



# ***SUMMARY AND HIGHLIGHTS***

## **Principal Authors:**

**Jamie Lewis Keith**, Vice President and General Counsel, University of Florida and  
**Daryl E. Chubin**, Director, Center for Advancing Science & Engineering Capacity,  
American Association for the Advancement of Science

Editor: Arthur L. Coleman, Education Counsel LLC

**January 2011**

**HANDBOOK ON DIVERSITY AND THE LAW:**  
Navigating a Complex Landscape to Foster Greater Faculty and Student Diversity  
In Higher Education

**Primary Handbook Authors and Project Counsel**

**Robert Burgoyne, Theodore M. Shaw, Ralph C. Dawson, and Rena Scheinkman**, Fulbright & Jaworski L.L.P.

**Arthur L. Coleman** (also *Chair, Expert Legal Advisory Board and Co-Editor*), **Steven Y. Winnick, Jennifer Rippner, and Scott R. Palmer**, EducationCounsel LLC

**Co-Project Director, Editor, and Handbook Author; and Primary Summary and Highlights Author**

**Jamie Lewis Keith**, Vice President and General Counsel, University of Florida, Member, AAAS Capacity Center Advisory Board, AAU General Counsels Advisory Committee

**Co-Project Directors and Contributors**

**Dr. Daryl E. Chubin**, Founding Director, Center for Advancing Science & Engineering Capacity, American Association for the Advancement of Science

**Dr. Shirley M. Malcom**, Head of Education and Human Resources Programs, American Association for the Advancement of Science

**Project Liaison**

**Dr. John Vaughn**, Executive Vice President, Association of American Universities

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

AAAS acknowledges the generous support of the Alfred P. Sloan Foundation, which funded the 2009-2010 workshops and preparation of all materials through multiple awards (2007-5-51 UGSP, B2008-52, 2008-5-35 UGSP, and 2009-5-33 UGSP) and the National Science Foundation (NSF), which provided supplementary funding and is supporting the next phase of the project (HRD-1038753).

Special thanks to Kate Lipper of EducationCounsel and Sabira Mohamed of AAAS for assistance in producing this Summary.

The *Handbook* is available for free downloading at

<http://php.aaas.org/programs/centers/capacity/publications/complexlandscape/PDFs/LawDiversityBook.pdf>

## I. **Handbook on Diversity and the Law: Summary and Highlights Overview**

The American Association for the Advancement of Science (AAAS), with participation by the Association of American Universities (AAU), published the *Handbook On Diversity And The Law: Navigating A Complex Landscape To Foster Greater Faculty and Student Diversity In Higher Education* (hereafter *Handbook*) in April 2010, following two, two-day related workshops in April and October 2009. The *Handbook* provides extensive legal and policy resources for academic and legal leaders of institutions of higher education, to help them collaborate to improve access and broaden the diversity of their faculties and student bodies, particularly in science, technology, engineering, and mathematics (STEM) disciplines (but also in other fields). The *Handbook* is downloadable for free at <http://tiny.cc/LawHandbook> and is also available at cost from AAAS in hard copy.

Many complex legal regimes govern access and diversity efforts, and many legal issues are different for faculty and students. This legal context makes designing successful diversity programs very challenging. Consequently, rather than offer only abstract legal analysis with less immediate usefulness to legal and policy personnel of institutions, the *Handbook* offers in-depth legal analysis and resources tied to specific types of diversity-enhancing program models that are both effective in enhancing diversity, as well as legally sustainable. Refer to [Appendix A](#) to review the Table of Contents of the *Handbook* and access the range of resources it offers.

This document provides highlights of the *Handbook* with pertinent cross-references to the *Handbook's* more detailed discussion. It is not intended to be a legal guide nor a substitute for legal counsel.

## II. **Increasing Access and Broadening Diversity of Faculties and Student Bodies In STEM Fields: A National Imperative**

Industry leaders heavily invested in STEM education and professions have noted that, irrespective of one's political or social viewpoint, the U.S. must increase participation of minorities and women in STEM fields or we can soon expect to see an adverse effect on U.S. economic strength, leadership in innovation, and national security.<sup>1</sup> Observing that students

---

*[I]rrespective of one's political or social viewpoint, the U.S. must increase participation of minorities and women in STEM fields or we can soon expect to see an adverse effect on U.S. economic strength, leadership in innovation, and national security.*

---

<sup>1</sup> See Remarks of the Chief Executive Officer of Northrop Grumman Corporation, the Executive Vice President of IBM Corporation and the President of the National Academy of Engineering in Chubin, D.E., Malcom, S.M., Keith, J.L., and Bobb, K., "Standing Our Ground II: Efficacy of University-based S&E Programs Despite Limitations of 'Strict Scrutiny'," A Summary of the meeting, AAAS-NACME Roundtable 15 January 2008, revised April 2008, pp. 6-7 [http://php.aaas.org/programs/centers/capacity/07\\_Engagement/07\\_LawPolicyPractice.php](http://php.aaas.org/programs/centers/capacity/07_Engagement/07_LawPolicyPractice.php).

educated in STEM fields in China and India often lack creative and collaborative abilities that are as well developed as students educated in American institutions of higher education, these industry leaders note that China and India realize the need to foster such creativity and collaboration in STEM education and are working on enhancing their approach. These leaders warn that if we fail to make significant progress in increasing participation of minorities and women in U.S. STEM higher education and industry in the next several years, the nation's economic strength, leadership in innovation, and security may be expected to decline appreciably, just as other countries' effectiveness and creativity in STEM education is expected to ascend. Institutions of higher education serve critical roles in society, as most of them have an educational mission that encompasses delivering excellent educational experiences for all of their students; producing excellent research to increase knowledge; and serving society's greatest needs, including preparing students to participate in the workforce and citizenry and fueling innovation, the economy and national security. Thus, these industry leaders have challenged institutions of higher education to do more to help the nation meet the a-political need for greater access to and diversity in STEM higher education. That challenge is the driver for this AAAS project.

Technology is "increasingly recognized as a key determinant of economic growth by most nations,"<sup>2</sup> and NSF has emphasized that our "international economic competitiveness ... depends on the U.S. labor force's innovation and productivity" and that a "diverse, globally-oriented workforce of scientists and engineers" is needed to support continued U.S. economic leadership.<sup>3</sup> Yet, the NSF, the President's Council of Advisors on Science and Technology (PCAST), and the Commission on Professionals in Science and Technology (CPST) all report a negative trend in the first decade of the 21<sup>st</sup> Century: U.S. students' interest in STEM careers and their performance in science and mathematics continue to decline, while foreign students' interest and performance in these areas continue to increase. Only about one-third of the baccalaureate degrees earned in the United States in 2005 to 2006 were in STEM fields, whereas 56 percent of the baccalaureate degrees earned in China and 63 percent in Japan in 2005 were in STEM fields. Furthermore, in the U.S., about five percent of all bachelor's degrees are awarded in engineering, compared to 20 percent in Asia.<sup>4</sup> Overall, the United States trailed 16 countries in Europe and Asia in the proportion of each country's college population who earned degrees in science and engineering in 2001.<sup>5</sup>

Compounding this challenge, demographic trends in the U.S. demonstrate that minorities and women, while being highly underrepresented in STEM fields that drive economic growth, represent the nation's largest source

---

<sup>2</sup> NSF, *1 Science and Engineering Indicators 2002*, [www.nsf.gov/sbe/srs/seind02/start.htm](http://www.nsf.gov/sbe/srs/seind02/start.htm) (NSF's *Science and Engineering Indicators* are cited "SEI") at 5-44; The National Academies, *Rising Above The Gathering Storm: Energizing and Employing America for a Brighter Economic Future* (2005), [www.nap.edu/catalog.php?record\\_id=11463](http://www.nap.edu/catalog.php?record_id=11463).

<sup>3</sup> 1 SEI 3-15 to 3-29, 5-29 to 5-30; NSF, *Women, Minorities, and Persons With Disabilities in Science and Engineering 2000*, [www.nsf.gov/sbe/srs/nsf003271](http://www.nsf.gov/sbe/srs/nsf003271) ("WMD") at 1.

<sup>4</sup> SEI 2008, [www.nsf.gov/statistics/seind08/c2/c2s5.htm](http://www.nsf.gov/statistics/seind08/c2/c2s5.htm).

<sup>5</sup> WMD at 20; Amici Curiae Brief of Massachusetts Institute of Technology, Leland Stanford Jr. University, E. I. DuPont De Nemours and Company, International Business Machines Corp., National Action Council for Minorities in Engineering, the National Academy of Sciences and the National Academy of Engineering, in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding University of Michigan Law School's holistic assessment of each candidate for admission, taking race among other factors into account), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down as unconstitutional University of Michigan's automatic award of 20 points to minorities in an undergraduate admissions evaluation process) [web.mit.edu/newsoffice/nr/2003/amicus-brief.pdf](http://web.mit.edu/newsoffice/nr/2003/amicus-brief.pdf) ("MIT Brief"); President's Council of Advisors on Science and Technology ("PCAST"), Workforce/Education Subcommittee, [www.ostp.gov/pcast](http://www.ostp.gov/pcast), in the June 2004 report entitled, "Science and Engineering Capabilities" ("June 2004 report"), at parts 3 and 4. For a more recent analysis and updated statistics, see The National Academies, *Rising Above the Gathering Storm, Revisited—Rapidly Approaching Category 5* (2010), [http://www.nap.edu/catalog.php?record\\_id=12999](http://www.nap.edu/catalog.php?record_id=12999).

of intellectual resources for the not-so-distant future. Specifically, data from the U.S. Census Bureau and NSF demonstrate that individuals who today are referred to as minorities will soon constitute the majority of the college-age population and then the majority of the total population of the United States. Minorities constituted one in three members of the college-age population and about 24 percent of the total population of the U.S. in 2000. By 2025, NSF projects that minorities will constitute 38 percent of the college-age population. Minorities are projected to surpass Caucasians in the U.S. population soon after 2050.<sup>6</sup> At the same time, women already constitute well over half of the college-age population as well as more than half of the total U.S. population of the United States.<sup>7</sup>

In light of these realities, the persistent gaps reflected at every stage of the STEM pipeline must be addressed. While the gender gap in high school preparation in science and mathematics has largely been eliminated, wide racial and ethnic gaps persist in high school preparation. African American, Hispanic, and American Indian and Alaska Native students are less likely than Asian and non-Hispanic Caucasian students to take key advanced mathematics, chemistry, and physics courses in high school.<sup>8</sup> This evidence signals the beginning stage—and without prompt action, perpetuation—of a severe pipeline problem in STEM fields.

In higher education, African American, Hispanic, and Native American individuals are underrepresented in both STEM degrees and all degrees at the college and graduate school levels. Women are underrepresented in STEM degrees at all levels. Women have outnumbered men in undergraduate education since 1982 and earned 58 percent of all baccalaureate degrees in 2005, but earned only about half of all baccalaureates in science and engineering since 2000.<sup>9</sup> African Americans, Hispanics and Native Americans together accounted for only 18 percent of STEM baccalaureate degrees in 2005-2006.<sup>10</sup> Of PhDs awarded between 2005 and 2006 in the U.S. in STEM fields, only 20 percent were earned by women, and only 6 percent were earned by African Americans, Hispanics and Native Americans.<sup>11</sup>

Women's robust representation in college generally also should not obscure their lesser representation in PhD programs and in STEM fields in higher education and the workforce at all levels. Data on freshman "intentions" to major in a field, actual enrollments, and degree completions show wide variations by gender and broad field. The sex ratio (male to female) of interest ranges from 9:1 in computer science, to 6:1 in engineering, and 1.5:1 in physical sciences. Women's interest outpaces men's only in the biological sciences.<sup>12</sup> These patterns persist in enrollments and degree completion with the gap in retention rates narrowing to parity in many fields, but not in

---

<sup>6</sup>U.S. Census Bureau, U.S. Summary 2000 (July 2002), [www.census.gov/population/cen2000/phc-t08](http://www.census.gov/population/cen2000/phc-t08) (Tables 3 and 4 averaged) (15-24 year-olds in the U.S. population based on 2000 census data); 2 SEI, Table 2-2 (Appendix Tables); see also U.S. Department of Commerce, Minority Business Development Agency, "Minority Population Growth: 1995 to 2050," at 1-3 (1999); U.S. Census Bureau, "Dynamic Diversity: Projected Changes In U.S. Race and Ethnic Composition 1995-2050," at 1 (1999).

<sup>7</sup>See National Center for Education Statistics, *Digest of Education Statistics*, 2006, Table 6, [http://nces.ed.gov/programs/digest/d06/tables/dt06\\_006.asp](http://nces.ed.gov/programs/digest/d06/tables/dt06_006.asp).

<sup>8</sup>Commission on Professionals in Science and Technology ("CPST") 2008, *Professional Women and Minorities*, Chapters 1-2.

<sup>9</sup>SEI 2008, [www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42](http://www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42).

<sup>10</sup>2 SEI at Appendix Table 2-17; WMD at 20; MIT Brief, *supra* n. 22; PCAST, June 2004 report at parts 3 and 4; see also National Center for Education Statistics, [www.nces.ed.gov/programs/digest/d06/tables/dt06\\_274.asp](http://www.nces.ed.gov/programs/digest/d06/tables/dt06_274.asp); CPST 2008, Figure 3-1.

<sup>11</sup>CPST 2008, Figure 3-1; see also T.B. Hoffer, M. Hess, V. Welch, Jr., and K. Williams, *Doctorate Recipients from United States Universities: Summary Report 2006* (National Opinion Research Center 2007) (reporting on data collected in the Survey of Earned Doctorates, conducted for six federal agencies, NSF, NIH, USED, NEH, USDA, and NASA by NORC).

<sup>12</sup>*The American Freshman*, issued annually, UCLA: Higher Education Research Institute, [www.gseis.ucla.edu/heri/heri.html](http://www.gseis.ucla.edu/heri/heri.html).

---

*[S]cience and technology should be understood as actively evolving (not static) fields, requiring creative and collaborative undertakings . . . in a world that is increasingly connected and multicultural.*

all, *e.g.*, the retention ratio is 4:1 male to female in engineering.<sup>13</sup> The impact of these differentials on the composition of the STEM faculty and national workforce is clear.

Predictably, the patterns at the end of the pipeline—in the workforce, including academia—persist. More particularly, the relative dearth of science and technology degrees earned by minorities and women has led to severe underrepresentation in academia and the workforce. Only 10 percent of the science and engineering workforce in 2006 comprised African Americans, Hispanics, and Native Americans.<sup>14</sup> Underrepresented minorities, women, and persons with disabilities represent two-thirds of the U.S. workforce, but hold only one-fourth of the science and technology jobs that drive the global economy.<sup>15</sup> Caucasians and Asians, who represent the vast majority of this workforce and have the most experience, are aging.<sup>16</sup> The university faculty looks glaringly unlike the undergraduate student body. In the context of these demographics, *all* students and the entire nation will suffer if we do not address quality of and access to STEM education, and do not increase the racial and gender diversity of the workforce available to STEM fields.<sup>17</sup>

Academic research institutions educate our nation's STEM workforce and increase fundamental knowledge needed by industry to develop practical solutions to the needs of a rapidly changing, diverse and global society. This is the incomparable U.S. partnership of higher education, academic research, government and industry that has resulted in innumerable advances in knowledge and improvements in the quality of life, health, and productivity of society in this country and around the world.<sup>18</sup>

Beyond the U.S. demographics-driven needs of industry for a more diverse and larger STEM-educated labor pool, it is important to recognize, in a broadly diverse and global society, that *all students* (regardless of race or gender) must have meaningful educational experiences. All students need the opportunity to learn to work productively and creatively, and to live with individuals from a broad range of

---

<sup>13</sup> See *Professional Women and Minorities: A Total Human Resources Data Compendium, 17<sup>th</sup> Edition*, Washington, DC: Commission on Professionals in Science and Technology, November 2008, Chapters 2-4.

<sup>14</sup> CPST 2008, *Professional Women and Minorities*, Chapter 5.

<sup>15</sup> PCAST, June 2004 report at part 3.

<sup>16</sup> 1 SEI at 3-12, 3-15 to 3-24, 3-27, 5-29; WMD at 20-22, Text Table 5-2 at 52. Only 9.1 percent of all higher education faculty are members of these minority groups so the percentage who are faculty in science and technology fields is even less. See National Center for Education Statistics, [www.nces.ed.gov/programs/digest/d06/tables/dt06\\_229.asp](http://www.nces.ed.gov/programs/digest/d06/tables/dt06_229.asp).

<sup>17</sup> S.A. Jackson, "The Quiet Crisis: Falling Short in Producing America's Scientific and Technical Talent, Building Engineering and Science Talent (BEST)" (2004), [www.bestworkforce.org/PDFdocs/Quiet\\_Crisis.pdf](http://www.bestworkforce.org/PDFdocs/Quiet_Crisis.pdf); AAAS-NACME, *Standing Our Ground: A Guidebook for STEM Educators in the Post-Michigan Era* (Oct. 2004), [www.aaas.org/standingourground.org](http://www.aaas.org/standingourground.org) (hereafter "Standing Our Ground").

<sup>18</sup> See n. 22, MIT Brief, *supra*.



backgrounds, cultures, races, ethnicities, genders and experiences, or they—non-minority and minority—will not be well-prepared to enter the workplace or contribute as citizens in the 21<sup>st</sup> Century.

The graduates of STEM degree programs will have to work collaboratively and productively in a diverse society. Students learn not only in the classroom, but also through their experiences living, studying, working and interacting with each other and with faculty at colleges and universities across the country. Research establishes that students learn more and the workforce is more productive and successful in a broadly diverse setting.<sup>19</sup> Students, both minority and non-minority, who are educated in racially, ethnically, and otherwise diverse academic settings, benefit from experiencing a broader array of questions and perspectives as they identify and solve problems and are better equipped to function and thrive in an increasingly multi-cultural world.

Faculty, too, are more productive and creative teachers and researchers when they work with diverse colleagues and students.<sup>20</sup> Many institutions of higher education have determined that they require a broadly diverse faculty in STEM and other fields to achieve their mission-driven objectives in a diverse and global society. Importantly, science and technology should be understood as actively evolving (not static) fields, requiring creative and collaborative undertakings (not merely rote memorization and application of formulas and data, for instance) in a world that is increasingly connected and multicultural. Thus, diverse learning environments are vital settings for enhancing relevant knowledge and skills. U.S. academic research institutions must provide diverse campus, educational, research and living experiences to enable such learning inside and outside the classroom and the laboratory. Broadly diverse faculties and student bodies are critical to the success of the academic research endeavor and its partnership with government and industry, benefiting all in our nation and society in general.

Until our nation can provide access to high quality public Kindergarten through 12<sup>th</sup> grade science and mathematics education to a high percentage of all segments of our society, including underrepresented minorities and women, institutions of higher education—particularly selective institutions—will have to continue to take race and gender into account to achieve the racial and gender components of the broad diversity in STEM undergraduate and graduate student bodies and faculties that they require to achieve their educational missions and satisfy the nation's economic, national security and citizenry needs. Until we confront the root causes of our nation's deficiency in STEM fields, our businesses and industries will continue to struggle to build a sufficiently diverse workforce that effectively identifies our society's needs, develops products and services to address those needs, and competes in the world's markets to provide those products and services. This inter-generational pipeline problem is one of the greatest challenges facing institutions of higher education and our nation in the 21<sup>st</sup> Century. U.S. colleges and universities must respond creatively and unequivocally to increase access to education and broaden the diversity of our student bodies and faculties.

---

<sup>19</sup> See e.g., Patricia Gurin, et al., "Diversity and Higher Education: Theory and Impact on Educational Outcomes," 72 Harv. Educ. Rev. 3, 330-36 (2002); *The Shape of the River*, supra; Helen Lippman, "Variety is the Spice of a Great Workforce," Business & Health Archive (May 1, 2000); Somnath Saha, Gretchen Guiton, Paul Wimmers, and LuAnn Wilkerson, "Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in US Medical Schools," *JAMA*, 300(10):1135-1145 (2008); and Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies*, Princeton Univ. Press (2008).

<sup>20</sup> *Id.*; see also **Handbook Appendix IX, infra, "U.S. Leaders Speak"**; 17 SEI 2008, [www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42](http://www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42); MIT Brief.

### III. Overview of Federal Law Diversity-Broadening Program Models<sup>21</sup>

Federal law generally prohibits discrimination on the basis of race, ethnicity or gender by public institutions of higher education and by private institutions of higher education that receive federal funding. Federal law also prohibits discrimination on these and certain other bases in employment by public and most private employers. Having the determination of the institution's leadership and faculty that broad (not just racial and gender) faculty and student diversity are critical to achieving the institution's educational mission (including its academic, research, access and service components) is an important evidentiary foundation for the development of legally sustainable diversity programs. Subject to local jurisdiction-imposed limitations, such programs, with the appropriate evidentiary foundations and designs may reflect consideration of race, ethnicity and/or gender in selection of participants or conferral of other benefits, when that is relevant and necessary to achieve mission-driven broad diversity. The ability of colleges and universities to fulfill their societal roles—i.e., to support: the nation's economic strength; the success of the U.S. academic-industry partnership in innovation and national security; preparation of our citizenry to participate in our democracy and workforce; and our national workforce's ability to identify and serve the greatest needs of a broadly diverse and global society—depends on a broadly diverse faculty, student body, and workforce. The effectiveness of a diversity program is important to its legal sustainability, so legal sustainability and real-world effectiveness are closely aligned.

**A. Student Diversity and the “Diversity Rationale” For Race- and Gender-Conscious Action<sup>22</sup>:** Taking race- or gender-conscious action to achieve diversity in the student body of an institution of higher education may be justified under the “diversity rationale”, or, alternatively, when necessary to remedy the institution's own discrimination. However, race- and gender-conscious diversity efforts are not legally justifiable to remedy discrimination by society-at-large or simply for the purpose of achieving in the student body the same representation of minorities and women as exists in the overall population of a state or the nation (i.e., “racial balancing”).

---

<sup>21</sup> It may be helpful to the reader to review the **Key Definitions** section in the *Handbook*, located in **Chapter IV, pp. 23-29**, before reading Section III of this Summary and Highlights.

<sup>22</sup> See *Handbook, Chapter VII, on student diversity, as well as Appendix I (Relevant Constitutional, Statutory and Regulatory Authority) and Appendix II (case law summaries and analyses)*. Several laws apply in the student diversity context: the Equal Protection Clause of the U.S. Constitution (according to the Supreme Court, an individual right protecting all races and genders equally and to which strict judicial scrutiny applies to race- and ethnicity-conscious action and heightened scrutiny applies to gender-conscious action by public institutions); Title VI (race and ethnicity discrimination is prohibited for the whole operation of any public or private federal funding recipient and extends Equal Protection principles to private institutions); and Title IX (gender discrimination is prohibited for the whole operation—academics, athletics, employment, etc.—with some exceptions allowing some single gender programs, for private and public federal funding recipients and extends Equal Protection principles to private institutions). State constitutions and law also may apply.



Under the diversity rationale in the context of institutions of higher education, the educational benefit (to learning, research, access to and preparation for the workforce and citizenship, and economic and national security interests) realized by all students and the nation from a “broadly diverse” student body has been recognized by the courts as a compelling interest or objective that has the potential to satisfy strict judicial scrutiny and survive a legal challenge to race-conscious action. (Under existing case law, if gender were considered, the standard should be an important interest or objective in the educational benefits of diversity.) In order to survive strict scrutiny of race-conscious action or heightened scrutiny for gender-conscious action, the manner in which race is used must be “narrowly tailored” or, in the case of gender “substantially related,” to achieving the compelling or, in the case of gender important, educational benefits of broad diversity—i.e., the reliance on race or gender must not be overbroad. In addition to being time-limited to the period of need, in order to avoid being overbroad, use of race and gender should occur: where there is no workable alternative that relies less on race and gender (and this determination is periodically reviewed); and where these criteria are applied in a flexible manner (not uniformly to all applicants of a particular race or gender), as part of an individualized, holistic review of each applicant under the same criteria and process, thus allowing all to compete on equal footing and not over-burdening non-minorities and men. This is a difficult, but not impossible, legal standard to satisfy, and requires careful design and implementation of race- or gender-conscious diversity-enhancing approaches.

The “broad diversity” recognized by the courts as conferring compelling educational benefits is not limited to race, ethnic and gender diversity. Rather, such broad diversity means all aspects of individuals that contribute to a robust academic environment including experience, perspectives, disciplines, geographic background, talent, family socio-economic background, disability, ethnicity, race, gender and other characteristics, depending on the institution’s own academic, research, access and service mission. However, when some aspects of broad diversity have been easily achieved, while others—including racial and in some disciplines gender diversity—are more elusive, narrowly tailored, race- and gender-focused efforts may be justified to fill in the gaps and achieve the broad diversity required to further the institution’s academic, research, access and service mission.

Note that in some jurisdictions, state laws, constitutions or executive orders prohibit consideration of an applicant’s race, ethnicity or gender when public institutions make admissions decisions (and possibly when they confer other educational benefits), unless such consideration is required by federal law. In these jurisdictions, even when the U.S. Supreme Court and federal law would *allow* limited consideration of race, ethnicity, and gender, state law may not because the U.S. Supreme Court and federal law do not *require* such consideration. In these jurisdictions,

---

*[B]road diversity means all aspects of individuals that contribute to a robust academic environment.*

---

*Unlike student diversity efforts, the legal justification for taking race- and gender-conscious action to achieve broad faculty diversity has a “remedial” basis . . . The boundaries of what is “remedial” and what furthers Title VII’s equal opportunity purposes are key.*

race-, ethnic- and gender-neutral approaches that legitimately serve other institutional needs (e.g., practicing inclusive, multi-cultural conduct and including those from low socio-economic backgrounds)—but have an ancillary positive effect on racial, ethnic and gender diversity—are critical.

**B. Faculty Diversity and the “Remedial” Justification for Race- and Gender-Conscious Action in Employment<sup>23</sup>:** Unlike student diversity efforts, the legal justification for taking race- and gender-conscious action to achieve broad faculty diversity has a “remedial” basis under existing statutes, regulations and case law. Federal law generally prohibits racial and gender discrimination (including considering race or gender in decision-making and conferring benefits) in employment and employment benefits. To qualify for an exception from this general prohibition, it is necessary under existing U.S. Supreme Court decisions to establish a remedial justification that furthers Title VII’s equal opportunity in employment purposes. The boundaries of what is “remedial” and what furthers Title VII’s equal opportunity purposes are key.<sup>24</sup>

Generally, in order to take race- or gender-conscious action in employment, it is necessary to do a discipline-specific analysis and there must be evidence of a need to remedy one of the following:

(a) a *prima facie* (i.e., on its face) showing of an institution’s own actual discrimination against minorities or women in a particular discipline, which the courts have found to be evidenced by a disparity of two or more orders of magnitude between the representation of minorities or women in a particular discipline at the institution and their representation in the available and qualified labor pool (from which faculty could be recruited); or

(b) a *manifest imbalance* in the representation of minorities or women at the institution in that discipline as compared to their representation in

---

<sup>23</sup> See *Handbook*, Chapter VIII, on faculty diversity and Appendix I (Constitutional, Statutory and Regulatory Authority), and Appendix III (case law summaries and analyses). A number of laws apply in the employment context: the Equal Protection Clause of the U.S. Constitution (according to the Supreme Court, an individual right protecting all races and genders equally and to which strict judicial scrutiny applies to race and ethnicity conscious action and heightened scrutiny applies to gender conscious action by public institutions); Title VII (race, ethnicity, gender, religion discrimination is prohibited for private employers with more than 15 employees and public employers, and reasonable affirmative action is permitted where an institution-specific remedial justification exists); OFCCP regulations and executive orders (race, ethnicity, gender, and religion discrimination is prohibited for federal contractors, and reasonable affirmative action plans are required to attempt to address underutilization of minorities and women, but the hiring decision is expected to be made on a non-discriminatory basis); Title VI (race and ethnicity discrimination is prohibited for the whole operation of a public or private federal funding recipient, including in employment if the purpose of the funding is employment or if the employment confers an educational benefit, and extends Equal Protection principles to private institutions); and Title IX (gender discrimination is prohibited for the whole operation—academics, athletics, employment, etc.—with some exceptions allowing some single gender programs, for private and public federal funding recipients and extends Equal Protection principles to private institutions). While Title VI (in some circumstances) and Title IX apply to employment, in this area they overlap with Title VII which also applies. The interplay of these federal laws has not been decided, but Title VII applies in some fashion as it is the principal federal employment statute. State constitutions and law also may apply.

<sup>24</sup> See *Handbook*, Chapter VIII (pp. 93-105), as well as Appendix I, Relevant Constitutional, Statutory and Regulatory Authority) and Appendix III (case law summaries and analyses).

the available and qualified labor pool, which is a court-recognized but not precisely defined, somewhat lesser but still substantial disparity; or

(c) an *underutilization* of minorities or women at the institution in that discipline, which is measured under a number of regulatory tests, including the most popular and reasonably conservative—the 80 percent test of the Office of Federal Contract Compliance Programs (OFCCP). Under this test, OFCCP defines underutilization to exist when the representation of minorities or women at the institution in a discipline is less than 80 percent of their representation in the available and qualified labor pool for that discipline. (OFCCP requires federal contractors to make reasonable affirmative action plans with goals, but not quotas, to remedy underutilization, but expects hiring, promotion, and layoff decisions to be made on a non-discriminatory basis.)

In fields such as science, technology, engineering, and mathematics disciplines, where there is a “pipeline problem” because there are very few minorities or women in the available and qualified labor pool, there may be a “trainable cohort” of graduate students, fellows, or junior faculty who could be prepared to compete successfully for tenure and tenure-track positions. Limited, targeted, appropriately designed, and implemented capacity-building programs for this cohort (e.g., certain assistantships, fellowships, visiting appointments) may be justified, but require jurisdiction and institution-specific analysis, justification, and legal advice.<sup>25</sup>

Except for OFCCP’s required affirmative action goals and where actual discrimination must be remedied, federal law and the U.S. Constitution permit remedially based affirmative action in employment, but do not require affirmative action in employment. (In jurisdictions with state laws that prohibit consideration of race or gender in hiring, unless required by federal law, it is OFCCP’s required affirmative action—which does not apply to the hiring decision itself—that justifies race- and gender-targeted faculty diversity efforts in those disciplines where there is a legally recognized underutilization at the institution.)

While the logically strong argument exists that faculty are as critical as students to the achievement of educational benefits at colleges and universities, the U.S. Supreme Court has not yet addressed the question of whether the “diversity rationale” can justify consideration of race and gender in faculty employment actions. Also, the interplay of Title VII and Equal Protection/Title VI/Title IX principles has not been fully decided. Strong logical arguments building on—but not addressed by—existing U.S. Supreme Court decisions, exist that the purposes of Title VII are served in a higher education context by extending the diversity rationale alone to employment of faculty.<sup>26</sup> While colleges and universities are well-advised to articulate their compelling, mission-driven educational interest in having a broadly diverse faculty as one basis for faculty diversity efforts, it is prudent to also have a corresponding and aligned remedial basis for race- or gender-conscious actions regarding faculty employment and related benefits. (Thus, prudence would call for the justification to include a showing of discrimination, manifest imbalance, or underutilization, as described in part III.B above, that is being remedied.)

**C. Program Examples:** The following hypothetical program examples are for discussion only and do not constitute legal advice, which must be institution and fact specific. The examples are arranged and described as race/gender-neutral, outreach, or barrier removal programs; or as race/gender-conscious programs. The different meaning of each of these categories is critical.

---

<sup>25</sup> See *Handbook*, Chapter VIII (pp. 93-94).

<sup>26</sup> See *Handbook*, Appendix III, Section 3.a, pp. 182-85 (U.S. Solicitor General’s arguments to the U.S. Supreme Court at its invitation while considering whether to grant certiorari in *Taxman v. Bd. of Ed. 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)).

---

*[M]any neutral and outreach and barrier removal programs that have an authentic, institutional mission-driven purpose apart from race or gender diversity, should be suitable even in jurisdictions . . . prohibiting any consideration of race and gender in hiring, admissions, and contracting.*

- *Neutral programs* are programs that do not use race, gender, or other legally “suspect” criteria and for which there are authentic, institution mission-driven purposes. Examples are programs for inclusion of those from low socio-economic backgrounds or seeking faculty and students with records of broadly inclusive workplace conduct). As long as there is any legitimate (not illegal) purpose for such a program, it should survive a legal challenge because the judicial standard requires only a rational relationship to the legitimate objective and this is an easy standard to satisfy.
- *Inclusive outreach and barrier removal programs* are race-and gender-targeted outreach efforts that supplement general outreach to include those who are not captured well by general outreach). As long as there is any legitimate (not illegal) purpose for such a program, it should survive a legal challenge because the judicial standard requires only a rational relationship to the legitimate objective.
- *Race-conscious programs* are programs that consider race in selection of participants or to confer a not insignificant benefit). These programs are legally “suspect” and subject to strict judicial scrutiny. Satisfying this judicial standard and sustaining these programs is difficult. However—if there is adequate evidence that the consideration of race is necessary and the manner of considering race is narrowly tailored to achieve a legally recognized compelling purpose (i.e., there is no workable alternative that uses race less or not at all)—it is possible to satisfy the standard.
- *Race-exclusive programs* are programs that condition participation or receipt of a benefit on membership in a particular race. These programs are legally “suspect” and correspondingly are subject to strict judicial scrutiny. As a general rule, they are the hardest programs to sustain, although it is not always impossible to satisfy the standard.
- *Gender-conscious programs* and *gender-exclusive programs* are programs that consider gender, or condition participation on being a particular gender. These programs are subject to heightened judicial scrutiny and require a showing that gender is considered only as needed and in a manner that is substantially related to achieving an important objective.

Some program examples are reasonably easy to sustain legally. Subject to jurisdiction-specific analysis, many neutral and outreach and barrier removal programs that have an authentic, institutional mission-driven purpose apart from race or gender diversity, should be suitable even in jurisdictions that are subject to executive orders or voter referendum-initiated laws prohibiting any consideration of race and gender in hiring, admissions, and contracting. (Neutral programs, while aimed at important objectives other than racial and gender diversity may, as an

ancillary benefit, also enhance racial and gender diversity.) For other programs that take race or gender into consideration (or in duly limited situations are race or gender exclusive) and may be legally sustainable in jurisdictions where such consideration is permissible in appropriately limited ways and circumstances, the factual foundation and design, implementation, and actual effectiveness of the programs are critical to their legal sustainability. The institution may need to assess the proposed program and the effectiveness of other alternatives.

### **1. Inclusive Conduct/Multi-cultural Skills as Criterion in Hiring, Program Participation, Support [Neutral]<sup>27</sup>**

Academic and research excellence, accomplishments and promise, as well as traditional service contributions, are maintained as important criteria for faculty employment decisions and benefits. In holistically assessing many qualifications of each applicant or employee (regardless of race, ethnicity or gender), however, whether an individual has a record of breaking down barriers for self or others and of including racial minorities, women, other underserved individuals, and individuals with different perspectives, experiences, and backgrounds, in educational, research, mentoring and/or other workplace activities is favorably factored. This “inclusive workplace conduct” criterion may be included and considered in faculty position and program descriptions; hiring, tenure and promotion criteria; criteria to evaluate institutional and professional service contributions; selection criteria for fellowships, assistantships, research and other funding or gifts; participation in mentoring, bridging, research and other programs; and related advertisements. Inclusive conduct in the workplace provides experiences and opportunities for all students and faculty to develop multi-cultural skills needed to succeed in a diverse, global society. Inclusive conduct provides opportunities to utilize individuals’ differences to foster effective, multi-cultural and multi-perspective collaborations, issue identification, creativity, and problem-solving in classroom, research, laboratory and mentoring activities. Inclusive conduct also provides 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. (Student admissions, employment, research programs and other benefits may also include this criterion among preferred criteria.) This criterion is not a proxy for any one political viewpoint, and focuses on and evaluates workplace conduct, not viewpoint. This is a race and gender-neutral quality that individuals of any race or gender may possess—or lack.

An institution may have an authentic, mission-critical interest in building a faculty and student body who, among other core strengths, exhibit inclusive workplace conduct and possess multi-cultural skills. For example, an institution may determine that individuals with such 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; provide multi-cultural and multi-perspective experiences for all students and faculty that they need to succeed in a global, broadly diverse society; and create a more broadly welcoming academic community for research and learning. An ancillary, albeit welcome, benefit may be to increase racial and gender aspects of broad diversity (i.e., as long as racial minorities and women have different life experiences, they may have to overcome barriers, acquire multi-cultural skills, and exhibit inclusive conduct to succeed). However, not all women and minorities exhibit such conduct and possess such skills, and it should not be assumed they do. There are men and non-minorities who possess these skills and others who don’t. It depends on the individual. With an authentic, mission-critical basis for seeking individuals—of any race or gender—with records of such inclusive conduct and multi-cultural abilities, the institution can establish an educational necessity and overcome any disparate impact.

---

<sup>27</sup> See *Handbook, Race- And Gender-Neutral Alternatives, Chapter V* (pp. 31-40).

Subject to individual institutional and specific jurisdiction analysis, advice of counsel, and careful design, this should be a suitable, neutral criterion for referendum and executive order states. Search committee training is helpful for implementation.

## **2. Low Socio-economic Background or Other Disadvantage as Criterion [Neutral]<sup>28</sup>**

Selection criteria for fellowships, assistantships, research and other funding or gifts; participation in mentoring, bridging, research and other programs; admissions; and related advertisements may include, as a preferred or required criterion, low socio-economic background (on its own or in combination with other mission-critical “disadvantage” criteria, e.g., family background residing in rural or urban areas with high concentrations of poverty, first in family to attend a four-year college or pursue a STEM field, single parent household, English as a second language, weak prior educational institution, etc.). These criteria generally relate to enhancing access to and increasing broadly defined diversity of the student body. However, these criteria could also be used to enhance access to and increase the breadth of diversity of the faculty if life experience, including family socio-economic background, were considered.

To define low socio-economic status, consider total wealth, including but not limited to family income, and level and concentration of poverty in the family’s residential area and school district.<sup>29</sup> Low socio-economic status alone is an authentic and important aspect of mission-critical broad diversity—apart from race. Higher education serves a critical societal role in individual access to workforce opportunities and to full participation in our democracy, as recognized by the Supreme Court in *Grutter v. Bollinger*.

Low socio-economic status and other disadvantage criteria will often have the ancillary benefit of creating more racial diversity. This is the case for the expanded definition of low socio-economic status due to the history of slavery, residential and school segregation and discrimination in the U.S. which may result in a disparity in total wealth between individuals of the same income but different minority-majority racial status. However, this definition of socio-economic status considers appropriate and relevant factors in defining wealth and class in the U.S. With an authentic, mission-critical basis for seeking individuals who satisfy such disadvantage criteria, apart from race or gender, the institution can establish an educational necessity and overcome any disparate impact.

*These neutral criteria should be suitable even in referendum and executive order states.*

## **3. Inclusive Outreach and Barrier Removal in Faculty Hiring Process [Outreach]**

Before closing an applicant pool (*i.e.*, those submitting applications) or candidate pool (*i.e.*, those selected from the pool to interview), a determination is required on the adequacy of a search committee’s outreach efforts. The objective and focus are on the adequacy of outreach—not on whether the applicant or candidate pool itself, is diverse enough.<sup>30</sup>

The outreach that has been undertaken is one important data point as to whether outreach is sufficient. Has all reasonable outreach that has a possibility of being productive been done? The diversity of the applicant and potential candidate pools are two additional data points. If all reasonably possible that outreach that has the potential to be productive has *not* been undertaken and the pool of applicants—or the pool of potential

---

<sup>28</sup> See *Handbook, Race- And Gender-Neutral Alternatives, Chapter V (pp. 31-40)*.

<sup>29</sup> Richard Kahlenberg, “Affirmative Action in Higher Education After the Seattle and Louisville Decisions: Reexamining the Socio-economic Alternative,” [http://php.aaas.org/programs/centers/capacity/07\\_Engagement/07\\_LawPolicyPractice.php](http://php.aaas.org/programs/centers/capacity/07_Engagement/07_LawPolicyPractice.php).

<sup>30</sup> See *Handbook, Search Guidance Handout, Parts B and C. Refer to Race- And Gender-Neutral Alternatives, Chapter V, and Legal Issues Associated With Faculty Diversity, Chapter VIII (pp. 77-105, 111-125)*.



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 complete.

In such event, the instruction to the search committee is to do additional outreach, including additional targeted outreach, to broaden the applicant pool and provide an opportunity to broaden the inclusiveness of 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 complete candidate pool has been chosen, and in fact the process of defining these pools is not yet completed. It may be helpful to determine adequacy of outreach before any deadline for completing outreach or closing the application period 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 (which is determined after completion of adequate outreach).

If all reasonably possible outreach that has the potential to be productive has been undertaken and the pools of applicants and potential candidates 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”), the outreach process nevertheless ends, and the hiring process proceeds.

Alternatively, applications may be accepted until a hiring decision is made. In such event, if a determination of adequacy of outreach is to be made, it may be helpful to make that determination prior to beginning review of applications or at least before beginning interviews. If outreach will continue after the outreach is determined to be adequate, or after interviews begin, it may be helpful to ensure that such additional outreach includes both general, broad-based outreach, as well as (i.e., not only) targeted outreach (and that there is serious consideration of additional applicants from all additional outreach efforts, not only targeted efforts).

*This outreach process is suitable even for referendum and executive order states. Search committee training is helpful for implementation.*

Other good outreach and barrier removal practices include the following:

- Formally track minorities and women with promise at your own and other institutions through undergraduate and graduate school, academia and industry, as part of an overall effort to track promising prospects of any race or gender. Deans/unit heads assign a respected faculty member (with assistance) to oversee tracking and enlist participation of other faculty.
- Targeted advertising, targeted organization contacts and conference attendance, and personal outreach to minority and female (or in some fields, male) potential candidates, in addition to outreach to other potential candidates.
- Climate-enhancing programs available and useful to all, but potentially particularly meaningful to minorities and women (e.g., flexible work schedule, parental leave or accommodation in tenure timeline, spousal and domestic partner relocation benefits such as access to a networking and recruitment consortium, career counseling, adjunct opportunities).

*These outreach and barrier removal practices generally are suitable for referendum and executive order states.*

#### **4. Removal of Unnecessarily Restrictive Qualification Criteria [Barrier Removal]<sup>31</sup>**

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, training in more than a small group of institutions, a justifiably longer period of development of scholarship, family obligations, etc.), while maintaining high standards for intellectual capacity, academic achievement and promise. This approach requires a close and individual assessment of the accomplishments and promise of applicants and candidates, rather than reliance on generalizations (such as the generalization that only a handful of doctoral programs produce qualified academics in a field). This review and establishment of qualification prerequisites is done before the relevant positions are advertised; changes in qualification prerequisites related to or affecting race, ethnicity or gender diversity 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.

*This barrier removal practice should be suitable even for referendum and executive order states.*

#### **5. Community Building, Mentoring, Capacity-Building [Ranges from Barrier Removal to Race/Gender Conscious]<sup>32</sup>**

The following program examples can support the success of minority and female graduate students, post-doctoral fellows, and junior faculty members in pursuing faculty appointments and tenure.

##### **a. Facilitate creation of peer communities [Barrier Removal]**

These programs support minority, female, and other under-served (e.g., disabled) graduate students, post-doctoral fellows, and junior faculty members and foster their access to the larger 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. The institution evaluates relevant facts and (e.g., via surveys or other data gathering) determines that minorities, women and certain other underserved individuals are not well represented at the institution and would otherwise be isolated and impaired in accessing the university community as well as in building community. The institution has evaluated and determined that others access the university community and build community more easily and have ample opportunities to do so. It is prudent to periodically evaluate the need and effectiveness of the practice, which is used as long as the need exists.

*Subject to individual institutional and specific jurisdiction analysis, advice of counsel and careful design, this practice removes barriers that don't exist for others, may be viewed as inclusive and not discriminatory, and should be suitable even for referendum and executive order states.*

---

<sup>31</sup> See the Search Guidance, Part C; and *Handbook*, Chapters VIII for faculty and VI for state restrictions.

<sup>32</sup> See *Handbook*, Chapters VII for students, VIII for faculty, and VI for state restrictions.

**b. Create a formal advising and mentoring program [Barrier Removal]**

These programs are staffed by senior faculty, peers, and administrators to provide advice on grant-writing, research and academic politics, career counseling, and emotional and professional support to all junior faculty and graduate students who are interested in help to better prepare to compete for fellowships, faculty appointments, and tenure. Encourage participation by minority and female graduate students, as well as by other individuals in demonstrably underserved groups. Also, within and as a component of the overall program, provide options for focus groups for minorities and women and members of other underserved groups, such as disabled individuals. Practical, political, discipline-centric, and social advice and support are provided. Occasional informal get-togethers and meals are offered. An annual reception may be provided to acknowledge the participants.

Focus groups for minorities and women and targeted encouragement of participation in generally available as well as targeted mentoring programs are justified where minorities and women are not well represented at the institution and would otherwise be isolated and less prepared than others. 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. Targeted efforts and encouragement are 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 and comprising a part of a single larger mentoring program that is open to all who may need such assistance (e.g., all junior faculty and graduate students, or at least all those who are first in family to pursue a STEM or any academic career or satisfy 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. Institution-wide programs are, in effect, clustered so that the needs of all are met, including but not limited to minorities and women. Institution-wide assessment and combination of all available mentoring programs are helpful. (*Subject to individual institutional and specific jurisdiction analysis, advice of counsel and careful design, this program may be suitable for junior faculty and post-doctoral fellows, as well as students, even for referendum and executive order states.*) Where effectiveness would not be compromised, a mentoring program may be designed and described as focused on issues of particular importance to minorities or women, without prohibiting the participation of others. The only or predominant participants in such a program likely will be minorities or women as well as others who are sincerely interested in learning about such issues and fostering an inclusive community.

If this is a distinct program for minorities or women, 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.

It is helpful as an evidentiary foundation for necessity, if a regression analysis demonstrates that minority, women or others of targeted status statistically (not in an individual case) predicts less likelihood of success, all other factors being equal (i.e., without other “risk” factors being present). If so, that status may be identified for some targeted support using some (but not greatly disproportionate) resources, as long as others in need also have comparable opportunities for support. (See Title VII analysis in c below.)

*Institutional and jurisdiction-specific analysis, advice of counsel and careful design and implementation are necessary.*

**c. Establish research assistantships, fellowships, research funding supplements, and research opportunities [Race and Gender Conscious Capacity Building]**

These programs for multi-year cohorts of participants and senior faculty sponsors involve conferring significant benefits and require legally-recognized justification:

These programs further the achievement of missing aspects of mission-critical broad faculty and student diversity. Structured as an educational, not employment, program, for students, race and gender are criteria *among others* considered in selection of program participants (e.g., promise, accomplishments, personal qualities for success in STEM fields, other disadvantage criteria), where factual and legal justification exist, and where the jurisdiction permits such consideration. These programs may be structured for graduate students and undergraduates. These programs for students would be subject to the requirements of *Grutter v. Bollinger*, Title VI (race), Title IX (gender) and/or the Equal Protection Clause for strict judicial scrutiny and narrow tailoring. This means the program is tied to a legally recognized compelling (or for gender, important) mission-driven interest (e.g., the educational benefits of diversity—other, most prudent supplementary, compelling interests are national security and preparation of students for citizenship and the workforce); race is used only to the extent necessary (and gender is used in a manner that is substantially related) to achieving that interest (i.e., workable alternatives that use race and gender less or not at all, if any, are considered periodically and used if available); race and gender are applied in a flexible manner that doesn't 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 process so all may compete for opportunities; and the program is actually effective to expand diversity, is time-limited to the period in which the need exists, and is evaluated periodically.<sup>33</sup>

In the employment context, these programs are reasonable, time-limited, capacity-building programs that do not overburden men or non-minorities. They are aimed at remedying the current effects of an employer's own prior discrimination (the two or more orders of magnitude disparity in particular employer's workplace vs. labor pool representation that the Supreme Court has found constitutes a *prima facie* case of discrimination) or a manifest imbalance in the employer's workforce in a particular discipline (a substantial disparity, but somewhat less than a showing of actual discrimination or other substantial underutilization—e.g., the OFCCP 80 percent measure.<sup>34</sup> The programs also further the institution's compelling educational interests and mission.

---

<sup>33</sup> Title IX allows some gender exclusive programs under some circumstances. See *Handbook, Chapters VII on students and VIII on faculty*.

<sup>34</sup> See 65 Fed. Reg. 68,022, 68,033-34 (Nov. 13, 2000), U.S. Dept. of Labor, OFCCP, "Technical Assistance Guide for Federal Supply and Service Contractors," at 21-22 (Aug. 2009), and 41 C.F.R. 60-2.10-2.17 (collectively "OFCCP Guide").

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 perhaps in the field, 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 under Title VII and OFCCP tests, when compared with their representation in the qualified available pool). In such event, in jurisdictions that do not locally prohibit consideration of race or gender when justified, 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 and a “trainable cohort” exists but has been excluded. In such event, it is prudent to use race and gender as factors among many that are flexibly considered in a holistic individualized assessment of all applicants to these capacity building programs. The EEOC has recognized this justification under Title VII in the employment context when needed and appropriately structured,<sup>35</sup> and following EEOC’s guidance is a defense to claims of discrimination under Title VII.<sup>36</sup>

---

*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 perhaps in the field, in relevant education programs and the workforce . . .*

*Requires individual institutional analysis, use of lesser and neutral alternatives if available, close involvement of counsel, and careful design and implementation.*

**d. Target of Opportunity Models**

- i. Unit-wide benefits [neutral].** Benefits such as administrative support, equipment, graduate assistants, and funding are provided to those units that demonstrate exemplary outreach efforts, barrier removal, and other inclusive practices to foster 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. The benefit is based on the outreach, not necessarily the hiring results.

*Subject to individual institutional and jurisdiction specific analysis, advice of counsel and careful design, this practice is likely suitable even for referendum/executive order states. Race and gender are not used to confer a benefit on—or deprive a benefit to—any individual.*

- ii. Funding for a cluster of positions in multiple and flexibly defined disciplines [neutral].** Funding is provided by the Provost/Dean to simultaneously hire several faculty who are less traditional in their individual disciplines or interactions

---

<sup>35</sup> See 29 CFR 1608, 1608.3(c).

<sup>36</sup> See 42 USC 2000e-12(b); *Handbook*, Chapter VIII, pp. 93-105.

with other disciplines. Creative, interdisciplinary approaches to research are authentic, mission-critical activities because they support excellence in research. Race and gender are not factors, but the flexibility of discipline definitions, openness to non-traditional backgrounds, and simultaneous availability of multiple positions, with good outreach practices (see III.C.1, 3 and 4 above), increase the potential for competitiveness of minorities and women within the cluster. Record of inclusive conduct and multi-cultural skills in the workplace (see III.C.1 above) may also be a consideration.

*This approach should be suitable for referendum/executive order states.*

- iii. **Funding/position to hire faculty who especially advance priority objectives of the institution [neutral].** The Provost/Dean provides funding to hire 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 (multi-cultural) conduct in teaching, research and/or mentoring (i.e., mission-critical workplace behavior—see III.C.1 above). Holistic, individualized assessment is undertaken.

*Subject to individual institutional and specific jurisdiction analysis, advice of counsel and careful design and implementation, these programs are likely suitable even for referendum/executive order states. Neutral criteria are used and reflect an authentic mission-driven educational necessity apart from race and gender.*

- iv. **ALL:** The institution maintains a written policy 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 the institution's mission. The 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 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 whole process.<sup>37</sup>

## **6. Race or Gender-Conscious Faculty Hiring or Promotion<sup>38</sup>**

Considering race or gender in a hiring or promotion decision is prohibited under some states' executive orders and voter referendum-initiated laws and do not generally fall under the exceptions to the prohibitions in such laws which are tied to federally required affirmative action. These criteria are not included in federally *required* affirmative action under OFCCP regulations and executive orders (and Title VII provides for *voluntary* affirmative action).

In jurisdictions where consideration of race or gender in hiring and promotion is *permitted* in the limited circumstances when such consideration is justified, the institution assembles substantial institution-specific evidence of the inadequacy of outreach, barrier-removal, and capacity-building efforts to remedy the current effects of the institution's own legally recognized discrimination or a manifest imbalance of women or minorities in a discipline in the institution's workforce. (Remedying societal discrimination or racial balancing is not the objective.) When permissible, race or gender is only one factor among many that are considered in evaluating all candidates individually and holistically, and these criteria are flexibly considered (not weighed the same for

---

<sup>37</sup> See *Handbook*, Chapters VIII for faculty and VI for state restrictions.

<sup>38</sup> See *Handbook*, Chapters VIII for faculty and VI for state restrictions, Appendix I for Relevant Constitutional, Statutory and Regulatory Authority, and Appendix III for case summaries on employment.



all candidates of one race or gender), so that everyone may compete for all positions under the same criteria. Consideration of race or gender is time limited to the period needed to remedy the effects of the institution's own discrimination or a legally recognized manifest imbalance in a particular discipline in its workforce.

In addition to remedying discrimination by the institution or a legally recognized manifest imbalance of minorities or women in the institution's workforce, the educational imperative to build a broadly diverse faculty may be a supplementary justification for considering race and gender in faculty hiring, where these aspects of mission-critical broad diversity are missing. It is helpful if the leadership and faculty of the institution have found broad diversity of the faculty and student body to be mission-critical. There is also a remedial basis. The Supreme Court has not yet reached the question of whether institutions of higher education have a compelling interest in a broadly diverse faculty (akin to their interest in a broadly diverse student body) that might independently justify taking race and gender into account in furtherance of Title VII's equal opportunity in employment purposes. However, the faculty is as critical to the educational process as students, and logic, a non-binding Solicitor General's opinion, and some case law support this position.

*Requires assessment of the particular jurisdiction's limitations, individual institutional and factual analysis, advice of counsel, and careful design and implementation.*

## **7. Race or Gender Conscious Layoffs**

Taking race or gender into account in layoffs has been determined by the Supreme Court to unduly burden the vested interests of individuals being laid off. (In the defined circumstances in which race and gender conscious employment practices may be justified, the more diffuse the effect of the practice—so that everyone may compete for opportunities and not all opportunities are foreclosed on the basis of race or gender—the easier the practice is to justify.)<sup>39</sup>

## **IV. The Next Phase: Expanding the *Handbook's* Reach**

With new funding from NSF, the next phase of the project that produced the *Handbook* began in October 2010, with the goal of expanding its reach and continuing its impact. Specifically:

- Two additional workshops for general counsels and academic leaders will be held in different regions of the U.S. in 2011;

---

*The Supreme Court has not yet reached the question of whether institutions of higher education have a compelling interest in a broadly diverse faculty (akin to their interest in a broadly diverse student body) . . .*

---

<sup>39</sup> See *Wygant v. Jackson Bd. Of Education* [Taxman] and the *Handbook*, Chapter VIII for faculty, Appendix I for Relevant Constitutional, Statutory and Regulatory Authority, and Appendix III for case summaries on employment.

- The *Handbook* will be supplemented with guidance for sectors of higher education beyond research universities and, in particular, for institutions in referendum and executive order states; and,
- Advice will be provided on national executive and legislative branch initiatives that could clarify and strengthen the legal foundation for practices that enhance access and broaden diversity in STEM fields.

This Phase 2 of the project will support research and graduate degree-granting institutions and undergraduate-focused institutions—as well as productive connections between these institutions of higher education with community colleges, other two-year colleges and minority-serving institutions of higher education as a means of expanding the pipeline in STEM fields.

This project will continue to inform and support three roles on campus: (1) a routine and productive partnership of college and university general counsels and senior lawyers with (2) provosts and vice-provosts who lead the institutional mission and oversee its portfolio of policies and programs, and (3) faculty and administrators engaged in the actual design and conduct of programs and practices (e.g., faculty searches and hiring). The project contributes to NSF’s unique Congressional mandate to address diversity concerns for the nation, as well as NSF’s significant investment in research programs to increase knowledge on how best to “broaden participation” in the STEM fields. The outputs and opportunities (guidance, resource materials, opportunities to interact with others grappling with similar issues) that the project will yield will benefit the community of institutions that perform NSF-funded research and education.

Phase 2 will be led by the Principal Investigator on the NSF award, Dr. Daryl Chubin, Director of the AAAS Capacity Center; Project Outside Counsel, Art Coleman, Esq. and his team from EducationCounsel, LLC; Project Director, Jamie Lewis Keith, Vice President and General Counsel of University of Florida; and Project Senior Advisor and Coordinator for Policy Alternatives, Dr. Shirley Malcom, AAAS Head of Education and Human Resources Programs. An expanded Advisory Board of experts, led by Bob Burgoyne, Esq. and Ted Shaw, Esq. of Fulbright and Jaworski LLP, will include organizations representing a very large number and variety of colleges and universities across the country—the American Association of Community Colleges, the American Council on Education, the Association of American Medical Colleges, the Association of American Universities, The College Board, and the National Association of College and University Attorneys, the Thurgood Marshall College Fund—as well as officials of the Alfred P. Sloan Foundation, the Institute for Higher Education Policy, and institutions of higher education.

APPENDIX A

**Table of Contents**  
***from the HANDBOOK ON DIVERSITY AND THE LAW***

**VOLUME I**

I. PREFACE AND PROJECT OVERVIEW ..... 1

II. HISTORICAL CONTEXT ..... 6

III. THE COMPELLING CASE FOR DIVERSITY ..... 9

    A. The Diversity Imperative in 21<sup>st</sup> Century STEM Education..... 9

        1. Background ..... 9

        2. Diversity and STEM Education ..... 10

            a. Educational and Civic Outcomes ..... 10

            b. Economic and National Security Outcomes ..... 13

            c. Conclusion: Benefits to All..... 13

        3. The Challenges We Face ..... 13

        4. Moving Forward..... 18

IV. KEY DEFINITIONS..... 21

    A. Race-, Ethnicity-, and Gender-Conscious, -Exclusive and –Neutral Policies ..... 21

    B. Intentional and Impact Discrimination..... 22

        1. Intentional discrimination or Disparate Treatment..... 22

        2. Disparate impact..... 22

    C. Strict, Intermediate and Rational Basis Scrutiny ..... 22

        1. Strict scrutiny ..... 22

            a. A compelling interest ..... 22

            b. Narrow tailoring ..... 23

        2. Intermediate scrutiny ..... 23

        3. Rational basis scrutiny ..... 23

    D. Diversity Interests..... 24

        1. Diversity ..... 24

    E. Remedial Interests..... 24

    F. Critical Mass and Racial, Ethnic, or Gender Balancing ..... 25

        1. Critical mass ..... 25

	2.	Racial, ethnic or gender balancing.....	25
G.		Underrepresented Students.....	26
H.		Individualized, Holistic Review .....	26
I.		Inclusive Conduct and Multi-cultural Skills .....	27
V.		RACE- AND GENDER-NEUTRAL ALTERNATIVES.....	28
A.		Neutral Alternatives In General.....	28
B.		Inclusive Conduct and Multicultural Skills as a Criterion .....	29
	1.	Definition and Use of Inclusive Conduct and Multi-cultural Skills Criterion.....	29
	2.	Relevance to Institutional and Academic Unit Mission and Goals and Value of Inclusive Conduct and Multi-cultural Skills.....	30
C.		Low Socio-economic Background/First In Family To Four-Year College As A Criterion .....	31
	1.	Definition of Low Socio-economic Status and Uses as a Criterion .....	31
	2.	Relevance to Institutional and Academic Unit Mission and Goals and Value of Socio-economic Status.....	32
D.		How Inclusive Conduct And Multi-cultural Skills And/Or Socio-Economic Status Are Considered With Other Eligibility Considerations.....	32
	1.	Significance of Institutional Resources Committed .....	33
	2.	Assessment of Impact.....	33
	3.	Commentary and Examples .....	33
	4.	Examples of How Inclusive Conduct and Multicultural Skills and Low Socio- economic Status May be Used in Diversity Efforts.....	35
	a.	Advertisement, Interview and Evaluative Questions.....	35
	b.	Target of Opportunity Funding and Positions For Those Having Strong Records of Inclusive Conduct and Multi-cultural Skills .....	36
	c.	Research Funding .....	37
	d.	Other Programs.....	37
E.		Diversity Considerations, the First Amendment and Academic Freedom .....	38
VI.		RELEVANT STATE LAWS: VOTER INITIATIVES AND ADMINISTRATIVE RULES.....	40
VII.		LEGAL ISSUES ASSOCIATED WITH STUDENT DIVERSITY (Some duplication of material in the student and faculty diversity sections exists so that each section may stand alone as a resource.).....	42
A.		Overview of Governing Legal Principles.....	42
	1.	Equal Protection Clause (U.S. Constitution, 14 <sup>th</sup> Amendment) .....	42
	2.	Title VI (42 U.S.C. § 2000d) .....	43
	3.	Title IX (20 U.S.C. §§ 1681-1688) .....	48
B.		The Importance of Mission Alignment.....	50

C.	Issues Related to Enrollment.....	53
1.	In General.....	53
2.	Admissions .....	54
3.	Financial Aid and Scholarships.....	56
a.	Financial Aid for Disadvantaged Students.....	58
b.	Financial Aid Authorized by Congress .....	59
c.	Financial Aid to Remedy Past Discrimination.....	59
d.	Financial Aid to Create Diversity .....	60
4.	Outreach and Recruitment .....	61
5.	Student Mentoring, Retention, and Enrichment .....	62
D.	Student-Related Policy and Program Principles and Program Illustrations .....	63
1.	Key Elements of Legally Sustainable Policies and Programs .....	63
a.	Relationship to Institutional Mission .....	64
b.	Minimal Adverse Impact of Eligibility Criteria .....	64
c.	Assessment of Effect .....	65
2.	Illustrative Program Examples .....	66
a.	Holistic Admissions Program.....	66
b.	Introductory or Preview Minority Weekend.....	68
c.	Bridge/Mentoring/Scholarship Programs .....	69
d.	Summer Research Program (University or Industry) .....	71
e.	Partner Schools for Undergraduate and Graduate Program Preparedness and Recruitment.....	72
VIII.	LEGAL ISSUES ASSOCIATED WITH FACULTY DIVERSITY (Some duplication of material in the student and faculty diversity sections exists so that each section may stand alone as a resource.).....	74
A.	Overview of Governing Legal Principles.....	74
1.	Equal Protection Clause (U.S. Constitution, 14 <sup>th</sup> Amendment) .....	74
a.	Race: Strict Scrutiny Analysis.....	75
b.	Gender: Intermediate Scrutiny Analysis.....	77
2.	Title VI (42 U.S.C. § 2000d) .....	78
3.	Title VII (42 U.S.C. § 2000e) .....	80
4.	Title IX (20 U.S.C. §§ 1681-1688) .....	92
5.	Executive Orders 11246 and 11375 and the OFCCP .....	93
6.	Conclusion and Analysis.....	95
B.	Extending the <i>Grutter</i> Rationale to Faculty Hiring .....	98

C.	Reasonable Affirmative Action Under Title VII, OFCCP and Title VI/Equal Protection .....	101
D.	Post-Doctoral Fellows.....	102
E.	Policy and Program Principles and Illustrations .....	108
1.	In General: Importance of Relationship to Mission .....	109
2.	Specific Program Examples .....	109
a.	Awareness-Raising and Monitoring Programs .....	109
b.	Race and Gender-Targeted Outreach and Barrier Removal Efforts.....	111
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.....	117
d.	Inclusive Conduct and Multi-cultural Skills and Other Race and Gender-Neutral Approaches .....	122
3.	Assessment of Impact.....	122
IX.	AVAILABILITY OF BROADER DISCRETION WHEN JUSTIFIED .....	124
A.	Congress' Broader 14 <sup>th</sup> Amendment, Section 5 Authority .....	124
B.	Private Foundations .....	125
X.	ENFORCEMENT .....	127
A.	U.S. Department of Education Office for Civil Rights Under Title VI and Title IX: Educational Programs and Employment.....	127
B.	Private Rights of Action Under Titles VI and IX: Educational Programs and Employment.....	129
C.	U.S. Department of Justice Under Title VI and Title IX: Educational Programs and Employment .....	131
D.	Equal Employment Opportunity Commission: Employment .....	131
E.	Office of Federal Contract Compliance Programs: Employment .....	132



## **VOLUME II**

- Appendix I:** Relevant Constitutional, Statutory and Regulatory Authority
- Appendix II:** Key Legal Opinions Involving Student Diversity
- Appendix III:** Key Legal Opinions Involving Employment
- Appendix IV:** Diversity Considerations as They Relate to the First Amendment and Academic Freedom
- Appendix V:** Additional Resource Materials
- Appendix VI:** Government, Diversity-Related, Journal, Media and Other Websites
- Appendix VII:** Policy Papers, Op Ed Pieces, and Miscellaneous Publications
- Appendix VIII:** Professional Associations that Facilitate Student and Faculty Recruitment in STEM Disciplines, and Sample Institutional Outreach Plan Form
- Appendix IX:** Testimonial from U.S. Leaders in Support of Diversity in STEM Fields