May 31, 2014

A Step-by-Step Guide to Law-Attentive Design of Campus Diversity and Access Strategies[1]

In the holding in *Fisher v. University of Texas,* No. 11-345 (U.S. June 24, 2013) and guiding dicta in *Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigration Rights and Fight for Equality by Any Means Necessary (BAMN),* No. 12-682 (U.S. April 22, 2014), the U.S. Supreme Court has particularly emphasized that institutions of higher education must be able to demonstrate that they have seriously considered workable race-neutral strategies, that such strategies are utilized but are inadequate alone to achieve broad diversity and associated compelling educational outcomes, and that, if any race-conscious strategies are also used, they are effective and not overly burdensome on non-minorities. These decisions do not change the law of equal protection as articulated by the Court in its decisions in *Grutter v. Bollinger,* 539 U.S. 306 (2003) and *Gratz v. Bollinger, 539 U.S. 244 (2003)*—but do put renewed emphasis on the requirements to satisfy the narrow tailoring arm of strict scrutiny that applies when race-conscious means are used to achieve a compelling, mission-driven, educational interest. While these decisions do not address gender diversity, the Court also applies at least heightened scrutiny to decisions based on gender, requiring an important objective and means substantially related to achieving it. See *United States v. Virginia*, 518 U.S. 515, 532 (1996)(requiring an "exceedingly persuasive justification" for gender-based action and a means substantially related to attaining it). Consequently, institutions of higher education should consider whether their programs aimed at increasing the racial, ethnic and gender aspects of broad diversity are designed wisely, include neutral strategies (alone or in combination with race-conscious strategies), and any race-conscious components are supported by an adequate evidentiary foundation of need and effectiveness. A similar approach is prudent for gender-conscious strategies. The following guidance is intended to assist institutions to review their existing programs and design new and enhanced programs that are both effective in practice and sustainable under law.

In using the following guide, keep in mind that, while equal protection principles apply in educational and employment contexts (directly to public institutions and, in the educational context, through Title VI to public and private institutions), the rationales that justify limited, appropriate consideration of race and ethnicity in education and in employment differ. When considering race or ethnicity in conferring significant benefits on students, the required justification is either remedying an institution's own discrimination (the rarely used remedial rationale) or the compelling educational benefit to all students of a broadly diverse student body (the often used diversity rationale). When considering race or ethnicity in employment,

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the required justification is remedying either an institution's own discrimination or underutilization (both remedial rationales). For institutions of higher education, it is appropriate and helpful to demonstrate satisfaction of both the required remedial rationale, as well as the diversity rationale, when seeking to increase the racial and ethnic diversity of the faculty and others who are integral to the educational experience of students. Remedying societal discrimination generally is deemed "racial balancing" by the Supreme Court, is unconstitutional, and is prohibited as an objective or justification.

A. Threshold Mission Determinations and Evidentiary Foundations

STEP 1: Tie Diversity Objectives of Program/Strategy to Institutional and Unit Mission. Race and gender are cited as often-missing aspects of broad diversity. Multiple aspects of diversity are likely important to excellence in education, research, and service; some aspects are just easier to realize than others.

1. Sample Determination of Why Mission Requires Broad Diversity (to be tied to the overall mission statement of the institution): *Broad*[2] faculty and student diversity are needed to achieve the institution's educational mission (including excellence in education, service and [as applicable] research) in a diverse and global society. Adequate racial and female gender components, along with some others (e.g., perspectives, disabilities, sexual orientation, socio-economic background), are often missing. "Adequacy" is a representation or "critical mass" of women, minorities, and other underserved people that allows their full participation and individual expression; breaks down stereotypes; and/or provides *experience* for all students to be supervised by people different than themselves and for students and faculty to work in a broadly diverse setting. This experience offers the multi-cultural and multi-perspective context needed to develop skills for success and excellence. Such diversity also serves the nation's and all U.S. citizens' economic, national security, and individual job opportunity needs considering population demographics.

 2. Sample Determination of Conduct Critical To Achieving and Maintaining Broad Diversity: Faculty and students of any race or gender whose record of conduct in learning, teaching, research, mentoring, and/or service is to include individuals of a broad range of races, genders, nationalities, perspectives, and experiences are often necessary to achieve these critical institutional goals. Such individuals, regardless of their own race or gender, can create the climate and dynamics that foster use of individual differences to create multi-cultural and -perspective experiences that enhance learning, research and other work.

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[2] Broad diversity refers to multiple aspects of an individual or individuals that contribute to a robust academic environment including experience, perspectives, disciplines, geographic background, talent, childhood socio-economic background, disability, ethnicity, race, gender, and other characteristics.   Some aspects of broad diversity have been easily achieved, while others—including racial and, in some disciplines, gender diversity—have been more elusive and require focused outreach, capacity-building, and barrier removal efforts.

3. How to Make These Determinations:

a) Institutional (and component unit)[3] leadership and faculty make these determinations.

b) Testimonials and reports of alumni in leadership positions and in the workforce confirm these determinations.

c) The determinations are documented.

d) Specific elements of the mission or goals that are advanced by diversity are identified.

e) Institutional and unit assessments of inadequacy of representation by minorities, women, and/or others to achieve goals are conducted, relying on professional judgments of faculty and administrators and, possibly, input from students.

f) See **Attachment 1**, *Surveys Regarding Educational Excellence and Benefits of Broad Diversity of Students and Faculty*.

STEP 2:   Determine Whether There Is *Adequate Utilization/Representation* (among employees) or "*Critical Mass*" (among students) of Minorities, Women, And Other Under-served Groups To (a) Achieve Institutional and Unit Goals of Excellence in Education, Service and, As Applicable, Research[4] and (b) Avoid Under-utilization of Minorities and Women on the Faculty.[5]

1. Legal Parameter Applying to Students and Faculty: Remedying societal discrimination—or trying to achieve the same representation of women and minorities in the student body, faculty, or other workforce as exists in society at-large–is an *unconstitutional* purpose for (and cannot justify) considering race or gender when making decisions materially benefiting or burdening students, faculty, or other employees.

2. Critical Mass That Creates Experiences and Other Educational Outcomes/Benefits for Students Across The Institution and/or In a Component Unit:

a) Critical mass is "adequacy" of representation to foster participation individually and collectively (see Part A, STEP 1(1) above). This may be measured as described below through an established periodic process.

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[3] Consider the right unit, e.g., discipline, center, department, etc., based on relevance of the unit to mission-driven necessary diversity.

[4] For students and faculty, this concerns the experiences and other benefits *derived from* broad diversity—not diversity as an end in itself.

[5] This is a requirement of law for federal contractors (almost all colleges and universities).

b) Data are collected by the Institutional Research Department, College, and/or Department to determine how well-represented women, men, minority races, majority races, foreign nationals, individuals with low socio-economic backgrounds, and others as known are and whether the representation is enough to foster individual participation.

c) <u>Informal Approach</u>: Professional judgments of faculty and administrators and opinions of students are collected by interviews of a sample (whether or not statistically significant), informal surveys, or evaluations on a periodic basis to determine (i) whether individuals of less well represented groups are marginalized, isolated, represent their group—or whether they are able to fully participate as individuals and (ii) whether individuals of all groups are experiencing broad cultures and perspectives different than their own, in their curricular and co-curricular activities.

d) <u>Formal Approach</u>: Review and supplement aggregated and institution disaggregated questions and answers to HERI and other formal surveys. Develop freshman, senior, graduate student, faculty, and alumni surveys. Conduct expert analysis. (See **Attachment 1**.)

3. <u>Legally Recognized Underutilization of Minorities and Women in Faculty Employment</u>**:**

a) Annually in an affirmative action plan developed by the central equal opportunity office experts (using an accepted methodology), determine whether women and minority groups are legally recognized as under-utilized. Under-utilization provides a "remedial justification" for taking voluntary remedial action, and for federal contractors triggers a requirement to take remedial action.

b) Share results with each hiring unit on a routine schedule that is part of an assessment and general awareness process, not associated with a particular search.

c) Measures of underutilization and whether the law *allows* or *requires* appropriate remedial action:

- Comparing minority or female representation in a discipline and job category in the institution's own workforce to their representation in the available, qualified market from which they could be recruited, consider discipline/position/category-specific data on the following measures of "under-utilization":

   - **Discrimination** = rebuttable presumption, evidenced by 2 or more standard deviations of disparity and may be (voluntarily) remedied under Title VII. (Actual present discrimination must cease of course, and may be the subject of a court order to take particular remedial action.)
   - **Manifest Imbalance** = a Supreme Court-recognized (*Weber* and *Johnson*), somewhat lesser, but still substantial disparity under the main federal employment statute, Title VII, likely roughly equivalent to the OFCCP "80% measure"--and may be (voluntarily) remedied.

-**<u>Underutilization</u>** = (OFCCP/Executive Orders and regulations) evidenced by a representation of women or minorities in a discipline and job category at the employer that is <80% of their representation in the available and qualified labor market from which they could be recruited. Federal contractor/employers must (mandatory) annually assess, and establish goals and plans and use good faith efforts to remedy, underutilization.

However, consideration of race, ethnicity or gender in the hiring, promotion or layoff decision is not required or sanctioned.

-**<u>Lesser disparities</u>** (OFCCP) any "less representation than expected" based on availability may be recognized (particularly if combined with the need for faculty diversity to achieve mission-critical educational benefits), but courts have not decided. 65 Fed. Reg. 68,022, 69,033-34 (Nov. 13, 2000); *Technical Assistance Guide for Federal Supply And Service Contractors,* at 21-22 (Aug. 2009); 41 CFR 60-2.10-2.17.

- **<u>Artificially Limited Qualified Labor Pool-Pipeline Problems</u>** (EEOC Regulations, 29 CFR 1608.3(c)) and *Weber* case; also OFCCP's anything "less than expected" measure) = EEOC encourages capacity-building/training programs to remediate artificial restrictions that have resulted in exclusion of minorities or women from skilled positions (but still not discrimination in hiring). Thus, the following may possibly establish underutilization for purposes of justifying capacity building programs (e.g., time-limited: mentoring/training programs, fellowships, research assistantships, summer, visiting or other supplemental research and publication experiences) that take race or gender into account as one among other factors in selection:

- a history of segregation in the category of position in a discipline at the specific institution (and in the field) *plus*
- the representation of women and minorities in the already-qualified labor pool from which the employer could recruit *plus*
- the representation of women and minorities in a trainable labor pool cohort at the institution (e.g., an institution's graduate students, post-doctoral fellows, adjunct faculty, junior faculty in the discipline). (With institution-specific evidence (through alumni, faculty and student surveys) of the need to remove a major barrier to equal access to critical faculty relationships at the undergraduate level in order to progress to graduate programs and jobs, representation of women and minorities in undergraduate majors in related disciplines may also theoretically be possible.)

Importantly, pipeline-expanding programs that take race or gender into account in selecting participants, should also be available to those who are not in the targeted groups so they too have opportunities to compete and participate in the programs. Such capacity-building programs expand the recruitment pool, and further Title VII's and OFCCP's objectives of breaking down artificial barriers to employment opportunity. *But see state restrictions in Part A, STEP 3*

- **Without underutilization/remedial need, consideration of race, ethnicity, gender in hiring, promotion, terms and conditions of employment is not presently prudent**– even if there is a compelling educational need for a diverse faculty. (Inadequate diversity to achieve the institution's educational mission should logically provide a remedial basis for limited intentional race/gender action in faculty employment to further Title VII's purposes of breaking down patterns of discrimination and opening employment opportunities due to the special role of higher education in opening opportunity in society—if neutral criteria, barrier removal and outreach are inadequate. But this is unresolved by the courts.)

- **Even with underutilization/remedial need, courts view consideration of race, ethnicity, and gender in layoffs as overly burdensome** on existing job interests of individual non-minorities and men, and such consideration is unlikely to survive a legal challenge.

STEP 3: For Students and Faculty, Determine the _Need_ To Consider Race, Ethnicity and/or Gender In Strategies/Programs To Achieve The Full Breadth Of Diversity Required To Meet Compelling Institutional and Unit Goals. (This concerns the experiences and outcomes/benefits derived from broad diversity—and a focus on the _effects_ of broad diversity and the aspects that are missing–not diversity as an end in itself.) For Faculty Employment, Consider Such Need To Remedy Underutilization. (Policy-makers and lawyers are partners in these assessments.)

1. State Law Restrictions: Determine whether your state prohibits or more strictly restricts consideration of race, ethnicity, and gender in education, employment, contracting (including the scope of any prohibition)—even when federal law would _allow_ but would not _require_ such consideration with adequate evidence of legal justification. Determine whether any state restriction provides an exception where federal funding is conditioned on diversity- or minority/women-utilization- enhancing action.

2. Confirm Need To Build Critical Mass (For Students) Or To Remedy Under-utilization (For Faculty). (See Part A, STEP 2.)

3. Demonstrate Use Of A Progression Of Approaches From Neutral To Barrier Removal To Outreach To Race- And Gender- Conscious—To Show Need Before Relying More On Race/Gender:

(a) Document that strategies with the least burden on those of the non-benefited race or gender are used. (E.g., neutral strategies and neutral barrier removal are used; general outreach with, if needed, targeted outreach and targeted barrier removal are used; and if they are inadequate alone or in combination, and if the state allows, then race and/or gender are considered as one of many factors and are not always determinative; and racial and gender

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exclusive criteria and quotas for participation are not used unless state law allows, there is no other alternative, and adequate evidence of a legally-recognized strong justification exists.)

- For the below-listed approaches that are not wholly neutral, see **Attachment 2**, *Building An Evidentiary Foundation That Race- and Gender- Targeted Efforts Put Minorities and Women On Equal Footing With Others And Are Not Preferences.*

(b) *Neutral Criteria:* Use neutral criteria applied neutrally, with authentic, mission-driven institutional objectives when making program participation, benefit awards, or hiring or promotion decisions. Neutral criteria (i) do not consider race, ethnicity, or gender (or are clearly inclusive in effect, without excluding anyone) and (ii) are aimed at achieving authentically important institutional goals apart from race, ethnicity, and gender preferences (see Part B on neutral strategies) and (iii) also may produce the ancillary benefit of helping to fill racial and gender gaps in the broad diversity needed to achieve institutional and/or unit goals (and there aren't means with less disparate impact on race and gender that are known and would achieve the main aim). Determine whether these neutral strategies are inadequate alone and in combination with outreach and barrier removal efforts to achieve missing aspects of needed broad diversity.

(c) *Neutral Barrier Removal:* Remove unnecessary barriers to identifying qualified applicants, using approaches that do not consider race, ethnicity or gender. This barrier removal is neutral on its face or has an inclusive effect (supported by data demonstrating the same barriers do not exist for non-minorities and men and that steps create equal footing, not preferences). Examples:

- Eliminate unnecessary qualification requirements that make the recruitment process easier for the search committee but do not necessarily yield more qualified candidates. Do not limit a search to those who have graduated from a limited number of doctoral programs. Train search committees (or at least chairs), including information about unintended bias. Critically assess the relevance of presumed qualification requirements and consider non-traditional records when justified. Do the hard work to search more broadly, assessing individual capability, accomplishments, and promise without sacrificing quality.
- Define discipline expertise requirements as broadly as will serve the institution's or unit's needs or hire multiple positions simultaneously in clusters with a range of disciplines.

Determine whether such barrier removal has been adequate alone or in combination with neutral criteria.

(d) Document the existence of particular barriers for women or minorities (that do not exist for others), efforts to remove such barriers, and whether such efforts also are inadequate alone or in combination with neutral strategies and outreach efforts.

(e) Use robust general outreach to anyone who is interested and qualified, combined with race- and gender-targeted outreach without using disproportionate resources or conferring disproportionate benefits.

- In states where law prohibits discrimination and preferences on racial and sex bases, also demonstrate that similar outreach to non-minorities and men is undertaken, that general outreach is done but is less effective for minorities and women, and that limited targeted steps create effective communications (and therefore equal footing) for women and minorities, not preferences.

Document that the outreach encourages applications and builds an inclusive, qualified applicant pool. Determine whether such outreach also has been inadequate alone and in combination with neutral strategies and barrier removal.

(f) Use barrier removal that considers race or gender in program selection or making awards (but not in hiring, promotion, or layoff decisions), where there is an inclusive effect (supported by data-gathering demonstrating the same barriers do not exist for non-minorities and men and that steps create equal footing, not preferences).

- *Caution should be used in states where law prohibits consideration of race, ethnicity, and sex in public higher education, employment, and contracting.* Consult with counsel.

Examples are: community building programs with very limited resources and evidence that women and minorities are isolated and don't have the same access to integrate into the institution's academic community; and a few focused capacity building/mentoring programs for them with demonstration of particular need (and where similar programs are generally available for all in need and the focused portion is part of the larger generally available program).

(g) Where evidence shows lesser alternatives are inadequate, consider race or gender in admissions, hiring and promotion or in selection for program participation and benefits.

- *Caution should be exercised* for admissions, hiring, or promotion in states where law prohibits consideration of race, ethnicity, or sex in these areas. Consult with counsel. In other program selection it is not a recommended approach in such states unless there are no other alternatives and this is necessary to retain federal funding. Note Title VII does not require affirmative action and OFCCP does not require race or gender considerations in hiring and promotion.

Examples include a few time-limited, capacity-building research experiences/training, fellowships, assistantships, and visiting opportunities that consider race or gender as one factor among many in selection, with demonstration of need (see Part A, STEP 2(3) and STEP 3), where others may compete and participate.

(h) Consideration of race or gender in layoffs is unlikely sustainable in any jurisdiction because it so heavily burdens reasonable existing individual expectations.

4. <u>Whenever Any Use Of–Or Disparate Effect On Those Of Different–Races/Ethnicities/Genders Occurs, Be Sure The Strategy Is Actually Effective To Increase Diversity And Achieve The Compelling And Legally Recognized Policy Objective:</u> If the program or strategy isn't effective, or has very little effect, to increase diversity and achieve a compelling mission-driven objective, it will be hard to demonstrate it is necessary.

   B. **Neutral and Inclusive Design Strategies – Contrasted With Race/Gender Exclusive and Conscious Strategies**

STRATEGY 1: Use Neutral Participation Criteria Aimed At Authentic Institutional/Unit Goals Apart From Race, Ethnicity or Gender—That Have Ancillary, Diversity-Enhancing Effects And Create A Climate For Success and Excellence (Neutral)

1. <u>Focus On What The Institution Needs To Be Excellent In A Global Society (Tied To Institutional Mission) And On What Non-Race/Ethnicity or Non-Gender Attributes Of Individuals Will Be Necessary:</u>

(a) Workplace conduct of inclusion by individuals of any race or gender is critical. Examples of implementation:

- *Ads*: [i] Short: "Among other qualifications, we will favorably consider *any* applicant's record of including individuals of diverse backgrounds, experiences, races, ethnicities, genders, and perspectives in research, teaching, service and other work activities." [ii] More: "To support all students and faculty and foster excellence in a diverse and global society, we will favorably consider, among other qualifications, *any* applicant's record of including individuals of diverse backgrounds, experiences, races, ethnicities, genders, and perspectives in research, teaching, service and other work activities." [iii] Full: "The College's excellence in a diverse and global society depends in part on welcoming a broadly diverse faculty and student body. Among other qualifications, we will favorably consider *any* applicant's record of including individuals of diverse backgrounds, experiences, races, ethnicities, genders, and perspectives in research, teaching, service and other work activities."
  This language goes to "conduct of inclusion" by an applicant of **any** race or gender — meaning the applicant's conduct in research, teaching, service and other work activities that includes individuals of a broad diversity of backgrounds, experiences, races, ethnicities, genders, and perspectives. People of any race, gender, or perspective may demonstrate such conduct.
- *Position descriptions*: Should include similar language (as above) as a performance measure in assessment of an individual's service or overall skills.
- *Selection Criteria*: This gift is provided to the ___ Center for research support to faculty and researchers who have demonstrated an excellent record of undertaking robust

outreach and creating a good climate to include in research and educational activities colleagues and students of diverse experiences, races, ethnicities, genders and perspectives. This multi-cultural, inclusive conduct is critical to excellence in research and education in a diverse and global society. Broad diversity of students and faculty provides experience working in a diverse setting and opportunities for multi-cultural and multi-perspective issue identification, collaboration and problem-solving.

(b) See **Attachment 3,** *Questions For Assessing Excellence In Conduct Of Inclusion.*

(c) Use Of Conduct Of Inclusion As Part Of A Target Of Opportunity Program:

- Establish an overall Target of Opportunity Policy that overlays and applies to all searches and hiring or program selection from the start, allowing target of opportunity considerations to be factored in hiring and selection decisions. Such considerations may also justify granting a waiver of the nation-wide search process to hire a specific person or to conduct an expedited or internal search process when a qualifying candidate is identified. While the criterion may be triggered part way through a search or selection, the possibility that this may occur is there from the start.
- Target of Opportunity criteria may identify an individual who—in addition to having necessary academic, intellectual and other professional qualifications—(i) has a truly extraordinary professional achievement (Nobel or other top prizes, National Academy Membership, or equivalent—or only or one of a few experts in a field) or (ii) as another special professional accomplishment, has an exceptional record of conduct of inclusion in the workplace—and these special achievements [a] are among the many positively factored qualifications considered in any full search process; [b] justify filling an additional position to hire a candidate (who has extraordinary professional achievement or an exceptional record of conduct of inclusion) identified in any full search process, without a further search process (as a kind of expedited search.); [c] justify a hire without a search (for someone of extraordinary professional achievement); or [d] justify an expedited search, which is limited but allows others to compete (when an individual who has an exceptional record of conduct of inclusion is identified).
- Use of target of opportunity considerations is not a change in the basic hiring process being employed where the policy is adopted to overlay all searches, not in the middle of a particular search process. The identification of the candidate who satisfies the criterion may occur during the search but the possibility this could happen and be acted upon exists at the beginning of all searches.

STRATEGY 2: Reward Advancement of Key Institutional Objectives Through Neutral Efforts. (Neutral)

1. <u>Reward Neutral Encouraged Behavior and Success</u>:

(a) A unit (not an individual hiring authority, hired person, or search committee) that demonstrates excellence in (i) robust outreach undertaken to build as broadly inclusive a

qualified applicant pool as possible or (ii) success in hiring individuals with excellent records of inclusive conduct or other truly exceptional professional accomplishments, will receive a financial supplement, staff supplement, or piece of equipment. The award for excellent outreach is based on outreach efforts only, not actual hiring results (although results may be one—not the only—way to show that good outreach occurred).

STRATEGY 3: Pool Funds That Have No Race, Ethnicity, or Gender Restrictions With Some Restricted Funds–To Expand The Pool Available To Recipients Qualified On Neutral Bases. Similarly, Select Participants Using Neutral Criteria, And Once Selected, Name Positions For Minorities/Women (Neutral Decision, Neutral Effect)

1. Separate The Award Decision (Made On A Neutral Basis) From The Funding Source (Which May Include Some Race- or Gender-Targeted Funds):

(a) Pool all funds available to fund a scholarship, fellowship, research supplement, or other financial-benefit-focused program's awards, with the great majority of funding not having a racial or gender criterion. A small portion of the funding may be available only to specified races and genders.

(b) First, make decisions on the recipients of the awards, and the amount to be received by each recipient, considering need, disadvantage, or merit criteria, but without considering race, ethnicity, or gender.

(c) Then, match race- or gender-restricted funds to already-selected recipients who satisfy the restriction first, and then award unrestricted funds to the rest of the already-selected recipients.

(d) Money is fungible to the recipients so this approach expands the pool of funds available to everyone who qualifies on non-race/ethnicity or non-gender bases.

2. Separate The Selection Decision (Made Using Neutral Criteria, But With Robust Outreach To Build A Broadly Inclusive Qualified Applicant Pool) From The Naming Of Positions For Minorities and Women.

(a) Do not use race and gender as criteria in selection of program participants or hiring.

(b) A sponsor may provide funding to supplement and expand a pool of start-up funding where the funding is conditioned on the institution committing to broadly inclusive and robust outreach (general and targeted) with the institution certifying the adequacy of outreach prior to beginning interviews; the institution seeking individuals with records of conduct of inclusion; and search committee chairs being trained and held accountable for robust outreach. Receipt and use of the sponsor funding is not restricted on the basis of race or gender, just on reports of the outreach and search process that satisfy the commitment. Outcomes may be reported but are not determinative of awarded funding.

(c) Undertake robust general outreach, with limited targeted outreach (not using disproportionate resources) to build as broadly inclusive a qualified applicant pool as possible. Advertise that participation is available to all, and that the community is broadly welcoming of all, including minorities and women. Note that once selected and resourced through the regular, generally applicable process on neutral bases, there will be sponsor-named positions for minorities and women (e.g., NSF-named positions).

(d) Name a flexible and ever changing number of positions (not a quota or reserved number), for women and minorities, after selection of participants on a neutral basis is completed. Do not provide additional funds or other benefits on a race or gender basis, just a name.

(e) The sponsor funds will expand the pool of start-up funds available to all. The does not allow additional positions to be hired unless the institution contributes substantial funds, but does contribute to the institution's ability to hire additional faculty.

STRATEGY 4: Use Race, Ethnicity, and Gender To Define The Subject—Not The Participation Criteria—Of Programs. (Neutral if Subject—Race/Gender Conscious if Participation Criteria)

1. Use Race, Ethnicity, and Gender To Define The Subject of a Program—Not The Participation Criteria/Participants.

(a) *Subjects:* A program or benefit that is available to anyone who is interested, may—without triggering legal restrictions or judicial skepticism and strict scrutiny—address subjects defined with reference to a particular race or gender (e.g., African American history), or subjects of particular relevance to minorities and women (e.g., marginalization of women in engineering careers), or issues relating to minorities' and women's barriers and successes (e.g., how to address a survey that reveals minorities have less knowledge of the tenure process).

(b) *Participation Criteria/Participants:* Contrast race or gender related subjects, with use of race or gender to define the participation criteria and participants of a program. When a race-, ethnicity-, or gender-based criterion for participation in a program or receipt of a benefit is used, rigorous judicial scrutiny is applied and the program is harder to sustain. The institution's attorney should be involved in program design and there must be a legally sufficient justification and strong evidentiary basis.

- Race/ gender-exclusive programs are hardest to sustain (i.e., to be considered for participation or to receive a benefit, an individual must be a member of a specified race or gender group) and should not be used in admission of students or in hiring or layoff of employees.
- Race/gender-conscious programs also must satisfy strict judicial scrutiny. They require a compelling/important, legally recognized goal (e.g., the educational benefits of diversity for students —or educational benefits together with remedying legally recognized underutilization for faculty) and a carefully tailored approach (i.e., necessary—neutral, inclusive/barrier removal, and lesser use of race or gender have not been adequate; not

overbroad, but narrowly tailored to achieve the legally recognized compelling goal; not over-burdening others who also may compete for participation/the benefit; time limited to period of need and neutral or lesser alternatives are periodically evaluated accordingly; and *effective to achieve the compelling goal*). These are programs open to all, where race or gender will be considered flexibly as one of many factors in determining who may participate or receive a benefit (i.e., race and gender will not be weighed the same for all candidates of a particular race or gender but will be viewed as part of an individual's total profile with many other attributes—and race/gender will not be the factor that tips the balance for selection in all cases).

- Programs/strategies that are facially neutral (because they don't call out race or gender) but have a racial or gender preferring purpose are also race/gender conscious and subject to rigorous scrutiny. This is distinguished from programs that have an authentic, neutral mission-driven purpose apart from race or gender preferences (e.g., seeking faculty or students of *any* race or gender with inclusive conduct to create a climate that fosters, uses and retains a broadly diverse student body and faculty; seeking faculty or students from low socio-economic backgrounds for educational diversity and advancing access).

(c) Example of Difference Between Program Subjects and Criteria:

- *Criterion:* A visiting faculty program is established providing for only women faculty to visit for a month-long period and/or only women graduate students to attend a weekend symposium.
- *Subject*: A symposium on the subject of the contributions of women to the biochemistry field is hosted by the Biochemistry Department. Successful women at every stage of career will be invited to speak both on their substantive research and on their educational and career paths. If there is a prominent scholar (male or female) on the subject, s/he will be invited to speak. Men and women in academic administration leadership and faculty roles will also be invited to speak on issues of bias and climate that affect the integration and success of women in biochemistry and other STEM fields. Anyone who is interested will be invited to attend, and both men and women in the Department will be encouraged to attend. The symposium is expected to explore the substantive work of women in biochemistry and to raise awareness by men and women on the issues. It will have the ancillary benefit of getting to know more women in the field. The Department has other visiting opportunities available to all.

STRATEGY 5: Inventory and Cluster Programs With Similar Participation Or Award Criteria (putting race and gender aside) To Create One Program, With Focus Groups That Have An Inclusive Effect. (Neutral to Targeted with Inclusive Effect)

1. Cluster Programs To Create One Large Inclusive Program, Rather Than Isolated Race- Or Gender- Exclusive Programs. **Identify and cluster programs** (e.g., financial aid, or scholarships, or fellowships, or research experiences, or supplementary or special research funding, or mentoring) that offer similar benefits and have similar qualification criteria (putting aside

whether some have also considered, or been exclusively available to those of a particular race or gender) to create a large and comprehensive single program, and avoid race or gender based stand-alone programs.

(a) Within a single program available to all:

- **Offer focus groups available to anyone who is interested that address issues of relevance to women and minorities.** (Neutral-suitable in all states)
- **Offer a single program open without regard to race or gender. But establish an evidentiary foundation that general outreach is ineffective or is less effective for women and minorities, and/or they are isolated in the institution's community or less well-informed or prepared (see Attachment 2). Undertake targeted outreach not using disproportionate resources, as well as general outreach, to provide effective outreach to all.** (Outreach and Barrier Removal-with evidence and proper design should be suitable in all states)
- **With sufficient justification (see Attachment 2), and as a small component of a large program available to all** (same benefits available in overall program for all and demonstrated special need to put women or minorities on equal footing), **offer a focus group particularly inviting women or minorities, but open to all and well-publicized as such.**

STRATEGY 6: Open Pathways Through Recruitment Consortia and Educational Collaborations. (Neutral to Targeted with Inclusive Effect)

1. Create A Recruitment Consortium. Institutions collaborate in a consortium that one hosts to create a Facebook and web-accessible database of students in specified disciplines for recruitment of undergraduates to graduate programs, graduate students to fellowships and junior faculty positions, and students and fellows to positions in industry. All interested students, fellows and junior faculty may participate. Data may be sorted and are used in a particular search for both general and targeted outreach (but not only targeted outreach).

2. Create Education Collaborations. Institutions collaborate through formal contracts and informal programs to open and facilitate pathways for students to enhance preparation and progress through increasing levels of education at participating institutions. Institutions may collaborate because they have different but complementary programs on various bases (demographics [e.g., HBCUs/Tribal Colleges/minority-serving with others], level of program, quality of curriculum and faculty, undergraduate and graduate focus, etc.). (For detailed background, *see* Coleman et al., *The Smart Grid for Institutions of Higher Education and the Students They Serve* (AAAS and EdCounsel, 2012).) Institutions may also collaborate because they are similar and want to provide opportunities for their students to train elsewhere before recruiting them for faculty roles. Curriculum at participating institutions in identified programs is assessed, articulated and coordinated; academic counseling and dissemination of information for students equip them to access opportunities at all participating institutions. Oversight committees assess and indentify degree programs that articulate from one to another

participating institution well and measure outcomes. Institutions may apply normal admission processes and standards and decide whether to accept credits on a case-by-case basis. Or institutions may agree to admit and accept credits for students who achieve a specified level of course and grade at participating institutions.

Attachment 1—*Surveys Regarding Educational Excellence and Benefits of Broad Diversity of Students and Faculty*

As evidence of the importance of broadly diverse classrooms, research environments and other academic environments to the institution's ability to deliver excellent education to all students and prepare them well for the workforce and leadership in the 21st Century and a global society—as well as to produce excellent research to meet the needs of that society:

1. Review diversity- and access-related questions and institution-specific data from HERI and other surveys in which the institution participates (and include additional questions as needed—see (ii) below), consider differences for freshmen and seniors;

2. Survey alumni, seniors and freshmen (on a blind basis, but identifying degree major and minor and graduating class and, at a participant's option, racial/ethnic group and gender) regarding

   a. whether, for example, in their experience at the institution on a regular basis, they have (or had) opportunities to learn from, interact with, and be supervised by faculty and other instructors (e.g., teaching assistants) of races, the gender, sexual orientation, nationalities, ethnicities, cultures, perspectives, and experiences different than their own;

   b. whether, in their experience at the institution on a regular basis, they have (or had) opportunities to work, collaborate, and interact on campus and in their classroom, laboratory and other academic activities with students of races, the gender, sexual orientation, nationalities, ethnicities, cultures, perspectives, and experiences different than their own,

   c. whether they feel they gained a greater understanding of the individuality of each person and the cultures of people of racial groups, gender, sexual orientation, nationalities, ethnicities, and cultures different than their own during their experiences at the institution;

   d. whether they feel broad diversity of students on campus and in the classroom, laboratory, and other academic activities is (or was) important to the quality of their educational experience;

   e. whether broad diversity of students on campus and in the classroom, laboratory, and other academic activities will be, is (or was) important to their preparation for and success in work and leadership after graduation in a global and diverse society— what about broad diversity of faculty—and whether the campus and their classes and other academic activities were adequately diverse for this purpose;

f. whether they felt isolated or marginalized on campus, whether they felt they could fully participate in class and other academic activities (what about in co-curricular activities), and whether they could represent themselves as individuals or felt they were representing their racial or gender group; or

g. whether they had opportunities to participate fully in other experiences that would be considered an important part of the culture, academic life, and social fabric of the institution.

3. Interview groups of faculty to get their judgment as educators about whether "critical mass" of women and minorities has been achieved in a class, discipline, college and what the effect is on the experience for all students and excellence of teaching and learning.

Attachment 2, *Building An Evidentiary Foundation That Race- and Gender- Targeted Efforts Put Minorities and Women On Equal Footing With Others And Are Not Preferences*

Periodically, unrelated to a particular search or program selection process, collect data to demonstrate whether particular barriers exist for women or minorities that do not exist for others and, if so, limited gender- and race- targeted outreach, barrier removal, community-building opportunities, or (in states that permit) capacity building mentoring and training, are not "preferences" for women and minorities, but merely put them on equal footing:

> **-As an evidentiary foundation for race and gender targeted outreach (targeted notices and invitations to apply) within a robust general outreach effort, and without using disproportionate resources or conferring a benefit on women and minorities to the exclusion of others:** In referendum states, conduct **surveys and interviews** that show whether robust general outreach (e.g., advertisements, specific outreach to experts in the field, etc.) to recruit students or faculty in the discipline is conducted and effective for non-minority men, but is ineffective or substantially less effective with women minorities, and/or other under-served groups;

> **-As an evidentiary foundation for race and gender targeted invitations or focus groups within mentoring programs available to all in need, and for specific community building programs for those who are isolated:** In all jurisdictions, conduct **surveys or interviews** that show whether women and minorities are isolated and not well-integrated in the institution's campus community, whereas non-minority men are well-integrated; whether women and minorities have substantially less knowledge of the logistics and practical requirements for academic achievement and advancement; and whether women and minorities are substantially less likely to have access to influential faculty mentors, research opportunities, resources, and funding, etc.;

> **-As an evidentiary foundation for race and gender targeted invitations or focus groups within mentoring programs available to all in need**: In all jurisdictions, conduct **multi-variable regression analyses** demonstrating—all other variables being equal (e.g., parental level of education, family pursuit of STEM degrees or careers, childhood socio-economic status, parent(s) in the household, grade point average, standardized test scores, level of educational attainment, etc.)—that statistically, women and minorities in the aggregate (not on an individual basis) (a) are significantly less likely than men and non-minorities to avoid academic probation or to earn above a certain grade point average (in the appropriately clustered academic programs), (b) are significantly less academically prepared when they matriculate, (c) perceive academic or financial barriers that discourage them from entering particular disciplines or continuing in a program once begun, (c) are less likely than men and non-minorities to graduate, pursue a further degree, be hired in a tenure-track position, continue in a tenure-track position through the tenure process, be tenured, or otherwise succeed in relevant fields.

Attachment 3, *Questions For Assessing Excellence In Conduct Of Inclusion.*

Sample considerations and interview questions[6] to assess applicants' and candidates' record of conduct of inclusion/experience breaking down barriers:

- Have you <u>either</u> experienced discrimination or barriers to achievement on any basis, felt isolated in your residential setting or educational and professional/work experience—or identified the existence of these or other barriers for others—<u>and then</u> removed such barriers and created an inclusive community for all? Describe.
- Have you mentored or collaborated with a student/faculty member/staff from a different background, perspective, or experience from your own (e.g., a different race, gender, sexual orientation, socio-economic background, political perspective)? Was the collaboration successful? Explain.
- How much and what kind of contact have you had as a teacher/supervisor with students/staff of different backgrounds, perspectives, and experiences from your own? Were you able to achieve equal success with students/staff of such differences? Explain.
- Have you experienced as a student or post-doctoral fellow/associate close collaboration with faculty members or peers of different backgrounds, perspectives, or experiences from your own? Were you able to successfully bridge any differences? Explain.
- For people applying for higher level jobs: Have you helped an undergraduate with a different background, perspective, or experience from your own get into a PhD program/a junior staffer with a different background advance his or her career? Mentored such a PhD to conclusion? Hired such a post-doc into your lab? Describe.
- What is your experience educating people around you about the issues that people of different groups encounter in higher education and research?

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[6] Dean Paul D'Anieri of the University of Florida College of Liberal Arts and Sciences collaborated in authoring these questions.