct of an individual. Inclusive conduct and multi-cultural skills provide opportunities to identify and utilize broad perspectives in teaching, learning, research, and mentoring. Inclusive conduct and multi-cultural skills create an inclusive environment in which individuals reflecting a range of cultures, backgrounds, and experiences, including but not limited to different races and genders, can fully participate and work productively and creatively together. Inclusive conduct and multi-cultural skills provide opportunities to break down stereotypes that assume all individuals of a particular race, ethnicity, gender, or socio-economic group or who have a disability share the same views, personal qualities, and experiences. These are race- and gender-neutral qualities that individuals of any race or gender may possess -- or lack.\textsuperscript{29}

Position and program descriptions, selection criteria, and selection processes for employment, fellowships, assistantships, admissions, funding, participation in mentoring and other programs and their related advertisements may include, as a preferred or

\textsuperscript{27} See Fisher I and II supra, n. 23; Students for Fair Admission v. President and Fellows of Harvard College, 397 F. Supp. 3d 126 (D. Mass. 2019), aff’d 2020 WL 6604313 (1st Cir. Nov. 12, 2020), U.S. Supreme Court cert. petition pending. See generally Coleman and Keith, The Playbook, supra at n. 8 (synthesizing relevant caselaw and providing research-based examples of nine “plays” illustrative of the range of neutral strategies to consider when developing enrollment policies and practices).

\textsuperscript{28} See e.g. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 622(1990) (O’Connor, dissenting) One of the primary takeaways from O’Connor’s dissent in particular, is the viability of favoring applicants whose particular background will serve to meet the stated goal of diversity programming. O’Connor’s reasoning strongly indicates that authentic experience-based strategies are neutral. Under that rationale, it should be permissible, without application of strict scrutiny, for IHEs to consider whether a student’s particular background or unique experience will contribute to the IHE’s diversity mission.

\textsuperscript{29} The inclusive conduct and multi-cultural skills criterion concerns a person’s workplace conduct of inclusion and non-discrimination on the basis of race, gender, other specified bases, and perspective, not a person’s viewpoint. See Appendix V, infra (“Diversity Considerations, the First Amendment and Academic Freedom”).
required criterion, a record of utilizing inclusive conduct and multi-cultural skills as defined above. This means that an individual -- through his or her conduct in classroom, research, mentoring or other relevant workplace activities -- has a record of successfully including and fostering participation by colleagues and students with broadly diverse perspectives, experiences and backgrounds including, without limitation, racial minorities, women and people from low socio-economic backgrounds or with disabilities. Individuals of any race or gender may possess or lack a record of inclusive conduct and multi-cultural skills, which provide opportunities to enhance educational and research outcomes through broad and multi-cultural issue identification, collaboration, and problem-solving. Performance evaluations, promotion evaluations, program selection and admissions decisions may include consideration of the presence or absence of a record of such inclusive conduct and multi-cultural skills. In doing so, it is important that this criterion is evaluated on the basis of inclusive conduct that provides opportunities for multi-cultural collaboration, issue identification, creativity and problem-solving in classroom, research, laboratory, mentoring and other workplace activities, not on the basis of personal viewpoint.

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

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

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

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

An institution may have an authentic, mission-critical interest in building a faculty and student body that possess multi-cultural skills and exhibit inclusive conduct, recognizing that individuals with these abilities and conduct are needed to expand opportunities for excellence in research and teaching in a broadly diverse society. Such individuals create a more robust intellectual environment and a more broadly welcoming academic community for research and learning by broadly diverse individuals. In furtherance of its mission, the institution may also have a non-discrimination policy that prohibits discriminatory conduct in university work on the basis of race, gender, ethnicity, religion, age, sexual orientation, etc. It is a good practice to be explicit about the institution’s and unit’s multi-pronged mission and related multi-cultural and broad diversity needs.

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

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

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

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

A more comprehensive definition of low socio-economic background than is typically used considers total wealth, including but not limited to family income and concentration of poverty in the family’s residential area and school district. This formulation provides a more complete reflection of low socio-economic status, which alone is an authentic and important aspect of broad diversity, and also has the ancillary effect of increasing racial diversity. In a country with a history of slavery, residential and school segregation and discrimination on the basis of race, individuals who are members of racial minority groups tend to have less total wealth than other individuals with equal annual income. Of course, higher socio-economic status is also important to broad diversity, but may be easier to achieve.

Employment opportunities and benefits for faculty members (e.g., hiring, promotion, retention, community building and mentoring in support of preparation for tenure, supplemental compensation, research funding and facilities, participation in other

programs, etc.); selection of students for post-doctoral fellowships and research and teaching assistantships; admission of students; and selection of students to participate in other programs or to receive other educational benefits may be based on low socio-economic background, without considering race and gender, sometimes in combination with being the first in one’s family to graduate from a four-year college, to pursue a STEM career, and/or to pursue any career in academia. Socio-economic (or “class”) diversity within all groups is also required to achieve mission-critical broad diversity. Consideration of a student’s low socio-economic background relates to a student’s family’s socio-economic status. If this criterion is a consideration for faculty, it relates to family background.

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

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

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

Academic accomplishments, intellectual capacity and, if applicable, particular discipline expertise, are baseline requirements. A strong record -- in classroom, research, mentoring or other relevant workplace activities -- of including and fostering full participation by individuals of different cultures, socio-economic backgrounds, races, genders, experiences, and perspectives, and/or an individual’s socio-economic background, is one factor among many that may “tip the balance” in a holistic assessment of an individual, or may be a prerequisite, when making a decision concerning hiring, compensation, promotion, research support, mentoring, participation in fellowships, admissions, participation in other programs, and/or conferring other employment or educational benefits. Whether an individual is first in his or her family to attend a four-year college, enter a STEM field, or pursue any academic career may also be considered.
1. **Significance of Institutional Resources Committed**

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

2. **Assessment of Impact**

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

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

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

3. **Commentary and Examples**

If these approaches are properly applied, race and gender and individual viewpoint (as distinguished from inclusive workplace conduct that provides opportunities for multi-cultural interactions, experience, problem-solving and issue identification to strengthen research, teaching, learning and advising) are not considered in employment or educational decisions and benefits. These inclusive conduct/multi-cultural skills and socio-economic approaches also are not used as a proxy for race or gender because these criteria fulfill separate authentic institutional needs. Strict judicial scrutiny should not apply and the prohibition against racial and gender discrimination in hiring and in the terms and benefits of employment under Title VII of the Civil Rights Act of 1964, the Equal
Protection Clause, Title IX of the Education Amendments of 1972, and any state law or executive order should not be invoked.

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

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

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

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

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

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

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

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

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

E. Diversity Considerations, the First Amendment and Academic Freedom

To understand appropriate implementation of diversity efforts in higher education, it is helpful to recognize the generally peaceful co-existence of such efforts with First Amendment rights and academic freedom principles -- a co-existence that reflects the necessary balance of academic freedom and responsibility. Consideration of diversity in higher education reaches the fundamental purposes of the academic endeavor. Colleges and universities, whose multi-pronged educational missions embrace providing excellent educational experiences for all students, producing excellent research to increase and disseminate knowledge, increasing educational access, and serving the nation’s needs for a well-prepared citizenry and workforce, have a compelling interest in creating a broadly diverse student body and faculty. Public colleges and universities play a special role in society by providing otherwise unavailable broadly affordable access to higher education. Many public and private institutions of higher education require a broadly diverse community in order to provide excellent educational experiences and


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

34 See Grutter, 539 U.S. at 331-32.
produce excellent research in a global, multi-cultural and diverse society. A broadly diverse academic community is fundamental to higher education’s endeavor to best serve all students, and to contribute to solutions that will enable our nation and society-at-large to progress and prosper. Many institutions’ faculties have found and embraced this necessity.

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

Freedom to express ideas, however controversial and offensive, is also a deeply held value that defines great institutions of higher education, public and private. This academic freedom, which extends to the institution itself as well as to faculty and students, is a fundamental policy governing academic life. Academic freedom is accompanied by the countervailing policy of academic responsibility, which is also a foundation of academic culture and is embedded in many institutions’ internal regulations and, indeed, in federal research funding agencies’ requirements. Members of the college and university community have the responsibility, in the exercise of their academic freedom, to act legally, ethically, and with academic honesty (e.g., in scholarship, research, test-taking, and grading); and to not unreasonably interfere with the ability of others in the academic community to participate fully in academic life.

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

36 See, e.g., YALE UNIVERSITY, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE, 5 (1975) (“The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.”); COMMITTEE ON A CIVIL, SAFE, AND OPEN ENVIRONMENT, UNIVERSITY OF FLORIDA, FINAL REPORT (2008); NARRATIVE REPORT AND GENERAL RECOMMENDATIONS, TASK FORCE ON ASSEMBLY AND EXPRESSION, UNIVERSITY OF TEXAS AT AUSTIN (2002).

37 See, e.g., id.; 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS (“AAUP 1940 Statement”) (“Institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole” and academic freedom in teaching and learning is accompanied by “duties correlative with [such] rights.”); 42 C.F.R. Parts 50, 93 (Public Health Service, Office of Research Integrity regulations); 2 C.F.R. Part 180.
Neither free speech rights protected by the First Amendment to the U.S. Constitution that apply in public educational institutions,\textsuperscript{38} nor principles of academic freedom that apply in most public and private institutions of higher education, are offended when the institution appropriately considers whether faculty and students practice conduct of \textit{inclusion and non-discrimination on the basis of race, gender, other specified bases} to achieve essential educational benefits of, and the rich discourse that results from, broad diversity.

This tenet is true in the context of employment, the classroom, and the research laboratory. Consideration of faculty and student \textit{workplace conduct} required by the institution to achieve its educational mission does not regulate viewpoint or diminish principles of academic freedom. Hence, the institution may consider whether a faculty member, regardless of his or her viewpoint on race or gender (and regardless of his or her race and gender) -- through conduct in class, research, advising or other relevant workplace activities with students and colleagues -- has a record of success in including and fostering full participation of broadly diverse individuals of different perspectives, socio-economic backgrounds, races, genders, ethnicities and experiences that will provide opportunities for multi-cultural analysis, issue identification, collaboration and problem-solving. This consideration does not judge the viewpoint or subject that a faculty member or student may possess or pursue in research or, in most situations, in didactic pursuits or as a citizen.

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

\textsuperscript{38} The First Amendment applies through the 14th Amendment of state institutions of higher education. See \textit{Gitlow v. N.Y.}, 268 U.S. 652, 666 (1925); \textit{see also Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.}, 508 U.S. 384, 387 (1993).
V. LEGAL ISSUES ASSOCIATED WITH STUDENT DIVERSITY

A. Overview Of Governing Legal Principles

Federal constitutional and statutory provisions, along with corresponding legal principles regarding the consideration of race, ethnicity and gender in educational programs govern many student diversity efforts at institutions of higher education and are summarized below.

1. Equal Protection Clause (U.S. Constitution, 14th Amendment)

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

Public institutions are subject to Constitutional restrictions; private institutions are not. However, Title VI has been held to be coextensive with the Equal Protection Clause as it relates to race discrimination. Title IX also tracks equal protection principles on key points with respect to sex discrimination, although some differences exist between those two laws. Consequently, private institutions that receive federal funds are effectively subject to the same restrictions as those that arise under the Equal Protection Clause in their educational programs (under Title VI respecting race and under Title IX respecting gender). As a consequence, more in-depth issues relevant to each legal regime is included within relevant statutory sections below.

Before turning to those sections, however, one remaining issue of constitutional relevance remains: relevant standards and analysis related to student citizenship.

**Citizenship: From Rational Basis Review to Strict Scrutiny**

It is important to note that while strict scrutiny applies to race and ethnicity, as described in the section below, the waters are somewhat murkier in citizenship context. Courts have been more willing to subject federal legislation and executive action to lower levels of scrutiny than state action. This is primarily based on the fact that Congress has plenary power over immigration policy. In fact, when Congress acts within the context of immigration law such any such challenges to alienage classification are not subject to judicial review. Even outside of the immigration law context, the Supreme Court is extremely deferential to federal alienage classifications and applies rational basis review.

As to state citizenship classifications, strict scrutiny generally applies in the context of non-citizens who are lawfully present in the United States. There are however,

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


44 *Graham v. Richardson*, 403 U.S. 365 (1971). We further note that courts have also increasingly applied a deferential rational basis scrutiny to certain state classifications in which the courts apply federal
exceptions to this general rule.\textsuperscript{45} First, the Supreme Court carved out a somewhat broad exception under the political function doctrine.\textsuperscript{46} Under this line of cases, the Supreme Court held that states could require citizenship for certain positions in executive, legislative and judicial positions and for officers who participate in the formulation, execution or review of public policy functions.\textsuperscript{47} Second, the Supreme Court applied a level of review somewhere in between rational basis and strict scrutiny when presented with a challenge to a Texas statute requiring children to be U.S. Citizens in order to enroll in public school.\textsuperscript{48} Here, the Court held that undocumented children were protected by the Equal Protection Clause, but they were not a suspect class entitled to strict scrutiny.\textsuperscript{49} The Court noted that the undocumented children were present in the country at no fault of their own, and while a free public education is not an inalienable right it is a “vital civic institution.” Thus, the undocumented children were deemed “special members of [an] underclass” of individuals in the country involuntarily and thus, entitled to something more than rational basis review. As such, Texas could not prevent the children from attending public school unless a substantial state interest was involved. No such interest was found in this case where denying the students free public education would impose a lifetime hardship on them.\textsuperscript{50}

Notably, the Supreme Court’s application of strict scrutiny is limited to state classifications involving lawful permanent residents. Thus, it has not opined whether this level of review applies to individuals who reside in the United States on a temporary, conditional basis—referred to in the relevant cases as “nonimmigrants”. Individuals in the United States under student visas fit into the category, and thus IHEs should be aware of the distinction. There is a split in the federal circuit courts on this issue. The Second Circuit held that nonimmigrant individuals are a suspect class and thus any such classification is subject to

\textsuperscript{45} Most federal alienage classifications are upheld pursuant to standards of review that grants deference to the judgment of the political branches of the national government.

\textsuperscript{46} \textit{Sugarman v. Dougall}, 413 U.S. 634 (1973).


\textsuperscript{49} \textit{Id.} at 230. The Court held that “[i]f the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by showing that it furthers some substantial state interest.”

\textsuperscript{50} \textit{Id.}
strict scrutiny. The Fifth and Sixth Circuit however, disagreed and held that rational basis review applies to laws that classify based on nonimmigrant status.

The circuit split noted above also raises the question as to the level of review that applies to another unique group of individuals—those who may apply for a special status in order to be recognized as legally present in the United States through the Deferred Action for Childhood Arrivals (“DACA”) program. This is particularly important to IHEs as many of these individuals have sought admission and scholarships in the higher education context. Certain states however, have successfully prevented this group of students access to the benefits and opportunities afforded to students who are United States citizens. In doing so, these states rely on the distinction between lawful presence and lawful status in crafting the prohibitive laws and policies at issue. While the Supreme Court has not decided this issue, it has made its way to at least one federal circuit court. In a recent case, the Eleventh Circuit applied rational basis review to an equal protection challenge to a Georgia law limiting admission to its selective schools to persons who are not lawfully in the United States. In doing so, the court noted that strict scrutiny was not triggered where the Supreme Court has never stated that education is a fundamental right and where undocumented individuals are not a suspect class.

Notably, Title VI (discussed below) does not include prohibitions on the basis of citizenship. The question is whether private institutions be impacted by questions of citizenship as public institutions are. Other statutes may be relevant in the overall analysis

51 Dandamudi v. Tisch, 686 F.3d 66, 81 (2d Cir. 2012) (The 2nd Circuit, relying on Graham and noting while that the Supreme Court never explicitly applied strict scrutiny to nonimmigrant individuals it also never held that they are outside of Graham’s protection, held that strict scrutiny applied to a New York law preventing nonimmigrants from obtaining pharmacists licenses).

52 See LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005) (distinguishing legal permanent residents and nonimmigrants and applying rational basis review to challenge to Louisiana law permitting only citizens or legal permanent residents to apply to state bar exam admissions); Van Staden v. St. Martin, 664 F.3d 56 (5th Cir. 2011), cert denied, Van Staden v. St. Martin, 568 U.S. 814, (2012) (applying rational basis review to challenge of a law allowing only legal permanent residents and citizens to apply for nursing licenses); League of United Latin American Citizens (LULAC) v. Bredesen, 500 F.3d 523 (6th Cir. 2007) (distinguishing nonimmigrants from legal permanent residents and applying rational basis review to a law preventing nonimmigrants from obtaining drivers licenses.)

53 See Id.

54 Britteny Pfleger Show Me” Your Legal Status: A Constitutional Analysis of Missouri’s Exclusion of DACA Students from Postsecondary Educational Benefits, 81 Mo. L. Rev. 605, 609 (2016); 6 C.F.R. § 37.3 (2015) (“A person in lawful status is a citizen or national of the United States; or an alien lawfully admitted for permanent or temporary residence in the United States.”).

55 Estrada v. Becker, 917 F. 3d 1298, 1308-11 (11th Cir. 2019).

56 Id. The Eleventh Circuit also distinguished this case from Supreme Court cases applying strict scrutiny on the basis that plaintiffs were granted deferred status rather than being lawfully admitted and where they were denied admission to selective IHEs rather than denied a state-sponsored benefit. The Georgia law “neither strikes at appellants’ ability to exist in the community nor conflicts with any congressional determination.”
here. 42 U.S.C. §1981 and 42 U.S.C. §1985(3) both apply to private institutions in ways that may trigger citizenship issues. Section 1981, which prohibits discrimination in the making and enforcing of contracts, has widely been interpreted as protecting non-citizens from discrimination by the state, and several courts have held the same for discrimination by a private actor.57 Section 1985(3), which prohibits conspiracies to interfere with rights, is not limited to racial discrimination and thus, likely applies to private conspiracies that discriminate on the basis of alienage or citizenship.58

2. Title VI (42 U.S.C. § 2000d)

In general, Title VI prohibits discrimination on the basis of race, color and national origin by public and private recipients of federal funds: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”59 Title VI applies with respect to all aspects of an institution’s operations, including its educational program and certain employment matters (the latter being addressed in Section VI, infra.)

As interpreted by the agencies and the courts, Title VI prohibits both intentional discrimination (disparate treatment) and the use of facially neutral procedures or practices that have the effect of subjecting individuals to discrimination based on their race, color, or national origin (disparate impact). The analysis of intentional discrimination claims under Title VI is similar to the analysis of disparate treatment under the Equal Protection Clause,60 and can be proved through direct evidence of discriminatory motive or intent; or in the absence of such evidence, using an analysis similar to Title VII burden-shifting analysis61 -- requiring the establishment of an

57 See Angela M. Ford, Private Alienage Discrimination and the Reconstruction Amendments: The Constitutionality of 42 U.S.C. S 1981, 49 U. Kan. L. Rev. 457, 473-76 (2001); see Duane v. GEICO, 37 F.3d 1036, 1043 (4th Cir. 1994) (holding that plaintiff had a claim under § 1981 after being denied homeowner’s insurance based on his citizenship status because “we conclude that regardless of whether we agree or disagree with Jones and McCrary, their holdings compel us to find that section 1981 prohibits private discrimination against aliens. With respect, then, we must disagree with the Fifth Circuit’s decision in Bhandari.”)

58 See Ken Gormley, Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3), 64 Tex. L. Rev. 527, 575, 579-581 (1985). However, § 1985(3), there is a question as to whether it would apply to private institutions as it has been interpreted to prohibit private action in very limited circumstances as it was originally intended to prevent the Ku Klux Klan from preventing state and local governments from providing equal protection of the law. See Douglas G. Smith, The Intracorporate Conspiracy Doctrine and 42 U.S.C. S 1985(3): The Original Intent, 90 Nw. U. L. Rev. 1125, 1142 (1996) (noting that it is unlikely that the statute applies to intracorporate conspiracies because they do not interfere with the government’s ability to protect citizens’ rights).


“educational necessity” similar to Title VII’s business necessity standard to justify disparate impacts. (As discussed below, compelling educational interests in broadly diverse student bodies and faculties should establish an educational necessity.) Meanwhile, the Supreme Court has held that there is a private right of action under Title VI as to disparate treatment claims, but not disparate impact claims.62

Strict scrutiny and other standards of review. Federal legal principles regarding the consideration of race and ethnicity when conferring educational opportunities and benefits to students appear well settled. Under the Equal Protection Clause of the 14th Amendment of the United States Constitution and Title VI of the Civil Rights Act of 1964, higher education institutions that include racial or ethnic considerations in their programs and policies must ensure that they comport with strict scrutiny standards -- ensuring that those programs and policies are supported by a compelling interest and that the policy and program design is narrowly tailored to achieve those compelling goals.64 In addition, the status of the entity responsible for making the race- or ethnicity-conscious decisions is unlikely to affect the level of legal scrutiny applied. The 14th Amendment of the U.S. Constitution, which applies to “state actors” or public entities, is coextensive with Title VI, which applies to any recipient of federal education funds, public or private. Therefore, a college or university’s status as public or private is unlikely to affect the determination regarding whether strict scrutiny applies to a particular policy or practice.

Although strict scrutiny standard is the most probing standard applicable to preferences that may be provided to some students, the rigor of the analysis does not result in an


63 Ethnicity, or national origin, refers to heritage, nationality group, lineage, or country of birth of the person or the person’s parents or ancestors before their arrival in the United States. See U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: 2017 SUBJECT DEFINITIONS, (2017) https://www2.census.gov/programs-surveys/acs/tech_docs/subject definitions/2017_ACSSubjectDefinitions.pdf# . See also Dawavendewa v. Salt River Project, 154 F.3d 1117 (9th Cir. 1998) (ruling that “national origin” includes “the country of one’s ancestors” in a Title VII employment discrimination case); OFFICE OF MANAGEMENT & BUDGET, REVISIONS TO THE STANDARDS FOR THE CLASSIFICATION OF FEDERAL DATA ON RACE AND ETHNICITY, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

64 In the landmark decision of Adarand v. Pena, the U.S. Supreme Court explained why strict scrutiny is “essential” when reviewing classifications based on race and ethnicity:

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

impossible hurdle. In Justice O’Connor’s words, “strict in theory does not mean fatal in fact” -- as the University of Michigan’s Law School demonstrated in its successful defense of its race-conscious admissions policies. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context. The higher education context -- an institution’s mission, its academic freedom interests, and role in society -- do matter to the analysis. On September 19, 2019, the federal district court for the District of Massachusetts upheld Harvard’s consideration of race in its admissions program, using the same type of strict scrutiny analysis laid out in the Grutter and Fisher I and II cases.

Compelling interests. Federal courts have expressly recognized a number of interests that can be sufficiently compelling to justify the consideration of race or ethnicity -- ranging from remedial interests in multiple settings to a university’s interest in promoting the educational benefits of a diverse student body on its campus. With respect to this latter interest, it is important to note the centrality of the educational aims. The interest in diversity is not “diversity for diversity’s sake” nor can the interest be one of “racial balancing” -- mirroring the representation of certain racial or ethnic groups in relevant service areas or society at large -- or remedying societal discrimination. In addition, the compelling interest recognized by law requires a broader focus, encompassing the educational benefits of nonracial and non-ethnic diversity as well as of racial and ethnic diversity. The type of diversity at the core of a compelling educational interest is a

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

66 “In determining the rationality of [the Texas law], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the law] can hardly be considered rational unless it furthers some substantial goal of the state.”

67 The U.S. Department of Education’s Title VI regulations also authorize “a recipient to take additional steps to make the benefits of Title VI fully available to racial and nationality groups previously subject to discrimination.” 34 C.F.R. § 100.5(h) (2020). The regulations recognize that affirmative steps may be needed, and appropriate, in situations where there has been no prior discrimination:

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

34 C.F.R. § 100.5(i).
diversity of individuals -- their backgrounds, cultures, and life experiences -- of which race and ethnicity may be only two of several determinants.

Although some judicial hostility to expanding the list of compelling interests is apparent\(^6^8\), the U.S. Supreme Court in the University of Michigan decisions and those that have followed has not addressed (and has not ruled out) other interests that might justify race- and ethnicity-conscious practices in the higher education context. Indeed, in *Grutter*, the Court’s decision may also be viewed as having recognized a broader definition of educational benefits that encompasses a university’s multi-pronged teaching, research, access, and service mission. Justice O’Connor’s opinion for the Court, for example, emphasized the need to cultivate a set of leaders with legitimacy in the eyes of the citizenry and, to that end, to make “the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”\(^6^9\) Similarly, in *Fisher II*, Justice Kennedy’s opinion, without further explanation, cited the need to reconcile diversity and “the constitutional promise of equal treatment and dignity.”\(^7^0\)

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

- The flexibility of use of race in the program,
- The necessity of using race or ethnicity at all (which includes an examination of viable race-neutral alternatives) and the necessity of the extent to which race or ethnicity is used (which considers whether a lesser use -- *e.g.*, as one factor of many rather than as an exclusive requirement -- would be adequate),
- The effectiveness of the program and the benefit to those who are targeted for assistance, as well as the burden imposed on non-beneficiaries of the racial/ethnic preference, and
- Whether the policy has an end point and is subject to periodic review (i.e., to determine whether the need to use race and the extent it is used continue to be necessary to achieve a compelling aim and whether workable neutral alternatives are available).

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\(^6^8\) See *Grutter*, 539 U.S. at 395 (Kennedy dissenting) (approving consideration of race in “this one context”); *Grutter*, 539 U.S. at 349-378 (Thomas dissenting) (expansive discussion of hostility to racial classifications); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).


\(^7^0\) *Fisher II*, supra n. 23, 136 S.Ct. at 2214. Justice Kennedy has invoked the concept of equal dignity to support decisions in other cases, including, but not limited to, cases involving gay marriage, the constitutionality of the death penalty for persons under the age of 18, abortion rights, and the rights to due process for war on terrorism prisoners detained in Guantanamo Bay.
As reflected in various federal court opinions, narrow tailoring factors generally should not be viewed or applied in a rigid mechanical way, but rather, they should be considered in light of each other, as part of a comprehensive assessment. It is possible for instance, that the relative strength of one or more factors might offset weaker support related to another of the narrow tailoring factors.71 Of course, when strict scrutiny applies, it is helpful to have a reasonably strong position on each factor.

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

Moreover, in the context of efforts to achieve the educational benefits of diversity, federal law requires that race- and ethnicity-conscious admissions policies be flexible enough to take into account all pertinent elements of educational diversity (not merely race and ethnicity) that each applicant may bring to an institution. As a result, and as the Court in the University of Michigan and Fisher cases explained, applicants’ files in the admissions process should be subject to a “highly individualized, holistic review,” with “serious consideration” to “all the ways an applicant might contribute to a diverse educational environment.” In short, admissions practices should not result in an applicant’s race becoming “the defining feature of his or her application.”72

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

**Necessity.** As with other elements of the narrow tailoring analysis, the necessity of maintaining race- or ethnicity-conscious practices should be evaluated in the context of

71 Legal Guidance on the Implications of the Supreme Court’s Decision in Adarand Constructors, Inc. v. Pena, Department of Justice, Memorandum to General Counsels (June 28, 1995). (available at https://www.justice.gov/olc/opinion/legal-guidance-implications-supreme-courts-decision-adarand-constructors-inc-v-pe%C3%B1a.)

72 Grutter, 539 U.S. at 337. Thus, the use of points assigned to members of minority races on the basis of race, coupled with the “relative weight” of the totality of points assigned, was found to be unconstitutional in Gratz, 539 U.S. 244 (2003). See also Students for Fair Admissions v. President and Fellows of Harvard College, supra n. 27 (the court noted that applicants of all races received individualized, complete review and race was considered within that context).
the goals the institution seeks to achieve with those practices. Specifically, race and ethnicity may be used only to the extent necessary to achieve the institution’s compelling interest -- in many cases, the educational benefits of diversity.\textsuperscript{73}

Correspondingly, federal courts have insisted that institutions give “serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek.” To this end, the Supreme Court in \textit{Grutter} admonished that higher education institutions “draw on the most promising aspects of . . . race-neutral alternatives as they develop” -- specifically pointing to experimentation in states where race- and ethnicity-conscious admissions practices had been banned as a matter of state law.\textsuperscript{74}

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

Similarly, higher education institutions are not faced with an “either-or” choice when it comes to the use of race-neutral alternatives when pursuing access and diversity-related goals. On many campuses where consideration of race is not prohibited by state law and educational goals associated with student body diversity are paramount, enrollment management, student affairs, and academic officials are pursuing both race-neutral and race-conscious practices. The two can often work together to help institutions achieve their diversity-related goals and to help institutions demonstrate that their strategies are narrowly tailored toward the achievement of their goals.\textsuperscript{75}

\textbf{Undue Burden.} Under federal law, race- and ethnicity-conscious policies must not “unduly burden individuals who are not members of the [policy’s] favored racial and ethnic groups.” As a general rule, the less severe and more diffuse the burden on individuals who do not benefit from a race- and ethnicity-conscious policy, the more likely the policy will pass legal muster. As the Supreme Court in the University of Michigan cases recognized, for example, the use of race and ethnicity as “plus” factors in admissions in the context of an “individualized consideration” of all applicants under the same criteria

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{73} \textit{Fisher II}, 136 S.Ct. at 2203 (quoting \textit{Fisher I}, 570 U.S. at 297).
\item \textsuperscript{74} \textit{Id.}; \textit{Grutter}, 539 U.S. at 342.
\item \textsuperscript{75} See generally \textit{The Playbook}, supra n. 8.
\end{itemize}
\end{footnotesize}
did not disqualify non-minority applicants from competing for every seat in the class and
did not result in undue harm to non-minority candidates.76

Periodic Review. The Supreme Court in the University of Michigan decisions, recognizing
that a “core purpose of the 14th Amendment was to do away with all governmentally
imposed discrimination based on race,” ruled that “all governmental use of race must
have a logical end point.” In the context of higher education, the Court established that
this “durational requirement” can be met by sunset provisions and “periodic reviews to
determine whether racial preferences are still necessary to achieve student body
diversity.” (Notably, the inclusion of a sunset provision is not a categorical requirement
imposed by federal law; the University of Michigan in Grutter successfully defended its
law school policy, which did not include a sunset provision.) This concept was reaffirmed
by the Supreme Court in Fisher II as well as the federal district court in Students for Fair
Admissions v. President and Fellows of Harvard College, which provided that Harvard must
“continue to use [its valuable] data to scrutinize the fairness of its admissions program”
and to make “refinement[s]” in light of changing conditions.77

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

OCR Enforcement Decisions. The Office for Civil Rights (OCR) of the U.S. Department of
Education, in separate determination letters that have been published, has upheld
consideration of race and national origin by five universities the University of North
Carolina (UNC),78 the University of Virginia (UVA),79 Princeton University,80 Rice

76 Grutter, 539 U.S. at 337.
77 Students for Fair Admissions, Inc., supra n. 27.
78 OCR Letter of Findings, November 27, 2012. The complaint challenged the University’s use of race and
national origin as factors to achieve diversity in its undergraduate classes.
79 OCR Letter of Findings, March 19, 2013. The complaint alleged that the University discriminated against
white and male applicants by considering race and gender as factors in admissions to its undergraduate
program.
80 OCR Letter of Findings, September 9, 2015. The case involved a compliance review (rather than a
complaint), which examined whether Princeton discriminated against Asian students on the basis of race
or national origin.
University,\textsuperscript{81} and North Carolina State University (NCSU)\textsuperscript{82} – and consideration of gender by one of the universities (UVA) -- in admitting students to one or more of their colleges or programs.\textsuperscript{83} The written determinations rested on the stated principle that a use of race, national origin, or gender that violated the Equal Protection Clause of the Constitution also violated Title VI of the Civil Rights Act (with regard to race and national origin) or Title IX of the Education Amendments of 1972 (with regard to gender). OCR therefore examined the admissions programs based on Court decisions under the 14\textsuperscript{th} Amendment, in particular the \textit{Grutter}, \textit{Gratz}, and \textit{Fisher I} decisions regarding consideration of race or national origin in college admissions.

Regarding consideration of race or national origin in admissions, OCR carefully analyzed the programs under strict scrutiny standards, including each university’s compelling interest in diversity – each institution indicated that it sought a critical mass of minority students, not about achieving a particular number, but rather, to achieve a meaningful level of participation with a diversity of student voices as an integral part of the institution’s learning and student living environment -- and the narrow tailoring of its program. Each of the OCR determinations also upheld the programs under narrow tailoring criteria used by the Supreme Court and discussed in the following sections of this document, including—

\begin{itemize}
  \item The necessity of considering race and national origin to achieve diversity, including whether the institution had considered (not necessarily implemented) race-neutral means and whether they could accomplish its diversity goals about as well as the use of race or national origin, a criterion met by some of the institutions by having used several race-neutral approaches and finding them insufficient to achieve the desired student diversity;\textsuperscript{84}
\end{itemize}

\textsuperscript{81} OCR Letter of Findings, September 10, 2013. The complaint challenged Rice’s to consider race and national origin as admissions factors for the class entering in Fall 2004.

\textsuperscript{82} OCR Letter of Findings, November 27, 2012. The complaint challenged the University’s consideration of race and national origin in undergraduate admissions.

\textsuperscript{83} The compliance review of Princeton addressed possible discrimination against Asian applicants; the complaint against UNC alleged discrimination against white and Asian-American students; and the complaint against UVA alleged discrimination against white and male applicants.

\textsuperscript{84} The complaint against Rice did not question that Rice had a compelling interest in diversity, but rather asserted that Rice had achieved diversity comparable to that achieved by the University of Michigan Law School, as addressed in the \textit{Grutter} case, through race-neutral means, and therefore alleged that Rice failed the narrow tailoring test. OCR nevertheless analyzed Rice’s program under both strict scrutiny tests – compelling interest and narrow tailoring. Rice had previously sought diversity, using race-neutral means, in light of the \textit{Hopwood} decision of the Fifth Circuit (\textit{Hopwood v. University of Texas}, 78 F.3d 932 (1996), \textit{reh’g en banc denied}, 84 F.3d 720, \textit{cert. denied}, 518 U.S. 1033 (1996)) banning consideration of race in college admissions, but Rice adopted an admissions program that involved a holistic and limited review of race/ethnicity in 2003, after the Supreme Court’s decision in \textit{Grutter}. OCR ruled that the \textit{Grutter} case did not create a cap on the amount of compositional diversity that could be sought by a university, but rather that a critical mass that justified use of race meant the point at which a university concluded that it was
The flexibility of the institution’s use of race or national origin, in particular whether race was not a defining feature of a minority applicant’s application; whether every applicant was considered as an individual through a holistic review of his or her application; whether a set number of points or percentages were not assigned to each minority applicant; and whether race or national origin was just one of many diversity criteria used in reviewing an application.  

Whether there was an undue burden on applicants who were not minorities, including whether there was a holistic review that considered each applicant as an individual, and the absence of sorting applications based on race or quotas or points for race.

Periodic review of the continuing need for consideration of race or national origin, with several of the institutions meeting this criterion by committing to review their admissions program by a year-certain or through annual reviews and to discontinue or reduce consideration of race at such time that it was no longer needed to achieve the educational benefits of diversity that it sought.

In its Determination letter regarding UVA, OCR indicated that it found no evidence of consideration of sex in admissions, consistent with representations of the University that its admissions process was gender-neutral.

By contrast to these determinations, OCR in 2019 entered a Resolution Agreement with Texas Tech University Health Sciences Center (TTUHSC) in which TTUHSC agreed to discontinue all consideration of an applicant’s race and/or national origin in its admissions of students. Although the Agreement stated that it did not constitute an admission by TTUHSC of a Title VI violation, it also provided that TTUHSC would implement actions achieving the educational benefits of diversity in light of its circumstances and educational mission. OCR also found that Rice had actually implemented a wide array of alternatives to considering race and continued to implement race-neutral alternatives together with its race-conscious program and accepted Rice’s analysis that its private status and small size made some race-neutral measures such as the “Top Ten” program used by the University of Texas unworkable for Rice. Using the same analysis, OCR found that NCSU was using some race-neutral factors such as such as socioeconomic status and first-generation college status, and approved NCSU’s analysis that these factors did not achieve a comparable level of diversity. OCR also noted that NCSU had committed to review its use of race in admissions later in the year that OCR’s determination was made.

OCR’s determination for Princeton included an extensive analysis of the wide array of factors beyond race considered in admissions and the very limited consideration of race, with each applicant considered as an individual and with race considered not automatically, but only as a plus factor — including for Asian applicants — if warranted in individual circumstances when it provided further context about an individual applicant, and with no racial balancing or quota. OCR also found that Princeton was using multiple race-neutral alternatives to promote diversity, including extensive outreach and recruitment and developmental programs for promising socioeconomically disadvantaged students.

In both the Princeton and NCSU cases, OCR found that the universities used race as a factor in a relatively small number of cases.
required in the Agreement “in order to address the compliance concerns raised during OCR’s investigation.”

Those concerns were summarized in a March 7, 2019, letter to the Center for Equal Opportunity, which filed the complaint against TTUHSC in this case. The concerns focused on whether TTUHSC’s use of race met narrow tailoring requirements, rather than whether TTUHSC established a compelling interest in having race-conscious admissions policies. The letter included “Findings of Fact,” including—(1) TTUHSC’s School of Medicine’s (SOM) (the only TTUHSC school that currently used race or national origin in its admissions process) consideration of race was designed to prepare students to serve the needs of diverse populations that graduates of the school would be called upon to serve; (OCR did not address whether this was a compelling interest under strict scrutiny standards); (2) Admissions officials could not articulate how or at what stage of the application process an applicant’s race was considered or remember specific instances when they considered race; (3) SOM acknowledged that it did not review the necessity for continued use of race-conscious admissions policies or whether race-neutral alternatives would be as effective in achieving diversity and that it did not maintain documentation of its annual process to review implementation of its admissions program.

OCR accordingly expressed concerns that SOM did not subject its race-conscious admissions policy to appropriate periodic review and did not consider whether race-neutral alternatives were sufficient to obtain the educational benefits of student diversity. OCR’s letter indicated that SOM produced no review of the continued necessity for race-conscious policies in response to OCR requests and could not articulate how/when race is used. OCR therefore inferred that TTUHSC had failed to assess who or how many applicants were burdened by its use of race or otherwise assess how well SOM tailored its use of race.

OCR’s resolution of the TTUHSC case is not inconsistent with the five OCR cases described above upholding use of race or national origin in admissions by higher education institutions. Whereas the institutions in those cases provided ample documentary and testimonial evidence of how their use of race met each of the standards for narrow tailoring, TTUHSC failed to do so, according to OCR. Taken together, these cases underscore the importance of institutions of higher education that decide to use race or national origin in admissions decisions to accomplish the educational benefits of diversity carefully addressing and compiling documentary evidence of compliance with compelling interest and narrow tailoring criteria, as articulated in applicable case law.87

87 Another institution – Washington University in St. Louis – similarly agreed to terminate use of race as an eligibility condition for certain educational and financial aid programs – designed to promote the educational benefits of diversity – in response to OCR’s investigation of a complaint filed with OCR against the University. OCR and the University entered a Resolution Agreement on May 13, 2005, in which the University agreed that it would no longer select students for these programs using race-exclusive criteria or providing a preference on the basis of race. However, the Agreement provided that the University would use selection criteria that addressed, among other things, demonstration of the student’s commitment to
In two other cases, OCR addressed the issue of whether an institution of higher education may consider legacies of candidates for admission.

An October 4, 1990, determination letter, with an attached, lengthy statement of findings addressed Harvard University’s undergraduate admissions program and whether it discriminated against Asian-American applicants. The determination concluded that Asian-Americans were admitted to Harvard at a statistically significant lower rate than white applicants over a 10-year period, which could not be justified by weaker applications. However, Harvard asserted, and OCR agreed, that the lower admissions rate for Asian-Americans was due to priorities for legacies and athletes that disproportionately benefited white applicants. OCR found that those preferences were permissible, were not a pretext to discriminate against Asian-American applicants, and did not violate Title VI. It analyzed the reasons for the legacy preference; namely, to increase alumni financial contributions and to promote alumni participation in activities to support the University, and found them to be legitimate, as well as concluding that there were no less discriminatory alternatives to accomplish these goals.

The other OCR determination related to the consideration of legacies in admissions involved a June 30, 2004, determination letter resolving a complaint filed against Georgetown University asserting discrimination based on race in declining the complainant’s application for admission, while admitting an African-American applicant from the same high school with an allegedly, substantially inferior academic record. The bringing diverse people together (e.g., through involvement in diversity initiatives in their schools or communities); of the student’s commitment to serving historically underprivileged populations; or of the student’s achievement and determination in the face of personal challenges. The Agreement also provided that the University may periodically study whether the programs should be revised to meet the University’s mission-based, compelling interests, including possibly including race or national origin as one factor among the eligibility criteria, subject to strict scrutiny standards and to advance notice to and approval by OCR. A third institution – Carnegie Mellon University – voluntarily agreed to convert selective race-exclusive scholarships into scholarships using race or national origin flexibly as a plus factor among broader criteria and to make the scholarships open to all students, in response to OCR’s investigation of a complaint against the University. In an attachment to OCR’s determination letter of June 23, 2008, the University agreed that no points would be awarded to an applicant based solely on his or her race or national origin; that it would review annually the necessity to take race and national origin into account to achieve the educational benefits of diversity and consider whether race-neutral means would achieve its mission-based diversity objectives; and that it would notify OCR in advance and obtain OCR approval for any changes in the scholarship program that implicate the use of race or national origin in selecting scholarship recipients.

OCR’s statement of findings also quoted from Justice Blackmun’s separate opinion in *Bakke*, regarding the irony of concerns over race-conscious policies, when IHEs gave preferences “to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous and the powerful.” *Bakke*, 438 U.S at 404. As summarized in the OCR statement of findings, Justice Blackmun went on to defer such matters to the expertise of educators, and to presume the good faith of the institutions administering such policies.

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88 The statement of findings indicated that only one court case had addressed the legacy issue – *Rosenstock v. Board of Governors of University of North Carolina*, 423 F. Supp. 1321, 1327 (1976) – upholding UNC’s priority for out-of-state applicants who were children of alumni. OCR’s statement of findings also quoted from Justice Blackmun’s separate opinion in *Bakke*, regarding the irony of concerns over race-conscious policies, when IHEs gave preferences “to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous and the powerful.” *Bakke*, 438 U.S at 404. As summarized in the OCR statement of findings, Justice Blackmun went on to defer such matters to the expertise of educators, and to presume the good faith of the institutions administering such policies.
admitted student was the child of an alumnus of the University. The University asserted that her legacy status was the reason she was admitted, and that her application also benefited from the recommendation of a prominent alumnus who was a member of the University Alumni Board of Governors and a financial contributor to the University. OCR found that these were legitimate, non-discriminatory reasons for different treatment of these applications, and there was no discrimination based on race.  

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

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

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

Title IX applies to all aspects of “education programs or activities” that are operated by recipients of federal financial assistance, including admissions, educational programs and benefits, and employment. Moreover, Title IX is not limited in its application to colleges, universities, and elementary and secondary schools. It applies to “any education or training program operated by a recipient of federal financial assistance.” For example,

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89 The legacy issue was also addressed in the September 30, 2019, decision of the U.S. District Court for Massachusetts in *Students for Fair Admissions v. Harvard*, supra, n. 27. In response to plaintiffs’ argument that eliminating legacies would be a race-neutral alternative to promote diversity, in that case, the court held that eliminating “tips” for legacies (as well as athletes and the children of faculty or staff) would come at considerable costs and adversely affect Harvard’s ability to achieve benefits from its relationships with its alumni and other individuals who have made significant contributions to Harvard and would have limited probable impact on racial diversity. The court ruled: “The Court notes that reasonable minds can differ on the importance of . . . alumni relations . . . but takes no position on these issues other than to note that these are topics best left to schools to figure out for themselves. As relevant here, eliminating these tips or preferences is largely unrelated to the goal of diversity or the issue of race, and in any event, is not a race-neutral alternative that would obviate the need for considering race in admissions.”


91 Under Title IX regulations – 34 CFR 106.37 -- a recipient of federal funding for an education program may be legally accountable for sex-conscious requirements or criteria of an independent third party related to financial assistance if it participates in administering or provides significant assistance to the financial aid program of the third party; for example, where a third party funds scholarships at the institution limited to male or female students. The regulations give as examples of assistance to the third party that may make the educational institution accountable —

- Institutional assistance to the third party in setting criteria for the selection of applicants or students;
- Institutional assistance in selecting qualified students;
- Institutional assistance in supporting the external funder through solicitation, listing, provision of facilities, or other services.
Title IX would cover such diverse activities as a forestry workshop run by a state park receiving funds from the Department of Interior ... [or] state and local courses funded by the Federal Emergency Management Agency in planning how to deal with disasters ....

Title IX was modeled after Title VI and much of the Title VI case law is broadly applicable in Title IX cases. There are important differences between the statutes, however. Title IX includes various statutory exemptions that are absent under Title VI. For example, Title IX does not prohibit single-sex admissions policies of public and private elementary and secondary schools or private undergraduate schools. The Title IX regulations provide additional exemptions of possible relevance to the present analysis, including one that permits affirmative action to overcome the effects of conditions that result in limited participation in a program by persons of a particular sex, and one that requires appropriate remedial action if an agency finds that a recipient has discriminated against individuals on the basis of sex.

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

Cases in the federal trial and appeals courts on gender identity and expression in public schools concern student use of facilities under Title IX and the Equal Protection Clause of the U.S. Constitution, and indicate similar treatment of sex and gender discrimination under federal law, at least where stereotyping is involved.

Although there are no parallel provisions in the Department of Education’s Title VI regulations, the education institution logically would also be accountable for -- and would need to justify -- race- or ethnicity-conscious requirements of a third party if the institution participates in administering or significantly assists the third party’s program.

93 Id. at 10.
94 Id. at 11.
95 See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (nursing school policy that excluded male applicants violated 14th Amendment notwithstanding the applicability of a Title IX exemption).
96 See, Whitaker et. al. v. Kenosha Unified School District No. 1, 858 F.3d 1034, 47-52 (7th Cir. 2017) (while declining to conclude that “transgender status is per se entitled to heightened scrutiny,” the court upheld 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); Grimm v. Gloucester Co. School
Gender: Intermediate Scrutiny Analysis. In contrast to the strict scrutiny that applies to race-conscious policies and programs that condition opportunities or benefits, policies and programs based on gender or sex generally trigger “intermediate scrutiny,” which means that such programs must:

- Serve “important” (rather than “compelling”) governmental objectives that provide an “exceedingly persuasive” justification; and
- Be “substantially related” (rather than “narrowly tailored”) to the achievement of those objectives.97

The extent of evidence required to justify a race- and ethnicity-conscious policy is greater than that required to justify a sex-conscious policy, primarily based on the fact that federal law does recognize limited inherent biological and physiological differences between the sexes that are not based on stereotypes about the capabilities, interests or

Board, 302 F.Supp.3d 730 (E.D. VA 2018) (applying “intermediate scrutiny” where the school board’s policy relied on “sex stereotypes); Joel Doe, et al. v. Boyertown Area School District, 897 F.3d 518 (3rd Cir. 2018); c.f., Joel Doe, et al. v. Boyertown Area School District, 897 F.3d 518 (3rd Cir. 2018) (petition for certiorari docketed in Supreme Court at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-658.html) (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; Title IX allows but does not require the provision of separate bathroom facilities; plaintiffs have not established sufficient facts of harm to find a hostile environment on the basis of sexual harassment under the facts; and citing with favor Whitaker’s sex stereotyping rationale in support of permitting use of bathrooms aligned with a student’s gender identity).

Compare, R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist., No. WD 80005, 2017 WL 3026757 (Mo. Ct. App. July 18, 2017), reh’g and/or transfer denied (Sept. 5, 2017), transferred to Mo. S.Ct., No. SC 96683, 2019 WL 925511 (Mo. Feb. 26, 2019) (upholding the dismissal of a case alleging sex discrimination against a transgender female to male student who was denied access to the boys’ locker room and bathroom “based on my sex and gender identity,” for failure to state a claim under Missouri law because the student did not allege sex stereotyping (i.e., that he was discriminated against for failure to conform to the traits of his sex), and Missouri law does not protect against discrimination on the basis of “gender-related traits” (female genitalia) and, in dicta, no Missouri court has extended the Missouri human rights statutes to sex stereotyping). See Parents for Privacy v. Barr, 2020 WL 701730 (9th Cir. 2020) (upholding the dismissal of a challenge to a public high school’s Student Safety Plan -- which provided that a particular transgender student and any other transgender student who might make a similar request may use the boys’ locker room and bathroom with his peers at the high school, and also provided that staff would receive training and instruction regarding Title IX -- for failure to state a claim under Title IX where the plan treated all students equally and did not discriminate based on sex and because the normal use of privacy facilities does not constitute actionable sexual harassment under Title IX just because a person is transgender).

97 See notes 15-19 and accompanying text regarding the standard of review for classifications based on sexual orientation or transgender identification and expression.
proper role of sex; whereas the law has rejected inherent differences based on race.98 Major legal challenges to diversity efforts in higher education have focused on race, largely in the context of admissions. Gender is also an important element of diversity, however.

“Without equating gender classifications, for all purposes, to classifications based on race or national origin, the [Supreme] Court in [recent] decisions, has carefully inspected official action that closes a door to women (or to men).”99 Under the applicable intermediate scrutiny standard, a governmental actor making gender-based decisions must demonstrate an important governmental objective. The Supreme Court has stressed that to rise to the level of an “important governmental objective,” a justification “must be genuine not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males or females.”100

In invalidating VMI’s all-male admissions policy in 1996 in United States v. Virginia, the Supreme Court noted, “once again, the core instruction of th[e] Court’s path-making decisions: Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”101 Lower federal courts have approved a “broad array of objectives” as satisfying this standard,102 including redressing discriminatory effects in particular industries or sectors.103 The Supreme Court has expressly stated that “[s]ex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’...‘to promot[e] equal employment opportunity,’...[and] to advance full development of the talent and capacities of our Nation’s people.”104


100 United States v. Virginia, 518 U.S. at 532-33.

101 United States v. Virginia, 518 U.S. at 531 (citations omitted). In theory, then, it should be easier to sustain gender-based affirmative action or diversity efforts than race-based. But, in practice, a court might treat gender diversity efforts as it would those based on race and apply what amounts to strict scrutiny. Moreover, the context of a given case might make the challenged action more difficult to defend even if a lower standard is applied.

102 12 Georgetown Journal of Gender & the Law 281, 297-98.

103 Id., at 301-302; Michigan Road Builders Ass’n Inc. v. Milken, 834 F.2d 583 (6th Cir. 1987), cert denied 118 S. Ct. 1186 (1998)

104 United States v. Virginia, 518 U.S. at 533-34.
In both the Virginia case and the Hogan case, the Supreme Court ruled that admissions policies of educational institutions that barred admissions of students of one sex based on stereotyping sex-based interests, capabilities, and roles violated the Equal Protection Clause. In Virginia, women were excluded from VMI based on the state’s theory that women were not capable of meeting the requirements of the “adversative method” of training student cadets. In response to an appellate court ruling, the state established what it asserted was a comparable program for women at another state institution, but the Supreme Court ruled that the program, including its benefits for alumna, were not comparable to those at VMI. In the Hogan case, the Court overturned a women-only program at the Mississippi University of Women to train nurses, holding that the program perpetuated the stereotyped view of nursing as an exclusively woman’s job and did not bear a reasonable relationship to the state’s asserted goal of compensating women for past discrimination. In the Virginia case, the Court rejected the state’s argument that having VMI as an all-male school enhanced the diversity of higher education options provided by the state, finding that this had not been the basis for establishing VMI as a male-only institution, but was rather a post hoc rationale. In any event, the state’s invocation of a diversity rationale was inconsistent with the Court’s holdings that the educational benefits of diversity at a particular institution was a compelling interest justifying consideration of sex in admissions.

Suggestions by some courts and commenters that the Virginia decision establishes a new test, perhaps equivalent to strict scrutiny, for gender or sex classifications appear to be overstated. In fact, the opinion for the Court in the Virginia case, after stating that a reviewing court must determine whether a justification for the classification is “exceedingly persuasive,” indicated that the “State must show ‘at least that the [challenged] classification serves ‘important governmental objectives and the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” Prior Supreme Court cases similarly combined these concepts, including Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982) (holding that “a party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification [citations omitted]. The burden is met only by showing at least that the classification serves ‘important governmental objectives, and that the discriminatory means employed ‘are ‘substantially related to the achievement of those objectives.’” Other Supreme Court cases cited by the Hogan and Virginia cases suggest that intermediate scrutiny apply and its test means that the important governmental objective and the classifications used to

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address it must be exceedingly persuasive.\textsuperscript{107} Also, in a subsequent case citing the \textit{Virginia} and \textit{Hogan} decisions, the Court clearly used intermediate scrutiny in reviewing a gender-based classification:

“The fit between the means and the important end is ‘exceedingly persuasive.’ We have explained that an ‘exceedingly persuasive justification’ is established by showing at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”\textsuperscript{108}

However, lower federal appeals courts are split on whether a meaningful difference exists as to the extent of evidence required to justify a race- and ethnicity-conscious policy as compared to a sex-conscious policy.\textsuperscript{109} For example, the Sixth Circuit Court of Appeals, has interpreted the Supreme Court’s decision in \textit{City of Richmond v. J.A. Croson Co}, 488 U.S. 469 (1989), to require that strict scrutiny be applied to all affirmative action programs, including those related to gender or sex, although affirmative action based on gender or sex was not an issue addressed by the \textit{Croson} decision.\textsuperscript{110} That position has been taken expressly in several cases, and has been implicitly applied in cases involving a combination of race- and gender-based distinctions.\textsuperscript{111}

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\textsuperscript{108} \textit{Tuan Anh Nguyen v. INS}, 533 U.S. 53, 70 (2001) (quoting \textit{Hogan}, 458 U.S. at 724); \textit{see also Sessions v. Morales-Santana}, 137 S. Ct. 1678 (2017) (the government must show that “legislation that differentiates on the basis of gender must show ‘at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives’”) (quoting \textit{Virginia}, 518 U.S. at 111)).
\textsuperscript{109} \textit{Engineering Contractors Association of South Florida Inc. v. Metropolitan Dade County}, 122 F.3d 895, 907 (11th Cir. 1997), cert. denied, 118 S.Ct. 1186 (1998) (noting that the relevant standard was not entirely clear “at first blush”, but finding that the district court properly applied traditional intermediate scrutiny to the gender-conscious plan at issue); \textit{Cohen v. Brown Univ.} 101 F.3d 155, 183 n.22 (1st Cir. 1996) (stating “\textit{Virginia} adds nothing to the analysis of equal protection challenges to gender-based classification that has not been part of the analysis since 1979 . . . [w]hile the \textit{Virginia} Court made liberal use of the phrase ‘exceedingly persuasive justification,’ and sparse use of the formulation ‘substantially related to an important governmental objective,' the Court nevertheless struck down the gender-based admissions policy at issue in that case under intermediate scrutiny.”); \textit{Concrete Works Inc. v. City \& County of Denver}, 36 F.3d 1513, 1519 (10th Cir. 1994) (applying intermediate scrutiny); \textit{Contractors Ass’n v. City of Philadelphia}, 6 F.3d 990, 1000-01 (3rd Cir. 1993) (applying intermediate scrutiny to challenge against gender preference in awarding city contracts to women-owned businesses); \textit{Coral Construction Co. v. King County}, 941 F.2d 910, 930 (9th Cir. 1991) (upholding set-asides for women-owned businesses against facial challenge); contra, \textit{Brunet v. City of Columbus}, 1 F.3d 390, 403-04 (6th Cir. 1992), (invoking strict scrutiny); \textit{Nabozny v. Podlesny}, 92 F.3d 446 n.6 (7th Cir. 1996) (noting that the standard was different from traditional intermediate formulation, but not explicitly stating it was heightened).
\textsuperscript{110} \textit{Brunet v. City of Columbus}, 1 F.3d 390, 403-04 (6th Cir. 1993).
\textsuperscript{111} \textit{See, e.g. Brunet}, 1 F.3d at 403-04 (applying strict scrutiny to a consent decree containing an affirmative action plan in favor of female applicants to the city fire department); \textit{Vogel v. City of Cincinnati}, 959 F.2d
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In addition, several state courts apply strict scrutiny to sex-based classifications 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 the state constitution reflect an intent to raise the bar for justifying gender- or sex- based discrimination; by interpreting state constitutional provisions to confer suspect status to these classifications;\(^{112}\) or by pointing to the immutability of sex (which may be open to dispute) or to historical discrimination against women.\(^{113}\)

**Classifications Other than Race, Ethnicity, and Gender.** Still further removed from the rigor of strict scrutiny review, federal courts will employ a “rational basis” standard for most other classifications (such as when students receive opportunities or benefits based on income or special talents). As the least rigorous federal standard of review applicable to classifications of individuals, the rational basis analysis requires only that the purpose or interest be “legitimate,” and that the means be “rationally related” to the accomplishment of that interest.\(^{114}\)

**B. The Importance of Mission Alignment**

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

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594, 599 (6th Cir. 1992) (applying strict scrutiny and upholding an affirmative action policy using race and sex preferences); *Long v. City of Cincinnati*, 911 F.2d 1192, (6th Cir. 1990) (stating, “We can only conclude that the classifications based upon sex, like classifications based on race, alienage, or national origin, are inherently suspect, and therefore must be subject to strict judicial scrutiny”); *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989) (applying strict scrutiny to a state affirmative action plan using race and sex preferences).

\(^{112}\) State courts in California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Mexico, and West Virginia have found that strict scrutiny applies on the theory that state constitutional provisions make gender a suspect classification. Amanda Fretto & Zach Perez, *Equal Protection*, 12 Geo.J.Gender & Law, 281, 311-314 (2011)

\(^{113}\) 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).

policies associated with access and diversity goals and the core, mission-driven education interests of the institution.

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

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

[T]he overall quality of the educational program is affected not only by the academic and personal qualities of the individual students who are enrolled, but also by the characteristics of the entire group of students who share a common educational experience. ...In a residential college setting, in particular, a great deal of learning occurs informally ...through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. ... People do not learn very much when they are surrounded only by the likes of themselves... In the nature of things, it is hard to know how, and when, and even if, this informal ‘learning through diversity’ actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet
powerful sources of improved understanding and personal growth...These kinds of learning experiences, sometimes very satisfying and sometimes very painful, are important not only for particular students in an immediate sense but also for the entire society over time. Our society -- indeed our world -- is and will be multiracial. We simply must learn to work more effectively and more sensitively with individuals of other races, and a diverse student body can contribute directly to the achievement of this end.\textsuperscript{115}

Importantly, the U.S. Supreme Court’s recognition of the “substantial” and “real” educational benefits associated with student diversity in \textit{Grutter} and in \textit{Fisher I} and \textit{Fisher II}, while significant, does not eliminate the advisability for institutions to address the question, more specifically, of how \textit{their particular programs} advance the diversity interests that are central to their mission. To that end, a good practice in developing mission statements and related policies associated with STEMM objectives is to reflect:

♦ That the benefits of diversity, including those associated with STEMM and other disciplines, are a core institutional value and priority;

♦ A concrete articulation of the benefits of diversity associated with STEMM and other disciplines -- including educational, civic, economic/workforce and national security benefits, as appropriate to the institution -- that will explain the connections between the diversity of a student population and the educational success of the institution;

♦ The importance of multiple facets of diversity in achieving institutional goals (not just a focus on race, ethnicity, and gender);

♦ Any unique institutional history that may bear on the institution’s mission regarding access and diversity-related goals, including a history of discrimination or exclusion; and

♦ As applicable, the process leading to policy approval, including the role of faculty and students in affirming the importance of access and diversity to their individual and collective educational success associated with STEMM and other disciplines.\textsuperscript{116}

Institution-specific research -- ranging from student and faculty surveys to data regarding the association between diversity and desired educational outcomes -- should be


\textsuperscript{116} See \textit{Grutter}, 539 U.S. at 314-15 (observing that in 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to achieve its goals - including seeking “a mix of students with varying backgrounds and experiences who will respect and learn from each other” - and that upon the unanimous adoption of the committee’s report by the Law School faculty, it became the Law School’s official admissions policy.)
gathered and evaluated over time in light of policy statements of relevance. Generally, narrow tailoring requires that a program aimed at increasing diversity to provide certain compelling benefits to the institution be effective in advancing that aim. It is important to measure the effectiveness of an institution’s diversity programs to achieve the intended educational and other benefits.

C. Issues Related to Enrollment

1. In General

*Comprehensive review.* Although never definitively addressed by federal courts, the logic of the strict scrutiny analysis suggests that policies and programs should be evaluated in the context of all others that are designed to operate in tandem as part of a comprehensive effort to achieve access and diversity goals.\(^\text{117}\) Simply put, higher education institutions should not evaluate access- and diversity-related programs in isolation.

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

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

\(^\text{117}\) Notably, through its enforcement of Title VI, the U.S. Department of Education’s Office for Civil Rights has in fact inquired about the range of enrollment practices that bear on diversity interests, even in cases where Title VI complaints relate only to, e.g., a race-conscious financial aid policy. *See, e.g.,* Arthur Coleman and Jamie Lewis Keith, “Federal Nondiscrimination Law Regarding Diversity: Implications for Higher Education Financial Aid and Scholarship Policies and Programs” (College Board and EducationCounsel, June 2019) available at [https://educationcounsel.com/?publication=federal-nondiscrimination-law-regarding-diversity](https://educationcounsel.com/?publication=federal-nondiscrimination-law-regarding-diversity).
the end, such an analysis requires more than an isolated program evaluation and a substantial evidentiary basis.

Importantly, no federal case or Department of Education rule categorically rejects all race- or ethnicity-exclusive practices under strict scrutiny standards, except in admissions. (The Department’s 1994 federal guidance regarding financial aid and scholarships, withdrawn in 2019 and now under consideration by the Department, specifically contemplated the legal defensibility of such aid in limited, appropriate circumstances.) In the end, the core legal question to be posed is one of whether the exclusive nature of any program or policy is demonstrably necessary to achieve legally-recognized, compelling institutional goals (with no viable and less extreme or less categorical use of race or ethnicity promoting achievement of the goals). In any event, exclusive programs attract challenges, warrant careful, evidence-based justification, and are best used judiciously.

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

2. Admissions

In contrast to other facets of enrollment-related policies, where there is a dearth of on-point U.S. Supreme Court guidance, the U.S. Supreme Court has on five occasions

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

• Black students indicated that they could not have attended the University without the aid in question;

• The State of Florida Board of Regents found that “black student recruitment and retention [were] heavily dependent upon financial assistance programs” and the provision of financial aid was “among one of the most important criteria [for] black college-bound high school seniors in choosing a college”;

• The University had implemented “numerous non-race exclusive measures,” which were successful in recruiting students of other races and ethnicities, but “not...as successful in recruiting black students”; and

• Only 7-8% of the University’s scholarship financial aid was allocated to race-targeted programs, and there was “no indication that these programs created an undue burden” on the University’s ability to offer scholarship aid to non-minority students.
addressed questions related to discrimination in higher education admissions. In the seminal 1978 decision in *Bakke*, the U.S. Supreme Court struck down a medical school policy in which sixteen out of 100 positions were reserved for minority students. Twenty-five years later, the Court addressed two University of Michigan policies -- upholding its law school admissions policy in *Grutter*, characterized by individualized, holistic review; and striking down its undergraduate admissions policy in *Gratz*, characterized by a point system in which race and ethnicity were significantly weighted (20 points out of a potential total of 150, and where 100 points for any applicant practically ensured admission). And, in 2013 and 2016, the Court addressed the constitutionality of holistic admissions programs that considered race as one of a wide range of plus factors in making admissions decisions at the University of Texas at Austin. The Court in 2013 ruled that the 5th Circuit Court of Appeals had improperly given deference to the University’s good faith in using race to meet its interest in diversity and remanded the case to the 5th Circuit. In its 2016 decision, the Court upheld the University’s consideration of race as one of multiple, factors in making admissions decisions, holding that the University’s compelling interest in diversity was entitled to some deference and that the University met strict scrutiny standards that its use of race was necessary and narrowly tailored to meet its compelling interest in diversity. The Court did so despite a separate, legislatively mandated program at the University to accept applicants ranked in the top 10% of their high school class, which achieved a degree of diversity at the University. The Court gave some deference to the University’s position that the 10% program did not achieve sufficient diversity with reference to educational outcomes sought by the University.

Taken together, these landmark decisions highlight the importance of the following principles, which should inform the development and implementation of admissions policies that include voluntary consideration of race and ethnicity (and in all likelihood, gender)\(^\text{119}\):

**In General**

1. Institutional, mission-driven foundations (i.e., educational benefits) should also drive the scope and substance of admissions policies;
2. Admissions policies should provide for the assessment of the merit of students the institution seeks to admit holistically, with a focus on all relevant qualifications and characteristics -- those related to numerical as well as more qualitative academic preparation and potential (e.g., standardized test scores and grades, as well as drive, dedication, ability to overcome set-backs, creativity, etc.), *and* those related to other student qualities that the institution values such as aptitude for and interest in STEMM fields, inclusive conduct and multi-cultural skills, experiences and talents, as set forth in mission-related policies;

\(^{119}\) Given the relationship between “strict scrutiny,” which applies to race- and ethnicity-conscious policies, and “intermediate scrutiny,” which applies to gender-conscious policies, references to the latter have been included in principles discussed below, despite the absence of on-point federal guidance.
3. All applicants who are admitted, regardless of background, must be qualified.
4. Good educational and psychometric foundations should inform judgments regarding students who are deemed qualified and those who are not similarly evaluated;
5. Admissions policies should be integrated and aligned with related enrollment policies;
6. The weighting of race, ethnicity, and gender (among other factors) should not fundamentally undercut the value of individualized holistic review; or create rigid or quota-like mechanisms as part of the admissions process;
7. Each applicant should be evaluated in light of all criteria, all of the applicant’s attributes, and the many kinds of diversity that together create educational benefits, so that all applicants are on the “same footing for consideration.”
8. All applicants should be evaluated under the same criteria without separate evaluation criteria or admissions tracks based on race. Each member of the same race should not have his or her race weighted in the same way or to the same extent.
9. Qualified, non-minority applicants who bring other particular attributes should have the opportunity to be admitted over minority applicants with higher grades and scores;  

The Necessity of Considering Race, Ethnicity and/or Gender

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

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

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120 *Gratz* provides an example of how the existing student body and the applicant pool may influence the consideration of race and other attributes in admissions decisions. An individual who is African American from a wealthy and well-educated family would contribute differently to the student body than would an African American applicant who is from an inner city ghetto. 539 U.S. at 294-95. Another student who is an exceptional artist would bring something else. The school should look at each individually for all attributes each would bring to the student body and consider what attributes, including what aspects of diversity, are most needed at the time in order to select among the three.
e. The evolution of the policy to reflect changing circumstances, including shifts in applicant pools and the evolution of institutional goals.\textsuperscript{121}

How Race, Ethnicity and/or Gender May Be Considered

11. Race, ethnicity and/or gender may be considered as one, but may not be the only, diversity “plus” factor in evaluating all attributes of each and every applicant. Race may not be given the same weight in relation to all applicants of a particular race -- or at all times. Consideration of race should be flexible, taking into account the educational needs of the student body as they may change over time and the many attributes of each applicant.

12. Race, ethnicity and/or gender may be weighted more heavily than other diversity “plus” factors in a particular case, but not for all applicants of a particular minority group. Race may not be the only defining or outcome-deciding feature for applicants of a particular race. All members of a minority group may not be assumed to offer the same contribution to the student body based on their race.

13. Race, ethnicity and/or gender may be “outcome determinative” by “tipping the balance” when it is considered with all other attributes of a particular applicant who is academically qualified but isn’t in the top range of grades and scores; and there may be more minority applicants than non-minority applicants who aren’t in the top range of grades and scores and are offered admission.

3. Financial Aid and Scholarships

Unlike in the admissions setting, discussed above, there is a notable lack of widespread federal caselaw that relates specifically to race- and ethnicity-conscious financial aid and scholarships. No U.S. Supreme Court decision has comprehensively addressed the lawfulness of race-, ethnicity- or, gender-conscious financial aid and scholarships, and only a few lower court decisions have included such analysis. Four reported cases have addressed race, ethnicity or gender preferences in some fashion; in apparently every setting, the relevant legal analysis was shaped in the context of remedial (as opposed to non-remedial diversity-related) interests.\textsuperscript{122} The one case on financial aid and

\textsuperscript{121} See generally Bakke, 438 U.S. at 315-17 (opinion of Powell, J.) (to be narrowly tailored, a race-conscious admissions program cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants;” instead, it may consider race or ethnicity only as a “ ’plus’ in a particular applicant’s file;” it must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight”); Grutter, 539 U.S. at 309 (law school program adequately ensured that all factors that may contribute to diversity are meaningfully considered alongside race).

\textsuperscript{122} In Flanagan v. President & Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976), the court found that a minority financial aid policy that arbitrarily set aside 60% of its financial aid dollars for the 11% minority population in its freshman class violated Title VI.
scholarships considered by many to be the leading decision -- the 1994 Fourth Circuit decision in Podberesky v. Kirwan -- was by its terms highly fact-based and limited to the remedial justifications asserted by the University of Maryland; the University of Maryland did not assert (and the court did not address) the educational benefits of diversity rationale.

The U.S. Supreme Court has issued a decision as to access to state financial assistance with respect to citizenship. In Nyquist v. Mauclet,\(^{123}\) the Court reviewed a New York rule requiring that an applicant for state financial aid for higher education must either be a citizen, have applied for citizenship, submit a statement that he or she will apply for citizenship, or be a member of a specific class of refugees. Here, where the state statute contained a classification based on alienage the court applied strict scrutiny. First, the Court stated that “the fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.” The Court then rejected the reasons proffered in support of the rule: that it was justified as an incentive to naturalization because this was a matter of federal concern. It also rejected the rule’s stated purpose: that it served as a means to ensure that financial aid was limited to enhancing the education level of the electorate.\(^{124}\)

**U.S. Department of Education Guidance.** The dearth of federal caselaw of relevance to aid issues associated with the educational benefits of diversity stands in contrast to past comprehensive federal guidance on the topic -- federal policy guidance promulgated by the U.S. Department of Education in 1994. That guidance, relied upon by USED’s Office for Civil Rights as a foundation for its related enforcement activity, was withdrawn in August of 2020 by USED, on the grounds that: [1] unspecified “key portions” had been

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\(^{124}\) Note that the decision was based on a 5-4 vote of the Justices, and Chief Justice Burger dissented despite the fact he was in the majority in Graham v. Richardson, in which the Supreme Court applied strict scrutiny to a challenge to a welfare program that impacted citizens and non-citizens differently. Justice Burger distinguished prior cases on the basis that they involved questions of economic survival and livelihood (employment opportunities, welfare benefits, etc.).
“superseded by subsequent U.S. Supreme Court decisions addressing the use of race in higher education (citing Grutter and Fisher I and II); and because it “advocate[d] policy preferences and positions beyond the [unspecified] requirements of the Constitution and Title VI." 125 Subsequently, USED has indicated (without further explanation) that the withdrawal is under review by the agency. Neither the U.S. Supreme Court, nor a federal appeals court has reviewed this guidance.

Given that development, a brief overview of the policy is provided as background information:

On December 4, 1990, an official of the U.S. Department of Education’s Office for Civil Rights declared “that Title VI categorically prohibited colleges and universities from awarding scholarships on the basis of race.” Two weeks later, however, OCR issued a press release announcing a substantially more tolerant policy on minority scholarships.... On March 20, 1991, Secretary of Education Lamar Alexander ... announced in a press conference that he had withdrawn both policy statements and indicated that [the Department of Education] would continue to interpret Title VI as permitting federally funded institutions to provide minority scholarships.” 126

Then, on December 10, 1991, the U.S. Department of Education issued for notice and comment Proposed Policy Guidance on Title VI’s applicability to race- and national origin-conscious scholarship awards. 127 That guidance indicated that:

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

Subsequently, pending the issuance of a Congressionally-directed General Accounting Office Report on race-conscious scholarships, the Department of Education deferred final issuance of its policy. Then, on February 23, 1994, the Department of Education issued

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125 See “Dear Educators and Stakeholders” correspondence from USED Office for Civil Rights Acting Assistant Secretary, August 26, 2020 at https://www2.ed.gov/policy/gen/guid/fr-200826-letter.pdf.
its final policy guidance. Among the salient points of that Guidance were the following principles:

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

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

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

**b. Financial Aid Authorized by Congress** -- A college may award financial aid on the basis of race or national origin if the aid is

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

- Although many schools used race- or ethnicity-conscious scholarships, a “relatively small proportion of scholarship dollars” were devoted to race- or ethnicity-conscious scholarships. At undergraduate schools, the proportion was about four percent.

- Higher education institutions reported that such scholarships were “valuable tools for recruiting and retaining” minority students. (They identified the help scholarships provided in “overcom[ing] the traditional difficulties...in enrolling and graduating minority students, such as financial hardships and a perception of cultural isolation.”)

- Some higher education officials concluded that such scholarships “help[ed] build a critical mass of minority enrollment and sen[t] a message that the school sincerely want[ed] to attract [minority] students.”

See GAO Report at 11. The Department of Education subsequently concluded that the GAO report did “not indicate the existence of serious problems of noncompliance with the law in postsecondary institutions,” finding that “race-targeted scholarships constitute[d] a very small percentage of the scholarships awarded to students at postsecondary institutions.” See U.S. DEP’T OF EDUC., POLICY GUIDANCE, NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS, 59 Fed. Reg. 8756 (Feb. 23, 1994).
awarded under a federal statute that authorizes the use of race or national origin

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

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

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

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

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

Pursuant to Principle 4, and based on the application of principles derived from Justice Powell’s opinion in Bakke, the Department concluded that a higher education institution

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129 Consistent with Titles VI and IX, U.S. Department of Education regulations provide that: “Even in the absence of prior discrimination, a recipient [of federal funds] in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin.” 34 C.F.R. § 100.3; 34 C.F.R. § 106.3(b) (emphasis added). The Department of Education reviewed its Title VI regulations after the Supreme Court’s *Bakke* opinion and concluded that “no changes in the regulations are required or desirable. The Court affirmed the legality of
can consider race and national origin as: (1) “one factor, with other factors, in awarding financial aid if necessary to promote diversity”; and (2) “as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity.”

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

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

The 1994 guidance was applied by OCR in a November 26, 2012, determination letter upholding the University of Missouri-Columbia’s program to provide race-exclusive financial aid to minority students in support of the University’s compelling interest in diversity. OCR ruled that the use of race or national origin as a condition of eligibility for some scholarships did not preclude compliance with narrow tailoring principles if the university’s financial aid program as a whole provided individual competitive consideration for scholarships for all students. It proceeded to do a thorough analysis of narrow tailoring principles to uphold the scholarship program.

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

131 Notably, the Department in its Final Title VI Guidance framed the question as whether the effect of the use of race or ethnicity (in this case, for minority students) was “sufficiently small and diffuse so as not to create an undue burden on [non-qualifying, majority students’] opportunities to receive financial aid.” U.S. DEP’T OF EDUC., RACE-TARGETED SCHOLARSHIP POLICY, 59 Fed. Reg. 8756, 8757 (Feb. 23, 1994) (emphasis added).

132 The University also asserted, to OCR’s satisfaction, that even in awarding race-exclusive scholarships, it conducted an individualized assessment of the whole file of each applicant, including academic performance, demonstrated personal integrity, socioeconomic disadvantage, and involvement in the candidate’s school or community. OCR also found that whereas underrepresented minority students were
4. Outreach and Recruitment

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

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

nearly 9% of total enrollment, the award of race-involved aid (both exclusive and as a plus factor) represented less than 4% of total enrollment, and race-involved scholarships were a small percentage (6.7%) of the University's total grant aid. It further ruled that the race-exclusive scholarships were necessary to recruit minority students to – and to retain them at – the University; that the University regularly reviewed the program to ensure it was still needed to achieve the educational benefits of diversity and had made changes to the program based on that review; that the University had used race-neutral alternatives such as outreach and recruitment and considered using race as a plus factor in lieu of race-exclusive scholarships but concluded that these approaches would not be effective without the race-exclusive scholarships; and that the use of race-exclusive scholarships was not unduly burdensome on students ineligible for them, given that such scholarships constituted a small portion of all scholarship aid awarded by the University, and that individual competitive consideration was given to all aid applicants by the overall financial aid program.

do not confer a benefit or impose a burden do not implicate the Equal Protection Clause.”

Expanding on this principle in a fair housing marketing challenge, another district court reasoned that while the recruitment of minority applicants might be “race-conscious,” that action -- standing alone -- would not constitute a “preference” within the meaning of federal authorities on the subject. It stated: “The crucial distinction is between expanding the applicant pool and actually selecting from that pool. Expanding the pool is an inclusive act. Exclusion [based on race]...can only occur at the selection stage.”

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

Potentially relevant factors in the analysis include the following:

- The extent to which recruitment or outreach practices are balanced -- that is, if they include a focus on certain populations, there are corresponding practices that reach groups of individuals beyond the race, ethnicity, or gender focus of the particular practice.
- The extent to which recruitment and outreach efforts (including through the establishment of relationships with other institutions, participating in forums, and contacting professional organizations) do not “confer a benefit or impose a burden” on students based on race, ethnicity or gender -- but merely extend opportunities more broadly.

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136 In 2012, OCR resolved two complaints that raised issues as to whether recruitment, mentoring, and support programs that targeted African-American males (by the City University of New York) or African-American male and female students (by the Community College of Allegheny College) violated Title VI or Title IX. It upheld both programs, as unlikely to invoke strict scrutiny review. In the Allegheny case, it held that it is not a violation of Title VI or Title IX to operate a race-themed and/or gender themed mentoring program, so long as the program did not admit or exclude students on the basis of their race or sex and did not use race- or sex-exclusive recruiting. Quoting from Joint Guidance issued by the Departments of Education and Justice issued in 2011, it stated, “An institution could sponsor retention or support programs open to all students that offer content that the institution believes might be of particular interest to a group targeted for retention.” (The 2011 guidance was withdrawn in 2018, but that withdrawal does not vitiate its analysis of inclusive recruitment and retention programs.)
• The extent to which recruitment and outreach efforts merely articulate diversity-related goals, without more (e.g., without quotas).

By contrast, programs that compel certain race-conscious actions in the context of limited resources and that result in more limited information being provided to certain parties based on race or in influencing ultimate selection decisions based on race are likely subject to strict scrutiny.\(^{137}\)

In addition, Department regulations that address Title VI standards comport with the federal caselaw relating to recruitment and outreach practices: Under Title VI regulations, recipients of federal funds are prohibited from engaging in “specific discriminatory actions,” including denying “services” or “benefits” on the basis of race or national origin except in limited circumstances.

Guidance issued jointly by the U.S. Department of Justice and the U.S. Department of Education in 2011 expressly supported inclusive outreach and recruitment efforts to broaden applicant pools, including targeting school districts, schools, or colleges with significant numbers of students who are of races underrepresented in the applicant pool; use of advertising in media aimed at specific racial groups; participation of admissions staff in community-sponsored events aimed at informing underrepresented groups about the institution; and encouraging individual students to apply.\(^{138}\) However, this guidance, as well as dear colleague letters and guidance issued previously by either or both departments regarding the voluntary use of race to achieve diversity in postsecondary and elementary and secondary education, documents communicating the Supreme Court’s Fisher I and Fisher II decisions, and a document communicating the continued validity of diversity programs following the Supreme Court’s Schuette decision were “withdrawn” by the Departments in a July 3, 2018, letter. The letter expressed the view that the withdrawn documents advocated policy preferences beyond the requirements of the Constitution and Title VI and prematurely decided or appeared to decide whether particular actions violated federal law.\(^{139}\)

\(^{137}\) E.g., Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354 (D.C. Cir. 1998) (“We do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces [decisions]...with an eye toward meeting the numerical target.... [As a consequence,] strict scrutiny applies.”). See also MD/DC/DE Broadcasters Ass’n v. FCC, 236 F.3d 13 (D.C. Cir. 2001).

\(^{138}\) U.S. Dep’t of Justice & U.S. Dep’t of Educ., Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education, U.S. Department of Justice & U.S. Department of Education (2011). (This Guidance document has been archived, but has not been rescinded, by the Department of Education.)

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

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

However, where regression analysis demonstrates that, all other factors (e.g., parental educational attainment, standardized test scores, grades, etc.) being equal, minority racial group membership or gender statistically result in a lower success rate at the institution, it may be justifiable to focus targeting efforts for students of the relevant race and gender, so long as the program is inclusive, with participation by other students who demonstrate need.  

D. **Relevant State Laws: Voter Initiatives, Legislative Action and Executive Orders**

A threshold question that must be addressed by higher education institutions that seek to pursue racial, ethnic, or gender preferences to achieve the educational benefits of diversity is whether relevant state laws permit consideration of race, ethnicity, and gender within the limits of federal law. The Project’s State Law Bans resource at [https://www.aaas.org/programs/diversity-and-law](https://www.aaas.org/programs/diversity-and-law) provides an overview and detailed discussion of relevant state initiatives (voter bans, legislative action, and executive orders).

E. **Student-Related Policy and Program Principles and Program Illustrations**

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

This section provides an overview of key principles that should be considered in policy and program design, as well as descriptions of specific types of programs and initiatives that are framed in ways likely to be legally sustainable while advancing educational, STEM-related goals. Notably, this section does not describe all legally sustainable approaches to diversity efforts on campus. Institutions have constructed (and

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140 See Allegheny College case decided by OCR, supra, n. 136.
undoubtedly will construct) other approaches to achieving their diversity goals, consistent with their educational missions and applicable law.\textsuperscript{141}

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

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

1. \textit{Key Elements of Legally Sustainable Policies and Programs}

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

a. \textit{Relationship to Institutional Mission}

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

\textsuperscript{141} Moreover, the absence of an approach—or a variation on an approach—from this guide, is not an indication that the approach or variation is legally unsustainable. Similarly, the discussion of the approaches addressed is not intended to substitute for legal advice on the particular programs implemented by an institution. That analysis must be context-specific and should be undertaken by the lawyers for the institution.
efforts identified in this document can contribute to fulfilling missing aspects of broad
diversity or support overall efforts to achieve broad diversity.

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

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

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

Grades and standardized test scores, as well as challenging coursework are frequent
baseline requirements, but may not generate the otherwise qualified and diverse student
body (particularly in certain STEMM fields) that the institution is seeking. Additional,
important criteria may include: personal attributes, interest and motivation, ability to
overcome adversity, talents, experiences, accomplishments, conduct that demonstrates
an active orientation toward inclusion, interest in and proclivity towards STEMM fields,
service to the community, geography, age,\(^{142}\) and demonstrated success in collaborating
and fostering full participation by broadly diverse people (inclusive conduct and multi-
cultural skills) are also considered to identify qualified students. These criteria may be
evidenced through essays, recommendations, and interviews. An institution may find
that it could populate its student body with individuals having the highest range of test
scores and grades, but that such students would not be as qualified to contribute to and
benefit from the educational experience as the more broadly qualified students it seeks
to select.\(^ {143}\)

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

i) **Inclusion Criteria** – (an individual’s demonstrated commitment to, knowledge of,
or record of breaking down barriers based on race and ethnicity – e.g., in learning, working, research, co- and extra-curricular activities, and social activities – as a plus factor
in admissions, aid or other programs. This commitment, knowledge or record may be
demonstrated through essays, interviews, or information on activities and experiences);

ii) **Experience Criteria** – (also a plus factor; individuals, regardless of their own race
or ethnicity, who may have meaningful experiences involving societal issues of race and
ethnicity, who learned from those experiences and whose experiences are expected to

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\(^{142}\) 34 C.F.R. §§ 110 sets out the U.S. Department of Education’s rules for implementing the Age
Discrimination Act of 1975. If a school or college uses factors other than age as criteria for admission to a
program (such as requiring applicants to have graduated from their previous school within 2 years), and it
has the effect of excluding older people who may have graduated many years ago, the Act may prohibit this
if the requirement being questioned is not needed for the normal operation of the program being offered.

\(^{143}\) See *Bakke*, 438 U.S. at 316 (opinion of Powell, J.) (approving discussion of the Harvard plan).
contribute to elevating understanding of such issues and enhancing the quality of learning associated living and work outcomes for all students);

iii) Socio-economic Background Criteria – (low socio-economic background and financial need);

iv) Scaling Barriers Criteria – (first generation status, but not racial or ethnic status; first in family to enter a STEMM field; single parent household; English as a second language; weaker than desired preparation in last educational institution);

v) Macro Race- and Ethnicity-Consciousness – (applying percentage plans in racially segregated states; criteria or collaborations based on racial majority zip codes or schools, or attendance at HBCU’s or MSI’s)

c. Assessment of Effect

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

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

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

**Data Collection:** (a) for Admissions, Financial Aid, Bridging and Retention/Mentoring Programs -- GPA, graduation rates, presence or absence of academic probation, attainment of STEMM degree, pursuit of STEMM graduate or professional school; and (b) for Recruitment and Bridging Programs -- number or percentage of participants in the program who are from minority groups or are women and are successfully recruited to this institution or to any institution to study in a STEMM field and success (GPA, absence of academic probation, pursuit and achievement of STEMM degree, graduation rate) are measured for program participants as compared with non-program participants.
Regression Analysis: Performed for a list of characteristics of students (e.g., high or lower SAT scores and high school grades, educational attainment of parents, socio-economic background, race, gender, quality of high school, etc.) to evaluate the statistical effect of race on GPA, graduation rate, and field of study. (If, even in the absence of disadvantage criteria, there is a statistical correlation between minority status and lower GPA, lower graduation rate, and participation in STEMM fields, consideration of race, even without disadvantage criteria, may be justified when selecting participants for mentoring and retention programs.)

2. Illustrative Program Examples

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

a. Holistic Admissions Program (including inclusive conduct and multi-cultural skills)

Overview

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

Each applicant who has adequate quantitative measures to indicate the possibility of success in further study is then reviewed more holistically, considering many personal attributes, accomplishments and experiences, including but not limited to race and gender, to determine which applicants best embody the total person and contribute to the right mix of persons needed to serve the institution’s educational, research and service needs. Every applicant is also reviewed in the same process and under all of the same criteria to assemble an entire “class” that, with the existing student body, reflects a broadly diverse, richly talented community that actively contributes to the learning and living environment on campus.

Different personal attributes distinguish one student from another with similar quantitative statistics and may in certain cases “tip the balance”\textsuperscript{144} in favor of admission.

\textsuperscript{144} See Grutter, 539 U.S. at 339 (“When the Committee on Admissions reviews the large middle group of applicants who are “admissible” and deemed capable of doing good work in their courses, the race of an
It is hard to determine which attribute was determinative in any case because the whole package of each individual is so different. There are no quotas, reserved spaces or automatic and uniformly applied point systems or numerical values assigned on the basis of race or gender. (The Supreme Court has rejected these more rigidly race-conscious approaches to admissions.)

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

Variations

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

Discussion

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

applicant may tip the balance in his favor.” (quoting Justice Powell’s approving discussion of the Harvard plan in Bakke, 438 U.S. at 316)).
Whether or not permitted to consider race or gender in selection, institutions may include essay questions that address the applicant’s perceptions of the role of race and gender in society or that are aimed at identifying inclusive conduct and multi-cultural experiences and skills, in order to build a student body that will create an inclusive environment for a broadly diverse campus community.

\textit{b. Introductory or Preview Minority Weekend}

\textbf{Overview}

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

\textbf{Variations}

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

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

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

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

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

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

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

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

**Overview**

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

**Variations**

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

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

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

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

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

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

**Discussion**

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

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

d. Summer Research Program (University or Industry)

Overview

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

Variations

i) The institution provides financial support to faculty members to offer these research opportunities to students during the summer. Federal funding may also be available through the National Institutes of Health or National Science Foundation. Room and board and a summer stipend are provided. Social and cultural, community-building events are included.

ii) Some programs may include weekly workshops on standardized test preparation, the graduate school application process and writing and researching skills.

iii) Students may participate in clusters formed during the academic year and extend into the summer or multiple summers through the research program to provide a community of STEMM peers. Faculty sponsors also may serve as mentors during the academic year and during the summer. Partnerships may be formed with other institutions, including Historically Black Colleges and Universities, to expand opportunities for students to participate.

Discussion

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

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

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

Overview

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

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

Variations

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

ii) The institution partners with community colleges in its local community to provide a pipeline to four-year colleges and recruit students in STEMM fields. Curriculum coordination opportunities are provided through institutional agreements. Opportunities for campus visits and exposure to cutting edge research are also provided. The institution sends representatives to the partner community colleges to provide information and counseling to students and parents on completing applications to college.
iii) Partner school students who participate in the program may apply to participate in summer STEM and research experiences at the institution, “science camps” for younger students and pre-college programs for high school students.

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

**Discussion**

College scholarship recipients and summer program participants are selected by the institution based on GPA, standardized test scores, interest, teacher recommendations, promise, and disadvantage factors (low socio-economic background and financial need; first in family to attend college or enter a STEM field; single parent household; English as a second language; weaker than desired preparation in last educational institution; or other significant barriers to overcome). If the institution has done a regression analysis showing a statistical correlation between minority status and challenges to success and is not in a jurisdiction where race may not be considered, minority status may be considered.

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

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

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

A. Overview of Governing Legal Principles

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

This section addresses the employment law framework and its implications for affirmative action-related initiatives involving faculty hiring. More detailed information about the relevant federal constitutional and statutory provisions is provided in Appendix I.145

1. Equal Protection Clause (U.S. Constitution, 14th Amendment)

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

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

Public institutions are subject to Constitutional restrictions; private institutions are not. However, Title VI (regarding race), when it applies to employment as addressed below, has been held to be coextensive with the Equal Protection Clause. Title IX (regarding gender) also tracks equal protection principles on key points, although some differences

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145 The relevant federal statutory provisions that are summarized in Appendix I, infra, with applicable citations include the Civil Rights Restoration Act of 1987 (applying various federal anti-discrimination laws to an entire institution when any part of the institution receives federal financial assistance); Title VI of the Civil Rights Act of 1964 (prohibiting race, color and national origin discrimination by covered recipients of federal funds); Title VII of the Civil Rights Act of 1964 (prohibiting race, color, sex, religion and national origin discrimination by public and private employers); Title IX of the Education Amendments of 1972 (prohibiting sex discrimination by education programs or activities operated by recipients of federal financial assistance); Section 1981 (proscribing private as well as public racial discrimination in the making and enforcement of contracts); Section 1983 (providing additional remedies for individuals whose civil rights are violated by government officials and representatives); Section 1985(3)(proscribing private as well as public conspiracies to intentionally discriminate on the basis of race by interfering with civil rights created by other laws); Section 1988 (authorizing court-awarded attorneys’ fees to prevailing parties in actions under Titles VI and IX, Sections 1981 and 1983 and various other civil rights laws); and Executive Orders 11246 and 11375 (which together prohibit covered federal contractors from discriminating on the basis of race, color, religion, national origin, and sex).
exist between those two laws. Consequently, private institutions that receive federal funds are effectively subject to the same restrictions as those that arise under the Equal Protection Clause when Title VI or IX applies.\textsuperscript{146}

\textbf{a. Race: Strict Scrutiny Analysis.} When the government classifies individuals based on race, courts will apply strict scrutiny to the classification under the Equal Protection Clause of the 14\textsuperscript{th} Amendment of the U.S. Constitution. Thus, an affirmative action program implemented by a public institution must be narrowly tailored to promote a compelling state interest. Remediying the present effects of the institution’s own past discrimination is a compelling interest sufficient to support a race-based classification under the Equal Protection Clause of the 14\textsuperscript{th} Amendment.\textsuperscript{147}

In \textit{Wygant v. Jackson Board of Education},\textsuperscript{148} the Supreme Court considered for the first time whether racial preferences are appropriate in the employment context. The Court applied strict scrutiny to an affirmative action plan that protected minorities from layoffs. In examining the interests asserted by the Board of Education, the Court held that there was insufficient evidence that remedial action was necessary to remedy prior discrimination, as there was no evidence that the Board had engaged in prior discriminatory hiring practices.\textsuperscript{149} The Court declared that “societal discrimination alone is insufficient to justify a racial classification.”\textsuperscript{150} The Court also rejected the lower courts’ reasoning that providing minority role models for minority students is a valid basis for using racial classifications in the layoff context.\textsuperscript{151} The Court stated that the Board’s goal of linking the percentage of minority teachers to the percentage of minority students had no logical stopping point.\textsuperscript{152}

\begin{flushright}
146 Most colleges and universities are not subject to the Fifth Amendment, which imposes an equal protection requirement on federal governmental entities, but Fifth Amendment case precedent is nonetheless relevant. Equal protection claims under the 14th Amendment are “indistinguishable” from equal protection claims under the Fifth Amendment. \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200, 217 (1995).


149 \textit{Id.}

150 \textit{Id.} at 274.

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

152 476 U.S. at 274.
\end{flushright}
The Court expanded on the permissible contours of prior discrimination as a compelling interest in *Richmond v. J.A. Croson*, where it held that a public entity can assert remediation as a compelling interest when its race-conscious affirmative action program was designed either to (1) remedy the public entity’s own discriminatory practices or (2) dismantle a system of discrimination in which the entity has been a ‘passive participant.’ A public entity has been a passive participant when a system of discrimination exists and public dollars perpetuated that system of discrimination. The Court ultimately struck down the plan in *Croson*, finding that there was no direct evidence of race discrimination on the part of the city in letting contracts, or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.

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

In *Croson*, the Supreme Court held that narrow tailoring requires the consideration of race-neutral means to increase minority participation, and that rigid numerical quotas will not be considered a narrowly tailored remedy. The Court indicated that quotas and

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153 488 U.S. 469.

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

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


157 *Id.* at 282-83.

158 *Id.* at 283-84.

159 *Croson*, 488 U.S. at 507.
other race-exclusive approaches preclude the individual treatment of candidates and instead make the color of an applicant’s skin the controlling consideration.\textsuperscript{160}

In conclusion, the cases as a whole indicate that although the courts will apply strict scrutiny to any race-conscious programs challenged as violating the Equal Protection Clause of the 14\textsuperscript{th} Amendment, such programs can withstand strict scrutiny when (1) the institution can articulate a compelling interest, and (2) the programs are narrowly tailored so as not to unnecessarily trammel upon the rights of non-minorities. Remedying the institution’s own past discrimination or a “manifest imbalance” in the applicable workforce is a compelling interest. Other compelling interests (\textit{e.g.}, educational benefits of diversity or operational necessity in higher education) may also be recognized, although they have not been tested in the employment context in the Supreme Court. It is also clear that, in assessing narrow tailoring, the courts will consider whether there are race- or gender-neutral means to increase minority and women (or male) participation that could be used in lieu of, or to reduce the burdens of, the race- or gender-conscious approach. Courts will also consider whether race and gender are factors among many rather than exclusive prerequisites.

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

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

Until 1971, the 14th Amendment had not been held to address gender discrimination. In \textit{Reed v. Reed},\textsuperscript{161} the Court struck down an Idaho statute that preferred males over females to administer decedents’ estates. The Court concluded that the state statute did not bear “a rational relationship to \[the\] state objective that is sought to be advanced by the

\textsuperscript{160} \textit{id.}

\textsuperscript{161} \textit{Reed v. Reed}, 404 U.S. 71 (1971).
operation of [the statute].”¹⁶² And, as Justice Ginsburg later observed, “[w]ithout equating gender classifications, for all purposes, to classifications based on race or national origin, the Court in post-Reed decisions has carefully inspected official action that closes a door to women (or to men).”¹⁶³

The Court has adopted a standard of intermediate scrutiny with respect to gender-based classifications. Under “intermediate scrutiny,” a governmental actor making gender-based decisions must demonstrate an important governmental objective. In the words of the Court in the VMI case, there must be an “exceedingly persuasive justification” for gender-based governmental action.¹⁶⁴ This standard is somewhat lower than that which applies to race-based classifications. For example, consideration of gender need not be a last resort or be narrowly tailored, like race or ethnicity. In theory, then, it should be easier to sustain gender-based affirmative action or diversity efforts than race-based. But the context of a given case might make the challenged action more difficult to defend even if a lower standard is applied. As noted above (CITE similar discussion in student section), there exists some uncertainty as to the exact application of the standard. Applying the holdings in the Supreme Court’s education and contracting cases to the employment and contracting contexts, the federal circuit and federal trial/district courts that have ruled on the question provide conflicting opinions as to whether there is a material difference between “last resort” for race-consciousness and “exceedingly persuasive justification” for gender-consciousness. A majority of lower federal courts have interpreted the gender-conscious standard to be something less than a last resort. However, some federal circuit courts have interpreted the standards for race and gender to be similar.¹⁶⁵

The Supreme Court, applying intermediate scrutiny under the Equal Protection Clause, has not addressed the authority of state or local governments, including public

¹⁶² Reed, 404 U.S. at 73.


¹⁶⁴ Id. at 531 (citing J.E.B. v Alabama ex rel. T.B., 511 U.S. 127, 136-37 and n.6 (1994), and Mississippi Univ. Women v. Hogan, 458 U.S. 718, 724 (1982)); see notes 15-19 and accompanying text, supra, regarding the standard of review for classifications based on sexual orientation or gender identification and expression.

¹⁶⁵ Note that, while cases may reference government action under the Equal Protection Clause, their equal protection principles are extended to public and private IHEs that receive federal funding under Title IX. 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 sex/gender classifications, appearing to eliminate any material difference between intermediate and strict standards. Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1992) (interpreting the Supreme Court’s decision in City of Richmond v. J.A. Croson Co, 488 U.S. 469 (1989), to require that strict scrutiny be applied to all affirmative action programs, including those related to gender or sex); Naboyny v. Podlesny, 92 F.3d 446 n.6 (7th Cir. 1996) (noting that the standard is different from the traditional intermediate formulation, while not explicitly stating it is further heightened); Berkley v. United States, 287 F.3d 1076, 1085 (Fed. Cir. 2002) (reasoning that if plaintiffs could show preferential treatment, strict scrutiny would apply both to race and gender classifications).
institutions of higher education, to consider an individual’s gender for the purpose of remedying societal discrimination against that gender. The Supreme Court has recognized broad authority in Congress to enact legislation to address national issues of discrimination related to race, ethnicity, or gender.\footnote{166} Section 5 of the 14th Amendment grants express authority to the Congress to enforce the 14th Amendment (although the decisions have not always rested specifically on Section 5).\footnote{167} The Court also has issued decisions that address consideration of gender based on discrimination by educational institutions in admissions and employment,\footnote{168} but it has not addressed the permissibility – under the Equal Protection Clause -- of state and local governments, including public institutions of higher education, providing sex-conscious benefits as a remedy for discrimination in a state or local economic sector or labor market where the state or local government was not an active or passive participant in that discrimination.

There is a split among federal circuit and district courts about whether state or local governments may pursue the goal of redressing “societal discrimination” within an economic sector or labor market as an important government interest that may justify sex-conscious measures under the intermediate scrutiny standard. Some of the circuits and district courts support such measures only if the state or local government was actively or passively involved in the discrimination,\footnote{169} while others have held that sex-conscious measures may be justified if they redress “societal discrimination” in a particular economic sector or labor market even if the state or local government administering the sex-conscious measures was not involved in the discrimination.\footnote{170} In

\footnote{166} The Supreme Court has found that Section 5 of the 14th Amendment to the U.S. Constitution provides a limited exception for Congressional action righting broad and systemic societal inequities, when backed by robust evidence-based legislative fact-finding. \textit{Fullilove v. Klutznick}, 448 U.S. 448, 458-67, 488 (1980) (involving set-asides to correct systemic discrimination against minority contractors) provided that strict scrutiny (evidence of need) is satisfied, \textit{Adarand Constructors, Inc.}, 515 U.S. at 227; compare, \textit{Richmond v. J.A. Croson}, 488 U.S. 469, 492 (1989) (striking down a local ordinance, which was not adequately backed by findings).

\footnote{167} See, e.g., \textit{Califano v. Webster}, 430 U.S. 313 (1977) (upholding congressional legislation excluding several years from the computation of Social Security benefits for women, but not for men, thereby enhancing the level of old-age benefits for women, without citing Section 5).


\footnote{169} \textit{Michigan Road Builders Ass’n Inc. v. Milliken}, 834 F.2d 583 (6th Cir. 1987)[(holding that general assertions of societal discrimination were insufficient to support state contract set-asides for women-owned enterprises, absent evidence that such enterprises actually suffered a disadvantage in competing for state contracts); \textit{Buddie Contracting Co. v. City of Elyria, Ohio}, 773 F. Supp. 1018, 1031 (1991); \textit{LD Mattson, Inc. v. Multnomah County}, 703 F. Supp. 66 (D. Or. 1988).

\footnote{170} \textit{Ensley Branch, NAACP v. Seibels}, 31 F.3d 1548 (11th Cir. 1994), a case involving consideration of race and sex by local governments in employment decisions. \textit{see also Engineering Contractors Association of South Florida, Inc. 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; \textit{Coral Constr.. Co. v. King Cty.}, 941 F. 2d 910 (9th Cir. 1991) (involving preference for use of minority-owned and women-owned businesses in letting county contracts.
either case, plaintiffs in these cases need to present sufficient probative evidence – both appropriate statistical and anecdotal -- of the discrimination and evidence demonstrating that consideration of sex in providing benefits is substantially related to the government’s interest in redressing that discrimination. That includes evidence of the need to consider gender – as opposed to using barrier removal and gender-neutral strategies – to effect a remedy, in part to avoid unnecessarily disadvantaging others who would not be benefitted by such consideration.171 All of these cases address preferences based on sex in government employment or contracting to address discrimination in these areas. While there are cases that address claims of discrimination based on gender where educational institutions limit admissions to one sex, none of the cases address the right of educational institutions to establish sex-conscious preferences based on discrimination in an economic or geographic sector or the school’s service area.

c. Citizenship and National Origin: Strict Scrutiny and Rational Basis Review Analysis. In general, courts subject state alienage classifications to strict scrutiny. Historically, however, courts continually applied rational basis review under the political function doctrine and to undocumented individuals.

As noted above, strict scrutiny generally applies to a state alienage classification, while Courts provide great deference to Congress when faced with challenges to federal classifications.172

Two years after applying strict scrutiny to state alienage classification, the Supreme Court in dicta noted that its holding was limited and that states could require citizenship for certain positions in executive, legislative and judicial positions and for officers who

or subcontracts); *Builders Assn’ of Chicago v. Cty. of Cook*, 256 F.3d 642 (7th Cir. 2001), stating, “whereas a discriminatory remedy based on race or ethnicity is permissible only if the agency applying the remedy itself engaged in intentional discrimination against the group favored by the remedy . . ., a discriminatory remedy based on sex is permissible even if the agency was innocent of the discrimination against the favored group[,]” but ruling that the women’s set-aside program needed to meet the same standards as the minority set-aside program because the County had not argued for a different standard for the women’s set-aide program; Jason M. Skaggs, *Justifying Gender-Based Affirmative Action under United States v. Virginia’s Exceedingly Persuasive Justification Standard*, 86 California Law Review, 1169, 1178 (October 1998).

171 “If the State’s objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women. *Mississippi University for Women v. Hogan*, 458 U.S. at 726.

172 *Graham v. Richardson*, 403 U.S. 365 (1971) (*Graham* involved challenges to Arizona and Pennsylvania statutes that restricted welfare benefits to non-citizens. In analogizing the state alienage classification to that of race and national origin, the Court stated that “aliens” were “a prime example of a ‘discrete and insular minority.’” As such, it held that strict scrutiny applied); *Cf. Matthews v. Diaz*, 426 U.S. 67, 84-85 (1976); *Kleindienst v. Mandel*, 408 U.S. 753 (1972).
participate in the formulation, execution or review of public policy functions.\textsuperscript{173} The Court followed through on this warning in its subsequent decision in \textit{Foley v. Connelie} in enacting what is commonly referred to as the political function doctrine.\textsuperscript{174} Specifically, it upheld New York’s law preventing non-citizens from becoming state troopers based on its rationale that police officers have the authority to exercise a vast amount of discretionary powers, which impacts members of the public on a daily basis. Thus, because police officers executed “broad public policy,” the Court applied rational basis review rather than strict scrutiny. In doing so, it determined the standard of review based on the plaintiff’s desired job rather than the type of classification.\textsuperscript{175} From there, the Court extended this rationale into other spheres, arguably beyond its original iteration. Relevant here, the Court extended the political function doctrine to public school teachers where it found that such teachers prepare students to participate as citizens, help preserve societal values and thus play a critical role in the development of “students’ attitude toward government and understanding of the role of citizens in our society.”\textsuperscript{176}

Also, of note, the \textit{Graham} rationale was applied in the higher education financial aid context. In \textit{Nyquist v. Mauclet},\textsuperscript{177} the Court reviewed a New York rule requiring that an applicant for state financial aid for higher education must either be a citizen, have applied for citizenship, submit a statement that he or she will apply for citizenship, or be a member of a specific class of refugees. First, the Court stated that “the fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.” The court then rejected the reasons proffered in support of the rule: that it was justified as an incentive to naturalization because this was a matter of federal concern. It also rejected the rule’s stated purpose: that it served as a means to ensure that financial aid was limited to enhancing the education level of the electorate. Note that the decision was based on a 5-4 vote of the Justices, and Chief Justice Burger dissented despite the fact he was in the majority in \textit{Graham}. Justice Burger distinguished prior cases on the basis that they involved questions of economic survival and livelihood (employment opportunities, welfare benefits, etc.) Here, Burger stated that the state had the broad power to regulate the education system and simply chose to provide additional benefits to individuals most likely to return to the community and that the state was not prohibiting non-citizens from obtaining the same education that was available to citizens.

\begin{footnotesize}
\textsuperscript{176} \textit{Ambach v. Norwick}, 441 U.S. 68 (1979); But see \textit{Younus v. Shapat}, 336 F.Supp. 1137 (1971) (applying strict scrutiny to restriction on granting tenure to teachers on college faculty based on lawful permanent resident status and finding that defendants’ rationale—(1) providing its own citizen with work; (2) the fact that other public bodies discriminate against non-citizens and (3) questionable allegiance to the United States—could not be justified as bearing a rational relationship to a legitimate interest).
\end{footnotesize}
2. **Title VI (42 U.S.C. § 2000d)**

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

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

Title VI applies with respect to all aspects of an institution’s operations. However, for the most part, Title VI restricts claims of employment discrimination to instances in which the “primary objective” of the federal financial assistance is to provide employment.\(^\text{179}\) (No such restriction applies with respect to employment claims brought under Title IX.) Thus, “where the primary purpose of the Federal assistance is to provide employment, the recipient may not discriminate on the basis of race, color or national origin against applicants for employment or employees in that program. For example, Title VI prohibits discrimination against applicants for or participants in ‘work study’ programs that receive Federal assistance.”\(^\text{180}\) The Department of Education’s Title VI regulations also forbid employment discrimination in a second situation: “discrimination against employees or applicants for employment is prohibited by Title VI when the discriminatory practice results in discrimination against the program beneficiaries, usually the students.”\(^\text{181}\) Where faculty are critical to the delivery of educational programs and benefits to students, discrimination against faculty may be seen to carry through to students. When Title VI applies in the employment context, it “encompasses, but is not limited to, recruitment, advertising, employment, layoffs, firing, upgrading, demotions, transfers, rates of pay and other forms of compensation, and uses of facilities. The regulation applies to all employment decisions and actions made directly by the Department of Education’s recipients, as well as those made indirectly through contractual arrangements or other relationships with organizations such as employment agencies, labor unions, organizations providing or administering fringe benefits, and organizations providing training and apprenticeship programs.”\(^\text{182}\)

As interpreted by the agencies and the courts, Title VI prohibits both intentional discrimination (disparate treatment) and the use of facially neutral procedures or practices that have the effect of subjecting individuals to discrimination based on their

\(^{178}\) 42 U.S.C. § 2000d.


\(^{181}\) ED Pamphlet at 2. See 34 C.F.R. § 100.31(c)(3); see also 28 C.F.R. § 42.104(c)(2) (DOJ regulation).

\(^{182}\) Id.
race, color or national origin (disparate impact)\textsuperscript{183}. (Neutral policies that expand opportunities for some without excluding non-targeted individuals are generally regarded as inclusive and non-discriminatory under federal law.) The analysis of intentional discrimination claims under Title VI is similar to the analysis of disparate treatment under the Equal Protection Clause,\textsuperscript{184} and can be proved through direct evidence of discriminatory motive or, in the absence of such evidence, using the Title VII burden-shifting analysis established in \textit{McDonnell Douglas Corp. v. Green}\textsuperscript{185} (discussed below, in connection with Title VII). Title VI disparate impact claims are also analyzed using principles similar to those used under Title VII and require establishment of an “educational necessity” similar to Title VII’s business necessity standard to justify disparate impacts. When an educational institution establishes that a broadly diverse faculty is necessary to achieve its First-Amendment protected educational mission, and establishes that many aspects of that broad diversity have been achieved, but not racial diversity, the necessity test should be satisfied to justify the disparate impact of an employment program that considers race as a factor for this purpose.

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

\begin{quote}
The Secretary [of Education] believes that a college’s academic freedom interest in a robust exchange of ideas also includes an interest in the existence of a diverse faculty and, more generally, in diversity of professors nationally, since scholars engage in the interchange of ideas with others in their field, and not merely with faculty at their particular school.\textsuperscript{186}
\end{quote}

Moreover, the Department of Education’s Title VI regulations authorize “a recipient to take additional steps to make the benefits of Title VI fully available to racial and nationality groups previously subject to discrimination.”\textsuperscript{187} The regulations also recognize that affirmative steps may be needed, and appropriate, in situations where there has been no prior discrimination:

\begin{quote}
Even though an applicant or recipient has never used discriminatory policies ... [the] benefits of the program or activity it administers may not
\end{quote}

\textsuperscript{183} \textit{But see} JD S. Hsin, \textit{Is the Trump Administration Rethinking Title VI?}, Feb. 4, 2019, Congressional Research Service, available at: \url{https://fas.org/sgp/crs/misc/LSB10254.pdf} (citing to the Final Report of the Federal Commission on School Safety recommending prior OCR guidance addressing “racial disparities in the administration of school discipline” be withdrawn). Specifically, the Commission reading of Title VI was “dubious at best” as it questioned whether Section 602 allowed the Dept. of Education and the Department of Justice to issue rules barring the use of policies with a disparate impact.

\textsuperscript{184} \textit{See} Alexander v. Choate, 469 U.S. 287, 293 (1985).

\textsuperscript{185} 411 U.S. 792 (1973).

\textsuperscript{186} 59 F.R. 8756, 8761 (1994).

\textsuperscript{187} 34 C.F.R. § 100.5(h).
in fact be equally available to some racial or nationality groups. In such circumstances an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.\textsuperscript{188}

Similarly, an Appendix to the regulations contains Guidelines that include a section on the “Employment of Faculty and Staff.”\textsuperscript{189} The Appendix states:

Recipients may not engage in any employment practice that discriminates on the basis of race, color, or national origin \textit{if} such discrimination tends to result in segregation, exclusion, or other discrimination against students.\textsuperscript{190}

* * *

Recipients may not limit their recruitment for employees to schools, communities or companies disproportionately composed of persons of a particular race, color, national origin, sex, or handicap \textit{except} for the purpose of overcoming the effects of past discrimination.\textsuperscript{191}

Another subpart, entitled “The Effects of Past Discrimination,” states:

Recipients must take steps to overcome the effects of past discrimination in the recruitment, hiring and assignment of faculty. Such steps may include the recruitment or assignment of qualified persons of a particular race, nation origin or sex, or who are handicapped.\textsuperscript{192}

Taken as a group, these provisions suggest that a college or university receiving federal funds may give special attention to race or sex if it reasonably concludes that it is not adequately serving persons of that race or sex, and may undertake outreach and recruitment efforts to achieve adequate service to underserved groups even when the institution “has never used discriminatory policies.” This is implicit recognition that,

\textsuperscript{188} 34 C.F.R. § 100.5(i).

\textsuperscript{189} The guidelines are applicable to vocational education programs. See 34 C.F.R. Part 100, App. B. Nevertheless, they provide some guidance on what may be appropriate in the college and university setting.

\textsuperscript{190} \textit{Id.}, App. B, at VIII.A (emphasis added).

\textsuperscript{191} \textit{Id.}, App. B, at VIII.B (emphasis added).

\textsuperscript{192} \textit{Id.}, App. B, at VIII.F.
under Title VI, an educational institution may engage in outreach and recruitment activity to address a pipeline problem in minority communities not being adequately served.


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

Under Title VII:

It [is] an unlawful employment practice for an employer

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

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

To succeed on a claim under this provision, which prohibits disparate treatment, a plaintiff must show that the employer intentionally discriminated on the basis of a protected trait. Under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, a plaintiff may prove that an employment practice was intentionally discriminatory by first making a *prima facie* case sufficient to support an inference of discrimination (*e.g.*, that the plaintiff was a member of a protected class; that the plaintiff was eligible and applied for the position or program in question; that he or she was rejected; and that the defendant selected individuals outside the protected class, or the position or program remained open and the defendant continued to accept other applications). If a *prima facie* showing is made, the defendant may rebut that showing by offering a legitimate, non-discriminatory reason for the employment action. The plaintiff then has the ultimate burden of persuasion and must show that the employer’s proffered reason is pretextual -- *i.e.*, that the employer’s true reason for the practice was discriminatory on the basis of race or gender (or other protected characteristics). Of

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194 411 U.S. 792, 802-05 (1973)
course, “if a plaintiff is able to produce direct evidence of discrimination,” he can prevail without using the *McDonnell Douglas* framework.\(^{195}\)

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

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.... \(^{196}\)

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

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

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

(ii) the complaining party [proves that] an alternative employment practice [is available that has less disparate impact] and the respondent refuses to adopt such alternative employment practice.\(^{197}\)

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


A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.\(^{198}\)

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

Nothing contained in this subchapter shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.\(^{199}\)

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

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

(d) Training programs

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

* * *

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff


scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

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

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.\(^\text{200}\)

“It is important to note that the constitutional standard for justifying racial preferences is more stringent than the Title VII standard.”\(^\text{201}\) It is also important to note that “[p]olicies that affect actual employment decisions, such as hiring, promotions, and layoffs, have been treated differently than policies that do not affect actual employment decisions, such as targeted recruitment and outreach designed to increase the pool of qualified applicants, and data collection and analysis conducted to ensure compliance with anti-discrimination laws.”\(^\text{202}\) Layoffs have been treated most strictly under the case law. Note that, while increasing the applicant pool has not generally been regarded as part of the employment decision-making process, selecting candidates to interview from the applicant pool has been regarded as part of that process.

Of particular significance for present purposes, Title VII includes a provision that shields from liability any person who “pleads and proves that the act complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [EEOC] ....” See 42 U.S.C. § 2000e-12(b). This provision is discussed further in the “Agency Guidance” section, below.

**Case law.** The Supreme Court has held that Title VII affords more room than the Constitution for “voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.”\(^\text{203}\) However, there are limits on such efforts.

**Ricci v. DeStefano.** The Supreme Court revisited Title VII for the first time in over a decade, in a case that potentially implicated -- but did not overrule -- well-established Title VII case law. Decided in June 2009, *Ricci v. DeStefano* involved a challenge to New Haven, Connecticut’s decision to abandon the results of a standardized test that it had administered for promotions within the fire department because of the disparate impact

\(^{200}\) 42 U.S.C. § 2000e-2(d), (l), (m).


\(^{202}\) *Id.*

\(^{203}\) *Weber*, 443 U.S. at 204; *Johnson*, 480 U.S. at 628-29, 630 & n.8, 640, 642 (1987).
that the results would have had on black and Latino firefighters.\textsuperscript{204} Seventy-seven candidates (43 white, 19 black and 15 Hispanic) tested for 8 vacancies as lieutenants; 34 passed (25 white, 6 black, 2 Hispanic). Ten were eligible for immediate promotion. Forty-one candidates (25 white, 8 black, 8 Hispanic) tested for 7 vacancies among the ranks of captain; 22 passed (16 white, 3 black, 3 Hispanic). Nine were eligible for immediate promotion. African Americans and Hispanics comprise nearly sixty per cent of New Haven’s population, and there was a history of discrimination (unaddressed by the majority but cited by the dissenters) against minorities in the fire department that had been litigated and settled in the 1970’s.

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

The Court began its legal analysis by noting that “Title VII prohibits both intentional discrimination (known as ‘disparate treatment’) as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as ‘disparate impact’).”\textsuperscript{205} The Court then wrestled with what it saw to be a conflict between these two statutory bases of discrimination. As the Court framed the conflict, the City intentionally discriminated against white firefighters who scored well on the tests and were deprived of the opportunity to be promoted, in order to avoid the disparate effects of the promotion exam on minority firefighters who did not score as highly. A narrow majority of the Court sided with the white firefighters. New Haven argued that it abandoned the test results because of its belief that it might be sued by minority firefighters. The Court said that fear of such exposure is not enough; the City would have to show that there was a “strong basis in evidence” that it was in violation of the disparate impact provisions of Title VII. In other words, it would have to show that it would likely lose to minority plaintiffs because the test was not job-related or, even if job related, there were other measures that would have less of an adverse impact.

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

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\textsuperscript{204} Ricci v. DeStefano, 557 U.S. 557 (2009).

\textsuperscript{205} Id., at 578.
or changes an employment assessment or other criteria after the criteria have been finalized and utilized.

Ricci thus appears to expand the zone of protection afforded to non-minorities and males (or females if they are the majority in some fields) affected by race- or gender-conscious measures. In Wygant\(^\text{206}\), the Supreme Court effectively removed lay-off situations from the arena of affirmative action. White employees with seniority could not be terminated in order to protect minority teachers from the “last hired, first fired” phenomenon. The Wygant Court recognized the vested interest of white teachers with more seniority, who would lose if a minority teacher retention plan trumped traditional protections of collective bargaining agreement, when it distinguished hiring from layoff scenarios:

In cases involving general hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burdensome innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.\(^\text{207}\)

After Ricci, an employer cannot abandon a qualification measure that has been used to rank identifiable candidates for promotion (or possibly to make other employment-related decisions, although the case did not go so far), unless it has a “strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”\(^\text{208}\) It is unclear whether this same standard would apply if an employer takes such action to achieve diversity in its workforce, rather than to avoid disparate-impact liability -- the City disclaimed any reliance on the diversity rationale to justify its actions in Ricci,\(^\text{209}\) and the Supreme Court did not consider the viability of this potential rationale in its opinion.

In all events, it is clear that Ricci did not overrule Griggs or any other Title VII precedent that undergirds disparate impact statutory, regulatory, or case law. Ricci resolved a Court-perceived conflict between disparate treatment and disparate impact provisions of Title VII in the context of an employer’s use of an employment test; it is not an affirmative action case. Justice Kennedy, writing for the majority, rejected the argument that “under Title VII, avoiding unintentional discrimination cannot justify intentional discrimination.”\(^\text{210}\) Nor did the Court accept the argument that “an employer in fact must be in violation of the disparate impact provision before it can use compliance as a defense

\(^{206}\) 476 U.S. 267 (1986).

\(^{207}\) Id., at 283-83.

\(^{208}\) Ricci, 577 U.S. at 585.


\(^{210}\) Ricci., 577 U.S. at 580.
in a disparate treatment suit.” The Court made clear that it was not undercutting Congress’s intent that employers should voluntarily comply with Title VII disparate impact standards. And the majority did not address the constitutional question framed by Justice Scalia in his concurrence: “Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?” In sum, Ricci did not upset existing law governing Title VII other than to hold that, where identifiable individuals have been determined to satisfy the criteria that applied when they went into an employment process (and thereby have an entitlement of sorts), “before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe that it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”

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

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

211 Id.
212 Id., 577 U.S. at 594 (concurring op. of Scalia, J.).
213 Id., 577 U.S. at 585.
214 See 577 U.S. at 628 n.6 (dissenting op. of Ginsburg, J.) (citing Johnson v. Transportation Agency).
216 Id. at 202-03 (discussing remarks of Senator Humphrey at 110 Cong. Rec. 6548 (1964)).
as one method of solving this problem.\footnote{217} Significantly, the Court also noted that Congress did not intend to prohibit the private sector from taking effective steps to accomplish the goal of eliminating, so far as possible, “the last vestiges” of discrimination in this country.\footnote{218}

The Supreme Court reaffirmed \textit{Weber’s} interpretation of Title VII in \textit{Johnson v. Transportation Agency},\footnote{219} which upheld a public employer’s affirmative action program that gave a preference to gender as one factor in determining promotions. Recognizing the legitimacy of the Agency’s long-term goal of attaining a workforce that mirrored in its major job classifications the percentage of women in the area labor market, the Court stated:

\begin{quote}
\textit{Weber} held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an ‘arguable violation on its part.’ Rather, it need point only to a ‘conspicuous . . . imbalance in traditionally segregated job categories. Our decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII’s purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts.\footnote{220}
\end{quote}

The \textit{Johnson} Court looked to whether the affirmative action plan was justified by the existence of a “manifest imbalance” that reflected underrepresentation of women in traditionally segregated job categories.

In determining whether a manifest imbalance exists, employers should compare the percentage of minorities or women in the employer’s workforce with their percentage in the relevant labor market or general population.\footnote{221} Where a job requires special training, such as a professional or research job, the comparison should be with those in the labor force who possess the relevant qualifications.\footnote{222} The Supreme Court has not specifically defined a “manifest imbalance,” but has stated that the standard is not as high as it would be to establish a \textit{prima facie} case for discrimination.\footnote{223}

\footnotetext[217]{Id. at 203-04.}
\footnotetext[218]{Id. at 204.}
\footnotetext[219]{480 U.S. 616 (1987).}
\footnotetext[220]{Id. at 629-30.}
\footnotetext[221]{Id. at 632.}
\footnotetext[222]{Id.}
\footnotetext[223]{Id.}
When examining a race-conscious hiring plan under Title VII, the Supreme Court also looks to whether the plan creates “an absolute bar to the advancement of white employees.”

This factor needs consideration in the context of faculty hiring at higher education institutions if vacancies or opportunities come up infrequently and such institutions are looking to fill only one position. When pursuing hiring programs which take race and gender into consideration, careful crafting is in order to ensure that such considerations do not wholly predetermine the outcome of the hiring decision even if they are factored in.

The Supreme Court has expansively construed Title VII’s prohibition against discrimination “because of sex” to reach instances of impermissible sex stereotyping, same sex harassment, and instances involving discrimination against gay and transgender employees.

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224 See Weber, 443 U.S. at 208.


226 In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Supreme Court ruled that Price Waterhouse’s failure to promote a woman to be a partner because she’s was insufficiently feminine constituted stereotyping based on gender and was a violation of Title VII, even if there were also other reasons for that decision. In Bostock v. Clayton County Board of Commissioners, 140 S.Ct. 1731 (2020), the Court ruled that:

♦ “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;” and

♦ When a person who is biologically male is fired because he is attracted to men, he is being treated differently than a person who is biologically female and is attracted to men would be treated—resulting in unlawful discrimination because of sex.

See also Zarda v. Altitude Express, 883 F.3d 100 (2nd Cir. 2018), where the Court of Appeals en banc held that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination under Title VII, and that plaintiff, who had been terminated from his job as a skydive-instructor, was entitled to bring a Title VII claim for discrimination based on sexual orientation.

The OFCCP has taken the position that it will accept and investigate individual and systemic complaints of discrimination based on gender identity and transgender status as sex discrimination under Executive Order 11246, as amended, applying Title VII principles and case law, as appropriate. OFFCP DIRECTIVE 2014-02 (August 19, 2014). It also has indicated that it will implement Exec. No. Order 13672, signed July 21, 2014, and amending Exec. No. Order 11246, to prohibit federal contractors from discriminating on the basis of sexual orientation and gender identity, as such, OFCCP Directive 2015-01 (April 16, 2015). OFCCP final regulations implementing Exec. Order No. 13672 took effect April 8, 2015, and prohibit federal contractors and subcontractors from discriminating on the basis of sexual orientation and gender identity as well as previously covered race, color, religion, sex, and national origin and require federal contractors and contractors to take affirmative measures to prevent discrimination on those bases from occurring. Although Title VII does not explicitly include sexual orientation or gender identity in its list of protected bases, EEOC has also announced and implemented its position that Title VII bars employment discrimination based on sexual orientation or gender identification and expression.
Federal Appellate Decisions. Intermediate appellate courts have dealt with Title VII challenges to employment-related affirmative action programs in the education context, and have attempted to limit the reach of such programs. For example, in Hill v. Ross,227 the Seventh Circuit held that a state university may not require that each department’s faculty mirror the gender makeup of the pool of doctoral graduates in its discipline. The court found that such a policy is not narrowly tailored to remedy past sexual discrimination and violates Title VII. The suit was brought by a male psychology professor, recommended for a tenure-track position, whose appointment was blocked because a dean said that the department “needs 3.23 women to reach its target” of 62% women in the department. The appellate court held that the dean had used gender as the “sole basis” for the hiring decision, and thus a jury could conclude that the dean had created a quota system for hiring in the psychology department.229

In Rudin v. Lincoln Land Community College,230 the Seventh Circuit denied summary judgment for the college on plaintiff’s race and sex discrimination claims under Title VII. There, the college had implemented a race-conscious faculty hiring plan whereby a screening committee would review applications and recommend a pool of candidates to be interviewed.231 The pool was then sent to an “Equal Opportunity Compliance Officer” for review who could then (1) proceed with the candidates selected by the committee, (2) add minority candidates to the pool, or (3) halt the screening process.232 The officer’s role was to “determine if there was sufficient diversity among the interviewees.”233 The court held that, under Title VII, the addition of minority candidates into the interview pool, when considered with other facts and circumstances of the case, constituted circumstantial evidence of racial discrimination sufficient to require a trial as to whether the college had a discriminatory motive when it chose to hire a minority candidate over a non-minority candidate.234 The court noted that the college’s stated policy explicitly favored minority over non-minority job applicants and that non-minority candidates were effectively allowed to bypass the first elimination.235

227 183 F.3d 586 (7th Cir. 1999).
228 Id. at 588-89.
229 Id. at 588.
230 420 F.3d 712 (7th Cir. 2005).
231 Id. at 716.
232 Id.
233 Id.
234 Id. at 721.
235 Id. at 722.
The foregoing practice should be distinguished from the practice of ensuring the adequacy of the outreach process used to build an applicant pool from which the candidate pool of those to be interviewed is derived. (See discussion of specific types of programs and approaches, below, for a more extensive treatment of this distinction.) An educational institution may engage in the broadest possible outreach to identify, notify, and encourage qualified minority and women applicants in addition to other applicants to pursue faculty openings. Courts and administrative agencies have recognized that such activity is “pool expanding” inclusionary rather than exclusionary activity, and consistent with providing equal opportunity to all applicants. See Duffy v. Wolle, 123 F.3d 1026, 1039 (8th Cir. 1997), abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (2011); Shuford v. Alabama State Board of Education, 897 F. Supp. 1535, 1553 (M.D. Ala. 1995).

In Taxman v. Piscataway Board of Education,236 the Third Circuit concluded that the language and legislative history of Title VII indicated a congressional intent to limit affirmative action only to remedial purposes, and struck down a school’s affirmative action plan which made race a factor in selecting which of two qualified employees to lay off. The school articulated the purpose for the affirmative action plan as one of achieving racial diversity for education’s sake and specifically disclaimed any remedial purpose.237 The Third Circuit held that educational faculty diversity could not justify a race-conscious faculty termination decision under Title VII.238 The Third Circuit also held that the affirmative action plan in Taxman unnecessarily trammeled the interests of nonminority employees because it established a program of an unlimited duration, to be resurrected when the Board of Education believed that the ratio between blacks and whites was skewed.239 The court also noted that the harm imposed upon nonminority employees by the loss of their jobs is especially substantial where the nonminority employees are tenured.240

In conclusion, the Supreme Court has held that race-conscious hiring plans are valid under Title VII when they: (1) share Title VII’s statutory goals of breaking down patterns of discrimination or opening employment opportunities to minorities or women that were once closed to them; (2) are designed to eliminate a manifest imbalance that reflects underrepresentation of minorities or women in traditionally segregated job categories (i.e., a significant disparity but something less than a statistically significant disparity of

237 Id. at 1558.
239 Taxman, 91 F.3d at 1564.
240 Id. In a brief field in the Supreme Court on a petition for certiorari in Taxman, the Solicitor General argued that the appellate holding in Taxman was erroneous in key respects, as discussed infra in Appendix III to this guide.
two or more orders of magnitude); and (3) avoid unnecessarily trammeling the interests of nonminority and male (or, if males are the minority in some fields, female) employees or applicants. In training and, where justified, hiring decisions or promotions, the characteristics of workplace affirmative action plans that are permissible under Title VII may include the use of race or gender as a “‘plus’ factor” among several criteria in appropriate circumstances. However, all such programs must satisfy the three requirements set forth by the Supreme Court in Weber and Johnson (i.e., they must mirror the purposes of Title VII, they must not unnecessarily trammel the interests of non-minority or male employees, and they must be temporary measures). Plans involving “preferential hiring” (or preferential decisions concerning training and capacity-expanding programs), rather than “preferential layoffs or terminations,” are more likely to be upheld, because “while hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals.” The Supreme Court has favored temporary affirmative action plans that seek to attain, rather than maintain, a “permanent racial and sexual balance.” Further, in light of Ricci, it is important to identify the relevant criteria up front, and not change them on the basis of race or gender later in the process, unless there is a strong basis in the evidence to believe that, absent such a race- or gender-conscious change, the employer would be subject to disparate impact liability.

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

1608.1 Statement of purpose.

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

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

242 See Johnson, 480 U.S. at 657.

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

244 Taxman, 91 F.3d at 1564 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986)).

245 Johnson, 480 U.S. at 640.
1608.3 Circumstances under which voluntary affirmative action is appropriate.

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

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

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

(1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;

(2) Extensive and focused recruiting activity;

(3) Elimination of the adverse impact caused by invalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures ....);

(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

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

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

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

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

DIVERSITY AND AFFIRMATIVE ACTION

* * *

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

Affirmative action, in contrast, “means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity.” Affirmative action under Title VII may be (1) court-ordered after a finding of discrimination, (2) negotiated as a remedy in consent decrees and settlement agreements, or (3) conducted pursuant to government regulation. Also, employers may implement voluntary affirmative action plans in appropriate circumstances, such as to eliminate a manifest imbalance in a traditionally segregated job category. In examining whether such a voluntary affirmative action plan is legal under Title VII, courts consider whether the affirmative action plan involves a quota or inflexible goal, whether the plan is flexible enough so that each candidate competes against all other qualified candidates, whether the plan unnecessarily trammels the interests of third parties, and whether the action is temporary, e.g., not designed to continue after the plan’s goal has been met.
An affirmative action plan implemented by a public sector employer is subject to both Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution. Some federal courts have held that public law enforcement agencies may satisfy the Equal Protection Clause if an “operational need” justifies the employer’s voluntary affirmative action efforts. In the higher education context, the Supreme Court decided in *Grutter v. Bollinger* that attaining a diverse student body can justify considering race as a factor in specific admissions decisions at colleges and universities without violating the Equal Protection Clause or Title VI of the Civil Rights Act of 1964. The Supreme Court has not yet ruled on whether an “operational need” or diversity rationale could justify voluntary affirmative action efforts under Title VII, but a number of legal scholars and practitioners have debated the issue.

The Commission encourages voluntary affirmative action and diversity efforts to improve opportunities for racial minorities in order to carry out the Congressional intent embodied in Title VII. Further, the Commission believes that “persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes” of the statute. However, employers are cautioned that very careful implementation of affirmative action and diversity programs is recommended to avoid the potential for running afoul of the law.246

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

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

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

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.247

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

Title IX was modeled after Title VI and much of the Title VI case law is applicable in Title IX cases. There are important differences between the statutes, however, and Title IX

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includes various statutory exemptions that are absent under Title VI. For example, Title IX expressly permits affirmative action to overcome the effects of conditions that result in limited participation in a program by persons of a particular sex, and requires appropriate remedial action if an agency finds that a recipient has discriminated against individuals on the basis of sex.\footnote{U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, at 11 (Jan. 11, 2001).} However, even if conduct is carved out of Title IX’s general prohibition on sex discrimination, public entities also have a constitutional duty not to discriminate on the basis of sex.\footnote{See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (nursing school policy that excluded male applicants violated 14th Amendment notwithstanding the applicability of a Title IX exemption).} Equal protection obligations still apply to public institutions even if Title IX has been satisfied.

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

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

Executive Order 11246 (1965)\footnote{Set out as a note in 42 U.S.C. § 2000e.} provides that federal contracts of a certain amount must contain provisions that prohibit discrimination on the basis of race, color, religion, or national origin. (Executive Order 11375 (1967) added sex discrimination provisions to the provisions required in applicable federal contracts under Executive Order 11246.), and Executive Order 13672 (2014) added discrimination based on sexual orientation and gender identification. These orders require not only equal employment opportunity, but also affirmative action: federal contractors and subcontractors are required to develop, and update annually, an Affirmative Action Plan which includes goals and timetables for the increased utilization of minorities, women, and others covered by the Orders.

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

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

Non-construction (service and supply) contractors with 50 or more employees and government contracts of $50,000 or more are required, under Executive Order 11246, to develop and implement a written affirmative action program (AAP) for each establishment. The regulations define an AAP as a set of specific and result-oriented procedures to which
a contractor commits itself to apply every good faith effort. The AAP is
developed by the contractor (with technical assistance from OFCCP if
requested) to assist the contractor in a self-audit of its workforce. The AAP
is kept on file and carried out by the contractor; it is submitted to OFCCP
only if the agency requests it for the purpose of conducting a compliance
review.

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

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

* * *

Executive Order numerical goals do not create set-asides for specific
groups, nor are they designed to achieve proportional representation or
equal results. Rather, the goal-setting process in affirmative action
planning is used to target and measure the effectiveness of affirmative
action efforts to eradicate and prevent discrimination. The Executive
Order and the supporting regulations do not authorize OFCCP to penalize
contractors for not meeting goals. The regulations at 41 C.F.R. 60-2.12(e),
60-2.30 and 60-2.15, specifically prohibit quota and preferential hiring and
promotions under the guise of affirmative action numerical goals. 251

Note that the OFCCP uses the phrase “underutilization” of women and minorities as the
trigger for establishing “goals” and initiating “efforts” to increase the number of women
and minorities in an employer’s workforce. 252 OFCCP does not use the phrase “manifest

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251 See also OFCCP, “Facts on Executive Order 11246 – Affirmative Action,” U.S. Dept. of Labor Employment
Standards Administration, at ¶ ¶ C and D (Dec. 13, 1999). Available at
http://library.law.columbia.edu/urlmirror/12/AffirmativeActionFactSheet.htm

contractor may use a variety of methods to determine what constitutes "underutilization", including: (1)
imbalance,” which is the term used by the Supreme Court in *United Steel Workers v. Weber*, 443 U.S. 193, (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), in upholding the affirmative action plans at issue in those cases relative to Title VII. The Supreme Court did not define “manifest imbalance” in either case, or indicate how much of an imbalance is necessary to create a manifest imbalance. However, the Court did state that a manifest imbalance could be found without the statistical disparity rising to the level of a *prima facie* pattern and practice case under Title VII. *Johnson*, 480 U.S. at 632.253 A *prima facie* pattern and practice case is made under Title VII by showing a sufficient disparity between the minority composition of the applicable employer workforce and the qualified labor pool that a court can infer an intent to discriminate. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (utilizing a standard deviation analysis to analyze statistical disparities and suggesting that a standard deviation that exceeds two is sufficient to create an inference of discrimination); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (*prima facie* case made out by showing that the percentage of minorities in the employer’s work force is significantly lower than the percentage of minorities in the general population). Thus, under the holding in *Johnson*, an affirmative action plan would be proper on the basis of a “manifest imbalance” if something less than a statistical disparity of at least two orders of magnitude is present. Whether this is a more demanding showing than the OFCCP’s 80 percent “under-utilization” standard is unclear.254

any numerical difference between incumbency and availability, (2) a numerical difference of one person or more, (3) minority or female incumbency that is less than 80% of availability (i.e., less than 80% of their representation in the available and qualified labor pool), (4) a disparity between the actual representation and expected representation for minorities and women that is statistically significant – namely -2.00 standard deviations or more); see also U.S. DEP’T OF LABOR, OFCCP, “Technical Assistance Guide for Federal Supply and Service Contractors,” at 21-22 (Aug. 2009). Applied broadly and in good faith, any of these approaches to underutilization should afford educational institutions opportunities to engage in affirmative action that is as least as extensive as the affirmative action that is authorized under OFCCP regulations.

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

6. Conclusion and Analysis

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

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


255 Title VII requires the same remedial justification for both data supporting a presumption of discrimination or revealing underutilization) to justify taking race- or gender-conscious affirmative action—if needed.

256 To the extent there is a difference in the standards justifying race- and gender-conscious affirmative action in employment, it relates to the degree of evidence required to demonstrate a need for such identity consciousness (likely including the rigor of review of neutral strategies). The measure of underutilization or discrimination, which is a fundamental requirement for both race- and gender-conscious affirmative action in employment, however, is based on representation of races and genders in an employer’s relevant workforce as compared with their representation in the available, qualified pool from which the employer could recruit. See 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 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 in the area to determine the manifest imbalance); Steelworkers v. Weber, 443 U.S. 193, 209 (1979) (Supreme Court upheld reserving 50% of places in a skilled craft training program for trainable Black workers at the plant to build capacity in a traditionally segregated field where representation was not in line with the relevant labor pool, the local trainable labor market. Note that the Court’s decision a decade later in Johnson made a point that gender was a consideration in an affirmative action plan, but there was no set-aside.).
As applied by the agencies that implement Title VII and complementary Executive Orders (the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs), these measures are the same for race and gender. Courts have used discrimination (at least a two standard deviation order of magnitude disparity in representation, comparing an employer’s workforce with the available, qualified pool) or a persistent “manifest imbalance” in a traditionally segregated workforce, as the baseline measure to justify gender and race based affirmative action. See e.g., Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); Steelworkers v. Weber, 443 U.S. 193 (1979);

In Shea v. Kerry, 796 F.3d 42 (Fed. Cir. 2015), cert. denied, 136 S.Ct. 1656, (2016), 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, 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 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. The court cited a congressional act and hearings, which found this overwhelming imbalance to exist and to evidence discrimination, which required remediation.

The Shea court also cited the 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 race-conscious strategies occurred only when neutral strategies 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.

Examples of neutral strategies include, e.g., Honadle v. University of Vermont and State Agricultural College, 56 F. Supp. 2d 419, 427-28 (D.Vt. 1999) (upholding targeted outreach in employment); Shuford v. Alabama State Board of Education, 897 F. Supp. 1535, 1553-56 (M.D. Ala. 1995) (upholding “inclusionary” targeted outreach to African Americans and women to expand the pool of qualified applicants for employment as part of an affirmative action plan; stating that “traditional” equal protection analysis should not apply,
While permissible affirmative action may be voluntary under Title VII, institutions that receive federal contracts (i.e., virtually all colleges and universities) are required by the OFCCP to prepare affirmative action plans and goals, which they must update annually, and to take affirmative steps in good faith to address any underutilization of women and minorities, a concept similar to manifest imbalance. Under OFCCP’s regulations, affirmative action plans and goals, and associated good faith actions, must be made by federal contractors to remedy underutilization in the representation of minorities or women in the institution’s faculty within a particular discipline as compared with their where race and sex are not considered in hiring decisions and the outreach does not have the effect of excluding qualified candidates from the pool on the basis of race or sex, but demonstrating strict scrutiny would be satisfied if it were to apply); Compare, e.g., MD/DC/DE Broadcasters Ass’n v. FCC 236 F.3d 13, 20 (D.C. Cir. 2001) (applying strict scrutiny to an FCC rule requiring race-targeted outreach and tracking in licensee employment programs, which had the effect of requiring limited recruitment resources to be targeted to recruiting minorities, depriving others of information to compete for positions).

Multiple enforcement actions by OFCCP — many of which are resolved through conciliation agreements between OFCCP and educational institutions that enter contacts or subcontracts with the Federal Government — address shortcomings in contractors’ analysis of equal opportunity problems and affirmative action plans, including in specifying the availability of minority or women qualified for jobs with the contractor or subcontractor. Some limited examples include:

- May 6, 2014, conciliation agreement between OFCCP and Bethel University finding, among other things, that the University had failed to consider internal availability (the percentage of minorities and women among those promotable, transferable, and trainable within the contractor’s organization) in comparing incumbency with availability and establishing placement goals. The conciliation agreement mandated that these actions be taken.

- December 19, 2013, conciliation agreement with Indiana University finding that the University had failed to attain established goals, and specifically that it had failed to demonstrate good faith efforts to recruit minorities and females and remove identified barriers. The agreement mandated a remedy of efforts to correct underutilization of minorities and females, including extensive outreach and recruitment.

- March 10, 2008, conciliation agreement with Valparaiso University finding that the University had failed to submit an acceptable analysis to determine the availability of minorities and women for each job group and had failed to perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist.

- August 30, 2012 conciliation agreement with Syracuse University finding that the University had failed to maintain complete and accurate employment records and to track all personnel activity, making it impossible to establish appropriate goals and identify job groups where good faith efforts were needed, and that internal and external availability estimates did not reflect its actual recruitment and employment practices. The agreement required the University to prepare and maintain appropriate records and to conduct the necessary analyses.

- June 19, 2012 conciliation agreement with Blinn College finding that the College had failed to establish placement goals consistent with its availability data, to perform in-depth analyses of its total employment process to identify impediments to equal employment opportunity and develop and execute action-oriented programs to correct identified problem areas. The agreement required the College to correct these deficiencies to do an adverse impact analysis on at least an annual basis to determine whether adverse impact exists against applicants based on race, gender, or ethnic group in hiring, promotion, termination, and other personnel activities.
representation in the available qualified labor pool. Underutilization includes but is not limited to a manifest imbalance and other Title VII measures. More permissive measures of underutilization also apply under OFCCP. (See footnote 209, supra.) One of OFCCP’s underutilization measures -- whether there is a representation of minorities or women in the institution’s workforce in a particular discipline that is less than 80 percent of their representation in the available qualified pool -- is often used to measure underutilization and may generally align with notions of manifest imbalance under Title VII. OFCCP’s requirements provide that the actual hiring and promotion decision “is to be made on a non-discriminatory basis.” Consequently, when using OFCCP’s more permissive measures of underutilization -- or when using any OFCCP measures in referendum or Executive Order states -- to justify consideration of race or gender, it may be prudent to focus on outreach, barrier removal, training/access, and mentoring, rather than considering race in the actual hiring or promotion decision.

In some fields, including many STEMM fields, there may not be a manifest imbalance under Title VII, and there may not be underutilization as measured under the OFCCP 80 percent test, and minorities and women may not be otherwise underutilized under OFCCP requirements, even when minorities and women are not well represented (or they are not represented at all) in the faculty of a particular department at the institution. Instead, a “pipeline” problem may exist which has resulted in little or no representation of women or minorities in the qualified and available labor pool in the discipline. Thus, the absence of, or a very limited representation of, women or minorities in the discipline at the institution may not constitute a manifest imbalance or other underutilization as compared with their representation in the qualified and available labor pool. In such cases, it is helpful to determine whether there is an available pool of “trainable” minorities and women who, with better access to fellowships, mentoring and other access-enhancing programs, could acquire the additional preparation to compete more effectively for full faculty positions. In such circumstances, and possibly others, affirmative action may also mean taking an action to remedy a pipeline problem by providing opportunities for minorities and women to become better prepared to compete for faculty positions in the field, where minorities and women have been historically excluded at the institution or where the institution, at least passively, participated in creation of the pipeline problem in a field that requires training. (See EEOC April 2006 Agency Guidance on Diversity and Affirmative Action and 29 C.F.R. § 1608.3(c), supra, addressing limited labor pools, and Section VI.A., supra, discussing the Weber case regarding available trainable workers and training programs and the Croson case, strict scrutiny and passive participation in perpetuating discrimination.)

Under Croson, higher education employers, and especially state colleges and universities, may take steps to avoid being a “passive participant” in discrimination by others (e.g., state educational systems or elementary and secondary schools). To do so, they would have to demonstrate, with a good evidentiary basis, that they need to consider race or gender in order to avoid being part of a system of racial or gender exclusion through their own financial or other support of entities that have excluded minorities or women.
The courts have not resolved whether the First Amendment-protected, compelling interest of an institution of higher education to deliver excellent education to all students, produce excellent research, and serve the nation’s security and workforce needs, may allow race and gender to be considered -- in the Title VII context -- as one of many factors in a holistic assessment of the qualifications of a particular candidate for employment or a particular employment benefit, under a Title VI and Equal Protection Clause analytic model. The EEOC has acknowledged that this is possible, but has not taken a definitive position. (See April 2006 Agency Guidance on Diversity and Affirmative Action, Section VIII.A.3.) Such an approach would have to satisfy strict judicial scrutiny (at least in the case of race and intermediate heightened scrutiny in the case of gender) and be educationally mission-driven, and it would complement the remedial justification generally required under Title VII or OFCCP’s 80 percent measure of underutilization. Where there would otherwise be an undue burden on others, race and gender would have to be factored flexibly in each decision, not uniformly for all members of the same race or gender and opportunities to compete would generally have to be provided to others. (See the sections on employment under Title VI and Title VII and obtain legal guidance.)

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

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

**B. Extending the *Grutter/Fisher* Rationale to Faculty Hiring**

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

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

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

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258 See also 42 U.S.C. § 2000e(d), which generally prohibits race and gender discrimination in “Training programs”, quoted at Section VIII.A.3, *supra*, and the EEOC’s regulatory implementation of Title VII, at 29 C.F.R. § 1608.3(c), which permits affirmative action through training programs where there is an artificially limited labor pool due to historic exclusion and the pool may be expanded.


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education, an institution has a similarly strong interest in selecting its faculty to further the same ends. Faculty have at least as much impact as students in the classroom and laboratory dynamic and the learning process.260

Many of the arguments reaffirmed and expanded in *Grutter* and *Fisher* apply to diversity in faculty hiring, as increased faculty diversity would contribute to the “robust exchange of ideas” in the classroom.261 For example:

[A] student’s stereotypical assumptions can be challenged effectively by exposure to an Asian-American art history professor who specializes in Western Renaissance art, even if the class discussions do not address issues of race and ethnicity. An African-American medieval historian or Hispanic professor of English literature can also challenge assumptions and subtle forms of prejudice precisely by defying stereotypes. If students enter college with preconceived notions of intellectual abilities and interests based on race or national origin, these prejudices can be overcome by exposure to individuals who provide living demonstrations of the falsity of race-based notions. Such direct personal experience might be the most effective teaching tool available.262

A racially diverse faculty would also promote cross-racial understanding and contribute to breaking down racial stereotypes, prepare students for “work and citizenship” in a global economy, and improve civic legitimacy by increasing the number of minorities in positions of business and political leadership.263 The *Grutter* Court also noted that “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”264 While the Court noted that this benefit is a product of a diverse student body, it is equally the product of a diverse faculty. A diverse faculty can help create a network of future leaders in all academic disciplines. Moreover, in STEMM fields, diverse faculties are part of the workforce whose research increases fundamental

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

264 539 U.S. at 331.
knowledge that is used by industry to create products supporting our nation’s economic strength and national security.

At least one court has concluded that the interest in racial diversity in higher education, as outlined in *Bakke*, applies with equal force to a race-conscious hiring plan that aims to achieve diversity among the faculty of institutions of higher education. In *University and Community College System of Nevada v. Farmer*, the Nevada Supreme Court held that the University had a compelling interest in fostering a culturally and ethnically diverse faculty.265 The court held that the University’s affirmative action plan, which allowed a department to hire an additional faculty member following the placement of a minority candidate, was constitutional. In so holding, the court stated: “We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court.”266 The court noted that a failure to attract minority faculty perpetuates the University’s “white enclave” and limits student exposure to multi-cultural diversity.267 The court also noted that the affirmative action plan was narrowly tailored to promote diversity and that the plan satisfied the *Bakke* command that race be only one of several factors in evaluating applicants.268

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

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266 *Id.* at 735.
267 *Id.*
268 *Id.*
or her race and gender, with those of other candidates; and (8) periodic review of the
demographic composition to evaluate the status of goals or critical masses.\(^{269}\)

Thus, the reasoning in *Grutter* provides multiple bases for asserting that the same notions
of academic freedom that apply to the admission of students apply to the employment of
faculty in colleges and universities. The overarching goal of colleges and universities
implementing race-or gender-conscious hiring plans should be the careful identification
of their particular compelling educational or national service interest, and the
implementation of initiatives that are narrowly tailored so as not to unduly burden
nonminority or male job candidates.\(^{270}\) Such an approach would have to satisfy strict
judicial scrutiny (at least with respect to race) and be mission-driven. Race and gender
would have to be factored flexibly, not uniformly for all members of the same race or
gender, in each decision. It is also prudent to consider application of Title VII in such
analyses and to seek expert counsel. Assuming that faculty diversity is recognized as a
compelling educational interest, that interest should, at the very least, serve as
complementary support for Title VII and OFCCP-sanctioned affirmative action, providing
a basis for satisfying corresponding Equal Protection requirements.

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

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

Reasonable affirmative action under Title VII and OFCCP (and, to the extent applicable,
diversity efforts under Title VI and the Equal Protection Clause), should be aimed at
remedying discrimination, a manifest imbalance, or significant underutilization and
achieving mission-critical diversity, and should not extend beyond the necessary time
period or be overly broad. It is a good practice to identify workable race- and gender-
neutral alternatives and approaches that break down barriers or constitute outreach (as
distinguished from employment benefits) and to use them first if they are available. It is
also a good practice to consider race or gender first in training, mentoring and other
access-building programs. Race or gender may be used under Title VII, if justified (and if

\(^{269}\) *Grutter*, 539 U.S. 306.

\(^{270}\) “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.... [It] does,
however, require serious, good faith consideration of workable race-neutral alternatives that will achieve
the diversity the university seeks.” *Id.* at 339. Gender-based decisions are subject to a lesser standard of
legally permitted in a jurisdiction), in hiring and promotion decisions where there is the need to remedy an institution’s own discrimination or its present effects or there is a manifest imbalance. All use of race and gender should be limited to the period of time in which the manifest imbalance, other significant underutilization or effect of discrimination exists under Title VII (or, to the extent applicable, the time in which inadequate representation exists under Title VI and is required to support the institution’s mission), and such consideration is warranted. An employer should not discharge or lay off non-minorities or men to hire minorities or women; should not have quotas; and should not bar non-minorities or men from all opportunities to compete for positions or promotion; or otherwise unduly burden non-minorities or men. However, an employer should be able to take race or gender into account as a factor among many in determining which qualified applicants to include in the candidate pool to be interviewed, in hiring and in other employment decisions under Title VII (and Title VI and Equal Protection if they apply) if lesser efforts (e.g., removing barriers, more effective targeted outreach to build a more diverse applicant pool, or neutral approaches) are inadequate to remedy the underutilization.

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

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

D. Post-Doctoral Fellows

The discussion above focuses on faculty members. It is also relevant, however, with respect to other individuals at colleges and universities who are treated as “employees” by the school, or who might be so characterized by a court. Schools sometimes treat postdoctoral fellows as employees. The same may be true for graduate students, at

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271 A postdoctoral student or ‘post doc’ as they are frequently called are defined as “an individual holding a doctoral degree who is engaged in a temporary period of mentored research and/or scholarly training for the purpose of acquiring the professional skills needed to pursue a career path of his or her choosing.”
least for some purposes, i.e., if they receive a stipend for a service on a research project as opposed to financial support for a credit-bearing, research or experiential learning activity. In all events, there is a chance that the courts will view post-doctoral fellows and graduate students acting as research or teaching assistants as employees, at least when the conduct that is challenged in the lawsuit relates to teaching, research, or other activities for which the individual receives a stipend or other monetary consideration. In contrast, courts are less likely to treat postdoctoral fellows or graduate students as employees when the basis for the challenged action is academic in nature, such as a dismissal from a program or school because of academic deficiencies. 

272 See, e.g., Seaton v. Univ. of Pennsylvania, 2001 U.S. Dist. LEXIS 19780, **23-26 (E.D. Pa. 2001) (noting that “courts have carefully delineated between graduate students’ academic activities and employment activities, and deemed them to be employees only with respect to what they do in employment,” and holding that plaintiff’s Title VII claim was not actionable because it did not relate to his status as an employee); Annett v. Univ. of Kansas, 82 F. Supp. 2d 1230, 1237 (D. Kan. 2000) (allowing a professor’s Title VII retaliation claim to proceed where the claim involved her opposition to certain graduate student financial support policies, and rejecting the school’s argument that her opposition was not protected under Title VII because the “policies affect graduate students, not employees of the University”); Ivan v. Kent State Univ., 863 F. Supp. 581, 585-86 (N.D. Ohio 1994), aff’d 92 F.3d 1185 (6th Cir. 1996) (holding a graduate student who lost her graduate assistant position was properly viewed as an employee under Title VII), aff’d mem, 92 F.3d 1185 (6th Cir. 1996); Mohankumar v. Kansas State Univ., 60 F. Supp. 2d 1153, 1160 (D. Kan. 1999) (“The court will assume ... that by virtue of her agreement to teach classes ... in exchange for a stipend, plaintiff was an employee covered by Title VII and that the discontinuation of a stipend was either a refusal to hire her or a denial of a term or condition of her employment.”); see also United Faculty of Florida, Local 1847 v. Bd. of Regents, State Univ. Sys., 417 So.2d 1055, 1061 (Fla. App. 1982) (holding that “graduate assistants” are employees for collective bargaining purposes); Regents of the Univ. of Michigan v. Empl. Rel. Comm’n, 254 N.W.2d 218 (Mich. 1973) (holding that “interns, residents and post-doctoral fellows” were reasonably treated as employees for collective bargaining purposes, after noting that a portion of their compensation was withheld for federal and state tax purposes, they received “fringe benefits available only to regular [UM] employees,” and they received W-2 forms).

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

Courts will undertake a fact-based inquiry to determine whether a plaintiff should be viewed as an employee or a student with respect to the school conduct that is challenged in a given case. For example, in *Cuddeback v. Florida Bd. of Education*, the 11th Circuit

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274OFCCP Directive 2019-05, issued September 5, 2019, indicates that OFCCP -- in addressing whether various types of student workers at educational institutions that are federal contractors are employees under the laws that OFCCP enforces, and thus whether these students should be included in contractors’ affirmative action plans -- is guided by the test set forth in the U.S. Supreme Court’s case, *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). That case addressed the issue of whether Mr. Darden had been an employee or an independent contractor of Nationwide. Darden sued for retirement benefits that would be owing to him if he had been an employee of Nationwide under the Employee Retirement Income Security Act of 1974. The case did not involve an issue of whether students who performed work for an education institution were to be treated as employees. Nevertheless, OFCCP interpreted the Court’s decision to set the standard for when students are deemed employees of education institutions. The Court ruled that where a federal statute does not give specific guidance on the definition of employee or suggest that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results, the definition of employee turns on traditional, common-law agency principles, which means that there is no shorthand formula for determining who is an employee, and all of the incidents of the employment relationship must be weighed with no one factor being decisive. The OFCCP directive proceeded to opine that there is no single answer to the question of employee status under OFCCP’s laws given the multitude of fact-specific circumstances. It noted that with regard to graduate student assistants, “courts have typically refused to treat them as employees for Title VII purposes only where their academic requirements were truly central to the relationship with the institution,” citing *Cuddeback v. Florida Bd. of Educ*, 381 F.3d 1230, 1235 (11th Cir. 2004), discussed in the text in the following paragraph. However, the OFCCP Directive conceded that courts have reached various outcomes on this issue based on the particular facts at issue. In a *Technical Assistance Guide for Educational Institutions*, published in October 2019, at p. 52, OFCCP indicated that the following factors derived from the *Darden* case should be considered: the contractor’s right to control when, where, and how the individual performs the job; the skill required for the job; the source of the instrumentalities and tools; the location of work; the duration of the relationship between the parties; whether the contractor has the right to assign additional projects to the individual; the individual’s discretion over when and how long to work; the method of payment; the contractor’s role in hiring and paying assistants; whether the individual’s work is part of the regular business of the contractor; whether the individual is in business; and the provision of employee benefits to the individual.

Perhaps most importantly, the OFCCP Directive indicates that OFCCP is interested in focusing its time and resources on individuals whose primary relationship with the educational institution is work-related. Accordingly, its policy is not to cite violations for excluding student workers from affirmative action plans or personnel data submissions in compliance evaluations. It will, however, continue to accept and review complaints filed by and on behalf of student workers at these educational institutions, and its evaluations of the employee status of any such student workers will be guided by the *Darden* factors and related legal principles.
applied an “economic realities test” in determining whether a graduate research assistant was an “employee” for purposes of Title VII:

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

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

381 F.3d 1230, 1234-35 (11th Cir. 2004) (citations omitted).

There are very few published opinions that involve employment-based discrimination claims asserted by postdoctoral fellows, and they are not very informative on the issue of “student vs. employee.” Guidance can be found, however, in the cases that involve

275 See also Stilley v. Univ. of Pittsburgh, 968 F. Supp. 252, 261-62 (W.D. Pa. 1996) (finding that the plaintiff student was an employee with respect to her status as a researcher); Ivan v. Kent State Univ., 863 F. Supp. at 585-86 (finding that a graduate student researcher was an employee where she had an employment contract, was paid biweekly, and had retirement benefits withheld); compare Jacob-Mua v. Veneman, 289 F. 3d 517, 520-21 (8th Cir. 2002), abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (2011)(holding that a volunteer graduate student researcher was not an employee because she was not financially compensated for her work).

276 See, e.g., Sizova v. Nat’l Inst. of Stds. & Technology, 282 F.3d 1320, 1328-29 (10th Cir. 2002) (affirming summary judgment for a university which hosted a research fellow who sued the university and NIST under Title VII, on the grounds that NIST selected the fellowship recipient and supervised her work and thus was her employer, not the school, but treating the fellow as an employee); Hankins v. Temple Univ., 829 F.2d 437 (3d Cir. 1987) (treating a plaintiff who was terminated from a fellowship program as an employee for purposes of her discrimination claims under Title VI, Title VII and Section 1981, without considering whether she should be treated as a student, but characterizing plaintiff as a student rather than an employee for purposes of her due process claim); Brewer v. Bd. of Trustees of the Univ. of Illinois, 407 F. Supp. 2d 946, 962-70 (C.D. Ill. 2005) (considering a Title VII discrimination claim asserted by a fellow who had a paid, one-
graduate students. In addition, numerous court cases have considered whether medical residents are properly viewed as employees or as students. Residents have been characterized as students in some contexts even though they receive monetary payments (stipends) and perform services. For example, several courts have held that post-graduate medical residents may qualify as “students” for purposes of a statutory exception that exempts from FICA payroll taxes “students” who are “in the employ of a school, college or university” and “enrolled and regularly attending classes at such school, college or university.” There are also cases which have characterized medical residents as students, rather than employees, with respect to due process challenges that they asserted to their dismissal from a residency program. But residents have also been treated as employees in some contexts.

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

quarter time research assistantship, and applying Title VII without suggesting that the plaintiff could be characterized as a student not an employee).

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

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

279 See, e.g., Lipsett v. Univ. of Puerto Rico, 864, F.2d 881 (1st Cir. 1988) (evaluating a Title IX claim of a discriminatory discharge from a residency program, and holding that because the plaintiff was both a student and an employee, Title VII’s substantive law should be applied to her Title IX claim); Regents of the Univ. of Calif. v. Pub. Emp. Rel. Bd., 41 Cal. 3d 601, 604 (Cal. 1986) (upholding agency determination that “housestaff, who are paid by the University while participating in residency programs ..., are ‘employees’” for collective bargaining purposes).

280 See Purdue University, Graduate Student Employment Manual, at 6 (July 2019; available at https://www.purdue.edu/gradschool/documents/gspo/graduate-student-employment-manual.pdf. (“The University makes assistantships and fellowships available as forms of financial aid to support graduate study. Employment is incident to graduate study. Graduate students who are employed by the University provide services (teaching, research, administrative/professional) that further the missions of the University while providing students with valuable professional experience and financial remuneration in the
The classification for postdoctoral fellows is often driven by the mechanism by which the fellows are paid. If they receive a salary from the institution, which is typically derived from a supervisor’s grant or other funds, they are generally classified as an employee with the attendant right to participate in the school’s benefit programs. If they receive a stipend, however, based upon independent funding from a fellowship or other external source, they are often not treated as employees, or at least not employees who are entitled to all the benefits provided by the school to its regular employees. Indeed, a range of classifications is possible.\textsuperscript{281}

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

In this regard, it should be noted that the U.S. Department of Justice has challenged certain diversity-based fellowship programs under Title VII. DOJ sued Southern Illinois University in 2006, alleging that the school was violating Title VII by operating various “paid fellowship programs [that were] open only to undergraduate, prospective graduate and doctoral students who are either of a specific race and/or national origin or who are form of tuition remission and a modest salary. These students are considered employees and are subject to the policies and procedures outlined in this manual. This statement contains the following footnote: “While the University considers graduate staff who provide services to be employees for most purposes, graduate staff are not subject to certain federal laws governing the employer-employee relationship.” The Manual further states, “Students who receive fellowships are not employees and are not obligated to provide services to the University. The purpose of fellowships is to recognize outstanding graduate students and to support their education. While there are broad policies and procedures covered in this document that may apply to fellowships, in general, these guidelines are intended to address graduate student employment. For more information about fellowships, see the \textit{Purdue University Graduate School Fellowship Manual}, .\textsuperscript{281}

\textsuperscript{281} The National Postdoctoral Association has suggested, for example, that several different classifications have been used by institutions as part of strategies for offering health benefits to postdoctoral fellows: (1) “Classify all postdocs as students;” (2) “Create a new category for the postdoc that is not staff, employee or student;” (3) “Create multiple new postdoc categories based on funding source;” (4) “Classify fellows and paid directs as employees by paying them a small salary;” (5) “Offer a small stipend to non-employee postdocs to cover insurance costs;” or (6) “Ignore funding source, and put all postdocs in the employee payroll.” See \url{https://cdn.ymaws.com/www.nationalpostdoc.org/resource/resmgr/2019_launch/resources/policy/providing_benefits_for_postd.pdf}
female.” The lawsuit was resolved by way of a Consent Decree. Among other things, the Decree enjoined SIU from “setting aside, reserving or in any way restricting any paid fellowship positions ... on the basis of race, national origin or sex;” from establishing or maintaining “any paid fellowship positions in any fellowship programs that ... are set aside, reserved or in any way restricted on the basis of race, national origin or sex;” from failing to “consider, hire, employ, compensate and provide terms, conditions and privileges of employment to persons for any paid fellowship position without discriminating on the basis of race, national origin or sex in violation of Title VII;” and from limiting “recruitment for any paid fellowship positions to members of any particular groups on the basis of race, national origin or sex.” At a minimum, the SIU Consent Decree confirms that at least some diversity-based fellowship programs may be subject to challenge under Title VII (by the government or by private individuals).

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

Recognizing that other considerations will likely dictate how an institution structures its relationship with postdoctoral fellows or graduate student assistants, certain factors can

282 See United States v. Bd. of Trustees of Southern Illinois Univ., Complaint at ¶ 7, No. 4:06-cv-04037 (S.D. Ill.) (filed Feb. 8, 2006, and available on PACER).

283 Id., Consent Decree at 4 (available on PACER).

284 For example, under NIH policies, recipients of Kirschstein National Research Service Individual Fellowships are not to be treated as employees of “either the Federal government or the sponsoring institution,” and institutions “may not seek funds, or charge individual fellowship awards, for costs that normally would be associated with employee benefits (for example, FICA, workmen’s compensation, and unemployment insurance).” NIH Grants Policy Statement, Part II: Terms and Conditions of NIH Grant Awards- Subpart B, “Employee Benefits” (October 2018) (available at https://grants.nih.gov/policy/nihgps/index.htm NRSA fellows are allowed to supplement their stipends, however, by way of “part-time employment,” so long as the compensation is “in accordance with organizational policies applied consistently to both federally and non-federally supported activities and must be supported by acceptable accounting records that reflect the employer-employee relationship. Under these conditions, the funds provided as compensation (salary, fringe benefits, and/or tuition remission) for services rendered, such as teaching or laboratory assistance . . . are allowable charges to Federal grants. . .” Id., “11.2.10 Supplementation of Stipends, Compensation, and Other Income.” See also Coordinating Officials’ Guide, NSF Graduate Research Fellowships, at D.13 (“Fellows are not in any sense salaried employees of the National Science Foundation nor of their affiliated institutions. Therefore, no funds will be deducted from the stipends [for tax purposes]; no W-2 Forms will be issued; and provision must be made by the Fellow for ... payment of all income taxes that may become due.”).
nonetheless be identified that would improve an institution’s ability to argue against the application of Title VII to a discrimination challenge to a given fellowship or assistantship program:

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

This is not an exhaustive list, and there is no assurance that the existence of any one or more of these factors would tip the scale in favor of -- or against -- a “not an employee” finding.
It is clear that an individual whose relationship to the college or university is primarily that of a student does not lose his or her “student status” merely because that relationship includes some aspects of employment. Moreover, an individual may be characterized as both a student and an employee in his or her relationship with the institution, depending on the particular aspect of the relationship at issue.

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

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

E. Policy and Program Principles and Illustrations

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

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

285 Other relevant factors that an agency or court might look to include the tax treatment of fellowship awards by the IRS (see, e.g., I.R.C. § 117 and IRS Publication 520, “Scholarships and Fellowships”); and the treatment of graduate students, externs, and residents by the DOL for FLSA purposes. See, e.g., DOL Field Operations Handbook at paragraphs 10618-620 and 10624 (1993).
The absence of an approach -- or of a variation on an approach -- from this guide is not an indication that the approach or variation is legally unsustainable. Similarly, our discussion of various approaches is not intended to substitute for legal advice on the particular programs implemented by an institution. That analysis must be institution and context-specific and should be undertaken by the lawyers for the institution.

It is critical that Section A.6, Conclusion, above be reviewed before and in conjunction with the following program descriptions.

1. **In General: Importance of Relationship to Mission**

Each program described in this part is mission-driven and used where the institution has determined that achieving its educational, research and service mission in STEMM (and other fields) requires a broadly diverse faculty and student body. Many aspects of broad diversity can be achieved in the faculty and student bodies through race and gender-neutral means. However, racial diversity is often the most difficult to achieve, and gender and socio-economic aspects of broad diversity are also difficult. Where that is the case, the efforts identified in this document can contribute to fulfilling missing aspects of broad diversity (such as the racial, gender or socio-economic aspects) or support overall efforts to achieve broad diversity. This section focuses on diversity of faculty. A diverse faculty, however, also engenders a diverse student body.

Note, as a threshold matter, that the awareness-raising and monitoring programs in 2.a. below, the outreach and barrier removal programs in 2.b. below and the neutral alternatives in 2.d below, generally do not trigger equal protection or Title VII restrictions and may be used in any jurisdiction. However, the affirmative action programs in 2.c. require careful application, particularly in jurisdictions where local law prohibits consideration of race and gender in employment. The federal requirement that federal contractors have an affirmative action plan in place and make good faith efforts to address an under-utilization issue may provide a basis for pursuing such programs in these jurisdictions (unless authentic neutral alternatives such as record of inclusive conduct and multi-cultural skills or socio-economic background satisfy the federal requirement), but do not justify consideration of race or gender in actual employment or promotion selection decisions.

2. **Specific Program Examples**

   a. **Awareness-Raising and Monitoring Programs**

   Mission-related purpose; benefits to participants; institutional resources committed

   These measures provide oversight, support, and monitoring to foster the success of other diversity efforts (e.g., efforts to increase and broaden the pool of applicants for faculty or postdoctoral positions and efforts to support the success of minority and female faculty and students once recruited). No direct individual benefits are conferred; these measures
raise awareness and support other diversity efforts to fully realize all aspects of broad diversity. Institutional staffing and funding are (and legally may be) devoted to monitoring, reporting, and training to oversee and assess effectiveness of diversity efforts.

1. **Web site.** The university maintains a Web site, providing diversity resources, posting diversity data, and otherwise providing a clearinghouse for diversity news and resources university wide.

2. **Diversity Council.** The President appoints a diversity council to serve as policy and legal experts and to coordinate and monitor diversity efforts university wide. The Council may collect data and report annually on progress, conduct faculty and student body surveys and focus groups, champion new initiatives, and provide support, resources, training, and expertise. The Council may be sponsored by and report to a Diversity Cabinet.

3. **Diversity Cabinet.** University officers and faculty senate committee chairs meet regularly (e.g., monthly or quarterly) to provide strategic direction and review progress on diversity efforts.

4. **Senior Administration Accountability.** The Board of Trustees establishes increasing racial and gender diversity of the faculty and student body (which are aspects of broad diversity that have eluded the institution) as long-term goals for the President, among a number of other goals including, but not limited to, diversity goals. There are no numerical goals, but the President’s quantitative and qualitative progress are reviewed on an annual basis and the President, Cabinet and Faculty Senate periodically assess whether adequate progress has been made to meet the educational, research and service missions of the institution. The President’s annual evaluation by the Trustees includes consideration of progress against these goals and all other goals; no one goal is determinative. The President similarly holds the Provost accountable for achieving, monitoring, and reporting progress, the Provost holds the Deans accountable, the Deans hold the Department and major unit heads accountable, and the Department and unit heads hold search committees, program directors and admissions leadership accountable.

5. **Ad Hoc Committee.** An ad hoc committee is appointed by the President to evaluate the status of women or minorities at the University as compared with non-minorities and men. The committee identifies areas of inequity or quality of life concerns and makes recommendations on types and prioritization of efforts to address these issues.

6. **Faculty Hiring Toolkit and Search Committee Training.** The Provost’s Office, with support from the Human Resources and General Counsel’s Offices, creates a toolkit for faculty hiring that provides resources and training for search committees. All search committee members, or at least the Chair, may be required to complete training before serving. The toolkit and training include guidance on how to maximize outreach efforts.
The toolkit also provides guidance on how to search for individuals who will bring a record of inclusive conduct and multi-cultural skills to the institution. Where and to the extent permissible, the toolkit provides guidance on how to take race and gender into account in outreach and/or hiring processes. It also describes how to make quality of life and community resources available to maximize diversity outcomes. The toolkit provides guidance on how to bring training to the search committee process through initial and periodic discussions and check-in concerning goals and approaches by the committee. The chair of the search committee is tasked by the department head or dean to lead efforts to incorporate broad diversity objectives in the search process and is sometimes supplemented by an expert diversity representative from the Provost’s Office.

7. **Search Committee Plans.** Search Committees are required to develop a search plan that includes substantial outreach aimed at traditional candidates as well as those from groups that are not well represented at the institution. The plan also includes a process for articulating qualification requirements that capture necessary intellectual and scholarship standards, while not imposing unnecessarily restrictive requirements and preserving the flexibility to consider less traditional backgrounds without compromising on quality. Selection criteria are not changed once the application process begins and applicants can be identified. See Appendix VIII.

8. **Search Committee Accountability.** Search Committees are required to have the relevant Dean or Department head certify the adequacy of outreach efforts before the application process is closed and a list of candidates to be interviewed is completed. (Refer to Specific Program Examples, in Section VIII.D.2.b.5, pure outreach and barrier removal, *supra*, for a fuller description and explanation of certification of adequacy of outreach.)

**Commentary.** If implemented properly, these efforts merely raise awareness, monitor progress and areas needing improvement, and provide expert resources for other diversity efforts. Strict scrutiny and statutory prohibitions are not implicated. These efforts provide important data, expertise, and assessment of effectiveness of other diversity efforts. Moreover, these activities are not involved in individual decision-making about hiring or the award of other benefits and thus should raise no question as to legal sustainability.

**Assessment of impact.** Effectiveness of these efforts may be measured as follows:

1. *Surveys and focus groups* are conducted of those who administer diversity programs, Deans, and Department heads.

2. *The President’s annual evaluation* process for the Provost, Deans and Vice Presidents includes consideration of some of these efforts, as part of their overall evaluation. The Trustees’ evaluation of the President annually includes consideration of some of these efforts, as part of the President’s overall evaluation.
3. **Self-assessments** may be conducted.

4. **Climate studies** assess the quality of the environment at the institution as a whole, in each of the colleges, and in particular units within colleges, for minorities and women. Input is collected on specific measures that would improve the climate.

5. **Surveys** are conducted to determine the availability of formal and informal mentoring to men and majority races as compared with women and minority races and their respective knowledge of the tenure and promotion and research award processes.

6. **Search committee training** is required for all individuals (or at least the Chairs) serving on faculty search committees, which includes awareness-raising about diversity and outreach in support of broad diversity. The adequacy of outreach efforts (process) must be certified by the Dean or unit head before the application process is completed and all candidates are identified for interviews. Outreach is inadequate if additional outreach means are reasonably available to achieve greater diversity in the applicant and potential candidate pools. (Refer to the next section on targeted outreach).

   **b. Race and Gender-Targeted Outreach and Barrier Removal Efforts**

   **Mission-related purpose; benefits to participants; institutional resources committed**

   Outreach and the elimination of unnecessary barriers to employment create more opportunities for minorities and women to compete for positions at the University and to receive and accept offers. There is a distinction between outreach and breaking down barriers, on the one hand (which do not trigger Title VII prohibitions or strict scrutiny), and the employment process and decisions (which may trigger such legal constraints), on the other. These programs address outreach and barrier removal, not employment or benefits associated with employment. The institution provides funding for general as well as targeted advertisements, personnel and other resources to contact prospects and individuals for referrals; for transportation and small honoraria for general as well as targeted lectures or other non-employment, relationship-building programs; for general as well as targeted recruitment travel (e.g., to meetings of professional societies targeted to minorities and women); and for benefits programs that are available to all employees but that also remove barriers to the employment and success of minorities and women.

   **Outreach**

   Outreach builds the pool of applicants from which candidates will be identified, interviewed, and considered. Outreach opens opportunities for all potentially qualified individuals to apply and to compete to become candidates. Minorities and women, who are underrepresented in STEMM careers or who have not traditionally pursued careers in a particular discipline, and whom the institution needs to achieve the breadth of diversity it requires for its education/research/service missions, are provided enhanced access and information about faculty opportunities through outreach efforts specifically targeted to
them. (Enhancing access to women and minorities typically remedies previously inadequate access.) Minorities and women are actively encouraged to apply. Outreach targeted to minorities and women is critical where there is a pipeline problem (i.e., they are insufficiently represented in the labor pool in a discipline). Outreach that is particularly effective with individuals of one group, making them feel welcome and encouraging their interest, is undertaken within the context of a broad array of outreach efforts that provide any interested and qualified individual an opportunity to learn about and apply for the position. The fact that the outreach process may vary based on race and/or gender does not mean that the employment process or decision-making similarly varies on these bases.

There is more flexibility in where to draw the line between outreach and conferring benefits in the employment process if minorities or women are underutilized in a discipline. Where underutilization exists in the representation of minorities or women in the institution’s faculty within a particular discipline as compared to their representation in the available qualified pool, significant institutional resources may be provided to pursue the goal of elimination of underutilization. (Underutilization of minorities or women exists when there is a statistically meaningful under-representation in the relevant faculty discipline at the institution relative to the relevant labor pool from which the institution may hire or there is other evidence of underutilization. See the section on Title VII/OFCCP regulations.)

Barrier removal

Breaking down barriers means removing unnecessarily rigid and restrictive prerequisites to employment that limit access by minorities and women. When unnecessarily restrictive qualifications are shed and flexibility to consider individual situations is possible, minorities and women, as well as individuals of other underserved groups, are better able to present a compelling employment application with a less traditional background.

Pure outreach and barrier removal

1. **Targeted Advertising.** Advertise in outlets targeted to minorities or women in the field, as well as in those that are popular with traditional applicants.

2. **Targeted Organization Contacts.** Contact networks, listservs, and professional associations, and attend professional association conferences, that are popular with traditional applicants, as well as those that are targeted to minorities or women in the field.

3. **Personal Contacts Via Email, Letter, Telephone.** Contact senior faculty in the field to ask for nominations and referrals, and to ask specifically for nominations and referrals of qualified minorities and women. Include senior faculty in the field or related fields who
are minorities or women. Use the tracking list and guest lecturer experiences (see below) to invite individual prospects to apply.

4. Formally Track Individuals With Promise Throughout Their Careers. Maintain a list of talented minorities and women in the field, both in academia and in research-oriented industry positions. (Usually, individuals with more traditional backgrounds who are academics in the field are known and apply without hesitation or are routinely recruited. If this is not the case in a particular field or respecting a promising prospect, track others too.) Lists may be developed at conferences, from reading publications, from reviewing research proposals, from tracking talented undergraduate and graduate students as they progress through their educational programs and in their junior and senior faculty careers. The Department head or Dean may assign an influential faculty member (with administrator assistance) to be the steward of this list with responsibility for eliciting support from the rest of the faculty. The Department head or Dean may periodically remind faculty members that they are expected to contribute and to ensure that the list is used by search committees when positions open.

5. Outreach Plan and Certification of Adequacy of Outreach. A search outreach plan is required for every search. (See example in Appendix VIII). Before closing an applicant pool (i.e., those submitting applications) or candidate pool (i.e., those selected from the pool to interview), a certification is required on the adequacy of a search committee’s outreach efforts. The focus is on whether the outreach is adequate -- not whether the candidate pool itself (of individuals to be interviewed), is diverse enough. The outreach that has been undertaken is one data point. The diversity of the applicant and potential candidate pools are two additional data points as to whether outreach is sufficient. If all reasonably possible outreach has not been undertaken and the pool of applicants or the pool of potential candidates identified from individuals who apply is not broadly diverse, including minorities and women, then the outreach (not the diversity of applicants or candidates) may be inadequate and the search committee should be required to continue outreach before the applicant pool is closed and the potential candidate pool is finalized and interviews commence. In such event, the instruction to the search committee is to do additional targeted outreach to broaden the applicant pool and provide an opportunity to broaden the potential candidate pool, not to add minorities or women to the list of candidates to be interviewed. At this point, there has been no communication made to any applicant or member of the applicant or candidate pool that leads him or her to believe that the outreach period has been closed or that the candidate pool has been chosen, and in fact the process of defining these pools is not yet completed. It may be helpful to certify adequacy of outreach before any deadline for completing outreach occurs and to include in initial advertisements that a notice will be posted on a web page with the date when the application period is closed following completion of outreach.

If all reasonably possible outreach is undertaken and the pool of applicants and those with the potential to be interviewed do not include minorities and women, then it is reasonable to conclude that there is likely a significant deficit of qualified and available
minorities and women (i.e., a severe “pipeline problem”), and interviews and the rest of the process proceeds.

It is critical that Deans and unit heads be well-informed of available resources for outreach and hold search committees accountable for undertaking all reasonably possible outreach. It is important that a committee or official at the institution have responsibility for keeping such hiring authorities and search committees well informed.

6. Removing Unnecessarily Restrictive Qualifications, Without Affecting Quality. To remove barriers to employment of minorities and women, the qualification prerequisites in position descriptions and advertisements, as well as in the minds of the search committee members, are challenged to ensure that they are not unnecessarily limiting and that they include sufficient flexibility to consider individual situations (e.g., non-traditional background, a justifiably longer period of development of scholarship, family obligations, training at more than a small group of institutions, etc.), while maintaining high standards for intellectual capacity, academic achievement and promise. This approach requires a close and individual assessment, rather than a reliance on generalizations. This review and establishment of qualification prerequisites is done before the relevant positions are advertised; changes in qualification prerequisites are not made once the hiring process has attracted applicants for the applicant pool. The same criteria are applied to all applicants and candidates, but they are sufficiently flexible to favorably consider non-traditional as well as traditional backgrounds.

7. Relationship-Building Guest Lectures. Be aware of opportunities posed when talented junior and senior minority and female faculty are invited to lecture in the department to build familiarity and a relationship. When opportunities arise, extend a personal invitation to apply to minorities and women of interest. Senior guest lecturers are not only prospects for appropriate positions, but also may be sources of nominations when junior positions open. The funding provided is limited to travel and a small honorarium, and the lecture does not constitute even a temporary position. (This assumes travel and a small honorarium are also provided when others guest lecture.) Where awareness is raised to recognize the opportunity provided by guest lecturers for future recruiting data are kept to demonstrate that men and non-minorities are frequent guest lecturers, and targeted organized efforts are made to also invite women and minorities who have not been as frequently invited, this is also pure outreach.

8. Improving Climate for Women and Minorities Through Benefits, Flexibility and Relocation Programs. Have and communicate the availability of family leave, career support for dual-career couples, work schedule and other programs that provide flexibility and support for all faculty, but that have particular importance to women or minorities, and break down barriers to their pursuit of success in academic careers, particularly at research universities. These measures will also increase the likelihood that individuals will accept offers of employment.
Examples of these climate-enhancing measures that are available to all faculty, regardless of race or gender, are: a) offer employment counseling and assistance to help spouses and domestic partners of new faculty to find a position in the area; b) offer adjunct faculty and lecturer roles for spouses and domestic partners; c) form a consortium of regional businesses and academic institutions to provide a Web site with available positions and networking opportunities in the area; d) offer participation in a regional recruiting organization; e) offer programs that provide family leave and flexible schedules for any faculty member who needs to care for infants or ill children, or ill spouse or parents; f) provide health insurance and possibly other benefits to domestic partners. These programs have been particularly helpful to women, but as gender roles evolve, they are increasingly important to many relocating faculty, regardless of gender or gender orientation.

Commentary. Where a college or university seeks to increase the diversity of its faculty, breaking down barriers to the employment of minorities and women and improving outreach are legally permitted and are a good first step. This is true whether the aim is to remedy the present effects of the institution’s own prior racial or gender discrimination or the institution’s passive participation in discrimination by others; to achieve its compelling educational interests; to remedy a manifest imbalance or underutilization of minorities or women in its workforce; or to attract minorities and women who are not effectively reached by other means. Such efforts may avoid or limit the need for affirmative action in the actual employment process or in connection with awarding significant benefits of employment. Outreach and barrier removal need only satisfy the “rational basis” standard of judicial review. Under this standard, an outreach and barrier removal program need only avoid being arbitrary and capricious. That standard will clearly be met if there is any relationship between the institution’s mission and fostering an environment of inclusiveness for a broad range of individuals.

This approach does not disparately burden non-minorities and men as long as they have (a) access to information about available positions, even if through different means of communication than are used to target minorities and women, and (b) non-minorities and men have opportunities to compete for employment in the same pool and to receive the same employment benefits, under the same criteria as apply to minorities and women. Funding and staff resources may be provided for outreach efforts that target only minorities and women, as long as there are also resources to continue other general outreach efforts that reach more traditional candidates. Resources may be provided for programs that benefit all employees even if they are essential to the success of women or minorities.

Additional Variations/Examples of Outreach and Barrier Removal

1. **Provide Community-Building Opportunities For Minority and Female Junior Faculty and Graduate Students To Support Their Pursuit of Faculty Appointments and Tenure.** Facilitate creation of peer communities for minority, female and other under-served (e.g., disabled) graduate students, post-doctoral fellows, and junior faculty members to foster their retention and access to the larger campus community. These groups are organized for minorities, women and other under-served individuals to support their success, as necessary to achieve mission-critical broad diversity. Minimal funding is provided for refreshments and minimal ancillary administrative support is provided.

Minorities, women and certain other under-served individuals are not well represented at the institution and would otherwise be isolated and impaired in accessing community-building opportunities. The institution has determined that others build community more easily. It is prudent to periodically evaluate the need and effectiveness of the practice, which is used as long as the need exists.

2. **Inspire Minority and Female Students and Faculty and Build Relationships Through Short Visits By Alumni Faculty.** Invite talented minority and female faculty from this institution or other institutions who are alumni of this institution to visit for a weekend to speak and meet with undergraduates, graduate students, and junior faculty. (This approach need not be limited to alumni visitors.) Travel costs are funded and possibly a small honorarium is provided to visitors; an annual event recognizes the commitment of mentors from this institution. The purpose of the program is to inspire this institution’s minority and female students and junior faculty to pursue STEMM academic and other careers at this institution and at other institutions nationally. An ancillary benefit may be building relationships with individuals who are minorities and women and may be recruited for faculty positions in the future.

Attendance at the program is open to any interested faculty or student of the department, regardless of race or gender. The stated and advertised purpose of the program would be to inspire minorities and women to pursue academic and other careers in STEMM disciplines and to stress the importance of their doing so. The program is part of the institution’s larger program in which speakers are invited without regard to race or gender; this is a focused complement of a general program of recruitment and outreach for all qualified individuals, where special attention is needed to reach minorities and women.

3. **Mentor Minority and Female Junior Faculty and Graduate Students to Support Their Pursuit of Faculty Appointments and Tenure.** Create a formal advising and mentoring program, staffed by senior faculty, peers, and administrators to provide advice, career counseling, and emotional and professional support to minority and female graduate students and junior faculty to help them better prepare to compete for faculty appointments and tenure. (If there are other demonstrably under-served groups that do not have access to mentoring, such as disabled or low-income individuals, the program is
open to them as well.) Practical, political, discipline-centric, and social advice and support are provided. Occasional informal, inexpensive get-togethers and meals are offered. An annual reception at the department, college or Provost’s or President’s residence may be provided to acknowledge participants.

Minorities and women are not well represented at the institution and would otherwise be isolated. The institution collects data (e.g., via junior faculty and graduate student surveys) demonstrating that minorities and women have difficulty accessing mentoring opportunities and are less familiar than their majority and male peers with the faculty appointment and tenure processes. This program is necessary to achieve mission-critical broad diversity. The effectiveness and need for this program are evaluated periodically and the program is used as long as the need exists.

If there are focus groups for minorities and women -- with an undetermined and variable number of places assigned to them -- within a larger mentoring program that is open to all who may need such assistance (e.g., based on first in family to pursue a STEMM or any academic career or other disadvantage criteria), and if the institution can demonstrate the availability of mentoring for others, then this program is likely to be regarded as barrier removal -- inclusive, not discriminatory -- and, with institution- and jurisdiction-specific analysis and consultation with counsel, may be suitable even for referendum and Executive Order states.

If this is a distinct program, but minimal resources are provided and comparable opportunities exist for anyone in need, this program also may be regarded as inclusive, not discriminatory, but advice of counsel is important, and jurisdictions may differ.

**Commentary.** If these efforts are a subset of an overall program available to faculty without regard to race and gender, and merely highlight availability of the same benefits to minorities and women, they should remain in the “barrier removal” inclusive category of efforts and pass muster even in referendum states. At some point, e.g., where significant funding or benefits are provided only for minorities or women, and non-minorities or men are appreciably burdened, activities designed to improve outreach or break down barriers will require greater justification to survive legal challenge. In all events, these programs are more sustainable where there is evidence that existing programs open to all do not provide meaningful or sufficient opportunity to minorities and women.

Refer to Race and Gender Affirmative Action programs, below, if the institution desires to, or due to limited resources must, devote significant funding or benefits only or very predominantly to minorities and/or women (e.g., if programs similar to the additional examples in 2-3 above are available only to minorities and women). Additional analysis and justification are warranted; however, these capacity-building programs are easier to justify than some others.

**Assessment of Impact**
1. **Accountability.** The President and Provost hold all Deans, who hold all academic/research unit heads, who hold all search committees, accountable for excellent outreach.

2. **Informal surveys** may be kept to determine important factors in decisions of minorities and women on whether or not to apply or accept an offer.

3. **Data** are collected to track increases in racial, ethnic, gender and socio-economic diversity of candidate pools and successful hires.

4. **Surveys and data collection** may be kept on opportunities available (informal and formal) to nonminorities and men as compared to minorities and women and to demonstrate that women and minorities are less well informed and prepared regarding tenure, promotion, and research support.

5. **Regression analysis** is done to show that minorities and women are statistically less likely to be hired, to be promoted or to receive tenure.

c. **Affirmative Action To Address Underutilization or a Manifest Imbalance in the Faculty Workforce, To Remedy Present Effects of Institution’s Own Prior Discrimination, or to Address a Pipeline Problem Where a Compelling Need Exists, There is a Trainable Cohort and the Pool is Artificially Restricted.**

   **Mission-related purpose; benefits to participants; institutional resources committed.**

   These programs require additional legal advice and assistance and a careful assessment of remedial justification, complemented by compelling educational interests under *Grutter.*

   Establish research assistantships, fellowships, research funding supplements, clustered summer or academic year research opportunities with multi-year cohorts of participants and senior faculty sponsors, where race and gender are criteria among others considered in selection (e.g., promise, accomplishments, personal qualities for success in STEMM fields, other disadvantage criteria), where factual and legal justification exist, and where the jurisdiction permits such consideration. These programs may be structured for junior faculty, post-doctoral fellows, graduate students, and undergraduates.

   These programs involve conferring significant benefits and require justification.

   These programs further the achievement of missing aspects of mission-critical broad faculty and student diversity. They are time-limited, capacity-building programs aimed, in the employment context, at remedying prior discrimination or a manifest imbalance in the workforce of a particular discipline (a significant disparity, but somewhat less than the 2 or more orders of magnitude that the Supreme Court has found constitutes a prima facie case of discrimination) or other substantial underutilization (e.g., the OFCCP 80

There is a pipeline problem if the qualified faculty pool in the discipline is artificially restricted by a history of exclusion at the institution, and generally in relevant educational programs and the workforce (so that little or no representation of women or minorities in a discipline at the institution does not constitute a manifest imbalance or other underutilization when compared with their representation in the qualified available pool). In such event, training, or other capacity-building programs such as these may expand the qualified pool, where targeted outreach, barrier removal and race- and gender-neutral efforts are inadequate. The EEOC has recognized this justification when needed and appropriately structured, see 29 C.F.R. §§ 1608, 1608.3(c), and following EEOC’s guidance is a defense to claims of discrimination, 42 U.S.C. § 2000e-12(b).

These programs rely on a remedial justification under Title VII and OFCCP guidelines and, if narrowly tailored, may be further supported by extension of Grutter/Title VI/Equal Protection analysis to faculty programs, fellowships, and research assistantships. Under 41 CFR §60-2.18(c), federal contractors, as part of their required affirmative action programs, must develop and execute action-oriented programs designed to correct any identified problem areas and to attain established goals and objectives. The contractors must demonstrate that they have made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results. OFCCP’s Federal Contract Compliance Manual, published in 2020, provides that where discrimination based on race, national origin, or sex is identified in pattern or practice cases, the preferred method for determining relief is formula relief (as opposed to victim-specific remedies), and, in addition to monetary relief, a “preferential hiring or promotion list” may be created “consisting of the members of the class and from which the contractor must make all selections to fill vacancies until the number of class members hired is equal to the shortfall. The contractor must hire class members before non-class members.”

These provisions have been applied in individual enforcement cases to give preferences for jobs or training to members of the class that has been discriminated against.

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288 In a 2018 conciliation agreement with the University of Maryland, College Park, OFCCP found that the University’s use of an Oral Board Interview for hiring University police officers resulted in a statistically significant disparity in the rates Black applicants advanced to the next stage of the hiring process and the University could not produce an acceptable validity study for the Oral Board Interview or any other evidence demonstrating its validity in accordance with Uniform Guidelines on Employee Selection Procedures. The remedy agreed to involved the cessation of use of the Oral Board Interview; a process whereby listed Black applicants could register for relief; all members of the class who registered would receive a share of a monetary settlement and, if interested in employment by the University, subject to meeting other requirements, would be conditionally hired by the University at prescribed starting salaries,
Based on an examination of multiple OFCCP compliance notices and conciliation agreements issued against educational agencies and institutions for approximately the last ten years, it appears that most of these cases impose remedies that eliminate barriers or other forms of discrimination, including outreach and recruitment efforts, but do not address race- or sex-based remedial preferences for jobs, promotions, or capacity building opportunities. Each of the disclosed letters and agreements involves violations

enrolled in a training program, and receive retroactive seniority. Similarly, in an August 2019 Conciliation Agreement with Thomas Jefferson University, OFCCP found that the University discriminated against female applicants in hiring for Security Officer positions by failing to apply its selection criteria uniformly for all applicants, resulting in a statistically significant difference in the rates at which male and female applicants were hired for these positions. The agreed to remedy included a cessation of the problematic selection procedures; a process for female applicants to register for relief; all members of the affected class who registered would receive a share of a monetary settlement and, if interested in employment by the University, as positions became available, the University would consider eligible and interested class members until the prescribed number of positions was filled or there were no more interested class members. In addition, as in the University of Maryland case, all hired class members hired would receive retroactive seniority.

E.g., June 26, 2016, Compliance Letter & September 13, 2016, Conciliation Agreement finding that St Louis University failed to perform in-depth analyses of its total employment process to determine impediments to equal employment opportunity, with the remedy being to require such analyses at least annually; August 30, 2014, Compliance Letter & May 9, 2014, Conciliation Agreement finding that Bethel University failed to consider internal availability (the percentage of minorities and women among those promotable, transferable, and trainable within the contractor’s organization), failed to use the most current and discrete statistical information available to drive availability figures, and failed to correctly compare incumbency with availability and establish placement goals, with the remedy to correct these deficiencies on a prospective basis; November 25, 2013, Compliance Letter & December 19, 2013, Conciliation Agreement finding that Indiana University at Bloomington failed to develop and execute action-oriented programs designed to correct identified problem areas and to attain established goals and objectives, including failing to demonstrate good faith efforts to recruit minorities and women, remove identified barriers, expand employment opportunities, and produce measurable results, with the remedy to correct these deficiencies, including, where there is underutilization, providing written notification with prescribed information to specified minority and female recruitment sources and to community organizations when there are available employment opportunities at the University; March 6, 2008 Compliance letter & March 10, 2008, Conciliation Agreement finding that Valparaiso University failed to submit an acceptable availability analysis that compared incumbency to availability identifying job groups where the percentage of minorities and women is less than would be reasonably expected, thus making the goals unacceptable, with the remedy being prospectively to do that analysis and, when the percentage of minorities or women employed in a job group was less than would reasonably be expected, to establish a percentage annual placement goal, at least equal to the availability figure derived for minorities or women for that job group;
of requirements to analyze and take actions to address any deficiencies in employment opportunities for minorities or women, but do not specifically address whether or to what extent there was a discriminatory impact on women or minorities resulting from these violations. For example, the letters address whether a school complied with process requirements to identify adverse impact of employment components based on race, sex, or ethnicity, and steps to remedy any such deficiencies, but they do not expressly address whether or the extent to which such violations in fact resulted in discriminatory effects or, if so, what the appropriate remedy would be. In many of the cases, it may have been difficult to assess whether and the extent to which there were discriminatory effects since the deficiencies prevented or inhibited that determination. The footnote gives examples from these letters, but does not summarize every finding in the letters.

The Grutter rationale is a logical underpinning for faculty diversity efforts and is recognized as a possibility by EEOC in its April 2006 agency guidance/compliance manual, but has not been addressed by the Supreme Court or definitively acknowledged by EEOC. Although they have not yet done so, if the Court -- or EEOC -- were to definitively recognize a compelling educational need and First Amendment protected interest in a broadly diverse faculty as consistent with the purposes of Title VII, that may provide an independent justification for these programs under Title VII. Alternatively, such Court or EEOC recognition of a compelling educational need for a diverse faculty might combine with a lesser remedial justification (e.g., based on one of the more liberal OFCCP underutilization tests, see OFCCP Guide) to suffice under Title VII.

If an assistantship is structured as an educational program (or if Grutter is an additional justification for an employment program -- or if a public institution is involved in an employment program so that Equal Protection applies in any event), the program would be subject to the requirements of Grutter for strict judicial scrutiny and narrow tailoring. (This means the program is tied to a compelling mission-driven interest; race and, possibly, gender are used only to the extent necessary to achieve that interest and are applied in a flexible manner that does not assign the same weight to race or gender for all applicants of the same race and gender; all candidates are evaluated under the same criteria; and the program is effective, time-limited to the period in which the need exists, and evaluated periodically).

June 19, 2012 & Conciliation Agreement of June 25, 2012 finding that Blinn College failed to establish placement goals that were at least equivalent to the availability figure calculated in accordance with OFCCP regulations, with the remedy being to establish placement goals that met these requirements, and finding that Blinn College had failed to conduct an adverse impact analysis by job, with the remedy that it do so on at least an annual basis to determine whether adverse impact exists against applicants based on race, gender, or ethnic group in hiring, promotion, termination, and other personnel activities with regard to the total selection process and, if adverse impact is so identified, for individual components of the selection process and, if such adverse impact is identified, to validate each such component in accordance with Uniform Guidelines on Employee Selection Procedures or utilize selection procedures that do not result in adverse impact.
(i) Considering Race And Gender As One Of Many Factors In Employment Benefits, But Not For Layoffs

Where a manifest imbalance or substantial underutilization at the institution exists, or there is a pipeline problem where there is an artificially restricted pool and, through training or other capacity-building the pool can be expanded, and where targeted outreach and barrier removal, and race- or gender-neutral efforts have proven to be inadequate, race and gender may be taken into account as factors among many in holistic reviews of each candidate for a special program or benefit (e.g., research space, start-up resources for equipment, post-doctoral fellows and graduate student assistants, and research supplements). Race and gender are not considered in determining whom to lay off from existing positions. Men and non-minorities are not barred from competing for special programs and benefits.

(ii) Mentor And Provide Community-Building Opportunities For Minority And Female Junior Faculty And Graduate Students To Support Their Pursuit Of Faculty Appointments And Tenure

Create a formal advising and mentoring program, staffed by senior faculty, peers, and administrators, to provide advice, career counseling, and emotional and professional support to minority and female graduate students, post-doctoral fellows, and junior faculty to help them better prepare to compete for faculty appointments and tenure. Practical, political, discipline-centric, and social advice and support are provided. Occasional informal get-togethers and meals are offered. An annual reception at the department, college or Provost’s or President’s residence may be provided to acknowledge the participants.

This is a time-limited capacity-building program aimed at remedying prior discrimination or a manifest imbalance in the workforce or other substantial underutilization issue (e.g., the OFCCP 80 percent measure), or a pipeline problem where there is an artificially restricted pool and, through training or other capacity-building, the pool can be expanded and where targeted outreach, barrier removal and race- and gender-neutral efforts are inadequate. (See Sections VIII.A.1, 3, 5 and 6, supra.) This is a focused program that complements and exists within the context of other, generally available programs. The institution documents through data, surveys and/or focus groups that minorities and women have limited representation and may be relatively isolated, making their access more difficult to the formal or informal mentoring that is generally available to others.

(iii) Relationship And Capacity Building Through Visiting Faculty And Post-doctoral Fellowships, And Graduate Research Assistantships

Invite talented recent minority or female PhDs and junior and senior minority and female faculty to be post-doctoral fellows or visiting faculty in the department to build familiarity and relationships. Build capacity beginning in graduate school by providing some graduate research assistantships to minorities and women. These programs demonstrate
to minorities and women that they are welcome. They are time-limited positions that build capacity and relationships to help participants compete more effectively for permanent positions. These positions are focused, complementary efforts within the context of similar, generally available post-doctoral fellowships, visiting opportunities, and assistantships. (See Sections VIII.A.6 and B, supra). When a position opens, extend a personal invitation to apply to minorities and women of interest. Senior visiting faculty are not only prospects for appropriate positions, but also may be sources of nominations when junior positions open.

These are time-limited capacity-building programs aimed at righting discrimination, a manifest imbalance or underutilization, or a pipeline problem where there is an artificially restricted pool and, through capacity building, the pool can be expanded and where targeted outreach, barrier removal and race- and gender-neutral efforts are inadequate. The problem arises from minorities and women being historically excluded from STEMM academic and other careers. (See Sections VIII.A.1, 3, 5, and 6 and Sections VIII.B and C, supra.) The institution documents through data, surveys and/or focus groups that minorities and women have limited representation and are relatively isolated, making their access more difficult to the formal or informal visiting opportunities and assistantships that are generally available to others.

(iv) Research Funding Supplements

Race and/or gender is considered as a factor among many in providing research funding to junior minority and women faculty to help them succeed in the first several years of their career, or through tenure. This is a time-limited benefit for the first several years of their career and is a start-up/training supplement for individuals who satisfy certain disadvantage criteria that pose barriers to success, including women and minorities where they have limited representation. This benefit enhances preparedness for tenure. The program remedies discrimination, a manifest imbalance or substantial underutilization at the institution or a pipeline problem where there is an artificially restricted pool and, through capacity building, the pool can be expanded and where targeted outreach, barrier removal and race- and gender-neutral efforts are inadequate. (See Sections VIII.A.1, 3, 5 and 6, supra.) Such support is narrowly tailored, has a remedial purpose and is finite in duration.

(v) Clustering Minority Or Women Fellows, Research Assistants, Or Junior Faculty

A group of minorities or women (only) are selected to work together in a cluster as graduate assistants or fellows or in a junior faculty program to create a community of social and professional support to enhance retention and foster access to the larger campus community. Senior academic administration offers full or partial funding and must ultimately approve the selected cohort. This is a limited-in-time training program that builds capacity. It is aimed at righting discrimination, a manifest imbalance or substantial underutilization, or a pipeline problem where there is an artificially restricted pool and, through capacity building, the pool can be expanded and where targeted
outreach, barrier removal, and race and general neutral efforts are inadequate. Minorities and women have been historically excluded from STEMM academic and other careers. (See Sections VIII.A.1, 3, 5 and 6, and Sections VIII.B and C, supra.) The institution documents through data, surveys and/or focus groups that minorities and women have limited representation and are relatively isolated, making their access more difficult to the formal or informal fellowships, assistantships and professional development opportunities that are generally available to others. These positions complement and are available within the context of generally available fellowships, research assistantships, and junior faculty opportunities. (See Sections VIII.A.6 and B, supra.)

(vi) Hiring Generally

Where there is compelling educational need combined with a manifest imbalance in the institution’s workforce, and where lesser efforts (outreach, barrier removal and neutral approaches) are inadequate, race and gender are taken into account under Title VII in holistic reviews of individuals to determine whether they should be on the list of candidates to be interviewed and/or whether a particular candidate should be hired or promoted. Race and gender are considered flexibly, are not weighed equally for all members of the same race or gender, and are not the only “plus” factor that may tip the balance for a particular applicant or candidate. Each candidate is evaluated under all of the same criteria. Men and non-minorities are not barred from competing for positions or promotions. (OFCCP guidelines require the actual hiring decision to be made on a non-discriminatory basis and do not support race- or gender-conscious hiring or promotion decisions.) See Sections VIII.A.1, 3, 5 and 6 and Sections VIII.B and C, supra, and consult counsel first to appropriately identify the justification and to design and implement the approach.

(vii) Target of Opportunity Hiring

[1] Unit-wide benefits (e.g., administrative support, equipment, graduate assistants, funding) are provided to those units that make exemplary progress in increasing faculty and/or student diversity. These benefits are not provided particularly to any individual (i.e., a person hired, a member or chair of a search committee), but inure to the benefit of the whole or a significant portion of the unit.

[2] Funding for a cluster of positions in multiple and flexibly defined disciplines is provided by the Provost/Dean to simultaneously hire several faculty who are less traditional in their individual disciplines or interactions with other disciplines. Race and gender are not factors, but the flexibility of discipline definitions, openness to non-traditional backgrounds, and simultaneous availability of multiple positions increase the potential for competitiveness of minorities and women within the cluster. Record of inclusive conduct and multi-cultural skills may also be a consideration.

[3] Funding/position is provided by the Provost/Dean to hire faculty who especially advance priority objectives of the institution: e.g., Nobel and other top prize winners;
National Academy members; those (of any race or gender) who are otherwise exemplary even among the usual high standards of the institution; those (of any race or gender) with proven records of exemplary inclusive conduct providing multi-cultural opportunities in teaching, research and/or mentoring (i.e., mission-critical behavior).

[4] After a unit makes a decision to hire, without knowledge of whether or not target of opportunity funding will be provided, it may apply to the Provost/Dean for target of opportunity funding if the individual hired especially advances priority objectives of the institution: e.g., Nobel and other top prize winners; National Academy members; those (of any race or gender) who are otherwise exemplary even among the usual high standards of the institution; those (of any race or gender) with proven records of exemplary inclusive conduct providing multi-cultural opportunities in teaching, research and/or mentoring (i.e., mission-critical behavior); missing aspects of broadly defined diversity. There is no guarantee of funding and funding is not part of the hiring decision. Funding provided after the fact is not paid to the target of opportunity candidate, but increases the pool of funding available for all hiring.

The institution maintains a written protocol setting forth hiring procedures which, among other things, include target of opportunity hiring as an essential, although not regular, tool for obtaining faculty who possess assets and characteristics that specially advance institutional mission. The hiring protocol makes clear that in any given search the target of opportunity option may be utilized if circumstances warrant, or a special position may be created to hire a particular individual. Target of opportunity hiring affords the institution resources and flexibility to move expeditiously to hire faculty who, for a variety of reasons, would otherwise be beyond reach. Processes and criteria are not changed once a hiring process commences and individual candidates are identifiable, as the policy pre-dates the particular hiring and overlays the process.
The EEOC’s affirmative action guidelines recognize that voluntary affirmative action may be appropriate to address an “actual or potential adverse impact” that is likely to “result from existing or contemplated practices;” to “correct the effects of prior discriminatory practices;” and to address an “artificially limited” labor pool that has resulted “[b]ecause of historic restrictions by employers.” If neutral approaches (e.g., multi-cultural skills and conduct), outreach and barrier removal are inadequate to remedy the underutilization or discriminatory effects, reasonable, not overly burdensome consideration of race or gender may be permissible as part of affirmative action plans and efforts under Title VII and EEOC rules. In addition, OFCCP rules require an affirmative action plan and good faith steps to remedy a federal contractor’s underutilization of minorities and women (although OFCCP rules also provide that the actual hiring or promotion decision must be made on a non-discriminatory basis).

**d. Inclusive Conduct and Multi-cultural Skills and Other Race and Gender-Neutral Approaches**

See Sections V.B and C on inclusive conduct and multi-cultural skills and other race- and gender-neutral approaches to achieving authentic mission-critical educational objectives apart from (but also possibly contributing to) racial and gender diversity.

**3. Assessment of Impact**

The following measures are implemented to assess the effect of these programs:

1) **Data are collected annually to identify any underutilization or manifest imbalance** in the representation of minorities and women in the faculty of each discipline at the institution, as compared with their representation in the qualified, available pool. Where a manifest imbalance or underutilization is found, a remedial affirmative action plan is developed. Where a pipeline problem is found, it too is documented and an assessment may be made of whether the pool is artificially limited due to a history of exclusion, but could be expanded through training and other capacity building for individuals who would then be better able to compete.

2) **Data are collected to track remediation of any underutilization or manifest imbalance found.**

3) **Data are collected to track the representation of minorities and women** in each department and major unit.

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4) *Surveys and focus groups* periodically assess the effect on education (including breaking down stereotypes), research and mentoring of minority and female faculty members. The effect on recruitment of, and acceptance of offers by, minorities and women are also assessed.
VII. AVAILABILITY OF BROADER DISCRETION WHEN JUSTIFIED

A. Congress’ Broader 14th Amendment, Section 5 Authority

The Supreme Court has recognized that Congress has greater latitude in taking race into account than state or local governments. In *Fullilove v. Klutznick*, the Supreme Court found constitutional a Congressional program which required that 10% of federal construction grants be set aside and awarded to minority business enterprises. The Court held that Congress had been granted unique remedial powers under Section 5 of the 14th Amendment of enforce the equal protection guarantees of that Amendment, and that Congress could exercise that power where the legislative history had reflected a nationwide history of systemic discrimination against minorities seeking federal construction grants. In *Croson*, the Supreme Court distinguished the local ordinance at issue there from the set aside program in *Fullilove* established by Congress under its broader powers granted under Section 5 of the 14th Amendment, noting that a factor in the result in *Fullilove* was the Court’s obligation to provide greater deference to the actions of the Congress, a co-equal branch of government. Under *Adarand*, strict scrutiny also applies to federal action. However, Section 5 may provide the necessary justification to survive strict scrutiny with a narrowly tailored approach.

*Fullilove* and *Croson* suggest that Congress could adopt legislation enabling the National Science Foundation, National Institute of Health, and other STEMM research funding agencies to pursue more aggressively programs directly aimed at increasing the number of minority and female faculty and students in STEMM fields. This is consistent with Congress’ enactment of the Science and Engineering Equal Opportunity Act of 1981 (“SEEOA”), which gives the NSF “standing authority’ to encourage full participation of women, minorities and other groups currently underrepresented in scientific, engineering, and professional fields.” The legislation also established the Committee on Equal Opportunities in Science and Engineering (“CEOSE”) to advise the NSF concerning options for achieving full participation of minorities and women in those fields. Under this legislation, the NSF has provided fellowship grants through the Minority Postdoctoral Research Fellowship Program (“MPRF”) to assist underrepresented minorities in preparing to compete for positions in academia and industry. In its 2004 Report to Congress, the CEOSE reported on the MPRF’s progress: from 1990 to 2002, 75% of the former fellows surveyed were employed at institutions of higher learning, mainly doctorate-level research universities. A large majority (80%) said the MPRF enabled them to develop professional experience they would not have otherwise developed and helped

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292 Id. at 458-67.
293 Id. at 488.
294 See also *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress overstepped its Section 5 authority in passing parts of the Violence Against Women Act of 1994, including its creation of a federal civil remedy to victims of gender-based violence).
them to enhance their research skills and focus their research interests. This experience is an indication that affirmative action to include underrepresented minorities and women can make a real difference. In its most recent 2005-2006 Biennial Report to Congress, the CEOSE stated that it would refocus its priorities to include “institutional transformation,” such that colleges and universities would become more inviting to, supportive of, and enabling of students and faculty from underrepresented groups both academically and socially.

The Supreme Court’s holding in *City of Boerne v. Flores* 295 affects the analysis of the extent of Congress’ authority under Section 5 of the 14th Amendment. If Congress chose to adopt additional legislation it would be on its strongest ground if it rested such legislation on hearings and findings that demonstrated nationwide problems in access to STEMM fields resulting from discrimination against women and minorities, or another compelling governmental interest necessitating faculty and students in STEMM fields. Use of the *Grutter* diversity rationale respecting students and an extension of the *Grutter* diversity rationale to faculty might suffice, as might a finding linking diverse faculty and students to the looming crisis in national security and world competitiveness as a result of shifting demographics and severe underrepresentation of minorities and, in many disciplines, women, in STEMM fields. There are other fields in which Section 5 may apply if supported by a strong evidentiary foundation.

### B. Private Foundations

In cases where higher education institutions are directly involved in the administration of private, externally funded programs (such as scholarship programs or research funding supplements), they are likely to be subject to strict scrutiny liability for those private practices, given the institutional role in actively supporting those programs. By contrast, in cases in which the program is funded from a completely separate entity and the institution of higher education may act only as a pass-through of the separate entity’s funding and program information, federal non-discrimination issues are not likely to be implicated, as a general rule.

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295 521 U.S. 507 (1997). Under the authority granted to it by Section 5 of the 14th Amendment, Congress has broad enforcement power and can legislate beyond simply providing remedies for the constitutional violation. Congress can enact statutes with criminal and civil penalties. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). So far, the Supreme Court has not disturbed its holdings on congressional authority under the post-Civil War Reconstruction amendments to legislate against racial discrimination. In *City of Boerne*, however the Court struck down the Religious Freedom Restoration Act (RFRA), which it found was not sufficiently congruent and proportional to the problem it was enacted to address. RFRA was not a race case, and there is a strong argument that when Congress acts to address racial discrimination, it is at the height of its 14th Amendment powers. The *Boerne* Court did not overrule *Morgan’s* interpretation of the broad power granted to Congress under the enforcement clause of the 14th Amendment; however, the Court did make clear there are limits to those powers. Consequently, when Congress acts pursuant to its Section 5 authority, it is on the most firm ground when it has a record that demonstrates “congruence” and “proportionality,” regardless of Morgan’s vitality.
Where the practices may fall between those two extremes, well-developed federal regulatory principles establish that institutions of higher education must satisfy relevant federal standards (under Title VI or Title IX, depending on the preference at issue) with respect to privately endowed aid in cases in which they administer or “significantly assist” in the administration of those funds. Thus, in cases where institutions of higher education that are recipients of federal funds provide administrative support (such as selection guidance) to separate private entities that fund certain scholarship recipients, they must be able to justify their participation in any such race-conscious program under Title VI legal principles.

More specifically, Title VI prohibits discrimination “directly or through contractual or other arrangements” and “in the administration” of financial aid programs. As applied by the U.S. Department of Education’s Office for Civil Rights, potential Title VI liability (and, consequently, the application of strict scrutiny) extends to situations in which higher education institutions fund, administer, or significantly assist in the administration of private financial aid. In such cases, that action will likely be deemed to be “within the operations of the college” and, therefore, subject to strict scrutiny.296

U.S. Department of Education regulations highlight the kinds of practices that are likely to subject higher education institutions to potential liability pursuant to strict scrutiny for the operation of private race-, ethnicity-, or gender-conscious scholarships. These include:

- Institutional assistance in setting criteria for the selection of students eligible for private scholarships;
- Institutional assistance in selecting qualifying students for private scholarships; and

296 The Office for Civil Rights has also confirmed that “individuals or organizations not receiving Federal funds are not subject to Title VI.” See U.S. Department of Education’s 1994 Title VI Final Policy Guidance (Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964 (Feb. 23, 1994)) (guidance withdrawn on other grounds and under review) at n.12; see also In re Northern Virginia Community College, Case No. 03962088 (Aug. 1, 1997) (approving the transfer of the “administration and award” of race-conscious scholarships to a private entity, where the higher education institution also “returned the funds for the scholarships to the [external] donors.”) It is important to note, however, that “OCR may examine the relationship among potential ‘external’ funders or administrators to ensure that they are, in fact, separate from the higher education institution. In one case, OCR rejected as ‘not a good choice’ a proposal by a college to allow a separate foundation to administer race-conscious scholarships that were funded from another external source. OCR indicated that the college’s ‘extensive ties’ to the foundation were problematic and would raise Title VI concerns.” In re Northern Virginia Community College, supra. An example of such impermissible close ties would be where the college’s Student Financial Aid Committee selected the scholarship recipients for the external, private foundation.
• Institutional assistance in supporting the external funder through advertising or promotion (beyond the general assistance provided to any outside entity that seeks to advertise its scholarship programs).
VIII. ENFORCEMENT

Several federal agencies have authority to enforce civil rights laws, and some of the agencies have overlapping authority. As a general rule, the U.S. Department of Education Office for Civil Rights has been delegated authority from other agencies to enforce civil rights laws -- including Title VI (race/educational programs and employment) and Title IX (gender/educational programs and employment) -- as they relate to educational institutions, whether in connection with their educational programs for students or employment of faculty or students. The U.S. Department of Justice has authority to enforce civil rights laws dealing with race or national origin, and it has the option to intervene in cases bringing claims under Title VI, Title VII (employment), and Title IX where the government has an interest in the issues being litigated. The Equal Employment Opportunity Commission has enforcement authority under Title VII, and the Office of Federal Contract Compliance Programs has authority to enforce certain Executive Orders dealing with the employment conduct of federal contractors. Accordingly, understanding the enforcement of the civil rights laws requires a basic understanding of which agencies have authority and jurisdiction over certain claims.

A. U.S. Department of Education Office for Civil Rights Under Title VI and Title IX: Educational Programs and Employment

The U.S. Department of Education’s Office for Civil Rights (“OCR”) is a law enforcement agency, charged with the responsibility of ensuring that recipients of federal funds do not engage in discriminatory conduct. OCR enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; discrimination on the basis of gender is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and discrimination on the basis of age is prohibited by the Age Discrimination Act of 1975. OCR also has enforcement responsibilities under Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public entities, whether or not they receive federal financial assistance.297 Most federal agencies have delegated certain compliance responsibilities pursuant to Title VI, Title IX, and other civil rights laws to the Department of Education to the extent they relate to educational institutions. As a result, the Department of Education is the lead agency for Title VI and Title IX compliance.298

The civil rights laws enforced by OCR extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary

297 See generally www.ed.gov/about/offices/list/ocr/index.html for a comprehensive description of OCR’s mission and scope of authority. See Appendix I, infra, for a summary of these laws and their application.

schools, state vocational rehabilitation agencies, libraries, and museums, as well as all private institutions that receive U.S. Department of Education funds and other agencies’ funds through delegations to the Department of Education. Areas covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment.

OCR investigates complaints filed by individuals and also conducts compliance reviews of institutions that OCR selects. When an individual complaint involves a claim of employment discrimination under Title VI or Title IX, the Department of Education generally refers the complaint to the Equal Employment Opportunity Commission (“EEOC”).\(^{299}\) Refer to Appendix 1 for a fuller discussion of the enforcement process. OCR itself handles complaints involving claims of discrimination in non-employment educational programs.

OCR is obligated by law to investigate, and resolve where possible, complaints filed with OCR that state a claim under various nondiscrimination laws. There is no “standing” requirement.\(^{300}\) OCR may also initiate investigations known as compliance reviews, which are agency-initiated investigations typically based on information suggesting potential noncompliance by a recipient of federal funds.

In the event that OCR determines there is sufficient evidence to conclude that a recipient is not in compliance with federal law, OCR may: (1) enter into a voluntary resolution agreement with the recipient, stipulating terms pursuant to which legal compliance will be achieved; or (2) issue a letter of findings, which may precede the initiation of enforcement proceedings. OCR is obligated by federal law to attempt a voluntary resolution when issues of non-compliance are found before proceeding to more formal enforcement steps.

(Detailed procedures for evaluating, investigating, and resolving complaints, conducting compliance reviews, and initiating enforcement are contained in OCR’s Case Processing Manual, updated in 2020, at [http://www2.ed.gov/aboutoffices/list/ocr/docs/ocrcpm.pdl](http://www2.ed.gov/aboutoffices/list/ocr/docs/ocrcpm.pdl).

OCR has two basic avenues for enforcement if it finds non-compliance with Title VI or Title IX: (1) suspend or terminate federal funds to the institution, and/or refuse to provide prospective financial assistance to the institution; or (2) refer the matter to the Department of Justice with a recommendation that enforcement litigation be filed against the institution.\(^{301}\) Termination of or a refusal to grant federal financial assistance may be

\(^{299}\) See generally 28 C.F.R. §§ 42.601 - 42.613.

\(^{300}\) 34 C.F.R. § 100.7

\(^{301}\) See 34 C.F.R. § 100.8.
effected only after notice, an opportunity for a hearing on the record, an opportunity to appeal that decision to a review board and the Secretary of Education, and filing of a report with the House and Senate Committees with jurisdiction over the program involved.\textsuperscript{302}

Although the Civil Rights Restoration Act redefined the terms “program or activity” for purposes of coverage under Title VI, Title IX, and other civil rights statutes to refer generally to all operations of an institution that receives federal financial assistance, it did not revise the so-called pinpoint provision in these laws that limits the effect of fund termination by providing that it “shall be limited to the particular political entity, or part thereof, or other recipient as to whom a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . . .”\textsuperscript{303} “The procedural limitations placed on the exercise of such power were designed to insure that termination would be pinpointed . . . to a particular program that is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the [overall operation of an educational institution] that it thereby becomes discriminatory.”\textsuperscript{304}

In at least one respect, the Office for Civil Rights’ jurisdiction over substantive issues of discrimination based on race, national origin and gender may be broader in scope than that of a court. That is because U.S. Department of Education regulations based on Titles VI and IX bar not only intentional discrimination, but also the use of criteria or methods of administration that have the effect of subjecting individuals to “disparate impact” discrimination in the absence of an educational necessity.\textsuperscript{305}

\section*{B. Private Rights of Action Under Titles VI and IX: Educational Programs and Employment}

In addition to agencies’ enforcement of Titles VI and IX, private individuals (aggrieved students regarding educational programs and student and faculty regarding employment) can also assert Title VI and IX claims. The most common form of relief obtained through a private right of action is an injunction, but monetary damages can also be recovered for

\textsuperscript{302} See 34 C.F.R. §§ 100.8-11; 34 C.F.R. Part 101. The regulations also prescribe procedural steps that must be followed by OCR before a matter may be referred to the Department of Justice. 34 C.F.R. § 100.8(d).


\textsuperscript{304} Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969).

\textsuperscript{305} 34 C.F.R. § 100.3(b)(2). In Alexander v. Sandoval, 532 U.S. 275 (2001), the Supreme Court ruled that Title VI disparate impact regulations do not afford private litigants a remedy in federal court. However, this decision does not affect the authority or jurisdiction of the U.S. Department of Justice or the U.S. Department of Education’s Office for Civil Rights to enforce these regulations. Additionally, some courts have held that a private right of action alleging disparate impact against public actors may be sustained under 42 U.S.C. § 1983 (prohibiting any person acting under color of state law from violating federal laws). See, e.g., White v. Engler, 188 F. Supp. 2d 730 (E.D. Mich. 2001). But see S. Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001).
intentional discrimination under Title IX.\textsuperscript{306} States do not enjoy Eleventh Amendment immunity from monetary liability under Title IX.\textsuperscript{307}

The courts have generally held that Title VII’s \textit{substantive} standards apply when evaluating claims of employment discrimination under Title IX.\textsuperscript{308} DOJ has taken the same view with respect to agency investigations.\textsuperscript{309} The same is not true with respect to the \textit{procedural} requirements for cases brought by private individuals:

The Supreme Court has yet to explicitly decide whether the far more detailed and comprehensive procedural requirements of Title VII are applicable to claims of employment discrimination brought under Title IX. The lower courts that have faced this question are divided. One view treats Title IX as an independent basis for finding discrimination based on the substantive standards of Title VII, but divorced from its administrative requirements. Under this view, complainants filing complaints under Title IX are not subject to Title VII’s filing deadlines, exhaustion of administrative remedy requirements, and state referral requirements, but are still governed by Title VII’s substantive standards. The other view is that the more focused and detailed enforcement scheme of Title VII preempts Title IX in the area of employment discrimination. Under this view, employees of federally assisted education programs operated by recipients of federal financial assistance have only a Title VII remedy for sex-based employment discrimination.

The Department takes the position that Title IX and Title VII are separate enforcement mechanisms. Individuals can use both statutes to attack the same violations.\textsuperscript{310}

As noted above, Title IX generally tracks Title VII’s substantive analysis. Title VII provides that sex may constitute a bona fide occupational qualification, and the Title IX common agency rule likewise reflects such a BFOQ exception:


\textsuperscript{308} See, \textit{e.g.}, \textit{Johnson v. Baptist Med. Ctr.}, 97 F.3d 1070, 1072 (8th Cir. 1997) (“When a plaintiff complains of discrimination with regard to conditions of employment in an institution of higher learning, the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case.”).

\textsuperscript{309} See \textit{U.S. Dep’t of Justice, Title IX Legal Manual}, at 39 (“In conducting an investigation alleging employment discrimination [under Title IX], agencies shall consider Title VII case law and EEOC Guidelines, 29 C.F.R. parts 1604-1607, unless inapplicable, in determining whether a recipient ... has engaged in an unlawful employment practice”).

\textsuperscript{310} \textit{U.S. Dep’t of Justice, Title IX Legal Manual}, at 39 (citations omitted).
A recipient may take action otherwise prohibited ... provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons....

DOJ has cautioned that “BFOQ’s are very narrow exceptions.”

A “common rule” has been adopted by numerous federal agencies to address the enforcement of Title IX. See “Nondiscrimination of the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” 65 Fed. Reg. 52857 (Aug. 30, 2000) (also available at www.justice.gov/crt/coord/t9final.php). Among other things, these common regulations require gender-based recruitment in the remedial context: “Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.” See id. at 52873 (§.510); see also, e.g., 45 C.F.R. § 86.53(a) (HHS version of common rule).

C. U.S. Department of Justice Under Title VI and Title IX: Educational Programs and Employment

The U.S. Department of Justice has several authorities for enforcement against discrimination based on race or national origin, through the initiation of, or intervention in, court litigation:

- The U.S. Department of Justice may enforce against possible discrimination based on referrals by the U.S. Department of Education under Title VI of the Civil Rights Act in connection with educational programs or covered employment. DOJ generally seeks to settle these cases prior to filing litigation, and its enforcement guidelines include alternative administrative options for seeking resolution. See 28 C.F.R. § 50.3.
- Under Title VI of the Civil Rights Act of 1964, DOJ may file or intervene in litigation if (among other things) the Department receives a written complaint that an individual has been denied admission, financial aid, or other educational benefit, or was not permitted to continue to attend a public college because of race, color, religion, sex, or national origin; the Department believes the complaint is

311 34 C.F.R. § 106.61.

meritorious, gives notice of the complaint to the college authority, and is satisfied that the college has had reasonable time to correct the condition alleged in the complaint; and the complainant is unable, in the Department’s judgment, to maintain appropriate legal proceedings for relief. See 42 U.S.C. § 2000c-6.

- DOJ may file or intervene in litigation under Title IX alleging gender discrimination (whether in educational programs or employment) or denial of equal protection of the laws under the 14th Amendment of the Constitution based on race, color, religion, sex, or national origin; or in lawsuits brought under the statutes it administers or where the government has an interest or where a claim or defense has been raised based on a statute or regulation administered by a federal agency. DOJ also may file an amicus curiae (“friend of the court”) brief or otherwise participate as an amicus in cases relating to enforcement of the civil rights laws.


The Equal Employment Opportunity Commission (“EEOC”) has enforcement authority under Title VII, and can initiate litigation directly or by way of a referral to DOJ. 313

Private individuals can also assert Title VII claims. The remedies available for Title VII violations include:

- Back pay for up to two years
- An order to hire, promote, or reinstate (courts have also ordered the demotion of someone whose promotion was the product of discrimination)
- Front pay (an equitable remedy and a substitute for reinstatement when reinstatement is unavailable)
- Other actions to make an individual “whole”
- Compensatory damages including various non-pecuniary losses (e.g., emotional suffering) --but available only in disparate treatment and not in disparate impact cases
- Punitive damages -- but available only in disparate treatment and not in disparate impact cases; requires a showing of malice or reckless indifference; cannot be awarded against federal, state, or local governments
- Attorneys’ fees and court costs “may” be allowed, to the “prevailing party” 314

In addition to pursuing a complaint involving a limited number of specific individuals, the EEOC has the authority under Title VII to file a complaint which alleges a “pattern or practice” of discrimination involving a broad class of individuals. See 42 U.S.C. § 2000e-6.

Section 702(a) (like Executive Order 11246, as amended) exempts religious corporations, associations, educational institutions, or societies from requirements in Title VII with


314 See 42 U.S.C. §§ 2000e-5(g), 5(k); 29 C.F.R. Parts 1600, 1604, 1691.
regard to the “employment of individuals of a particular religion to perform work
cconnected with to the carrying on of their activities.”

Unlike the Executive Order, Title VII does not include express provisions indicating that
such religious employers are not exempted from complying with other non-discrimination
provisions in Title VII. However, the Title VII religious exemption has been interpreted
not to exempt religious organizations from Title VII prohibitions of employment
discrimination, including race, sex, national origin, sexual orientation, and gender
identification, but they could present difficult issues in particular circumstances where
religious doctrine may overlap with allegations of discrimination on the prohibited
bases. 315

E. Office of Federal Contract Compliance Programs: Employment

Enforcement of Executive Order 11246 can take the form of an administrative procedure
or a referral by the Office of Federal Contract Compliance Programs (“OFCCP”) to the
EEOC or DOJ to initiate judicial proceedings. The jurisdictions of the EEOC and OFCCP
sometimes overlap, and the agencies have entered into a Memorandum of
Understanding to coordinate their enforcement roles.

OFCCP investigates violations of these Executive Orders through compliance evaluations
or in response to complaints. 316 If a violation is found, OFCCP typically asks the federal

315 See Appendix I, infra, for a fuller discussion of this issue. Discrimination by federal contractors and
subcontractors based on sexual orientation or gender identification is expressly prohibited by Exec. Order
13672 and its implementing regulations. Title VII does not expressly include sexual orientation or gender
identity in its list of prohibited discrimination by employers, but EEOC has interpreted the law to bar
discrimination on these bases. Recently, the Supreme Court held that Title VII prohibits discrimination
because of an employees’ sexual orientation or gender identity. Bostock, 140 S.Ct. 1731 (2020). However,
Title VII Exec. Order 11246 and OFCCP regulatory amendments in 2020 and 2021, 41 C.F.R. part 60-1.5
include specific exemptions for religious employers.

Although none of these cases directly involve employment discrimination under Title VII or Executive Order
11246, during the regulatory amendment process, OFCCP cited as supporting its then proposed regulation
the right of a Colorado bakery to refuse to make a wedding cake for a same-sex couple based on the baker’s
religious opposition to same-sex marriage); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)
(upholding the right of a for-profit company to opt out of requirements in the Affordable Care Act to provide
insurance for their employees that covers approved contraceptive methods, which conflicted with the
religious beliefs of company ownership); and Trinity Lutheran Church of Columbia, Inc. v. Comer
(upholding the eligibility of a church school under the Constitution’s First Amendment Free Exercise of Religion clause
for federal grants to upgrade its playground, despite a provision in the Missouri Constitution barring public
financial assistance to a church.

2018-07 (August 24, 2018), OFCCP announced stepped-up procedures to verify that all federal contractors
are preparing and updating their written affirmative action programs. It acknowledged that based on the
size of the contractor population and other factors, it has been able to conduct compliance evaluations of
only a portion of federal contractors and cited GAO findings on the need for enhanced OFCCP monitoring
processes. The enhanced processes include annual certifications by contractors of their compliance with
contractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP can initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor, or it can refer the matter to the EEOC or to the DOJ. OFCCP can pursue (or refer) “individual” discrimination complaints, as well as “pattern and practice” discrimination complaints.

If OFCCP files an administrative complaint, an ALJ hears the case and recommends a decision. If the contractor is dissatisfied with the ALJ’s decision, it may appeal to the DOL’s Administrative Review Board. The Board issues the final decision in all cases, even if there is no appeal.

If the Board finds a violation, it will order the contractor to provide appropriate relief, which may include back pay and restoration of employment status and benefits for the victim(s) of discrimination. Violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, debarment, and/or other sanctions. Contractors can appeal Board decisions to the federal courts.
APPENDIX I: RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY AUTHORITY

1. Equal Protection Clause (U.S. Constitution, 14th Amendment)

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

Public institutions are subject to Constitutional restrictions; private institutions are not. However, because Title VI has been held to be coextensive with the Equal Protection Clause, private institutions that receive federal funds are effectively subject to the same restrictions as those that arise under the Equal Protection Clause.

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


Provides that, if any part of an institution, agency or corporation receives federal financial assistance, the following non-discrimination laws apply to the entire institution, agency or corporation, and not just to the department or division that received the funds: Title VI, Title IX, the Age Discrimination Act, and Section 504 of the Rehabilitation Act.

The CRRA includes a definition of “program or activity” that applies specifically in the educational context:

For the purposes of this subchapter, the term ‘program or activity’ and the term ‘program’ mean all of the operations of—

* * *

(A) a college, university, or other postsecondary institution, or a public system of education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

* * *
any part of which is extended Federal financial assistance.


Jurisdiction under these statutes consequently applies to all activities and programs of an institution of higher education that receives federal funding. However, enforcement through loss of federal funding requires the violation of an act to have a nexus to the federal funds at risk (referred to as the “pinpoint provision”).

Regulations:


3. **Title VI (42 U.S.C. § 2000d)**

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

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


Title VI applies with respect to all aspects of an institution’s operations. However, Title VI restricts claims of employment discrimination to instances in which the “primary objective” of the financial assistance is to provide employment. See 42 U.S.C. § 2000d-3. (No such restriction applies with respect to employment claims brought under Title IX.) Thus, “where the primary purpose of the Federal assistance is to provide employment, the recipient may not discriminate on the basis of race, color or national origin against applicants for employment or employees in that program. For example, Title VI prohibits discrimination against applicants for or participants in ‘work study’ programs that receive Federal assistance.” Office for Civil Rights, U.S. Dept. of Education (“ED”), *Non-discrimination in Employment Practices in Education* 2 (1991) (“ED Pamphlet”).

When Title VI applies in the employment context, it “encompasses, but is not limited to,

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317 The “pinpoint provision” is discussed further in the section addressing Title VI.

318 ED’s Title VI regulations also forbid employment discrimination in a second situation: “where the primary purpose of the Federal assistance is not to provide employment, discrimination against employees or applicants for employment is prohibited by Title VI when the discriminatory practice results in discrimination against the program beneficiaries, usually students.” ED Pamphlet, *supra* at n. 180; see also 34 C.F.R. § 100.3(c)(3) (ED regulation); 28 C.F.R. § 42.104(c)(2) (DOJ regulation).
recruitment, advertising, employment, layoffs, firing, upgrading, demotions, transfers, rates of pay and other forms of compensation, and uses of facilities. The regulation applies to all employment decisions and actions made directly by ED recipients, as well as those made indirectly through contractual arrangements or other relationships with organizations such as employment agencies, labor unions, organizations providing or administering fringe benefits, and organizations providing training and apprenticeship programs.” Id.

As interpreted by the agencies and the courts, Title VI prohibits both intentional discrimination (disparate treatment) and the use of facially neutral procedures or practices that have the effect of subjecting individuals to discrimination based on their race, color, or national origin (disparate impact). The analysis of intentional discrimination claims under Title VI is similar to the analysis of disparate treatment under the Equal Protection Clause, Alexander v. Choate, 469 U.S. 287, 293 (1985), and can be proved through direct evidence of discriminatory motive or, in the absence of such evidence, using the Title VII burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (discussed below, in connection with Title VII). Title VI disparate impact claims are also analyzed using principles similar to those used under Title VII:

To establish discrimination adverse disparate impact, the investigating agency [or court] must first ascertain whether the recipient utilized a facially neutral practice that had a disparate impact on a group protected by Title VI. The agency must (1) identify the specific policy or practice at issue; (2) establish adversity/harm; (3) establish significant disparity; and (4) establish causation. See N.Y.C. Envtl. Justice All. V. Guiliani, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must “allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities.”). If the evidence establishes a prima facie case of adverse disparate impact . . . courts then determine whether the recipient has articulated a ‘substantial legitimate justification’ for the challenged policy or practice. . . ‘Substantial legitimate justification’ in a disparate impact case is similar to the Title VII concept of ‘business necessity,’ which requires an employer to show that the policy or practice is demonstrably related to a significant, legitimate employment goal. . .

Although determining a substantial legitimate justification is a fact-specific inquiry, Title VI case law and agency guidance set forth general requirements. For example, courts have required that the recipient show that the challenged policy was ‘necessary to meeting a goal that was legitimate, important, and integral to the [recipient’s] institutional mission’ In order to establish a “substantial legitimate justification.” Elston, 997 F.2d at 1412 (emphasis added). Courts have evaluated whether the policy was “necessary” by requiring that the justification bear a manifest
demonstrable relationship” to the challenged policy. Georgia State Conf., 775 F.2d at 1418 (11th Cir. 1985).

If a substantial legitimate justification for the recipient’s discriminatory policy or practice is identified, the investigating agency must also determine whether there are alternative practices that be comparably effective with less disparate impact. Title VI requires recipients to implement a “less discriminatory alternative” if it is feasible and meets their legitimate objectives. Elston, 997 F.2d at 1407; Georgia State Conf., 775 F.2d at 1417.

If the recipient can make such a showing, the inquiry must focus on whether there are any ‘equally effective alternative practices’ that would result in less racial disproportionality or whether the justification proffered by the recipient is actually a pretext for discrimination.


Enforcement:

The U.S. Department of Education (“ED”) has enforcement authority under Title VI as it applies to programs and activities funded by ED. ED’s Office for Civil Rights investigates complaints filed by individuals and also conducts compliance reviews of institutions that OCR selects.

If an investigation discloses a violation of Title VI, OCR attempts to obtain voluntary compliance. If it cannot do so, OCR may initiate an enforcement action, either by referring the case to DOJ for court action, or by initiating proceedings before an administrative law judge (“ALJ”), to terminate federal funding. Terminations are made only after the recipient has had an opportunity for a hearing before an ALJ and exhausted (or not exercised) its appeals.

The primary means of enforcing compliance with Title VI, however, is through voluntary agreements between the enforcing agency and the recipient of the federal

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319 More than 25 federal agencies have statutes, regulations, and/or guidance statements that impose civil rights obligations upon recipients of federal financial assistance from those agencies. Although this appendix does not include citations to all such legal authorities, they should not be overlooked.

320 When an individual complaint involves a claim of employment discrimination under Title VI (or Title IX), ED generally refers the complaint to the Equal Employment Opportunity Commission (“EEOC”). See generally 28 C.F.R. §§ 42.601-42.613.
financial assistance. The relief provided through such voluntary settlements can include an agreement to discontinue certain conduct, as well as back pay in employment cases or compensatory damages in nonemployment cases. The agency is required by statute to pursue voluntary compliance before terminating or refusing to grant financial assistance, and before referring a matter to DOJ to initiate legal proceedings. 42 U.S.C. § 2000d-1. Funding suspension or termination is a means of last resort.

If voluntary compliance efforts do not succeed, four procedural requirements must be met before an agency may deny or terminate federal funds to an applicant/recipient:

1) the agency must notify the recipient that it is not in compliance with the statute and that voluntary compliance cannot be achieved;

2) after an opportunity for a hearing on the record, the ‘responsible Department official’ must make an express finding of failure to comply;

3) the head of the agency must approve the decision to suspend or terminate funds; and

4) the head of the agency must file a report with the House and Senate legislative committees having jurisdiction over the programs involved and wait 30 days before terminating funds.

U.S. DOJ, *Title VI Legal Manual*, at 79. Given the severity of the sanction, on the one hand, and these procedural hurdles, on the other hand, it is not surprising that fund termination or suspension is a rare occurrence.

Moreover, when it does occur, the termination or suspension must be “limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found. . . .” 42 U.S.C. § 2000d-1. This so-called “pinpoint provision” was not modified by the Civil Rights Restoration Act of 1987, which addresses the interpretation of “program or activity” only for purposes of establishing coverage under Title VI and related statutes, and not for purposes of enforcing compliance with those statutes. Consequently, where a Title VI or IX violation occurs

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321 See also 42 U.S.C. § 2000d-1; 34 C.F.R. § 100.6; 28 C.F.R. § 42.601 et. seq.

322 As discussed above, the CRRA provides that Title VI, Title IX, the Age Discrimination Act, and Section 504 of the Rehabilitation Act apply to all of the operations of an institution if any part of the institution receives federal financial assistance. The statute thus superseded the Supreme Court’s decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), in which the Court held that Title IX applied to a private school whose students had received federally funded scholarships, but held that the regulation would only apply to the institution’s financial aid department and not to the school as a whole. See also *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, (1999) USED’s civil rights regulations, when originally issued and implemented, were interpreted to mean that acceptance of federal assistance by a school resulted in broad institutional
in a program (e.g., a summer program for high school students) that is supported by private, not federal, funds, the available remedy should not include loss of federal funds, unless discrimination in that program “infects” a federally funding program.

Private individuals can also assert certain Title VI claims. The Supreme Court has held that there is a private right of action under Title VI as to disparate treatment claims, but not disparate impact claims. See Alexander v. Sandoval, 532 U.S. 275, 293 (2001). The relief available in such cases includes injunctive relief as well as “monetary damages.” See Franklin v. Gwinett Pub. Sch., 503 U.S. 60, 72-76 (1992). States do not have Eleventh Amendment Immunity under Title VI (or under Title IX). See 42 U.S.C. § 2000d-7.

Regulations:

DOJ Title VI Regulations: 28 C.F.R. Part 42
DOJ Title VI Coordination Regulations: 28 C.F.R. § 42.401 et seq.
DOJ Title VI Enforcement Guidelines: 28 C.F.R. § 50.3
EEOC Title VI Regulations: 29 C.F.R. Part 1691

ED Title VI Regulations: 34 C.F.R. § 100.1 et seq. See generally: U.S. DOJ, Civil Rights Division, Regulations and Statutes, Title VI of the Civil Rights Act of 1964, https://www.justice.gov/crt/fcs/TitleVI#2 (last visited November 14, 2019).

4. Title VII (42 U.S.C. § 2000e)

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

Under Title VII:

It [is] an unlawful employment practice for an employer—

coverage. Following the Supreme Court’s decision in Grove City College, USED changed its interpretation, but not the language, of these regulations to be consistent with the Court’s restrictive view. When the CRRA was enacted, USED reinstated its broad interpretation to be consistent with the CRRA, again without changing the language of the regulations. Thus in 2000, USED amended language of the regulations to be consistent with the CRRA. The regulations now define “program or activity” or “program” as it is defined in the CRRA for the purpose of establishing coverage, but not for the imposition of penalties, which would apply only to that part of the institution specifically involved. See Conforming Amendments to the Regulations Governing Nondiscrimination Under the Civil Rights Restoration Act of 1987, 34 C.F.R. pts. 100, 104, 106, and 110 (2008), available at http://www.ed.gov/about/offices/list/ocr/docs/edlite-restorationactregs.html (last visited July 17, 2020).
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

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


To succeed on a claim under this provision, which prohibits disparate treatment, a plaintiff must show that the employer intentionally discriminated on the basis of a protected trait. Under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), a plaintiff may prove that an employment practice was intentionally discriminatory by first making a *prima facie* case sufficient to support an inference of discrimination (e.g., that the plaintiff was a member of a protected class; that the plaintiff was eligible and applied for the position or program in question; that he or she was rejected; and that the defendant selected individuals outside the protected class, or the position or program remained open and the defendant continued to accept other applications). If a *prima facie* showing is made, the defendant may rebut that showing by offering a legitimate, non-discriminatory reason for the employment action. The plaintiff then has the ultimate burden of persuasion and must show that the employer’s proffered reason is pretextual—*i.e.*, that the employer’s true reason for the practice was racially discriminatory. Of course, “if a plaintiff is able to produce direct evidence of discrimination,” he can prevail without using the *McDonnell Douglas* framework. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

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

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

42 U.S.C. § 2000e-2(e)(1). A race-based BFOQ was considered by Congress when the other BFOQ’s were considered, but no such race-based BFOQ was included in the statute as enacted. See 110 Cong. Rec. 2563 (1964) (amendment that would have added race to the list of potential BFOQ characteristics was defeated); Bryan W. Leach, “Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond,” 113 YALE L.J. 1093, 1094-95 (2004).

Title VII includes a provision which states that Title VII does not “require” any employer to grant “preferential treatment” because of an “imbalance” in its workforce:

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

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

42 U.S.C. § 2000e-2(j). But see discussion of OFCCP regulations infra, requiring federal contractors (which would include virtually all universities) to take certain actions to address “under-utilization” of women and minorities in their workforces.

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

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
(ii) the complaining party [proves that] an alternative employment practice [is available that has less disparate impact] and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1)(A). Title VII further provides that the “business necessity” defense is not available with respect to disparate treatment claims: “A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.” 42 U.S.C. § 2000e-2(k)(2).

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

(d) Training programs

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

* * *

(l) Prohibition of discriminatory use of test scores

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

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

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


The clear Congressional intent of Title VII was to encourage voluntary compliance to remedy discrimination in the workplace. However, employers who employ affirmative action plans in voluntary compliance with Title VII may be vulnerable to claims of reverse discrimination. The Equal Employment Opportunity Commission (“EEOC”) has issued

The EEOC affirmative action guidelines are of particular significance in light of the following statutory provision in Title VII:

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of ... the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission.... Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that ... after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect....


“It is important to note that the constitutional standard for justifying racial preferences is more stringent than the Title VII standard.” Stuart Licht, Analyzing Racial Classifications in Employment Discrimination Litigation, 52 U.S. Attorneys’ Bulletin 10, 11 (May 2004). It is also important to note that “[p]olicies that affect actual employment decisions, such as hiring, promotions, and layoffs, have been treated differently than policies that do not affect actual employment decisions, such as targeted recruitment and outreach designed to increase the pool of qualified applicants, and data collection and analysis conducted to ensure compliance with anti-discrimination laws.” Id.

Enforcement:

The EEOC has enforcement authority under Title VII, and can initiate litigation directly or by way of a referral to DOJ. See 42 U.S.C. § 2000e-5. Private individuals can also assert Title VII claims. The remedies available for Title VII violations include:

- Back pay for up to two years

- An order to hire, promote, or reinstate (courts have also ordered the demotion of someone whose promotion was the product of discrimination)
Front pay (an equitable remedy and a substitute for reinstatement when reinstatement is unavailable)

Other actions to make an individual “whole”

Compensatory damages including various non-pecuniary losses (e.g., emotional suffering) -- but available only in disparate treatment and not in disparate impact cases

Punitive damages -- but available only in disparate treatment and not in disparate impact cases; requires a showing of malice or reckless indifference; cannot be awarded against federal, state, or local governments

Attorneys’ fees and court costs (“may” be allowed to the “prevailing party”)
  - See 42 U.S.C. §§ 1981a(a)(1), (b); 2000e-5(g), 5(k).
  - Regulations:
    - EEOC Title VII Regulations: 29 C.F.R. Parts 1600, 1604, 1606, 1607, 1608, 16141691

5. Exemptions for Religious Employers Under Title VII, the Executive Orders, OFCCP Regulations and the Constitution

Title VII makes it illegal for an employer to discriminate in employment on the basis of race, color, religion, national origin, or sex, and it has been interpreted by the EEOC to bar such discrimination based on sexual orientation and gender identification. In addition, Executive Order 13672, issued by President Obama in 2014 as an amendment to Executive Order 11276, expands the prohibition of employment discrimination by federal contractors and subcontractors to cover not only discrimination based on race, color, religion, national origin, and sex, but also discrimination based on sexual orientation and gender identification.

However, both Title VII and Executive Order 11276 include exemptions for religious organizations. Section 702(a) provides:

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323 See also Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (2020).
“This subchapter [meaning the provisions barring discrimination] shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying out by such corporation, association, educational institution, or society of its activities.”

Section 703(e) of Title VII provides:

“Notwithstanding any other provision of this subchapter, . . . (2) it shall not be an unlawful employment practice -for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.”

Executive Order 11246 likewise provides, in Section 204c., that provisions of the Order regarding non-discrimination provisions that must be included in government contracts –

“. . . shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.”

(Emphasis added)

Although neither Title VII nor Executive Order 11246 defines a “religious corporation, association, or society,” definitions have been developed in cases decided by federal appellate and district courts. Courts have considered (1) the purpose or mission of the organization; (2) the ownership, affiliation, or source of financial support of the organization; (3) requirements placed on staff and members of the organization (faculty and students if the organization is a school); and (4) the extent of religious practices in or

324 These Title VII exemptions appear to apply only with respect to employment decisions regarding the hiring and firing of employees based on religion. “Once an organization makes a decision to employ an individual, the organization may not discriminate on the basis of religion regarding the terms and conditions of employment, including compensation, benefits, privileges, etc.” Cynthia Brougher, Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religion and Religious Organizations, 7-5700 Congressional Research Service, at pp.3-4 (January 20, 2011), www.crs.gov (citing to EEOC Notice, N-915, September 23, 1987). But see, Kennedy v. St. Joseph’s Ministries, Inc., 657 F.3d 189 (4th Cir. 2011) (overruling a district court decision that the Title VII exemption applied only to employment decisions like hiring and firing and does not apply to harassment or retaliation claims).

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the religious nature of products and services offered by the organization. Also, regulatory amendments adopted in 2020 and 2021 by the Department of Labor’s OFCCP provides broad and deferential definitions of “particular religion,” “religion” and “religious corporation, association educational institution, or society” to include entities and an individual’s or entity’s own understanding of their “sincere religious tenets” for purposes of qualifying for an exemption from prohibitions against employment discrimination based on religion by government contractors. By their terms, and as

325 See LeBoon v. Lancaster Jewish Community Center Association, 503 F.3d 217, 226-27 (3rd Cir. 2007) (providing a summary discussion of circuit courts’ interpretations of organizations that qualify under Title VII’s exemption; Cynthia Brougher, Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religion and Religious Organizations, Congressional Research Service, at p. 3, note 355.

326 OFCCP’s regulation amends 41 C.F.R. Part 60-1.3 (Definitions) and 60-1-5 (Exemptions). It creates a broadened definition of religion under a four-part test, emphasizes an “organization’s own sincere understanding of its religious tenets,” and embraces the broadest protection of religious freedom allowed by the U.S. Constitution and law, for purposes of determining what organizations are covered by exemptions from otherwise applicable prohibitions against employment discrimination on the basis of religion by federal contractors.

The regulation provides, in part:

Particular religion means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to sincere religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.

. . . . Religion includes all aspects of religious observance and practice, as well as belief.

. . . . Religious corporation, association, educational institution, or society.

(1) Religious corporation, association, educational institution, or society means a corporation, association, educational institution, society, school, college, university, or institution of learning that:

(i) Is organized for a religious purpose;

(ii) Holds itself out to the public as carrying out a religious purpose;

(iii) Engages in activity consistent with, and in furtherance of, that religious purpose; and

(iv)(A) Operates on a not-for-profit basis; or

(B) Presents other strong evidence that its purpose is substantially religious.

(2) Whether an organization’s engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization’s own sincere understanding of its religious tenets.

(3) To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: have a mosque, church, synagogue, temple, or other house of worship; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.

Section 60-1.5 (Exemptions) provides

. . . . (e) Broad interpretation. This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb et seq.

See the OFCCP news release https://www.dol.gov/newsroom/releases/ofccp/ofccp20201207: OFCCP Issues Final Rule Broadening its Religious Exemption for Federal Contractors, the National Review
applied in federal appellate and district court cases, these provisions apply not just to employees involved in religious activities, but to employees involved in any activity of the organization and to applicants for any position that involves carrying out the activities of the organization.\textsuperscript{327} Courts have interpreted these provisions not only to permit preferences in employing individuals who share the religious employer’s religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employer. Thus, the provisions have been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employers.\textsuperscript{328}

It is clear under the express terms of Section 204c of the Executive Order that the exemption for religious organizations in effect insulates such organizations from prohibitions of religious discrimination, but does not exempt them from prohibitions of discrimination based on race, national origin, sex, and -- with the issuance of Executive Order 13672 -- sexual orientation and gender identification. Although Title VII does not include a corresponding provision limiting the exemption to religious discrimination, courts have generally interpreted the Title VII exemption to be similarly limited.\textsuperscript{329}

\textsuperscript{327} A separate exception applies to the employment of ministers by churches. Based on the Free Exercise of Religion and Establishment of Religion Clauses in the First Amendment to the Constitution (and applicable to the states through the 14th Amendment) -- not on language in Title VII or the Executive Orders -- the Supreme Court has held that employment decisions regarding ministers are absolutely exempt from Title VII restrictions. \textit{Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.}, 565 U.S. 171 (2012). The “ministerial exception” had previously been recognized by federal appellate courts, starting with \textit{McClure v. Salvation Army}, 460 F.2d 553 (5th Cir. 1972). The Court’s rationale was that by interfering in the selection of a minister, the state or federal government infringed upon the Free Exercise Clause, and also infringed upon the Establishment Clause, which prohibits government involvement in ecclesiastical decisions. Although the Executive Orders regarding federal contractors and subcontractors were not before the Court in that case, the ministerial exception clearly would exempt ministerial positions from requirements in the Executive Orders as well. The Supreme Court declined to adopt a specific test for determining who is a minister for purposes of this exemption, but it considered four factors in making this decision: (1) the employee’s formal title; (2) the substantive actions reflected by the title; (3) the employee’s understanding and use of the title; and (4) the important religious functions performed by the employee. The Court used these factors to determine that a “called” teacher, required to be Lutheran and to be trained by the Synod -- as opposed to a lay or contract teacher -- came within the ministerial exception and could be fired by the church’s school without review under federal and state law, including the Americans with Disabilities Act.

\textsuperscript{328} \textit{Little v. Wuerl}, 929 F.2d 944, 951 (3rd Cir. 1991); \textit{Killinger v. Samford University}, 113 F.3d 196, 200 (11th Cir. 1997).

In its *Hobby Lobby* decision, the Supreme Court rejected the possibility that discrimination in hiring based on race might be cloaked as religious practice to escape legal sanction, asserting the proposition that the Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race and that prohibitions on racial discrimination are precisely tailored to achieve that goal. However, the Supreme Court’s express assurance referred only to discrimination based on race, not to discrimination based on sex, sexual orientation, or gender identification. No Supreme Court decision has addressed the possibility that discrimination based on sex, sexual orientation, or gender identification may be “cloaked” (or justified) as reflecting an employer’s religious principles and therefore exempted from Title VII or Executive Order bans on discrimination. Significantly, cases decided by federal appellate and district courts are divided on these issues. Many of them support deference to religion; in other words, if it is clear that the religion of a religious employer or its owners calls for such discrimination, that has been considered in a number of court decisions to come within the exemption. In 2020, the Supreme Court in *Bostock v. Clayton County*, interpreted Title VII to prohibit discrimination in employment based on sexual orientation and gender identity, while reserving the question of how the intersection of that prohibition and religious freedom rights should be resolved.

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330 See n. 315, *supra*.

331 A theme running through a number of these cases is the deference that courts have afforded to religious institutions known as the “church autonomy” doctrine or “ecclesiastical abstention,” rooted in the First Amendment’s Free Exercise and Establishment Clauses. The doctrine respects the authority of churches to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions free from governmental interference. It is the basis for the “ministerial exception” and it embodies the concern of federal courts to avoid applying federal statutes in a way that fosters excessive government entanglement with the affairs of religious organizations. *Garrick v. Moody Bible Institute*, 412 F. Supp. 3d 859 (N.D. Ill. 2019). It also may affect the judgment made by courts in deciding whether an adverse employment action that discriminates based on sex, sexual orientation, or gender identification but that also reflects sincere beliefs of a religious organization comes within the Title VII and Executive Order exemption for religious organizations.

332 See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); Oliver Encarnacion, *Lawful Religious Discrimination? The Ministerial Exception’s Almighty Spillage Over the Grayer Non-Ministerial Areas*, Seton Hall University, 2017, Law School Student Scholarship, 871 (https://scholarship.shu.edu/student_scholarship/871) (extensive discussion of cases in this area); *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 186 F. Supp. 2d 757, 763 (W.D. 2001) (holding that Kentucky Baptist Homes could legally fire a therapist for being a lesbian because that conflicted with the religious mission or principles of her employer); *Madsen v. Erwin*, 395 Mass. 715 (1985) (a case that did not involve a Title VII claim, holding that a sportswriter for the Christian Science Monitor could be terminated based on her sexual orientation and the case would entangle the court in an essentially ecclesiastical procedure, which would be impermissible under the Establishment of Religion Clause); *Boyd v. Harding Academy of Memphis, Inc.*, 887 F. Supp 157, 158 (W.D. Tenn. 1995), *aff’d*, 88 F.3d 410 (6th Cir. 1996) (holding that a religious school affiliated with the Church of Christ could, under Title VII, fire a pre-school teacher based on its policy against extra-marital sex, when she became pregnant out of wedlock, despite Title VII proscriptions against discrimination based on pregnancy); *Little v. Wuerl*, *supra*, footnote 328, at 951 (holding that a Catholic school could refuse to renew the contract of a non-Catholic
6. **Title IX (20 U.S.C. §§ 1681-1688)**

Prohibits sex/gender discrimination by “education” programs or activities that receive federal financial assistance:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

teacher whose divorce and remarriage did not conform to Catholic norms); *Chambers v. Omaha Girls Club*, 629 F. Supp. 943, 941-52 (D. Neb. 1986), *aff’d*, 834 F.2d. 697 (8th Cir. 1987), *rehearing denied*, 840 F.2d. 583 (8th Cir. 1988) (holding that the Club could fire an unmarried counselor who became pregnant on the basis that compliance with Christian traditions was a bona fide occupational requirement since she was expected to serve as a role model for adolescent girls); *Vigars v. Valley Christian Center of Dublin*, Cal., 805 F. Supp. 802, 810 (N.D. Cal. 1992) (requiring a trial to determine whether the religious school fired a librarian because she was pregnant out of wedlock (which the court indicated would be impermissible under the Pregnancy Discrimination Act, which amended Title VII in 1978 to bar discrimination based on pregnancy as a subset of discrimination based on sex, Sec. 701(4) of Title VII) or because she had an adulterous affair, which was inconsistent with the religious values of the church and school.) See also, *Herx v. Diocese of Fort Wayne-South Bend*, 48 F. Supp. 3d 1168 (N.D. In. Sept. 3, 2014) (involving a claimed violation of Title VII and the Americans with Disabilities Act for non-renewal of an employee’s employment contract after she underwent in vitro fertilization). The court denied summary judgment for the Diocese, holding that whether Mrs. Herx was nonrenewed because of her sex, or because of a sincere religious belief of the Diocese about the morality of in vitro fertilization was a triable issue, thus implying that the Diocese would prevail if its action against the complainant reflected its sincere religious belief regarding in vitro fertilization.

Other cases hold that the religious exemption does not authorize religious institutions to invoke religious precepts that justify or result in discrimination based on sex, sexual orientation, or gender identification. These include: *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 344, 359-60 (E.D.N.Y. 1998), (holding that a sectarian private school has the right to employ only teachers who adhere to the school’s moral code and religious tenets, but also that restrictions on pregnancy are not permitted because they are gender-discriminatory by definition but, by contrast, restrictions on sexual activity, applied equally to males and females, are not discriminatory, and that a factual determination by a jury would be necessary to determine if a neutral policy against non-marital sex was pretextual); and an EEOC notice finding that a Catholic school engaged in unlawful pregnancy discrimination in firing a teacher who became pregnant and indicated that she did not plan to marry the father (*Catholic School Cannot Discriminate Against Unwed Pregnant Teacher, EEOC Rules*, New York City Liberties Union (Oct. 11, 2016) http://www.nyclu.org/news/catholic-school-cannot-discriminate-against-unwed-pregnant-teacher-eec-rules. See also, (1) *Equal Employment Opportunity Commission v. Pacific Press Publishing Association*, 676 F.2d 1272 (1982) (holding that a religious publishing house affiliated with the Seventh-Day Adventist Church violated Title VII by paying reduced salaries to women and retaliating against and ultimately discharging a woman employee for participating in a complaint to the EEOC. Both actions by the Publishing House reflected its religious doctrines (the latter, to resolve employee disputes within the church), but the Court ruled that the government’s compelling interest in assuring equal employment opportunity justified that burden); and (2) *Richardson v. Northwest Christian University*, 242 F. Supp. 3d 1132 (2017) (holding that the University’s termination of woman employee for cohabiting with the father of her unborn child withstood a summary judgment motion by the University to dismiss the case. The court acknowledged that private employers may lawfully subject their employees to morality requirements, but found that there was evidence from which jurors could conclude that the University’s actions reflected animus against pregnant women).
discrimination under any education program or activity receiving Federal financial assistance.


Title IX applies to all aspects of “education programs or activities” that are operated by recipients of federal financial assistance, including admissions, treatment of participants, and employment. Moreover, Title IX is not limited in its application to colleges, universities, and elementary and secondary schools. It applies to “any education or training program operated by a recipient of federal financial assistance. For example, Title IX would cover such diverse activities as a forestry workshop run by a state park receiving funds from the Department of Interior . . . [or] state and local courses funded by the Federal Emergency Management Agency in planning how to deal with disasters; and vocational training for inmates in prisons receiving assistance from the Department of Justice. Generally, it covers all aspects of the education program, including admissions, treatment of participants, and employment. Title IX guarantees equal educational opportunity in federally funded programs.”

Title IX was modeled after Title VI and much of the Title VI case law is applicable in Title IX cases. There are important differences between the statutes, however. Title IX includes various statutory exemptions that are absent under Title VI. For example, Title IX does not cover single-sex admissions policies of elementary, secondary, or private undergraduate schools. 20 U.S.C. § 1681(a)(1); U.S. DOJ, Title IX Legal Manual, Section I. Overview of Title IX. The Title IX regulations (like Title VI regulations) provide additional exemptions of possible relevance to the present analysis, including one that permits affirmative action to overcome the effects of conditions that result in limited participation in a program by persons of a particular sex, and one that requires appropriate remedial action if an agency finds that a recipient has discriminated against individuals on the basis of sex. 34 C.F.R. § 106.3. Remember, however, that even if conduct is carved out of Title IX’s general prohibition on sex discrimination, public entities also have a constitutional duty not to discriminate on the basis of sex. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982) (nursing school policy that excluded male applicants violated 14th Amendment notwithstanding the applicability of a Title IX exemption).

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

Enforcement:

The U.S. Department of Education has enforcement authority under Title IX with respect to entities receiving financial assistance from ED; other agencies have enforcement authority with respect to their funding. See Procedures for Complaints of
Employment Discrimination Filed Against Recipients of Federal Financial Assistance, 28 C.F.R. §§ 42.601-42.613 (DOJ); 29 C.F.R. §§ 1691.1-1691.13 (EEOC). Agency enforcement includes the investigation of individual complaints, as well as compliance reviews of institutions selected by the agency. Private individuals can also assert Title IX claims. The most common form of relief obtained through a private right of action is an injunction, but monetary damages can also be recovered for intentional discrimination under Title IX. See Franklin v. Gwinett City Pub. Sch., 503 U.S. 60, 75 n.8 (1992). States do not enjoy Eleventh Amendment immunity from monetary liability under Title IX. 42 U.S.C. § 2000d-7. The courts have generally held that Title VII’s substantive standards apply when evaluating claims of employment discrimination under Title IX. See, e.g., Johnson v. Baptist Med. Ctr., 97 F.3d 1070, 1072 (8th Cir. 1996) (“when a plaintiff complains of discrimination with regard to conditions of employment in an institution of higher learning, the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case”). DOJ has taken the same view with respect to agency investigations. See U.S. DOJ, “Title IX Legal Manual,” at 39 (Jan. 11, 2001) (“In conducting investigations alleging employment discrimination [under Title IX], agencies shall consider Title VII case law and EEOC Guidelines, 29 C.F.R. parts 1604-1607, unless inapplicable, in determining whether a recipient . . . has engaged in an unlawful employment practice”).

The same is not true with respect to the procedural requirements for cases brought by private individuals:

The Supreme Court has yet to explicitly decide whether the far more detailed and comprehensive procedural requirements of Title VII are applicable to claims of employment discrimination brought under Title IX. The lower courts that have faced this question are divided. One view treats Title IX as an independent basis for finding discrimination based on the substantive standards of Title VII, but divorced from its administrative requirements. Under this view, complainants filing complaints under Title IX are not subject to Title VII’s filing deadlines, exhaustion of administrative remedy requirements, and state referral requirements, but are still governed by Title VII’s substantive standards. The other view is that the more focused and detailed enforcement scheme of Title VII preempts Title IX in the area of employment discrimination. Under this view, employees of federally assisted education programs operated by recipients of federal financial assistance have only a Title VII remedy for sex-based employment discrimination.

The Department takes the position that Title IX and Title VII are separate enforcement mechanisms. Individuals can use both statutes to attack the same violations.

U.S. DOJ, Title IX Legal Manual, Section IV. B(2)(b)
As noted above, Title IX generally tracks Title VII’s substantive analysis. Title VII provides that sex may constitute a bona fide occupational qualification, and the Title IX common agency rule likewise reflects such a BFOQ exception:

A recipient may take action otherwise prohibited . . . provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons . . . .

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Common Rule, 65 Fed. Reg. 52857, 52874 § .550 (Aug. 30, 2000) [hereinafter Final Common Rule]; see also 34 C.F.R. § 106.61 (Department of Education regulation regarding BFOQ).

DOJ has cautioned that “BFOQ’s are very narrow exceptions.” U.S. DOJ, Title IX Legal Manual, at 41 (citing Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991)).

The Title IX common rule contains a general prohibition on providing or denying “aid, benefits, or services” on the basis of sex, as well as specific prohibitions relating to such areas as housing, course offerings, counseling or guidance materials for students or applicants, financial assistance, employment assistance, and textbooks and curriculum materials. Final Common Rule at 52870-73 §§ .400; .405; .415; .425; .430; .435; .455; see also 34 C.F.R. §§ 106.31(b); 106.32; 160.34; 106.36-.38; 106.42 (Department of Education regulations regarding same). But it also endorses affirmative action programs, and it does so using language that arguably imposes a less stringent standard than required under Title VII’s “manifest imbalance” or OFCCP’s “under-utilization” analyses discussed below. Specifically, the Title IX common rule provides: “In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex.” Final Common Rule at 52866 § 110.

As with Title VI, the primary means of enforcement under Title IX is through voluntary agreements with funding recipients, and termination of funding is a last resort that can occur only after numerous procedural requirements have been met. See discussion of Title VI enforcement, above. Likewise, if funding is terminated, the termination is limited in its effect to the particular program or part thereof in which noncompliance was found. 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682.
Regulations:

DOJ Title IX Regulations: 28 C.F.R. § 54.100 et seq.
ED Title IX Regulations: 34 C.F.R. § 106.1 et seq.
NSF Title IX Regulations: 45 C.F.R. Parts 611 (enforcement) and 618
Other agencies also have Title IX regulations


   Prohibits discrimination on the basis of race in the making and enforcement of contracts, including employment contracts; covers the making, performance, modification and termination of contracts, as well as the benefits, privileges, terms and conditions of the contractual relationship. All institutions are subject to Section 1981.

   Section 1981 can be very significant in a given case because it does not impose the various administrative and procedural requirements that apply under Title VII, it has a longer limitations period (4 years), and it does not cap recoverable damages. See, e.g., *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008).


   Provides additional remedies for individuals whose civil rights are violated by individuals acting under “color of law”—i.e., by individuals acting as a government official or representative.

   Public institutions are subject to Section 1983; private institutions are not.

   Statute of limitations determined by state limitations for personal injury claims.


   Provides cause of action for conspiracies to deprive any persons or class of persons of equal protection of the laws or of equal privileges and immunities under the laws.

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333 See *Comcast Corp. v. National Assoc. of African American-Owned Media and Entertainment Studios Networks, Inc.*, 140 S.Ct. 1009 (2020). The Supreme Court in its 2020 term considered an important issue of interpretation under Section 1981. A plaintiff who sues for racial discrimination under § 1981 must prove causation, or in other words the plaintiff must plead facts that, if true, show that “but-for” racial discrimination the contract would have been entered. This burden remains on the plaintiff throughout the life of the lawsuit.

   Authorizes courts to award attorneys’ fees to prevailing parties in actions brought to enforce various civil rights laws, including Titles VI and IX and Sections 1981 and 1983.

11. **Federal Executive Orders**

   **Executive Order 11246 (1965) (set out as a note in 42 U.S.C. § 2000e):** Provides that federal contracts of a certain amount (over $10,000) must contain provisions that prohibit discrimination on the basis of race, color, religion or national origin; requires both equal employment opportunity and affirmative action: federal contractors are required to develop, and update annually, an Affirmative Action Plan which includes goals and timetables for the increased utilization of minorities and women (by virtue of Executive Order 11375, discussed below).

   **Executive Order 11375 (1967):** Added sex discrimination provisions to the provisions required in applicable federal contracts under Executive Order 11246.

   **Executive Order 13672 (2014):** Added sexual orientation and gender identity discrimination provisions to the provisions required in applicable federal contracts under Executive Order 11246.

   The Office of Federal Contract Compliance Programs (‘‘OFCCP’’) has enforcement authority with respect to these Executive Orders. OFCCP is a division within the U.S. Department of Labor.

   **Affirmative Action Requirements:**

   The OFCCP’s applicable affirmative action requirements are as follows:

   Non-construction (service and supply) contractors with 50 or more employees and government contracts of $50,000 or more are required, under Executive Order 11246, to develop and implement a written affirmative action program (AAP) for each establishment. The regulations define an AAP as a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The AAP is developed by the contractor (with technical assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The AAP is kept on file and carried out by the contractor; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.\(^{334}\)

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The AAP defines those areas, if any, in the contractor’s workforce that reflect under-utilization of women and minorities. OFCCP uses the term “underutilization’ to refer to the presence of fewer minorities or women in a particular job group than would reasonably be expected given their availability. Contractors use a number of methods to determine whether actual representation rates of minorities and women are lower than would be reasonably expected. Some contractors declare underutilization when there is any difference between the availability percentage and the utilization percentage, while others conclude that underutilization exists when the number of minority or women incumbents in a particular job group is at least one whole person lower than the number predicted by the availability percentages. Other contractors use an “80 percent” rule of thumb and declare underutilization only when the actual representation of minorities or women is less than 80 percent of availability (which is the expected representation). Still others test whether the difference between the actual and expected representation of minorities and women is statistically significant.” “Federal Contract Compliance Manual,” OFCCP, at 33-34 (May 2020). Retrieved from https://www.dol.gov/sites/dolgov/files/OFCCP/FCCM/508_FCCM_05012020.pdf.

Based on the utilization analyses under Executive Order 11246 and the availability of qualified individuals, the contractors establish goals to reduce or overcome the under-utilization. Good faith efforts may include expanded information dissemination, training opportunities, counseling and encouragement of minority and female employees to apply, recruitment, review of selection criteria and procedures and other activities to increase the pool of qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

* * *

Executive Order numerical goals do not create set-asides for specific groups, nor are they designed to achieve proportional representation or equal results. Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. The Executive Order and the supporting regulations do not authorize OFCCP to penalize contractors for not meeting goals. The regulations at 41 C.F.R. 60-2.12(e), 60-2.30, 60-2.15 and 60-2.16, specifically prohibit quota and preferential

335 See 41 C.F.R. 60-2.15.
hiring and promotions under the guise of affirmative action numerical goals.\textsuperscript{336}

The OFCCP regulations require contractors to perform quantitative analyses to evaluate the composition of their workforces compared to the composition of the relevant labor pools and to use that information to address any identified under-utilization of women or minorities in their workforces. \textit{See generally} 41 C.F.R. §§ 60-2.10-60-2.17. While the regulations identify specific considerations, the contractors should use in conducting their analyses, they do not define specific percentages or discrepancies \textit{as per se} under-utilization. Instead, the key question is whether the percentage of women or minorities is less than would be expected. Specifically, section 60-2.15 provides:

(a) The contractor must compare the percentage of minorities and women in each job group determined pursuant to Sec. 60-2.13 with the availability for those job groups determined pursuant to Sec. 60-2.14.

(b) When the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group, the contractor must establish a placement goal in accordance with Sec. 60-2.16.

The OFCCP regulations identify four principles in establishing placement goals:

(1) Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

(2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual’s employment status, on the basis of that person’s race, color, religion, sex, or national origin.

(3) Placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.

(4) Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

\textsuperscript{336} \textit{See} http://library.law.columbia.edu/urlmirror/12/AffirmativeActionFactSheet.htm
Note that the OFCCP regulations use the phrase “under-utilization” of women and minorities as the trigger for establishing “goals” and initiating “efforts” to increase the number of women and minorities in an employer’s workforce. See generally 41 C.F.R. §§ 60-2.10-2.17. OFCCP does not use the phrase “manifest imbalance,” which is the term used by the Supreme Court in United Steel Workers v. Weber, 443 U.S. 193, 208 (1979), and Johnson v. Transportation Agency, 480 U.S. 616, 631-632 (1987), in upholding the affirmative action plans at issue in those cases. The Supreme Court did not define “manifest imbalance” in either case, or indicate how much of an imbalance is necessary to create a manifest imbalance. However, the Court did state that a manifest imbalance could be found without the statistical disparity rising to the level of a prima facie pattern and practice case under Title VII. Johnson, 480 U.S. at 632. A prima facie pattern and practice case is made under Title VII by showing such a gross disparity between the minority composition of the applicable employer work force and the qualified labor pool that a court can infer an intent to discriminate. See Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977) (utilizing a standard deviation analysis to analyze statistical disparities and suggesting that a standard deviation that exceeds two is sufficient to create an inference of discrimination); Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (prima facie case made out by showing that the percentage of minorities in the employer’s work force is significantly lower than the percentage of minorities in the general population). Thus, under the holding in Johnson, an affirmative action plan would be proper if something less than a gross statistical disparity is present. Whether this is a more demanding showing than the OFCCP’s “under-utilization” standard is unclear. On the general question of establishing a “manifest imbalance” in a given workforce, see Kenneth R. Davis, Wheel of Fortune: A Critique of the “Manifest Imbalance” Requirement for Race-Conscious Affirmative Action Under Title VII, 43 Ga. L. Rev. 993 (2009); David D. Meyer, Note, Finding a “Manifest Imbalance”: the Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII, 87 Mich. L. Rev. 1986 (1989).

337In a Management Directive issued in 1987 relating to the affirmative action plans of federal agencies, the EEOC defined “manifest imbalance” as “[r]epresentation of [protected] groups in a specific occupational grouping or grade level in the agency’s work force that is substantially below its representation in the appropriate [civilian labor force].” EEOC, Equal Employment Opportunity Management Directive EEO MD-714 at ¶ 10.m (Oct. 6, 1967). The Directive went on to say that agencies could “establish numerical objectives (goals) for each job category or major occupation group where there is a manifest imbalance or conspicuous absence of EEO Group(s) in the work force.” Id. at ¶ 13.d. This Directive was superseded by EEOC Management Directive 715, which provides federal agencies with “policy guidance and standards for establishing and maintaining effective affirmative action programs of equal employment opportunity. . . .” EEO MD-715 at 1 (Oct. 1, 2003). The latter Directive does not use the phrase “manifest imbalance.” Instead, it directs agencies to “identify any meaningful disparities” in their work forces by conducting a self-assessment that “compare[s] their internal participation rates with corresponding participation rates in the relevant civilian labor force . . . .” Id. part A, at Section II. “Meaningful disparities” is not defined. The Directive also uses the term “statistical disparities,” but, again, it does not define the term.
If OFFCP makes a finding of pattern or practice discrimination, it may order preferences in hiring based on race, national origin, or sex to remedy the discrimination, including possible race- or sex- exclusive remedies if necessary to remedy the resulting short-fall. Race- or sex- exclusive remedies are not authorized for underutilization, or as a voluntary remedy initiated by the contractor or subcontractor.338

There is also a split among the federal circuit courts of appeal on the issue of whether a local government must have been involved, whether actively or passively, in the discrimination against women 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.339

Enforcement:

Enforcement can take the form of an administrative procedure or a referral by the OFCCP to the EEOC or DOJ to initiate judicial proceedings. The jurisdictions of the EEOC...

338 The OFFCP Compliance Manual (updated through 2020) provides:

“[N]on-monetary relief [for pattern or practice discrimination] includes corrective actions that stop the policy, practice, or procedure that caused the discrimination. Additionally, the [OFCCP compliance officer (CO)] . . . should, as appropriate, require nonmonetary remedies, such as preferential hiring or promotion goals or special training programs and EEO counseling for supervisors. With formula relief (as distinct from victim-specific or individual relief), it is difficult to provide reinstatement or retroactive promotion because, using the formula, no individual is tied to any particular opportunity. However, the CO may create a preferential hiring or promotion list consisting of the members of the class, and from which the contractor must make all selections to fill existing vacancies until the number of class members hired is equal to the shortfall or the class member list is exhausted. The contractor must hire class members before non-class members.” (sec. 7C12).

339 Several circuit courts have taken the position that, as opposed to 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 3rd Circuit – 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); the 9th Circuit – Coral Construction Co. v. King County, 941 F.2d 910, 932 (9th Cir. 1991) (upholding set-asides for women-owned businesses against facial challenge); and the 11th circuit – 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 7th Circuit Court of Appeals has 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 for women under intermediate scrutiny. Builders Ass’n of Chicago v. County of Cook, 256 F.3d 642 (7th Cir. 2001). So has the 6th 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). The 6th Circuit subsequently also adopted the view that strict scrutiny applies to gender-based affirmative action in Brunet v. City of Columbus, 1 F.3d 390, 404 (6th Cir. 1993).
and OFCCP sometimes overlap, and the agencies have entered into Memorandums of Understanding to coordinate their enforcement roles.

OFCCP investigates violations of these Executive Orders through compliance evaluations or in response to complaints. If a violation is found, OFCCP typically asks the federal contractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP can initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor, or it can refer the matter to the EEOC or to the DOJ.

If OFCCP files an administrative complaint, an ALJ hears the case and recommends a decision. If the contractor is dissatisfied with the ALJ’s decision, it may appeal to the DOL’s Administrative Review Board. The Board issues the final decision in all cases, even if there is no appeal.

If the Board finds a violation, it will order the contractor to provide appropriate relief, which may include back pay and restoration of employment status and benefits for the victim(s) of discrimination. Violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, debarment, and/or other sanctions. Contractors can appeal Board decisions to the federal courts.

Regulations:

OFCCP Regulations: 41 C.F.R. Part 60


12. Administrative Agency Policies

On March 10, 2020 NASA published its reporting requirement regarding findings of harassment, sexual harassment, other forms of harassment, or sexual assault. NASA implemented new reporting requirements to ensure that NASA provides funding to research environments that are free from harassment and sexual assault as defined. Under the rule, IHES and other organizations that receive funds from NASA are responsible for investigating complaints under and for compliance with federal non-discrimination laws, regulations, and executive orders. Specifically, the rule requires reporting when an administrative leave or other temporary action is imposed upon, or a final determination is made regarding a Principal Investigator or Co-Principal Investigator who is accused of sexual harassment, assault, or other harassment.
See the final notice of the terms and conditions.

13. **State Laws**

Most states also have anti-discrimination laws. Many of these laws are similar to the federal laws, but some are broader in scope. State constitutions might also be relevant.

As one example, Pennsylvania has a Human Relations Act which prohibits employment discrimination based on “race, color, religious creed, ancestry, age, sex, national origin, handicap or disability,” 43 Pa. Stat. Ann. §§ 952; it also has a Fair Educational Opportunities Act, which states that “all persons shall have equal opportunities for education regardless of their race, religion, color, ancestry, national origin, sex, handicap or disability.” 24 Pa. Stat. Ann. § 5002(a).

**APPENDIX II: KEY LEGAL OPINIONS INVOLVING STUDENT DIVERSITY**

1. **Fisher v. University of Texas at Austin,**
   136 S.Ct. 2198 (2016) (“FISHER II”)

**Policies at Issue:** Consideration of race in postsecondary student admissions

**Relevant Background Facts**

The University of Texas at Austin’s (UTA) undergraduate admissions system at issue in this case is described in the summary analysis of Fisher I, above. As noted there, plaintiffs challenged UTA’s use of a Personal Achievement Index that considered an applicant’s race as part of a holistic review of multiple factors. No specific weight was assigned to race, but race and other factors were considered in coming up with a Personal Achievement Index score that was combined with an Academic Index score based on high school grades and performance on the Scholastic Aptitude Test.

In a prior, 2013 ruling in this case, the Supreme Court, in Fisher I, 570 U.S. 297, vacated a summary judgment rendered by the District Court in favor of the University and affirmed by the 5th Circuit Court of Appeals, on the basis that the lower courts had applied an overly deferential “good faith” standard of review, rather than the proper strict scrutiny standard. It remanded the case to the Court of Appeals to apply the proper strict scrutiny standard and included significant guidance on the application of that standard, in particular the standard that use of race be narrowly tailored to meet a compelling interest. On remand, the 5th Circuit again affirmed summary judgment for UTA.
Relevant Legal Issues

The overarching legal issue in the case was whether the University’s holistic consideration of race as part of its Personal Achievement Index satisfied the strict scrutiny standard of judicial review under the Equal Protection Clause of the 14th Amendment to the Constitution, including whether it served a compelling interest and whether it was narrowly tailored and necessary to meet that interest. The existence of a compelling interest in diversity was essentially acknowledged by the Court with limited analysis. Reaffirming its decision in Fisher I, the Court ruled that the benefits that flow from student body diversity are in substantial measure an academic judgment to which some, but not complete, judicial deference is proper: “Once . . . a university gives a reasoned, principled explanation for its decision, deference must be given to the University’s conclusion . . . that its diverse student body would serve its educational goals.” The case thus focused on whether use of race in admissions was narrowly tailored and necessary to meet this goal. That issue was somewhat unique in this case, given that UTA was accomplishing some level of diversity through its legislatively mandated 10% plan.

Holding

The Court, consistent with its prior decisions in Grutter and in Fisher I, held, with little analysis, that the University’s interest in the diversity of its student body was a compelling interest entitled to “some, but not complete deference,” reaffirming analysis from Fisher I that this was not an interest in a specific number of minority students, but rather an interest in the educational benefits that would flow from diversity. However, it also indicated that no deference is owed to a university in determining whether use of race is narrowly tailored to meet the university’s compelling interest. It held that the UTA’s use of race was narrowly tailored, given (1) the University’s consideration and use of alternative, race-neutral approaches and the evidentiary conclusions of its study that, during the period that race was not considered in its holistic review of applicants, minority students experienced feelings of loneliness and isolation; data showed very low representation of African-American and Hispanic students in the large majority of classrooms; and the percentage of minority students enrolling at the University stagnated over a seven year period; (2) the limited but meaningful increase in diversity that resulted from consideration of race; (3) the fact that race was considered only once in the application process as a sub-factor of the Personal Achievement Index; (4) significant training given to admissions officers to ensure consistent application of race; and (5) other factors.

Significance

The decision solidifies legal support for student diversity as a possible compelling goal of postsecondary institutions in support of considering race as part of a holistic review of applicants, provided the goals are clear and transparent, concrete, and specific, and framed, consistent with the institution’s mission, without reference to numbers only.
(which might constitute an impermissible quota), but rather with reference to evidence-based academic judgments regarding educational outcomes sought by the institution. As evidenced in this case, these outcomes may include, for example, fostering cross-racial understanding, breaking down racial stereotypes, providing enlightened discussion and learning, and preparing students to function and assume leadership positions in an increasingly diverse workforce and society. Institutions should describe the educational benefits of student body diversity (including but not limited to racial diversity) and how those benefits support the mission of the institution and identify measurable objectives to support review and evaluation of progress over time in achieving their goals.

With reference to narrow-tailoring, the decision clarifies that a university has the burden to provide strong and coherent evidence that—

- It considered race-neutral alternatives in the entire spectrum of its enrollment policies and practices as means to achieve its student diversity goals and drew a reasoned and principled decision that such alternatives were not as effective as using race or required non-tolerable administrative costs in reaching those goals. Institutions should also be able to show that they are using race-neutral factors in other aspects of their enrollment management processes (outreach, recruitment, financial aid, and retention) to complement their use of race in making admissions decisions.

- Race-conscious policies have a measurable and meaningful (in percentages), if limited (in absolute numbers), positive impact on the achievement of the institution’s goals. The Court held that a relatively limited impact from consideration of race supports the conclusion that the admissions system is narrowly tailored and does not undermine a determination that consideration of race is necessary to achieve the university’s goals.

- An institution’s use of race is part of a holistic review reflecting the institution’s mission and grounded in research and evidence that considers a wide range of factors not limited to race to achieve diversity in its student body, involving flexible consideration of race through individualized evaluation of every applicant’s unique strengths, abilities, and backgrounds, consistent with the institution’s unique mission.

- An institution’s process involves ongoing review of its admissions policy and specifically whether there is a continuing need to consider race. The decision to consider race is not a one-time judgment. The Court encouraged UTA to continue to use its own qualitative and quantitative data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the positive and negative effects of use of race in its program.
• Institutions should have transparent guardrails to ensure that their holistic review policy is being implemented consistently and reliably, including training for admissions officials on how to -- and how not to -- consider race and processes to review implementation of their policies.

Justice Kennedy and the Concept of Dignity

In his opinion for the Court, Justice Kennedy, without explanation, invoked the concept of “equal treatment and dignity” as a value that might be addressed in these cases, seemingly apart from the compelling goal of diversity. He stated,

“Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.”

The concept of dignity or equal dignity is nowhere expressly stated in the Constitution, and no other Justice endorsed this concept as a constitutional marker in this case or any other cases related to the consideration of race. Justice Kennedy invoked the concept of dignity or equal dignity in other cases, including but not limited to cases involving gay marriage, United States v. Windsor, 570 U.S.744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015); the unconstitutionality of the death penalty for persons under the age of 18, Roper v. Simmons, 543 U.S. 551 (2005); abortion rights, Planned Parenthood v. Casey, 505 U.S. 883 (1992); and the rights to due process extended to war on terrorism detainees in Guantanamo Bay, Hamdi v. Rumsfeld, 542 U.S. 507, (2004).

Justice Kennedy may have perceived the concept of equal dignity as supporting expanded opportunities for racial minority groups, based on governmental animus towards these groups, but this is unclear. Indeed, his express language in Fisher II – suggesting that dignity needed to be reconciled with diversity – could be read to suggest a tension or inconsistency between the consideration of race to achieve diversity and the goal to support dignity. Given these uncertainties, the absence of any standards to measure this concept or of express support for this concept from other Justices, the Court’s consistent rejection of broad, historical, societal discrimination as a foundation for consideration of race, and Justice Kennedy’s retirement from the Court, postsecondary institutions would be ill-advised at this time to premise their programs in any significant manner on this concept.

Dissent

Justice Alito’s dissent was more than twice the length of the majority opinion. It expressed several concerns, including his views that UTA:
• Lacked transparency in its decision-making process to reintroduce consideration of race into the admissions process, shifting among its rationales and never defining its goal to secure a “critical mass” of African-American and Hispanic students, making it impossible to apply the narrow-tailoring test of strict scrutiny. (The dissent disavowed any requirement to identify a specific number of minority students as a “critical mass,” but asserted that UTA “must identify some sort of concrete interest.” (emphasis in the original).

• Stated only vague and amorphous goals for consideration of race (such as eliminating stereotyping) which cannot be measured to determine when the program was successful.

• Failed to show that consideration of race was necessary, asserting that UTA had achieved adequate diversity through the use of race-neutral holistic review, combined with the 10% plan.

• Did not present sufficient evidence to support its policies, particularly on the link between applicants selected for admissions and their specific contributions to the educational benefits of diversity on campus.

• Used a “covert” holistic review process that masked what role race really plays in its admissions decisions.

• Only valued a certain type of “diverse” applicant (e.g. minority students from wealthy families (minorities selected through holistic review as opposed to those admitted through the top 10% plan, many of whom came from poor and disadvantaged communities) and African-American and Hispanic students, but not Asian-American students), who, in the dissent’s view, were even less represented on campus.

• Linked its concept of diversity and “critical mass” to state demographics, in effect engaging in racial balancing, which courts have considered to be clearly unauthorized.

Justice Alito took the somewhat rare step of reading a summary of his dissent from the bench when the opinion was announced by the Court to register his strong disapproval of the Court’s decision – describing it as “affirmative action gone berserk.” Justice Thomas wrote his own brief dissent, as well, to reaffirm his view that “a State’s use of race in higher education admissions is categorically prohibited.”

2.  

**Fisher v. University of Texas at Austin,**

570 S. 297 (2013) (“FISHER I”)

**Policies at Issue:** Consideration of race in postsecondary student admissions
Relevant Background Facts

The University of Texas at Austin (UTA) used an undergraduate admissions system with two components. First, as required by state law, it offered admission to any students who graduated from a Texas high school in the top 10% of their class. Up to 75% of its freshman class was filled on this basis. It then filled the remainder of its incoming freshman class by combining an applicant’s “Academic Index,” based on the student’s SAT score and academic performance, with the applicant’s “Personal Achievement Index,” a holistic review including numerous factors such as leadership and work experience, extracurricular activities, awards and honors, letters of recommendation, writing samples, community service, and the socioeconomic status of the applicant’s family and school. Following the Supreme Court’s Grutter decision and a year-long study of its own admissions system, starting in 2004 UTA included a student’s race as one of multiple factors in the student’s Personal Achievement Index, based on its conclusion that its prior system did not reach its goal of providing the educational benefits of diversity to its students. The plaintiff in this case was not in the top 10% of her high school class. She did not challenge the 10% plan, although the Supreme Court noted in its subsequent Fisher II decision that the plan had a greater impact on her denial of admission and, given its purpose to admit minority students, could not be understood as race-neutral. Instead, the lawsuit challenged the consideration of race in the Personal Achievement Index.

The 5th Circuit Court of Appeals affirmed summary judgment rendered by the District Court in favor of the University, based on deference to the University’s “good faith” in asserting its interest in the educational benefits of student diversity and in concluding that consideration of race was necessary to meet that goal.

Relevant Legal Issues

The overarching legal issue in the case was whether the University’s holistic consideration of race as part of its Personal Achievement Index satisfied the strict scrutiny standard of judicial review under the Equal Protection Clause of the 14th Amendment to the Constitution, including whether it served a compelling interest and whether it was narrowly tailored and necessary to meet that interest. The specific issue before the Supreme Court was whether the 5th Circuit Court of Appeals had applied the correct strict scrutiny standards in deferring to UTA and its good faith judgment respecting both its goal to obtain the educational benefits of student diversity and its use of race in making admissions decisions to achieve that goal.

Holding

The Court ruled that the benefits that flow from student body diversity are in substantial measure an academic judgment to which some, but not complete, judicial deference is proper: “Once . . . a university gives a reasoned, principled explanation for its decision, deference must be given to the University’s conclusion . . . that its diverse student body
would serve its educational goals.” The Court held that numerical diversity of students of
different races could not in itself be a compelling, or even a legitimate, goal, which would
be tantamount to impermissible racial balancing, but rather that its goal needed to be
framed with reference to the educational benefits that would flow from student diversity.
The case focused on whether use of race in admissions was narrowly tailored and
necessary to meet this goal. That issue was somewhat unique in this case, given that UTA
was accomplishing some level of diversity through its legislatively mandated 10% plan.

The Court held that no deference is owed to a university in determining whether use of
race is narrowly tailored and necessary to meet the university’s compelling interest and
that the 5th Circuit’s determination that deference was owed to UTA’s good faith
consideration of race was an improper application of strict scrutiny standards. The Court
remanded the case to the 5th Circuit to apply the proper strict scrutiny standards.

Significance

The decision preserved the Grutter strict scrutiny framework for reviewing a
postsecondary institution’s consideration of race in selecting applicants for admission. It
solidifies legal support for student diversity as a possible compelling goal of
postsecondary institutions in support of considering race as part of a holistic review of
applicants, provided the goals are clear and transparent, concrete, and specific, and
framed, consistent with the institution’s mission, without reference to numbers only
(which might constitute an impermissible quota), but rather with reference to
evidence-based academic judgments regarding educational outcomes sought by the
institution. Institutions should describe the educational benefits of student body diversity
(including but not limited to racial diversity) and how those benefits support the mission
of the institution and identify measurable objectives to support review and evaluation of
progress over time in achieving their goals.

With reference to narrow-tailoring, the decision clarifies that a university has the burden
to provide strong and coherent evidence that—

- It considered race-neutral alternatives in the entire spectrum of its enrollment
  policies and practices as means to achieve its student diversity goals and drew a
  reasoned and principled decision that such alternatives were not as effective as
  using race or required non-tolerable administrative costs in reaching those goals.

Institutions should also be able to show that they are using race-neutral factors

340 Institutions may include numerical indicators of progress, but should not reduce their goals to “pure
numbers,” which may suggest an intent to impose quotas. The Court explained in this decision that
institutions need not specify the particular level of minority enrollment for obtaining the educational
benefits of diversity. Indeed, the Court’s decision in this case suggests that the Court does not view “critical
mass” as a one-size-fits all bright line test for justifying use of race to achieve student body diversity, but
rather gives some deference to institutions in defining what levels of minority enrollment are sufficient to
achieve the educational benefits of diversity.
in other aspects of their enrollment management processes (outreach, recruitment, financial aid, and retention) to complement their use of race in making admissions decisions.

- Race-conscious policies have a measurable and meaningful (in percentages), if limited (in absolute numbers), positive impact on the achievement of the institution’s goals. The Court held that a relatively limited impact from consideration of race supports the conclusion that the admissions system is narrowly tailored and does not undermine a determination that consideration of race is necessary to achieve the university’s goals.

- An institution’s use of race is part of a holistic review reflecting the institution’s mission and grounded in research and evidence that considers a wide range of factors not limited to race to achieve diversity in its student body, involving flexible consideration of race through individualized evaluation of every applicant’s unique strengths, abilities, and backgrounds, consistent with the institution’s unique mission, and without using race in a way that makes it the defining feature of a candidate’s application.


**Policies at Issue:** Consideration of race in postsecondary student admissions

**Relevant Background Facts**

The University of Michigan used admissions policies for admitting students to its undergraduate school and to its law school that considered race, ethnicity, and other factors in order to enroll a diverse student body that would contribute to the educational mission of the schools. The law school admissions process at issue in *Grutter* involved an individualized, holistic review of each applicant’s file that considered both academic criteria (grades, LSAT scores) and other criteria that were important to the law school’s educational goals (such as work experience, leadership and service, letters of recommendation, and life experiences, including whether the applicant was an underrepresented minority, defined by the University as African-Americans, Hispanics, and Native Americans). The Law School’s admissions policy was designed to achieve a “critical mass” of underrepresented minority students to ensure meaningful interactions among students of different racial backgrounds that would enhance the quality of education provided by the School.

In 1998 and the years following, the undergraduate admissions policy provided for individual review and evaluation of all applicants, but the review was characterized by an index system in which (in 1999 and 2000) race and ethnicity (in addition to two other criteria) were awarded 20 points out of a possible maximum of 150 points. A maximum of 110 points could be awarded for academic performance, including grades and test
scores, and a maximum of 40 points out of 150 points could be awarded based on non-
academic factors, including residence, alumni relationships, personal experience and
leadership, with 20 points automatically assigned for underrepresented minority
students, students attending predominantly minority or disadvantaged high schools, and
athletes. This index system resulted in the admission of virtually every qualified applicant
who was an underrepresented minority.

Relevant Legal Issues

The key issues for the Court included: (1) Whether a higher education institution’s
mission-driven interest in enrolling a diverse student body to secure the educational
benefits of diversity is a compelling interest under the strict scrutiny test applied to
consideration of race and national origin in the conferral of benefits under the Equal
Protection Clause of the 14th Amendment to the Constitution and Title VI of the Civil
Rights Act of 1964; and (2) Whether the admissions programs at the Law School and
Undergraduate School were narrowly tailored to achieve that goal.

Holding

The Court concluded that the educational benefits of diversity are a “compelling
interest” that can justify the limited use of race in higher education admissions. Then,
with respect to the means of achieving that interest, the Court approved (in the law school
setting) the individualized, holistic review of applicants, where race is one factor among
many considered; and struck down (in the undergraduate setting) as overly mechanical
and rigid the process of awarding 20 out of 150 possible admissions points based on the
status of students as “underrepresented minority students.”

Significance

These cases resolved the long-simmering issue of whether Justice Powell’s opinion
in the Bakke case represented the law of the land, affirming and expanding upon the
principles laid out by Justice Powell in Bakke, in holding that a university’s interest in
promoting the educational benefits of diversity can be sufficiently compelling to justify
consideration of race and ethnicity in admissions decisions.

The federal requirement that race- and ethnicity-conscious policies be sufficiently
flexible was, in the context of the University of Michigan’s goal of achieving the
educational benefits of diversity, the single most important factor distinguishing the
Court’s acceptance of the University of Michigan Law School’s admissions policy from its
rejection of the undergraduate admissions policy. Building on Justice Powell’s Bakke
opinion, the Court focused its inquiry into the flexibility of the admissions programs on
two elements: (1) Whether the use of race or ethnicity ensured competitive
consideration among all students (thereby not operating as an impermissible quota,
insulating certain students from competition with others); and (2) whether the use of race
or ethnicity ensured that each applicant was “evaluated as an individual and not in a way
that [impermissibly] made an applicant’s race or ethnicity the defining feature of his or her application.”

The Court found that the law school considered the various diversity qualifications of each applicant, including race, on a “case-by-case basis” while the undergraduate program “relies on a selection index to assign every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant,” which operates to “by and large ... automatically determine[ ] the admissions decision for each applicant.” (O’Connor, J., concurring) (emphasis in original). In its rejection of the University of Michigan’s undergraduate admissions program, in which 20 points (out of a possible total of 150) were “automatically” assigned to “every single applicant from an underrepresented minority group” (defined by the University of Michigan), the Court set forth several clearly impermissible characteristics of that point system:

- Certain applicants received an admissions advantage based on nothing more than their status as an underrepresented minority;

- The operation of the point system made “race a decisive factor for virtually every minimally qualified underrepresented minority applicant;” and

- The point system precluded meaningful comparisons and evaluations of how students’ “differing backgrounds, experiences, and characteristics” might benefit the institution.

Two other points are significant about the holding:

- The Court sustained the Law School’s objective of enrolling a critical mass of underrepresented minority students to achieve the educational benefits of diversity, and as not constituting a quota designed to assure admission or enrollment of specified percentages of students based on race or ethnicity. (Justice Kennedy dissented on this issue, opining that the Law School’s critical mass objectives functioned too much like a quota and that the Court inappropriately deferred to the University on this issue.)

- Justice O’Connor opinion for the Court in Grutter also recognized an interest in access and equal opportunity that at the least complements and supports the interest in the educational benefits of diversity as a compelling interest. Language in her opinion— stressing the importance of the accessibility of all public institutions, and particularly higher education institutions, to people of all races and ethnicities and the need to assure that paths to leadership be visibly open to talented and qualified persons of every race and ethnicity to realize the American dream—arguably provides a basis for asserting a distinct compelling interest in assuring equal access in future cases.
Chief Justice Rehnquist, joined by Justices Scalia, Kennedy and Thomas, filed a dissenting opinion that argued that the close correlation between the size of each minority applicant pool with the numbers of admitted students from each such pool suggested that the Law School’s use of race was really a masked way of effecting racial balancing, which the Court had previously ruled in multiple opinions was “patently unconstitutional.” Justice Rehnquist’s dissent also maintained that there was no authentic Law School interest in enrolling a critical mass of minority students, given the significant differences in admitted African-Americans, Hispanics, and Native Americans, noting that the concept of “critical mass” was applied inconsistently to each minority group by the Law School. He therefore ruled that the Law School’s program was not narrowly tailored, not merely because of a lack of fit between the end and means, but because the means used by the Law School were forbidden by the Constitution. Justice Kennedy also filed a separate dissent, reaffirming Justice Powell’s opinion in Bakke that the educational benefits of diversity constituted a compelling interest for considering race in a holistic admissions program, but fully joining in Chief Justice Rehnquist’s opinion that the Law School’s program did not satisfy strict scrutiny because it was not narrowly tailored. Justice Kennedy opined that the Law School had used the concept of “critical mass” “as a delusion to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.” Justice Scalia filed a short, separate dissenting opinion joining in the Rehnquist dissent and opining that the Law School’s admissions statistics show that its critical mass justification was a “sham to cover a scheme of racially proportionate admissions” and that the state’s true interest was to maintain a “prestige” (sic) law school whose normal admissions standards disproportionately exclude blacks and other minorities. Justice Thomas also filed a dissent, in which he expressed the view that only measures the state must take to provide a bulwark against anarchy, or to prevent violence, would constitute a public necessity justifying the use of race. He found that “Michigan has no compelling interest in having a law school at all, much less an elite one.”

4. **Regents of the University of California v. Bakke**

438 U.S. 265 (1978)

**Program at Issue:** Medical school student admissions policies

**Relevant Background Facts**

The University of California at Davis Medical School adopted an admissions program that reserved 16 of 100 places for entering students for underrepresented
minority applicants and evaluated them under different standards than were used for other applicants.

**Relevant Legal Issue**

Issues addressed by the Court included whether use of race in an admissions program to benefit underrepresented minorities was subject to strict scrutiny and, if so, whether such use addressed a compelling interest and was narrowly tailored to meet that interest.

**Holding**

The Court held that the University’s admissions program was unconstitutional but did not rule out all use of race in higher education admissions. Six separate and splintered opinions were filed by the Justices, with no opinion commanding a majority of the Court. Justice Powell’s opinion represented, in essence, a “compromise position” between two factions of the Court that were split four-to-four. Justice Powell joined with four Justices who concluded that the Constitution did not preclude all use of race in higher education admissions and he joined with four other justices who concluded that the admissions practices at issue in the case were unconstitutional. Given the split in the Court, there was a longstanding dispute in the lower courts and among legal scholars as to whether Justice Powell’s opinion represented the law of the case as a binding precedent. That dispute was rendered moot by the Court’s decision in the *Grutter* case.

Justice Powell’s opinion found that institutions of higher education can use race or national origin, as one factor among many, in admissions and financial aid decisions to promote the educational benefits of a diverse student body, which constituted a compelling interest. His opinion cited affirmatively to and attached an appendix on the “Harvard Plan,” which involved a holistic review of applicants in which race was one of multiple considerations to achieve a diverse student body in support of the educational mission of the school. The Harvard Plan established that admissions decisions involved both evaluation of the student and how to create the desired educational experience for all students; involved an initial screening to identify academically qualified students, followed by an evaluation under expanded criteria, including those associated with diversity goals; flexible consideration of race among other factors; and did not function to virtually guarantee admissions to all qualified minority applicants.

Justice Powell’s opinion in *Bakke* also rejected other asserted interests as a basis for use of race in admissions:

- Societal discrimination, which would be unlimited in reach and time.
- Racial balancing, which constitute little more than discrimination for its own sake.
His opinion also held that the University’s asserted interest in considering race to improve healthcare services to underserved communities may be a compelling interest to support use of race in admissions, but that evidence was lacking in the case to support that need or that the admissions program was geared to promote that goal.

Significance

Justice Powell’s opinion in Bakke established the legal and practical foundation for limited consideration of race among other factors in postsecondary admissions and other enrollment management decisions in the years following the decision up to the Court’s decisions in the Grutter and Gratz cases. The opinion also provided the core analysis adopted by the Court in the Grutter and Gratz cases.

5. **Smith v. University of Washington Law School** 392 F.3d 367 (9th Cir. 2004), cert denied, 546 U.S. 813 (2012)

Program at Issue: Use of race in law school student admissions

Relevant Background Facts

The University of Washington Law School used a law school admissions process by which candidates were designated—based on an index score as well as race and ethnicity and non-racial diversity factors such as cultural background, accomplishments, and career goals—as “presumptive admits” or “presumptive denies” before their applications for admission were further reviewed, with a limited number being referred to committee for further evaluation.

All applicants were measured against each other in determining the presumptive admits, taking into account all the ways that an applicant might contribute to a diverse educational environment. Evidence showed that the law school accepted non-minority applicants with grades and test scores lower than underrepresented minority applicants who were rejected.

Other features of the law school’s program included:

- using an “ethnicity substantiation letter” sent to self-identified racial and ethnic minorities with the goal of obtaining additional information about “whether the applicant’s race or ethnicity should be considered a plus factor.”

- providing Asian Americans “a slight plus for racial diversity” even where they “might have comprised 7 to 9 percent of the class in the relevant years in the absence of a racial or ethnic plus.”

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pulling and evaluating “minority files” from a pool of “discretionary” applicants (as judged by index scores) on an expedited basis to permit the Law School to “mak[e] an early decision on minority candidates who were extremely well qualified based solely on their high index scores.”

practices that resulted in “predominantly white” applicants being referred to the admissions committee for review, rather than (in numbers comparable to minority applicants) being automatically admitted.

Relevant Legal Issue

The issue before the court was whether the University of Washington Law School’s use of race satisfied strict scrutiny, consistent with the Supreme Court’s decision in Grutter.

Holding

The court found that the Law School’s program addressed a compelling interest in the educational benefits of diversity and was narrowly tailored to meet that goal.

The court also upheld the ethnicity substantiation letters as a practice “designed to be sufficiently flexible to give more weight to those minority candidates who had more to contribute to the diversity of the classroom” and need not have been extended to all applicants (given their opportunity to supplement their files “on their own initiative”); deferred to the University’s judgment on the plus factor for Asian Americans, noting that the Grutter Court “explicitly refrained from setting a cap on what could constitute critical mass;” upheld the practice of expediting review of minority candidates as a step to achieve the compelling interest in diversity by taking steps to increase the prospects of actually enrolling qualified minority applicants; and found that none of the favorable admissions decisions by the referring admissions officer were “based solely on race” and that the Law School used a “system of checks and balances” in which such decisions were reviewed and debated in the event that the Admissions Committee chairperson recommended admission for “less academically promising applicants.”

Significance

This case is the first significant court decision applying the Supreme Court’s Grutter decision to admissions policies of other postsecondary institutions. It simply provides an example of how postsecondary schools may reasonably apply the Grutter precedent and frame appropriate processes that are needed to enroll a diverse student body.

**Program at Issue:** Race-exclusive postsecondary scholarships for African-American students

**Relevant Background Facts**

The University of Maryland established a race-exclusive merit scholarship program for African-American students designed to remedy the present effects of past discrimination. The University contended that the scholarships were needed to redress current conditions that were caused by past discrimination, including poor reputation in the African American community; a racially hostile campus climate; underrepresentation of African Americans; and low retention and graduation rates among African Americans. Plaintiff was a Hispanic student who did not meet the higher academic criteria for a separate merit-based scholarship program that was not restricted to African-Americans.

**Relevant Legal Issue**

The issue before the court was whether there was an adequate remedial basis for the race exclusive scholarship program.

**Holding**

The court, citing the principle that racial and ethnic distinctions are inherently suspect, found that the University had failed to meet its burden to provide a strong basis in evidence that the present effects it identified were caused by the University’s own prior discrimination and that the scholarship program was designed to cure those present effects and to prove that its remedial measures were narrowly tailored to meet its remedial goal. The court also found that the scholarship program was not limited to its stated goals: students eligible for the program included individuals who had not suffered discrimination (the Court noted that the program was targeted to high achieving students, not the group of students against whom the University had discriminated in the past) and students from other states. The court also found that the University had failed to try, without success, any race neutral solutions to the stated problems.

**Significance**

While *Podberesky* is one of the few cases to address the consideration of race in financial aid, the University did not base the program on the educational benefits of diversity. The issue of those benefits as a compelling interest was simply not an issue in the case. The case does stand for the proposition that institutions that use race to confer benefits such as admissions or financial aid as a remedy for past discrimination need to be able to show a clear nexus between such use and conditions that are caused by past discrimination.
7.  *Parents Involved in Community Schools v. Seattle School District No. 1*
551 U.S. 701 (2007)

Program at Issue: Use of race in assigning students under K-12 school choice programs.

Relevant Background Facts

This case involved consolidated cases relating to school choice programs of two elementary and secondary school districts in Seattle, Washington and Jefferson County, Kentucky. The Seattle program invalidated by the Court involved an “open choice” plan for its ten high schools whereby prospective 9th grade students could choose to attend any high school in the district if space was available. Under the plan, if a school was oversubscribed—and half of them typically were—students were assigned according to a series of four tiebreakers, including a priority for students with a sibling in the school and an “integration tiebreaker,” applicable to white and nonwhite students, triggered when a high school was racially imbalanced, which was defined to mean that the school was not within 10 percentage points of the district’s overall white/nonwhite racial balance. This tiebreaker in effect focused on whether assignment of a student to an oversubscribed, racially imbalanced high school would bring the school closer to a 59% nonwhite / 41% white balance.

Similarly, the Jefferson County plan involved a voluntary school choice plan that considered a student’s race (along with other factors) in determining which school a student would be placed. The plan designated students as “black” or “other” and established that all schools needed a black student enrollment between 15% and 50%—a range based on the overall demographics of the public-school population in the County. Students were assigned to their local school or to another magnet or other school of the student’s choice unless it exceeded capacity or hovered at the extreme ends of the racial guidelines.

Relevant Legal Issue

The issues presented in both cases related to whether the Supreme Court’s *Grutter* postsecondary analysis of a compelling interest in diversity applied to elementary and secondary schools, where there is not an application review process that involves a holistic review of individual student applications similar to that at the postsecondary level, and whether the programs were narrowly tailored to achieve that interest.

Holding

In a series of splintered opinions, the Court struck down both programs, concluding that the interests advanced by both districts did not track previously

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In each school the District sought white enrollment of between 31 and 51 percent and non-white enrollment of between 49 and 69%, each within 10% of overall district demographics.
recognized “compelling interests” and that the districts had not established the necessity of their respective uses of race to achieve their goals (in particular, by showing demonstrable impact of their race-conscious policies toward the achievement of their goals).

The Court’s decision was a multi-faceted, fractured 4-1-4 decision, with Justice Kennedy serving as the swing vote. Justice Kennedy joined the four more “conservative” justices (Chief Justice Roberts along with Justices Scalia, Thomas, and Alito) in what was actually a narrow holding. The Court struck down the specific student assignment policies because they were not “narrowly tailored” to achieve their specified goals, in part because the districts failed to show that they could not have used race-neutral alternatives. Justice Kennedy sided with the four more “liberal,” dissenting justices (Justices Breyer, Stevens, Souter, and Ginsburg) in recognizing that a school district has compelling interests in achieving a diverse student population and avoiding the harms of racial isolation—interests that can be pursued through appropriate race-conscious means.

Despite the school districts’ asserted interests in the educational benefits of diversity and avoiding the harms of racial isolation, the Court concluded that the previously recognized interests that could justify the use of race—remedying the effects of past discrimination and pursuing educational benefits associated with diversity in postsecondary education—were not bases for (and therefore supportive of) the district plans. Neither of these interests was implicated in these cases because (1) the cases did not involve remedies to current effects of de jure (imposed by law) segregation and (2) the programs at issue did not involve a truly holistic review of individual students based on a range of factors but made race determinative of many student assignments and defined diversity in simple black and white or white and nonwhite terms.

The Court also ruled that the student assignment policies were not narrowly tailored because the districts did not prove (1) that the use of race was necessary to achieve the enumerated goals and (2) that they had fully considered race-neutral alternatives. On the former point, the Court ruled that the district policies were not “necessary” means toward diversity goals inasmuch as they had a “minimal effect” on student assignments, “suggesting that other means would be effective.” Elaborating in a way seldom, if ever, previously emphasized in its discrimination-in-education cases, the Court compared the limited impact of the district policies—as described above—with the University of Michigan race-conscious law school policy in Grutter that was “indispensable” in more than tripling minority representation at the law school, from 4 to 14.5%. On the question of race-neutral alternatives, the Court found that in Seattle, several race-neutral alternatives were rejected “with little or no consideration,” and that Jefferson County “failed to present any evidence that it considered alternatives.”

Justice Kennedy issued a separate opinion reflecting clear agreement—as well as strong disagreement—with several of the major points of the Roberts opinion. In Justice
Kennedy’s words, the portion of the Chief Justice’s opinion that he declined to join was “too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”

Specifically, five justices—Justices Breyer, Ginsburg, Souter, and Stevens in dissent, along with Justice Kennedy—agreed that K-12 public schools have potentially compelling interests that can be pursued through appropriate race-conscious means, including interests in promoting diversity and in avoiding racial isolation. Justice Kennedy, acting as the apparent swing vote on this issue on behalf of a Court majority, said in his concurrence:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents, and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here [in these specific policies], is to classify every student on the basis of race and to assign each of them to schools based on that classification . . . . Even so, measures other than differential treatment based on racial typing of individuals must first be exhausted. The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.

**Significance**

In their separate opinions, all nine Justices affirmed the Court’s decision in *Grutter* that the educational benefits of diversity are a compelling interest that justifies limited use of race in admissions and presumably other enrollment decisions. In addition, this is the first time that five justices have recognized the possibility of such a compelling interest in the K-12 education context. Furthermore, Justice Kennedy, as the new swing vote on these issues, recognizes avoidance of the harms of racial isolation as a possible compelling interest, perhaps building on the theme raised in Justice O’Connor’s *Gratz* decision related to equal opportunity interests.

At the same time, the case makes clear that the Court will use a very high bar on the issue of narrow tailoring and the necessity for using race in admissions and student assignments.

Relevant Background Facts

This case involved proposed changes to the admission process for New York City’s specialized high schools. Plaintiffs, three organizations and the parent of an Asian-American 8th grade student in the public-school system, sought a preliminary injunction prohibiting the implementation of the proposed changes. By way of background, admission to the specialized schools was highly competitive, and the racial demographics of the specialized schools were not representative of the New York City public school system. There are two ways in which students gain admission to the specialized schools: (1) test scores on the Specialized High School Admissions Test; or (2) through the Discovery Program, which was implemented to “give disadvantaged students of demonstrated high potential an opportunity to try the special high school program.” Over time, and in an effort to increase the enrollment of Black and Latino students at the specialized schools, the New York Department of Education (“DOE”) implemented a number of race-neutral alternatives, which proved to be unsuccessful. These efforts included the addition of a specialized school to each borough, instituting extra-curricular programs focused on test preparation, and targeted outreach to underrepresented groups.

In 2018, the DOE adopted two changes to the Discovery Program, which were at issue in this case. The first was to expand the program from 252 seats up to 800 over a two-year time period. The second was a change in the eligibility criteria by requiring that a student attend a school with a 2017-2018 Economic Need Indicator (“ENI”) of 60% or higher to qualify for 20% of the seats at each specialized school. As a result, only students attending a school with a low-income student body would be eligible for the program. Plaintiffs alleged violations of the Equal Protection Clause because the changes discriminated against Asian-American students.

Relevant Legal Issue

The court was tasked with deciding whether plaintiffs met the preliminary injunction standard. In considering the likelihood of success on the merits, the Court looked to whether the racially-neutral changes violated equal protection by having a disproportionate effect on Asian-Americans, and that result was intended by the defendants.

Holding

In implementing the race-neutral changes, the defendants’ goal of seeking to improve racial diversity among secondary school students did not amount to
discriminatory intent. The Court stated that the Discovery Program likely survived rational basis review where the new changes were rationally related to seeking to prioritize eligibility to the students who were the most in need. The Court’s opinion discusses the kind of evidence that would be needed to establish discriminatory intent. In addition, the Court went one step further in stating that it would not issue the injunction even if the program were subject to strict scrutiny. The Court stated that while the record was not fully developed in this case, “it is more likely than not that achieving racially diverse classrooms will be shown to be a compelling government interest.” It also noted that increased racial diversity was perhaps even more beneficial at the high school level than the college level. Here, the changes were projected to increase Black and Latino enrollment at the specialized high schools by a modest percentage, and thus, the court noted that the defendants likely intended to achieve the benefits of increased diversity rather than to racially balance them.

Significance

This case is significant in that it builds off of Justice Kennedy’s concurrence in Parents Involved in Community Schools v. Seattle School District No. 1 that there is a compelling interest in increased diversity at the high school level. It further provides an example of a race-neutral measure with a resulting increase in diversity that is subject to a less stringent standard of review.


Relevant Facts

Plaintiff Students for Fair Admissions (SFFA) challenged Harvard’s undergraduate admissions policies as unlawfully discriminatory under Title VI in considering race and in allegedly discriminating against Asian Americans. Approximately 35,000 applicants sought admission to Harvard for Fall 2019; about 2000 were admitted, and 1600 enrolled. While academic excellence was required, Harvard sought students who would contribute to a “transformative…liberal arts education” and were “exceptional across multiple dimensions”—well beyond “just standardized test scores or high school grades.”

342 The summary of this case has been taken largely from “NACUA Notes,” a case summary prepared for the National Association of College and University Attorneys (NACUA), October 25, 2019, Volume 18 No. 1, authored by Arthur L. Coleman and Jamie Lewis Keith, with the permission of NACUA. Segments of this analysis are derived, with permission, from “Takeaways from the District Court Decision in Students for Fair Admissions v. Harvard: A Preliminary Analysis” published on October 4, 2019 by the College Board’s Access and Diversity Collaborative.
Harvard’s admission process involved “an overall rating” based on “first reader” academic, extracurricular, and personal ratings of applicants, as well as high school support ratings. (Additional readers also could assign ratings.) Subcommittees then made recommendations, and a 40-member committee ultimately made final admissions decisions.

In addition, non-academic factors “especially beneficial to the Harvard community” that could result in “large tips” in admission included: recruited athletes, legacies, applicants on the dean’s list, and children of faculty and staff (“ALDCs”). Tips also were assigned to applicants who “offer a diverse perspective or are exceptional in ways that do not lend themselves to quantifiable metrics,” i.e., “distinguishing excellences” that could include race and ethnicity, as well as creativity, leadership, geography, and economics. Only in the context of a whole file “overall rating” could race or ethnicity be “a tip or plus factor.” Race was “only ever one factor among many used to evaluate an applicant,” and it was never viewed as a “negative attribute.”

Harvard’s admissions staff tracked the racial and other composition of the applicant pool through “one-pagers” that provided a “snapshot of the projected class and compared it to the prior year,” including statistics on applications and application rates by racial or ethnic group (among other factors). The aim of this tracking was to provide “some perspective on whether [Harvard] was admitting a diverse class” and to help “better forecast its overall yield rate.”

Relevant Issues

The overriding issue in this case was whether Harvard’s consideration of race met strict scrutiny standards developed by the Supreme Court in cases under the Equal Protection Clause of the 14th Amendment. These standards were applicable to Harvard as a private institution, based on its receipt of federal funds that made it subject to Title VI.

SFFA challenged Harvard’s admissions policies and practices as discriminatory under Title VI, claiming that Harvard unlawfully:

- Pursued racial balancing;
- Considered the race of applicants in a mechanical way;
- Failed to pursue viable race-neutral alternatives in lieu of its consideration of race; and
- Engaged in intentional discrimination against Asian American applicants.

Holding

The district court ruled that Harvard’s use of race in admissions satisfied strict scrutiny standards and was therefore lawful under Title VI. More specifically, the Court ruled that:
1. Harvard did not engage in racial balancing. The court found that Harvard treated applicants as individuals, with “every applicant compet[ing] for every seat,” through a process of individualized holistic review that continued at every stage of the process, despite Harvard’s consideration of “one pagers” that tracked race and ethnicity (among other information) during the process. In affirming the use of the “one pagers,” the court stated: “Although a university could run afoul of Title VI’s prohibition on quotas even where it stopped short of defining a specific percentage and instead allowed some fluctuation around a particular number...Harvard’s admission policy ha[d] no such target number or specified level of permissible fluctuation.” Also, there was “considerable variation” in the percentage of Asian-American students admitted from year to year. For these reasons, the court concluded that Harvard’s awareness of numbers (with no target numbers “firmly in mind”) was, in fact, necessary “to remain compliant” with strict scrutiny standards, “including monitoring...the availability of race-neutral alternatives.”

2. Harvard considered race as a non-mechanical plus factor. While Harvard’s consideration of race was an important factor in the admission of many black and Hispanic students, the court concluded that race was part of an “individualized consideration” and was “never... the ‘defining feature’ of applications.” With respect to expert estimates of the “average magnitude of Harvard’s race-related tips,” the court concluded: (a) The magnitude of a tip for any applicant could not be “precisely determined” because the consideration of race was “contextual” as part of the “holistic evaluation of each applicant,” (b) The estimated magnitude was “comparable” in “size and effect” to the tips upheld by the Supreme Court in Grutter (less % effect) and in Fisher II (about the same % effect); and (c) The magnitude of the race tips was “modest,” particularly compared to tips for ALDCs.  

The court also found that “[e]very student Harvard admits is academically prepared for the educational challenges offered at Harvard.”

3. There were no adequate race-neutral alternatives. The court examined the viability of various neutral alternatives proposed by SFFA, considering their benefits and costs, as well as Harvard’s standards and diversity-related goals. In light of Harvard’s existing race-neutral efforts (outreach, recruitment, and more), and because the court found that they would have no meaningful impact on diversity, except to significantly reduce the admission of black and Hispanic students, and/or to diminish Harvard’s

343 Tips for ALDCs were greater than tips for racial identity. The court also recognized that tips for ALDCs, “like so many facets of . . . American life, disproportionately benefit individuals in the majority ad more affluent group.” That comparison was not determinative but informed the court’s conclusion that race was not unduly weighed.

344 Carrying forward a point from Grutter, the court observed that Harvard was not obligated to sacrifice its character of academic excellence in assessing the viability of race-neutral alternatives.
excellence and student experience, the court rejected the suggested alternatives, such as:

· Eliminating early action decisions in admissions (which was tried for three years, with adverse racial diversity outcomes in a competitive recruitment context);

· Eliminating tips in favor of recruited athletes, legacies, applicants on the dean’s or director’s interest list, and children of faculty and staff (which would diminish athletic and faculty competitiveness, alumni and donor relations, and associated student experience);

· Augmenting recruitment and financial aid (noting that existing robust programs already “very nearly” achieved “maximum returns in increased socioeconomic and racial diversity”);

· Eliminating consideration of standardized test scores (which would reduce “academic qualifications...at least as measured by the criteria Harvard presently uses”); and

· Providing a “more significant tip for economically disadvantaged students (which would “sacrifice the academic strength of its class”).

4. Harvard didn’t intentionally discriminate. Addressing SFFA’s claim that Harvard should admit Asian American applicants at a “higher rate than” white applicants, the court found that there was “no evidence of any racial animus whatsoever;” no “evidence that any particular admissions decision was negatively affected by Asian American identity;” and no evidence of prohibited intentional discrimination under court precedent. The court found no pattern ... of stereotyping of any kind. Moreover, SFFA failed to produce a “single Asian American applicant who was overtly discriminated against or who was better qualified than an admitted white applicant....”

Significance

It is important not to over- or under-state the impact of this – as a district court – decision. SFFA appealed the decision to the First Circuit Court of Appeals and subsequently requested certiorari by the Supreme Court for the Circuit Court decision. This decision also has been rendered in the context of other federal litigation and OCR investigations of relevance. On the day this decision was rendered, a federal district court in North Carolina denied summary judgment motions of all parties in Students for Fair Admission v. University of North Carolina, where the plaintiff claims (and UNC denies) that UNC failed to articulate diversity goals and objectives with sufficient clarity and precision,


346 Students for Fair Admissions, Inc. v. Univ. of N.C., No. 1:14CV954 (M.D.N.C., 2019).
unlawfully considered race in admissions, and failed to pursue viable race neutral alternatives. Other cases and OCR investigations that are pending throughout the country involve similar claims associated with financial aid and scholarship programs, law review selection, enrichment programs, and more. Many also include claims of sex discrimination under Title IX.

The court’s decision follows four decades of admissions precedent affirming that the educational benefits of diversity to all students are “compelling” enough to support limited consideration of race and ethnicity in admissions upon a showing of “narrowly tailored” policy design and implementation. The decision recognized Harvard’s authentic institution-specific interests: student diversity’s impact on faculty perspectives, curriculum, and research; and “immersion in a diverse community” as a method of teaching students to “engage across differences.”

347 The court also observed: “[i]t is vital that...racial minorities be able to discuss their racial identities in their applications[, recognizing that] race can profoundly influence applicants’ sense of self and outward perspective [and applicants have] the right to advocate the value of their unique background, heritage, and perspective....”

The court’s decision illustrates the fact-intensive, institution-specific investments in policy design and implementation needed to satisfy strict scrutiny standards over time (i.e., specific desirable educational outcomes sought and whether, why, and how race and ethnicity of individuals are considered).

The court also “emphatically repeat[ed] what the Supreme Court said in Fisher II,”—that Harvard must “continue to use [its valuable] data to scrutinize the fairness of its admissions program” and to make “refinement[s]” in light of changing conditions.

The decision depended substantially on the careful design and authenticity of Harvard’s individualized holistic review policy—and its fidelity to policy aims in practice. While recognizing on several occasions that Harvard’s admissions process was not perfect, the court pointed to key features of the policy and its effects to conclude that the policy satisfied strict scrutiny standards.

The court’s review of the parties’ evidence about the viability of race-neutral alternatives to Harvard’s consideration of race in admissions reflects the most extensive treatment of the issue by any federal court on record. Coupled with similar claims in the pending SFFA v. UNC litigation, this area of focus can be expected to generate more attention in cases to come.

The decision in this case suggests that institutions are well advised, on an ongoing basis, to systematically collect, document, and evaluate evidence as a basis for any race-conscious enrollment program design and practice (as well as to evaluate and document impacts from race-neutral strategies, when utilized), tied to factors such as -- mission-related goals and objectives associated with the benefits of student diversity; the
necessity of any consideration of race in admissions; the careful policy design and integration of race as an element of individualized holistic review; and periodic review and data-informed evaluation of policies and practices over time that document judgments regarding issues presented under prevailing non-discrimination standards.

State laws prohibiting preferences based on Race, National Origin, Gender, and Sex


Relevant Facts

Plaintiffs challenged Michigan Proposal 2, a voter initiative modeled after California Proposition 209, enacted into law as a constitutional amendment, which banned preferences based on race, national origin, gender, and sex in public education, public contracting, and public employment.

Relevant Issues

The overall question is whether the State of Michigan, consistent with the 14th Amendment, may alter the political process for racial minorities to seek preferences in public education, public contracting, and public employment only through a state constitutional amendment. Plaintiffs’ assertion was that whereas other issues relating to such education, contracting, or employment could be addressed through various political processes, such as regulations or legislation, Proposal 2 required minorities to address the issue of preferences by securing a constitutional amendment, thereby discriminating in the political processes required based on race. Prior cases ruled that the bar for political actions relating to racial minorities could not be raised where the state action in question had the serious risk, if not the purpose, of causing specific injuries on account of race.

Holding

The Court, in an opinion authored by Justice Kennedy, held that the 14th Amendment is not violated if a state amends its own constitution to ensure that race is not taken into account in admissions to public education institutions. It declined to extend cases cited by plaintiffs, indicating, “Those cases were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.” Here, by contrast, “[t]he question is not how to address or prevent injury caused on account of race, but whether voters may determine whether a policy of race-based preferences should be continued.”
Significance

This decision makes it clear that state constitutional amendments adopted to bar preferences based on race or gender in public education, contracting, or employment are valid under the federal Constitution. While specifically addressed to public education affected by Michigan’s Proposal 2, the Court’s analysis clearly would apply to other states that have adopted such restrictions in their state constitutions, including California, Nebraska, Arizona, New Hampshire, and Oklahoma. Washington and New Hampshire (through legislation) and Florida (through regulation) adopted similar provisions barring preferences based on race or sex, but did so without amending their state constitutions. Therefore, it would appear that the political process issue addressed in the Schuette case would not be presented in these states.
APPENDIX III: KEY LEGAL OPINIONS INVOLVING EMPLOYMENT

Consideration of Race to Remedy Prior Discrimination

1. **Wygant v. Jackson Board of Education**  
   476 U.S. 267 (1986)

Plan/Action at Issue: Layoff; public school teachers

Relevant Background Facts

The Jackson Board of Education and a teachers’ union approved a new provision to a collective bargaining agreement to protect employees who were members of certain minority groups against layoffs. The provision provided that teachers would be laid off in order of reverse seniority, but it specifically limited the proportional percentage of minority teachers that could be laid off.

When layoffs became necessary, however, the Board realized that following the policy would result in laying off tenured, non-minority teachers while retaining minority teachers on probationary status. The Board opted not to follow the policy, and instead laid off probationary minority teachers. The union and the teachers filed suit, alleging violations of the Equal Protection Clause and Title VII. A state court ruled in favor of the plaintiffs. After that decision, the Board followed the policy and subsequently laid off non-minority teachers while retaining minority teachers with less seniority.

The laid off non-minority teachers sued the Board in federal court, alleging violations of the Equal Protection Clause, Title VII, and Section 1983. The district court granted summary judgment for the Board. The court determined that the lack of minority representation on the faculty was the result of societal racial discrimination, not discriminatory hiring practices by the Board. But it found that “the racial preferences granted by the Board need not be grounded on a finding of prior discrimination. Instead, . . . the racial preferences were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing ‘role models’ for minority schoolchildren.” 476 U.S. at 272. The Sixth Circuit affirmed the lower court’s decision, adopting much of the reasoning and language of the lower court.

Relevant Legal Issue

Did the layoff provision in the collective bargaining agreement violate the Equal Protection Clause? Specifically, (1) was the “role model” theory a constitutional basis for a race-conscious layoff provision that sought to remedy societal discrimination; and (2) in the absence of particularized findings of prior racial discrimination by the school district, was the race-conscious layoff provision supported by a compelling state purpose and narrowly tailored to meet that purpose?
Holding

The Supreme Court reversed the holdings of the Sixth Circuit.

(1) The Court explicitly rejected the lower court’s reasoning that the role model theory—providing minority role models for minority students—is a valid basis for using racial classifications. The lower court upheld the provision as a valid attempt to alleviate the effects of societal discrimination. But the Supreme Court explained: “This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.” Id. at 274. The Court noted that the Board’s attempt to alleviate the effects of societal discrimination by linking the percentage of minority teachers to the percentage of minority students has no stopping point. Taken to its logical extreme, the Court said it would result in the very system that was rejected by the Court in Brown v. Board of Education.

(2) The Court determined that there was insufficient evidence that remedial action was necessary to remedy prior discrimination by the Board; therefore, the layoff provision was not supported by a compelling state purpose. The Court found no evidence of prior discriminatory hiring practices. Id. at 279. Even assuming such compelling purpose existed, however, the race-conscious layoff provision was not a narrowly-tailored remedy because it imposed the entire burden of the remedy on specific individuals (those laid off), rather than diffusing the burden. Id. at 282-83. The Court distinguished hiring remedies—where a broad group of individuals may be denied a future employment opportunity—from layoff remedies—where the lives of specific individuals will be seriously disrupted. Id. at 283-84. The Court held that the burden imposed on those being laid off was “too intrusive,” and the remedy—even for a compelling purpose—was “not sufficiently narrowly tailored.” Id. at 283.

Significance

In Wygant, the Court considered for the first time whether and under what circumstances racial preferences are appropriate in the employment context. In this plurality opinion, the Court applied strict scrutiny, explaining that racial classifications are inherently suspect and that “the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.” Id. at 273.

The plurality unequivocally found: (1) remedying societal discrimination is not a legitimate justification for racial preferences; (2) promoting role models for racial minorities is also not a legitimate justification for racial preferences; and (3) tying employment goals to the racial makeup of the student body is not a narrowly tailored remedy for any particularized, prior discriminatory hiring practices because there is no logical connection between the two.
Yet the concurring and dissenting opinions suggested that promoting diversity within a faculty is a valid interest surviving constitutional review. In her concurring opinion, Justice O’Connor noted: “. . . a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the context of higher education, to support the use of racial considerations in furthering that interest.” *Id.* at 286. Justice O’Connor agreed with the plurality’s assessment that using the “role model” theory to justify the conclusion that the plan at issue had a legitimate remedial purpose was in error. But she cautioned that providing role models is different than promoting racial diversity, and she suggested that promoting racial diversity could justify race-conscious decisions. *Id.* at 278.

Justice Stevens went even further in his dissent. Explaining that race-consciousness can be part of sound governmental decision making, consistent with the Equal Protection Clause, Justice Stevens opined:

In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous ‘melting pot’ do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only ‘skin deep;’ it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

*Id.* at 315. He went on to distinguish between decisions that exclude minorities and those that include them, explaining:

. . . the fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not.

*Id.* at 316.
2. City of Richmond v. J.A. Croson Co.  
488 U.S. 469 (1989) 

Plan/Action at Issue: Set aside; minority contractors 

Relevant Background Facts 

The Richmond City Council adopted a set-aside plan requiring prime contractors to whom the City awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more Minority Business Enterprises (“MBEs”). The plan defined an MBE as a business at least 51 percent of which is owned or controlled by minority group members. The 30 percent set aside did not apply to minority-owned prime contractors. 

The Council claimed that the plan was remedial in nature and that it was enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects. The plan was adopted after public hearing, but there was no direct evidence of racial discrimination on the part of the City in letting contracts or any evidence that the City’s prime contractors had discriminated against minority-owned subcontractors. 

After the plan was adopted, the City issued an invitation to bid on a project at the city jail. The only original bidder on the contract had trouble fulfilling the 30 percent set-aside requirement. While he was requesting a waiver from the City, a local MBE submitted a bid after the deadline for prime bids. The City ultimately decided to rebid the contract, and the original bidder, J.A. Croson Company, sued the City, arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case. 

Relevant Legal Issue 

Did the minority set-aside program adopted by the City violate the Equal Protection Clause? Specifically, did the City act with a compelling interest to remedy past discrimination by apportioning contracting opportunities on the basis of race? 

Holding 

In this opinion, the Supreme Court considered the applicability of two prior decisions—Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding the constitutionality of a federal set-aside program) and Wygant (rejecting the constitutionality of a school board’s race-conscious layoff provision). 

The Court held that the minority set-aside program at issue here violated the Equal Protection Clause. The City failed to point to any identified discrimination in the Richmond construction industry and therefore failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. 488 U.S. at 505. The Court distinguished Fullilove as dealing with the broad remedial powers of
Congress to address a nationwide history of past discrimination. *Id.* at 487-91. By contrast, states and their political subdivisions cannot fashion remedies to address societal discrimination. *Id.* at 499. States may take remedial action when they have “evidence that their own spending practices are exacerbating a pattern of prior discrimination,” and they must identify that discrimination with some specificity before employing race-conscious relief. *Id.* at 504-09. The Court explained, however, that its decision in this case did not preclude “a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.” *Id.* at 509.

**Significance**

This case is important because it established that all race-conscious action by state and local governments is subject to strict scrutiny. The Court reaffirmed its view in *Wygant* that “[t]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.” *Id.* at 494. The opinion was limited, however, because the Court was not presented the opportunity to determine the appropriate legal standard under which racial classifications imposed by federal programs should be analyzed. As a result, the Supreme Court made a distinction between the broad remedial powers of Congress to address societal discrimination and the more limited powers of state and local governments to remedy the effects of identified prior discrimination. The Court later rejected that distinction in *Adarand*, where it held that strict scrutiny applies to all racial classifications, regardless of which level of government imposes them.

3. **Adarand Constructors, Inc. v. Pena**  

**Plan/Action at Issue:** Additional compensation for socially and economically disadvantaged contractors

**Relevant Background Facts**

A highway construction company challenged the constitutionality of provisions in federal agency contracts that granted additional compensation to prime contractors that hired subcontractors that were certified as small businesses owned and controlled by “socially or economically disadvantaged individuals.” To determine whether individuals were socially or economically disadvantaged, the government relied on statutes that used race-based presumptions.

Adarand submitted the lowest bid on a subcontract, but it lost the contract to a company that was certified as a small business owned and controlled by “socially or economically disadvantaged individuals.” Adarand filed suit, arguing that the race-based presumptions in the statute violated the Fifth Amendment’s guarantee that no one will be denied equal protection of the laws.
Relevant Legal Issue

Under what legal standard should courts review governmental classifications based on race?

Holding

After detailed consideration of the Court’s precedent, the Supreme Court concluded that analysis of equal protection claims under the Fifth Amendment is the same as that under the Fourteenth Amendment. The Court remanded the case to the Tenth Circuit after defining the appropriate legal standard under which courts should review governmental classifications based on race.

The Supreme Court held: “All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed . . . under strict scrutiny.” 515 U.S. at 227. Racial classifications are constitutional only if they are narrowly tailored to meet compelling governmental interests.

The Tenth Circuit had upheld the race-based presumptions after applying intermediate scrutiny analysis—which requires a “significant” rather than “compelling” government purpose. Holding that strict scrutiny was required, the Supreme Court remanded the case for the lower courts to review under strict scrutiny. The Supreme Court explained that the Tenth Circuit did not address the issue of narrow tailoring by considering whether there were “race-neutral means to increase minority business participation in government contracting” or whether the program was sufficiently limited in duration to ensure that it “will not last longer than the discriminatory effects it is designed to eliminate.”  Id. at 237-38 (quoting Croson, 488 U.S. at 507 and Fullilove, 448 U.S. 448, 513 (1980)).

Significance

This case is significant in that the majority of the Court concluded that all racial classifications must be reviewed under strict scrutiny. The majority opinion was authored by Justice O’Connor and joined by then-Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia (in relevant part). Prior to reaching this significant holding, Justice O’Connor detailed the history of the Court’s jurisprudence, noting the gaps that its prior decisions left because of the Court’s failure to produce majority opinions, particularly in key decisions such as Bakke (“racial and ethnic distinctions . . . call for the most exacting judicial examination”), Fullilove (“racial or ethnic criteria must necessarily receive a most searching examination”), and Wygant (applying strict scrutiny). Underscoring its announcement that strict scrutiny applies to all racial classifications, the Court expressly overruled its decision in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), where it held that “benign” federal racial classifications need only survive intermediate scrutiny.
Justices Stevens, Souter, and Ginsburg each authored their own dissenting opinions, and they all joined in each other’s dissents. In his dissent, Justice Stevens echoed his dissent in Wygant, distinguishing between “state action that imposes burdens on a disfavored few and state action that benefits few in spite of its adverse effect on the many.” *Id.* at 246. In Wygant and again here, Justice Stevens argued that race is not always irrelevant to governmental decision making and suggested that an interest in diversity is sufficient to justify a racial classification. Addressing head-on the majority’s announcement that *Metro Broadcasting* was overruled, Justice Stevens explained that the interest in diversity had been mentioned previously in *Bakke* and in Justice O’Connor’s and his own dissents in Wygant.

But it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting*, of course, answered that question in the affirmative. The majority today overrules *Metro Broadcasting* only insofar as it is ‘inconsistent with the holding’ that strict scrutiny applies to ‘benign’ racial classifications promulgated by the Federal Government. The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court’s holding today—indeed, the question is not remotely presented in this case—and I do not take the Court’s opinion to diminish that aspect of our decision in *Metro Broadcasting*.

*Id.* at 257-58.

4. *Rothe Development Corp. v. Department of Defense*
545 F.3d 1023 (Fed. Cir. 2008)

**Plan/Action at Issue:** Set-aside; socially and economically disadvantaged contractors

Congress enacted (and reenacted several times) a statute (10 U.S.C. § 2323) which, in relevant part, set a goal that five percent of federal defense contracting dollars for each year be awarded to certain entities, including small businesses owned or controlled by “socially and economically disadvantaged individuals (as defined by . . . the Small Business Act) . . . .” The Small Business Act presumed that African-Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities were “socially and economically disadvantaged individuals.”

Rothe Development Corporation (“Rothe”), owned by a white woman, lost a bid for a Department of Defense (“DOD”) contract to a company owned by a Korean-American couple, as a result of the statute. Rothe challenged the statute as facially unconstitutional. Applying strict scrutiny, the district court granted summary judgment to DOD, finding that “Congress sought to further a compelling interest supported by a ‘strong basis in evidence,’ and that the statute was narrowly tailored to that interest.” 545 F.3d at 1033. Rothe appealed.
The Federal Circuit held that the statute violated the equal protection component of the Fifth Amendment. Like the lower court, the Federal Circuit applied strict scrutiny because the statute authorized DOD to afford preferential treatment on the basis of race. But the appellate court found that there was not a strong basis in evidence (compelling interest) to justify race-based remedial action. In so holding, the court took a hard look at the statistical evidence before Congress at the time it enacted (and reenacted the statute). Specifically, it looked at the six disparity studies conducted of one state, two counties, and three cities, that Congress considered and the district court determined were sufficient to demonstrate a compelling interest for race-based preferences. Debunking the methodology used in those studies—particularly accounting for the qualifications of the pool of available minority contractors and the capacity of those contractors to bid on multiple contracts simultaneously—the court concluded: “the defects we have noted detract dramatically from the probative value of these six studies, and, in conjunction with their limited geographic coverage, render the studies insufficient to form the statistical core of the ‘strong basis in evidence’ required to uphold the statute.” Id. at 1045. The court cautioned, however, that it was not making any blanket statements about the reliability of disparity studies. It emphasized that “there is no precise mathematical formula to assess the quantum of evidence that rises to the Croson ‘strong basis in evidence’ benchmark” and that the sufficiency of evidence to justify government action “must be evaluated on a case-by-case basis.” Id. at 1049. Finding that there was no compelling interest for the government program, the court did not reach a decision on whether it was narrowly tailored.

This case is important because following the Supreme Court’s lead in Croson and Adarand, the Federal Circuit confirmed that strict scrutiny applies to government programs that confer benefits to groups defined in racially-neutral terms—such “socially and economically disadvantaged”—at least where those terms are defined as including certain racial or ethnic groups.

5. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*

345 F.3d 964 (8th Cir. 2003)

**Plan/Action at Issue:** Set-aside; socially and economically disadvantaged contractors

Plaintiffs challenged a federal program, as implemented in Minnesota and Nebraska, that required ten percent of federal highway construction funds to be paid to small businesses owned and controlled by “socially and economically disadvantaged individuals,” as defined by the Small Business Act. Based on the holdings in Croson and Adarand, the government conceded that the program should be analyzed under strict scrutiny because “the statute employs a race-based rebuttable presumption to define a class of beneficiaries and authorizes the use of race-conscious remedial measures.” 345 F.3d at 969. The district court upheld the program, and the Eighth Circuit affirmed.
Recognizing that Congress had spent decades compiling evidence of racial discrimination in government highway contracting, the court concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary. Therefore, Congress had a compelling interest in enacting the program. The court rejected plaintiffs’ argument that the states needed to independently meet the strict scrutiny evidentiary standard and held that a state’s implementation of the program is relevant to the narrow tailoring component of the analysis. The court then held that the states’ implementation of the program, consistent with the implementing regulations, was sufficiently narrowly tailored to withstand strict scrutiny.

6. **Hayden v. County of Nassau**  
180 F.3d 42 (2d Cir. 1999)

**Plan/Action at Issue:** Hiring; police entrance exam

A class of applicants who took a police officers’ entrance exam sued the County alleging violations of the Equal Protection Clause and Title VII, among other claims. The exam was redesigned pursuant to several consent decrees entered into after the Department of Justice sued the County for discriminating against blacks, Latinos, and female applicants in hiring. The lower court dismissed the plaintiffs’ claims finding that “although [the exam] was designed with race in mind, [it] was administered and scored in a race-neutral fashion.” 180 F.3d at 46.

The Second Circuit affirmed the dismissal, after distinguishing *Bakke*, *Croson*, and *Adarand*:

Our reading of those cases suggests that they are concerned with select affirmative action tools, such as quota systems, set-aside programs, and differential scoring cutoffs, which utilize express racial classifications and which prevent non-minorities from competing for specific slots or contracts. . . . Here, unlike in the above cited cases, although Nassau County was necessarily conscious of race in redesigning its entrance exam, it treated all persons equally in the administration of the exam.

*Id.* at 49. The Second Circuit concluded that the race-neutral efforts to remedy the racially disproportionate effects of the entrance exam did not violate the Equal Protection Clause or Title VII because they did not discriminate against non-minorities. *Id.* at 54-55.

7. **Rothe Development, Inc. v. United States Department of Defense,**  
836 F.3d 57 (D.C. Cir. 2016)

**Factual Background**
Rothe Development, Inc. (“Rothe”), a small business that bids on Defense Department contracts, challenged the constitutionality of the Small Business Administration’s 8(a) business development program (the “8(a) Program”). The 8(a) Program was created to provide contracting opportunities to small businesses owned by “socially and economically disadvantaged” individuals.

Relevant Legal Issue

Whether section 8(a) of the Small Business Act’s definition of socially disadvantaged individuals was race-neutral, and thus, not subject to strict scrutiny.

Holding

The statute at issue did not contain racial classifications where it used facially race-neutral terms to identify qualifying individuals without presuming that members of certain racial, ethnic, or cultural groups are included. As such, the statute was subject to rational basis review rather than strict scrutiny.

Rothe alleged that the 8(a) program contained an unconstitutional racial classification that prevents it from competing with minority-owned business. In support of its argument, Rothe pointed to the statutory definition of socially disadvantaged individuals; i.e., “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” The Court disagreed and found that the definition was facially race-neutral. It stated that Congress “considered and rejected statutory language that included a racial presumption...[and] chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic or cultural bias.” Here, the definition of “socially disadvantaged” was distinguishable from that of “disadvantaged” students in University of California v. Bakke, 438 U.S. 265, (1978). In Bakke, an applicant’s race was a factor in determining disadvantage and not the individual’s own experience of racial or ethnic discrimination, as was the case in Rothe. By contrast, the definition of social disadvantage in Rothe did not include a group-based classification and in doing so effectively recognized that not all individuals in minority groups have been subjected to discrimination, ethnic prejudice, or cultural bias.

Significance

The court noted that in enacting the statute, Congress intentionally differentiated this from other statutes which specifically limit participation to racial or ethnic minorities or instruct that certain racial or ethnic groups, or minorities in general, are presumed to be eligible. Rather, eligibility in this case turned on the individual’s experience of bias rather than on a group-based racial classification.

Plan/Action at issue: Hiring ratio

On remand from the Sixth Circuit, the District Court considered whether a 1 in 3 minority hiring ratio continued to remedy past discrimination by the Cleveland Fire Department. The Court ultimately found that there was no evidence that the prior consent decree’s racial classifications remained remedial. Among other things, the Court looked to the following in support of its finding: (1) the Fire Department’s aggressive minority recruiting efforts through targeted advertising, its maintaining a list of potential individuals from minority communities, implementation of a high school trade program for firefighting at a local high school that had almost 100% minority enrollment and its giving significant preference points on the exam to graduates of that program; (2) the fact that there were a significant number of minorities in leadership positions who had influence on hiring; and (3) the substantial increase in the percentage of minority firefighters from the time of the initial filing of the lawsuit (4%) to the present (26%).

The Court also did not find any evidence in support of the contention that the hiring ratio would remedy past discrimination. Here, it cited the increase in minority representation combined with minority leadership in the City and the Fire Department as well as existence of organizations committed to increasing minority participation as factors that have eliminated any long term effects of the prior lack of minority representation. It also added that there were no longer any employees left in the Fire Department who were employed at the time the original consent decree was in place, and therefore no current employees were either negatively or positively impacted by any prior discrimination.

9. Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, 713 F.3d 1187 (9th Cir. 2013)

Plan/Action at Issue: set-off, socially and economically disadvantaged contractors.

Plaintiffs alleged that California Dept. of Transportation’s Disadvantaged Business Enterprise program was unconstitutional in that it provided race and sex-based preferences to African-American, Native American, Asian-Pacific Americans, and women.

Plaintiffs did not have standing, but in any event the 9th Circuit determined that the program survived strict scrutiny. The Court did not consider whether the gender-
conscious program passed intermediate scrutiny where the entirety of the program passed strict scrutiny.

The program was supported by statistical and anecdotal evidence of discrimination in the California transportation industry and was tailored to groups that actually suffered discrimination in the industry. Unlike the case in *Western States Western States Paving Co., v. Washington State Dept. of Transportation*, 407 F.3d 983 (9th Cir. 2005), where the Defendants provided no statistical or anecdotal evidence, but rather compared the availability of disadvantaged businesses to the percentage of contract dollars awarded, the defendants here provided a disparity study of African American-, Native American-, Asian-Pacific American-, and women-owned firms in multiple categories of transportation contracts. The court noted that while the statistical disparities alone were enough, the Defendants also provided anecdotal evidence. It further stated that the Defendants were not required to identify individual acts of deliberate discrimination. Finally, the Court rejected the Plaintiff’s argument that the statistics showed varied results when broken down between categories where the court only needed to look for patterns of discrimination and thus, it was important to analyze the statistics in their entirety rather than view them in isolation.

**Consideration of Race to Address a Manifest Imbalance in Applicable Workforce**

10. *Steelworkers v. Weber*
    
    443 U.S. 193 (1979)

*Plan/Action at Issue:* Hiring; craft training program

*Relevant Background Facts*

As part of a collective bargaining agreement, a union and private employer agreed on an affirmative action plan that reserved 50 percent of openings in a craft training program for black employees until the percentage of black craft workers in the plant was commensurate with the percentage of the black local labor force. White employees challenged the program’s validity under Title VII, alleging that junior black employees received training in preference to senior white employees. The district court held that the plan violated Title VII. A divided panel on the Fifth Circuit affirmed, holding that all employment preferences based on race, including those incidental to affirmative action plans, violated Title VII’s prohibition against racial discrimination in employment.
Relevant Legal Issue

Did Title VII forbid a private employer from voluntarily implementing an affirmative action plan designed to eliminate manifest racial imbalances in traditionally segregated job categories?

Holding

The Supreme Court reversed the Fifth Circuit’s decision. It held that the voluntary race-conscious efforts of the employer’s training program did not violate Title VII’s prohibition against racial discrimination. The Court stated that an interpretation of Title VII that “forbade all race-conscious affirmative action would ‘bring about an end completely at variance with the purpose of the statute’ and must be rejected.” 443 U.S. at 202. The Court upheld the plan because its “purposes . . . mirror[ed] those of the statute,” which included breaking down patterns of racial hierarchy in occupations that have been traditionally segregated. Id. at 208. Further, the plan neither “unnecessarily trammel[ed] the interests of white employees” nor “create[d] an absolute bar to the[ir] advancement.” Id. Finally, the plan was a temporary measure designed to eliminate a manifest racial imbalance, not to maintain a racial balance.

Significance

*Weber* is important in that the Court established the precedent that Title VII’s prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans. To the contrary, a plan should be upheld under Title VII where its purpose mirrors that of Title VII, it does not unnecessarily trammel the rights of those outside the group it is designed to protect, and it is a temporary measure designed to eliminate a manifest imbalance. Courts consistently rely on the framework established in *Weber* in assessing the validity of affirmative action plans designed to remedy manifest imbalances.


Plan/Action at Issue: Promotion; transportation agency

Relevant Facts

The Santa Clara County Transportation Agency (“Agency”) promulgated an affirmative action plan for promoting its employees. The plan did not set aside a specific number of positions for minorities or women, but authorized the Agency to consider race or sex as one factor when evaluating qualified candidates. The plan did not contain an explicit end date, but rather created long-term and short-term goals to attain a balanced work force. When the Agency announced a vacancy for a road dispatcher position, seven
applicants were deemed eligible for promotion, including Joyce (female) and Johnson (male). Ultimately, Joyce received the promotion.

Johnson sued, alleging sex discrimination in violation of Title VII. The district court found that the Agency’s plan was invalid under Weber because the plan was not temporary. The Ninth Circuit reversed, holding that: (1) the absence of an express end date was not dispositive; (2) the consideration of Joyce’s sex was lawful; and (3) the plan was adopted to address a conspicuous imbalance in the Agency’s work force, and neither trammeled the rights of other employees nor created a bar to their advancement. 480 U.S. at 626.

Relevant Legal Issue

Did the Agency’s voluntary affirmative action plan violate Title VII? Specifically, (1) was the consideration of Joyce’s sex justified because of a “manifest imbalance” reflecting the underrepresentation of women in a “traditionally segregated job category;” and (2) did Joyce’s promotion “unnecessarily trammeled the rights” of male employees or create an “absolute bar to the[ir] advancement?”

Holding

The Supreme Court affirmed the Ninth Circuit’s decision. The Court held that the Agency appropriately considered Joyce’s sex as one factor when promoting her. The Court found that the Agency implemented its plan to overcome a conspicuous imbalance in certain job categories and to attain a balanced work force. The plan was a moderate, flexible, case-by-case approach. Accordingly, the Court held that the plan was “fully consistent with Title VII, for it embodie[d] the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.” Id. at 642.

(1) The Court found that Joyce’s promotion was appropriately undertaken to remedy underrepresentation in a “traditionally segregated job category.”

The Court held that to determine whether a manifest imbalance exists that justifies taking race or sex into account for filling a job that requires special training, it is appropriate to compare the percentage of minorities or women in the employer’s work force to those in the general labor force who possess the relevant qualifications. Id. at 632. The Court reasoned that requiring that the manifest imbalance be related to the traditionally segregated job category ensures that the purposes of Title VII are met without unduly infringing on the interests of other employees. Importantly, however, the Court stated that “[a] manifest imbalance need not be such that it would support a prima facie case against the employer,” distinguishing the requirements of Title VII from the stricter requirements of the Equal Protection Clause, at least for voluntarily adopted affirmative action plans. Id.
Here, the Agency’s plan acknowledged that limited opportunities had existed in the past for women to find jobs in certain classifications. *Id.* at 634. In order to measure progress in eliminating underrepresentation, the Agency set a long-term goal of attaining a work force that mirrored in its major job classifications the percentage of women in the area labor market. It also directed that annual short-term goals be formulated. The Court upheld the plan because it directed that numerous factors be considered in making hiring decisions, including the specific qualifications of female applicants for particular jobs, rather than authorizing blind hiring by the numbers.

(2) The Court found that promoting Joyce neither “trammeled the rights” of male employees nor “created a bar to their advancement.”

The Court discussed three points to support its conclusion. First, the Agency’s plan did not set aside a specific number of positions for women, but rather authorized the consideration of sex as one factor when evaluating qualified applicants, requiring women to compete with all other applicants. Second, Johnson neither had an “absolute entitlement” to the position nor a “legitimate, firmly rooted expectation” for it. *Id.* at 638. Finally, the Agency’s plan was intended to “attain a balanced work force, not maintain one.” *Id.* at 639. The Court noted that express assurance that a program is only temporary might be necessary if the program has quotas, in order to minimize intrusion on the expectations of other employees and to ensure that the plan is not being used to maintain a permanent racial and sexual balance. However, here, the Agency took “a moderate, gradual approach to eliminating the imbalance in its work force,” alleviating the need to express an end date.

**Significance**

In *Johnson* the Court applied and refined the Title VII scrutiny detailed in *Weber*—an affirmative action plan does not violate Title VII if it is designed to eliminate a manifest imbalance; it does not unnecessarily trammel on the rights of those outside the group it is designed to protect, it cannot create an absolute bar to advancement, and remedial action cannot be designed to do more than attain, rather than maintain, a balance. The Court also reaffirmed the importance of voluntary affirmative action on the part of employers. And, significantly, the Court distinguished Title VII scrutiny from that required under the Equal Protection Clause, which requires evidence of actual discrimination. This distinction enables employers to voluntarily adopt affirmative action plans without admitting past discrimination and without compiling evidence that could be used to subject them to discrimination lawsuits. Cases since *Johnson* have relied on this distinction.

12. *Humphries v. Pulaski County Special School District*

   580 F.3d 688 (8th Cir. 2009)

   **Plan/Action at Issue:** Promotion; public school district
A white female who had been passed over for multiple promotions sued her school district employer under Title VII and a state civil rights statute, claiming that the district unlawfully used race in its hiring practices. The district defended on the grounds that its affirmative action policies were promulgated in response to various desegregation orders and were also justified as being necessary to address a manifest imbalance in the relevant job positions (school administrators). The district court granted summary judgment for the school district. The court of appeals reversed, finding genuine issues of material fact.

As an initial matter, the Eighth Circuit joined its “sister courts in concluding that evidence that an employer followed an affirmative action plan in taking a challenged adverse employment action may constitute direct evidence of unlawful discrimination. If the employer defends by asserting that it acted pursuant to a valid affirmative action plan, the question then becomes whether the affirmative action plan is valid under Title VII and the Equal Protection Clause.” 580 F.3d at 694. “An affirmative action policy is valid,” said the court, “if the policy is remedial and narrowly tailored to meet the goal of remedying the effects of past discrimination.”  Id. at 695. “A policy may be considered remedial if the employer has identified a ‘manifest imbalance’ in the work force,” or if the policy was “implemented ‘in adherence to a court order, whether entered by consent or after litigation.’ But a policy may not ‘unnecessarily trammel’ the right of non-minorities, and it must be ‘intended to attain a balance, not to maintain one.’”  Id. at 695-96 (citations omitted). Here, the court of appeals concluded that there were genuine issues of material fact related to whether the school district’s affirmative action policies “addressed a manifest racial imbalance in the workforce,” and whether the district was “impermissibly maintaining, rather than attaining, a racial balance.”  Id. at 696.

13.  *Rudin v. Lincoln Land Community College*  
420 F.3d 712 (7th Cir. 2005)

**Plan/Action at Issue:** Hiring; community college faculty

Rudin, a white female, applied for a full-time, tenure-track position at a community college. A screening committee reviewed the applications and selected candidates for interviews, including Rudin. The list of selected candidates was sent to the College’s Equal Opportunity Compliance Officer, whose role was to “determine if there was sufficient diversity among the interviewees.” 420 F.3d at 716. At this point, Hudson, an African-American male who had applied but had not been selected for an interview, was added to the list of interviewees. Ultimately, Hudson was offered the teaching position. Rudin filed a complaint in federal court, advancing two Title VII claims: race discrimination and sex discrimination. The district court granted summary judgment for the College on both claims. On appeal, the court considered whether Rudin put forth sufficient evidence to survive summary judgment on her claims that her employer discriminated against her on the basis of her race and sex. The Seventh Circuit reversed the district court’s award of summary judgment on both claims.
With regard to Rudin’s race claim, the court noted that the College had argued below that its “race-conscious hiring process was a permissible way of increasing diversity in its faculty.” *Id.* at 721 (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)). However, on appeal, the College made no such argument. Instead, it simply argued that the practice of inserting minority candidates into the interview pool did not show that race was a consideration in the employment decision at issue.

Rudin supported her intentional discrimination claim by proffering evidence of discriminatory motive. A plaintiff can avoid summary judgment in such a case by relying on either direct or circumstantial evidence to show discriminatory motive. Here, the court found that, while not sufficient in itself to support a finding of racial discrimination, “the practice of including a racial minority in the candidate pool, when considered with other factors in the case, can constitute circumstantial evidence of race discrimination.” *Id.* at 722 (emphasis in original). The court summarized the other factors present in this case: “Hudson’s name was inserted into the interview pool according to a stated policy . . . that explicitly favored minority over non-minority job applicants.” The court reasoned, “he was not simply placed in the general applicant pool; he was allowed to bypass the first elimination.” *Id.* The court found additional evidence of intentional discrimination, including statements about administrative pressure to hire a minority candidate; failure of the College to follow its own internal hiring procedures; and inconsistencies in the College’s proffered justification for the hiring decision.

On the sex discrimination claim, the College conceded that Rudin had established a *prima facie* case, and the court found that the College proffered a legitimate, non-discriminatory reason for its hiring decision. Accordingly, to survive summary judgment, Rudin had to put forth sufficient evidence from which a rational factfinder could infer that the College lied about its reasons for hiring Hudson over her. The court found that Rudin provided enough facts to create the inference of pretext, specifically that the College’s justification for not offering Rudin the position changed over time and that the College failed to follow its own hiring policies.

14. *Rudebusch v. Hughes*

    313 F.3d 506 (9th Cir. 2002)

**Plan/Action at Issue:** Salary; one-time pay adjustment for women and minority faculty

Northern Arizona University instituted a one-time base pay adjustment for women and minority faculty after finding apparent overall pay inequity. A class of white male professors sued the University under Title VII, alleging that the University failed to consider their eligibility for pay adjustments. They alleged that they, too, were entitled to adjustments because their pay fell below the assessed mean salary that was used as a baseline for the pay adjustments given to the female and minority faculty.

In this case, the Ninth Circuit examined for the first time the Title VII parameters for analysis of pay equity adjustments. In doing so, it relied on the Supreme Court’s
framework in Johnson. First, it acknowledged that the aggrieved professors did not challenge on appeal the jury’s finding that the University implemented the pay adjustments to address a manifest imbalance with respect to the pay of minority and women professors. Assuming as true that a manifest imbalance existed, the court then turned to the question of whether the pay adjustments unnecessarily trammeled on the rights of the white male professors. The court determined that the one-time adjustment was not “an absolute bar” to their advancement, they retained their positions at the same salary, and they were eligible for future promotions. The court explained:

One thing is clear in this case: Whatever the reason, white male faculty who were earning less than their predicted salaries were not doing so because of their race or sex, or at least they have not demonstrated as much. Despite this reality, Rudebusch would have us hold that anytime an employer attempts to address a manifest imbalance in the pay equity context, it must simultaneously consider the unrelated concerns of those employees who have not demonstrated such a legally cognizable imbalance. Such logic would all but eliminate employer efforts to attain pay equity as required by law.313 F.3d at 522-23.

Yet, the court stopped short of upholding the lower court’s summary judgment in favor of the University. Instead, the Ninth Circuit remanded the case for the fact-finder to determine whether the pay adjustments were more than remedial. Consistent with Weber and Johnson, the adjustments would be valid under Title VII only the extent they were designed to “attain” a balance and they did not overcompensate the women and minority faculty members.

15. Maitland v. University of Minnesota
155 F.3d 1013 (8th Cir. 1998)

Plan/Action at Issue: Salary; pay adjustment for female faculty

Maitland, a male faculty member at the University of Minnesota, filed a reverse discrimination suit, alleging that salary increases paid to female faculty at the University pursuant to a consent decree violated his equal protection rights and Title VII. Prior to entering into the consent decree, each side to the underlying dispute prepared a statistical pay study. The results of the studies differed because the parties disagreed on the relevance of certain variables. The results of the plaintiffs’ study showed a disparity between male and female salaries roughly between four and ten percent, while the results of the University’s study showed results around two percent. The parties relied on a compromise model—showing salary disparities around six percent—upon which they based the affirmative action salary plan set forth in the consent decree. In his suit against the University, Maitland argued that the University discriminated against him by implementing salary increases for women when there was no salary disparity that required remediation.
On an appeal of a grant of summary judgment in favor of the University, the Eighth Circuit considered whether there was undisputed evidence that there was a “manifest” (Title VII) or “conspicuous” (equal protection) imbalance in the salaries of male and female faculty at the time the affirmative action salary plan was implemented. The court relied on the standard set forth in Weber and Johnson—that consideration of gender in an affirmative action plan is improper unless it is justified by a “manifest imbalance” that reflects an underrepresentation of women in traditionally segregated job categories, that the plan does not unnecessarily trammel on the rights of male employees, and that the plan was intended to attain, not maintain a balance in the workforce. The court concluded that because there were three comparative salary studies reaching different results (one of which might not be statistically significant) the relevant evidence regarding whether there was a manifest imbalance in salaries was far from undisputed. The court explained that the finder of fact must be able to consider the variables that have been excluded, hear the reasons for the exclusions, and determine what weight to accord the results of the studies. Accordingly, the Eighth Circuit reversed the lower court’s grant of summary judgment for the University.

16. Smith v. Virginia Commonwealth University
   84 F.3d 672 (4th Cir. 1996)

Plan/Action at Issue: Salary; pay adjustment for female faculty

Five male professors sued the University alleging that pay increases for female faculty members violated Title VII. The pay increases were given after a salary equity study was completed. The Salary Equity Study Committee used a multiple regression analysis, but it excluded several performance factors, such as teaching quality; quantity and quality of publications; and quantity and quality of research. The plaintiffs contended that excluding these factors, among others, called into question the validity of the study’s results. The University relied solely on the results of the multiple regression analysis to determine manifest imbalance in pay between male and female faculty members and in granting the pay increases to the female faculty.

The lower court granted summary judgment in favor of the University, and the male professors appealed. Relying on Weber and Johnson, the Fourth Circuit considered whether there was a manifest imbalance that justified the pay increases. The court reversed the grant of summary judgment: “Given the number of important variables omitted from the multiple regression analysis, and the evidence presented by the appellants that these variables are crucial, a dispute of material fact remains as to the validity of the study to establish manifest imbalance.” 84 F.3d at 677.
17. **Honadle v. University of Vermont & State Agricultural College**  
56 F. Supp. 2d 419 (D. Vt. 1999)

**Plan/Action at Issue:** Promotion; state college

Honadle, a white female professor, brought a reverse discrimination suit under Title VII and the Equal Protection Clause when Halbrendt, a Chinese-born female professor, was promoted to a department chair position over her. The court considered the validity of the University’s affirmative action plan under Title VII and the Equal Protection Clause.

**Title VII**

The court held that the University’s affirmative action plan, which included employment goals to correct the underutilization of women and minorities, was valid under Title VII. The University’s affirmative action plan included a Minority Faculty Incentive Fund (“MFIF”) that provided financial incentives to departments that increased minority hiring for tenure-track faculty positions. But the MFIF funds were not intended to influence hiring decisions. Upholding the University’s affirmative action plan under Title VII, the court found that the University presented sufficient evidence of a manifest imbalance and that the plan did not unnecessarily trammel on the rights of non-minorities. The court noted that the awards were limited and that the incentive funds would not be available for job groups that no longer showed underrepresentation.

Importantly, this case helps define what constitutes a “manifest imbalance.” The court explained that under OFCCP regulations, government contractors can identify underutilization of minorities or women by analyzing the difference between the actual and the estimated available number of employees under a standard deviation test or the 80 percent rule, where actual employees must be at least 80 percent of the estimated available employees. 56 F. Supp. 2d at 421-22. Under a standard deviation test, the court observed, “[a] difference between an expected and an observed value greater than two or three standard deviations would support a prima facie case of discrimination. But an employer may, consistent with Title VII, adopt an affirmative action plan where the disparity is not so striking.” *Id.* at 426. Here, the court found manifest imbalance where the underrepresentation was “above or near the two standard deviation level.” *Id.*

**Equal Protection**

The court found that a public University could be “racially conscious” by compiling “statistics on the racial and ethnic makeup of its faculty and encouraging broader recruiting of . . . minorities, without triggering the Equal Protection Clause’s strict scrutiny review.” *Id.* at 428. The court also found that the MFIF did not “have the purpose of creating an inducement to hire” minorities. *Id.* However, the court distinguished the requirements under Title VII and equal protection analysis: “Although an affirmative action plan may be justified under Title VII by statistical evidence of ‘manifest imbalance’
in the workforce, [citing Johnson], evidence of ‘gross statistical disparities’ is required to withstand an equal protection challenge [citing Croson].” Id. at 429. The court determined that the two standard deviation difference that was sufficient to withstand a Title VII challenge did not demonstrate the gross statistical disparity, standing alone, needed to survive an equal protection challenge. Moreover, the University “articulated no other purpose asserted to be compelling, such as encouraging diversity or ensuring equal opportunity.” Id. at 429. Accordingly, the court held that if the jury determined that MFIF funds influenced its decision to hire Halbrendt, the affirmative action plan would not withstand strict scrutiny review.

262 Fed. Appx. 598 (5th Cir. 2008)

Plan/Action at Issue: Hiring; electric company

Sharkey, a white male, brought a reverse discrimination suit under Title VII, alleging that the Dixie Electric Membership Corporation (“DEMCO”) engaged in discriminatory hiring practices when it hired McCray (African-American) over other candidates. DEMCO had adopted affirmative action plans since 1984, and each year it evaluated and updated its minority hiring and placement goals. Pursuant to the plan at issue, the number of minorities in the job category for which Sharkey applied was underutilized by over 33 percent, as compared to available minorities with the requisite skills in the recruitment area. The district court granted summary judgment for DEMCO, finding DEMCO presented a legitimate, nondiscriminatory rationale for hiring the African-American employee over other candidates pursuant to the affirmative action plan, and that Sharkey did not satisfy his burden of proving that the plan was invalid and that it was a pretext for race-based discrimination.

The Fifth Circuit affirmed. On appeal, as on summary judgment, DEMCO argued that it presented a legitimate, nondiscriminatory rationale for hiring McCray pursuant to its internal hiring procedures, including consideration of the affirmative action plan. Relying on Weber, the court explained: “[W]e have no difficulty concluding that the subject [plan] is valid, and thus can serve as DEMCO’s legitimate, nondiscriminatory rationale for hiring McCray over other white candidates.” 262 Fed. Appx. at 604.

Sharkey did not argue on appeal that there was no manifest imbalance in DEMCO’s workforce. Rather, he argued that the plan violated the Weber test because it was an absolute bar to employment for white applicants and it was not temporary in nature. The court rejected both claims. The court found that the plan was not an absolute bar to the advancement of whites and did not unnecessarily trammel their interests because the uncontroverted evidence established that the application and hiring process was not discriminatory (employee selection considered an applicant’s background, education, training, experience; applicants had to score “medium” or “high” on certain tests before being selected for an interview; the race of candidates did not appear their applications and it was unknown to DEMCO prior to a candidate’s interview; DEMCO
selected several applicants for interviews—both white and African-American—but Sharkey was not selected; McCray was chosen for the a variety of reasons including his background, education, and prior work experience at DEMCO). Consideration of McCray’s race was simply a plus factor among others and was permissible under Title VII. The court also found that Sharkey failed to create a genuine issue of material fact as to whether the plan was anything more than a temporary measure designed to eliminate a manifest racial imbalance in DEMCO’s workforce.

19. Schurr v. Resorts International Hotel, Inc.
196 F.3d 486 (3d Cir. 1999)

Plan/Action at Issue: Hiring; hotel

Schurr, a white male, brought this action against a hotel/casino. Schurr alleged that race was the determining factor in the employer casino’s decision not to offer him a job that was filled by an equally qualified minority candidate. Schurr contended that the casino’s affirmative action plan was invalid under Title VII. The district court granted summary judgment to the hotel/casino. The Third Circuit considered whether it was appropriate to take race into account in a hiring decision when there was no showing of or reference to a manifest racial imbalance in the pertinent job category or industry.

The Third Circuit reversed the district court’s award of summary judgment and held that the employer hotel’s affirmative action plan was invalid under Title VII. It relied on the two-prong test, derived from Weber, to determine whether an affirmative action plan: (1) had “purposes that mirror[ed] those of the statute,” and (2) “unnecessarily trammel[ed] the interests of the [non-minority] employees.” 196 F.3d at 497. To answer the first question, the court relied on the rule it announced in Taxman: “Unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and therefore, cannot satisfy the first prong of the Weber test.” Id. (quoting Taxman, 91 F.3d at 1556). To be characterized as remedial, the court held, the plan must be designed to correct a “manifest imbalance in traditionally segregated job categories.” Id. (quoting Weber, 443 U.S. at 207). The court found that there was no reference to or showing of past or present discrimination in the casino industry. Therefore, the plan was invalid under the first prong of Weber, and violated Title VII.

20. Shea v. Kerry,

Plan/Action at Issue: Hiring

Relevant Factual Background

Plaintiff, a white Foreign Service Officer, challenged as reverse discrimination under Title VII the Department of State’s hiring plan designed to increase racial diversity
among the officer corps in the United States Foreign Service. The State Department had two programs that allowed for the hiring of external candidates: (1) a Career Candidate program ("CCP") that was race-neutral; and (2) an "Affirmative Action" plan that targeted minority applicants. Plaintiff argued that he started at a lower pay grade due to the Department’s minority hiring plan because he was not able to be considered for a mid-level position without a certificate of need (although he could have sought placement through the CCP).

**Relevant Legal Issue**

Did *Ricci v. DeStefano*, 557 U.S. 557 (2009) displace the established standard for analyzing reverse discrimination claims under Title VII? After deciding that the analysis set forth in *Weber/Johnson* applies, was the plan at issue based on evidence of a manifest imbalance in a traditionally segregated job category and did it trammel the rights of non-minority employees in violation of Title VII?

**Holding**

The Court rejected Plaintiff’s argument that *Ricci* governed and that the applicable test should have been whether the State Department could show “a strong basis in evidence that, had it not [instituted an affirmative action plan], it would have been liable” for disparate impact discrimination under Title VII. It held that *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987) and *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) were directly applicable and had not been overturned by *Ricci*. Here, as in *Johnson* and *Weber*, the State Department acted to “expand[] job opportunities for minorities and women” and “eliminate traditional patterns of racial segregation.” *Ricci*, on the other hand, addressed the question of whether the employer’s decision to discard test results in order to avoid disparate-impact liability was permissible.

Applying *Johnson* and *Weber*, the Court determined that the plan at issue was grounded in evidence of a manifest imbalance in a traditionally segregated job category and did not unnecessarily trammel the rights of white employees. Relying on a GAO Report and its own analyses, the State Department analyzed statistical disparities between the racial makeup of the workforce and a comparable group. The Court also found that the plan did not trammel upon the rights of others. The Court stated that the fact that this was a hiring plan as opposed to a layoff plan meant that it had less of an impact on employee expectations. Further, only qualified candidates were hired and minority applicants went through the same race-neutral application process as did their white counterparts. In addition, the court noted that the plan was not long-lasting and did not create any bar to non-minority candidates.

**Significance**
The case distinguished application of Johnson and Weber from Ricci, upholding affirmative action plans that address a manifest imbalance in a traditionally segregated job category without unnecessarily trammeling the rights of white employees.

**Consideration of Race to Obtain Greater Employee Diversity**

♦ **Diversity in the Education Context**

21. *Taxman v. Board of Education of the Township of Piscataway*

91 F.3d 1547 (3d Cir. 1996), *cert. granted, 521 U.S. 1117, cert. dismissed, 522 U.S. 1010 (1997)*

**Plan/Action at Issue:** Layoff; individual public high school teacher

**Relevant Background Facts**

The Board of Education of Piscataway relied on an affirmative action plan to lay off a white teacher instead of a black teacher with equal seniority. The affirmative action plan was adopted to provide equal educational opportunities for students and equal employment opportunities for employees and prospective employees. It was not adopted to remedy the results of any prior discrimination or any identified underrepresentation of minorities in the Piscataway school system. The plan provided, in relevant part, that the most qualified candidate would always be recommended for a position, but where candidates had equal qualifications, the candidate meeting the criteria of the affirmative action program would be recommended.

The Board had to lay off one teacher, and it faced the rare situation of two teachers with identical seniority. One was white (Taxman) and one was black. The Board decided to invoke the affirmative action policy to break the tie and laid off the white teacher. She filed a charge of discrimination with the EEOC, and the United States sued the Board in federal court asserting claims under Title VII. Taxman joined the lawsuit.

**Relevant Legal Issue**

Did Title VII permit an employer with a racially balanced work force to grant a non-remedial racial preference in order to promote racial diversity?

**Holding**

The Third Circuit explicitly rejected diversity, standing alone, as a valid reason to deviate from the antidiscrimination mandate of Title VII. The court described the two purposes of Title VII: (1) to end discrimination and (2) to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nation’s work force (manifest imbalance). By contrast, the court said, “there is no congressional
recognition of diversity as a Title VII objective requiring accommodation.” 91 F.3d at 1558.

The court struck down the Board’s affirmative action policy because it did not satisfy either prong of the test articulated by the Supreme Court in *Weber*. First, the plan’s purpose did not mirror the purpose of Title VII. The Board admitted that the purpose of the plan was not remedial in nature and that there was no evidence of a manifest imbalance among faculty in the individual school or in the school district as a whole. Rather, its purpose was the pursuit of racial diversity.

Second the court concluded that the plan unnecessarily trammeled nonminority interests. In so holding, the court considered three factors: structure of the plan, duration of the plan, and the plan’s applicability to layoff decisions. **Structure**: The plan was found to lack definition and structure. By contrast, affirmative action plans that have been upheld had defined objectives and benchmarks to ensure decisions met each plan’s purpose. **Duration**: The plan was of unlimited duration. By contrast, valid affirmative action plans “are ‘temporary’ measures that seek to ‘attain,’ not ‘maintain’ a ‘permanent racial . . . balance.’” *Id.* at 1564 (quoting *Johnson*, 480 U.S. at 639-40). **Layoffs**: Invoking the plan resulted in the layoff of a nonminority, tenured employee. Applying the Supreme Court’s decision in *Wygant*, the court explained that “the harm imposed upon a nonminority employee by the loss of his or her job is so substantial and the cost so severe that the Board’s goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion.” *Id.*

The Third Circuit held that promoting racial diversity, absent a history of past discrimination, was insufficient justification for laying off the white teacher because of her race and violated Title VII.

**Significance**

In this case, the Third Circuit definitively stated that diversity, standing alone, is not a valid reason to implement race-conscious decisions. Then Judge, now Supreme Court Justice Alito sat on the Third Circuit panel and sided with the majority. This case is also important because prior to granting certiorari, the Supreme Court invited the Solicitor General to express his views on the legal issues presented in the case. The United States submitted an amicus brief to the Supreme Court, arguing that diversity is, indeed, a valid justification for race-conscious decisions.

The Solicitor General first argued that the writ of certiorari should have been denied because the case was not representative of the typical non-remedial affirmative action policy because the school district implemented the policy to foster diversity in a single department of a high school and because it used race in a layoff decision. Accordingly, the Solicitor General argued that the Court should wait for a case that presented the question of the validity of non-remedial affirmative action in a more typical Title VII context.
Significantly, however, the Solicitor General went on to argue that non-remedial affirmative action could be upheld if it survived strict scrutiny analysis. He made the following key arguments in response to the question of “whether Title VII prohibits race-conscious affirmative action in employment that is designed to foster diversity in the faculty of [an educational institution]”:

(1) Following the Court’s decision in Adarand, the Department of Justice issued an extensive memorandum to federal agencies offering three important guiding principles for applying strict scrutiny to non-remedial affirmative action:

First, to the extent affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective, beyond the mere achievement of diversity itself. Second, in some settings, in order to perform its mission, a government entity may have a compelling need for a diverse workforce that justifies the use of racial considerations. And third, to justify the use of race, there must be a convincing factual basis for the conclusion that the use of race is needed to promote the government’s mission; a broad assertion of operational need is insufficient. If those prerequisites are satisfied, narrowly tailored, non-remedial affirmative action can be constitutional. . . . In our view, affirmative action that satisfies the three prerequisites set forth above and is narrowly tailored to further a compelling institutional mission also complies with Title VII.


(2) Citing Jacobson, Zaslawsky, Bakke, and Justice’s Stevens’ dissent in Wygant, the Solicitor General argued:

Courts of appeals have [] held that a school district may constitutionally seek to provide a racially diverse faculty at each of its schools by using race as a factor in deciding the particular school to which a teacher is assigned. Such policies can serve multiple educational objectives: A faculty composed of persons with different backgrounds and experiences is likely to offer a wider array of educational perspectives. Children in the minority at a school may feel more welcome and able to learn when the staff is racially diverse. And exposing students to a diverse faculty on a daily basis can dispel stereotypes and misconceptions and foster mutual understanding and respect in a much more powerful and lasting way than imparting those lessons through words alone.

Id. at *12 (citations omitted).
Arguing that “non-remedial affirmative action that satisfies constitutional standards also mirrors a purpose of Title VII,” the Solicitor General observed that in the legislative history of the 1972 amendments to Title VII:

Congress concluded that the exclusion of minority teachers from educational institutions profoundly affects the education of children: It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

Id. at 15 (citations omitted).

22. Hill v. Ross
183 F.3d 586 (7th Cir. 1999)

Plan/Action at Issue: Hiring; university faculty

University of Wisconsin blocked the hiring of Hill (male) to a tenure-track position in its clinical psychology department because the dean of the college wanted the department to hire a woman instead to meet the department’s hiring goals pursuant to the University’s affirmative action plan, which was implemented to find and assist members of underrepresented groups and not to remedy any past discrimination.

The lower court granted summary judgment for the University, holding that the decision was supported by a valid affirmative action plan. The Seventh Circuit reversed, finding that a reasonable jury could decide that: (1) the dean used Hill’s sex as the sole basis for denying him the position, rather than one factor among many; (2) the dean’s decision was not mandated by the affirmative action plan because the dean cared only about the results of the hiring process—hiring more women—rather than the openness of the outreach and recruitment process; and (3) the University failed to provide any “exceedingly persuasive” justification for its race-based decision, as it is required to do to survive constitutional scrutiny.

23. University and Community College System of Nevada v. Farmer

Plan/Action at Issue: Hiring; community college faculty

The Nevada University system instituted a “minority bonus policy” by which a University department could hire an additional faculty member after the initial placement
of a minority candidate. This policy was an unwritten amendment to the University’s affirmative action policy. The University hired black male candidate into its sociology department. The plaintiff in this case (Farmer) was another finalist for that position. Farmer was hired into the department one year later, taking the additional position created by the minority bonus policy. She sued the University, alleging race and gender discrimination under Title VII, among other claims. A jury returned a verdict in Farmer’s favor and the University appealed. The Nevada Supreme Court considered whether University’s affirmative action plan survived strict scrutiny. Specifically, did the University have a compelling interest in implementing the plan to increase faculty diversity, and was it narrowly tailored to achieve its goal?

The Nevada Supreme Court upheld the affirmative action plan as constitutional. Relying on the Supreme Court’s reasoning in Bakke, it held that the University had a compelling interest in fostering a culturally and ethnically diverse faculty. The court explained: “We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the Bakke Court.” 930 P.2d at 735. The court noted that a failure to attract minority faculty perpetuates the University’s “white enclave” and “limits student exposure to multicultural diversity.” Id. at 97-98. The court also determined that the minority bonus policy was “narrowly tailored to accelerate racial and gender diversity.” Id. at 98.

24. Jacobson v. Cincinnati Board of Education
961 F.2d 100 (6th Cir.), cert. denied, 506 U.S. 830 (1992)

Plan/Action at Issue: Transfers; public school teachers

Plaintiffs, teachers, and a teachers’ union, sued the Board of Education, alleging that its teacher transfer policy violated the Equal Protection Clause. The policy, adopted in 1970, was designed to ensure that the teaching staff at each school reflected the racial balance of the teaching staff of the entire school system. To achieve that balance, the policy restricted the voluntary transfer of some teachers and required reassignment of others.

The Sixth Circuit reasoned that intermediate scrutiny was the proper legal standard because while the Board’s transfer decisions were “race conscious,” the policy was race neutral because it applied equally to black and white teachers. 961 F.2d at 102. Applying intermediate scrutiny, the court held that the policy was substantially related to an important government interest. Id. at 103. In so holding, the court relied on the Supreme Court’s recognition in United States v. Montgomery County Board of Education,
395 U.S. 225 (1969), “that the attainment of an integrated teaching staff is a legitimate concern in achieving a school system free of racial discrimination.” Id. at 102.348

25.  **Zaslawsky v. Board of Education**  
610 F.2d 661 (9th Cir. 1979)

**Plan/Action at Issue:** Transfers; public school teachers

A class of approximately 25,000 teachers sued the Board of Education, alleging that a faculty integration plan violated the Equal Protection Clause and 42 U.S.C. § 1981. The goal of the plan was to ensure that the teaching staff at each school reflected the racial balance of the teaching staff of the entire school system, plus or minus ten percent. The plan would achieve that goal by first using voluntary transfers and then mandating transfers, if necessary. The Board implemented the plan in response to pressure from the Office of Civil Rights of the Department of Health, Education, and Welfare, which alleged that the Board’s voluntary plan that was already in place violated Title VI of the Civil Rights Act and that the racial composition of the students and faculty that existed at that time raised a presumption that the school district was assigning teachers in a discriminatory manner. 610 F.2d at 662.

The Ninth Circuit upheld the plan, explaining that its focus “was to enhance the educational opportunities available to the students by achieving better racial balance in the teaching faculty throughout the district,” an objective “well recognized and approved by the Supreme Court” in *Swann v. Charlotte-Meckenburg Board of Education*, 402 U.S. 1 (1971). Id. at 664.

♦ **Diversity in Other Contexts**


**Relevant Background Facts**

Entertainment Studios Network (“ESN”), owned by Byron Allen and the National Association of African American-Owned Media, filed a lawsuit against Comcast Corp. alleging that its refusal to carry several television channels offered by ESN was motivated by racial discrimination in violation of 42 U.S. § 1981. ESN acknowledged that Comcast provided legitimate business reasons for its decision not to carry its channels, but argued that these reasons were pretextual.

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348 But see *Perrea v. Cincinnati Public Schools System*, 709 F.Supp.2d 628 (S.D. Ohio, April 20, 2010) (noting that Jacobson has not specifically been overturned, but the 6th Circuit has not been required to analyze Jacobson in light of subsequent Supreme Court precedents mandating that “all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.”)
The action was dismissed at the district court level. The Ninth Circuit however, reversed the lower court’s decision based on its finding that ESN only need to plead facts alleging that race played “some role” in Comcast’s decision-making standard.

**Relevant Legal Issue**

Whether a plaintiff alleging contract discrimination on the basis of race must plead facts that show “but-for” racial discrimination the contract would have been entered, or on the other hand whether the plaintiff need only plead facts that show race was at least one motivating factor in defendant’s decision whether to enter the contract, sustaining the viability of the lawsuit, proceeding to discovery, and shifting the burden of proof to the defendant to demonstrate that there was a legitimate and adequate non-discriminatory reason for the decision?

**Holding**

A plaintiff who sues for racial discrimination under § 1981 must prove causation, or in other words the plaintiff must plead facts that, if true, show that “but-for” racial discrimination the contract would have been entered. This burden remains on the plaintiff throughout the life of the lawsuit.

The Supreme Court relied on the text of the statute, its history, and the Court’s precedent in its conclusion that § 1981 follows the general rule that a plaintiff in a tort action must prove but-for causation. Among other things, the Supreme Court noted that § 1981 has been construed similarly to § 1982, which bars racial discrimination in the sale of property. Where the Supreme Court has held that a plaintiff alleging a § 1982 violation must show that the challenged conduct was “because of” race, it would naturally follow that § 1981 would require the same showing.

The Supreme Court rejected ESN’s argument that Title VII’s motivating factor test, a lesser standard applied. The motivating factor test, also referred to as “mixed-motive,” requires that the Plaintiff need only show that discrimination was a motivating factor in the defendant’s decision. In doing so, the Court relied on the fact that the Court applied this test to Title VII claims in 1989, but the test was later replaced by Congress’ own version of the rule two years later in the Civil Rights Act of 1991. In comparison, § 1981 has a much different history in that it dates back to 1866 and at no point suggests that a motivating factor test applies. Further, the Court pointed to the fact that when Congress adopted the Civil Rights Act of 1991 it also amended § 1981. If Congress intended the motivating factor test to apply to § 1981 it could have added such language, but did not do so at the time.

**Significance**

This case is important because it clarifies the plaintiff’s burden when alleging contract discrimination on the basis of race under § 1981. The unanimous decision follows in the footsteps of two prior Supreme Court decisions rejecting application of the motivational factor test in other contexts. For instance, in *Gross v. FBL Financial Services,*
557 U.S. 167 (2009), the Court held that a plaintiff alleging a violation under the ADEA must prove that age was the but-for cause of the defendant’s conduct. Similarly, the Court held that the but-for test is the appropriate test when a plaintiff claims retaliation under Title VII. University of Texas Southwestern Methodist v. Nassar, 570 U.S. 338 (2013).

27. Lomack v. City of Newark
463 F.3d 303 (3d Cir. 2006)

Plan/Action at Issue: Transfers; firefighters

Recognizing that many of its firefighting companies were racially homogeneous, a city fire department implemented a race-based transfer and assignment policy to diversify the companies. Many firefighters were involuntarily transferred based solely on their race. The City acknowledged that there was no history of discrimination. After firefighters and their unions filed suit against the City, the City articulated three “compelling interests” for implementing its diversity policy: (1) to eliminate de facto discrimination, (2) to secure the educational, sociological, and job performance benefits of diverse fire companies, and (3) to comply with a consent decree that was more than 20 years old. The Third Circuit considered whether the City’s race-based transfer and assignment policy within its fire companies violated the Equal Protection Clause when any existing racial imbalance was not the result of past intentional discrimination by the City. Specifically, was securing the educational, sociological, and job performance benefits of a diverse firefighting company a compelling interest that justified a transfer and assignment policy employing racial classifications?

The Third Circuit held that the race-based transfer and assignment policy violated the Equal Protection Clause because none of the three interests asserted by the City were sufficiently compelling for the program to survive strict scrutiny. The court held that there was no remedial justification for the policy and rejected the City’s contention that using racial classifications to eliminate unintentional de facto segregation was appropriate. The court also held that the holding in Grutter—that the educational benefits of diversity are compelling—does not apply in this context. In so holding, the court explained, “Grutter does not stand for the proposition that the educational benefits of diversity are always a compelling interest, regardless of the context. Rather, it stands for the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate.” 463 F.3d at 310. Because the mission of the fire department was to fight fires, not to educate, the diversity argument was not sufficiently compelling.
28. *Petit v. City of Chicago*
352 F.3d 1111 (7th Cir. 2003), *cert. denied*, 541 U.S. 1074 (2004)

**Plan/Action at Issue:** Promotions; police exam

The City relied on an examination as the basis for promotions of patrol officers to the rank of sergeant. The raw scores were standardized for race and ethnicity. Based on the exam results, the City promoted 402 candidates. Non-minority patrol officers who were not promoted sued the City alleging that the promotions violated their rights under the Equal Protection Clause. The City defended by arguing that it had a compelling interest in a diversified police force. On appeal, the Seventh Circuit considered whether the City’s use of a test, standardized for race and ethnicity, to make promotion decisions violated the Equal Protection Clause. Specifically, was there a compelling need to have a diversified police force, and if so, were the procedures narrowly tailored to meet that goal?

The Seventh Circuit held that the City’s actions survived strict scrutiny. First, relying on the reasoning in *Grutter*, the court determined that the City had a compelling interest in a diversified police force and that such diversity met an operational need of the police department. The court explained that diversity in a large metropolitan police force, charged with protecting a racially and ethnically divided major American city like Chicago, is “even more compelling” than diversity in the educational setting. The court deferred to the views of criminal justice experts and police executives regarding the necessity of the affirmative action plan (e.g., when police officers are supervised by minorities, fears that the department was hostile to the minority community declined; and visible presence of minorities in supervisory positions was critical to effective policing in a racially diverse city because it helped earn the trust of the community).

Second, the court determined that the City’s procedure of making promotion decisions based on the results of a test that was standardized for race and ethnicity was narrowly tailored to meet the goal of achieving a racially diverse police force.

Other cases have relied on *Petit* for the proposition that diversity is a compelling interest in law enforcement. For example, in *Alexander v. City of Milwaukee*, 474 F.3d 437 (7th Cir. 2007), the parties agreed that the City had a compelling interest in a diversified police force. The court held in that case, however, that the race-conscious promotion policy was not sufficiently narrowly tailored to survive strict scrutiny.

29. *Klawitter v. City of Trenton*

**Plan/Action at Issue:** Promotions; individual police officer

A white detective sued the City, claiming reverse discrimination under New Jersey’s Law Against Discrimination, after she was denied a promotion in favor of an
African-American officer who had identical seniority and comparable or better qualifications. The appellate court upheld the jury verdict in favor of the white officer, finding that there was sufficient evidence to support the jury’s verdict that race was a determinative factor in the City’s decision. The court determined that the City did not have an affirmative action plan in place and held that “race can be considered in an employment decision only pursuant to and in accordance with an established affirmative action plan.” 928 A.2d at 918.

30. **Matthews v. Waukesha County,**
759 F.3d 821 (7th Cir. 2014)

In this individual discrimination case, plaintiff alleged, among other things, that Waukesha County had a pattern and practice of discriminating against African-Americans. She presented statistical evidence in support of her argument. The Court took issue with her evidence for a number of reasons, including the fact that while statistical evidence may be helpful it has to include the proper comparison group. For example, racial composition of teacher work force to student population was not a proper comparison in *Hazelwood School District v. United States.* Here, the plaintiff’s expert compared the African-American representation of all county employees in 2005 to such representation among workers in the private sector organizations in the Milwaukee-Waukesha Primary Metropolitan Statistical Area in a number of categories. The County argued that group was not representative of the potential applicants for the job at issue and the court agreed. The 7th Circuit indicated that the lower court, correctly relying on *Johnson v. Transportation Agency, Santa Clara County,* Cal. 480 U.S. 616 (1987), stated that the plaintiff’s evidence was of limited value due to its broad scope.

### Consideration of Race in Outreach Efforts

31. **Shuford v. Alabama State Board of Education**
897 F. Supp. 1535 (M.D. Ala. 1995)

**Plan/Action at Issue:** Outreach/hiring: state postsecondary educational system

**Relevant Background Facts**

This case involved reviewing the constitutionality of a consent decree in a class-action lawsuit brought by a class of African-American employees, and later joined by a class of women employees, against the Alabama State Board of Education. The decree sought to increase the pool of qualified applicants through recruitment.

**Relevant Legal Issue**

Was an affirmative action plan designed to increase the number of women and minorities in the pool of qualified applicants, but where neither race nor sex was a
determination factor in hiring decisions, valid under the Equal Protection Clause and Title VII?

**Holding**

The court began its analysis by distinguishing between “inclusionary” and “exclusionary” affirmative action techniques, but noted that other courts had not explicitly analyzed affirmative action in that way. The court characterized inclusionary techniques as those that ensure that the pool of qualified candidates is as large as possible, increasing competition, whereas exclusionary techniques usually select some applicants over others from the pool. The key consideration in determining the validity of a program under the Equal Protection Clause, however, is its adverse effects on third parties. 897 F. Supp. at 1551. The court reasoned, “inclusive techniques impose no or slight adverse effects on third parties and are easier to justify than exclusion, which has significant potential to cause adverse consequences.” Id. at 1552. The court found that inclusionary techniques are both proper and desirable, and do not require traditional Equal Protection and Title VII analysis. However, exclusionary techniques that involve the selection process must survive traditional analysis under the Equal Protection Clause and Title VII.

The court concluded that the decree at issue in this case was inclusive, finding that the employment goals were neither quotas—setting aside or reserving jobs for women and minorities, nor selection goals—creating preferences of women or minorities. The court held that employment goals detailed in the decree required inclusive, sex-conscious techniques like recruitment and merely increased competition. Accordingly, the court found that traditional constitutional analysis was not necessary to determine that the legality of the decree. Id. at 1556 (explaining that only the sex-conscious provision of the decree that set a quota for the recruitment and selection committees necessitated traditional analysis).

Nonetheless, the court considered the legality of the decree under traditional constitutional analysis. In reviewing the constitutionality of the decree under Title VII and the Equal Protection Clause, the court noted that classifications based on race must survive strict scrutiny, while classifications based on sex must survive only intermediate scrutiny. With regard to the sex-conscious provisions, the court held that the remedies embodied in the decree were “substantially related to the goal of eradicating sex discrimination,” and did not unnecessarily trammel on the rights of men. Id. at 1567. Accordingly, the sex-conscious provisions of the decree were valid under both the Equal Protection Clause and Title VII. With regard to the race-conscious provisions of the decree, the court held that they were narrowly tailored to meet the compelling interest of remedying discrimination in the postsecondary educational system. The court found that the decree provided justified reforms to rectify the effects of discrimination against women and minorities in Alabama.
Significance

This case is significant in that it deals with outreach efforts that broaden the pool of qualified applicants, rather than affirmative action in hiring decisions. The court detailed the distinction between inclusive and exclusive affirmative action techniques, a distinction that was suggested as early as 1986 by Justice Stevens in his dissent in Wygant, 416 U.S. at 316, but had never been adopted as acceptable analysis of the legality of affirmative action plans. The court suggested that plans that are inclusive and that do not adversely affect third parties are legal and need not be subject to traditional analysis. The court considered the affirmative action plan under traditional constitutional analysis, however, recognizing that “relying on the distinction between inclusion and exclusion at all is a deviation from general affirmative-action case law.” 897 F. Supp. at 1556. The court found that a plan survives strict scrutiny and is consistent with Title VII where, as here, it is conscious of race or sex in its efforts to broaden the applicant pool and therefore increases competition among applicants, but where neither race nor sex is a factor in the selection of specific applicants.

32. Duffy v. Wolle
123 F.3d 1026 (8th Cir. 1997), abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (2011)

Plan/Action at Issue: Hiring; individual probation officer

A panel of three United States District Judges appointed a female applicant to a vacant Chief United States Probation Officer position over a male applicant (Duffy). At the suggestion of the Administrative Office of the United States Courts, the vacant position was advertised in a publication that was circulated nationwide to all probation officers to reach a “diverse pool of applicants.” Duffy sued, alleging reverse discrimination. The lower court granted summary judgment for the panel, and the Eight Circuit affirmed. The court determined, in relevant part, that the Administrative Office’s interest in obtaining a diverse pool of applicants did not support a finding that the panel’s proffered non-discriminatory reasons for hiring the female candidate were in fact a pretext for intentional discrimination. 123 F.3d at 1038-39.

The court explained: “An employer’s affirmative efforts to recruit minority, female applicants does not constitute discrimination. An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. This not only allows employers to obtain the best possible employees, but it is an excellent way to avoid lawsuits. The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, is not an appropriate objection, and does not state a cognizable harm.” Id. at 1039 (internal citations omitted).
Plan/Action at Issue: Promotion; individual FDIC employees

Plaintiffs, white males, alleged that an affirmative action program of the Federal Deposit Insurance Company (“FDIC”) was discriminatory because it called for quotas for women and minorities at the expense of white males. The court ruled for the defendants.

Through its affirmative action plan, the FDIC had collected data about the racial and gender make-up of its workforce, noted dramatic disparities relative to the general labor force, and made efforts to reduce those disparities through monitoring hiring practices and eliminating artificial barriers. Notably, the program did not give the FDIC’s Affirmative Employment and Counseling Section, the section charged with overseeing the program, the authority over the hiring process. The court found that “the FDIC had taken steps to ensure that no person [was] denied equal employment opportunity with the agency, but the agency did not give any specific group or person a preference in hiring.” 39 F. Supp. 2d at 25.

Relying on Duffy, Shufford, and other case law, the court noted that “[c]ourts have consistently declined to apply strict scrutiny to outreach efforts to minorities which do not accompany actual preferences.” Id. The court drew a careful distinction between those cases and Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998), where the D.C. Circuit held that FCC regulations that provided strong incentives for radio stations to grant racial preferences in hiring were subject to strict scrutiny. The court explained that in Lutheran Church, the FCC regulations put pressure on stations to make race-based hiring decisions. By contrast, “the program in this case falls within the category of programs, those conscious of race but devoid of ultimate preferences, which have been consistently upheld by courts.” 39 F. Supp. 2d at 27. Accordingly, the court held that the FDIC’s affirmative action plan did not need to be examined under strict scrutiny and that it was legal under both Title VII and the Equal Protection Clause.

Plan/Action at Issue: Outreach/recruitment; radio broadcasters

Broadcasters challenged an FCC rule requiring licensees to achieve a broad outreach in their recruiting efforts, arguing that the rule violated the equal protection component of the Fifth Amendment. The court held that the strict scrutiny standard of review applied in the context of determining constitutionality of those affirmative action outreach efforts. Specifically, the court determined that a government mandate for recruitment targeted at minorities constituted a racial classification that subjected persons of different races to unequal treatment. Here, for example, the FCC rule made it
less likely that non-minorities would receive notification of job openings solely because of their race.

In so holding, the court questioned the ruling by Eleventh Circuit in *Allen v. Alabama State Board of Education*, 164 F.3d 1347 (11th Cir. 1999), *vacated*, 216 F.3d 1263 (11th Cir. 2000), that strict scrutiny is inapplicable in affirmative outreach situations where “the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race broadening the pool of applicants, but disadvantaging no one.” 236 F.3d at 20 (quoting *Allen*, 164 F.3d at 1352). The court expressly disagreed with the Eleventh Circuit’s conclusion that preferential recruiting “disadvantages no one.” *Id.* (quoting *Allen*, 164 F.3d at 1352). Holding that the FCC’s rule was subject to review under strict scrutiny, the court explained: “that the most qualified applicant from among those recruited will presumably get the job does not mean that people are being treated equally—that is, without regard to their race—in the qualifying round.” *Id.* at 21.

Relying on its holding in *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998), the court explained that promoting “programming diversity” is not a compelling interest and questioned whether the FCC had a compelling interest for the rule at issue. The court held that the FCC rule did not survive strict scrutiny, regardless of any purported compelling interest, because its “sweeping” requirements were not narrowly tailored to meet a compelling interest. 236 F.3d at 22.

In this case, the D.C. Circuit held that outreach efforts targeted solely at recruiting minorities are subject to strict scrutiny review. Notably, however, the court did not examine the distinction made by the District Court in *Sussman* between outreach plans that create pressure to make race-based hiring decisions and those that do not, and it made no mention of the Eighth Circuit’s decision in *Duffy*. The Supreme Court has not yet had the opportunity to weigh in and resolve what seems to be an emerging split among the circuit courts on what standard of review is applicable to outreach efforts.

35. *Hammer v. Ashcroft*
   
   383 F.3d 722 (8th Cir. 2004)

**Plan/Action at Issue:** Promotion, individual corrections officer

Hammer, a white male, filed suit alleging race and age discrimination when he was twice denied a promotion in favor of first an African-American and then a man six years younger than him. The Eighth Circuit affirmed the lower court’s grant of summary judgment against Hammer on both claims. The court relied on its holding in *Duffy*—that inclusive recruitment efforts do not constitute discrimination—to reject Hammer’s race claim.
Consideration of Race to Avoid Disparate Impact Liability

36.  *Ricci v. Destefano (Firefighters)*

129 S. Ct. 2658 (2009), *reversing* 530 F.3d 87 (2d Cir. 2008) and 554 F. Supp. 2d 142 (D. Conn. 2006)

Plan/Action at Issue: Promotions; firefighter exam

**Relevant Background Facts**

The New Haven Fire Department administered oral and written examinations for promotion to Lieutenant and Captain. Pursuant to merit selection rules mandated by local law and the results of the exam, certain firefighters qualified for the opportunity to be promoted. For promotion to lieutenant, 34 out of 77 examinees passed the exam (25 white, 6 black, and 3 Hispanic), but only 10 white firefighters were eligible for promotion. For promotion to captain, 22 out of 41 examinees passed the exam (16 white, 3 black, and 3 Hispanic), but only 9 were eligible for promotion (7 white and 2 Hispanic). The City of New Haven (“City”) determined that the test results yielded a racially disparate impact and ultimately decided not to certify the test results. Without certification, the promotion process could not proceed, and the City did not make any promotions.

The white and Hispanic firefighters who took the exam, and who were allegedly passed over for promotion, filed suit alleging violations of Title VII and the Equal Protection Clause. At trial, the plaintiffs argued that the City inappropriately relied on race in deciding not to certify the test results. Regarding Title VII, plaintiffs claimed that the City’s admitted desire to comply with Title VII’s anti-disparate-impact requirements was a pretext for intentional discrimination against plaintiffs—that the City’s diversity rationale was prohibited as reverse discrimination under Title VII. 554 F. Supp. 2d at 151, 157-58. Although the City did not conduct a validity study of the test prior to rejecting its results, it did determine that the racial disparity in the results showed an adverse impact under the EEOC’s guidelines. *Id.* at 153-54. Nonetheless, plaintiffs asserted that the City’s failure to conduct the validity study or explore other alternatives was a violation of Title VII. Plaintiffs also argued that the City violated the Equal Protection Clause by either applying a race-based classification system for promotion or employing a neutral system in a discriminatory manner.

The District Court heard arguments on cross motions for summary judgment. The District Court awarded summary judgment to the City, determining that the City’s decision not to certify the test results was not in violation of either Title VII or the Equal Protection Clause. The lower court determined that intent to remedy disparate impact of the exam “is not equivalent to an intent to discriminate against non-minority applicants.” *Id.* at 158-59. Although the City considered race in deciding not to certify the test results, the result was race neutral because all the test results were discarded, and no one was promoted. The Second Circuit affirmed. The Supreme Court reversed.
Relevant Issue

Was the City’s decision to reject the test results and not promote any firefighters a violation of Title VII and the Equal Protection Clause? Specifically, where a promotion process was race neutral but yielded unintended, racially disproportionate results, did the City’s decision to reject the results—because it hoped to achieve racial proportionality in promotions—run afoul of Title VII and the Equal Protection Clause?

Holding

The Supreme Court reversed the holding of the district court and the Second Circuit. Justice Kennedy delivered the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. The Court noted that, “however well-intentioned or benevolent it might have seemed,” the City’s decision not to certify the results was based on race. 129 S. Ct. 2674. In this context, the Court articulated the issue before it as “whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination.”  id.

The majority of the Court held that, “under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”  id. at 2677. The Court reasoned that “fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.”  id. at 2681. The majority further held that summary judgment for the City was inappropriate because the City “lacked a strong basis in evidence to believe it would face disparate-impact liability of it certified the examination results.”  id.

The Court recognized that the racial adverse impact was “significant” and that the City faced a prima facie case of disparate-impact liability because of the small number of minority firefighters (compared to white firefighters) who were eligible for promotion.  id. at 2677-78. But the majority concluded that “a prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity, and nothing more—is far from a strong basis in evidence” that the City would have been liable for disparate-impact discrimination had it certified the test results.  id. at 2678. The Court reasoned that a prima facie case of disparate impact liability is not—by itself—a strong basis in evidence of liability because the City would only be liable if evidence showed that the test was not job related and consistent with business necessity or if there was an equally valid but less discriminatory alternative that the City knew about but failed to adopt.  id. The majority found no such evidence in the record.

Although the firefighters alleged violations of both Title VII and the Equal Protection Clause, the Court reached its decision only on Title VII grounds.  id. at 2681.
Justices Scalia and Alito wrote separate concurring opinions.

Dissent

Justice Ginsburg authored the dissenting opinion, which was joined by Justices Stevens, Souter, and Breyer. Justice Ginsburg disagreed with the majority’s determination that Title VII’s disparate-treatment and disparate-impact provision conflict:

Standing on equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity.

Yet the Court today sets at odds the statute’s core directives. When an employer changes an employment practice in an effort to comply with Title VII’s disparate-impact provision, the Court reasons, it acts “because of race”—something Title VII’s disparate-treatment provision generally forbids. This characterization of an employer’s compliance-directed action shows little attention to Congress’ design or to [the Supreme Court’s] line of cases Congress recognized as path-marking.

Id. at 2699 (citation omitted).

Justice Ginsburg criticized the Court’s adoption of the strong-basis-in-evidence standard from equal protection jurisprudence because the Equal Protection Clause prohibits only intentional discrimination and does not have a disparate-impact component. Id. at 2700. “Title VII, in contrast, aims to eliminate all forms of employment discrimination, unintentional as well as deliberate.” Id.

She explained that the majority’s holding also conflicts with “a dominant Title VII theme . . . that the statute should not be read to thwart efforts at voluntary compliance.” Id. at 2701 (citations omitted). She reasoned that the Court’s holding will require employers to establish a “provable, actual violation” against themselves before taking voluntary action to comply with the disparate-impact provision of Title VII, a standard that, in her view, is contrary to settled law and the purpose of the statute. Id. And she noted that even in cases applying the strong-basis-in-evidence standard, the Court has never before suggested that anything beyond a prima facie case would have been required to justify voluntary action consistent with Title VII’s disparate-impact proscription. Id. at 2702 n.7.

Reading Title VII’s disparate-treatment and disparate-impact proscriptions as complementary, and in keeping with the purpose of the statute -- ending workplace discrimination -- Justice Ginsburg offered an alternative analysis:
[A] employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII’s disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity.

Id. at 2699. Justice Ginsburg reasoned that, here, the City “had ample cause to believe its selection process was flawed and not justified by business necessity.” Id. at 2703-07

Significance

Because the Court decided this case under Title VII, the holding applies to both public and private entities. In adopting the strong-basis-in-evidence standard, the Court arguably raised the bar for employers who wish to act voluntarily to eliminate unintentional discrimination resulting from race-neutral selection devices.

37. U.S. v. Brennan,
650 F.3d 65 (2nd Cir. 2011)

Relevant Facts

Employees of the New York City public school system argued that the implementation of a voluntary settlement agreement violated Title VII and 42 U.S.C. § 1983. The settlement agreement, among other things, provided retroactive seniority for certain minority employees.

Relevant Issue

Whether Johnson and Weber apply to all race- or gender-conscious employer actions post-Ricci.

Holding

The 2nd Circuit stated that the District Court erred in finding that there was a viable affirmative action defense under Johnson and Weber where the retroactive seniority awards were not an affirmative action plan. The analysis set forth in Johnson and Weber “extends, at most, to circumstances in which an employer has undertaken a race- or gender-conscious affirmative action plan designed to benefit all members of a racial or gender class in a forward-looking manner only.” Here, where the City, as employer, sought to provide retroactive seniority to remedy previous disparate impact, the Court determined that these actions constituted an individualized grant of employment benefits that must be individually justified and did not constitute an affirmative action plan benefiting all members of a protected class.
The Court also stated that pursuant to the City’s second defense—that the seniority awards were intended to provide make-whole relief to victims of previous testing and recruiting practices that had a disparate impact—*Ricci’s* strong basis in evidence test applied. The decision discussed the test in the Title VII context at length. Specifically, it stated that the test “is objective, not subjective, and it therefore focuses on the strength of the evidence of liability, not the strength of the employer’s fear of litigation.” Next, it is measured “at the time the employer took the race- or gender-based action.” Third, either an actual prima facie case of disparate-impact liability is required, or a strong basis in evidence either that its challenged employment procedures are not job-related or consistent with business necessity, or that there was a less discriminatory option available. Once the employer has met this burden, it must then show that the action was necessary to avoid disparate impact liability.

**Significance**

This decision is important in that it contains a discussion of what does or does not constitute an affirmative action plan in light of the decisions in *Ricci*, *Johnson*, and *Weber*. It also includes a lengthy analysis of the “strong basis in evidence” for possible disparate impact liability standard in the Title VII context.

38. *Graham v. Richardson*,
403 U.S. 365 (1971)

**Relevant Facts**

Two district court cases were consolidated on appeal. The first involved an Arizona statute requiring that a person be a citizen or have resided in the United States for fifteen years in order to be eligible for its state assistance programs. Plaintiff/Appellee was a lawfully admitted resident alien who met all the requirements for assistance to persons permanently and totally disabled except the specified citizenship/residency requirement. The second case was a challenge to a Pennsylvania statute requiring that individuals be citizens, among other things, to be eligible for public assistance. Plaintiffs/Appellees in each of these cases were individuals who otherwise qualified for assistance except for the citizenship and/or residency requirement.

**Relevant Legal Issue**

Whether the Equal Protection Clause prevents a State from conditioning welfare benefits upon an individual’s status as a citizen, or if not a citizen, upon residing in the United States for a specific time. What is the applicable standard of review in an Equal Protection challenge based on non-citizenship?
Holding

The Court found that the state statutes at issue violated the Equal Protection Clause. It first recognized that the Fourteenth Amendment protections extend to citizens as well as lawfully admitted resident aliens. It then determined that strict scrutiny applied. Specifically, the Court stated that “classifications based on alienage (including durational residency requirements for aliens), like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority. . . for whom such heightened judicial solicitude is appropriate.” The court disagreed with Pennsylvania’s and Arizona’s argument that the statutes were based on the states’ “special public interest” in providing citizens preference over non-citizens when it came to distribution of limited public resources. That doctrine had been cited in other cases to uphold state policies to use its own resources for its citizens to the exclusion of aliens and citizens of other states. In doing so, the Court questioned the continued validity of the special public interest doctrine, which was grounded on the notion that a privilege, rather than a right, may be conditioned on citizenship. And it clarified that constitutional rights do not turn upon whether a government benefit is classified as a right or a privilege. It ruled that, “The saving of welfare costs cannot justify an otherwise invidious classification. The Court further opined that state laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with overriding national policies in an area constitutionally entrusted to the Federal Government.

Significance

This case is significant because it held that the non-citizen plaintiffs were a protected class, and thus strict scrutiny applied. In doing so, the Court clarified that the special public interest doctrine was not as far-reaching as once thought.


Relevant Facts

Plaintiffs were non-citizens who were discharged from their classified civil service positions with the city of New York pursuant to a New York statute that restricted eligibility to citizens.

Relevant Legal Issue
Whether New York’s prohibition against the employment of non-citizens in the classified civil service was constitutionally valid.

**Holding**

Applying the standard in *Graham v. Richardson*, 403 U.S. 365 (1971), the Court held that the state statute at issue did not survive strict scrutiny and violated the Equal Protection Clause. As in the *Graham* case, the Court rejected the “special-public-interest” doctrine as a basis for upholding the state statute. However, the Court clarified its holding was limited to the case here, which constituted a flat, broad, and imprecise ban based on non-citizenship. It cautioned that its holding did not extend to situations in which, “on the basis of an individualized determination, an alien may . . . be refused, or discharged, from, public employment, even on the basis of noncitizenship” if the decision not to hire or terminate was based on “legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee.”

**Significance**

This case laid the foundation for the political function exception that would be used to chip away at the application of strict scrutiny as provided for in *Graham*. The Court provided that states could in fact require citizenship for individuals “holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy functions that go to the heart of representative government.”

40. *Foley v. Connelie*,
435 U.S. 291 (1978)

**Relevant Facts**

Appellant was a non-citizen who was lawfully in the country as a permanent resident. He applied for a position as a New York State trooper, but was not allowed to take the examination due to a New York statute that required an individual to be a citizen in order to be appointed to the New York state police force.

**Relevant Legal Issue**

Whether a state may limit the appointment of members of its police force to citizens of the United States.

**Holding**
The New York State statute limiting the appointment of members of its state police force to citizens was constitutional where police officers fit into the category of government officials participating in the execution of broad public policy. Here, the Court recognized the standard set forth in *Graham*, but noted that it had never held that strict scrutiny always applies because in doing so it would “obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.” It went on to note that a State may deny non-citizens the right to vote, run for office, or serve on a jury. It further stated that citizenship is a prerequisite for many legislative, executive, and judicial positions.

The Court determined the political function exception referenced in *Sugarman* applied to police officers as they served in somewhat equivalent roles to others in government roles that execute public policy. For instance, police officers have the power to arrest, search, invade privacy, and stop vehicles, which can significantly impact the daily lives of the people they serve. As such, “[p]olice officers in the ranks do not formulate policy, per se, but they are clothed with authority to exercise an almost infinite variety of discretionary powers.”

**Significance**

This is the first time the court upheld a state classification based on non-citizenship since it adopted the political function doctrine in *Sugarman*. In doing so, the Court sent a message that the political function doctrine was perhaps broader than previously understood in determining that police officers’ everyday decisions were the equivalent of governmental policy decisions.

The appropriate test was not strict scrutiny, but rather – based on analysis that strict scrutiny was not appropriate “where we deal with matters firmly within a state’s constitutional prerogatives” -- whether there was “some rational relationship between the interest sought to be protected and the limiting classification.”


**Relevant Facts**

New York Education Law § 3001(3) prohibited certification as a public-school teacher of any person who was not a citizen, unless the individual manifested an intention to apply for citizenship.

Appellants were non-citizens who were each married to a United States citizen, and otherwise met all of the requirements for certification as a public-school teacher. Although both appellants were eligible to seek citizenship, they chose not to do so.
**Relevant Legal Issue**

Whether the New York law requiring citizenship, or intent to apply for citizenship, in order to become certified as a public school teacher was subject to strict scrutiny, or whether it fell into the governmental function exception that applied a less stringent standard of whether the citizenship requirement was rationally related to a legitimate state interest.

**Holding**

The Supreme Court reversed the lower court’s application of *Graham’s* strict scrutiny standard of review in which the lower court found that the statute was overbroad because it exclude all non-citizens from all teaching jobs regardless of subject matter taught, the alien’s nationality, the nature of the alien’s relationship to the United States and the individual’s willingness to show some sign of loyalty to the United States, such as an oath of allegiance.

The Supreme Court determined that public school teachers perform a government function and thus, a lower standard of review applied. In support, it stated that “[p]ublic education, like the police function, ‘fulfills a most fundamental obligation of government to its constituency.’” For instance, public schools prepare students to participate as citizen and help preserve societal values. In addition, public school teachers play a critical role in developing “students’ attitude toward government and understanding of the role of citizens in our society.” The Court further supported its conclusion based on the idea that teachers served as role models for students, regardless of what subject they taught.

Applying a rational basis review, the Court determined that the citizenship requirement was rationally related to the state’s legitimate interest in furthering educational goals of promoting civic virtue in all classrooms, and limiting non-citizens who refuse to become citizens from teaching was rationally related to those educational goals.

**Significance**

This decision expanded the government function exception to the general rule to reach to public school teachers.


**Relevant Facts**
A Texas statute, Tex.Educ.Code Ann. § 21.031, required that state funds be provided only for education of children legally admitted to the country; it also allowed school districts to deny enrollment to undocumented school age children.

Relevant Issues

Whether the Equal Protection Clause extends to undocumented non-citizens. After finding that the Equal Protection Clause applied, what was the appropriate standard of review?

Holding

The Equal Protection Clause applies to the undocumented plaintiffs because they were persons within the state’s territory and subject to its laws, which is not confined to citizens.

When considering the applicable standard, the Court stated that the undocumented children were special members of an “underclass” of undocumented individuals who were encouraged to remain in the United States as “a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.” These children were notably in the United States as a result of their parents’ conduct and had no control over their own status and thus, it would not be just to punish children for the parents’ conduct. At the same time, the Court noted that they were still undocumented, which is not an immutable characteristic because it is the result of conscious action.

The Court declined to treat undocumented children as a suspect class because they were unlawfully present in the United States and held that education was not a fundamental right, thus declining to presume the classifications that denied a free public education to undocumented children were invidious and to apply a strict scrutiny standard to the state’s actions. Relying on the importance of education to (1) the United States’ political and cultural heritage; (2) democracy and (3) an individual’s own success, the Court held that the state must justify its denial of the children of undocumented individuals a free public education by showing that it furthers “some substantial state interest,” and that the state had failed to do so.

Significance

While critically important to the lives of undocumented children and their opportunities to have a productive and meaningful life in our Nation, the decision may have limited precedential significance except in cases involving discrimination against non-citizen children. Technically, the Court applied a rational basis test to the Texas law, but it did so in terms that arguably suggested intermediate scrutiny. It stated:
“In determining the rationality of [the Texas law], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the law] can hardly be considered rational unless it furthers some substantial goal of the state.”

APPENDIX IV: COURT CASES REGARDING REVIEW OF SEX, SEXUAL ORIENTATION, AND TRANSGENDER IDENTIFICATION AND EXPRESSION


Relevant Facts

Plaintiffs challenged under the Equal Protection Clause the admissions policy of the Virginia Military Institute (VMI), a state university which only enrolled male students. The school provided a unique “adversative” educational program designed to develop leaders for the military and for the civilian sector. In response to the litigation, Virginia proposed to develop as a remedial matter a separate single sex postsecondary institution for women – the Virginia Women’s Institute for Leadership ((VWIL) at Mary Baldwin College. The district court and appellate court found that program sufficiently comparable to the VMI program to sustain both programs as single sex opportunities.

Relevant Issues

What level of review should apply to the single sex program at VMI and to the remedial establishment of a single sex institution at Mary Baldwin College? Did the potential benefits of single sex education justify these programs? Did the benefits of VMI’s adversative program approach justify excluding women students from VMI, based on Virginia’s assertion that the program would have to be reconstituted in a manner that would undermine its unique benefit to accommodate the needs of women students if they were required to be admitted? Was the Mary Baldwin opportunity for women equal to the VMI program?

Holding

The exclusion of women from VMI was subject to intermediate scrutiny and needed to have an exceedingly persuasive justification under the Equal Protection Clause. The potential benefits of single-sex education, which were conceded by the parties, did not meet this standard, and the Court rejected the state’s argument that the admission of women would require fundamental changes to the adversative character of the program,
which would undermine its unique benefits. Justice Ginsburg, in her opinion for the Court, also held that the proposed VWIL program did not provide women with the same type of military training, facilities, courses, faculty, financial opportunities, and alumni connections that VMI provided to its students. In sum, the Court ruled that the opportunity for women to attend the new VWIL program was not remotely equal to the opportunity of men to attend VMI.

Significance

This Supreme Court decision firmly established heightened scrutiny as the review standard for classifications based on gender or sex. It expressed that standard as requiring an “exceedingly persuasive justification,” which Justice Scalia in his dissent and some commenters have interpreted to effect a higher standard, perhaps equivalent to strict scrutiny, for the exclusion of women from education benefits available to men. However, it appears that the Court’s invocation of a need for an “exceedingly persuasive justification” was simply an expression of the Court’s view of what intermediate scrutiny meant in requiring an important government objective and the substantial relationship of the discriminatory means employed to that objective.


Relevant Facts

Plaintiffs challenged Section 3 of the Defense of Marriage Act (DOMA), which denied federal economic and other benefits to same-sex couples lawfully married in Massachusetts and to the surviving spouses from such couples. In particular, DOMA prevented the surviving spouse of a same-sex marriage from collecting Social Security survivor benefits. It also prevented same-sex married couples from filing joint federal tax returns and from sharing health insurance and other medical benefits. Rather than directly addressing the right of states to define marriage as they see fit, the appeals contested the right of Congress to undercut the choices made by same-sex couples and by individual states in deciding who can be married to whom. Plaintiff asserted that Section 3 of DOMA denied him/her equal protection of the law as embodied in the Due Process Clause of the 5th Amendment and violated the Spending Clause and the 10th Amendment to the Constitution. The Department of Justice initially filed a brief with the 1st Circuit Court of Appeals defending DOMA against all the asserted grounds, but it subsequently revised its position, asserting that the statute was subject to heightened scrutiny and that if failed that standard of review, while continuing to defend DOMA on the Spending Clause and 10th Amendment issues.

Relevant Legal Issues
Whether the denial of federal benefits to same-sex married couples and survivors of those couples under Section 3 of DOMA violates equal protection of the law; what standard of review should apply in deciding that equal protection claim; and whether congressional enactment of the subject DOMA provisions intruded on matters left to the states by the Constitution and thereby violated the Constitution’s 10th Amendment.

Holding

The Court held that, combining equal protection and federalism concerns – not to create some new category of heightened scrutiny for DOMA – but rather to require a “closer than usual review” based in part on the discrepant impact among married, same-sex couples and in part on the importance of state interests in regulating marriage, DOMA was unconstitutional. The Court applied a rational basis test, but held, consistent with what it described as Supreme Court movement to apply an intensified scrutiny of purported justifications where minorities are subject to discrepant treatment – and held that in an area where state regulation has traditionally governed, the federal government’s interest in intervention must be shown with particular clarity. The Court held that neither the Spending Clause nor the 10th Amendment invalidated DOMA, but justified the need for closer than usual scrutiny and less deference than extent ordinarily accorded to the government under the rational basis test.

Significance

This decision showed that the Courts may use a robust form of rational basis scrutiny to rule against discrimination based on sex. It also suggests that the specific category of scrutiny may mean less in discrimination cases based on sex than the extent and scope of harm to the disadvantaged group and whether the government’s justification makes any sense.


Relevant Facts

Plaintiff filed a sex discrimination case under Title VII against the Price Waterhouse accounting firm for its refusal to make her a partner of the firm. She presented evidence of statements by multiple co-workers and officers of the firm that she was regarded as insufficiently feminine to become a partner. In explaining its decision to put her candidacy on hold, a firm representative advised her that she should “walk more femininely, wear make-up, have her hair styled, and wear jewelry.”

Relevant Issues
The case presented two key issues for the Court: (1) If sex stereotyping played a part in defendant’s decision not to make plaintiff a partner, did that constitute discrimination based on sex in violation of Title VII; and (2) If other factors played a part in making that decision, did that abrogate a finding of discrimination under Title VII?

**Holding**

In an opinion authored by Justice Brennan, with dissents from Justice Kennedy, Chief Justice Rehnquist, and Justice Scalia, the Court ruled that discrimination based on sex stereotyping constituted discrimination based on sex under Title VII. The Court also ruled that Price Waterhouse could avoid liability by providing by clear and convincing evidence that that it would have placed plaintiff’s candidacy for partner on hold if it had made the same decision even absent the discrimination based on sex stereotyping. It ruled that Price Waterhouse had not carried this heavy burden.

**Significance**

Price Waterhouse’s holding that adverse employment actions based on sex stereotyping constituted discrimination based on sex under Title VII became a key foundation for multiple court decisions holding that discrimination based on sexual orientation or on transgender identity and expression constituted discrimination based on sex, in violation of Title VII, Title IX, and – subject to the level of scrutiny – the Equal Protection Clause of the 14th Amendment (or implicit in the 5th Amendment), even though sexual orientation and transgender identity and expression were not expressly mentioned in any of these laws.


**Relevant Background Facts**

This decision arose out of three consolidated cases involving differing factual circumstances, but sharing similar questions of law in whether an employer violates Title VII by firing and individual on the basis of his, her or their LGBTQ status.

In *Bostock v. Clayton County Board of Commissioners*, 723 Fed. Appx. 964 (11th Cir. 2018) a Clayton County Georgia employee, Gerald Bostock, was terminated from his employment after ten years of service shortly after he began participating in a gay recreational softball league. Not long after, Bostock was fired for conduct “unbecoming” of a county employee.
In the second case, *Zarda v. Altitude Express*, 883 F.3d 100 (2nd Cir. 2018), an employee was fired from his job as a skydiving instructor after he mentioned he was gay. In the third case, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 844 F.3d 560 (6th Cir. 2018), Aimee Stephens, who presented as a male when hired was fired after she informed her employer that she planned to “live and work full-time as a woman.”

Relevant Legal Issues

Title VII provides that it is unlawful for an employer to discriminate against any individual “because of such individual’s race, color, religion, sex, or national origin.” The relevant legal issue here is whether an employer violates Title VII of the Civil Rights Act of 1964 when it terminates an employee on the basis of sexual orientation or transgender status. It was undisputed that the employees were fired because of gender identity or transgender status. The employers argued that they did not violate Title VII because (1) the employees themselves would state that they were fired for being gay or transgender, not because of sex; and (2) the drafters of Title VII did not intend for it to apply to discrimination against gay or transgender individuals.

Holding

Title VII protects gay, lesbian, and transgender employees from workplace discrimination. Specifically, an employer violates Title VII by terminating an employee because the individual is gay, lesbian, or transgender. In deciding this, the Court indicated that it need not look beyond the text of Title VII, which explicitly states it is unlawful for an employer to discriminate “because of . . . sex.” Where the statute includes the phrase “because of” it incorporates a but-for causation standard – meaning that an employer cannot avoid liability by pointing to some other reason for the employer’s challenged conduct. Thus, an employer violates Title VII when an employee’s sex is a factor (and regardless of whether there were other factors) in decision to intentionally fire an employee. It also is of no issue if the employer treated men (as a group) and women (as a group) equally. Title VII’s focus is on the individual and where an employer “intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put differently, if changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred.” The Court reasoned: “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different [biological] sex. Sex plays a necessary and undistinguishable role in the decision, exactly what Title VII forbids.” It further reasoned that there is no denying that when a person who is biologically male is fired because he is attracted to men, he is being treated differently than a person who is biologically female and is attracted to men would be treated. That is discrimination based on biological sex. The Court held that Congress need not have had in mind all of the consequences of its broad use of the word “sex” (e.g., effects on homosexuality, transgender status—or motherhood or sexual harassment of men for that matter); the statute’s wording must be applied according to its plain
meaning at the time of enactment and “homosexuality and transgender status are inextricably bound up with sex.” Thus, where sexual orientation and gender identity are “inextricably bound up with sex” an employer discriminates based on these traits it “necessarily and intentionally applies sex-based rules.”

As to the employers attempt to distinguish the fact that the employees would state that they were terminated for being gay or transgender and not because of sex, the court stated that conversational conventions do not control and rather, and rather the Court applies the but-for cause test. In addition, the Court noted that Title VII’s legislative history was inconsequential where there was no ambiguity as to the application of Title VII’s text to the facts at issue.

Significance

This decision is significant in that it confirms Title VII’s reach extends to gay, lesbian, and transgender employees. The decision is particularly important as it provides protections to employees in a majority of states who would not otherwise be protected under his, her or their respective state laws. The Court specifically reserved questions of sex-segregated bathrooms, locker rooms and dress codes under Title VII or any other laws (such as Title IX), as well as the effect of free exercise of religion rights vis a vis differential treatment of individuals on the basis of sex. We cannot predict the outcome of future cases that may raise those issues. However, if the Court is to make decisions that are consistent with its holdings in Bostock, it is hard to imagine that discrimination against transgender people who seek to use bathrooms consistent with their gender identity would be upheld. It would be only because of their biological sex that they would suffer adverse consequences.

5. Whitaker v. Kenosha Unified School District,
858 F.3d 1034 (7th Cir. 2017)

Relevant Facts

Plaintiff, a 17-year old transgender boy sued to overturn the school district’s policy of denying him access to the school’s rest room for boys. He asserted that the denial of such access caused him harm, exacerbating his vasovagal syncope, a condition that made him susceptible to fainting and seizures if dehydrated and provoking suicidal ideations. The trial court found that the school district’s policy violated Title IX and the 14th Amendment’s Equal Protection Clause and granted plaintiff’s motion for a preliminary injunction.

Relevant Issues
The Court addressed whether a preliminary injunction barring the school district’s denial of access to the boys’ restroom was appropriate, focusing on whether the policy caused irreparable harm to the plaintiff and whether plaintiff was likely to succeed on the merits. In addressing the latter question, the Court addressed whether discrimination based on transgender identification and expression constituted discrimination based on sex prohibited by Title IX and whether heightened scrutiny applied under the Equal Protection Clause.

**Holding**

The Court upheld the preliminary injunction. It cited the Supreme Court’s *Price Waterhouse* decision for the principle that adverse actions based on sex stereotyping violated civil rights statutes (in that case, Title VII; here, Title IX). It opined that by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth and that requiring an individual to use a restroom that does not conform to his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The Court also held that the school district’s policy was subject to heightened scrutiny under the Equal Protection Clause. It stated, “If a state actor cannot defend a sex-based classification by relying on overbroad generalizations, it follows that sex-based stereotypes are also insufficient to sustain a classification.

**Significance**

A variety of cases have arisen in recent years regarding the exclusion of transgender students from school restroom facilities that serve their newly identified sex and employment discrimination based on transgender identification and expression. The cases have not been consistently decided under Title IX, Title VII, and the Equal Protection Clause. This case – based on sex stereotyping of transgender individuals – represents the direction to which court decisions are moving and provides, at the appellate level, a cogent and thorough analysis of why discrimination against transgender individuals violates federal law.

6. *Grimm v. Gloucester County School Board*,

**Relevant Facts**

Plaintiff, who had been identified at birth as a female, but identified himself in high school as a male student, was barred by the Gloucester School District from using bathrooms
reserved for males. He claimed that this caused him harm in violation of Title IX and the Equal Protection Clause.

**Relevant Issues**

The issues presented were whether transgender status and expression constituted a protected class that could not be discriminated under Title IX or the Equal Protection Clause, or if not, because of sex stereotyping. The Court also addressed the issue of the standard of review under the Equal Protection Clause, whether barring the plaintiff from using the bathroom for males students harmed him, and whether the school district’s asserted interest in protecting the privacy of male students constituted an important governmental interest that justified its bathroom policy.

**Holding**

The court held that under Title IX, discrimination on the basis of transgender status constituted gender stereotyping because, by definition, transgender persons do not conform to gender stereotypes. The court noted that the First, Sixth, Ninth, and Eleventh Circuits relied on *Price Waterhouse* in holding that claims of discrimination based on transgender status constituted per se sex discrimination under Title VII and other civil rights laws. The court also ruled that discrimination against transgender individuals was subject to intermediate scrutiny under the Equal Protection Clause because transgender individuals constituted at least a quasi-suspect class and because discrimination based on sex stereotypes constituted a sex-based classification “of the type” subject to intermediate scrutiny. It found that the school district’s bathroom policy was not substantially related to its asserted interest in protecting the privacy rights of its students (specifically, the privacy interests of students in avoiding exposure of their unclothed bodies).

**Significance**

This case furthers and documents the increasing movement of the courts to find that discrimination against transgender individuals – whether as students or potential or existing employees – per se constitutes discrimination based on sex in violation of Title VII or Title IX, as well as subjecting government actors to intermediate scrutiny under the Equal Protection Clause.
APPENDIX V: DIVERSITY CONSIDERATIONS AS THEY RELATE TO THE FIRST AMENDMENT AND ACADEMIC FREEDOM

Colleges and universities, whose three-pronged educational missions embrace providing excellent educational experiences for all students, producing excellent research to increase and disseminate knowledge, and serving the nation’s needs for a well-prepared citizenry and workforce, have a compelling interest in creating a broadly diverse student body and faculty. Public colleges and universities play a special role in society by providing otherwise unavailable broadly affordable access to higher education. Many public and private institutions of higher education require a broadly diverse community in order to provide excellent educational experiences and deliver excellent research in a global, multicultural and diverse society. A broadly diverse academic community is fundamental to higher education’s endeavor to best serve all students, and to contribute to solutions that will enable our nation and society-at-large to progress and prosper. Many institutions’ faculties have found and embraced this necessity.

Neither free speech interests protected by the First Amendment to the U.S. Constitution that apply in public educational institutions, nor principles of academic freedom that apply in most public and private institutions of higher education, are offended when the institution appropriately considers whether a faculty member’s conduct in class, the research laboratory or advising activities furthers the institution’s educational mission-driven diversity objectives when making hiring, promotion or tenure decisions. This consideration does not judge the faculty member’s viewpoint or the


350 See Univ. and Comm. College Sys. of Nev. v. Farmer, 930 P.2d 730, 735 (Nev. 1997) (faculty diversity is a compelling interest in a manner similar to student body diversity in higher education that may justify consideration of race in faculty hiring), cert. denied, 523 U.S. 1004 (1998); cf. Rudin v. Lincoln Land Comm. College, 420 F.3d 712, 721 (7th Cir. 2005) (district court granted summary judgment for college, which argued that compelling diversity interests justified consideration of race in a faculty hiring, but diversity argument not made on appeal).

351 See Grutter, 539 U.S. at 331-32.

352 This is particularly the case in science, technology, engineering, and mathematics (“STEM”) fields because STEMM fields are critical to the economic strength and security of the nation. In light of national demographics, which demonstrate that African Americans, Hispanics and Native Americans and women are severely underrepresented in STEMM higher education and careers, while their numbers are increasing in the college age and total U.S. populations, there is a national imperative to increase the racial and gender diversity of STEMM higher education, business and industry in a short time. Other underrepresented groups include students who are first-generation college-goers. If higher education fails to meet this national need, the nation’s leadership in higher education, innovation, and the global economy, as well as our national security, may be expected to decline.

353 The First Amendment applies through the 14th Amendment to state institutions of higher education. See Gitlow v. New York, 268 U.S. 652, 666 (1925); see also Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 387 (1993).
content of speech, nor does it depend on the faculty member’s race or gender; it evaluates the effectiveness of the faculty member’s workplace conduct. There are also certain circumstances in which reasonable regulation of speech is necessary and appropriate in an academic setting.

1. Academic Freedom and Responsibility

Freedom to express ideas, however controversial and offensive, is a deeply held value, a veritable foundation of the intellectual freedom that defines great institutions of higher education, public and private. This academic freedom, which extends to the institution itself as well as to faculty and students, is a fundamental policy governing academic life, quite apart from the law. A faculty member’s academic freedom, as conferred by the institution as a matter of culture and policy, is recognized by most institutions of higher education, regardless of the as-yet to be fully defined extent to which it is also afforded legal protection under the First Amendment.

Academic freedom is accompanied by the countervailing policy of academic responsibility, which is also a foundation of academic culture and is embedded in many institutions’ internal regulations and, indeed, in federal research funding agencies’ requirements. Members of the college and university community have the responsibility, in the exercise of their academic freedom, to act legally, ethically, and with academic honesty (e.g., in scholarship, research, test-taking, and grading); and to not unreasonably interfere with the ability of others in the academic community to participate fully in academic life. Faculty members have the responsibility to commit their primary effort to the fulfillment of their core mission-driven duties of teaching, research, and service.

That one faculty member’s or student’s speech may offend another is not a breach of this responsibility; it is sometimes the necessary consequence of an open intellectual dialogue or debate. An institution may encourage its members to respect one another’s right to express differing views, to communicate in a manner that will evidence that respect, and to communicate effectively (which often means with some modicum of

354 See, e.g., YALE UNIV., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE 5 (1975) (“The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.”); COMMITTEE ON A CIVIL, SAFE, AND OPEN ENVIRONMENT, UNIVERSITY OF FLORIDA, FINAL REPORT (2008); NARRATIVE REPORT AND GENERAL RECOMMENDATIONS, TASK FORCE ON ASSEMBLY AND EXPRESSION, UNIVERSITY OF TEXAS AT AUSTIN (2002).

355 See, e.g., AM.ASS’N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS [hereinafter AAUP 1940 Statement] (“Institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole and academic freedom in teaching and learning is accompanied by “duties correlative with [such] rights.”); 42 C.F.R. §§ 50, 93 (Public Health Service, Office of Research Integrity regulations); 2 C.F.R. § 180.
diplomacy so that others may more willingly listen). However, there are times when an exchange of ideas will be highly offensive to some or even many in the academic community of a college or university. At the same time, making statements that are offensive is one thing, and creating an environment in the classroom, research laboratory, or office that undermines the core mission of the institution—or are so hostile to another that s/he cannot, as a reasonable person, be expected to work there—is another matter entirely and would offend the responsibility that accompanies academic freedom.

2. **First Amendment Protections**

While the legal boundaries of academic freedom have not been fully drawn, the Supreme Court has clearly held that the academic freedom of an *institution* of higher education is protected by the First Amendment to the U.S. Constitution. The U.S. Supreme Court has recognized the special and fundamental role of colleges and universities in the preparation of future generations to fully participate as citizens and leaders in our democratic society, as well as their fundamental role in the creation of a well-prepared workforce in support of our economic strength and national security. The Court has recognized that, if institutions of higher education are to fulfill these critical roles in our society, then as long as such institutions operate within Constitutional and legal boundaries, they have a First Amendment-protected interest in exercising their discretion as to academic matters.

Justice Powell’s plurality opinion in *Regents of the University of California v. Bakke* recognizes a university's academic freedom as “a special concern of the First Amendment” and quotes Justice Frankfurter’s concurring opinion in *Sweezy v. New Hampshire* for the essential elements of that freedom. Justice Frankfurter acknowledges that the government must refrain from interfering in the “intellectual life of a university” and that there are “four essential freedoms’ of a university to determine

356 *Grutter*, 539 U.S. at 331-32; *Widmar v. Vincent*, 454 U.S. 263, 278-79 n.2 (1981) (Stevens, J., concurring); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (The Court held that the New Hampshire Attorney General, acting as agent for the state legislature, could not, on due process grounds, compel a citizen who is a professor to testify as to the content of his class lectures. The offending questions sought to determine the professor’s personal viewpoint on socialism. While not basing its ultimate decision on the First Amendment, the Court recognized important First Amendment protected interests in academic freedom, stating, “The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.”).


358 *Bakke*, 438 U.S. at 312.

359 *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).
for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

While the case was decided on due process, not First Amendment grounds, Justice Frankfurter’s articulation of the important relationship of academic freedom and the First Amendment forms the basis of later decisions that depend on recognition of a college or university’s First Amendment-protected interests in that freedom.

Justice O’Connor’s majority opinion in the University of Michigan law school admissions case, *Grutter v. Bollinger*, leaves no doubt that the Supreme Court has in fact recognized that institutions of higher education have an important First Amendment-protected interest in exercising academic discretion. It is this First Amendment interest upon which Justice O’Connor relies to find a context in which the Court will recognize the compelling educational interest in a broadly diverse student body that can survive strict judicial scrutiny on Equal Protection grounds and justify the consideration of race in student admissions decisions. The Court’s binding endorsement of this interest as being within the First Amendment’s ambit represents one of the greatest victories for higher education and the nation.

For important societal reasons wrapped up in the role of higher education in our society, as well as the roles of faculties and students in higher education, the government must also refrain from regulating the intellectual freedom of individual faculty and students to freely explore and debate their ideas in the context of public higher education. The Supreme Court has observed the importance of faculties and students to the achievement of the institution’s compelling educational mission, as well as the importance of ensuring freedom from government intrusion on the academic discretion of faculties and students. However, while the Court has clearly recognized the

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360 Id. (quoting from senior scholars at the University of Cape Town and University of the Witwatersrand, South Africa); *Grutter*, 539 U.S. at 363; *Bakke*, 438 U.S. at 312.

361 *Sweezy*, 354 U.S. at 254-55.

362 *Grutter*, 539 U.S. at 331-32. In *Parents Involved In Comm. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2753-54, 2792-95 (2007) (Kennedy, J., concurring) (Chief Justice Roberts, writing for the Court, states that “we have recognized as compelling for purposes of strict scrutiny...the interest in diversity in higher education upheld in *Grutter*” and in so doing, “relied upon considerations [i.e., expansive free speech rights] unique to institutions of higher education” and Justice Kennedy’s needed concurrence in the result, distinguishing his view of diversity as being a compelling educational goal at all educational levels in a nation whose history includes segregation and where de facto segregation is still present).


364 *Sweezy*, 354 U.S. at 250 (stating that “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.” The case involved forced testimony of a citizen, who is a college professor, concerning the content of his lectures as they relate to his beliefs regarding socialism).

365 *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy*, 354 U.S. at 250 (stating that the government to “impose any strait jacket upon the intellectual leaders in our colleges and universities [that] would imperil the future of our Nation”).
institution’s First Amendment-protected academic discretion to decide “who may teach, what may be taught, how it shall be taught . . .,” the Supreme Court has never squarely decided the extent of any First Amendment-protected academic freedom of a faculty member, or whether any such individual interest could prevail when in conflict with that of the institution.

The former General Counsel of the American Association of University Professors (“AAUP”) has opined that faculty members have or should have their own legally protected right to academic freedom independent from that which the institution holds. The AAUP clarifies the dimensions of that freedom by recognizing the importance of both academic freedom and corresponding academic responsibility. Even in recognizing the faculty member’s right to speak as an individual citizen without institutional censorship, the AAUP recognizes that, at least in clear circumstances, the institution may find “extramural utterances” of a faculty member to be so at odds with the faculty member’s duties as to justify initiation of disciplinary action. The Fourth Circuit, the Third Circuit, and a concurring opinion in the D.C. Circuit have rejected the notion of independent, legally protected academic freedom of faculty members. The

366 Sweezy, 354 U.S. at 263; see Grutter, 539 U.S. at 331-32.

367 See Grutter, 539 U.S. at 331-32 (institution’s First Amendment protected academic freedom to determine that broad student body diversity is a compelling need in order to achieve its educational mission); Ewing, 474 U.S. at 226, n.12 (stating that the academy itself has autonomous authority to make academic decisions and academic freedom depends on the exercise of that authority, although this may seem inconsistent with individual academic freedom); Bakke, 438 U.S. at 312 (institution’s First Amendment protected academic freedom to determine that broad student body diversity is necessary may be a compelling interest in student admissions, but the means of achieving that interest must be narrowly tailored); Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000) (noting that, if the Supreme Court “constitutionalized a right of academic freedom,” it has recognized the right of the institution, not that of the individual).


369 The rights of an individual when acting as a citizen are broader than the rights of an individual when acting as a public employee.

370 See AAUP 1940 Statement, supra n. 37, at 3 (“Institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition . . . [which] carries with it duties correlative with rights.” While faculty “are citizens, members of a learned profession, and officers of an educational institution,” and they “should be free from institutional censorship or discipline” when they speak as citizens, “their special position in the community imposes special obligations” for them to “at all times be accurate, . . . exercise appropriate restraint, . . . show respect for the opinions of others, and . . . make every effort to indicate that they are not speaking for the institution.” If the institution’s administration feels that a faculty member has failed to fulfill this responsibility and “believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher’s fitness for his or her position,” it may engage the disciplinary process.).

371 Emergency Coalition to Defend Educ. Travel v. U.S. Treasury, 545 F.3d 4, 12-14 (D.C. Cir. 2008) (holding that, when a coalition of professors challenged the trade embargo by the U.S. of Cuba, which limits academic travel to Cuba, as violative of their First Amendment-protected academic freedom, the foreign
Seventh Circuit has recognized both the faculty member’s and the institution’s academic freedom, while weighing the institution’s interest more in circumstances where the faculty member may exercise his right in an alternative manner.\footnote{Piarowski v. Ill. Comm. Coll. Dist., 759 F.2d 625, 629-33 (7th Cir. 1985) (institution may compel relocation of administrator/faculty member’s sexually explicit and racially offensive art work from a location in which the administration judged it to have an adverse effect on university interests, where faculty could exhibit the work elsewhere).}

Whatever the dimensions of a faculty member’s academic freedom are, consideration of a faculty member’s personal social-political viewpoint in a tenure or promotion decision likely would violate First Amendment interests (if involving a public institution) and academic freedom principles. However, the effectiveness of the faculty member’s conduct in fostering productive collaborations among broadly diverse students, junior faculty and peers in the classroom and research laboratory concerns conduct in a critical work-related function—not his or her personal viewpoints. And these considerations are appropriate for any government employer and do not offend the Constitution or academic freedom.

3. **General First Amendment Concepts**

Without fully addressing the complex universe of the First Amendment, there are some important concepts to keep in mind. Different First Amendment interests may attach in different activities and locales on campus. This is another constitutional regime in which context matters, as it does in applying the compelling diversity rationale to admissions.\footnote{Cf. Grutter, 539 U.S. at 327.}

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

policy interests of the U.S. are a compelling interest, and any First Amendment right to academic freedom was not infringed; \textit{id.} at 18 (Silberman, J., concurring) (arguing that any First Amendment interest inures to the universities, not to the individual professors); \textit{Brown v. Armenti}, 247 F.3d 69, 74-78 (3d Cir. 2001); \textit{Urofsky}, 216 F.3d at 412 (upholding a state statute barring use of state computers for sexually explicit material, but allowing a university’s leader to provide exceptions for bona fide research, the court found that if academic freedom is a constitutional right, it attaches to the institution, not to the professor individually); \textit{Edwards v. Ca. Univ. of Pa.}, 156 F.3d 488, 491-92 (3d Cir. 1998) (First Amendment does not restrict university’s right to control curriculum and to establish related policy); \textit{RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 17:31.50, at 2-4 (2009)}; \textit{cf. Burt v. Gates}, 502 F.3d 183, 189-91 (2d Cir. 2007) (Yale law school professors unsuccessfully sought independent First Amendment-protected academic freedom not to be forced to associate with military recruiters on the same terms as other recruiters, due to a fundamental disagreement with the military’s policies on homosexuality, when the Supreme Court had rejected universities’ rights in \textit{Rumsfeld v. Forum for Academic and Institutional Rights, Inc.}, 547 U.S. 47 (2006)).
or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In U.S. Supreme Court jurisprudence, there is a hierarchy of First Amendment-protected speech interests, with political/social-political and religious speech at the apex.374 Expressions of viewpoint about race and gender would generally fall under political and, possibly, religious speech. With limited exceptions, the content (i.e., language used, subjects addressed, viewpoint expressed) of such speech may not be regulated by the government (including public colleges and universities), unless the regulation satisfies the standard of strict judicial review. There must be a compelling government interest that requires the regulation, and the manner of regulation must also be narrowly tailored, not overbroad, to achieve that interest. The regulation may not limit more speech or burden speech more than is necessary to achieve the interest.375

Not all, even political and religious speech, is protected by the First Amendment, however. Certain defamatory speech is not protected and may be prohibited.376 Also, speech that is likely to incite imminent unlawful or violent action or to create an imminent unsafe condition, speech that is aimed at violence against a particular person or persons (hate speech and fighting words), and obscene—not just profane—speech,377 are not protected by the First Amendment and may be prohibited. Hate speech, including speech that is aimed at inciting violence against racial minorities, women, or persons based on their sexual orientation, is not protected and may be prosecuted.378 Academic freedom, which is accompanied by academic responsibility, also would not be offended by the

374 See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 55 (1983) (holding that a school district’s actions did not create a public forum and rejecting a First Amendment claim by a teacher’s union when the district had forbidden them to use the intramural mail system but allowed another union to use it).

375 There must be a compelling interest and a narrowly-tailored approach to regulate the content of protected speech. The regulation must avoid vagueness and make reasonably clear what content is and is not allowed to avoid a “chilling” effect on protected speech. The officials implementing the regulation must do so consistently and may not be given unbridled discretion in its application. R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992); Burson v. Freeman, 504 U.S. 191, 199 (1992).

376 Defamatory speech (i.e., untrue, speech casting the professional or moral reputation of an individual or institution in a negative light) with actual malice by the press or about matters of public concern or public officials or figures, and untrue defamatory speech about private persons on subjects not of public concern, are not protected. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

377 See Miller v. California, 413 U.S. 15, 24 (1973) (defining the test for unprotected obscene speech); Cohen v. California, 403 U.S. 15, 26 (1971) (“Fuck the Draft” on a jacket worn silently in political protest at a courthouse is not obscene speech and is protected); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words, “which by their very utterance inflict injury or tend to incite an immediate breach of the peace,” are not protected). Obscene speech is speech that appeals to a prurient—shameful or morbid—sexual interest as defined by local community standards, is patently offensive as defined by local community standards, and lacks serious redeeming artistic, literary, political, or scientific value as defined by national standards. See Miller, 413 U.S. at 24.

prohibition of such speech. However, expressing views that are offensive about minorities, women, or others—without more—is not hate speech. Some faculty will have such personal views. While the institution need not embrace such views and may express a hope for understanding and inclusion, with limited exceptions individual faculty members may generally express their personal views in at least some campus settings, both as a matter of academic freedom policy and, for public institutions, as a matter of Constitutional law.

Where First Amendment-protected speech interests are involved, they are analyzed by the courts in the context of the forum (public or non-public) in which speech interests are exercised, as well as whether the content (language, subject and viewpoint) of the speech, or only the time, place and manner of the speech, are being regulated.

In nonpublic fora, such as classrooms, research laboratories and offices, more government regulation of speech is permitted under the First Amendment and only a rational basis standard of judicial review applies, requiring that the regulation have some

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379 *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802-03 (1985). *Traditional Public Fora* are those locations and other fora that have traditionally and historically been generally open to the public for assembly and free speech, such as public parks and sidewalks. *Id.* Whether a location is an open public forum depends on the traditional and historic use of the location for free speech, not whether the government presently intends to make the area open for this purpose. *Limited or Designated Public Fora* are those areas and other fora that are not traditional open public fora, but that the government intends to, and purposefully does, make available to the public generally or to a category of people (e.g., all students or all members of the campus community) for assembly and free speech, sometimes relating to particular purposes or topics (e.g., an open microphone for public questions at the time and in accordance with the protocols established at an open forum for students on the Iraq war). A limited or designated public forum is treated as a traditional open public forum for the category of people and purposes and the time period for which the government has made the area available. *Cornelius*, 473 U.S. at 802-03; *Perry Educ. Ass’n*, 460 U.S. at 45-46.

380 While regulation of the content of speech (subject, language and viewpoint) in public fora must generally satisfy strict judicial scrutiny and will be upheld only when justified by a compelling interest and a narrowly tailored approach, even the most protected First Amendment interests (political and religious speech) exercised in the most protected fora for speech (open public fora), may be subject to reasonable time, place and manner limitations. *Cornelius*, 437 U.S. at 818 (Blackmun, J., dissenting). An intermediate standard of judicial review applies to determine the propriety of time, place, and manner restrictions in any public or designated public forum. Such regulations must be imposed without regard to the content of the speech and must serve an important government interest (e.g., safety, efficient use of limited public resources, ability to schedule use and sharing of resources, and protection of other activities through noise, sanitation, or other legitimate controls). *See id.* These restrictions must be reasonably narrowly designed—even if not the least restrictive and most narrowly targeted approach—to achieve the important government interest. Typically, in addition to being justified by an important purpose, there must be another time and place where the protected speech may be expressed, and the limitations must be applied consistently by officials who do not have unbridled discretion in their application. *Cornelius*, 437 U.S. at 802; *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry Educ. Ass’n*, 460 U.S. at 45-46.
reasonable relationship to a legitimate work-related purpose.\textsuperscript{381} In the special context of a college or university, the culture of academic freedom influences, and tempers, the exercise of the institution’s right to regulate speech.

4. \textbf{First Amendment And Employee Speech}

Faculty members are employees. However, their special role at an institution of higher education, where they are academic officers and the intellectual leaders of the institution,\textsuperscript{382} influences the weighing of the faculty/employee’s and the institution/employer’s First Amendment interests. While public employers have broad (albeit not limitless) legal discretion to regulate employee work-related speech and performance,\textsuperscript{383} the culture and societal role of the higher education setting often result in greater accommodation of individual faculty freedom than public employees would have in some other settings. However, consideration of whether a faculty member’s conduct in the classroom, in the research laboratory, or in fulfilling advising and other service responsibilities meets the high standards of inclusion established by an institution of higher education to serve its mission, neither violates the First Amendment, nor prevailing principles of academic freedom.\textsuperscript{384}

The U.S. Supreme Court has held that individuals do not “surrender all their First Amendment rights” by accepting public employment because they continue to be

\textsuperscript{381} \textit{See Perry Educ. Ass’n,} 460 U.S. at 49 (“Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.”); \textit{Lehman v. City of Shaker Heights,} 418 U.S. 298, 302-04 (1974) (a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum); \textit{Justice for All v. Faulkner,} 410 F.3d 760, 765 (5th Cir. 2005).

\textsuperscript{382} \textit{See AAUP 1940 statement, supra} note 37, at 3.


\textsuperscript{384} \textit{See Healy v. James,} 408 U.S. 169, 180, 189, 191 (1972) (a student group seeking recognition by the university has no constitutional right to violate “reasonable school rules governing conduct” for in the special environment of a university, an agreement to conform with reasonable standards respecting conduct to serve the interests of the entire academic community, is a minimal requirement to impose on the acquisition of the privilege of recognition.); Regulations prohibiting discrimination in the university context are regulations of conduct, not viewpoint. \textit{See Rumsfeld v. Forum for Academic & Inst’l Rights, Inc.}, 547 U.S. 47, 62 (2006). Even if the regulation of conduct imposes an incidental burden on viewpoint, the standard under \textit{United States v. O’Brien,} 391 U.S. 367, 377 (1968) for such incidental effect is that the regulation be within the university’s constitutional power; that the regulation furthers an important government purpose; that such purpose be unrelated to suppression of speech; and that the incidental burden on expression be no greater than necessary. The interest served by a university’s nondiscrimination and multi-cultural policies is a compelling educational and national interest in inclusion grounded in the university’s mission and role in society and unrelated to suppression of expression; and providing educational opportunity to all without discrimination on the basis of race or gender could not be achieved without a policy of inclusion.
citizens. However, the government, as an employer, has a much greater interest in regulating the speech of its employees, than the government has in regulating the speech of the general public.

The deciding factor in whether a public employee has a First Amendment interest that may give rise to a right to speak in a manner at odds with an employer’s position, is whether the public employee is speaking in his or her capacity as an employee, or in his or her capacity as a citizen about a matter of public concern. A public employee who speaks in his or her capacity as an employee, or in his or her capacity as a private citizen on a matter of personal, not public, concern, “has no First Amendment cause of action based on his or her employer’s reaction to the speech,” assuming that the employer has a rational basis for its action. Thus, public employers may regulate speech of their employees for any legitimate purpose when their employees are speaking in the performance of their employment duties and when their employees are speaking outside of their employment duties on subjects of personal, not public concern.

It is not the location that decides in what capacity an individual is speaking because an individual may speak as a citizen (not in the performance of his or her official employment-related duties), whether in or out of the workplace and during or after work hours. Similarly, an individual may speak in his or her capacity as an employee outside of the workplace and outside of work hours. Neither does it matter whether the subject of the speech is a subject relevant to the individual’s job. The dispositive fact is whether public employees are speaking “pursuant to their official [employment-related] duties.” The Supreme Court has held that “when public employees make statements pursuant to their official job duties, the employees are not speaking as citizens for First Amendment protection,” even when the subject of their speech is very much a matter of public concern.

A public employee retains the First Amendment interest to speak as a citizen on a matter of social, political or other public concern, as long as s/he is not so speaking in the performance of his or her employment-related duties. However, this retained First Amendment interest to speak as a citizen is subject to the same regulations as any other citizen. The location of an individual’s speech may be relevant in determining whether an individual is speaking as a citizen or as an employee. For example, an individual may speak as an employee at a worksite, or as a citizen outside of the workplace.

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386 Pickering, 391 U.S. at 568.
387 Garcetti, 547 U.S. at 418; Conn ick, 461 U.S. at 147, 154; Pickering, 391 U.S. at 568.
388 Garcetti, 547 U.S. at 422-24.
389 Id. at 421.
390 Id.
Amendment interest is not absolute; it may give rise to a right to speak only if the employee-citizen’s speech interest outweighs the employer’s interest against disruption of the workplace. The public employee’s interest in speaking as a citizen on a particular matter of public concern must be balanced against the interests of the public employer to operate an efficient workplace for its public purposes, to maintain discipline among its employees, and to maintain trusting and confidential relationships between employees and their close supervisors and colleagues. If the employer’s interests in an efficient workplace outweigh those of the employee, the First Amendment is not violated by the employer’s regulation of an employee-citizen’s speech on a matter of public concern. Considerations weighed in this balancing of interests include whether the speech is aimed at anyone with whom the employee would normally come in contact in performing work, whether the speech threatens the ability of supervisors to maintain discipline or supervisors or coworkers to maintain harmony, and whether the employee has violated close relationships of trust and loyalty in the workplace.\textsuperscript{392}

teachers is a matter of public concern); \textit{Perry v. Sindermann}, 408 U.S. 593 (1972) (speech regarding whether a college should be elevated to four-year status is a matter of public concern); \textit{Pickering}, 391 U.S. at 571-73 (a school teacher’s letter criticizing school funding is a matter of public concern). \textsuperscript{392} Compare \textit{Pickering}, 391 U.S. at 569-74 (teacher was not acting within the scope of her employment, but rather was acting as a citizen when she wrote an editorial to the newspaper criticizing the school board’s allocation of bond funds; although her letter was critical of her school system and included false statements adverse to the school system, her dismissal was a violation of her First Amendment rights because her interests as a citizen to speak about a matter of public concern outweigh the interests of her employer in efficient operation of the workplace, maintaining discipline and maintaining confidential relationships of trust with employees, where the teacher’s criticisms were not aimed at any supervisor or colleague with whom she would come into frequent contact in the performance of her job or with whom she had a close relationship of confidence and trust, and her criticism would not likely threaten discipline in the workplace); and \textit{Garcetti}, 547 U.S. at 420-22 (when an Assistant District Attorney who is responsible for assessing the adequacy of an affidavit in support of a warrant criticized the sufficiency of the affidavit to his supervisors and, although they decided to proceed with the prosecution, wrote a memorandum criticizing the affidavit that resulted in discord with the sheriff’s office, this individual was acting as an employee within the scope of his employment and his actions amounted to insubordination; consequently, his First Amendment rights were not implicated when his employer took adverse employment action in reaction); \textit{with Connick}, 461 U.S. at 141-143, 150-52 (prosecutor, who objects to being transferred and expresses her strong objections to her supervisors, prepares a questionnaire and distributes it to her fellow prosecutors soliciting their views about the transfer policy, office morale, the need for a grievance committee, and pressure to work on political campaigns, fomenting what her supervisors regarded as a “mini revolt” and resulting in her termination, may have been speaking on at least one matter of public concern [i.e., political pressure to work on campaigns]; however, her interests on this issue were out-weighed by her employer’s interest in maintaining discipline and harmony in the workplace where the prosecutor had close working relationships with the supervisors and colleagues she involved in her actions and her employers are not obligated to wait until disruption in the workplace occurs to maintain discipline).
The University Employer and Faculty Speech

The college or university’s purpose and role in society, and the nature and role of faculty members within the college or university, contribute to what an academic institution needs to operate efficiently for the realization of its public purpose.

Under the case law addressing a public employer’s prerogatives, a public higher education institution could, under the First Amendment, specify a particular curriculum and course materials to be used, or specific matters to be researched, by an employee. However, except in limited circumstances (for example, possibly, in certain introductory level or distance-learning courses, some courses taught by graduate students, some courses designed to fulfill specific minimum content requirements of a state education board, or a special department-funded course or research project), such requirements would be inconsistent with principles of academic freedom, at least, and are rarely imposed in four-year colleges and universities. In fact, faculty members are usually given broad discretion to choose course materials within the subject matter and level of course assigned to be taught, to express views about those subjects, and to choose research areas within the tenure department’s discipline or multidisciplinary areas. (In the context of community colleges, greater direction may be provided to faculty more often in order to fulfill the nature of these institutions’ missions, courses, and degree requirements.)

Even so, a faculty member of a public or a private institution of higher education who is assigned to teach physics, may not decide against teaching physics and instead teach poetry—if s/he does, s/he may be subject to discipline or, if s/he is untenured, s/he may not have an appointment renewed. (Of course, such a faculty member could elect to punctuate the course with poetry.) A faculty member who is employed by and seeks tenure in the physics department, must perform research that is in an area and of a caliber qualifying the faculty member for tenure in that department. There is considerable flexibility to foster creativity and, increasingly, interdisciplinary pursuits. However, if all of a physics faculty member’s research is in poetry, without adding significant value to the discipline of physics, s/he will not likely be deemed qualified for continued appointment, promotion, or tenure in the physics department. Multidisciplinary work may qualify for tenure, of course, depending on the facts.

Race and gender are matters of public concern in our society, and the intellectual freedom of faculty members to explore controversial subjects is an important foundation of the First Amendment-protected academic freedom of an institution of higher education.393 A public institution may not under the First Amendment, and many private institutions would not under principles of academic freedom, make an adverse decision relating to employment, tenure or promotion on the basis of a faculty member’s personal viewpoints on race or gender (or other matters of public concern), expressed in a manner that makes clear the faculty member is not speaking on behalf of the institution and at a

393 Sweezy, supra, n. 356, 354 U.S. at 250.
time and in a capacity that is not at odds with the faculty member’s work-related duties. The fact that a faculty member’s research and intellectual viewpoints are controversial, alone, should not affect decision-making if the academic quality of the work and its contributions to the field were judged to meet the institution’s high standards, which typically take into account national and international peer review. (Different standards may apply in the community college setting.)

However, it is important to recognize the special nature and role of faculty members. While faculty members have freedom of intellectual inquiry and expression, they also have a responsibility to teach students and mentor junior faculty in a manner that enables full participation in the academic endeavor. Faculty members are the intellectual leaders of the college or university. If the college or university has determined that a broadly diverse, including racially and gender diverse, student body and faculty are essential to achieving the institution’s core educational, research and service mission, speech at odds with this objective, at least in certain work-related activities involving close interactions with colleagues and students, may be at odds with a faculty member’s responsibility. At the same time, controversial or offensive views about race or gender held in good faith for purposes of intellectual inquiry, and not employed in a manner that excludes others from full participation in the academic endeavor of the institution, generally would not be at odds with a faculty member’s employment and are likely to be protected at least by principles of academic freedom, and possibly by the First Amendment in public institutions depending on the facts and the reach of the First Amendment.

Of course, a faculty member who expresses non-defamatory personal views about race and gender (or anything else) in a newspaper editorial, or in a public forum on a public institution’s campus at a time when s/he is not required to be in class teaching or otherwise to be fulfilling employment obligations is generally free to do so. Under the First Amendment and principles of academic freedom only a compelling interest would generally allow the protected content of the faculty member’s speech in such a setting to be regulated in even a narrowly tailored manner. Such personal views may be unpopular, insensitive, offensive to many, or contrary to the institution’s view of its mission.

A faculty member of a public institution likely would not have a First Amendment-protected interest in speaking about race or gender in a manner that is at odds with the institution’s view, of course, if the faculty member’s official role at the institution involves responsibility for diversity efforts (e.g., if the individual is an academic administrator in a leadership role or is responsible for a diversity initiative). Even if this were not the case, if the particular comment’s disruptive effect on the workplace outweighs the individual’s interest as a citizen in expressing the viewpoint, the faculty member would not have a First Amendment-protected interest. This could occur if the speech has little or no intellectual value and is merely vitriolic, it is at odds with the faculty member’s duties to individuals with whom the faculty member normally interacts in the classroom or research laboratory, and it is likely to have a substantial disruptive effect on the harmony
and operation of the classroom or research laboratory. Academic freedom principles and the role of faculty in a college or university may temper this analysis and help define both the work-related duties and the responsibilities of the faculty member, providing some more leeway to the faculty member than may be accorded to public employees in other settings. However, the overall analysis should be the same.

If the institution has determined the need for broad diversity—particularly if that need has been determined in a faculty process—then taking into account the faculty member’s role in and responsibility to the institution and all members of its community, a college or university may be well within its rights to take action against a faculty member who spews racist or sexist speech against colleagues, supervisors or students, even in a public forum, in a manner that is substantially disruptive of the workplace and the faculty member’s official role and duties in it. Of course, the nature, openness and tolerance of controversy that is inherent in this particular workplace would color whether substantial disruption is truly threatened. The facts of a particular situation would matter very much in the analysis.

In almost all colleges and universities, academic freedom, at least, would protect a faculty member’s ability to produce scholarship that expresses offensive views about race and gender (or other subjects). The product’s academic value and quality, its contribution to the field, would be evaluated in the peer review process and in the faculty member’s supervisor’s regular review process. Even in a public context where the First Amendment applies, the right of the academy to make judgments about the value of the academic work product of faculty members is almost always upheld. The courts are loath to substitute their judgment for the subjective academic judgment of the academy. The institution can make clear that the views are not the institution’s views, while the interest of the faculty member to express the views is respected.

Similarly, most colleges and universities would probably interpret academic freedom to protect a faculty member’s ability to express his or her offensive views about race and gender to some extent for didactic purposes in class or in a research laboratory. An offensive viewpoint that is not gratuitous (i.e., it is relevant to the work and is held in good faith in the process of intellectual exploration), would not necessarily be deemed to create a hostile environment, although it could depending on the facts. While only the rational basis standard would apply to a public institution’s limitations on (at least gratuitous) speech in the performance of work in the classroom or research laboratory,

394 See, e.g., *Ewing*, 474 U.S. at 226 n.12 (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making [sic] by the academy itself.” (citation omitted)); *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 349 (5th Cir. 2006); *Coats v. Pierre*, 890 F.2d 728, 733 (5th Cir. 1989); *Levi v. Univ. of Tex., San Antonio*, 840 F.2d 277, 280 (5th Cir. 1988).

395 See *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990); *Emergency Coalition*, 545 F.3d at 19 (D.C. Cir. 2008) (Silberman, J., concurring) (opining that a public university clearly may prohibit classroom speech espousing racial inferiority).
deeply held and fundamental values of academic freedom would likely provide some degree of didactic freedom, along with corresponding responsibility to avoid creating an environment that unnecessarily threatens the ability of all students to learn and fully participate.396

6. The University Employer and Faculty Conduct

Regardless of the legally permissible extent of limitations on faculty work-related speech in public institutions, higher education institutions may make employment decisions that consider a faculty member’s conduct to measure his or her contributions, absence of contributions, or harm to compelling broad diversity objectives (not only racial and gender diversity) as part of the tenure and promotion process. Regardless of personal viewpoint, an individual faculty member may not, through conduct, act in a discriminatory manner in violation of the institution’s nondiscrimination policy,397 nor through conduct or speech create a classroom or research environment that is so hostile as to make it unreasonable to expect some other members of the community (e.g., minorities, women and those with unpopular political viewpoints) to be able productively and collaboratively to learn, research and conduct their work.398 A faculty member whose conduct advances inclusion, provides opportunities for the development of multi-cultural analysis and collaboration skills, and fosters the broad diversity the institution so vitally needs, may have these critical conduct-tied contributions factored favorably, among other factors considered, in the tenure and promotion process. (This is a race and gender-neutral, and viewpoint-neutral, consideration as any person may engage in such conduct and possess and contribute such skills.)

For example, an institution of higher education is within its rights to require a faculty member who (offensively to most) believes certain racial minorities are inferior and who may be undertaking research related to that view, nevertheless to include students in the faculty member’s class and to provide the same educational opportunities and treatment to all students and junior faculty members, without regard to their race. The faculty member is employed by the institution and may express his or her personal views, at least as a consequence of academic freedom principles, through his or her

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396 See AAUP 1940 Statement, supra note 37, at 3, 5 (“Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject,” meaning “not to discourage what is ‘controversial’” but “to underscore the need for teachers to avoid persistently intruding material that has no relation to their subject.”).


398 See Garcetti, supra, note 383 and accompanying text. Cf. Truth v. Kent Sch. Dist., 542 F.3d 634 (9th Cir. 2008); Chi iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136 (2d Cir. 2007); Every Nation Campus Ministries v. Achtenberg, 597 F. Supp. 2d 1075 (S.D. Cal. 2009).
research and, within limitations permitted under the First Amendment, in public fora. However, the faculty member’s conduct—to allow students to join in a class or laboratory and to give them equal access to and treatment in learning—and the faculty member’s in-class conduct and speech may be required to meet institutional nondiscrimination and educational standards tied to the institution’s nondiscriminatory educational mission. The faculty member may have his or her views, but is paid to teach all students without regard to race, in furtherance of the institution’s academic mission, and the institution is not required to employ, tenure or promote a faculty member who will not do so. Implementation of nondiscrimination policies by academic institutions in furtherance of their missions have been widely held to constitute regulation of conduct, not viewpoint. Rational basis scrutiny should apply in this workplace context.399

Applying inclusive conduct that provides opportunities to enhance broad collaborations and develop multi-cultural skills to teaching and supervision of research may be workplace conduct required by the institution of faculty members in order to achieve the institution’s educational mission. Inclusive conduct means including and fostering participation of individuals of different cultures, socio-economic backgrounds, races, perspectives, and experiences to provide opportunities to engender an increased understanding of and explore a broad range of individuals’ ideas and problem-solving approaches. Multi-cultural skills include the demonstrated ability to utilize such understanding and broad perspectives in teaching, research and mentoring and to create an inclusive environment in which individuals of a range of experiences, perspectives and cultures, including different races and genders, can work productively and creatively together. Inclusive conduct and multi-cultural skills include breaking down stereotypes that may lead some to assume that all individuals of a particular race, ethnicity, gender, nationality, or socio-economic group share the same views, personal qualities, and experiences. This conduct is inclusive and non-discriminatory action on the basis of race, gender, religion, age, sexual orientation, perspective, etc. Even if a court were to determine that speech interests -- not only conduct -- were implicated when inclusion to foster multi-cultural skills is favored in teaching students in class or supervising or working with others in a research laboratory, such speech would be in the context of official duties to the institution or would satisfy constitutional standards for incidental effects, and its regulation would not offend the First Amendment. If the institution’s core, academy-embraced mission fundamentally requires inclusion, consideration of this conduct also should not offend academic freedom any more than do the judgments made in the tenure process.

399 See SMOLLA, supra note 371, at 6. Even if an incidental effect on speech were to result, the institution’s compelling interest in such policy would meet the O’Brien standard. See United States v. O’Brien, 391 U.S. 367 (1968).
7. **Conclusion**

Institutions of higher education are, by nature and of necessity, environments of open dialogue and exploration of ideas, some of which are offensive or controversial. The imperative for colleges and universities to encourage such freedom of exploration and expression is at the core of how such institutions advance knowledge and serve society. Equally at the core of higher education is the inclusion of broadly diverse students and faculties. Regulation of speech within this setting requires the soft touch of careful judgment and appreciation of context, but appropriately judicious parameters on individual speech that ensure the ability of all students and faculty members to reasonably and fully participate in the academic endeavor are critical. As a separate but associated matter, in an increasingly diverse and global society requiring conduct that fosters inclusion, collaboration and a broadly-defined diverse learning and research community is both essential to the success (and excellence) of higher education and the nation, and permissible under the First Amendment and principles of academic freedom.