

APPENDIX I: Relevant Constitutional, Statutory, and Regulatory Authority

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

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

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

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

2. Civil Rights Restoration Act of 1987 (“CRRA”) (20 U.S.C. § 1687; 29 U.S.C. § 794, 42 U.S.C. § 2000d-4a, and 42 U.S.C. § 6101)

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

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

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

* * *

(A) a college, university, or other postsecondary institution, or a public system of education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

* * *

any part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a(2).

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Jurisdiction under these statutes consequently applies to all activities and programs of an institution of higher education that receives federal funding. However, enforcement through loss of federal funding requires the violation of an act to have a nexus to the federal funds at risk (referred to as the “pinpoint provision”).²⁶⁸

Regulations:

Conforming amendments to the applicable nondiscrimination regulations can be found at 65 Fed. Reg. 68049 (Nov. 13, 2000) (Dep’t of Education) and 68 Fed. Reg. 51333 (Aug. 26, 2003) (numerous other federal agencies).

3. Title VI (42.U.S.C. § 2000d)

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

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

42 U.S.C. § 2000d.

Title VI applies with respect to all aspects of an institution’s operations. However, Title VI restricts claims of employment discrimination to instances in which the “primary objective” of the financial assistance is to provide employment. *See* 42 U.S.C. § 2000d-3. (No such restriction applies with respect to employment claims brought under Title IX.) Thus, “where the primary purpose of the Federal assistance is to provide employment, the recipient may not discriminate on the basis of race, color or national origin against applicants for employment or employees in that program. For example, Title VI prohibits discrimination against applicants for or participants in ‘work study’ programs that receive Federal assistance.” Office for Civil Rights, U.S. Dept. of Education (“ED”), *Non-discrimination in Employment Practices in Education 2* (1991) (“ED Pamphlet”).²⁶⁹ When Title VI applies in the employment context, it “encompasses, but is not limited to, recruitment, advertising, employment, layoffs, firing, upgrading, demotions, transfers, rates of pay and other forms of compensation, and uses of facilities. The regulation applies to all employment decisions and actions made directly by ED recipients, as well as those made indirectly through contractual arrangements or other relationships with organizations such as employment agencies, labor unions, organizations

²⁶⁸ The “pinpoint provision” is discussed further *infra* at p. 7, in the section addressing Title VI.

²⁶⁹ ED’s Title VI regulations also forbid employment discrimination in a second situation: “where the primary purpose of the Federal assistance is not to provide employment, discrimination against employees or applicants for employment is prohibited by Title VI when the discriminatory practice results in discrimination against the program beneficiaries, usually students.” ED Pamphlet, *supra*, at 2; *see also* 34 C.F.R. § 100.3(c)(3) (ED regulation); 28 C.F.R. § 42.104(c)(2) (DOJ regulation).

providing or administering fringe benefits, and organizations providing training and apprenticeship programs.” *Id.*

As interpreted by the agencies and the courts, Title VI prohibits both intentional discrimination (disparate treatment) and the use of facially neutral procedures or practices that have the effect of subjecting individuals to discrimination based on their race, color or national origin (disparate impact). The analysis of intentional discrimination claims under Title VI is similar to the analysis of disparate treatment under the Equal Protection Clause, *Alexander v. Choate*, 469 U.S. 287, 293 (1985), and can be proved through direct evidence of discriminatory motive or, in the absence of such evidence, using the Title VII burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (discussed below, in connection with Title VII). Title VI disparate impact claims are also analyzed using principles similar to those used under Title VII:

To establish discrimination under a disparate impact scheme, the investigating agency [or court] must first ascertain whether the recipient utilized a facially neutral practice that had a disparate impact on a group protected by Title VI. The agency must show a causal connection between the facially neutral policy and the disproportionate and adverse impact on a protected Title VI group. . . .

If the evidence establishes a *prima facie* case, the investigating agency [or court] must then determine whether the recipient can articulate a ‘substantial legitimate justification’ for the challenged practice. ‘Substantial legitimate justification’ is similar to the Title VII concept of ‘business necessity,’ which involves showing that the policy or practice in question is related to performance on the job.

To prove a ‘substantial legitimate justification,’ the recipient must show that the challenged policy was ‘necessary to meeting a goal that was legitimate, important, and integral to the [recipient’s] institutional mission.’ The justification must bear a ‘manifest demonstrable relationship’ to the challenged policy. . . . *See, e.g., Elston [v. Talladega County Bd. of Educ.]*, 997 F.2d 1394, 1413 (11th Cir. 1993)] (In an education context, the practice must be demonstrably necessary to meeting an important educational goal, *i.e.* there must be an ‘educational necessity’ for the practice). If the recipient can make such a showing, the inquiry must focus on whether there are any ‘equally effective alternative practices’ that would result in less racial disproportionality or whether the justification proffered by the recipient is actually a pretext for discrimination.

U.S. DOJ, *Title VI Legal Manual* 49-52 (2001) (citations omitted), *available at* www.usdoj.gov/crt/cor/coord/vimanual.php (last visited July 28, 2009).

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Enforcement:

The U.S. Department of Education (“ED”) has enforcement authority under Title VI as it applies to programs and activities funded by ED.²⁷⁰ ED’s Office for Civil Rights investigates complaints filed by individuals and also conducts compliance reviews of institutions that OCR selects.²⁷¹

If an investigation discloses a violation of Title VI, OCR attempts to obtain voluntary compliance. If it cannot do so, OCR may initiate an enforcement action, either by referring the case to DOJ for court action, or by initiating proceedings before an administrative law judge (“ALJ”), to terminate federal funding. Terminations are made only after the recipient has had an opportunity for a hearing before an ALJ and exhausted (or not exercised) its appeals.

The primary means of enforcing compliance with Title VI, however, is through voluntary agreements between the enforcing agency and the recipient of the federal financial assistance. The relief provided through such voluntary settlements can include an agreement to discontinue certain conduct, as well as back pay in employment cases or compensatory damages in nonemployment cases. The agency is required by statute to pursue voluntary compliance before terminating or refusing to grant financial assistance, and before referring a matter to DOJ to initiate legal proceedings. 42 U.S.C. § 2000d-1. Funding suspension or termination is a means of last resort.

If voluntary compliance efforts do not succeed, four procedural requirements must be met before an agency may deny or terminate federal funds to an applicant/recipient:

- 1) the agency must notify the recipient that it is not in compliance with the statute and that voluntary compliance cannot be achieved;
- 2) after an opportunity for a hearing on the record, the ‘responsible Department official’ must make an express finding of failure to comply;
- 3) the head of the agency must approve the decision to suspend or terminate funds; and
- 4) the head of the agency must file a report with the House and Senate legislative committees having jurisdiction over the programs involved and wait 30 days before terminating funds.

U.S. DOJ, *Title VI Legal Manual*, at 79.²⁷²

²⁷⁰ More than 25 federal agencies have statutes, regulations, and/or guidance statements that impose civil rights obligations upon recipients of federal financial assistance from those agencies. Although this appendix does not include citations to all such legal authorities, they should not be overlooked.

²⁷¹ When an individual complaint involves a claim of employment discrimination under Title VI (or Title IX), ED generally refers the complaint to the Equal Employment Opportunity Commission (“EEOC”). *See generally* 28 C.F.R. §§ 42.601-42.613.

²⁷² *See also* 42 U.S.C. § 2000d-1; 34 C.F.R. § 100.6; 28 C.F.R. § 42.601 *et. seq.*

Given the severity of the sanction, on the one hand, and these procedural hurdles, on the other hand, it is not surprising that fund termination or suspension is a rare occurrence.

Moreover, when it does occur, the termination or suspension must be “limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found. . . .” 42 U.S.C. § 2000d-1. This so-called “pinpoint provision” was not modified by the Civil Rights Restoration Act of 1987, which addresses the interpretation of “program or activity” only for purposes of establishing coverage under Title VI and related statutes, and not for purposes of enforcing compliance with those statutes.²⁷³ Consequently, where a Title VI or IX violation occurs in a program (e.g., a summer program for high school students) that is supported by private, not federal, funds, the available remedy should not include loss of federal funds, unless discrimination in that program “infects” a federally funding program.

Private individuals can also assert certain Title VI claims. The Supreme Court has held that there is a private right of action under Title VI as to disparate treatment claims, but not disparate impact claims. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). The relief available in such cases includes injunctive relief as well as “monetary damages.” *See Franklin v. Gwinnett Pub. Sch.*, 503 U.S. 60, 72-76 (1992). States do not have Eleventh Amendment Immunity under Title VI (or under Title IX). *See* 42 U.S.C. § 2000d-7.

Regulations:

DOJ Title VI Regulations: 28 C.F.R. Part 42

DOJ Title VI Coordination Regulations: 28 C.F.R. § 42.401 *et seq.*

DOJ Title VI Enforcement Guidelines: 28 C.F.R. § 50.3

EEOC Title VI Regulations: 29 C.F.R. Part 1691

ED Title VI Regulations: 34 C.F.R. § 100.1 *et seq.*

²⁷³ As discussed above, the CRRA provides that Title VI, Title IX, the Age Discrimination Act, and Section 504 of the Rehabilitation Act apply to all of the operations of an institution if any part of the institution receives federal financial assistance. The statute thus superseded the Supreme Court’s decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), in which the Court held that Title IX applied to a private school whose students had received federally funded scholarships, but held that the regulation would only apply to the institution’s financial aid department and not to the school as a whole. The ED’s civil rights regulations, when originally issued and implemented, were interpreted by the ED to mean that acceptance of federal assistance by a school resulted in broad institutional coverage. Following the Supreme Court’s decision in *Grove City College*, the ED changed its interpretation, but not the language, of these regulations to be consistent with the Court’s restrictive view. When the CRRA was enacted, the ED reinstated its broad interpretation to be consistent with the CRRA, again without changing the language of the regulations. Thus in 2000, the ED amended language of the regulations to be consistent with the CRRA. The regulations now define “program or activity” or “program” as it is defined in the CRRA for the purpose of establishing coverage, but not for the imposition of penalties, which would apply only to that depart of the institution specifically involved. *See* Conforming Amendments to the Regulations Governing Nondiscrimination Under the Civil Rights Restoration Act of 1987, 34 C.F.R. pts. 100, 104, 106, and 110 (2008), available at <http://www.ed.gov/about/offices/list/ocr/docs/edlite-restorationactregs.html> (last visited July 28, 2009).

See generally: U.S. DOJ, Civil Rights Division, Coordination and Review Section, Title VI of the Civil Rights Act of 1964, www.usdoj.gov/crt/cor/coord/titlevi.php (last visited July 28, 2009).

4. Title VII (42 U.S.C. § 2000e)

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

Under Title VII:

It [is] an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

To succeed on a claim under this provision, which prohibits disparate treatment, a plaintiff must show that the employer intentionally discriminated on the basis of a protected trait. Under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), a plaintiff may prove that an employment practice was intentionally discriminatory by first making a *prima facie* case sufficient to support an inference of discrimination (*e.g.*, that the plaintiff was a member of a protected class; that the plaintiff was eligible and applied for the position or program in question; that he or she was rejected; and that the defendant selected individuals outside the protected class, or the position or program remained open and the defendant continued to accept other applications). If a *prima facie* showing is made, the defendant may rebut that showing by offering a legitimate, non-discriminatory reason for the employment action. The plaintiff then has the ultimate burden of persuasion and must show that the employer's proffered reason is pretextual—*i.e.*, that the employer's true reason for the practice was racially discriminatory. Of course, "if a plaintiff is able to produce direct evidence of discrimination," he can prevail without using the *McDonnell Douglas* framework. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

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

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

42 U.S.C. § 2000e-2(e)(1). A race-based BFOQ was considered by Congress when the other BFOQ's were considered, but no such race-based BFOQ was included in the statute as enacted. *See* 110 Cong. Rec. 2563 (1964) (amendment that would have added race to the list of potential BFOQ characteristics was defeated); Bryan W. Leach, “*Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*,” 113 YALE L.J. 1093, 1094-95 (2004).

Title VII includes a provision which states that Title VII does not “require” any employer to grant “preferential treatment” because of an “imbalance” in its workforce:

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

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

42 U.S.C. § 2000e-2(j). *But see* discussion of OFCCP regulations *infra*, requiring federal contractors (which would include virtually all universities) to take certain actions to address “under-utilization” of women and minorities in their workforces.

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

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the

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challenged practice is job related for the position in question and consistent with business necessity; or

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

42 U.S.C. § 2000e-2(k)(1)(A). Title VII further provides that the “business necessity” defense is not available with respect to disparate treatment claims: “A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.” 42 U.S.C. § 2000e-2(k)(2).

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

(d) Training programs

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

* * *

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

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

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

42 U.S.C. § 2000e-2.

The clear Congressional intent of Title VII was to encourage voluntary compliance to remedy discrimination in the workplace. However, employers who employ affirmative action plans in voluntary compliance with Title VII may be vulnerable to claims of reverse discrimination. The Equal Employment Opportunity Commission (“EEOC”) has issued Guidelines to “clarify and harmonize principles of Title VII.” *See* EEOC Guidelines on Affirmative Action, 29 C.F.R. § 1608.1(a). The Guidelines identify circumstances under which

voluntary affirmative action is appropriate and provide guidance for employers establishing affirmative action plans. *See generally id.* §§ 1608.3-1608.4; *see also* EEOC, *EEOC Compliance Manual*, Section 15 (“Race & Color Discrimination”), at 15-31 (“Diversity and Affirmative Action”) (April 19, 2006), *available at* <http://www.eeoc.gov/policy/docs/race-color.html>.

The EEOC affirmative action guidelines are of particular significance in light of the following statutory provision in Title VII:

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of ... the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission.... Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that ... after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect....

42 U.S.C. § 2000e-12(b).

“It is important to note that the constitutional standard for justifying racial preferences is more stringent than the Title VII standard.” Stuart Licht, *Analyzing Racial Classifications in Employment Discrimination Litigation*, 52 U.S. Attorneys’ Bulletin 10, 11 (May 2004). It is also important to note that “[p]olicies that affect actual employment decisions, such as hiring, promotions, and layoffs, have been treated differently than policies that do not affect actual employment decisions, such as targeted recruitment and outreach designed to increase the pool of qualified applicants, and data collection and analysis conducted to ensure compliance with anti-discrimination laws.” *Id.*

Enforcement:

The EEOC has enforcement authority under Title VII, and can initiate litigation directly or by way of a referral to DOJ. *See* 42 U.S.C. § 2000e-5. Private individuals can also assert Title VII claims. The remedies available for Title VII violations include:

- Back pay for up to two years
- An order to hire, promote, or reinstate (courts have also ordered the demotion of someone whose promotion was the product of discrimination)
- Front pay (an equitable remedy and a substitute for reinstatement when reinstatement is unavailable)

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- Other actions to make an individual “whole”
- Compensatory damages including various non-pecuniary losses (*e.g.*, emotional suffering) -- but available only in disparate treatment and not in disparate impact cases
- Punitive damages -- but available only in disparate treatment and not in disparate impact cases; requires a showing of malice or reckless indifference; cannot be awarded against federal, state or local governments
- Attorneys’ fees and court costs (“may” be allowed to the “prevailing party”)

See 42 U.S.C. §§ 1981a(a)(1), (b); 2000e-5(g), 5(k).

Regulations:

EEOC Title VII Regulations: 29 C.F.R. Parts 1600, 1604, 1608, 1691

See generally EEOC Laws, Regulations and Policy Guidance, www.eeoc.gov/policy/index.html (last visited July 28, 2009).

5. Title IX (20 U.S.C. §§ 1681-1688)

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

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

20 U.S.C. § 1681.

Title IX applies to all aspects of “education programs or activities” that are operated by recipients of federal financial assistance, including admissions, treatment of participants, and employment. Moreover, Title IX is not limited in its application to colleges, universities, and elementary and secondary schools. It applies to “any education or training program operated by a recipient of federal financial assistance. For example, Title IX would cover such diverse activities as a forestry workshop run by a state park receiving funds from the Department of Interior . . . [or] state and local courses funded by the Federal Emergency Management Agency in planning how to deal with disasters” U.S. DOJ, *Title IX Legal Manual*, at 6 (2001).

Title IX was modeled after Title VI and much of the Title VI case law is applicable in Title IX cases. There are important differences between the statutes, however. Title IX includes various statutory exemptions that are absent under Title VI. For example, Title IX does not cover single-sex admissions policies of elementary, secondary, or private undergraduate schools. 20 U.S.C. § 1681(a)(1); U.S. DOJ, *Title IX Legal Manual*, at 7. The Title IX regulations (like Title VI regulations) provide additional exemptions of possible relevance to the present analysis, including one that permits affirmative action to overcome the effects of conditions that result in

limited participation in a program by persons of a particular sex, and one that requires appropriate remedial action if an agency finds that a recipient has discriminated against individuals on the basis of sex. 34 C.F.R. § 106.3. Remember, however, that even if conduct is carved out of Title IX’s general prohibition on sex discrimination, public entities also have a constitutional duty not to discriminate on the basis of sex. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982) (nursing school policy that excluded male applicants violated 14th Amendment notwithstanding the applicability of a Title IX exemption).

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

Enforcement:

The U.S. Department of Education has enforcement authority under Title IX with respect to entities receiving financial assistance from ED; other agencies have enforcement authority with respect to their funding. *See* Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance, 28 C.F.R. §§ 42.601-42.613 (DOJ); 29 C.F.R. §§ 1691.1-1691.13 (EEOC). Agency enforcement includes the investigation of individual complaints, as well as compliance reviews of institutions selected by the agency. Private individuals can also assert Title IX claims. The most common form of relief obtained through a private right of action is an injunction, but monetary damages can also be recovered for intentional discrimination under Title IX. *See Franklin v. Gwinnett City Pub. Sch.*, 503 U.S. 60, 75 n.8 (1992). States do not enjoy Eleventh Amendment immunity from monetary liability under Title IX. 42 U.S.C. § 2000d-7. The courts have generally held that Title VII’s **substantive** standards apply when evaluating claims of employment discrimination under Title IX. *See, e.g., Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996) (“when a plaintiff complains of discrimination with regard to conditions of employment in an institution of higher learning, the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case”). DOJ has taken the same view with respect to agency investigations. *See* U.S. DOJ, “Title IX Legal Manual,” at 39 (Jan. 11, 2001) (“In conducting investigations alleging employment discrimination [under Title IX], agencies shall consider Title VII case law and EEOC Guidelines, 29 C.F.R. parts 1604-1607, unless inapplicable, in determining whether a recipient . . . has engaged in an unlawful employment practice”).

The same is not true with respect to the **procedural** requirements for cases brought by private individuals:

The Supreme Court has yet to explicitly decide whether the far more detailed and comprehensive procedural requirements of Title VII are applicable to claims of employment discrimination brought under Title IX. The lower courts that have faced this question are divided. One view treats Title IX as an independent basis for finding discrimination based on the substantive standards of Title VII, but divorced from its administrative requirements. Under this view, complainants filing complaints under Title IX are not subject to Title VII’s filing deadlines,

exhaustion of administrative remedy requirements, and state referral requirements, but are still governed by Title VII's substantive standards. The other view is that the more focused and detailed enforcement scheme of Title VII preempts Title IX in the area of employment discrimination. Under this view, employees of federally assisted education programs operated by recipients of federal financial assistance have only a Title VII remedy for sex-based employment discrimination.

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

U.S. DOJ, *Title IX Legal Manual*, at 39 (citations omitted).

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

A recipient may take action otherwise prohibited . . . provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students or other persons

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Common Rule, 65 Fed. Reg. 52857, 52874 § .550 (Aug. 30, 2000) [hereinafter Final Common Rule]; *see also* 34 C.F.R. § 106.61 (Department of Education regulation regarding BFOQ).

DOJ has cautioned that "BFOQ's are very narrow exceptions." U.S. DOJ, *Title IX Legal Manual*, at 41 (citing *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991)).

The Title IX common rule contains a general prohibition on providing or denying "aid, benefits, or services" on the basis of sex, as well as specific prohibitions relating to such areas as housing, course offerings, counseling or guidance materials for students or applicants, financial assistance, employment assistance, and textbooks and curriculum materials. Final Common Rule at 52870-73 §§ .400; .405; .415; .425; .430; .435; .455; *see also* 34 C.F.R. §§ 106.31(b); 106.32; 160.34; 106.36-.38; 106.42 (Department of Education regulations regarding same). But it also endorses affirmative action programs, and it does so using language that arguably imposes a less stringent standard than required under Title VII's "manifest imbalance" or OFCCP's "underutilization" analyses discussed below. Specifically, the Title IX common rule provides: "In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex." Final Common Rule at 52866 § 110.

As with Title VI, the primary means of enforcement under Title IX is through voluntary agreements with funding recipients, and termination of funding is a last resort that can occur only after numerous procedural requirements have been met. *See* discussion of Title VI enforcement, above. Likewise, if funding is terminated, the termination is limited in its effect to the particular program or part thereof in which noncompliance was found. 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682.

Regulations:

DOJ Title IX Regulations: 28 C.F.R. § 54.100 *et seq.*

ED Title IX Regulations: 34 C.F.R. § 106.1 *et seq.*

NSF Title IX Regulations: 45 C.F.R. Parts 611 (enforcement) and 618

Other agencies also have Title IX regulations

See generally: U.S. DOJ, Civil Rights Division, Coordination and Review Section, Title IX of the Education Amendments of 1972, www.usdoj.gov/crt/cor/coord/titleix.php (last visited July 28, 2009).

6. Section 1981 (42 U.S.C. § 1981)

Prohibits discrimination on the basis of race in the making and enforcement of contracts, including employment contracts; covers the making, performance, modification and termination of contracts, as well as the benefits, privileges, terms and conditions of the contractual relationship. All institutions are subject to Section 1981.

Section 1981 can be very significant in a given case because it does not impose the various administrative and procedural requirements that apply under Title VII, it has a longer limitations period (4 years), and it does not cap recoverable damages. *See, e.g., CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008).

7. Section 1983 (42 U.S.C. § 1983)

Provides additional remedies for individuals whose civil rights are violated by individuals acting under “color of law”—*i.e.*, by individuals acting as a government official or representative.

Public institutions are subject to Section 1983; private institutions are not.

Statute of limitations determined by state limitations for personal injury claims.

8. Section 1985(3) (42 U.S.C. § 1985(3))

Provides cause of action for conspiracies to deprive any persons or class of persons of equal protection of the laws or of equal privileges and immunities under the laws.

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9. Section 1988 (42 U.S.C. § 1988)

Authorizes courts to award attorneys' fees to prevailing parties in actions brought to enforce various civil rights laws, including Titles VI and IX and Sections 1981 and 1983.

10. Federal Executive Orders

Executive Order 11246 (1965) (set out as a note in 42 U.S.C. § 2000e): Provides that federal contracts of a certain amount (over \$10,000) must contain provisions that prohibit discrimination on the basis of race, color, religion or national origin; requires both equal employment opportunity and affirmative action: federal contractors are required to develop, and update annually, an Affirmative Action Plan which includes goals and timetables for the increased utilization of minorities and women (by virtue of Executive Order 11375, discussed below).

Executive Order 11375 (1967): Added sex discrimination provisions to the provisions required in applicable federal contracts under Executive Order 11246.

The Office of Federal Contract Compliance Programs ("OFCCP") has enforcement authority with respect to these Executive Orders. OFCCP is a division within the U.S. Department of Labor.

Affirmative Action Requirements:

The OFCCP has summarized the applicable affirmative action requirements as follows:

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

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

Based on the utilization analyses under Executive Order 11246 and the availability of qualified individuals, the contractors establish goals to reduce or overcome the under-utilization. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to increase the pool of

qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

* * *

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

OFCCP, Facts on Executive Order 11246—Affirmative Action, at ¶¶ C and D (Jan. 4, 2002), available at www.dol.gov/ofccp/regs/compliance/aa.htm (last visited July 28, 2009).

The OFCCP regulations require contractors to perform quantitative analyses to evaluate the composition of their workforces compared to the composition of the relevant labor pools and to use that information to address any identified under-utilization of women or minorities in their workforces. *See generally* 41 C.F.R. §§ 60-2.10-60-2.17. While the regulations identify specific considerations the contractors should use in conducting their analyses, they do not define specific percentages or discrepancies as *per se* under-utilization. Instead, the key question is whether the percentage of women or minorities is less than would be expected. Specifically, section 60-2.15 provides:

(a) The contractor must compare the percentage of minorities and women in each job group determined pursuant to Sec. 60-2.13 with the availability for those job groups determined pursuant to Sec. 60-2.14.

(b) When the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group, the contractor must establish a placement goal in accordance with Sec. 60-2.16.

The OFCCP regulations identify four principles in establishing placement goals:

(1) Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

(2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, or national origin.

(3) Placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.

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(4) Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

41 C.F.R. § 60-2.16(e).

Note that the OFCCP regulations use the phrase “under-utilization” of women and minorities as the trigger for establishing “goals” and initiating “efforts” to increase the number of women and minorities in an employer’s workforce. *See generally* 41 C.F.R. §§ 60-2.10-2.17. OFCCP does not use the phrase “manifest imbalance,” which is the term used by the Supreme Court in *United Steel Workers v. Weber*, 443 U.S. 193, 208 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616, 631-632 (1987), in upholding the affirmative action plans at issue in those cases. The Supreme Court did not define “manifest imbalance” in either case, or indicate how much of an imbalance is necessary to create a manifest imbalance. However, the Court did state that a manifest imbalance could be found without the statistical disparity rising to the level of a *prima facie* pattern and practice case under Title VII. *Johnson*, 480 U.S. at 632.²⁷⁴ A *prima facie* pattern and practice case is made under Title VII by showing such a gross disparity between the minority composition of the applicable employer work force and the qualified labor pool that a court can infer an intent to discriminate. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (utilizing a standard deviation analysis to analyze statistical disparities and suggesting that a standard deviation that exceeds two is sufficient to create an inference of discrimination); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (*prima facie* case made out by showing that the percentage of minorities in the employer’s work force is significantly lower than the percentage of minorities in the general population). Thus, under the holding in *Johnson*, an affirmative action plan would be proper if something less than a gross statistical disparity is present. Whether this is a more demanding showing than the OFCCP’s “under-utilization” standard is unclear. On the general question of establishing a “manifest imbalance” in a given workforce, *see* Kenneth R. Davis, *Wheel of Fortune: A Critique of the “Manifest Imbalance” Requirement for Race-Conscious Affirmative Action Under Title VII*, 43 Ga. L. Rev. 993 (2009); David D. Meyer, Note, *Finding a “Manifest Imbalance”: the Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII*, 87 Mich. L. Rev. 1986 (1989).

²⁷⁴ In a Management Directive issued in 1987 relating to the affirmative action plans of federal agencies, the EEOC defined “manifest imbalance” as “[r]epresentation of [protected] groups in a specific occupational grouping or grade level in the agency’s work force that is substantially below its representation in the appropriate [civilian labor force].” EEOC, Equal Employment Opportunity Management Directive EEO MD-714 at ¶ 10.m (Oct. 6, 1967). The Directive went on to say that agencies could “establish numerical objectives (goals) for each job category or major occupation group where there is a manifest imbalance or conspicuous absence of EEO Group(s) in the work force.” *Id.* at ¶ 13.d. This Directive was superseded by EEOC Management Directive 715, which provides federal agencies with “policy guidance and standards for establishing and maintaining effective affirmative action programs of equal employment opportunity. . . .” EEO MD-715 at 1 (Oct. 1, 2003). The new Directive does not use the phrase “manifest imbalance.” Instead, it directs agencies to “identify any meaningful disparities” in their work forces by conducting a self-assessment that “compare[s] their internal participation rates with corresponding participation rates in the relevant civilian labor force. . . .” *Id.* part A, at Section II. “Meaningful disparities” is not defined. The Directive also uses the term “statistical disparities,” but, again, it does not define the term.

Enforcement:

Enforcement can take the form of an administrative procedure or a referral by the OFCCP to the EEOC or DOJ to initiate judicial proceedings. The jurisdictions of the EEOC and OFCCP sometimes overlap, and the agencies have entered into a Memorandum of Understanding to coordinate their enforcement roles.

OFCCP investigates violations of these Executive Orders through compliance evaluations or in response to complaints. If a violation is found, OFCCP typically asks the federal contractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP can initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor, or it can refer the matter to the EEOC or to the DOJ.

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

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

Regulations:

OFCCP Regulations: 41 C.F.R. Part 60

See generally: OFCCP, Compliance Assistance—Executive Order 11246, www.dol.gov/ofccp/regs/compliance/ca_11246.htm (last visited July 28, 2009).

11. State Laws

Most states also have anti-discrimination laws. Many of these laws are similar to the federal laws, but some are broader in scope. State constitutions might also be relevant.

As one example, Pennsylvania has a Human Relations Act which prohibits employment discrimination based on “race, color, religious creed, ancestry, age, sex, national origin, handicap or disability,” 43 Pa. Stat. Ann. §§ 952; it also has a Fair Educational Opportunities Act, which states that “all persons shall have equal opportunities for education regardless of their race, religion, color, ancestry, national origin, sex, handicap or disability. 24 Pa. Stat. Ann. § 5002(a).”

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APPENDIX II: Key Legal Opinions Involving Student Diversity

Grutter v. Bollinger, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003)

Policies at Issue: Consideration of race in postsecondary student admissions

A. Relevant Background Facts

The University of Michigan used admissions policies for admitting students to its undergraduate school and to its law school that considered race, ethnicity, and other factors in order to enroll a diverse student body that would contribute to the educational mission of the schools. The law school admissions process at issue in *Grutter* involved an individualized, holistic review of each applicant's file that considered both academic criteria (grades, LSAT scores) and other criteria that were important to the law school's educational goals (such as work experience, leadership and service, letters of recommendation, and life experiences, including whether the applicant was an underrepresented minority, defined by the University as African-Americans, Hispanics, and Native Americans). The Law School's admissions policy was designed to achieve a "critical mass" of underrepresented minority students to ensure meaningful interactions among students of different racial backgrounds that would enhance the quality of education provided by the School.

In 1998 and the years following, the undergraduate admissions policy provided for individual review and evaluation of all applicants, but the review was characterized by an index system in which (in 1999 and 2000) race and ethnicity (in addition to two other criteria) were awarded 20 points out of a possible maximum of 150 points. A maximum of 110 points could be awarded for academic performance, including grades and test scores, and a maximum of 40 points out of 150 points could be awarded based on non-academic factors, including residence, alumni relationships, personal experience and leadership, with 20 points automatically assigned for underrepresented minority students, students attending predominantly minority or disadvantaged high schools, and athletes. This index system resulted in the admission of virtually every qualified applicant who was an underrepresented minority

B. Relevant Legal Issues

The key issues for the Court included: (1) Whether a higher education institution's mission-driven interest in enrolling a diverse student body to secure the educational benefits of diversity is a compelling interest under the strict scrutiny test applied to consideration of race and national origin in the conferral of benefits under the Equal Protection Clause of the 14th Amendment to the Constitution and Title VI of the Civil Rights Act of 1964; and (2) Whether the admissions programs at the Law School and Undergraduate School were narrowly tailored to achieve that goal.

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C. Holding

The Court concluded that the educational benefits of diversity are a “compelling interest” that can justify the limited use of race in higher education admissions. Then, with respect to the means of achieving that interest, the Court approved (in the law school setting) the individualized, holistic review of applicants, where race is one factor among many considered; and struck down (in the undergraduate setting) as overly mechanical and rigid the process of awarding 20 out of 150 possible admissions points based on the status of students as “underrepresented minority students.”

D. Significance

These cases resolved the long-simmering issue of whether Justice Powell’s opinion in the *Bakke* case represented the law of the land, affirming and expanding upon the principles laid out by Justice Powell in *Bakke*, in holding that a university’s interest in promoting the educational benefits of diversity can be sufficiently compelling to justify consideration of race and ethnicity in admissions decisions.

The federal requirement that race- and ethnicity-conscious policies be sufficiently flexible was, in the context of the University of Michigan’s goal of achieving the educational benefits of diversity, the single most important factor distinguishing the Court’s acceptance of the University of Michigan Law School’s admissions policy from its rejection of the undergraduate admissions policy. Building on Justice Powell’s *Bakke* opinion, the Court focused its inquiry into the flexibility of the admissions programs on two elements: (1) Whether the use of race or ethnicity ensured competitive consideration among all students (thereby not operating as an impermissible quota, insulating certain students from competition with others); and (2) whether the use of race or ethnicity ensured that each applicant was “evaluated as an individual and not in a way that [impermissibly] made an applicant’s race or ethnicity the defining feature of his or her application.”

The Court found that the law school considered the various diversity qualifications of each applicant, including race, on a “case-by-case basis” while the undergraduate program “relies on a selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant,” which operates to “by and large ... automatically determine[] the admissions decision for each applicant.” (O’Connor, J., concurring) (emphasis in original).

In its rejection of the University of Michigan’s undergraduate admissions program, in which 20 points (out of a possible total of 150) were “automatically” assigned to “every single applicant from an underrepresented minority group” (defined by the University of Michigan), the Court set forth several clearly impermissible characteristics of that point system:

- Certain applicants received an admissions advantage based on nothing more than their status as an underrepresented minority;

- The operation of the point system made “race a decisive factor for virtually every minimally qualified underrepresented minority applicant;” and
- The point system precluded meaningful comparisons and evaluations of how students’ “differing backgrounds, experiences, and characteristics” might benefit the institution.

Two other points are significant about the holding:

- The Court sustained the Law School’s objective of enrolling a critical mass of underrepresented minority students to achieve the educational benefits of diversity, and as not constituting a quota designed to assure admission or enrollment of specified percentages of students based on race or ethnicity. (Justice Kennedy dissented on this issue, opining that the Law School’s critical mass objectives functioned too much like a quota and that the Court inappropriately deferred to the University on this issue.)
- Justice O’Connor opinion for the Court in *Grutter* also recognized an interest in access and equal opportunity that at the least complements and supports the interest in the educational benefits of diversity as a compelling interest. Language in her opinion—stressing the importance of the accessibility of all public institutions, and particularly higher education institutions, to people of all races and ethnicities and the need to assure that paths to leadership be visibly open to talented and qualified persons of every race and ethnicity to realize the American dream—arguably provides a basis for asserting a distinct compelling interest in assuring equal access in future cases.

Regents of the University of California v. Bakke,
438 U.S. 265 (1978)

Program at Issue: Medical school student admissions policies

A. Relevant Background Facts

The University of California at Davis Medical School adopted an admissions program that reserved 16 of 100 places for entering students for underrepresented minority applicants and evaluated them under different standards than were used for other applicants.

B. Relevant Legal Issue

Issues addressed by the Court included whether use of race in an admissions program to benefit underrepresented minorities was subject to strict scrutiny and, if so, whether such use addressed a compelling interest and was narrowly tailored to meet that interest.

C. Holding

The Court held that the University’s admissions program was unconstitutional but did not rule out all use of race in higher education admissions. Six separate and splintered opinions were filed

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by the Justices, with no opinion commanding a majority of the Court. Justice Powell's opinion represented, in essence, a "compromise position" between two factions of the Court that were split four-to-four. Justice Powell joined with four Justices who concluded that the Constitution did not preclude all use of race in higher education admissions and he joined with four other justices who concluded that the admissions practices at issue in the case were unconstitutional. Given the split in the Court, there was a longstanding dispute in the lower courts and among legal scholars as to whether Justice Powell's opinion represented the law of the case as a binding precedent. That dispute was rendered moot by the Court's decision in the *Grutter* case.

Justice Powell's opinion found that institutions of higher education can use race or national origin, as one factor among many, in admissions and financial aid decisions to promote the educational benefits of a diverse student body, which constituted a compelling interest. His opinion cited affirmatively to and attached an appendix on the "Harvard Plan," which involved a holistic review of applicants in which race was one of multiple considerations to achieve a diverse student body in support of the educational mission of the school. The Harvard Plan established that admissions decisions involved both evaluation of the student and how to create the desired educational experience for all students; involved an initial screening to identify academically qualified students, followed by an evaluation under expanded criteria, including those associated with diversity goals; flexible consideration of race among other factors; and did not function to virtually guarantee admissions to all qualified minority applicants.

Justice Powell's opinion in *Bakke* also rejected other asserted interests as a basis for use of race in admissions:

- Societal discrimination, which would be unlimited in reach and time.
- Racial balancing, which constitute little more than discrimination for its own sake.

His opinion also held that the University's asserted interest in considering race to improve healthcare services to underserved communities may be a compelling interest to support use of race in admissions, but that evidence was lacking in the case to support that need or that the admissions program was geared to promote that goal.

D. Significance

Justice Powell's opinion in *Bakke* established the legal and practical foundation for limited consideration of race among other factors in postsecondary admissions and other enrollment management decisions in the years following the decision up to the Court's decisions in the *Grutter* and *Gratz* cases. The opinion also provided the core analysis adopted by the Court in the *Grutter* and *Gratz* cases.

Smith v. University of Washington Law School,
392 F.3d 367 (9th Cir. 2004)

Program at Issue: Use of race in law school student admissions

A. Relevant Background Facts

The University of Washington Law School used a law school admissions process by which candidates were designated—based on an index score as well as race and ethnicity and non-racial diversity factors such as cultural background, accomplishments, and career goals—as “presumptive admits” or “presumptive denials” before their applications for admission were further reviewed, with a limited number being referred to committee for further evaluation.

All applicants were measured against each other in determining the presumptive admits, taking into account all the ways that an applicant might contribute to a diverse educational environment. Evidence showed that the law school accepted non-minority applicants with grades and test scores lower than underrepresented minority applicants who were rejected.

Other features of the law school’s program included:

- using an “ethnicity substantiation letter” sent to self-identified racial and ethnic minorities with the goal of obtaining additional information about “whether the applicant’s race or ethnicity should be considered a plus factor.”
- providing Asian Americans “a slight plus for racial diversity” even where they “might have comprised 7 to 9 percent of the class in the relevant years in the absence of a racial or ethnic plus.”
- pulling and evaluating “minority files” from a pool of “discretionary” applicants (as judged by index scores) on an expedited basis to permit the Law School to “mak[e] an early decision on minority candidates who were extremely well qualified based solely on their high index scores.”
- practices that resulted in “predominantly white” applicants being referred to the admissions committee for review, rather than (in numbers comparable to minority applicants) being automatically admitted.

B. Relevant Legal Issue

The issue before the court was whether the University of Washington Law School’s use of race satisfied strict scrutiny, consistent with the Supreme Court’s decision in *Grutter*.

C. Holding

The court found that the Law School’s program addressed a compelling interest in the educational benefits of diversity and was narrowly tailored to meet that goal.

The court also upheld the ethnicity substantiation letters as a practice “designed to be sufficiently flexible to give more weight to those minority candidates who had more to contribute to the diversity of the classroom” and need not have been extended to all applicants (given their

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opportunity to supplement their files “on their own initiative”); deferred to the University’s judgment on the plus factor for Asian Americans, noting that the *Grutter* Court “explicitly refrained from setting a cap on what could constitute critical mass;” upheld the practice of expediting review of minority candidates as a step to achieve the compelling interest in diversity by taking steps to increase the prospects of actually enrolling qualified minority applicants; and found that none of the favorable admissions decisions by the referring admissions officer were “based solely on race” and that the Law School used a “system of checks and balances” in which such decisions were reviewed and debated in the event that the Admissions Committee chairperson recommended admission for “less academically promising applicants.”

D. Significance

This case is the first significant court decision applying the Supreme Court’s *Grutter* decision to admissions policies of other postsecondary institutions. It simply provides an example of how postsecondary schools may reasonably apply the *Grutter* precedent and frame appropriate processes that are needed to enroll a diverse student body.

Podberesky v. Kirwan,
38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995)

Program at Issue: Race-exclusive postsecondary scholarships for African-American students

A. Relevant Background Facts

The University of Maryland established a race-exclusive merit scholarship program for African-American students designed to remedy the present effects of past discrimination. The University contended that the scholarships were needed to redress current conditions that were caused by past discrimination, including poor reputation in the African American community; a racially hostile campus climate; underrepresentation of African Americans; and low retention and graduation rates among African Americans. Plaintiff was an Hispanic student who did not meet the higher academic criteria for a separate merit-based scholarship program that was not restricted to African-Americans.

B. Relevant Legal Issue

The issue before the court was whether there was an adequate remedial basis for the race exclusive scholarship program.

C. Holding

The court, citing the principle that racial and ethnic distinctions are inherently suspect, found that the University had failed to meet its burden to provide a strong basis in evidence that the present effects it identified were caused by the University’s own prior discrimination and that the scholarship program was designed to cure those present effects and to prove that its remedial

measures were narrowly tailored to meet its remedial goal. The court also found that the scholarship program was not limited to its stated goals: students eligible for the program included individuals who had not suffered discrimination (the Court noted that the program was targeted to high achieving students, not the group of students against whom the University had discriminated in the past) and students from other states. The court also found that the University had failed to try, without success, any race neutral solutions to the stated problems.

D. Significance

While *Podberesky* is one of the few cases to address the consideration of race in financial aid, the University did not base the program on the educational benefits of diversity. The issue of those benefits as a compelling interest was simply not an issue in the case. The case does stand for the proposition that institutions that use race to confer benefits such as admissions or financial aid as a remedy for past discrimination need to be able to show a clear nexus between such use and conditions that are caused by past discrimination.

Parents Involved in Community Schools v. Seattle School District No. 1,
551 U.S. 701 (2007)

Program at Issue: Use of race in assigning students under K-12 school choice programs.

A. Relevant Background Facts

This case involved consolidated cases relating to school choice programs of two elementary and secondary school districts in Seattle, Washington and Jefferson County, Kentucky. The Seattle program invalidated by the Court involved an “open choice” plan for its ten high schools whereby prospective 9th grade students could choose to attend any high school in the district if space was available. Under the plan, if a school was oversubscribed—and half of them typically were—students were assigned according to a series of four tiebreakers, including a priority for students with a sibling in the school and an “integration tiebreaker,” applicable to white and nonwhite students, triggered when a high school was racially imbalanced, which was defined to mean that the school was not within 10 percentage points of the district’s overall white/nonwhite racial balance.²⁷⁵ This tiebreaker in effect focused on whether assignment of a student to an oversubscribed, racially imbalanced high school would bring the school closer to a 59% nonwhite / 41% white balance.

Similarly, the Jefferson County plan involved a voluntary school choice plan that considered a student's race (along with other factors) in determining at which school a student would be placed. The plan designated students as “black” or “other” and established that all schools needed a black student enrollment between 15% and 50%—a range based on the overall

²⁷⁵ In each school the District sought white enrollment of between 31 and 51 percent and non-white enrollment of between 49 and 69%, each within 10% of overall district demographics.

demographics of the public school population in the County. Students were assigned to their local school or to another magnet or other school of the student's choice unless it exceeded capacity or hovered at the extreme ends of the racial guidelines.

B. Relevant Legal Issue

The issues presented in both cases related to whether the Supreme Court's *Grutter* postsecondary analysis of a compelling interest in diversity applied to elementary and secondary schools, where there is not an application review process that involves a holistic review of individual student applications similar to that at the postsecondary level, and whether the programs were narrowly tailored to achieve that interest.

C. Holding

In a series of splintered opinions, the Court struck down both programs, concluding that the interests advanced by both districts did not track previously recognized "compelling interests" and that the districts had not established the necessity of their respective uses of race to achieve their goals (in particular, by showing demonstrable impact of their race-conscious policies toward the achievement of their goals).

The Court's decision was a multi-faceted, fractured 4-1-4 decision, with Justice Kennedy serving as the swing vote. Justice Kennedy joined the four more "conservative" justices (Chief Justice Roberts along with Justices Scalia, Thomas, and Alito) in what was actually a narrow holding. The Court struck down the specific student assignment policies because they were not "narrowly tailored" to achieve their specified goals, in part because the districts failed to show that they could not have used race-neutral alternatives. Justice Kennedy sided with the four more "liberal," dissenting justices (Justices Breyer, Stevens, Souter, and Ginsburg) in recognizing that a school district has compelling interests in achieving a diverse student population and avoiding the harms of racial isolation—interests that can be pursued through appropriate race-conscious means.

Despite the school districts' asserted interests in the educational benefits of diversity and avoiding the harms of racial isolation, the Court concluded that the previously recognized interests that could justify the use of race—remedying the effects of past discrimination and pursuing educational benefits associated with diversity in postsecondary education—were not bases for (and therefore supportive of) the district plans. Neither of these interests was implicated in these cases because (1) the cases did not involve remedies to current effects of *de jure* (imposed by law) segregation and (2) the programs at issue did not involve a truly holistic review of individual students based on a range of factors but made race determinative of many student assignments and defined diversity in simple black and white or white and nonwhite terms.

The Court also ruled that the student assignment policies were not narrowly tailored because the districts did not prove (1) that the use of race was necessary to achieve the enumerated goals and (2) that they had fully considered race-neutral alternatives. On the former point, the Court ruled

that the district policies were not “necessary” means toward diversity goals inasmuch as they had a “minimal effect” on student assignments, “suggesting that other means would be effective.” Elaborating in a way seldom, if ever, previously emphasized in its discrimination-in-education cases, the Court compared the limited impact of the district policies—as described above—with the University of Michigan race-conscious law school policy in *Grutter* that was “indispensable” in more than tripling minority representation at the law school, from 4 to 14.5%. On the question of race-neutral alternatives, the Court found that in Seattle, several race-neutral alternatives were rejected “with little or no consideration,” and that Jefferson County “failed to present any evidence that it considered alternatives.”

Justice Kennedy issued a separate opinion reflecting clear agreement—as well as strong disagreement—with several of the major points of the Roberts opinion. In Justice Kennedy’s words, the portion of the Chief Justice’s opinion that he declined to join was “too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”

Specifically, five justices—Justices Breyer, Ginsburg, Souter, and Stevens in dissent, along with Justice Kennedy—agreed that K-12 public schools have potentially compelling interests that can be pursued through appropriate race-conscious means, including interests in promoting diversity and in avoiding racial isolation. Justice Kennedy, acting as the apparent swing vote on this issue on behalf of a Court majority, said in his concurrence:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here [in these specific policies], is to classify every student on the basis of race and to assign each of them to schools based on that classification Even so, measures other than differential treatment based on racial typing of individuals must first be exhausted. The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.

D. Significance

In their separate opinions, all nine Justices affirmed the Court’s decision in *Grutter* that the educational benefits of diversity are a compelling interest that justifies limited use of race in admissions and presumably other enrollment decisions. In addition, this is the first time that five justices have recognized the possibility of such a compelling interest in the K-12 education context. Furthermore, Justice Kennedy, as the new swing vote on these issues, recognizes

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avoidance of the harms of racial isolation as a possible compelling interest, perhaps building on the theme raised in Justice O'Connor's *Grutz* decision related to equal opportunity interests.

At the same time, the case makes clear that the Court will use a very high bar on the issue of narrow tailoring and the necessity for using race in admissions and student assignments.

APPENDIX III: Key Legal Opinions Involving Employment

1. Consideration of Race to Remedy Prior Discrimination

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986)

Plan/Action at Issue: Layoff; public school teachers

A. Relevant Background Facts

The Jackson Board of Education and a teachers' union approved a new provision to a collective bargaining agreement to protect employees who were members of certain minority groups against layoffs. The provision provided that teachers would be laid off in order of reverse seniority, but it specifically limited the proportional percentage of minority teachers that could be laid off.

When layoffs became necessary, however, the Board realized that following the policy would result in laying off tenured, non-minority teachers while retaining minority teachers on probationary status. The Board opted not to follow the policy, and instead laid off probationary minority teachers. The union and the teachers filed suit, alleging violations of the Equal Protection Clause and Title VII. A state court ruled in favor of the plaintiffs. After that decision, the Board followed the policy and subsequently laid off non-minority teachers while retaining minority teachers with less seniority.

The laid off non-minority teachers sued the Board in federal court, alleging violations of the Equal Protection Clause, Title VII, and Section 1983. The district court granted summary judgment for the Board. The court determined that the lack of minority representation on the faculty was the result of societal racial discrimination, not discriminatory hiring practices by the Board. But it found that “the racial preferences granted by the Board need not be grounded on a finding of prior discrimination. Instead, . . . the racial preferences were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing ‘role models’ for minority schoolchildren.” 476 U.S. at 272. The Sixth Circuit affirmed the lower court’s decision, adopting much of the reasoning and language of the lower court.

B. Relevant Legal Issue

Did the layoff provision in the collective bargaining agreement violate the Equal Protection Clause? Specifically, (1) was the “role model” theory a constitutional basis for a race-conscious layoff provision that sought to remedy societal discrimination; and (2) in the absence of particularized findings of prior racial discrimination by the school district, was the race-conscious layoff provision supported by a compelling state purpose and narrowly tailored to meet that purpose?

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C. Holding

The Supreme Court reversed the holdings of the Sixth Circuit.

(1) The Court explicitly rejected the lower court’s reasoning that the role model theory—providing minority role models for minority students—is a valid basis for using racial classifications. The lower court upheld the provision as a valid attempt to alleviate the effects of societal discrimination. But the Supreme Court explained: “This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.” *Id.* at 274. The Court noted that the Board’s attempt to alleviate the effects of societal discrimination by linking the percentage of minority teachers to the percentage of minority students has no stopping point. Taken to its logical extreme, the Court said it would result in the very system that was rejected by the Court in *Brown v. Board of Education*.

(2) The Court determined that there was insufficient evidence that remedial action was necessary to remedy prior discrimination by the Board; therefore, the layoff provision was not supported by a compelling state purpose. The Court found no evidence of prior discriminatory hiring practices. *Id.* at 279. Even assuming such compelling purpose existed, however, the race-conscious layoff provision was not a narrowly-tailored remedy because it imposed the entire burden of the remedy on specific individuals (those laid off), rather than diffusing the burden. *Id.* at 282-83. The Court distinguished hiring remedies—where a broad group of individuals may be denied a future employment opportunity—from layoff remedies—where the lives of specific individuals will be seriously disrupted. *Id.* at 283-84. The Court held that the burden imposed on those being laid off was “too intrusive,” and the remedy—even for a compelling purpose—was “not sufficiently narrowly tailored.” *Id.* at 283.

D. Significance

In *Wygant*, the Court considered for the first time whether and under what circumstances racial preferences are appropriate in the employment context. In this plurality opinion, the Court applied strict scrutiny, explaining that racial classifications are inherently suspect and that “the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.” *Id.* at 273.

The plurality unequivocally found: (1) remedying societal discrimination is not a legitimate justification for racial preferences; (2) promoting role models for racial minorities is also not a legitimate justification for racial preferences; and (3) tying employment goals to the racial makeup of the student body is not a narrowly tailored remedy for any particularized, prior discriminatory hiring practices because there is no logical connection between the two.

Yet the concurring and dissenting opinions suggested that promoting diversity within a faculty is a valid interest surviving constitutional review. In her concurring opinion, Justice O’Connor noted: “. . . a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the context of higher education, to support the use of racial

considerations in furthering that interest.” *Id.* at 286. Justice O’Connor agreed with the plurality’s assessment that using the “role model” theory to justify the conclusion that the plan at issue had a legitimate remedial purpose was in error. But she cautioned that providing role models is different than promoting racial diversity, and she suggested that promoting racial diversity could justify race-conscious decisions. *Id.* at 278.

Justice Stevens went even further in his dissent. Explaining that race-consciousness can be part of sound governmental decisionmaking, consistent with the Equal Protection Clause, Justice Stevens opined:

In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous ‘melting pot’ do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only ‘skin deep;’ it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

Id. at 315. He went on to distinguish between decisions that exclude minorities and those that include them, explaining:

. . . the fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not.

Id. at 316.

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989)

Plan/Action at Issue: Set aside; minority contractors

A. Relevant Background Facts

The Richmond City Council adopted a set-aside plan requiring prime contractors to whom the City awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more Minority Business Enterprises (“MBEs”). The plan

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defined an MBE as a business at least 51 percent of which is owned or controlled by minority group members. The 30 percent set aside did not apply to minority-owned prime contractors.

The Council claimed that the plan was remedial in nature and that it was enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects. The plan was adopted after public hearing, but there was no direct evidence of racial discrimination on the part of the City in letting contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors.

After the plan was adopted, the City issued an invitation to bid on a project at the city jail. The only original bidder on the contract had trouble fulfilling the 30 percent set-aside requirement. While he was requesting a waiver from the City, a local MBE submitted a bid after the deadline for prime bids. The City ultimately decided to rebid the contract, and the original bidder, J.A. Croson Company, sued the City, arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case.

B. Relevant Legal Issue

Did the minority set-aside program adopted by the City violate the Equal Protection Clause? Specifically, did the City act with a compelling interest to remedy past discrimination by apportioning contracting opportunities on the basis of race?

C. Holding

In this opinion, the Supreme Court considered the applicability of two prior decisions—*Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding the constitutionality of a federal set-aside program) and *Wygant* (rejecting the constitutionality of a school board's race-conscious layoff provision).

The Court held that the minority set-aside program at issue here violated the Equal Protection Clause. The City failed to point to any identified discrimination in the Richmond construction industry and therefore failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. 488 U.S. at 505. The Court distinguished *Fullilove* as dealing with the broad remedial powers of Congress to address a nationwide history of past discrimination. *Id.* at 487-91. By contrast, states and their political subdivisions cannot fashion remedies to address societal discrimination. *Id.* at 499. States may take remedial action when they have "evidence that their own spending practices are exacerbating a pattern of prior discrimination," and they must identify that discrimination with some specificity before employing race-conscious relief. *Id.* at 504-09. The Court explained, however, that its decision in this case did not preclude "a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." *Id.* at 509.

D. Significance

This case is important because it established that all race-conscious action by state and local governments is subject to strict scrutiny. The Court reaffirmed its view in *Wygant* that "[t]he standard of review under the Equal Protection Clause is not dependent on the race of those

burdened or benefited by a particular classification.” *Id.* at 494. The opinion was limited, however, because the Court was not presented the opportunity to determine the appropriate legal standard under which racial classifications imposed by federal programs should be analyzed. As a result, the Supreme Court made a distinction between the broad remedial powers of Congress to address societal discrimination and the more limited powers of state and local governments to remedy the effects of identified prior discrimination. The Court later rejected that distinction in *Adarand*, where it held that strict scrutiny applies to all racial classifications, regardless of which level of government imposes them.

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995)

Plan/Action at Issue: Additional compensation for socially and economically disadvantaged contractors

A. Relevant Background Facts

A highway construction company challenged the constitutionality of provisions in federal agency contracts that granted additional compensation to prime contractors that hired subcontractors that were certified as small businesses owned and controlled by “socially or economically disadvantaged individuals.” To determine whether individuals were socially or economically disadvantaged, the government relied on statutes that used race-based presumptions.

Adarand submitted the lowest bid on a subcontract, but it lost the contract to a company that was certified as a small business owned and controlled by “socially or economically disadvantaged individuals.” Adarand filed suit, arguing that the race-based presumptions in the statute violated the Fifth Amendment’s guarantee that no one will be denied equal protection of the laws.

B. Relevant Legal Issue

Under what legal standard should courts review governmental classifications based on race?

C. Holding

After detailed consideration of the Court’s precedent, the Supreme Court concluded that analysis of equal protection claims under the Fifth Amendment is the same as that under the Fourteenth Amendment. The Court remanded the case to the Tenth Circuit after defining the appropriate legal standard under which courts should review governmental classifications based on race.

The Supreme Court held: “All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed . . . under strict scrutiny.” 515 U.S. at 227. Racial

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classifications are constitutional only if they are narrowly tailored to meet compelling governmental interests.

The Tenth Circuit had upheld the race-based presumptions after applying intermediate scrutiny analysis—which requires a “significant” rather than “compelling” government purpose. Holding that strict scrutiny was required, the Supreme Court remanded the case for the lower courts to review under strict scrutiny. The Supreme Court explained that the Tenth Circuit did not address the issue of narrow tailoring by considering whether there were “race-neutral means to increase minority business participation in government contracting” or whether the program was sufficiently limited in duration to ensure that it “will not last longer than the discriminatory effects it is designed to eliminate.” *Id.* at 237-38 (quoting *Croson*, 488 U.S. at 507 and *Fullilove*, 448 U.S. 448, 513 (1980)).

D. Significance

This case is significant in that the majority of the Court concluded that all racial classifications must be reviewed under strict scrutiny. The majority opinion was authored by Justice O’Connor and joined by then-Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia (in relevant part). Prior to reaching this significant holding, Justice O’Connor detailed the history of the Court’s jurisprudence, noting the gaps that its prior decisions left because of the Court’s failure to produce majority opinions, particularly in key decisions such as *Bakke* (“racial and ethnic distinctions . . . call for the most exacting judicial examination”), *Fullilove* (“racial or ethnic criteria must necessarily receive a most searching examination”), and *Wygant* (applying strict scrutiny). Underscoring its announcement that strict scrutiny applies to all racial classifications, the Court expressly overruled its decision in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), where it held that “benign” federal racial classifications need only survive intermediate scrutiny.

Justices Stevens, Souter, and Ginsburg each authored their own dissenting opinions, and they all joined in each other’s dissents. In his dissent, Justice Stevens echoed his dissent in *Wygant*, distinguishing between “state action that imposes burdens on a disfavored few and state action that benefits few in spite of its adverse effect on the many.” *Id.* at 246. In *Wygant* and again here, Justice Stevens argued that race is not always irrelevant to governmental decisionmaking and suggested that an interest in diversity is sufficient to justify a racial classification. Addressing head-on the majority’s announcement that *Metro Broadcasting* was overruled, Justice Stevens explained that the interest in diversity had been mentioned previously in *Bakke* and in Justice O’Connor’s and his own dissents in *Wygant*.

But it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting*, of course, answered that question in the affirmative. The majority today overrules *Metro Broadcasting* only insofar as it is ‘inconsistent with the holding’ that strict scrutiny applies to ‘benign’ racial classifications promulgated by the Federal Government. The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court’s holding today—indeed, the question is not remotely presented in this case—and I do not

take the Court’s opinion to diminish that aspect of our decision in *Metro Broadcasting*.

Id. at 257-58.

Rothe Development Corp. v. Department of Defense,
545 F.3d 1023 (Fed. Cir. 2008)

Plan/Action at Issue: Set-aside; socially and economically disadvantaged contractors

Congress enacted (and reenacted several times) a statute (10 U.S.C. § 2323) which, in relevant part, set a goal that five percent of federal defense contracting dollars for each year be awarded to certain entities, including small businesses owned or controlled by “socially and economically disadvantaged individuals (as defined by . . . the Small Business Act) . . .” The Small Business Act presumed that African-Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities were “socially and economically disadvantaged individuals.”

Rothe Development Corporation (“Rothe”), owned by a white woman, lost a bid for a Department of Defense (“DOD”) contract to a company owned by a Korean-American couple, as a result of the statute. Rothe challenged the statute as facially unconstitutional. Applying strict scrutiny, the district court granted summary judgment to DOD, finding that “Congress sought to further a compelling interest supported by a ‘strong basis in evidence,’ and that the statute was narrowly tailored to that interest.” 545 F.3d at 1033. Rothe appealed.

The Federal Circuit held that the statute violated the equal protection component of the Fifth Amendment. Like the lower court, the Federal Circuit applied strict scrutiny because the statute authorized DOD to afford preferential treatment on the basis of race. But the appellate court found that there was not a strong basis in evidence (compelling interest) to justify race-based remedial action. In so holding, the court took a hard look at the statistical evidence before Congress at the time it enacted (and reenacted the statute). Specifically, it looked at the six disparity studies conducted of one state, two counties, and three cities, that Congress considered and the district court determined were sufficient to demonstrate a compelling interest for race-based preferences. Debunking the methodology used in those studies—particularly accounting for the qualifications of the pool of available minority contractors and the capacity of those contractors to bid on multiple contracts simultaneously—the court concluded: “the defects we have noted detract dramatically from the probative value of these six studies, and, in conjunction with their limited geographic coverage, render the studies insufficient to form the statistical core of the ‘strong basis in evidence’ required to uphold the statute.” *Id.* at 1045. The court cautioned, however, that it was not making any blanket statements about the reliability of disparity studies. It emphasized that “there is no precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark” and that the sufficiency of evidence to justify government action “must be evaluated on a case-by-case basis.” *Id.* at 1049. Finding that there was no compelling interest for the government program, the court did not reach a decision on whether it was narrowly tailored.

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This case is important because following the Supreme Court's lead in *Croson* and *Adarand*, the Federal Circuit confirmed that strict scrutiny applies to government programs that confer benefits to groups defined in racially-neutral terms—such “socially and economically disadvantaged”—at least where those terms are defined as including certain racial or ethnic groups.

Sherbrooke Turf, Inc. v. Minnesota Department of Transportation,
345 F.3d 964 (8th Cir. 2003)

Plan/Action at Issue: Set-aside; socially and economically disadvantaged contractors

Plaintiffs challenged a federal program, as implemented in Minnesota and Nebraska, that required ten percent of federal highway construction funds to be paid to small businesses owned and controlled by “socially and economically disadvantaged individuals,” as defined by the Small Business Act. Based on the holdings in *Croson* and *Adarand*, the government conceded that the program should be analyzed under strict scrutiny because “the statute employs a race-based rebuttable presumption to define a class of beneficiaries and authorizes the use of race-conscious remedial measures.” 345 F.3d at 969. The district court upheld the program, and the Eighth Circuit affirmed.

Recognizing that Congress had spent decades compiling evidence of racial discrimination in government highway contracting, the court concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary. Therefore, Congress had a compelling interest in enacting the program. The court rejected plaintiffs’ argument that the states needed to independently meet the strict scrutiny evidentiary standard and held that a state’s implementation of the program is relevant to the narrow tailoring component of the analysis. The court then held that the states’ implementation of the program, consistent with the implementing regulations, was sufficiently narrowly tailored to withstand strict scrutiny.

Hayden v. County of Nassau,
180 F.3d 42 (2d Cir. 1999)

Plan/Action at Issue: Hiring; police entrance exam

A class of applicants who took a police officers’ entrance exam sued the County alleging violations of the Equal Protection Clause and Title VII, among other claims. The exam was redesigned pursuant to several consent decrees entered into after the Department of Justice sued the County for discriminating against blacks, Latinos, and female applicants in hiring. The lower court dismissed the plaintiffs’ claims finding that “although [the exam] was designed with race in mind, [it] was administered and scored in a race-neutral fashion.” 180 F.3d at 46.

The Second Circuit affirmed the dismissal, after distinguishing *Bakke*, *Croson*, and *Adarand*:

Our reading of those cases suggests that they are concerned with *select* affirmative action tools, such as quota systems, set-aside programs, and differential scoring cutoffs, which utilize express racial classifications and which prevent non-minorities from competing for specific slots or contracts. . . . Here, unlike in the above cited cases, although Nassau County was necessarily conscious of race in redesigning its entrance exam, it treated all persons equally in the administration of the exam.

Id. at 49. The Second Circuit concluded that the race-neutral efforts to remedy the racially disproportionate effects of the entrance exam did not violate the Equal Protection Clause or Title VII because they did not discriminate against non-minorities. *Id.* at 54-55.

2. Consideration of Race to Address a Manifest Imbalance in Applicable Workforce

Steelworkers v. Weber,
443 U.S. 193 (1979)

Plan/Action at Issue: Hiring; craft training program

A. Relevant Background Facts

As part of a collective bargaining agreement, a union and private employer agreed on an affirmative action plan that reserved 50 percent of openings in a craft training program for black employees until the percentage of black craft workers in the plant was commensurate with the percentage of the black local labor force. White employees challenged the program's validity under Title VII, alleging that junior black employees received training in preference to senior white employees. The district court held that the plan violated Title VII. A divided panel on the Fifth Circuit affirmed, holding that all employment preferences based on race, including those incidental to affirmative action plans, violated Title VII's prohibition against racial discrimination in employment.

B. Relevant Legal Issue

Did Title VII forbid a private employer from voluntarily implementing an affirmative action plan designed to eliminate manifest racial imbalances in traditionally segregated job categories?

C. Holding

The Supreme Court reversed the Fifth Circuit's decision. It held that the voluntary race-conscious efforts of the employer's training program did not violate Title VII's prohibition against racial discrimination. The Court stated that an interpretation of Title VII that "forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected." 443 U.S. at 202. The Court upheld the plan because its "purposes . . . mirror[ed] those of the statute," which included breaking down patterns of racial hierarchy in occupations that have been traditionally segregated. *Id.* at 208. Further, the plan neither "unnecessarily trammel[ed] the interests of white employees" nor

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“create[d] an absolute bar to the[ir] advancement.” *Id.* Finally, the plan was a temporary measure designed to eliminate a manifest racial imbalance, not to maintain a racial balance.

D. Significance

Weber is important in that the Court established the precedent that Title VII’s prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans. To the contrary, a plan should be upheld under Title VII where its purpose mirrors that of Title VII, it does not unnecessarily trammel the rights of those outside the group it is designed to protect, and it is a temporary measure designed to eliminate a manifest imbalance. Courts consistently rely on the framework established in *Weber* in assessing the validity of affirmative action plans designed to remedy manifest imbalances.

Johnson v. Transportation Agency, Santa Clara County,
480 U.S. 616 (1987)

Plan/Action at Issue: Promotion; transportation agency

A. Relevant Background Facts

The Santa Clara County Transportation Agency (“Agency”) promulgated an affirmative action plan for promoting its employees. The plan did not set aside a specific number of positions for minorities or women, but authorized the Agency to consider race or sex as one factor when evaluating qualified candidates. The plan did not contain an explicit end date, but rather created long-term and short-term goals to attain a balanced work force. When the Agency announced a vacancy for a road dispatcher position, seven applicants were deemed eligible for promotion, including Joyce (female) and Johnson (male). Ultimately, Joyce received the promotion.

Johnson sued, alleging sex discrimination in violation of Title VII. The district court found that the Agency’s plan was invalid under *Weber* because the plan was not temporary. The Ninth Circuit reversed, holding that: (1) the absence of an express end date was not dispositive; (2) the consideration of Joyce’s sex was lawful; and (3) the plan was adopted to address a conspicuous imbalance in the Agency’s work force, and neither trammelled the rights of other employees nor created a bar to their advancement. 480 U.S. at 626.

B. Relevant Legal Issue

Did the Agency’s voluntary affirmative action plan violate Title VII? Specifically, (1) was the consideration of Joyce’s sex justified because of a “manifest imbalance” reflecting the underrepresentation of women in a “traditionally segregated job category;” and (2) did Joyce’s promotion “unnecessarily trammel the rights” of male employees or create an “absolute bar to the[ir] advancement?”

C. Holding

The Supreme Court affirmed the Ninth Circuit’s decision. The Court held that the Agency appropriately considered Joyce’s sex as one factor when promoting her. The Court found that the Agency implemented its plan to overcome a conspicuous imbalance in certain job categories and to attain a balanced work force. The plan was a moderate, flexible, case-by-case approach. Accordingly, the Court held that the plan was “fully consistent with Title VII, for it embodie[d] the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.” *Id.* at 642.

(1) The Court found that Joyce’s promotion was appropriately undertaken to remedy underrepresentation in a “traditionally segregated job category.”

The Court held that to determine whether a manifest imbalance exists that justifies taking race or sex into account for filling a job that requires special training, it is appropriate to compare the percentage of minorities or women in the employer’s work force to those in the general labor force who possess the relevant qualifications. *Id.* at 632. The Court reasoned that requiring that the manifest imbalance be related to the traditionally segregated job category ensures that the purposes of Title VII are met without unduly infringing on the interests of other employees. Importantly, however, the Court stated that “[a] manifest imbalance need not be such that it would support a *prima facie* case against the employer,” distinguishing the requirements of Title VII from the stricter requirements of the Equal Protection Clause, at least for voluntarily adopted affirmative action plans. *Id.*

Here, the Agency’s plan acknowledged that limited opportunities had existed in the past for women to find jobs in certain classifications. *Id.* at 634. In order to measure progress in eliminating underrepresentation, the Agency set a long-term goal of attaining a work force that mirrored in its major job classifications the percentage of women in the area labor market. It also directed that annual short-term goals be formulated. The Court upheld the plan because it directed that numerous factors be considered in making hiring decisions, including the specific qualifications of female applicants for particular jobs, rather than authorizing blind hiring by the numbers.

(2) The Court found that promoting Joyce neither “trammled the rights” of male employees nor “created a bar to their advancement.”

The Court discussed three points to support its conclusion. First, the Agency’s plan did not set aside a specific number of positions for women, but rather authorized the consideration of sex as one factor when evaluating qualified applicants, requiring women to compete with all other applicants. Second, Johnson neither had an “absolute entitlement” to the position nor a “legitimate, firmly rooted expectation” for it. *Id.* at 638. Finally, the Agency’s plan was intended to “attain a balanced work force, not maintain one.” *Id.* at 639. The Court noted that express assurance that a program is only temporary might be necessary if the program has quotas, in order to minimize intrusion on the expectations of other employees and to ensure that the plan is not being used to maintain a permanent racial and sexual balance. However, here, the

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Agency took “a moderate, gradual approach to eliminating the imbalance in its work force,” alleviating the need to express an end date.

D. Significance

In *Johnson* the Court applied and refined the Title VII scrutiny detailed in *Weber*—an affirmative action plan does not violate Title VII if it is designed to eliminate a manifest imbalance; it does not unnecessarily trammel on the rights of those outside the group it is designed to protect, it cannot create an absolute bar to advancement, and remedial action cannot be designed to do more than attain, rather than maintain, a balance. The Court also reaffirmed the importance of voluntary affirmative action on the part of employers. And, significantly, the Court distinguished Title VII scrutiny from that required under the Equal Protection Clause, which requires evidence of actual discrimination. This distinction enables employers to voluntarily adopt affirmative action plans without admitting past discrimination and without compiling evidence that could be used to subject them to discrimination law suits. Cases since *Johnson* have relied on this distinction.

Humphries v. Pulaski County Special School District,
580 F.3d 688 (8th Cir. 2009)

Plan/Action at Issue: Promotion; public school district

A white female who had been passed over for multiple promotions sued her school district employer under Title VII and a state civil rights statute, claiming that the district unlawfully used race in its hiring practices. The district defended on the grounds that its affirmative action policies were promulgated in response to various desegregation orders, and were also justified as being necessary to address a manifest imbalance in the relevant job positions (school administrators). The district court granted summary judgment for the school district. The court of appeals reversed, finding genuine issues of material fact.

As an initial matter, the Eighth Circuit joined its “sister courts in concluding that evidence that an employer followed an affirmative action plan in taking a challenged adverse employment action may constitute direct evidence of unlawful discrimination. If the employer defends by asserting that it acted pursuant to a valid affirmative action plan, the question then becomes whether the affirmative action plan is valid under Title VII and the Equal Protection Clause.” 580 F.3d at 694. “An affirmative action policy is valid,” said the court, “if the policy is remedial and narrowly tailored to meet the goal of remedying the effects of past discrimination.” *Id.* at 695. “A policy may be considered remedial if the employer has identified a ‘manifest imbalance’ in the work force,” or if the policy was “implemented ‘in adherence to a court order, whether entered by consent or after litigation.’ But a policy may not ‘unnecessarily trammel’ the right of non-minorities, and it must be ‘intended to attain a balance, not to maintain one.’” *Id.* at 695-96 (citations omitted). Here, the court of appeals concluded that there were genuine issues of material fact related to whether the school district’s affirmative action policies “addressed a manifest racial imbalance in the workforce,” and whether the district was “impermissibly maintaining, rather than attaining, a racial balance.” *Id.* at 696.

Rudin v. Lincoln Land Community College,
420 F.3d 712 (7th Cir. 2005)

Plan/Action at Issue: Hiring; community college faculty

Rudin, a white female, applied for a full-time, tenure-track position at a community college. A screening committee reviewed the applications and selected candidates for interviews, including Rudin. The list of selected candidates was sent to the College’s Equal Opportunity Compliance Officer, whose role was to “determine if there was sufficient diversity among the interviewees.” 420 F.3d at 716. At this point, Hudson, an African-American male who had applied but had not been selected for an interview, was added to the list of interviewees. Ultimately, Hudson was offered the teaching position. Rudin filed a complaint in federal court, advancing two Title VII claims: race discrimination and sex discrimination. The district court granted summary judgment for the College on both claims. On appeal, the court considered whether Rudin put forth sufficient evidence to survive summary judgment on her claims that her employer discriminated against her on the basis of her race and sex. The Seventh Circuit reversed the district court’s award of summary judgment on both claims.

With regard to Rudin’s race claim, the court noted that the College had argued below that its “race-conscious hiring process was a permissible way of increasing diversity in its faculty.” *Id.* at 721 (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)). However, on appeal, the College made no such argument. Instead, it simply argued that the practice of inserting minority candidates into the interview pool did not show that race was a consideration in the employment decision at issue.

Rudin supported her intentional discrimination claim by proffering evidence of discriminatory motive. A plaintiff can avoid summary judgment in such a case by relying on either direct or circumstantial evidence to show discriminatory motive. Here, the court found that, while not sufficient in itself to support a finding of racial discrimination, “the practice of including a racial minority in the candidate pool, *when considered with other factors in the case*, can constitute circumstantial evidence of race discrimination.” *Id.* at 722 (emphasis in original). The court summarized the other factors present in this case: “Hudson’s name was inserted into the interview pool according to a stated policy . . . that explicitly favored minority over non-minority job applicants.” The court reasoned, “he was not simply placed in the general applicant pool; he was allowed to bypass the first elimination.” *Id.* The court found additional evidence of intentional discrimination, including statements about administrative pressure to hire a minority candidate; failure of the College to follow its own internal hiring procedures; and inconsistencies in the College’s proffered justification for the hiring decision.

On the sex discrimination claim, the College conceded that Rudin had established a *prima facie* case, and the court found that the College proffered a legitimate, non-discriminatory reason for its hiring decision. Accordingly, to survive summary judgment, Rudin had to put forth sufficient evidence from which a rational factfinder could infer that the College lied about its reasons for hiring Hudson over her. The court found that Rudin provided enough facts to

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create the inference of pretext, specifically that the College's justification for not offering Rudin the position changed over time and that the College failed to follow its own hiring policies.

Rudebusch v. Hughes,
313 F.3d 506 (9th Cir. 2002)

Plan/Action at Issue: Salary; one-time pay adjustment for women and minority faculty

Northern Arizona University instituted a one-time base pay adjustment for women and minority faculty after finding apparent overall pay inequity. A class of white male professors sued the University under Title VII, alleging that the University failed to consider their eligibility for pay adjustments. They alleged that they, too, were entitled to adjustments because their pay fell below the assessed mean salary that was used as a baseline for the pay adjustments given to the female and minority faculty.

In this case, the Ninth Circuit examined for the first time the Title VII parameters for analysis of pay equity adjustments. In doing so, it relied on the Supreme Court's framework in *Johnson*. First, it acknowledged that the aggrieved professors did not challenge on appeal the jury's finding that the University implemented the pay adjustments to address a manifest imbalance with respect to the pay of minority and women professors. Assuming as true that a manifest imbalance existed, the court then turned to the question of whether the pay adjustments unnecessarily trammelled on the rights of the white male professors. The court determined that the one-time adjustment was not "an absolute bar" to their advancement, they retained their positions at the same salary, and they were eligible for future promotions. The court explained:

One thing is clear in this case: Whatever the reason, white male faculty who were earning less than their predicted salaries were not doing so because of their race or sex, or at least they have not demonstrated as much. Despite this reality, *Rudebusch* would have us hold that anytime an employer attempts to address a manifest imbalance in the pay equity context, it must simultaneously consider the unrelated concerns of those employees who have not demonstrated such a legally cognizable imbalance. Such logic would all but eliminate employer efforts to attain pay equity as required by law.

313 F.3d at 522-23. Yet, the court stopped short of upholding the lower court's summary judgment in favor of the University. Instead, the Ninth Circuit remanded the case for the fact-finder to determine whether the pay adjustments were more than remedial. Consistent with *Weber* and *Johnson*, the adjustments would be valid under Title VII only the extent they were designed to "attain" a balance and they did not overcompensate the women and minority faculty members.

Maitland v. University of Minnesota,
155 F.3d 1013 (8th Cir. 1998)

Plan/Action at Issue: Salary; pay adjustment for female faculty

Maitland, a male faculty member at the University of Minnesota, filed a reverse discrimination suit, alleging that salary increases paid to female faculty at the University pursuant to a consent decree violated his equal protection rights and Title VII. Prior to entering into the consent decree, each side to the underlying dispute prepared a statistical pay study. The results of the studies differed because the parties disagreed on the relevance of certain variables. The results of the plaintiffs' study showed a disparity between male and female salaries roughly between four and ten percent, while the results of the University's study showed results around two percent. The parties relied on a compromise model—showing salary disparities around six percent—upon which they based the affirmative action salary plan set forth in the consent decree. In his suit against the University, Maitland argued that the University discriminated against him by implementing salary increases for women when there was no salary disparity that required remediation.

On an appeal of a grant of summary judgment in favor of the University, the Eighth Circuit considered whether there was undisputed evidence that there was a “manifest” (Title VII) or “conspicuous” (equal protection) imbalance in the salaries of male and female faculty at the time the affirmative action salary plan was implemented. The court relied on the standard set forth in *Weber* and *Johnson*—that consideration of gender in an affirmative action plan is improper unless it is justified by a “manifest imbalance” that reflects an underrepresentation of women in traditionally segregated job categories, that the plan does not unnecessarily trammel on the rights of male employees, and that the plan was intended to attain, not maintain a balance in the workforce. The court concluded that because there were three comparative salary studies reaching different results (one of which might not be statistically significant) the relevant evidence regarding whether there was a manifest imbalance in salaries was far from undisputed. The court explained that the finder of fact must be able to consider the variables that have been excluded, hear the reasons for the exclusions, and determine what weight to accord the results of the studies. Accordingly, the Eighth Circuit reversed the lower court's grant of summary judgment for the University.

Smith v. Virginia Commonwealth University,
84 F.3d 672 (4th Cir. 1996)

Plan/Action at Issue: Salary; pay adjustment for female faculty

Five male professors sued the University alleging that pay increases for female faculty members violated Title VII. The pay increases were given after a salary equity study was completed. The Salary Equity Study Committee used a multiple regression analysis, but it excluded several performance factors, such as teaching quality; quantity and quality of publications; and quantity and quality of research. The plaintiffs contended that excluding these factors, among others, called into question the validity of the study's results. The University relied solely on the results of the multiple regression analysis to determine manifest imbalance in pay between male and female faculty members and in granting the pay increases to the female faculty.

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The lower court granted summary judgment in favor of the University, and the male professors appealed. Relying on *Weber* and *Johnson*, the Fourth Circuit considered whether there was a manifest imbalance that justified the pay increases. The court reversed the grant of summary judgment: “Given the number of important variables omitted from the multiple regression analysis, and the evidence presented by the appellants that these variables are crucial, a dispute of material fact remains as to the validity of the study to establish manifest imbalance.” 84 F.3d at 677.

Honadle v. University of Vermont & State Agricultural College,
56 F. Supp. 2d 419 (D. Vt. 1999)

Plan/Action at Issue: Promotion; state college

Honadle, a white female professor, brought a reverse discrimination suit under Title VII and the Equal Protection Clause when Halbrecht, a Chinese-born female professor, was promoted to a department chair position over her. The court considered the validity of the University’s affirmative action plan under Title VII and the Equal Protection Clause.

Title VII

The court held that the University’s affirmative action plan, which included employment goals to correct the underutilization of women and minorities, was valid under Title VII. The University’s affirmative action plan included a Minority Faculty Incentive Fund (“MFIF”) that provided financial incentives to departments that increased minority hiring for tenure-track faculty positions. But the MFIF funds were not intended to influence hiring decisions. Upholding the University’s affirmative action plan under Title VII, the court found that the University presented sufficient evidence of a manifest imbalance and that the plan did not unnecessarily trammel on the rights of non-minorities. The court noted that the awards were limited and that the incentive funds would not be available for job groups that no longer showed underrepresentation.

Importantly, this case helps define what constitutes a “manifest imbalance.” The court explained that under OFCCP regulations, government contractors can identify underutilization of minorities or women by analyzing the difference between the actual and the estimated available number of employees under a standard deviation test or the 80 percent rule, where actual employees must be at least 80 percent of the estimated available employees. 56 F. Supp. 2d at 421-22. Under a standard deviation test, the court observed, “[a] difference between an expected and an observed value greater than two or three standard deviations would support a prima facie case of discrimination. But an employer may, consistent with Title VII, adopt an affirmative action plan where the disparity is not so striking.” *Id.* at 426. Here, the court found manifest imbalance where the underrepresentation was “above or near the two standard deviation level.” *Id.*

Equal Protection

The court found that a public University could be “racially conscious” by compiling “statistics on the racial and ethnic makeup of its faculty and encouraging broader recruiting of . . . minorities, without triggering the Equal Protection Clause’s strict scrutiny review.” *Id.* at 428. The court also found that the MFIF did not “have the purpose of creating an inducement to hire” minorities. *Id.* However, the court distinguished the requirements under Title VII and equal protection analysis: “Although an affirmative action plan may be justified under Title VII by statistical evidence of ‘manifest imbalance’ in the workforce, [citing *Johnson*], evidence of ‘gross statistical disparities’ is required to withstand an equal protection challenge [citing *Croson*].” *Id.* at 429. The court determined that the two standard deviation difference that was sufficient to withstand a Title VII challenge did not demonstrate the gross statistical disparity, standing alone, needed to survive an equal protection challenge. Moreover, the University “articulated no other purpose asserted to be compelling, such as encouraging diversity or ensuring equal opportunity.” *Id.* at 429. Accordingly, the court held that if the jury determined that MFIF funds influenced its decision to hire Halbrendt, the affirmative action plan would not withstand strict scrutiny review.

Sharkey v. Dixie Electric Membership Corp.,
262 Fed. Appx. 598 (5th Cir. 2008)

Plan/Action at Issue: Hiring; electric company

Sharkey, a white male, brought a reverse discrimination suit under Title VII, alleging that the Dixie Electric Membership Corporation (“DEMCO”) engaged in discriminatory hiring practices when it hired McCray (African-American) over other candidates. DEMCO had adopted affirmative action plans since 1984, and each year it evaluated and updated its minority hiring and placement goals. Pursuant to the plan at issue, the number of minorities in the job category for which Sharkey applied was underutilized by over 33 percent, as compared to available minorities with the requisite skills in the recruitment area. The district court granted summary judgment for DEMCO, finding DEMCO presented a legitimate, nondiscriminatory rationale for hiring the African-American employee over other candidates pursuant to the affirmative action plan, and that Sharkey did not satisfy his burden of proving that the plan was invalid and that it was a pretext for race-based discrimination.

The Fifth Circuit affirmed. On appeal, as on summary judgment, DEMCO argued that it presented a legitimate, nondiscriminatory rationale for hiring McCray pursuant to its internal hiring procedures, including consideration of the affirmative action plan. Relying on *Weber*, the court explained: “[W]e have no difficulty concluding that the subject [plan] is valid, and thus can serve as DEMCO’s legitimate, nondiscriminatory rationale for hiring McCray over other white candidates.” 262 Fed. Appx. at 604.

Sharkey did not argue on appeal that there was no manifest imbalance in DEMCO’s workforce. Rather, he argued that the plan violated the *Weber* test because it was an absolute bar to employment for white applicants and it was not temporary in nature. The court rejected both claims. The court found that the plan was not an absolute bar to the advancement of whites and

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did not unnecessarily trammel their interests because the uncontroverted evidence established that the application and hiring process was not discriminatory (employee selection considered an applicant's background, education, training, experience; applicants had to score "medium" or "high" on certain test before being selected for an interview; the race of candidates did not appear their applications and it was unknown to DEMCO prior to a candidate's interview; DEMCO selected several applicants for interviews—both white and African-American—but Sharkey was not selected; McCray was chosen for the a variety of reasons including his background, education, and prior work experience at DEMCO). Consideration of McCray's race was simply a plus factor among others and was permissible under Title VII. The court also found that Sharkey failed to create a genuine issue of material fact as to whether the plan was anything more than a temporary measure designed to eliminate a manifest racial imbalance in DEMCO's workforce.

Schurr v. Resorts International Hotel, Inc.,
196 F.3d 486 (3d Cir. 1999)

Plan/Action at Issue: Hiring; hotel

Schurr, a white male, brought this action against a hotel/casino. Schurr alleged that race was the determining factor in the employer casino's decision not to offer him a job that was filled by an equally qualified minority candidate. Schurr contended that the casino's affirmative action plan was invalid under Title VII. The district court granted summary judgment to the hotel/casino. The Third Circuit considered whether it was appropriate to take race into account in a hiring decision when there was no showing of or reference to a manifest racial imbalance in the pertinent job category or industry.

The Third Circuit reversed the district court's award of summary judgment and held that the employer hotel's affirmative action plan was invalid under Title VII. It relied on the two-prong test, derived from *Weber*, to determine whether an affirmative action plan: (1) had "purposes that mirror[ed] those of the statute," and (2) "unnecessarily trammel[ed] the interests of the [non-minority] employees." 196 F.3d at 497. To answer the first question, the court relied on the rule it announced in *Taxman*: "Unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and therefore, cannot satisfy the first prong of the *Weber* test." *Id.* (quoting *Taxman*, 91 F.3d at 1556). To be characterized as remedial, the court held, the plan must be designed to correct a "manifest imbalance in traditionally segregated job categories." *Id.* (quoting *Weber*, 443 U.S. at 207). The court found that there was no reference to or showing of past or present discrimination in the casino industry. Therefore, the plan was invalid under the first prong of *Weber*, and violated Title VII.

3. Consideration of Race to Obtain Greater Employee Diversity

a. Diversity in the Education Context

Taxman v. Board of Education of the Township of Piscataway,
91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997)

Plan/Action at Issue: Layoff; individual public high school teacher

A. Relevant Background Facts

The Board of Education of Piscataway relied on an affirmative action plan to lay off a white teacher instead of a black teacher with equal seniority. The affirmative action plan was adopted to provide equal educational opportunities for students and equal employment opportunities for employees and prospective employees. It was not adopted to remedy the results of any prior discrimination or any identified underrepresentation of minorities in the Piscataway school system. The plan provided, in relevant part, that the most qualified candidate would always be recommended for a position, but where candidates had equal qualifications, the candidate meeting the criteria of the affirmative action program would be recommended.

The Board had to lay off one teacher, and it faced the rare situation of two teachers with identical seniority. One was white (Taxman) and one was black. The Board decided to invoke the affirmative action policy to break the tie and laid off the white teacher. She filed a charge of discrimination with the EEOC, and the United States sued the Board in federal court asserting claims under Title VII. Taxman joined the lawsuit.

B. Relevant Legal Issue

Did Title VII permit an employer with a racially balanced work force to grant a non-remedial racial preference in order to promote racial diversity?

C. Holding

The Third Circuit explicitly rejected diversity, standing alone, as a valid reason to deviate from the antidiscrimination mandate of Title VII. The court described the two purposes of Title VII: (1) to end discrimination and (2) to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nation's work force (manifest imbalance). By contrast, the court said, "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." 91 F.3d at 1558.

The court struck down the Board's affirmative action policy because it did not satisfy either prong of the test articulated by the Supreme Court in *Weber*. First, the plan's purpose did not mirror the purpose of Title VII. The Board admitted that the purpose of the plan was not remedial in nature and that there was no evidence of a manifest imbalance among faculty in the individual school or in the school district as a whole. Rather, its purpose was the pursuit of racial diversity.

Second the court concluded that the plan unnecessarily trammelled nonminority interests. In so holding, the court considered three factors: structure of the plan, duration of the plan, and the plan's applicability to layoff decisions. Structure: The plan was found to lack definition and structure. By contrast, affirmative action plans that have been upheld had defined objectives and benchmarks to ensure decisions met each plan's purpose. Duration: The plan was of unlimited duration. By contrast, valid affirmative action plans "are 'temporary' measures that seek to

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‘attain,’ not ‘maintain’ a ‘permanent racial . . . balance.’” *Id.* at 1564 (quoting *Johnson*, 480 U.S. at 639-40). Layoffs: Invoking the plan resulted in the layoff of a nonminority, tenured employee. Applying the Supreme Court’s decision in *Wygant*, the court explained that “the harm imposed upon a nonminority employee by the loss of his or her job is so substantial and the cost so severe that the Board’s goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion.” *Id.*

The Third Circuit held that promoting racial diversity, absent a history of past discrimination, was insufficient justification for laying off the white teacher because of her race and violated Title VII.

D. Significance

In this case, the Third Circuit definitively stated that diversity, standing alone, is not a valid reason to implement race-conscious decisions. Then Judge, now Supreme Court Justice Alito sat on the Third Circuit panel and sided with the majority. This case is also important because prior to granting certiorari, the Supreme Court invited the Solicitor General to express his views on the legal issues presented in the case. The United States submitted an amicus brief to the Supreme Court, arguing that diversity is, indeed, a valid justification for race-conscious decisions.

The Solicitor General first argued that the writ of certiorari should have been denied because the case was not representative of the typical non-remedial affirmative action policy because the school district implemented the policy to foster diversity in a single department of a high school and because it used race in a layoff decision. Accordingly, the Solicitor General argued that the Court should wait for a case that presented the question of the validity of non-remedial affirmative action in a more typical Title VII context.

Significantly, however, the Solicitor General went on to argue that non-remedial affirmative action could be upheld if it survived strict scrutiny analysis. He made the following key arguments in response to the question of “whether Title VII prohibits race-conscious affirmative action in employment that is designed to foster diversity in the faculty of [an educational institution]:”

(1) Following the Court’s decision in *Adarand*, the Department of Justice issued an extensive memorandum to federal agencies offering three important guiding principles for applying strict scrutiny to non-remedial affirmative action:

First, to the extent affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective, beyond the mere achievement of diversity itself. Second, in some settings, in order to perform its mission, a government entity may have a compelling need for a diverse workforce that justifies the use of racial considerations. And third, to justify the use of race, there must be a convincing factual basis for the conclusion that the use of race is needed to promote the government’s mission; a broad assertion of operational need is insufficient. If those prerequisites are satisfied, narrowly tailored, non-

remedial affirmative action can be constitutional. . . . In our view, affirmative action that satisfies the three prerequisites set forth above and is narrowly tailored to further a compelling institutional mission also complies with Title VII.

Brief for the United States as Amicus Curiae, *Piscataway Twp. Bd. Ed. v. Taxman*, 519 U.S. 1089 (1997) (No. 96-679), 1997 WL 33561365, at *9 (citations omitted).

(2) Citing *Jacobson*, *Zaslowsky*, *Bakke*, and Justice’s Stevens’ dissent in *Wygant*, the Solicitor General argued:

Courts of appeals have [] held that a school district may constitutionally seek to provide a racially diverse faculty at each of its schools by using race as a factor in deciding the particular school to which a teacher is assigned. Such policies can serve multiple educational objectives: A faculty composed of persons with different backgrounds and experiences is likely to offer a wider array of educational perspectives. Children in the minority at a school may feel more welcome and able to learn when the staff is racially diverse. And exposing students to a diverse faculty on a daily basis can dispel stereotypes and misconceptions and foster mutual understanding and respect in a much more powerful and lasting way than imparting those lessons through words alone.

Id. at *12 (citations omitted).

(3) Arguing that “non-remedial affirmative action that satisfies constitutional standards also mirrors a purpose of Title VII,” the Solicitor General observed that in the legislative history of the 1972 amendments to Title VII:

Congress concluded that the exclusion of minority teachers from educational institutions profoundly affects the education of children: It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

Id. at 15 (citations omitted).

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Hill v. Ross,
183 F.3d 586 (7th Cir. 1999)

Plan/Action at Issue: Hiring; university faculty

University of Wisconsin blocked the hiring of Hill (male) to a tenure-track position in its clinical psychology department because the dean of the college wanted the department to hire a woman instead to meet the department's hiring goals pursuant to the University's affirmative action plan, which was implemented to find and assist members of underrepresented groups and not to remedy any past discrimination.

The lower court granted summary judgment for the University, holding that the decision was supported by a valid affirmative action plan. The Seventh Circuit reversed, finding that a reasonable jury could decide that: (1) the dean used Hill's sex as the sole basis for denying him the position, rather than one factor among many; (2) the dean's decision was not mandated by the affirmative action plan because the dean cared only about the results of the hiring process—hiring more women—rather than the openness of the outreach and recruitment process; and (3) the University failed to provide any “exceedingly persuasive” justification for its race-based decision, as it is required to do to survive constitutional scrutiny.

University and Community College System of Nevada v. Farmer,
930 P.2d 730 (Nev. 1997), *cert. denied*, 523 U.S. 1004 (1998)

Plan/Action at Issue: Hiring; community college faculty

The Nevada University system instituted a “minority bonus policy” by which a University department could hire an additional faculty member after the initial placement of a minority candidate. This policy was an unwritten amendment to the University's affirmative action policy. The University hired black male candidate into its sociology department. The plaintiff in this case (Farmer) was another finalist for that position. Farmer was hired into the department one year later, taking the additional position created by the minority bonus policy. She sued the University, alleging race and gender discrimination under Title VII, among other claims. A jury returned a verdict in Farmer's favor and the University appealed. The Nevada Supreme Court considered whether University's affirmative action plan survived strict scrutiny. Specifically, did the University have a compelling interest in implementing the plan to increase faculty diversity, and was it narrowly tailored to achieve its goal?

The Nevada Supreme Court upheld the affirmative action plan as constitutional. Relying on the Supreme Court's reasoning in *Bakke*, it held that the University had a compelling interest in fostering a culturally and ethnically diverse faculty. The court explained: “We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court.” 930 P.2d at 735. The court noted that a failure to attract minority faculty perpetuates the University's “white enclave” and “limits student exposure to multicultural diversity.” *Id.* at 97-

98. The court also determined that the minority bonus policy was “narrowly tailored to accelerate racial and gender diversity.” *Id.* at 98.

Jacobson v. Cincinnati Board of Education,
961 F.2d 100 (6th Cir.), *cert. denied*, 506 U.S. 830 (1992)

Plan/Action at Issue: Transfers; public school teachers

Plaintiffs, teachers and a teachers’ union, sued the Board of Education, alleging that its teacher transfer policy violated the Equal Protection Clause. The policy, adopted in 1970, was designed to ensure that the teaching staff at each school reflected the racial balance of the teaching staff of the entire school system. To achieve that balance, the policy restricted the voluntary transfer of some teachers and required reassignment of others.

The Sixth Circuit reasoned that *intermediate* scrutiny was the proper legal standard because while the Board’s transfer decisions were “race conscious,” the policy was race neutral because it applied equally to black and white teachers. 961 F.2d at 102. Applying intermediate scrutiny, the court held that the policy was substantially related to an important government interest. *Id.* at 103. In so holding, the court relied on the Supreme Court’s recognition in *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969), “that the attainment of an integrated teaching staff is a legitimate concern in achieving a school system free of racial discrimination.” *Id.* at 102.

Zaslowsky v. Board of Education,
610 F.2d 661 (9th Cir. 1979)

Plan/Action at Issue: Transfers; public school teachers

A class of approximately 25,000 teachers sued the Board of Education, alleging that a faculty integration plan violated the Equal Protection Clause and 42 U.S.C. § 1981. The goal of the plan was to ensure that the teaching staff at each school reflected the racial balance of the teaching staff of the entire school system, plus or minus ten percent. The plan would achieve that goal by first using voluntary transfers and then mandating transfers, if necessary. The Board implemented the plan in response to pressure from the Office of Civil Rights of the Department of Health, Education, and Welfare, which alleged that the Board’s voluntary plan that was already in place violated Title VI of the Civil Rights Act and that the racial composition of the students and faculty that existed at that time raised a presumption that the school district was assigning teachers in a discriminatory manner. 610 F.2d at 662.

The Ninth Circuit upheld the plan, explaining that its focus “was to enhance the educational opportunities available to the students by achieving better racial balance in the teaching faculty throughout the district,” an objective “well recognized and approved by the

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Supreme Court” in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *Id.* at 664.

b. Diversity in Other Contexts

Lomack v. City of Newark,
463 F.3d 303 (3d Cir. 2006)

Plan/Action at Issue: Transfers; firefighters

Recognizing that many of its firefighting companies were racially homogeneous, a city fire department implemented a race-based transfer and assignment policy to diversify the companies. Many firefighters were involuntarily transferred based solely on their race. The City acknowledged that there was no history of discrimination. After firefighters and their unions filed suit against the City, the City articulated three “compelling interests” for implementing its diversity policy: (1) to eliminate *de facto* discrimination, (2) to secure the educational, sociological, and job performance benefits of diverse fire companies, and (3) to comply with a consent decree that was more than 20 years old. The Third Circuit considered whether the City’s race-based transfer and assignment policy within its fire companies violated the Equal Protection Clause when any existing racial imbalance was not the result of past intentional discrimination by the City. Specifically, was securing the educational, sociological, and job performance benefits of a diverse firefighting company a compelling interest that justified a transfer and assignment policy employing racial classifications?

The Third Circuit held that the race-based transfer and assignment policy violated the Equal Protection Clause because none of the three interests asserted by the City were sufficiently compelling for the program to survive strict scrutiny. The court held that there was no remedial justification for the policy and rejected the City’s contention that using racial classifications to eliminate unintentional *de facto* segregation was appropriate. The court also held that the holding in *Grutter*—that the educational benefits of diversity are compelling—does not apply in this context. In so holding, the court explained, “*Grutter* does not stand for the proposition that the educational benefits of diversity are *always* a compelling interest, regardless of the context. Rather, it stands for the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate.” 463 F.3d at 310. Because the mission of the fire department was to fight fires, not to educate, the diversity argument was not sufficiently compelling.

Petit v. City of Chicago,
352 F.3d 1111 (7th Cir. 2003), *cert. denied*, 541 U.S. 1074 (2004)

Plan/Action at Issue: Promotions; police exam

The City relied on an examination as the basis for promotions of patrol officers to the rank of sergeant. The raw scores were standardized for race and ethnicity. Based on the exam results, the City promoted 402 candidates. Non-minority patrol officers who were not promoted sued the City alleging that the promotions violated their rights under the Equal Protection Clause. The City defended by arguing that it had a compelling interest in a diversified police force. On appeal, the Seventh Circuit considered whether the City's use of a test, standardized for race and ethnicity, to make promotion decisions violated the Equal Protection Clause. Specifically, was there a compelling need to have a diversified police force, and if so, were the procedures narrowly tailored to meet that goal?

The Seventh Circuit held that the City's actions survived strict scrutiny. First, relying on the reasoning in *Grutter*, the court determined that the City had a compelling interest in a diversified police force and that such diversity met an operational need of the police department. The court explained that diversity in a large metropolitan police force, charged with protecting a racially and ethnically divided major American city like Chicago, is "even more compelling" than diversity in the educational setting. The court deferred to the views of criminal justice experts and police executives regarding the necessity of the affirmative action plan (*e.g.*, when police officers are supervised by minorities, fears that the department was hostile to the minority community declined; and visible presence of minorities in supervisory positions was critical to effective policing in a racially diverse city because it helped earn the trust of the community).

Second, the court determined that the City's procedure of making promotion decisions based on the results of a test that was standardized for race and ethnicity was narrowly tailored to meet the goal of achieving a racially diverse police force.

Other cases have relied on *Petit* for the proposition that diversity is a compelling interest in law enforcement. For example in *Alexander v. City of Milwaukee*, 474 F.3d 437 (7th Cir. 2007), the parties agreed that the City had a compelling interest in a diversified police force. The court held in that case, however, that the race-conscious promotion policy was not sufficiently narrowly tailored to survive strict scrutiny.

Klawitter v. City of Trenton,
928 A.2d 900 (N.J. Super. Ct. App. Div. 2007)

Plan/Action at Issue: Promotions; individual police officer

A white detective sued the City, claiming reverse discrimination under New Jersey's Law Against Discrimination, after she was denied a promotion in favor of an African-American officer who had identical seniority and comparable or better qualifications. The appellate court upheld the jury verdict in favor of the white officer, finding that there was sufficient evidence to support the jury's verdict that race was a determinative factor in the City's decision. The court

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determined that the City did not have an affirmative action plan in place and held that “race can be considered in an employment decision only pursuant to and in accordance with an established affirmative action plan.” 928 A.2d at 918.

4. Consideration of Race in Outreach Efforts

Shuford v. Alabama State Board of Education,
897 F. Supp. 1535 (M.D. Ala. 1995)

Plan/Action at Issue: Outreach/hiring; state postsecondary educational system

A. Relevant Background Facts

This case involved reviewing the constitutionality of a consent decree in a class-action lawsuit brought by a class of African-American employees, and later joined by a class of women employees, against the Alabama State Board of Education. The decree sought to increase the pool of qualified applicants through recruitment.

B. Relevant Legal Issue

Was an affirmative action plan designed to increase the number of women and minorities in the pool of qualified applicants, but where neither race nor sex was a determination factor in hiring decisions, valid under the Equal Protection Clause and Title VII?

C. Holding

The court began its analysis by distinguishing between “inclusionary” and “exclusionary” affirmative action techniques, but noted that other courts had not explicitly analyzed affirmative action in that way. The court characterized inclusionary techniques as those that ensure that the pool of qualified candidates is as large as possible, increasing competition; whereas exclusionary techniques usually select some applicants over others from the pool. The key consideration in determining the validity of a program under the Equal Protection Clause, however, is its adverse effects on third parties. 897 F. Supp. at 1551. The court reasoned, “inclusive techniques impose no or slight adverse effects on third parties and are easier to justify than exclusion, which has significant potential to cause adverse consequences.” *Id.* at 1552. The court found that inclusionary techniques are both proper and desirable, and do not require traditional Equal Protection and Title VII analysis. However, exclusionary techniques that involve the selection process must survive traditional analysis under the Equal Protection Clause and Title VII.

The court concluded that the decree at issue in this case was inclusive, finding that the employment goals were neither quotas—setting aside or reserving jobs for women and minorities, nor selection goals—creating preferences of women or minorities. The court held that employment goals detailed in the decree required inclusive, sex-conscious techniques like recruitment and merely increased competition. Accordingly, the court found that traditional constitutional analysis was not necessary to determine that the legality of the decree. *Id.* at 1556

(explaining that only the sex-conscious provision of the decree that set a quota for the recruitment and selection committees necessitated traditional analysis).

Nonetheless, the court considered the legality of the decree under traditional constitutional analysis. In reviewing the constitutionality of the decree under Title VII and the Equal Protection Clause, the court noted that classifications based on race must survive strict scrutiny, while classifications based on sex must survive only intermediate scrutiny. With regard to the sex-conscious provisions, the court held that the remedies embodied in the decree were “substantially related to the goal of eradicating sex discrimination,” and did not unnecessarily trammel on the rights of men. *Id.* at 1567. Accordingly, the sex-conscious provisions of the decree were valid under both the Equal Protection Clause and Title VII. With regard to the race-conscious provisions of the decree, the court held that they were narrowly tailored to meet the compelling interest of remedying discrimination in the postsecondary educational system. The court found that the decree provided justified reforms to rectify the effects of discrimination against women and minorities in Alabama.

D. Significance

This case is significant in that it deals with outreach efforts that broaden the pool of qualified applicants, rather than affirmative action in hiring decisions. The court detailed the distinction between inclusive and exclusive affirmative action techniques, a distinction that was suggested as early as 1986 by Justice Stevens in his dissent in *Wygant*, 416 U.S. at 316, but had never been adopted as acceptable analysis of the legality of affirmative action plans. The court suggested that plans that are inclusive and that do not adversely affect third parties are legal and need not be subject to traditional analysis. The court considered the affirmative action plan under traditional constitutional analysis, however, recognizing that “relying on the distinction between inclusion and exclusion at all is a deviation from general affirmative-action case law.” 897 F. Supp. at 1556. The court found that a plan survives strict scrutiny and is consistent with Title VII where, as here, it is conscious of race or sex in its efforts to broaden the applicant pool and therefore increases competition among applicants, but where neither race nor sex is a factor in the selection of specific applicants.

Duffy v. Wolle,
123 F.3d 1026 (8th Cir. 1997)

Plan/Action at Issue: Hiring; individual probation officer

A panel of three United States District Judges appointed a female applicant to a vacant Chief United States Probation Officer position over a male applicant (Duffy). At the suggestion of the Administrative Office of the United States Courts, the vacant position was advertised in a publication that was circulated nationwide to all probation officers to reach a “diverse pool of applicants.” Duffy sued, alleging reverse discrimination. The lower court granted summary judgment for the panel, and the Eight Circuit affirmed. The court determined, in relevant part, that the Administrative Office’s interest in obtaining a diverse pool of applicants did not support

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a finding that the panel's proffered non-discriminatory reasons for hiring the female candidate were in fact a pretext for intentional discrimination. 123 F.3d at 1038-39.

The court explained: "An employer's affirmative efforts to recruit minority, female applicants does not constitute discrimination. An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. This not only allows employers to obtain the best possible employees, but it is an excellent way to avoid lawsuits. The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, is not an appropriate objection, and does not state a cognizable harm." *Id.* at 1039 (internal citations omitted).

Sussman v. Tanoue,
39 F. Supp. 2d 13 (D.D.C. 1999)

Plan/Action at Issue: Promotion; individual FDIC employees

Plaintiffs, white males, alleged that an affirmative action program of the Federal Deposit Insurance Company ("FDIC") was discriminatory because it called for quotas for women and minorities at the expense of white males. The court ruled for the defendants.

Through its affirmative action plan, the FDIC had collected data about the racial and gender make-up of its workforce, noted dramatic disparities relative to the general labor force, and made efforts to reduce those disparities through monitoring hiring practices and eliminating artificial barriers. Notably, the program did not give the FDIC's Affirmative Employment and Counseling Section, the section charged with overseeing the program, the authority over the hiring process. The court found that "the FDIC had taken steps to ensure that no person [was] denied equal employment opportunity with the agency, but the agency d[id] not give any specific group or person a preference in hiring." 39 F. Supp. 2d at 25.

Relying on *Duffy, Shufford*, and other case law, the court noted that "[c]ourts have consistently declined to apply strict scrutiny to outreach efforts to minorities which do not accompany actual preferences." *Id.* The court drew a careful distinction between those cases and *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), where the D.C. Circuit held that FCC regulations that provided strong incentives for radio stations to grant racial preferences in hiring were subject to strict scrutiny. The court explained that in *Lutheran Church*, the FCC regulations put pressure on stations to make race-based hiring decisions. By contrast, "the program in this case falls within the category of programs, those conscious of race but devoid of ultimate preferences, which have been consistently upheld by courts." 39 F. Supp. 2d at 27. Accordingly, the court held that the FDIC's affirmative action plan did not need to be examined under strict scrutiny and that it was legal under both Title VII and the Equal Protection Clause.

MD/DC/DE Broadcasters Association v. FCC,
236 F.3d 13 (D.C. Cir. 2001)

Plan/Action at Issue: Outreach/recruitment; radio broadcasters

Broadcasters challenged a FCC rule requiring licensees to achieve a broad outreach in their recruiting efforts, arguing that the rule violated the equal protection component of the Fifth Amendment. The court held that the strict scrutiny standard of review applied in the context of determining constitutionality of those affirmative action outreach efforts. Specifically, the court determined that a government mandate for recruitment targeted at minorities constituted a racial classification that subjected persons of different races to unequal treatment. Here, for example, the FCC rule made it less likely that non-minorities would receive notification of job openings solely because of their race.

In so holding, the court questioned the ruling by Eleventh Circuit in *Allen v. Alabama State Board of Education*, 164 F.3d 1347 (11th Cir. 1999), *vacated*, 216 F.3d 1263 (11th Cir. 2000), that strict scrutiny is inapplicable in affirmative outreach situations where “the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race broadening the pool of applicants, but disadvantaging no one.” 236 F.3d at 20 (quoting *Allen*, 164 F.3d at 1352). The court expressly disagreed with the Eleventh Circuit’s conclusion that preferential recruiting “disadvantages no one.” *Id.* (quoting *Allen*, 164 F.3d at 1352). Holding that the FCC’s rule was subject to review under strict scrutiny, the court explained: “that the most qualified applicant from among those recruited will presumably get the job does not mean that people are being treated equally—that is, without regard to their race—in the qualifying round.” *Id.* at 21.

Relying on its holding in *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998), the court explained that promoting “programming diversity” is not a compelling interest and questioned whether the FCC had a compelling interest for the rule at issue. The court held that the FCC rule did not survive strict scrutiny, regardless of any purported compelling interest, because its “sweeping” requirements were not narrowly tailored to meet a compelling interest. 236 F.3d at 22.

In this case, the D.C. Circuit held that outreach efforts targeted solely at recruiting minorities are subject to strict scrutiny review. Notably, however, the court did not examine the distinction made by the District Court in *Sussman* between outreach plans that create pressure to make race-based hiring decisions and those that do not, and it made no mention of the Eighth Circuit’s decision in *Duffy*. The Supreme Court has not yet had the opportunity to weigh in and resolve what seems to be an emerging split among the circuit courts on what standard of review is applicable to outreach efforts.

Hammer v. Ashcroft,
383 F.3d 722 (8th Cir. 2004)

Plan/Action at Issue: Promotion, individual corrections officer

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Hammer, a white male, filed suit alleging race and age discrimination when he was twice denied a promotion in favor of first an African-American and then a man six years younger than him. The Eighth Circuit affirmed the lower court's grant of summary judgment against Hammer on both claims. The court relied on its holding in *Duffy*—that inclusive recruitment efforts do not constitute discrimination—to reject Hammer's race claim.

5. Consideration of Race to Avoid Disparate Impact Liability

Ricci v. Destefano (Firefighters)

129 S. Ct. 2658 (2009), *reversing* 530 F.3d 87 (2d Cir. 2008) and 554 F. Supp. 2d 142 (D. Conn. 2006)

Plan/Action at Issue: Promotions; firefighter exam

A. Relevant Background Facts

The New Haven Fire Department administered oral and written examinations for promotion to Lieutenant and Captain. Pursuant to merit selection rules mandated by local law and the results of the exam, certain firefighters qualified for the opportunity to be promoted. For promotion to lieutenant, 34 out of 77 examinees passed the exam (25 white, 6 black, and 3 Hispanic), but only 10 white firefighters were eligible for promotion. For promotion to captain, 22 out of 41 examinees passed the exam (16 white, 3 black, and 3 Hispanic), but only 9 were eligible for promotion (7 white and 2 Hispanic). The City of New Haven ("City") determined that the test results yielded a racially disparate impact and ultimately decided not to certify the test results. Without certification, the promotion process could not proceed, and the City did not make any promotions.

The white and Hispanic firefighters who took the exam, and who were allegedly passed over for promotion, filed suit alleging violations of Title VII and the Equal Protection Clause. At trial, the plaintiffs argued that the City inappropriately relied on race in deciding not to certify the test results. With regard to Title VII, plaintiffs claimed that the City's admitted desire to comply with Title VII's anti-disparate-impact requirements was a pretext for intentional discrimination against plaintiffs—that the City's diversity rationale was prohibited as reverse discrimination under Title VII. 554 F. Supp. 2d at 151, 157-58. Although the City did not conduct a validity study of the test prior to rejecting its results, it did determine that the racial disparity in the results showed an adverse impact under the EEOC's guidelines. *Id.* at 153-54. Nonetheless, plaintiffs asserted that the City's failure to conduct the validity study or explore other alternatives was a violation of Title VII. Plaintiffs also argued that the City violated the Equal Protection Clause by either applying a race-based classification system for promotion or employing a neutral system in a discriminatory manner.

The District Court heard arguments on cross motions for summary judgment. The District Court awarded summary judgment to the City, determining that the City's decision not to certify the test results was not in violation of either Title VII or the Equal Protection Clause. The lower court determined that intent to remedy disparate impact of the exam "is not equivalent to an intent to discriminate against non-minority applicants." *Id.* at 158-59. Although the City

considered race in deciding not to certify the test results, the result was race neutral because all the test results were discarded and no one was promoted. The Second Circuit affirmed. The Supreme Court reversed.

B. Relevant Legal Issue

Was the City’s decision to reject the test results and not promote any firefighters a violation of Title VII and the Equal Protection Clause? Specifically, where a promotion process was race neutral but yielded unintended, racially disproportionate results, did the City’s decision to reject the results—because it hoped to achieve racial proportionality in promotions—run afoul of Title VII and the Equal Protection Clause?

C. Holding

The Supreme Court reversed the holding of the district court and the Second Circuit. Justice Kennedy delivered the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. The Court noted that, “however well intentioned or benevolent it might have seemed,” the City’s decision not to certify the results was based on race. 129 S. Ct. 2674. In this context, the Court articulated the issue before it as “whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination.” *Id.*

The majority of the Court held that, “under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.” *Id.* at 2677. The Court reasoned that “fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.” *Id.* at 2681. The majority further held that summary judgment for the City was inappropriate because the City “lacked a strong basis in evidence to believe it would face disparate-impact liability of it certified the examination results.” *Id.*

The Court recognized that the racial adverse impact was “significant” and that the City faced a *prima facie* case of disparate-impact liability because of the small number of minority firefighters (compared to white firefighters) who were eligible for promotion. *Id.* at 2677-78. But the majority concluded that “a *prima facie* case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity, and nothing more—is far from a strong basis in evidence” that the City would have been liable for disparate-impact discrimination had it certified the test results. *Id.* at 2678. The Court reasoned that a *prima facie* case of disparate impact liability is not—by itself—a strong basis in evidence of liability because the City would only be liable if evidence showed that the test was not job related and consistent with business necessity or if there was an equally valid but less discriminatory alternative that the City knew about but failed to adopt. *Id.* The majority found no such evidence in the record.

Although the firefighters alleged violations of both Title VII and the Equal Protection Clause, the Court reached its decision only on Title VII grounds. *Id.* at 2681.

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Justices Scalia and Alito wrote separate concurring opinions.

Dissent

Justice Ginsburg authored the dissenting opinion, which was joined by Justices Stevens, Souter, and Breyer. Justice Ginsburg disagreed with the majority's determination that Title VII's disparate-treatment and disparate-impact provision conflict:

Standing on equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity.

Yet the Court today sets at odds the statute's core directives. When an employer changes an employment practice in an effort to comply with Title VII's disparate-impact provision, the Court reasons, it acts "because of race"—something Title VII's disparate-treatment provision generally forbids. This characterization of an employer's compliance-directed action shows little attention to Congress' design or to [the Supreme Court's] line of cases Congress recognized as path-marking.

Id. at 2699 (citation omitted).

Justice Ginsburg criticized the Court's adoption of the strong-basis-in-evidence standard from equal protection jurisprudence because the Equal Protection Clause prohibits only intentional discrimination and does not have a disparate-impact component. *Id.* at 2700. "Title VII, in contrast, aims to eliminate all forms of employment discrimination, unintentional as well as deliberate." *Id.*

She explained that the majority's holding also conflicts with "a dominant Title VII theme . . . that the statute should not be read to thwart efforts at voluntary compliance." *Id.* at 2701 (citations omitted). She reasoned that the Court's holding will require employers to establish a "provable, actual violation" against themselves before taking voluntary action to comply with the disparate-impact provision of Title VII, a standard that, in her view, is contrary to settled law and the purpose of the statute. *Id.* And she noted that even in cases applying the strong-basis-in-evidence standard, the Court has never before suggested that anything beyond a *prima facie* case would have been required to justify voluntary action consistent with Title VII's disparate-impact proscription. *Id.* at 2702 n.7.

Reading Title VII's disparate-treatment and disparate-impact proscriptions as complementary, and in keeping with the purpose of the statute -- ending workplace discrimination -- Justice Ginsburg offered an alternative analysis:

[A] employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity.

Id. at 2699. Justice Ginsburg reasoned that, here, the City “had ample cause to believe its selection process was flawed and not justified by business necessity.” *Id.* at 2703-07

D. Significance

Because the Court decided this case under Title VII, the holding applies to both public and private entities. In adopting the strong-basis-in-evidence standard, the Court arguably raised the bar for employers who wish to act voluntarily to eliminate unintentional discrimination resulting from race-neutral selection devices.

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APPENDIX IV: Diversity Considerations as They Relate to the First Amendment and Academic Freedom

Colleges and universities, whose three-pronged educational missions embrace providing excellent educational experiences for all students, producing excellent research to increase and disseminate knowledge, and serving the nation's needs for a well-prepared citizenry and workforce, have a compelling interest in creating a broadly diverse student body²⁷⁶ and faculty.²⁷⁷ Public colleges and universities play a special role in society by providing otherwise unavailable broadly affordable access to higher education.²⁷⁸ Many public and private institutions of higher education require a broadly diverse community in order to provide excellent educational experiences and deliver excellent research in a global, multicultural and diverse society.²⁷⁹ A broadly diverse academic community is fundamental to higher education's endeavor to best serve all students, and to contribute to solutions that will enable our nation and society-at-large to progress and prosper. Many institutions' faculties have found and embraced this necessity.

Neither free speech interests protected by the First Amendment to the U.S. Constitution that apply in public educational institutions,²⁸⁰ nor principles of academic freedom that apply in most public and private institutions of higher education, are offended when the institution appropriately considers whether a faculty member's *conduct* in class, the research laboratory or advising activities furthers the institution's educational mission-driven diversity objectives when making hiring, promotion or tenure decisions. This consideration does not judge the faculty member's viewpoint or the content of speech, nor does it depend on the faculty member's race or

²⁷⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 325, 330-32, 338-39 (2003).

²⁷⁷ See *Univ. and Comm. College Sys. of Nev. v. Farmer*, 930 P.2d 730, 735 (Nev. 1997) (faculty diversity is a compelling interest in a manner similar to student body diversity in higher education that may justify consideration of race in faculty hiring), *cert. denied*, 523 U.S. 1004 (1998); cf. *Rudin v. Lincoln Land Comm. College*, 420 F.3d 712, 721 (7th Cir. 2005) (district court granted summary judgment for college, which argued that compelling diversity interests justified consideration of race in a faculty hiring, but diversity argument not made on appeal).

²⁷⁸ See *Grutter*, 539 U.S. at 331-32.

²⁷⁹ This is particularly the case in science, technology, engineering and mathematics ("STEM") fields because STEM fields are critical to the economic strength and security of the nation. In light of national demographics, which demonstrate that African Americans, Hispanics and Native Americans and women are severely underrepresented in STEM higher education and careers, while their numbers are increasing in the college age and total U.S. populations, there is a national imperative to increase the racial and gender diversity of STEM higher education, business and industry in a short time. Other underrepresented groups include students who are first-generation college-goers. If higher education fails to meet this national need, the nation's leadership in higher education, innovation and the global economy, as well as our national security, may be expected to decline. See Volume I, *supra*; see also Arthur L. Coleman, Scott R. Palmer, Jennifer Rippner, and Richard W. Riley, *A 21st-Century Imperative: Promoting Access and Diversity in Higher Education, A Policy Paper on Major Developments and Trends* (College Board and American Council on Education, October 2009).

²⁸⁰ The First Amendment applies through the 14th Amendment to state institutions of higher education. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925); see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993).

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gender; it evaluates the effectiveness of the faculty member's workplace conduct. There are also certain circumstances in which reasonable regulation of speech is necessary and appropriate in an academic setting.

Academic Freedom and Responsibility

Freedom to express ideas, however controversial and offensive, is a deeply held value, a veritable foundation of the intellectual freedom that defines great institutions of higher education, public and private.²⁸¹ This academic freedom, which extends to the institution itself as well as to faculty and students, is a fundamental policy governing academic life, quite apart from the law. A faculty member's academic freedom, as conferred by the institution as a matter of culture and policy, is recognized by most institutions of higher education, regardless of the as-yet to be fully defined extent to which it is also afforded legal protection under the First Amendment.

Academic freedom is accompanied by the countervailing policy of academic responsibility, which is also a foundation of academic culture and is embedded in many institutions' internal regulations and, indeed, in federal research funding agencies' requirements.²⁸² Members of the college and university community have the responsibility, in the exercise of their academic freedom, to act legally, ethically, and with academic honesty (e.g., in scholarship, research, test-taking, and grading); and to not unreasonably interfere with the ability of others in the academic community to participate fully in academic life. Faculty members have the responsibility to commit their primary effort to the fulfillment of their core mission-driven duties of teaching, research and service.

That one faculty member's or student's speech may offend another is not a breach of this responsibility; it is sometimes the necessary consequence of an open intellectual dialogue or debate. An institution may encourage its members to respect one another's right to express differing views, to communicate in a manner that will evidence that respect, and to communicate effectively (which often means with some modicum of diplomacy so that others may more willingly listen). However, there are times when an exchange of ideas will be highly offensive to some or even many in the academic community of a college or university.²⁸³ At the same time,

²⁸¹ See, e.g., YALE UNIV., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE 5 (1975) ("The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views."); COMMITTEE ON A CIVIL, SAFE, AND OPEN ENVIRONMENT, UNIVERSITY OF FLORIDA, FINAL REPORT (2008); NARRATIVE REPORT AND GENERAL RECOMMENDATIONS, TASK FORCE ON ASSEMBLY AND EXPRESSION, UNIVERSITY OF TEXAS AT AUSTIN (2002).

²⁸² See, e.g., YALE UNIV., *supra* note 281; AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS [hereinafter AAUP 1940 Statement] ("Institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole" and academic freedom in teaching and learning is accompanied by "duties correlative with [such] rights."); 42 C.F.R. §§ 50, 93 (Public Health Service, Office of Research Integrity regulations); 2 C.F.R. § 180.

²⁸³ See, e.g., *supra* note 281.

making statements that are offensive is one thing, and creating an environment in the classroom, research laboratory, or office that undermines the core mission of the institution—or are so hostile to another that s/he cannot, as a reasonable person, be expected to work there—is another matter entirely and would offend the responsibility that accompanies academic freedom.

First Amendment Protections

While the legal boundaries of academic freedom have not been fully drawn, the Supreme Court has clearly held that the academic freedom of an *institution* of higher education is protected by the First Amendment to the U.S. Constitution. The U.S. Supreme Court has recognized the special and fundamental role of colleges and universities in the preparation of future generations to fully participate as citizens and leaders in our democratic society, as well as their fundamental role in the creation of a well-prepared workforce in support of our economic strength and national security.²⁸⁴ The Court has recognized that, if institutions of higher education are to fulfill these critical roles in our society, then as long as such institutions operate within Constitutional and legal boundaries, they have a First Amendment-protected interest in exercising their discretion as to academic matters.²⁸⁵

Justice Powell’s plurality opinion in *Regents of the University of California v. Bakke*²⁸⁶ recognizes a university’s academic freedom as “a special concern of the First Amendment” and quotes Justice Frankfurter’s concurring opinion in *Sweezy v. New Hampshire*²⁸⁷ for the essential elements of that freedom. Justice Frankfurter acknowledges that the government must refrain from interfering in the “intellectual life of a university” and that there are “‘four essential freedoms’ of a university to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”²⁸⁸ While the case was decided on due process, not First Amendment, grounds,²⁸⁹ Justice Frankfurter’s articulation of

²⁸⁴ *Grutter*, 539 U.S. at 331-32; *Widmar v. Vincent*, 454 U.S. 263, 278-79 n.2 (1981) (Stevens, J., concurring); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (The Court held that the New Hampshire Attorney General, acting as agent for the state legislature, could not, on due process grounds, compel a citizen who is a professor to testify as to the content of his class lectures. The offending questions sought to determine the professor’s personal viewpoint on socialism. While not basing its ultimate decision on the First Amendment, the Court recognized important First Amendment protected interests in academic freedom, stating, “The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.”).

²⁸⁵ *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking [sic] by the academy itself.” (citation omitted)); Arthur L. Coleman and Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 1 (Summer 1996).

²⁸⁶ *Bakke*, 438 U.S. at 312.

²⁸⁷ *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)

²⁸⁸ *Id.* (quoting from senior scholars at the University of Cape Town and University of the Witwatersrand, South Africa); *Grutter*, 539 U.S. at 363; *Bakke*, 438 U.S. at 312.

²⁸⁹ *Sweezy*, 354 U.S. at 254-55.

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the important relationship of academic freedom and the First Amendment forms the basis of later decisions that depend on recognition of a college' or university's First Amendment-protected interests in that freedom.

Justice O'Connor's majority opinion in the University of Michigan law school admissions case, *Grutter v. Bollinger*,²⁹⁰ leaves no doubt that the Supreme Court has in fact recognized that institutions of higher education have an important First Amendment-protected interest in exercising academic discretion. It is this First Amendment interest upon which Justice O'Connor relies to find a context in which the Court will recognize the compelling educational interest in a broadly diverse student body that can survive strict judicial scrutiny on Equal Protection grounds and justify the consideration of race in student admissions decisions.²⁹¹ The Court's binding endorsement of this interest as being within the First Amendment's ambit represents one of the greatest victories for higher education and the nation.

For important societal reasons wrapped up in the role of higher education in our society, as well as the roles of faculties and students in higher education, the government must also refrain from regulating the intellectual freedom of individual faculty and students to freely explore and debate their ideas in the context of public higher education.²⁹² The Supreme Court has observed the importance of faculties and students to the achievement of the institution's compelling educational mission, as well as the importance of ensuring freedom from government intrusion on the academic discretion of faculties and students.²⁹³ However, while the Court has clearly recognized the institution's First Amendment-protected academic discretion to decide "who may teach, what may be taught, how it shall be taught . . . ,"²⁹⁴ the Supreme Court has never squarely decided the extent of any First Amendment-protected academic freedom of a faculty member, or whether any such individual interest could prevail when in conflict with that of the institution.²⁹⁵

²⁹⁰ *Grutter*, 539 U.S. at 331-32. The most recent articulation is in *Parents Involved In Comm. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2753-54, 2792-95 (2007) (Kennedy, J., concurring) (Chief Justice Roberts, writing for the Court, states that "we have recognized as compelling for purposes of strict scrutiny...the interest in diversity in higher education upheld in *Grutter*" and in so doing, "relied upon considerations [i.e., expansive free speech rights] unique to institutions of higher education" and Justice Kennedy's needed concurrence in the result, distinguishing his view of diversity as being a compelling educational goal at all educational levels in a nation whose history includes segregation and where *de facto* segregation is still present).

²⁹¹ See *Grutter*, 539 U.S., at 329, 331-32.

²⁹² *Sweezy*, 354 U.S. at 250 (stating that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." The case involved forced testimony of a citizen, who is a college professor, concerning the content of his lectures as they relate to his beliefs regarding socialism).

²⁹³ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy*, 354 U.S. at 250 (stating that were the government to "impose any strait jacket upon the intellectual leaders in our colleges and universities [that] would imperil the future of our Nation").

²⁹⁴ *Sweezy*, 354 U.S. at 263; see *Grutter*, 539 U.S. at 331-32.

²⁹⁵ See *Grutter*, 539 U.S. at 331-32 (institution's First Amendment protected academic freedom to determine that broad student body diversity is a compelling need in order to achieve its educational mission); *Ewing*, 474 U.S. at 226, n.12 (stating that the academy itself has autonomous authority to make academic decisions and academic

The former General Counsel of the American Association of University Professors (“AAUP”) has opined that faculty members have or should have their own legally protected right to academic freedom independent from that which the institution holds.²⁹⁶ The AAUP clarifies the dimensions of that freedom by recognizing the importance of both academic freedom and corresponding academic responsibility. Even in recognizing the faculty member’s right to speak as an individual citizen without institutional censorship,²⁹⁷ the AAUP recognizes that, at least in clear circumstances, the institution may find “extramural utterances” of a faculty member to be so at odds with the faculty member’s duties as to justify initiation of disciplinary action.²⁹⁸ The Fourth Circuit, the Third Circuit, and a concurring opinion in the D.C. Circuit have rejected the notion of independent, legally protected academic freedom of faculty members.²⁹⁹ The Seventh Circuit has recognized both the faculty member’s and the institution’s academic freedom, while

freedom depends on the exercise of that authority, although this may seem inconsistent with individual academic freedom); *Bakke*, 438 U.S. at 312 (institution’s First Amendment protected academic freedom to determine that broad student body diversity is necessary may be a compelling interest in student admissions, but the means of achieving that interest must be narrowly tailored); *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (noting that, if the Supreme Court “constitutionalized a right of academic freedom,” it has recognized the right of the institution, not that of the individual).

²⁹⁶ See David M. Rabban, ACADEMIC FREEDOM, INDIVIDUAL OR INSTITUTIONAL?, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 2001.

²⁹⁷ As discussed in this article, the rights of an individual when acting as a citizen are broader than the rights of an individual when acting as a public employee. See *infra* notes 310-320 and accompanying text.

²⁹⁸ See AAUP 1940 Statement, *supra* note 282, at 3 (“Institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition . . . [which] carries with it duties correlative with rights.” While faculty “are citizens, members of a learned profession, and officers of an educational institution,” and they “should be free from institutional censorship or discipline” when they speak as citizens, “their special position in the community imposes special obligations” for them to “at all times be accurate, . . . exercise appropriate restraint, . . . show respect for the opinions of others, and . . . make every effort to indicate that they are not speaking for the institution.” If the institution’s administration feels that a faculty member has failed to fulfill this responsibility and “believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher’s fitness for his or her position,” it may engage the disciplinary process.)

²⁹⁹ *Emergency Coalition to Defend Educ. Travel v. U.S. Treasury*, 545 F.3d 4, 12-14 (D.C. Cir. 2008) (holding that, when a coalition of professors challenged the trade embargo by the U.S. of Cuba, which limits academic travel to Cuba, as violative of their First Amendment-protected academic freedom, the foreign policy interests of the U.S. are a compelling interest, and any First Amendment right to academic freedom was not infringed); *id.* at 18 (Silberman, J., concurring) (arguing that any First Amendment interest inures to the universities, not to the individual professors); *Brown v. Armenti*, 247 F.3d 69, 74-78 (3d Cir. 2001); *Urofsky*, 216 F.3d at 412 (upholding a state statute barring use of state computers for sexually explicit material, but allowing a university’s leader to provide exceptions for bona fide research, the court found that if academic freedom is a constitutional right, it attaches to the institution, not to the professor individually); *Edwards v. Ca. Univ. of Pa.*, 156 F.3d 488, 491-92 (3d Cir. 1998) (First Amendment does not restrict university’s right to control curriculum and to establish related policy); RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 17:31.50, at 2-4 (2009); *cf. Burt v. Gates*, 502 F.3d 183, 189-91 (2d Cir. 2007) (Yale law school professors unsuccessfully sought independent First Amendment-protected academic freedom not to be forced to associate with military recruiters on the same terms as other recruiters, due to a fundamental disagreement with the military’s policies on homosexuality, when the Supreme Court had rejected universities’ rights in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006)).

weighing the institution's interest more in circumstances where the faculty member may exercise his right in an alternative manner.³⁰⁰

Whatever the dimensions of a faculty member's academic freedom are, consideration of a faculty member's personal social-political *viewpoint* in a tenure or promotion decision likely would violate First Amendment interests (if involving a public institution) and academic freedom principles. However, the effectiveness of the faculty member's conduct in fostering productive collaborations among broadly diverse students, junior faculty and peers in the classroom and research laboratory concerns conduct in a critical work-related function—not his or her personal viewpoints. And these considerations are appropriate for any government employer and do not offend the Constitution or academic freedom.

General First Amendment Concepts

Without fully addressing the complex universe of the First Amendment, there are some important concepts to keep in mind. Different First Amendment interests may attach in different activities and locales on campus. This is another constitutional regime in which context matters, as it does in applying the compelling diversity rationale to admissions.³⁰¹

The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In U.S. Supreme Court jurisprudence, there is a hierarchy of First Amendment-protected speech interests, with political/social-political and religious speech at the apex.³⁰² Expressions of viewpoint about race and gender would generally fall under political and, possibly, religious speech. With limited exceptions, the *content* (i.e., language used, subjects addressed, viewpoint expressed) of such speech may not be regulated by the government (including public colleges and universities), unless the regulation satisfies the standard of strict judicial review. There must be a compelling government interest that requires the regulation, and the manner of regulation

³⁰⁰ *Piarowski v. Ill. Comm. Coll. Dist.*, 759 F.2d 625, 629-33 (7th Cir. 1985) (institution may compel relocation of administrator/faculty member's sexually explicit and racially offensive art work from a location in which the administration judged it to have an adverse effect on university interests, where faculty could exhibit the work elsewhere).

³⁰¹ *Cf. Grutter*, 539 U.S. at 327.

³⁰² *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) (holding that a school district's actions did not create a public forum and rejecting a First Amendment claim by a teacher's union when the district had forbidden them to use the intramural mail system but allowed another union to use it); *See Coleman and Alger*, *supra* note 18.

must also be narrowly tailored, not overbroad, to achieve that interest. The regulation may not limit more speech or burden speech more than is necessary to achieve the interest.³⁰³

Not all, even political and religious speech, is protected by the First Amendment, however. Certain defamatory speech is not protected and may be prohibited.³⁰⁴ Also, speech that is likely to incite imminent unlawful or violent action or to create an imminent unsafe condition, speech that is aimed at violence against a particular person or persons (hate speech and fighting words), and obscene—not just profane—speech,³⁰⁵ are not protected by the First Amendment and may be prohibited. Hate speech, including speech that is aimed at inciting violence against racial minorities, women, or persons based on their sexual orientation, is not protected and may be prosecuted.³⁰⁶ Academic freedom, which is accompanied by academic responsibility, also would not be offended by the prohibition of such speech. However, expressing views that are offensive about minorities, women or others – without more – is not hate speech. Some faculty will have such personal views. While the institution need not embrace such views and may express a hope for understanding and inclusion, with limited exceptions individual faculty members may generally express their personal views in at least some campus settings, both as a matter of academic freedom policy and, for public institutions, as a matter of Constitutional law.

Where First Amendment-protected speech interests are involved, they are analyzed by the courts in the context of the forum (public or non-public) in which speech interests are exercised,³⁰⁷ as well as whether the content (language, subject and viewpoint) of the speech, or only the time, place and manner of the speech, are being regulated.³⁰⁸

³⁰³ There must be a compelling interest and a narrowly-tailored approach to regulate the content of protected speech. The regulation must avoid vagueness and make reasonably clear what content is and is not allowed to avoid a “chilling” effect on protected speech. The officials implementing the regulation must do so consistently and may not be given unbridled discretion in its application. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992); *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

³⁰⁴ Defamatory speech (i.e., untrue, speech casting the professional or moral reputation of an individual or institution in a negative light) with actual malice by the press or about matters of public concern or public officials or figures, and untrue defamatory speech about private persons on subjects not of public concern, are not protected. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³⁰⁵ See *Miller v. California*, 413 U.S. 15, 24 (1973) (defining the test for unprotected obscene speech); *Cohen v. California*, 403 U.S. 15, 26 (1971) (“Fuck the Draft” on a jacket worn silently in political protest at a courthouse is not obscene speech and is protected); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words, “which by their very utterance inflict injury or tend to incite an immediate breach of the peace,” are not protected). Obscene speech is speech that appeals to a prurient—shameful or morbid—sexual interest as defined by local community standards, is patently offensive as defined by local community standards, and lacks serious redeeming artistic, literary, political, or scientific value as defined by national standards. See *Miller*, 413 U.S. at 24.

³⁰⁶ See 18 U.S.C. § 245 (2007); see *Coleman and Alger*, *supra* note 18.

³⁰⁷ *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802-03 (1985). *Traditional Public Fora* are those locations and other fora that have traditionally and historically been generally open to the public for assembly and free speech, such as public parks and sidewalks. *Id.* Whether a location is an open public forum depends on the traditional and historic use of the location for free speech, not whether the government presently intends to make the area open for this purpose. *Limited or Designated Public Fora* are those areas and other fora that are not traditional open public fora, but that

In nonpublic fora, such as classrooms, research laboratories and offices, more government regulation of speech is permitted under the First Amendment and only a rational basis standard of judicial review applies, requiring that the regulation have some reasonable relationship to a legitimate work-related purpose.³⁰⁹ In the special context of a college or university, the culture of academic freedom influences, and tempers, the exercise of the institution's right to regulate speech.

First Amendment And Employee Speech

Faculty members are employees. However, their special role at an institution of higher education, where they are academic officers and the intellectual leaders of the institution,³¹⁰ influences the weighing of the faculty/employee's and the institution/employer's First Amendment interests. While public employers have broad (albeit not limitless) *legal* discretion to regulate employee work-related speech and performance,³¹¹ the culture and societal role of the higher education setting often result in greater accommodation of individual faculty freedom than public employees would have in some other settings. However, consideration of whether a faculty member's *conduct* in the classroom, in the research laboratory, or in fulfilling advising and other service responsibilities meets the high standards of inclusion established by an

the government intends to, and purposefully does, make available to the public generally or to a category of people (e.g., all students or all members of the campus community) for assembly and free speech, sometimes relating to particular purposes or topics (e.g., an open microphone for public questions at the time and in accordance with the protocols established at an open forum for students on the Iraq war). A limited or designated public forum is treated as a traditional open public forum for the category of people and purposes and the time period for which the government has made the area available. *Cornelius*, 473 U.S. at 802-03; *Perry Educ. Ass'n*, 460 U.S. at 45-46.

³⁰⁸ While regulation of the content of speech (subject, language and viewpoint) in public fora must generally satisfy strict judicial scrutiny and will be upheld only when justified by a compelling interest and a narrowly tailored approach, even the most protected First Amendment interests (political and religious speech) exercised in the most protected fora for speech (open public fora), may be subject to reasonable time, place and manner limitations. *Cornelius*, 437 U.S. at 818 (Blackmun, J., dissenting). An intermediate standard of judicial review applies to determine the propriety of time, place and manner restrictions in any public or designated public forum. Such regulations must be imposed without regard to the content of the speech and must serve an important government interest (e.g., safety, efficient use of limited public resources, ability to schedule use and sharing of resources, and protection of other activities through noise, sanitation, or other legitimate controls). *See id.* These restrictions must be reasonably narrowly designed—even if not the least restrictive and most narrowly targeted approach—to achieve the important government interest. Typically, in addition to being justified by an important purpose, there must be another time and place where the protected speech may be expressed, and the limitations must be applied consistently by officials who do not have unbridled discretion in their application. *Cornelius*, 437 U.S. at 802; *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry Educ. Ass'n*, 460 U.S. at 45-46.

³⁰⁹ *See Perry Educ. Ass'n*, 460 U.S. at 49 (“Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.”); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum); *Justice for All v. Faulkner*, 410 F.3d 760, 765 (5th Cir. 2005).

³¹⁰ *See AAUP 1940 statement, supra* note 282, at 3; *supra* note 298 and accompanying text.

³¹¹ *Garcetti v. Ceballos*, 547 U.S. 410, 417-18 (2006).

institution of higher education to serve its mission, neither violates the First Amendment, nor prevailing principles of academic freedom.³¹²

The U.S. Supreme Court has held that individuals do not “surrender all their First Amendment rights” by accepting public employment because they continue to be citizens.³¹³ However, the government, as an employer, has a much greater interest in regulating the speech of its employees, than the government has in regulating the speech of the general public.³¹⁴

The deciding factor in whether a public employee has a First Amendment interest that *may* give rise to a right to speak in a manner at odds with an employer’s position, is whether the public employee is speaking in his or her capacity as an employee, or in his or her capacity as a citizen about a matter of public concern. A public employee who speaks in his or her capacity as an employee, or in his or her capacity as a private citizen on a matter of personal, not public, concern, “has no First Amendment cause of action based on his or her employer’s reaction to the speech,” assuming that the employer has a rational basis for its action.³¹⁵ Thus, public employers may regulate speech of their employees for any legitimate purpose when their employees are speaking in the performance of their employment duties and when their employees are speaking outside of their employment duties on subjects of personal, not public concern.

It is not the location that decides in what capacity an individual is speaking because an individual may speak as a citizen (not in the performance of his or her official employment-related duties), whether in or out of the workplace and during or after work hours. Similarly, an individual may speak in his or her capacity as an employee outside of the workplace and outside of work hours.³¹⁶ Neither does it matter whether the subject of the speech is a subject relevant to the individual’s job. The dispositive fact is whether public employees are speaking “pursuant to

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³¹² See *Healy v. James*, 408 U.S. 169, 180, 189, 191 (1972) (a student group seeking recognition by the university has no constitutional right to violate “reasonable school rules governing conduct;” for in the special environment of a university, an agreement to conform with reasonable standards respecting conduct to serve the interests of the entire academic community, is a minimal requirement to impose on the acquisition of the privilege of recognition.) Regulations prohibiting discrimination in the university context are regulations of conduct, not viewpoint. See *Rumsfeld v. Forum for Academic & Inst’l Rights, Inc.*, 547 U.S. 47, 62 (2006). Even if the regulation of conduct imposes an incidental burden on viewpoint, the standard under *United States v. O’Brien*, 391 U.S. 367, 377 (1968) for such incidental effect is that the regulation be within the university’s constitutional power; that the regulation furthers an important government purpose; that such purpose be unrelated to suppression of speech; and that the incidental burden on expression be no greater than necessary. The interest served by a university’s nondiscrimination and multi-cultural policies is a compelling educational and national interest in inclusion grounded in the university’s mission and role in society and unrelated to suppression of expression; and providing educational opportunity to all without discrimination on the basis of race or gender could not be achieved without a policy of inclusion.

³¹³ *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County*, 391 U.S. 563, 568 (1968); see *Connick v. Myers*, 461 U.S. 138, 142 (1983).

³¹⁴ *Pickering*, 391 U.S. at 568.

³¹⁵ *Garcetti*, 547 U.S. at 418; *Connick*, 461 U.S. at 147, 154; *Pickering*, 391 U.S. at 568.

³¹⁶ *Garcetti*, 547 U.S. at 422-24.

their official [employment-related] duties.”³¹⁷ The Supreme Court has held that “when public employees make statements pursuant to their official job duties, the employees are not speaking as citizens for First Amendment protection,”³¹⁸ even when the subject of their speech is very much a matter of public concern.

A public employee retains the First Amendment interest to speak as a citizen on a matter of social, political or other public concern, as long as s/he is not so speaking in the performance of his or her employment-related duties.³¹⁹ However, this retained First Amendment interest is not absolute; it may give rise to a right to speak only if the employee-citizen’s speech interest outweighs the employer’s interest against disruption of the workplace. The public employee’s interest in speaking as a citizen on a particular matter of public concern must be balanced against the interests of the public employer to operate an efficient workplace for its public purposes, to maintain discipline among its employees, and to maintain trusting and confidential relationships between employees and their close supervisors and colleagues. If the employer’s interests in an efficient workplace outweigh those of the employee, the First Amendment is not violated by the employer’s regulation of an employee-citizen’s speech on a matter of public concern. Considerations weighed in this balancing of interests include whether the speech is aimed at anyone with whom the employee would normally come in contact in performing work, whether the speech threatens the ability of supervisors to maintain discipline or supervisors or coworkers to maintain harmony, and whether the employee has violated close relationships of trust and loyalty in the workplace.³²⁰

³¹⁷ *Id.* at 421.

³¹⁸ *Id.*

³¹⁹ See *Rankin v. McPherson*, 483 U.S. 378, 381 (1987) (county employee’s comment about the attempted assassination of President Reagan, “if they go for him again, I hope they get him” is a matter of public concern); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413-17 (1979) (speech on racially discriminatory policy of a school district is a matter of public concern); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (speech relaying the principal’s memorandum about the dress and appearance of school teachers is a matter of public concern); *Perry v. Sindermann*, 408 U.S. 593 (1972) (speech regarding whether a college should be elevated to four-year status is a matter of public concern); *Pickering*, 391 U.S. at 571-73 (a school teacher’s letter criticizing school funding is a matter of public concern).

³²⁰ Compare *Pickering*, 391 U.S. at 569-74 (teacher was not acting within the scope of her employment, but rather was acting as a citizen when she wrote an editorial to the newspaper criticizing the school board’s allocation of bond funds; although her letter was critical of her school system and included false statements adverse to the school system, her dismissal was a violation of her First Amendment rights because her interests as a citizen to speak about a matter of public concern outweigh the interests of her employer in efficient operation of the workplace, maintaining discipline and maintaining confidential relationships of trust with employees, where the teacher’s criticisms were not aimed at any supervisor or colleague with whom she would come into frequent contact in the performance of her job or with whom she had a close relationship of confidence and trust, and her criticism would not likely threaten discipline in the workplace), and *Garcetti*, 547 U.S. at 420-22 (when an Assistant District Attorney who is responsible for assessing the adequacy of an affidavit in support of a warrant criticized the sufficiency of the affidavit to his supervisors and, although they decided to proceed with the prosecution, wrote a memorandum criticizing the affidavit that resulted in discord with the sheriff’s office, this individual was acting as an employee within the scope of his employment and his actions amounted to insubordination; consequently, his First Amendment rights were not implicated when his employer took adverse employment action in reaction), with *Connick*, 461 U.S. at 141-143, 150-52 (prosecutor, who objects to being transferred and expresses her strong objections to her supervisors, prepares a questionnaire and distributes it to her fellow prosecutors soliciting their

The University Employer and Faculty Speech

The college or university's purpose and role in society, and the nature and role of faculty members within the college or university, contribute to what an academic institution needs to operate efficiently for the realization of its public purpose.

Under the case law addressing a public employer's prerogatives,³²¹ a public higher education institution could, under the First Amendment, specify a particular curriculum and course materials to be used, or specific matters to be researched, by an employee. However, except in limited circumstances (for example, possibly, in certain introductory level or distance-learning courses, some courses taught by graduate students, some courses designed to fulfill specific minimum content requirements of a state education board, or a special department-funded course or research project), such requirements would be inconsistent with principles of academic freedom, at least, and are rarely imposed in four-year colleges and universities. In fact, faculty members are usually given broad discretion to choose course materials within the subject matter and level of course assigned to be taught, to express views about those subjects, and to choose research areas within the tenure department's discipline or multidisciplinary areas. (In the context of community colleges, more direction may be provided to faculty more often in order to fulfill the nature of these institutions' missions, courses and degree requirements.)

Even so, a faculty member of a public or a private institution of higher education who is assigned to teach physics, may not decide against teaching physics and instead teach poetry—if s/he does, s/he may be subject to discipline or, if s/he is untenured, s/he may not have an appointment renewed. (Of course, such a faculty member could elect to punctuate the course with poetry.) A faculty member who is employed by and seeks tenure in the physics department, must perform research that is in an area and of a caliber qualifying the faculty member for tenure in that department. There is considerable flexibility to foster creativity and, increasingly, interdisciplinary pursuits. However, if all of a physics faculty member's research is in poetry, without adding significant value to the discipline of physics, s/he will not likely be deemed qualified for continued appointment, promotion or tenure in the physics department. Multidisciplinary work may qualify for tenure, of course, depending on the facts.³²²

Race and gender are matters of public concern in our society, and the intellectual freedom of faculty members to explore controversial subjects is an important foundation of the First Amendment-protected academic freedom of an institution of higher education.³²³ A public

views about the transfer policy, office morale, the need for a grievance committee, and pressure to work on political campaigns, fomenting what her supervisors regarded as a "mini revolt" and resulting in her termination, may have been speaking on at least one matter of public concern [i.e., political pressure to work on campaigns]; however, her interests on this issue were out-weighed by her employer's interest in maintaining discipline and harmony in the workplace where the prosecutor had close working relationships with the supervisors and colleagues she involved in her actions and her employers are not obligated to wait until disruption in the workplace occurs to maintain discipline.)

³²¹ See *supra* notes 310-312 and accompanying text.

³²² See *supra* notes 311-313; *infra* note 54 and accompanying text.

³²³ *Sweezy*, 354 U.S. at 250; see *supra* notes 5-24, 39, 43 and accompanying text.

institution may not under the First Amendment, and many private institutions would not under principles of academic freedom, make an adverse decision relating to employment, tenure or promotion on the basis of a faculty member's personal *viewpoints* on race or gender (or other matters of public concern), expressed in a manner that makes clear the faculty member is not speaking on behalf of the institution and at a time and in a capacity that is not at odds with the faculty member's work-related duties.³²⁴ The fact that a faculty member's research and intellectual viewpoints are controversial, alone, should not affect decision-making if the academic quality of the work and its contributions to the field were judged to meet the institution's high standards, which typically take into account national and international peer review. (Different standards may apply in the community college setting.)

However, it is important to recognize the special nature and role of faculty members. While faculty members have freedom of intellectual inquiry and expression, they also have a responsibility to teach students and mentor junior faculty in a manner that enables full participation in the academic endeavor. Faculty members are the intellectual leaders of the college or university. If the college or university has determined that a broadly diverse, including racially and gender diverse, student body and faculty are essential to achieving the institution's core educational, research and service mission, speech at odds with this objective, at least in certain work-related activities involving close interactions with colleagues and students, may be at odds with a faculty member's responsibility.³²⁵ At the same time, controversial or offensive views about race or gender held in good faith for purposes of intellectual inquiry, and not employed in a manner that excludes others from full participation in the academic endeavor of the institution, generally would not be at odds with a faculty member's employment and are likely to be protected at least by principles of academic freedom, and possibly by the First Amendment in public institutions depending on the facts and the reach of the First Amendment.³²⁶

Of course, a faculty member who expresses non-defamatory personal views about race and gender (or anything else) in a newspaper editorial, or in a public forum on a public institution's campus at a time when s/he is not required to be in class teaching or otherwise to be fulfilling employment obligations is generally free to do so. Under the First Amendment and principles of academic freedom only a compelling interest would generally allow the protected content of the faculty member's speech in such a setting to be regulated in even a narrowly tailored manner.³²⁷ Such personal views may be unpopular, insensitive, offensive to many, or contrary to the institution's view of its mission.

A faculty member of a public institution likely would not have a First Amendment-protected interest in speaking about race or gender in a manner that is at odds with the institution's view, of course, if the faculty member's official role at the institution involves responsibility for diversity efforts (e.g., if the individual is an academic administrator in a

³²⁴ See *supra* notes 281, 310-320 and accompanying text.

³²⁵ See *supra* notes 281-283, 310-320 and accompanying text.

³²⁶ See *id.*

³²⁷ See *supra* notes 307, 319-320 and accompanying text.

leadership role or is responsible for a diversity initiative). Even if this were not the case, if the particular comment's disruptive effect on the workplace outweighs the individual's interest as a citizen in expressing the viewpoint, the faculty member would not have a First Amendment-protected interest.³²⁸ This could occur if the speech has little or no intellectual value and is merely vitriolic, it is at odds with the faculty member's duties to individuals with whom the faculty member normally interacts in the classroom or research laboratory, and it is likely to have a substantial disruptive effect on the harmony and operation of the classroom or research laboratory. Academic freedom principles and the role of faculty in a college or university may temper this analysis and help define both the work-related duties and the responsibilities of the faculty member, providing some more leeway to the faculty member than may be accorded to public employees in other settings. However, the overall analysis should be the same.

If the institution has determined the need for broad diversity—particularly if that need has been determined in a faculty process—then taking into account the faculty member's role in and responsibility to the institution and all members of its community, a college or university may be well within its rights to take action against a faculty member who spews racist or sexist speech against colleagues, supervisors or students, even in a public forum, in a manner that is substantially disruptive of the workplace and the faculty member's official role and duties in it.³²⁹ Of course, the nature, openness and tolerance of controversy that is inherent in this particular workplace would color whether substantial disruption is truly threatened. The facts of a particular situation would matter very much in the analysis.

In almost all colleges and universities, academic freedom, at least, would protect a faculty member's ability to produce scholarship that expresses offensive views about race and gender (or other subjects). The product's academic value and quality, its contribution to the field, would be evaluated in the peer review process and in the faculty member's supervisor's regular review process. Even in a public context where the First Amendment applies, the right of the academy to make judgments about the value of the academic work product of faculty members is almost always upheld. The courts are loath to substitute their judgment for the subjective academic judgment of the academy.³³⁰ The institution can make clear that the views are not the institution's views, while the interest of the faculty member to express the views is respected.

Similarly, most colleges and universities would probably interpret academic freedom to protect a faculty member's ability to express his or her offensive views about race and gender to some extent for didactic purposes in class or in a research laboratory. An offensive viewpoint that is not gratuitous (i.e., it is relevant to the work and is held in good faith in the process of intellectual exploration), would not necessarily be deemed to create a hostile environment, although it could depending on the facts. While only the rational basis standard would apply to a

³²⁸ See *supra* notes 315-320 and accompanying text.

³²⁹ See *supra* notes 298, 316-320 and accompanying text.

³³⁰ See, e.g., *Ewing*, 474 U.S. at 226 n.12 (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking [sic] by the academy itself.” (citation omitted)); *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 349 (5th Cir. 2006); *Coats v. Pierre*, 890 F.2d 728, 733 (5th Cir. 1989); *Levi v. Univ. of Tex., San Antonio*, 840 F.2d 277, 280 (5th Cir. 1988).

RELEVANT
AUTHORITIESSTUDENT
DIVERSITY

EMPLOYMENT

FIRST
AMENDMENTADDITIONAL
RESOURCE
MATERIALSDIVERSITY-
RELATED
MEDIAPUBLIC POLICY
PUBLICATIONSPROFESSIONAL
ASSOCIATIONS

TESTIMONIALS

public institution's limitations on (at least gratuitous) speech in the performance of work in the classroom or research laboratory,³³¹ deeply held and fundamental values of academic freedom would likely provide some degree of didactic freedom, along with corresponding responsibility to avoid creating an environment that unnecessarily threatens the ability of all students to learn and fully participate.³³²

The University Employer and Faculty Conduct

Regardless of the legally permissible extent of limitations on faculty work-related speech in public institutions, higher education institutions may make employment decisions that consider a faculty member's conduct to measure his or her contributions, absence of contributions, or harm to compelling broad diversity objectives (not only racial and gender diversity) as part of the tenure and promotion process. Regardless of personal viewpoint, an individual faculty member may not, through *conduct*, act in a discriminatory manner in violation of the institution's nondiscrimination policy,³³³ nor through *conduct or speech* create a classroom or research environment that is so hostile as to make it unreasonable to expect some other members of the community (e.g., minorities, women and those with unpopular political viewpoints) to be able productively and collaboratively to learn, research and conduct their work.³³⁴ A faculty member whose conduct advances inclusion, provides opportunities for the development of multi-cultural analysis and collaboration skills, and fosters the broad diversity the institution so vitally needs, may have these critical conduct-tied contributions factored favorably, among other factors considered, in the tenure and promotion process. (This is a race and gender-neutral, and viewpoint-neutral, consideration as any person may engage in such conduct and possess and contribute such skills.)

For example, an institution of higher education is within its rights to require a faculty member who (offensively to most) believes certain racial minorities are inferior and who may be undertaking research related to that view, nevertheless to include students in the faculty member's class and to provide the same educational opportunities and treatment to all students and junior faculty members, without regard to their race. The faculty member is employed by

³³¹ See *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990); *Emergency Coalition*, 545 F.3d at 19 (D.C. Cir. 2008) (Silberman, J., concurring) (opining that a public university clearly may prohibit classroom speech espousing racial inferiority); *supra* notes 315-316 and accompanying text.

³³² See AAUP 1940 Statement, *supra* note 282, at 3, 5 ("Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject," meaning "not to discourage what is 'controversial'" but "to underscore the need for teachers to avoid persistently intruding material that has no relation to their subject."); *Coleman and Alger*, *supra* note 18; cf. *supra* note 299.

³³³ See AAUP 1940 Statement, *supra* note 282, at 3, 5; cf. *Christian Legal Soc'y v. Kane*, 2006 WL 997217 (N.D. Cal. 2006), *aff'd*, 2009 WL 693391 (9th Cir. 2009), *petition for cert. filed sub nom. Christian Legal Soc'y v. Newton* (U.S. May 5, 2009) (law school group had no right to discriminate in the selection of members based on religion and sexual orientation).

³³⁴ See *Garcetti*, 547 U.S. 410; *supra* note 298 and accompanying text; *supra* note 299; cf. *Truth v. Kent Sch. Dist.*, 542 F.3d 634 (9th Cir. 2008); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007); *Every Nation Campus Ministries v. Achtenberg*, 597 F. Supp. 2d 1075 (S.D. Cal. 2009); see *Coleman and Alger*, *supra* note 18.

the institution and may express his or her personal views, at least as a consequence of academic freedom principles, through his or her research and, within limitations permitted under the First Amendment, in public fora.³³⁵ However, the faculty member's conduct—to allow students to join in a class or laboratory and to give them equal access to and treatment in learning—and the faculty member's in-class conduct and speech may be required to meet institutional nondiscrimination and educational standards tied to the institution's nondiscriminatory educational mission. The faculty member may have his or her views, but is paid to teach all students without regard to race, in furtherance of the institution's academic mission, and the institution is not required to employ, tenure or promote a faculty member who will not do so. Implementation of nondiscrimination policies by academic institutions in furtherance of their missions have been widely held to constitute regulation of conduct, not viewpoint. Rational basis scrutiny should apply in this workplace context.³³⁶

Applying inclusive conduct that provides opportunities to enhance broad collaborations and develop multi-cultural skills to teaching and supervision of research may be *workplace conduct* required by the institution of faculty members in order to achieve the institution's educational mission. Inclusive conduct means including and fostering participation of individuals of different cultures, socio-economic backgrounds, races, perspectives and experiences to provide opportunities to engender an increased understanding of and explore a broad range of individuals' ideas and problem-solving approaches. Multi-cultural skills include the demonstrated ability to utilize such understanding and broad perspectives in teaching, research and mentoring and to create an inclusive environment in which individuals of a range of experiences, perspectives and cultures, including different races and genders, can work productively and creatively together. Inclusive conduct and multi-cultural skills include breaking down stereotypes that may lead some to assume that all individuals of a particular race, ethnicity, gender, nationality, or socio-economic group share the same views, personal qualities, and experiences. This conduct is *inclusive and non-discriminatory action on the basis of race, gender, religion, age, sexual orientation, perspective, etc.* Even if a court were to determine that speech interests -- not only conduct -- were implicated when inclusion to foster multi-cultural skills is favored in teaching students in class or supervising or working with others in a research laboratory, such speech would be in the context of official duties to the institution or would satisfy constitutional standards for incidental effects, and its regulation would not offend the First Amendment. If the institution's core, academy-embraced mission fundamentally requires inclusion, consideration of this conduct also should not offend academic freedom any more than do the judgments made in the tenure process.

Conclusion

Institutions of higher education are, by nature and of necessity, environments of open dialogue and exploration of ideas, some of which are offensive or controversial. The imperative for colleges and universities to encourage such freedom of exploration and expression is at the

³³⁵ See *supra* notes 307-320 and accompanying text.

³³⁶ See SMOLLA, *supra* note 299, at 6; *supra* notes 307-320 and accompanying text. Even if an incidental effect on speech were to result, the institution's compelling interest in such policy would meet the *O'Brien* standard. See *United States v. O'Brien*, 391 U.S. 367 (1968); *supra* note 312.

core of how such institutions advance knowledge and serve society. Equally at the core of higher education is the inclusion of broadly diverse students and faculties. Regulation of speech within this setting requires the soft touch of careful judgment and appreciation of context, but appropriately judicious parameters on individual speech that ensure the ability of all students and faculty members to reasonably and fully participate in the academic endeavor are critical. As a separate but associated matter, in an increasingly diverse and global society requiring conduct that fosters inclusion, collaboration and a broadly-defined diverse learning and research community is both essential to the success (and excellence) of higher education and the nation, and permissible under the First Amendment and principles of academic freedom.