

## I. PREFACE AND PROJECT OVERVIEW

These materials were developed for a project led by the American Association for the Advancement of Science ("AAAS"), with participation by the Association of American Universities ("AAU"). The project addresses a pressing issue posed by leaders of industry, academia, government and philanthropy: How can policy leaders of our nation's colleges and universities increase the racial and gender diversity of their faculties and student bodies so as to champion and sustain effective science, technology, engineering and mathematics ("STEM") programs in what often seems to be an overly complicated, barrier-laden, and hostile legal environment?

This issue goes to the heart of what our nation needs to do in the 21<sup>st</sup> Century to continue its leadership position in higher education, innovation, and the global economy. Successfully addressing this issue is vital if we are to maintain our national security and democracy; and to be successful, diversity efforts must be legally sustainable.

AAAS and AAU have engaged on this issue in an effort to influence policy and practice regarding our nation's critical need for greater access by racial minorities and women to educational opportunities and academic careers in STEM fields. This national need reflects a practical reality, which does not align with any particular political view.

AAAS and AAU consider STEM fields a special case because: (1) science and engineering are national assets that drive innovation, economic strength, leadership and our national security; (2) the United States has been a leader in producing research and development ("R&D") and the personnel responsible for its renewal; and (3) the federal investment in STEM fields continues to shape what colleges and universities do and what K-12 schools teach. Moreover, the Obama Administration has announced an aggressive agenda focused on environmental stewardship, alternative energy, and health promotion that depends on robust research and development investments as a key to economic recovery.<sup>1</sup>

The current political, legal and policy climates continue to demand new strategies and new thinking about how to broaden and increase participation in STEM fields. This project is one important step in helping the higher education community meet those challenges -- reflective of an authentic collaboration involving institutions of higher education and industry, government agencies, policy experts, and lawyers, to share and highlight those practices that are most likely replicable, effective, and lawful.

The project giving rise to this publication is the outgrowth of a day-long roundtable hosted by AAAS and the National Action Council for Minorities in Engineering, Inc. ("NACME") on January 15, 2008 in Washington, D.C. Funded by the Alfred P. Sloan Foundation, AAAS, and NACME, and attended by representatives of the National Science Foundation ("NSF") and the National Institutes of Health ("NIH"); leaders of industry, research universities, and the National Academy of Engineering; and policy-makers at education testing organizations, the roundtable

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<sup>1</sup> *The American Reinvestment and Recovery Plan – By the Numbers* (2009), [www.whitehouse.gov/assets/Documents/Recovery\\_Plan\\_Metrics\\_Report\\_508.pdf](http://www.whitehouse.gov/assets/Documents/Recovery_Plan_Metrics_Report_508.pdf).

explored the status of efforts to increase the racial and gender diversity of faculties and student bodies at the nation's research universities in the fields of science, technology, engineering and mathematics ("STEM").<sup>2</sup>

The higher education community won important ground in the U.S. Supreme Court in 2003, with the decision in the University of Michigan law school admissions case. However, this gathering of policy-makers recognized the challenges still posed by the legal context in which diversity efforts are pursued. The roundtable focused on the intersection of law and policy by initiating the day with a panel of legal scholars.<sup>3</sup> The panel painted the legal landscape for diversity efforts in the era of U.S. Supreme Court jurisprudence after the Court's University of Michigan law school and undergraduate admissions decisions in 2003, *Grutter v. Bollinger*<sup>4</sup> and *Gratz v. Bollinger*,<sup>5</sup> and the decision in the consolidated public school student assignment cases in 2007, *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County Board of Education*.<sup>6</sup> While *Grutter* was an important victory for higher education, the Court also reinforced the limitations on use of race and ethnicity under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.<sup>7</sup>

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<sup>2</sup> For a report on the roundtable, see *Standing Our Ground II: Efficacy of University-Based S&E Programs Despite Limitations of 'Strict Scrutiny'*, at [www.aaas.org/news/releases/2008/0204diversity.shtml](http://www.aaas.org/news/releases/2008/0204diversity.shtml).

<sup>3</sup> The panel was comprised of Professor Theodore Shaw of Columbia University School of Law (formerly the Director/Counsel of the NAACP Legal Defense and Educational Fund), Professor Michael Olivas of the University of Houston Law Center, and Richard Kahlenberg, Senior Fellow of The Century Foundation. The panel was moderated by Jamie Lewis Keith, Vice President and General Counsel of the University of Florida, member of the AAAS Capacity Center's Advisory Board and the AAU General Counsels Group, and former primary inside counsel for Massachusetts Institute of Technology. For articles by Professor Olivas and Dr. Kahlenberg written for the roundtable, see [http://php.aaas.org/programs/centers/capacity/07\\_Engagement/07\\_LawPolicyPractice.php](http://php.aaas.org/programs/centers/capacity/07_Engagement/07_LawPolicyPractice.php).

<sup>4</sup> 539 U.S. 306 (2003).

<sup>5</sup> 539 U.S. 244 (2003).

<sup>6</sup> 551 U.S. 701 (2007). The student assignment decision highlights the pivotal role of Justice Kennedy on the current Supreme Court. Justice Kennedy, as he had in *Grutter*, endorsed the view that the *educational benefits* of a diverse student body are compelling, thereby justifying consideration of race and ethnicity in an educational context. Yet, at the same time, he rejected the race-conscious means before him as insufficiently circumscribed and inappropriately designed to achieve those desired ends. *Id.*

<sup>7</sup> In *Grutter*, 539 U.S. at 325-33, 338-39, and 341-43, and *Gratz*, 539 U.S. at 270-71, the Supreme Court held that, under the Constitution and federal non-discrimination laws:

1. Higher education institutions could establish a compelling interest in the *educational benefits* to all students that accrue from a broadly (not just racially) diverse student body. Correspondingly, the *Grutter* majority also acknowledged the related mission-driven interest of serving the nation's need for well-prepared citizens and leaders to support our democracy and a well-prepared labor pool to support our economy and national security. (At the same time, the Court cautioned that race may not be used to remedy general societal discrimination or to achieve parity in the representation of minorities in a student body as compared with their representation in society at large, i.e. "racial balance.")
2. In that context, race could be taken into account as one of many factors in undertaking a holistic assessment of each individual for admission to college or graduate school, using the same criteria for all applicants individually—not uniformly—weighing race when, and only to the extent that, it is necessary to do so to achieve mission-driven compelling educational interests. The Court ruled that institutions considering race must ensure that viable, "workable alternatives" to the consideration of race do not exist.

And in 2009, the Supreme Court made clear -- in *Ricci v. DeStefano* -- that, absent an adequate "justification, ... express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race," given the "important purpose of Title VII -- that the workplace be an environment free of discrimination, where race is not a barrier to opportunity."<sup>8</sup> The *Ricci* opinion noted that "remediating an unintentional disparate impact" provides one such justification,<sup>9</sup> but it is unclear whether the courts will hold that *Grutter's* diversity rationale provides another. While it provides some insights, *Ricci* is a case involving the use of an employment test, not one addressing affirmative action.

Although it is easy in this context to focus on what *cannot* be done legally, it is essential for college and university General Counsels to have an understanding of, and an orientation toward, what *can* be done legally in order to achieve the central educational goals associated with a diverse faculty and student body. Correspondingly, the administrative and policy leaders in STEM higher education and research must communicate effectively about the role of their institutions and the creative, collaborative nature of STEM fields in our society. In short, policy and legal leaders must reach a common understanding of what approaches are both effective and legally sustainable. Indeed, judgments with respect to each go hand-in-hand.<sup>10</sup>

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The Sloan Foundation saw the opportunity to advance diversity efforts on campus and this project was born.<sup>11</sup> This guide, and the two-day AAAS and AAU workshops in which this guide is first being released, are offered as tools for the legal and policy leaders of institutions of higher education. Our goal is to provide sophisticated legal resources to General Counsels to help them and their academic leadership create, implement and sustain successful diversity programs.

<sup>8</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673-74 (June 29, 2009).

<sup>9</sup> *Id.*, 129 S. Ct. at 2677 ("We hold ... that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remediating 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."); *see also id.* at 2675 ("Th[is] Court has held that certain government actions to remedy past racial discrimination -- actions that are themselves based on race -- are constitutional only where there is a "strong basis in evidence" that the remedial actions were necessary.") (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (discussed *infra*)).

<sup>10</sup> Arthur L. Coleman and Scott R. Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues*, at 4 (College Board, 2006) ("Properly understood, federal law should affirm sound educational judgments . . . The basic answers to . . . inherently educational [questions] drive conclusions about the legal soundness of the policies in question."); *see generally Grutter*, 539 U.S. 306 (2003).

<sup>11</sup> The AAAS role in the current effort originated with a Sloan Foundation-funded conference in January 2004 and resulting report, *Standing Our Ground: A Guidebook for STEM Educators in the Post-Michigan Era*, S.M. Malcom, D.E. Chubin, and J.K. Jesse, AAAS-NACME, October 2004 [www.aaas.org/standingourground](http://www.aaas.org/standingourground).

It is important to note what we have *not* done in preparing this guide. We have not sought to capture all legally sustainable approaches to diversity efforts on campus. The absence of an approach -- or a variation on an approach -- from this guide does not indicate that the approach or variation is legally unsustainable. Similarly, our approaches are not intended to substitute for legal advice on the particular programs implemented by an institution. That analysis must be institution and context specific and should be undertaken by the lawyers for the institution in collaboration with their academic colleagues. Nothing in this guide or the appendices to this guide is intended to provide such legal advice.

We gratefully acknowledge the Alfred P. Sloan Foundation for its grant in support of the first phase of this project, and the NSF for its supplementary funding. We also thank our project's outside counsels, Fulbright & Jaworski L.L.P. (Robert Burgoyne, Theodore Shaw, Ralph Dawson and Rena Scheinkman), who focused primarily but not exclusively on faculty diversity; and EducationCounsel LLC (Art Coleman, Scott Palmer, Steve Winnick and Jennifer Rippner), who focused primarily but not exclusively on student diversity, for their generous contributions of firm resources and their outstanding expertise. The project's Expert Legal Advisory Board also brought wisdom and experience to this endeavor, and we gratefully recognize Art Coleman of EducationCounsel LLC, who also serves as Chair of the Advisory Board, and Jonathan Alger, Senior Vice President and General Counsel of Rutgers University, Lawrence White, General Counsel of the University of Delaware, and John Payton, the Director and Counsel of the NAACP Legal Defense and Educational Fund (and former senior partner of WilmerHale LLP and a primary counsel in the University of Michigan Supreme Court cases), who serve as Advisory Board members with Ms. Keith.

Finally, the AAAS hopes to periodically supplement this guide, in consultation with our Expert Legal Advisory Board, as the legal landscape is ever changing.

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**PERSPECTIVES: Association of American Universities**

"During nearly all of the forty-five plus years that I have been involved with higher education, as a faculty member or administrator, the hope of achieving a more diverse faculty and student body has been a goal – too often an elusive one – of our universities . . .

[A]chieving more diverse campuses remains a central objective for our universities. We know, from several compelling studies, that increasing campus diversity has profound educational advantages for all students, that achieving diversity and excellence are not mutually exclusive goals, and that the failure to reduce disparities of educational attainment among all of our citizens has profound consequences for national economic and civic development . . .

It is important that we understand the legally sustainable efforts our universities can undertake to achieve diversity; and it is important that we explore the means of succeeding in achieving diversity. What is legal and what works? . . .

Our commitment to diversity is not a product of an effort at rebalancing the scales of social justice, however long they may have been imbalanced. Rather it is because we believe our institutions will be better, our society enriched, our economy enhanced by educating better our richly diverse population. And it is inspired as well by the conviction that all students admitted to our institutions are capable of succeeding in a challenging curriculum and carrying that success with them to their world beyond the campus."

*Association of American Universities, Robert M. Berdahl, Written Statement, October 2009*



## II. HISTORICAL CONTEXT

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

Colleges and universities played a central role in opening opportunities to African Americans, Latinos, Native Americans, and other minority group members. They did not originally undertake that effort out of a concern for the educational benefits of broadly defined "diversity" as we now know it. In fact, if one were to scour the social, political, and judicial discourse of the time during which higher education first began to enroll significant numbers of minority students at historically white colleges and universities, there would be little focus on "diversity." The doors to higher education were opened as part of an effort to counter the effects of years, decades, and centuries of exclusion and discrimination by specific institutions as well as society at large.<sup>12</sup> While there was an increase in minority enrollment in higher education during the civil rights movement, much of the imperative came after the assassination of Dr. Martin Luther King, Jr. and the violence that wracked our cities in the late 1960's. Colleges and universities were not thinking as much about the benefits of diversity in the classroom in the sixties and early seventies as they were about their part in addressing the massive inequality and exclusion of black and brown people as a consequence of discrimination. Affirmative action in higher education began as a remedial imperative.<sup>13</sup>

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<sup>12</sup> In 1960, 38.6% of black Americans graduated from high school, and 5.4% from college. Only 3.8 % of black men and 6% of black women were professionals. The percentage of physicians who were black was 2.8%, the same as it had been in 1940. Of lawyers, 1.2% were black, as were 0.5% of engineers. There were only 265 black elected officials in the nation in 1965; of these, four were in Congress and there were no black senators. Four federal judges were black. (William G. Bowen and Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions, Princeton Univ. Press, at 2 (2d ed. 2008) (hereafter "The Shape of the River"). In 1965, barely 1% of all law students in the country were black; one-third of them attended black law schools. Barely 2% of all medical students were black; three-fourths of them attended two all-black medical schools. *Id.* at 5.

<sup>13</sup> Institutions of higher education today have recognized the critical educational benefits of diversity. In the early years of affirmative action in higher education, however, many universities probably were acting to address what the Supreme Court would come to call "societal discrimination." In contemporary debates or discourse on race-conscious measures to achieve diversity in higher education, there is little to be gained by recounting the remedial imperative for societal discrimination, except historical accuracy. Remedial imperatives may still have some vitality for Congress under Section 5 of the 14<sup>th</sup> Amendment, however and for institutions that seek to remedy the present effects of their own discrimination or of others' discrimination in which they can demonstrate they passively participated.

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

*Bakke* changed all of that. If colleges and universities were not thinking of diversity prior to *Bakke*, after it they were. Justice Powell's 1978 opinion in *Bakke* rested race-conscious efforts aimed at minority enrollment on First Amendment academic freedom principles and desired educational outcomes -- and not on the (distinct but related) access interests of minority students.<sup>14</sup> The educational interests were reaffirmed (and expanded upon) twenty-five years later by a Court majority in *Grutter*.

In the interim, colleges and universities across the nation relied upon Justice Powell's *Bakke* opinion, although as time passed it began to fray as the result of a sustained attack on its viability. That attack was reflected at the appellate court level in *Hopwood v. Texas* and *Johnson v. Board of Regents of the University of Georgia*,<sup>15</sup> in which the Fifth and the Eleventh Circuits held that diversity was not a compelling state interest and that *Bakke* was not controlling because there was no majority rationale. *Grutter* overruled *Hopwood* and *Johnson* and put to rest the controversy over *Bakke*'s vitality. There is now firm judicial precedent in support of efforts to ensure that our institutions, including our colleges and universities, corporations, and the military, are diverse and inclusive.

Today, regardless of one's political viewpoint of social justice, the nation's demographic trends demand a society in which our educational system, the academy, and industry include minorities and women; otherwise, our economic strength and national security will decline. Industry, government and higher education must communicate this reality more effectively or misunderstanding of this national imperative will persist and it will be more difficult to succeed in the diversity efforts on which our nation's and all of our citizens' future in part depends.

The Supreme Court has changed since *Grutter*. Justice Sotomayor recently replaced Justice Souter, and it is too early to evaluate the significance of this change. Former Chief Justice Rehnquist's replacement by Chief Justice Roberts is unlikely to change the Court's alignment on issues of race. However, Justice O'Connor's departure and the arrival of Justice Alito likely leaves the Court with a more conservative posture. Notably, however, Justice Kennedy's assumption of "swing vote" status introduces an element of unpredictability to the Court's race jurisprudence, as evidenced by the decision in *Parents Involved*, the student assignment case.<sup>16</sup> Justice Kennedy, who dissented in *Grutter* and joined the majority in *Parents Involved* in

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<sup>14</sup> Justice O'Connor's opinion for the majority in *Grutter* highlights these distinctions. She stated that "[t]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.... Effective participation by members of all racial and ethnic groups in the civic life of our nation is essential if the dream of one nation, indivisible, is to be realized." 539 U.S. at 331-32. This language arguably provides the basis for an independent compelling interest which recognizes the importance of access to higher education for minority students. It at least expands the scope of educational benefits that flow from diversity beyond educating all students and encompasses the service mission of the institution. What is no longer arguable, however, is that "diversity is a compelling state interest that can justify the use of race in university admissions;" as a result, "the Equal Protection Clause does not prohibit the ... narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." *Id.* at 325, 343. That interest belongs to the university.

<sup>15</sup> *Hopwood I*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996); *Hopwood II*, 236 F.3d 932 (5<sup>th</sup> Cir. 2000); *Johnson*, 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).

<sup>16</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

striking down the challenged plans, refused to go as far as Chief Justice Roberts' plurality opinion in prohibiting race-conscious considerations because "parts of the opinion by the Chief Justice imply an all-too-unyielding insistence that race cannot be taken into account in instances when, in my view, it may be taken into account."<sup>17</sup>

Colleges and universities, then, are at the center of the debates over affirmative action and diversity, which in turn have a significant impact on the nation's economic strength and national security. Higher education, particularly in the fields of science, technology, engineering and mathematics, plays a critical role by increasing basic knowledge and generating a well-trained workforce on which industry and government depend. Whatever one's politics may be, for the good and prosperity of all U.S. citizens, society and the nation, higher education must prevail in its goal of increasing access for minorities to education at all levels and in all fields, but particularly in STEM fields.

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<sup>17</sup> *Id.* at 787 (Kennedy, J., concurring). For an expanded analysis of the Court's *Seattle School District* opinion and the differing factions on the Court, see *Echoes of Bakke: A Fractured Supreme Court Invalidates Two Race-Conscious K–12 Student Assignment Plans but Affirms the Compelling Interest in the Educational Benefits of Diversity* (College Board, 2007).



III. THE COMPELLING CASE FOR DIVERSITY

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

1. Background

For decades, the higher education community has recognized the imperative of achieving diversity among students and faculty as a necessary foundation for attaining each institution's mission-driven core educational goals. That mission encompasses delivery of the best education to all of the institution's students, production of excellent research to increase knowledge and enrich learning, and service in support of the nation's most critical needs. Although established in a variety of ways, several central elements most often characterize diversity-related aims, particularly in the rapidly changing 21<sup>st</sup> Century world: (1) improving educational outcomes, both with respect to knowledge and skills, and civic engagement; (2) establishing foundations for a better prepared (and ultimately more productive) workforce that will support a more robust national and international economy; (3) conducting excellent technology research that will enable industry to serve the needs of a diverse and global society, thereby supporting innovation, economic strength and national security; and (4) enhancing the knowledge and skills of future military and national security personnel, and thus enhancing national defense at home and abroad. With respect to the importance of these goals, there is, at the end of the first decade of the 21<sup>st</sup> Century, little meaningful debate.<sup>18</sup> There is likewise little debate that institutions of higher learning may properly conclude that broadly-defined "diverse" faculties and student bodies are critical to achieving these goals.

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**PERSPECTIVES**

"Racial diversity . . . provides the necessary conditions under which other educational policies can facilitate improved academic achievement, improved intergroup relations, and positive long-term outcomes."

*Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases*, Washington, DC: National Academy of Education, 2007, p.49

In 2003, the United States Supreme Court weighed in for the first time in a quarter century on the then-central question of the day: Whether the educational goals associated with student diversity could ever rise to the level of a "compelling interest" that would, in certain cases, support race- and ethnicity-conscious means, such as in the admissions practices that were before the Court.

<sup>18</sup> See generally Coleman, Palmer, Rippner and Riley, *A 21st-Century Imperative: Promoting Access and Diversity in Higher Education* (College Board and American Council on Education, October 2009).

With a clear (if narrow) majority (and, indeed, with *all nine* Members of the Court acknowledging in 2007 the 2003 binding precedent regarding the issue in the higher education context)<sup>19</sup>, the Court recognized and embraced the educational imperative vigorously pressed by the education, business, military and other communities.<sup>20</sup>

This picture of consensus changes, however, as the discussion shifts from the question of broad-based *diversity goals* (that include, but are not limited to, race-, ethnicity-, and gender-conscious goals) to the question of *the precise means* by which that diversity is to be achieved. More specifically, despite strong support for certain practices, debates continue to surface regarding the educational and legal appropriateness of race-, ethnicity-, and gender-conscious strategies designed to achieve educational mission-driven diversity goals (ranging, for instance, from questions regarding higher education's race-conscious admissions and financial aid practices to its consideration of race in faculty recruitment and hiring).

It is in this context that the central question of diversity in STEM (and other) fields surfaces.

## 2. Diversity and STEM Education

The national imperative to enhance the diversity of institutions invested in STEM education, and ultimately in STEM fields, is best understood in the context of the broader diversity interests that have come to characterize higher education and workforce aims: improved and enhanced educational, civic, economic and national security outcomes. Increasing the diversity of academic research institutions' faculties, as well as undergraduate and graduate student bodies, is critical for the nation's continued leadership in innovation, higher education and the global economy.

### a. Educational and Civic Outcomes

Research establishes that students learn more and the workforce is more productive and successful in a broadly diverse setting.<sup>21</sup> Students, both minority and non-minority, who are educated in racially, ethnically, and otherwise diverse academic settings, benefit from experiencing a broader array of questions and perspectives as they identify and solve problems and are better equipped to function and thrive in an increasingly multi-cultural world. The

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<sup>19</sup> See *Parents Involved in Community Schools*, 551 U.S. 701, (2007) (Roberts, C.J., announcing the judgment and opinion of the Court; Thomas, J., concurring; Kennedy, J., concurring in part and concurring in the judgment; Breyer, J., dissenting).

<sup>20</sup> See *Grutter* 539 U.S. at 331, 343. See also *Smith v. Univ. of Washington Law School*, 392 F.3d 367 (9<sup>th</sup> Cir. 2004), *cert. denied*, 546 U.S. 813 (2005) (concluding that the law school's admission program had been narrowly tailored to serve the school's compelling interest in obtaining the educational benefits that flow from a diverse student body).

<sup>21</sup> See e.g., Patricia Gurin, et al., "Diversity and Higher Education: Theory and Impact on Educational Outcomes," 72 *Harv. Educ. Rev.* 3, 330-36 (2002); The Shape of the River, *supra*; Helen Lippman, "Variety is the Spice of a Great Workforce," *Business & Health Archive* (May 1, 2000); Somnath Saha, Gretchen Guiton, Paul Wimmers, and LuAnn Wilkerson, "Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in US Medical Schools," *JAMA*, 300(10):1135-1145 (2008); and Scott E. Page, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies, Princeton Univ. Press (2008).

graduates of STEM degree programs will have to work collaboratively and productively with -- and identify and serve the needs of -- a diverse society. Students learn not only in the classroom, but also through their experiences living, studying, working and interacting with each other and with faculty at colleges and universities across the country. Faculty, too, are more productive and creative teachers and researchers when they work with diverse colleagues and students.<sup>22</sup> Many institutions of higher education have determined that they require a broadly diverse faculty in STEM and other fields to achieve their mission-driven objectives in a diverse and global society. Importantly, science and technology should be understood as actively evolving (not static) fields, requiring creative and collaborative undertakings in a world that is increasingly connected and diverse. Thus, diverse learning environments are vital settings for enhancing relevant knowledge and skills. U.S. academic research institutions must provide diverse campus, educational, research and living experiences to enable such learning inside and outside the classroom and the laboratory.

<sup>22</sup> *Id.*; see also Appendix IX, *infra*, "U.S. Leaders Speak," 17 SEI 2008, [www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42](http://www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42); Amici Curiae Brief of Massachusetts Institute of Technology, Leland Stanford Jr. University, E. I. DuPont De Nemours and Company, International Business Machines Corp., National Action Council for Minorities in Engineering, the National Academy of Sciences and the National Academy of Engineering, in *Grutter* (upholding University of Michigan Law School's holistic assessment of each candidate for admission, taking race among other factors into account), and *Gratz* (striking down as unconstitutional University of Michigan's automatic award of 20 points to minorities in the admissions evaluation process) [web.mit.edu/newsoffice/nr/2003/amicus-brief.pdf](http://web.mit.edu/newsoffice/nr/2003/amicus-brief.pdf) ("MIT Brief").

**PERSPECTIVES: From the Classroom**

**"In speaking of broad diversity, one must recognize that every individual—of every ethnicity, gender, etc.—will bring different perspectives, experiences, creativity . . . . But when individuals from groups that face traditional biases in our society are excluded or inadequately represented, we inherently limit the diversity that is possible—and with that, we limit the potential for achievement, discovery, innovation and learning in the sciences (and likely in other fields). [T]his limits the robustness of the scientific enterprise as a whole . . . .**

**I offer . . . my judgment as an educator in science whose experience informs me that broad diversity of students and faculty in the classroom and laboratory enriches the learning environment for all students.**

**My experiences as an educator seem to have correlations with my observations about how progress occurs in the expansion of human scientific knowledge. The identification, recognition and exploitation of multiple distinct pathways for asking questions about and solving scientific problems often precedes discovery—and sometimes—head-spinning new paradigms. These new answers and advances in science [aid] its evolution and avoid the fate of becoming a static state of knowledge . . . .**

**My observation is that the broadest possible manifestation of diversity is a critical force-multiplier to the learning process for all students in a science classroom or laboratory. Diversity, in its inherent differences in background, experience and intellectual aesthetics (or style), seems to lead to the broadest spectrum of questions about any posed problem. Although there may be one answer to a physics, chemistry or mathematics problem (based on the current state of knowledge), there are often multiple paths for arriving at that answer. In a broadly diverse classroom, all students thus benefit from hearing the different questions posed in the educational arena. Fostering habits of seeking multiple pathways to solutions would seem a prudent strategy for the development of innovation in thinking of students in addition to enhancing each student's mastery of existing science."**

**S. James Gates, Jr., J. S. Toll Professor of Physics and Center for Particle & String Theory Director at the University of Maryland, College Park, "Thoughts On Creativity, Diversity and Innovation in Science and Education," at 3, 4 (2009), available at [www.aaas.org/](http://www.aaas.org/)**

## b. *Economic and National Security Outcomes*

STEM fields are important economic and innovation drivers and, consequently, provide an essential foundation for national security.<sup>23</sup> According to the National Science Foundation ("NSF"), "scientists and engineers contribute enormously to technological innovation and economic growth," far exceeding in impact the five percent of the U.S. civilian workforce that they represent.<sup>24</sup>

Because technology is "increasingly recognized as a key determinant of economic growth by most nations,"<sup>25</sup> NSF has emphasized that our "international economic competitiveness ... depends on the U.S. labor force's innovation and productivity" and that a "diverse, globally-oriented workforce of scientists and engineers" is needed to support continued U.S. economic leadership.<sup>26</sup>

## c. *Conclusion: Benefits to All*

Academic research institutions educate much of our nation's STEM workforce and increase fundamental knowledge from which industry can develop practical solutions to the needs of a diverse society. This is the incomparable U.S. partnership of higher education, academic research, government and industry that has resulted in innumerable advances in knowledge and improvements in the quality of life, health, and productivity of society in this country and around the world.<sup>27</sup> Broadly diverse faculties and student bodies are critical to the success of the academic research endeavor and its partnership with government and industry, benefiting all in our nation and society in general.

## 3. **The Challenges We Face**

U.S. leadership in STEM innovation, higher education and the global economy is at risk.

Illustrating this point, NSF, the President's Council of Advisors on Science and Technology ("PCAST"), and the Commission on Professionals in Science and Technology ("CPST") all report a negative trend in the first decade of the 21<sup>st</sup> Century: U.S. students' interest in STEM

<sup>23</sup> See, e.g., n. 61, *infra*; Massachusetts Institute of Technology, June 12, 2002, "Report of the Ad Hoc Faculty Committee on Access to and Disclosure of Scientific Information," Executive Summary, i-ii, 1-6 (committee chaired by MIT Professor, Sheila Widnall, former Secretary of the Air Force) ("National security, the health of our nation, and the strength of our economy depend heavily on the advancement of science and technology and on the education of future generations....").

<sup>24</sup> NSF, 1 *Science and Engineering Indicators 2002*, at Chs. 2, 3, 5, [www.nsf.gov/sbe/srs/seind02/start.htm](http://www.nsf.gov/sbe/srs/seind02/start.htm) (NSF's *Science and Engineering Indicators* are cited "SEI"); NSF, *Women, Minorities, and Persons With Disabilities in Science and Engineering 2000*, [www.nsf.gov/sbe/srs/nsf003271](http://www.nsf.gov/sbe/srs/nsf003271) ("WMD"); President's Council of Advisors on Science and Technology ("PCAST"), Workforce/Education Subcommittee, [www.ostp.gov/pcast](http://www.ostp.gov/pcast), in the June 2004 report entitled, "Science and Engineering Capabilities," parts 2 and 3.

<sup>25</sup> 1 SEI at 5-44; The National Academies, *Rising Above The Gathering Storm: Energizing and Employing America for a Brighter Economic Future* (2005), [www.nap.edu/catalog.php?record\\_id=11463](http://www.nap.edu/catalog.php?record_id=11463).

<sup>26</sup> 1 SEI 3-15 to 3-29, 5-29 to 5-30; WMD at 1.

<sup>27</sup> See n. 22, MIT Brief, *supra*.

careers and their performance in science and mathematics continue to decline, while foreign students' interest and performance in these areas continue to increase. Only about one-third of the bachelors degrees earned in the United States in 2005 to 2006 were in STEM fields, whereas 56 percent of the bachelors degrees earned in China and 63 percent in Japan in 2005 were in STEM fields. Furthermore, in the U.S., about 5 percent of all bachelor's degrees are awarded in engineering, compared to 20 percent in Asia.<sup>28</sup> Overall, the United States trailed 16 countries in Europe and Asia in the proportion of each country's college population who earned degrees in science and engineering in 2001.<sup>29</sup>

Demographic trends are even more striking. Data from the U.S. Census Bureau and NSF demonstrate that individuals who today are referred to as minorities will soon constitute the majority of the college-age population and then the majority of the total population of the United States. Minorities constituted one in three members of the college-age population and about 24 percent of the total population of the U.S. in 2000. By 2025, NSF projects that minorities will constitute 38 percent of the college-age population. Minorities are projected to surpass Caucasians in the U.S. population soon after 2050.<sup>30</sup>

In 2006, women already constituted 57 percent of the college-age population as well as more than half of the total U.S. population of the United States.<sup>31</sup>

While the gender gap in high school preparation in science and mathematics has largely been eliminated, women are still lagging in the pursuit of STEM higher education and wide racial and ethnic gaps persist in high school preparation. African American, Hispanic, and American Indian and Alaska Native students are less likely than Asian and non-Hispanic Caucasian students to take key advanced mathematics, chemistry, and physics courses in high school.<sup>32</sup> This evidence signals the perpetuation of a severe pipeline problem in STEM fields.

African American, Hispanic, and Native American individuals, whose representation in the college-age and U.S. population is increasing, are under-represented in both STEM degrees and all degrees at the college and graduate school levels. Women are under-represented in STEM degrees at all levels. Consider the following data on degrees in STEM and other fields at the bachelors and doctoral levels.

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<sup>28</sup> SEI 2008, [www.nsf.gov/statistics/seind08/c2/c2s5.htm](http://www.nsf.gov/statistics/seind08/c2/c2s5.htm).

<sup>29</sup> WMD at 20; MIT Brief; PCAST, June 2004 report at parts 3 and 4.

<sup>30</sup> U.S. Census Bureau, U.S. Summary 2000 (July 2002), [www.census.gov/population/cen2000/phc-t08](http://www.census.gov/population/cen2000/phc-t08) (Tables 3 and 4 averaged)(15-24 year-olds in the U.S. population based on 2000 census data); 2 SEI, Table 2-2 (Appendix Tables); see also U.S. Department of Commerce, Minority Business Development Agency, "Minority Population Growth: 1995 to 2050," at 1-3 (1999); U.S. Census Bureau, "Dynamic Diversity: Projected Changes In U.S. Race and Ethnic Composition 1995-2050," at 1 (1999).

<sup>31</sup> See National Center for Education Statistics, *Digest of Education Statistics*, 2006, Table 6, [http://nces.ed.gov/programs/digest/d06/tables/dt06\\_006.asp](http://nces.ed.gov/programs/digest/d06/tables/dt06_006.asp)

<sup>32</sup> CPST 2008, *Professional Women and Minorities*, Chs. 1-2.

Women have outnumbered men in undergraduate education since 1982 and earned 58 percent of all bachelor's degrees in 2005, but earned only about half of all bachelor's degrees in science and engineering since 2000.<sup>33</sup> African Americans, Hispanics and Native Americans together accounted for only 18 percent of STEM bachelors degrees in 2005-2006.<sup>34</sup> Of PhDs awarded between 2005 and 2006 in the U.S. in STEM fields, only 20 percent were earned by women, and only 6 percent were earned by African Americans, Hispanics and Native Americans.<sup>35</sup>

It is critical that women's robust representation in college generally not obscure their lesser representation in PhD programs and in STEM fields at all levels. Data on freshman "intentions" to major in a field, actual enrollments, and degree completions show wide variations by gender and broad field. The sex ratio of interest ranges from 9:1 in computer science, 6:1 in engineering, and 1.5:1 in physical sciences. Women's interest outpaces men's only in the biological sciences.<sup>36</sup> These patterns persist in enrollments and degree completion with the gap in retention rates narrowing to parity in many fields, but not in all, *e.g.*, 4:1 male to female in engineering.<sup>37</sup> The impact of these differentials on the composition of the STEM faculty is clear.

This relative dearth of science and technology degrees earned by minorities and women has led to severe under-representation in academia and the workforce, with only 10 percent of the science and engineering workforce in 2006 comprising African Americans, Hispanics and Native Americans.<sup>38</sup> Under-represented minorities, women and persons with disabilities represent two-thirds of the U.S. workforce, but hold only one-fourth of the science and technology jobs that drive the global economy.<sup>39</sup> Caucasians and Asians, who represent the vast majority of this workforce and have the most experience, are aging.<sup>40</sup> The university faculty looks glaringly unlike the undergraduate student body. In the context of these demographics, *all* students and

<sup>33</sup> SEI 2008, [www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42](http://www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s42).

<sup>34</sup> 2 SEI at Appendix Table 2-17; WMD at 20; MIT Brief, *supra* n. 22; PCAST, June 2004 report at parts 3 and 4; *see also* National Center for Education Statistics, [www.nces.ed.gov/programs/digest/d06/tables/dt06\\_274.asp](http://www.nces.ed.gov/programs/digest/d06/tables/dt06_274.asp); CPST 2008, Figure 3-1.

<sup>35</sup> CPST 2008, Figure 3-1; *see also* T.B. Hoffer, M. Hess, V. Welch, Jr., and K. Williams, *Doctorate Recipients from United States Universities: Summary Report 2006* (National Opinion Research Center 2007) (reporting on data collected in the Survey of Earned Doctorates, conducted for six federal agencies, NSF, NIH, USED, NEH, USDA, and NASA by NORC).

<sup>36</sup> *The American Freshman*, issued annually, UCLA: Higher Education Research Institute, [www.gseis.ucla.edu/heri/heri.html](http://www.gseis.ucla.edu/heri/heri.html)

<sup>37</sup> *See Professional Women and Minorities: A Total Human Resources Data Compendium, 17<sup>th</sup> Edition*, Washington, DC: Commission on Professionals in Science and Technology, November 2008, Chs. 2-4.

<sup>38</sup> CPST 2008, *Professional Women and Minorities*, Ch. 5.

<sup>39</sup> PCAST, June 2004 report at part 3.

<sup>40</sup> 1 SEI at 3-12, 3-15 to 3-24, 3-27, 5-29; WMD at 20-22, Text Table 5-2 at 52. Only 9.1 percent of all higher education faculty are members of these minority groups so the percentage who are faculty in science and technology fields is even less. *See* Nat'l Center for Education Statistics, [www.nces.ed.gov/programs/digest/d06/tables/dt06\\_229.asp](http://www.nces.ed.gov/programs/digest/d06/tables/dt06_229.asp).

the entire nation will suffer if we do not address quality of and access to STEM education, while increasing the racial and gender diversity of the workforce available to STEM fields.<sup>41</sup>

As long as public kindergarten through 12<sup>th</sup> grade ("K-12") education is deficient, the demographics of applicant pools for selective institutions of higher education may not yield significantly greater racial diversity when only socio-economics are considered.<sup>42</sup> Even minorities of high socio-economic status with better K-12 preparation statistically face lower expectations that may lead to under-performance.<sup>43</sup>

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<sup>41</sup> S.A. Jackson, "The Quiet Crisis: Falling Short in Producing America's Scientific and Technical Talent, Building Engineering and Science Talent (BEST)" (2004), [www.bestworkforce.org/PDFdocs/Quiet\\_Crisis.pdf](http://www.bestworkforce.org/PDFdocs/Quiet_Crisis.pdf); AAAS-NACME, *Standing Our Ground: A Guidebook for STEM Educators in the Post-Michigan Era* (Oct. 2004), [www.aaas.org/standingourground.org](http://www.aaas.org/standingourground.org) (hereafter "*Standing Our Ground*").

<sup>42</sup> See *The Shape of the River*, *supra*, at 49 (noting that there are six Caucasians for every African American in low socio-economic groups with "A" grade point averages and high enough test scores to be seriously considered for admission to selective colleges and universities based on national demographic data); see also Thomas J. Kane in *Standing Our Ground*, *supra*, at Appendix C; Travis L. Gosa and Karl L. Alexander, "Family (Dis)Advantage and the Educational Prospects of Better Off African American Youth: How Race Still Matters," *Teachers College Record*, 109, 285-321 (2007).

<sup>43</sup> *The Shape of the River*, *supra*, at 77-79, 88.

**PERSPECTIVES: Helping Students Finish the 4-Year Run**

**"America's public universities enroll a high percentage of the college-going population—about two-thirds of all full-time students seeking B.A.'s and more than three-fourths of all students in four-year programs . . . — [and have] the strongest historical commitment to promoting social mobility. Six major findings related to 21 flagship universities and all 47 four-year public universities in Maryland, North Carolina, Ohio and Virginia are:**

- 1. Disparities in outcomes (especially graduation rates and the time it takes to earn a degree) are strongly related to socioeconomic status, race and ethnicity.**
- 2. Lengthy time-to-degree is a major problem.**
- 3. Withdrawals from flagship universities are far less concentrated in the first two years of study than many people assume.**
- 4. Money matters.**
- 5. But money is by no means the entire story, perhaps not even the largest part.**
- 6. "Sorting" of applicants by universities, especially overreliance on standardized tests, is consequential and problematic."**

William G. Bowen, Matthew M. Chingos, and Michael S. McPherson, *Crossing The Finish Line, Completing College at America's Public Universities*, Princeton University Press, 2009, Ch. 3, pp. 32-56.

Available on-line, *The Chronicle of Higher Education*, Sept. 8, 2009,  
<http://chronicle.com/article/Helping-Students-Finish-the/48329>

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#### 4. Moving Forward

Industry leaders heavily invested in STEM education and professions have noted that, irrespective of one's political or social viewpoint, we must increase participation of minorities and women in STEM fields.<sup>44</sup> Observing that students educated in STEM fields in China and India often lack creative and collaborative abilities that are as well developed as students educated in American institutions of higher education, these leaders note that these countries realize the need to foster such creativity and collaboration in STEM education and are working on enhancing their approach. In addition, these leaders have opined that if we fail to make significant progress in increasing participation of minorities and women in U.S. STEM higher education and industry in approximately the next five or six years, the nation's economic strength, leadership in innovation, and security may be expected to decline appreciably, just as other countries' effectiveness and creativity in STEM education is expected to ascend.

*"Industry leaders heavily invested in STEM education and professions have noted that, irrespective of one's political or social viewpoint, we must increase participation of minorities and women in STEM fields . . . [or] the nation's economic strength, leadership in innovation, and security may be expected to decline appreciably...."*

Until our nation can provide access to high quality public K-12 science and mathematics education to a high percentage of all segments of our society, including under-represented minorities and women, institutions of higher education -- particularly selective institutions -- will have to continue to take race and gender into account to achieve the racial and gender components of the broad diversity in STEM undergraduate and graduate student bodies and faculties that they require to achieve their educational missions.

Until we confront the root causes of our nation's deficiency in STEM fields, our businesses and industries will continue to struggle to build a sufficiently diverse workforce that effectively identifies our society's needs, develops products and services to address those needs, and competes in the world's markets to provide those products and services. This inter-generational pipeline problem is one of the greatest challenges facing institutions of higher education and our nation in the 21<sup>st</sup> Century. U.S. colleges and universities must respond creatively and unequivocally.

Arguably, nowhere have race and ethnicity been more prominent in American life than in education, with institutions of higher education serving a pivotal role in opening opportunities to individuals. In many STEM fields, this has also been true for women. The effects of the shortage

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<sup>44</sup> See Remarks of the Chief Executive Officer of Northrop Grumman Corporation, the Executive Vice President of IBM Corporation and the President of the National Academy of Engineering in CHUBIN, D.E., MALCOM, S.M., KEITH, J.L., AND BOBB, K., "Standing Our Ground II: Efficacy of University-based S&E Programs Despite Limitations of 'Strict Scrutiny'," A SUMMARY OF THE MEETING, AAAS-NACME Roundtable 15 January 2008, revised April 2008, pp. 6-7

[http://php.aaas.org/programs/centers/capacity/07\\_Engagement/07\\_LawPolicyPractice.php](http://php.aaas.org/programs/centers/capacity/07_Engagement/07_LawPolicyPractice.php)

of educational opportunities, particularly in STEM fields, for racial minorities and women have been correspondingly felt in the faculties of our nation's colleges and universities and in the workforces of our nation's industries and businesses. Educational attainment is the pathway to individual upward mobility. But for at least 40 years, the influence of family and neighborhood, and to a lesser extent the influence of gender in STEM fields, have confounded school district policies to ensure equal educational opportunity and advance equitable educational outcomes.<sup>45</sup>

### **PERSPECTIVES: Race Still Matters**

**"We know from years of research that racial/ethnic gaps persist in almost every corner of our nation's campuses.**

- **There are racial disparities in college enrollment and college completion. Over the last three decades, undergraduate enrollment rates for racial/ethnic minority students have increased, nearly doubling. Minorities have also made gains in completion rates at the high school and collegiate levels; however, when compared to Whites, gaps in student achievement remain for nearly all minority groups.**
- **There are racial disparities in fields of study and graduate education. Fewer racial/ethnic minority students graduate in fields like science and engineering; fewer receive post-baccalaureate training and attain master's, doctorate, and professional degrees.**
- **There are racial disparities in perceptions of campus climate. Racial/ethnic minority students are less likely to express satisfaction with their overall undergraduate experience. They also are less likely to feel a sense of belonging, interact with faculty/staff, and hold leadership positions in clubs/organizations.**
- **There are racial disparities in hiring, tenure, and compensation policies. Post graduation, racial/ethnic minorities earn less, with the same credentials, as their White counterparts. Even within the ranks of our liberal-minded institutions, Blacks and Hispanics are grossly underrepresented in our faculties...."**

Michelle Asha Cooper and David A. Longanecker, Inside Higher Ed, Sept. 3, 2009, [www.insidehighered.com/layout/set/print/views/2009/09/03/cooper](http://www.insidehighered.com/layout/set/print/views/2009/09/03/cooper)

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<sup>45</sup> Isabel Sawhill, "Opportunity in America: The Role of Education," *The Future of Children, Princeton-Brookings, Policy Brief*, 2 (Fall 2006).

In a perfect world, the lessons of R&D would permeate educational institutions with a short lag and little controversy. As it is in the United States, however, every state, school district, college, and university must decide for itself what works, how to translate the most effective and legally sustainable approaches into its own structure, and what to measure as a demonstration of successful outcomes. In a word, the wheel is being constantly "re-invented" within an environment awash in information of varying validity.

If we are focused on the educational benefits for all students and the nation's needs rather than on trying to include those who have been historically excluded or to achieve "racial balancing," then we still must consider race, ethnicity and gender (among other diversity characteristics and qualities) appropriately.<sup>46</sup> The issue is not one of whether an African American student or prospective faculty member "deserves" or "needs" consideration of his or her race as one factor among many. Rather, a college or university may need to consider such a student's or prospective faculty member's *combination* of race and socio-economic background to achieve the broad diversity in each racial group that is required to combat stereotyping and produce educational benefits for all students and the nation. This is an especially important consideration if there are many more non-minorities who apply for college admission or faculty positions in a given discipline.

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<sup>46</sup> See *Grutter*, 539 U.S. at 326-30; *Bakke*, 438 U.S. at 289-90, 306-07, 310.

## IV. KEY DEFINITIONS

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

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

*Race-, ethnicity-, and gender-conscious, -exclusive and –neutral policies*, lack definitional coherence throughout all of federal law,<sup>47</sup> but as a general rule tend to refer to the following descriptions that will be followed in this guidance:

*Race-, ethnicity- and gender-conscious policies* are policies that reflect an express race, ethnicity or gender preference or that are principally motivated by those aims, with corresponding impact. Thus, for example, race-conscious policies may include explicit racial classifications (such as the University of Michigan Law School's race-as-a-factor admissions policy), where race was an express factor used in evaluating applicants, as well as those that are neutral on their face but that are motivated by a race-based purpose, resulting in disparate impact based on race. (Race-, ethnicity-, and gender-based policies, in contrast, tend to refer only to policies or practices reflecting express consideration of the preference of relevance.)<sup>48</sup>

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

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

<sup>47</sup> For a more comprehensive analysis of relevant federal caselaw and U.S. Department of Education definitions, see Coleman, Palmer and Winnick, *Race Neutral Policies in Higher Education: From Theory to Action* (College Board, 2008).

<sup>48</sup> See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (referring at times to the challenged employment practice as "express, race-based decisionmaking"); *Parents Involved in Community Schools*, 551 U.S. 701 (2007) (referring to challenged policy involving explicit consideration of race as "race-based"); United States Department of Education Policy Guidance, Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756 (Feb. 23, 1994) (referring to "race-based" policies).

targeted individuals. (The law regarding inclusive outreach and recruitment policies is described in Section VII.C.4 below.)

**B. *Intentional and Disparate Impact Discrimination***

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

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

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

There is a similar concept of disparate impact in participation of students and conferring benefits of educational programs. By federal regulation, Titles VI (respecting race) and IX (respecting gender) prohibit disparate impact discrimination in the absence of an educational necessity.<sup>49</sup>

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

**1. *Strict scrutiny*** is a legal term of art, referring to the most rigorous standard of judicial review. It is applicable to policies that treat individuals differently on the basis of their race or ethnicity ("race-conscious" policies). Such policies are "inherently suspect" under federal law, and to satisfy strict scrutiny and be upheld by a court, they must serve a "compelling interest" and be "narrowly tailored" to achieve that interest. This requirement is derived from federal constitutional principles (which apply to public higher education institutions) and identical principles of Title VI of the Civil Rights Act of 1964 (which apply to any recipient of federal funding, public or private).

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

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<sup>49</sup> Of note, the Supreme Court has held that there is a private right of action under Title VI as to disparate treatment claims but not disparate impact claims. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

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

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

**2. Intermediate scrutiny** is also a legal term of art, referring to a standard of judicial review that is less demanding than "strict scrutiny" but significantly more demanding than the "rational basis" standard that is applicable to most non-race, -ethnicity and -gender-conscious classifications under federal law. Intermediate scrutiny is applicable to policies that treat individuals differently on the basis of their sex or gender. Such polices must serve an "important interest" (also referred to in some contexts as "an exceedingly persuasive justification") and be "substantially related" to that interest. This requirement is derived from federal constitutional principles (which apply to public higher education institutions) and similar principles of Title IX of the Education Amendments of 1972 (which apply to any recipient of federal funding, public or private). The burden of proof is on the institution to establish that it has an important interest or exceedingly persuasive justification and its approach to achieving that interest, while not necessarily the most narrowly tailored, is substantially related.

**3. Rational basis scrutiny** is a legal term of art that reflects the standard applicable to the provision of most non-race, -ethnicity and -gender-conscious benefits or opportunities conferred by public or private institutions (where, in the latter case, the institution is a recipient of federal funds). It is the least rigorous standard of review, in which courts largely defer to decisions by educational institutions and others when preferences based on, *e.g.*, socio-economic status, special skills and talents, particular life experiences, etc. are challenged. The burden of proof is on the challenger of the classification to show that the institution was being "arbitrary and capricious" or had an "illegitimate or illegal" purpose. Programs using most non-race, -ethnicity, and -gender classifications are usually upheld by the courts.

## D. Diversity Interests

1. *Diversity* is a term that is best regarded as inextricably related to desired mission-driven educational outcomes ("the *educational benefits* of diversity"), inherently institution-specific, and broadly defined -- embodying the various qualities and characteristics a higher education institution may seek in its students or faculty. The precise meaning of "diversity" derives from an institution-specific context based upon the goals the school establishes for itself -- often reflected in mission and related policy statements.<sup>50</sup> Diversity qualities and characteristics can include various talents, life experiences, religions, geographic origins/experiences, socio-economic background, sexual orientation and more -- as well as race, ethnicity and gender characteristics.

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

Note that throughout this document, multiple facets of diversity are discussed -- frequently with reference to race, ethnicity and gender. In many instances, relevant and detailed guidance exists with respect to race- and ethnicity-conscious programs (such as the U.S. Department of Education's policy guidance on race-conscious financial aid and scholarships, discussed below), but not to gender-conscious programs. Thus, relevant omissions of discussions associated with gender preferences stem likely from a dearth of substantial legal authority on point.

## E. Remedial Interests

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

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

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<sup>50</sup> See, *e.g.*, *Grutter*, 539 U.S. at 306; see also Arthur L. Coleman and Scott R. Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues*, at 12 (College Board, 2006) ("[H]igher education officials should ensure that their educational goals are clearly stated and understood . . . . [T]here must be clarity regarding what kind of student body the institution wants to attract (and why) and how the institution conceptualizes (or defines) its goals and objectives . . . . Ultimately, given the obligation to ensure that race- and ethnicity-conscious measures are limited in both scope and time, higher education officials should be able to define success with respect to their goals, and to recognize when they've achieved it.")

state or private system of education in which discrimination and inequity affect minorities or women, may take steps to remedy a resulting pipeline problem which it passively helped to create.

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

(See Sections VIII.C and VIII.E for a more complete discussion of these concepts and how they may be used.)

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

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

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

In the University of Michigan cases, critical mass was framed as "neither a rigid quota nor an amorphous concept defying definition." Instead, it was defined as a "contextual benchmark that allows the Law School to exceed token numbers within its student body and to promote the robust exchange of ideas and views that is so central to the Law School's mission."<sup>51</sup> In the University of Michigan cases, the expert reports of Patricia Gurin and Stephen W. Raudenbush were most directly relevant to the critical mass issue.<sup>52</sup>

2. *Racial, ethnic or gender balancing* is seeking to achieve a representation of a minority group or women in the student body or faculty that approximates their representation in the local community, state or nation. The Supreme Court has made clear in a number of educational contexts that racial balancing is not a compelling interest and is not permissible for public institutions under the Equal Protection Clause of the U.S. Constitution. Racial balancing

<sup>51</sup> See Brief of the American Educational Research Association, the Association of American Colleges and Universities, and the American Association for Higher Education as *Amici Curiae* in Support of Respondents at 25, *Grutter v. Bollinger*, 539 U.S. 301 (2003).

<sup>52</sup> See <http://www.vpcomm.umich.edu/admissions/research/#um>. Extensive background on the concept of critical mass and the ways in which federal courts have addressed the issue can be found in *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issue*, Ch. 4 (College Board, 2006). A provocative and thoughtful paper on the topic is Larry White's *One Year After the Michigan Cases: What Are We Doing* (2004).

is also prohibited for private institutions that receive federal funding under Title VI, as is gender balancing under Title IX. Notably, the goal of achieving a "*critical mass*" of minorities and women in the student body and faculty in order to achieve the educational benefits of broadly defined (not just racial and gender) diversity is a different concept than racial or gender balancing.

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

#### **G. Underrepresented Students**

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

#### **H. Individualized, Holistic Review**

As a concept embodying the admissions process approved by the Supreme Court in *Grutter*, *individualized, holistic review* refers to a process by which, with respect to each applicant's file, "serious consideration" is given "to all the ways an applicant might contribute to a [broadly] diverse educational environment" that is needed to serve the institution's mission-driven educational objectives. It is a process involving and applying the same criteria to "applicants of all races," without an "automatic acceptance or rejection based on any single 'soft' variable" (for example, without any "mechanical, predetermined diversity 'bonuses' based on race or ethnicity"). Such a process is also "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing

for consideration, although not necessarily according them the same weight" in every case. All applicants are able to compete for all spots under the same criteria.

## I. Inclusive Conduct and Multi-cultural Skills

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

Inclusive conduct and multi-cultural skills should be understood to relate to criteria associated with *workplace conduct* desired by some higher education institutions to achieve their educational mission. Notably, these criteria do not regulate viewpoint, diminish principles of academic freedom that apply in public and private institutions, or violate rights protected under the First Amendment that apply in public institutions.<sup>53</sup>

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<sup>53</sup> Thus, in making various decisions, a higher education institution may consider whether a faculty member, regardless of his or her viewpoint on race or gender -- through his or her conduct in classroom, research, mentoring or other relevant activities -- has a record of successfully fostering participation by colleagues and students who have broadly diverse perspectives, experiences and backgrounds including, without limitation, racial minorities, women and people from low socio-economic backgrounds or with disabilities. Individuals of any race or gender may possess or lack this attribute, which provides opportunities to enhance educational and research outcomes through broad and multi-cultural issue identification, collaboration, and problem-solving. This attribute is *inclusive and non-discriminatory*. See Appendix IV, Section 1, *infra*, for a related discussion of First Amendment and academic freedom.



## V. RACE- AND GENDER-NEUTRAL ALTERNATIVES

### A. Neutral Alternatives In General

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

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

Notably, considering the demographics of students applying to selective institutions, race and socio-economic background generally do not correlate in a manner that allows full realization of the necessary diversity to achieve a selective institution's educational, research and service mission as a mere ancillary benefit of considering inclusive conduct and multi-cultural skills or socio-economics. It is important to achieve socio-economic diversity within each racial group to break down stereotypes, and not to achieve racial diversity only among those from lower socio-economic backgrounds.<sup>54</sup> Nor, for that matter, should minorities and women be assumed to possess and utilize inclusive conduct or multi-cultural skills and experiences that anyone of any race or gender may possess (or lack) and utilize (or not). Consequently, reliance on a record of inclusive conduct and multi-cultural skills or socio-economic background alone is unlikely in most instances to be adequate to achieve broad diversity. Community colleges and other institutions that are not as selective (on the basis of standardized test scores and grades), may be able to rely more heavily -- if not necessarily exclusively -- on these race- and gender-neutral approaches, depending on the demographics of their applicant pools that are competitive for admission.

<sup>54</sup> See *The Shape of the River*, *supra*, at 49 (noting the relative numbers of Caucasians and African Americans in low socio-economic groups with "A" grade point averages and high test scores, based on demographic data).

## **B. Inclusive Conduct and Multicultural Skills as a Criterion**

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

Inclusive conduct and multi-cultural skills refer to demonstrated success -- through conduct in classroom, research, mentoring and/or other work activities -- in including and fostering participation by individuals of different cultures, socio-economic backgrounds, races, genders, and life experiences in pursuit of increased understanding and exploration of a broad range of perspectives. This is not a proxy for any one viewpoint and focuses instead on the workplace conduct of an individual. Inclusive conduct and multi-cultural skills provide opportunities to identify and utilize broad perspectives in teaching, learning, research and mentoring. Inclusive conduct and multi-cultural skills create an inclusive environment in which individuals reflecting a range of cultures, backgrounds, and experiences, including but not limited to different races and genders, can fully participate and work productively and creatively together. Inclusive conduct and multi-cultural skills provide opportunities to break down stereotypes that assume all individuals of a particular race, ethnicity, gender, or socio-economic group or who have a disability share the same views, personal qualities, and experiences. These are race- and gender-neutral qualities that individuals of any race or gender may possess -- or lack.<sup>55</sup>

Position and program descriptions, selection criteria, and selection processes for employment, fellowships, assistantships, admissions, funding, participation in mentoring and other programs and their related advertisements may include, as a preferred or required criterion, a record of utilizing inclusive conduct and multi-cultural skills as defined above. This means that an individual -- through his or her conduct in classroom, research, mentoring or other relevant workplace activities -- has a record of successfully including and fostering participation by colleagues and students with broadly diverse perspectives, experiences and backgrounds including, without limitation, racial minorities, women and people from low socio-economic backgrounds or with disabilities. Individuals of any race or gender may possess or lack a record of inclusive conduct and multi-cultural skills, which provide opportunities to enhance educational and research outcomes through broad and multi-cultural issue identification, collaboration, and problem-solving. Performance evaluations, promotion evaluations, program selection and admissions decisions may include consideration of the presence or absence of a record of such inclusive conduct and multi-cultural skills. In doing so, it is important that this criterion is evaluated on the basis of inclusive conduct that provides opportunities for multi-cultural collaboration, issue identification, creativity and problem-solving in classroom, research, laboratory, mentoring and other workplace activities, not on the basis of personal viewpoint.

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

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<sup>55</sup> The inclusive conduct and multi-cultural skills criterion concerns a person's *workplace conduct* of inclusion and non-discrimination on the basis of race, gender, other specified bases, and perspective, *not* a person's viewpoint. See Appendix IV, Section 1, *infra* ("Diversity Considerations, the First Amendment and Academic Freedom").

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

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

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

An institution may have an authentic, mission-critical interest in building a faculty and student body that possess multi-cultural skills and exhibit inclusive conduct, recognizing that individuals with these abilities and conduct are needed to expand opportunities for excellence in research and teaching in a broadly diverse society. Such individuals create a more robust intellectual environment and a more broadly welcoming academic community for research and learning by

broadly diverse individuals. In furtherance of its mission, the institution may also have a non-discrimination policy that prohibits discriminatory conduct in university work on the basis of race, gender, ethnicity, religion, age, sexual orientation, etc. It is a good practice to be explicit about the institution's and unit's multi-pronged mission and related multi-cultural and broad diversity needs.

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

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

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

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

A more comprehensive definition of low socio-economic background than is typically used considers total wealth, including but not limited to family income and concentration of poverty

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in the family's residential area and school district.<sup>56</sup> This formulation provides a more complete reflection of low socio-economic status, which alone is an authentic and important aspect of broad diversity, and also has the ancillary effect of increasing racial diversity. In a country with a history of slavery, residential and school segregation and discrimination on the basis of race, individuals who are members of racial minority groups tend to have less total wealth than other individuals with equal annual income. Of course, higher socio-economic status is also important to broad diversity, but may be easier to achieve.

Employment opportunities and benefits for faculty members (e.g., hiring, promotion, retention, community building and mentoring in support of preparation for tenure, supplemental compensation, research funding and facilities, participation in other programs, etc.); selection of students for post-doctoral fellowships and research and teaching assistantships; admission of students; and selection of students to participate in other programs or to receive other educational benefits may be based on low socio-economic background, without considering race and gender, sometimes in combination with being the first in one's family to graduate from a four-year college, to pursue a STEM career, and/or to pursue any career in academia. Socio-economic (or "class") diversity within all groups is also required to achieve mission-critical broad diversity. Consideration of a student's low socio-economic background relates to a student's family's socio-economic status. If this criterion is a consideration for faculty, it relates to family background.

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

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

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

Academic accomplishments, intellectual capacity and, if applicable, particular discipline expertise, are baseline requirements. A strong record -- in classroom, research, mentoring or other relevant workplace activities -- of including and fostering full participation by individuals of different cultures, socio-economic backgrounds, races, genders, experiences, and perspectives,

<sup>56</sup> Richard Kahlenberg, "Affirmative Action in Higher Education After the Seattle and Louisville Decisions: Reexamining the Socio-economic Alternative," [http://php.aaas.org/programs/centers/capacity/07\\_Engagement/07\\_LawPolicyPractice.php](http://php.aaas.org/programs/centers/capacity/07_Engagement/07_LawPolicyPractice.php).

and/or an individual's socio-economic background, is one factor among many that may "tip the balance" in a holistic assessment of an individual, or may be a prerequisite, when making a decision concerning hiring, compensation, promotion, research support, mentoring, participation in fellowships, admissions, participation in other programs, and/or conferring other employment or educational benefits. Whether an individual is first in his or her family to attend a four-year college, enter a STEM field, or pursue any academic career may also be considered.

### ***1. Significance of Institutional Resources Committed***

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

### ***2. Assessment of Impact***

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

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

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

### ***3. Commentary and Examples***

If these approaches are properly applied, race and gender and individual viewpoint (as distinguished from inclusive workplace conduct that provides opportunities for multi-cultural interactions, experience, problem-solving and issue identification to strengthen research, teaching, learning and advising) are not considered in employment or educational decisions and

benefits. These inclusive conduct/multi-cultural skills and socio-economic approaches also are not used as a proxy for race or gender because these criteria fulfill separate authentic institutional needs. Strict judicial scrutiny should not apply and the prohibition against racial and gender discrimination in hiring and in the terms and benefits of employment under Title VII of the Civil Rights Act of 1964, the Equal Protection Clause, Title IX of the Education Amendments of 1972, and any state law or executive order should not be invoked. *See* Section VI, *infra*. Also, academic freedom and First Amendment rights should not be impinged upon. *See* Appendix IV, Section 1, *infra* and Section VIII, *infra*.

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

Under the "rational basis" standard of judicial review, decisions that take inclusive conduct and multi-cultural skills and/or socio-economic background into account need only avoid being arbitrary and capricious. That standard should be met if there is any relationship between the institution's mission and fostering an environment of inclusiveness for individuals of different socio-economic backgrounds, cultures and perspectives, including race and gender.<sup>57</sup>

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

These approaches do not disparately burden non-minorities and men if the same criteria (including consideration of record of inclusive conduct/multi-cultural skills and socio-economic background) and the same process are applied, and as long as the same opportunity to compete for positions and benefits are afforded to all candidates -- regardless of race and gender. (*See* Section VII.A.2, *infra* (undue burden)).

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

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

<sup>57</sup> *See* Section IV.C.3, *infra*.

inclusive conduct and to contribute multi-cultural skills. In all cases, it depends on the individual.

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

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

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

#### **4. *Examples of How Inclusive Conduct and Multi-cultural Skills and Low Socio-economic Status May be Used in Diversity Efforts***

##### ***a. Advertisement, Interview and Evaluative Questions***

An institution may include in its advertisements and/or position descriptions: "The University seeks to increase the diversity of its professoriate, workforce and undergraduate and graduate student populations because broad diversity (including all aspects of individuals that contribute to a robust academic environment)\* is critical to achieving the University's mission of excellence in education, research, educational access and service in an increasingly diverse society. Therefore, in holistically assessing many qualifications of each applicant—of any race or gender—we would factor favorably an individual's record of conduct that includes students and colleagues with broadly diverse perspectives, experiences and backgrounds in educational, research or other work activities. Among other qualifications, we would also factor favorably experience overcoming or helping others overcome barriers to an academic career or degree. This workplace conduct of inclusion and experience provide opportunities to enhance educational, research and other work outcomes by increasing opportunities for participation of a broad range of individuals and the potential to expand issue identification, collaboration, and problem-solving." "\*Broad diversity means all aspects of individuals that contribute to a robust academic environment including experience, perspectives, disciplines, geographic background, talent, family socio-economic background, disability, ethnicity, race, gender and other characteristics. Some aspects of broad diversity have been easily achieved, while others—including racial and in some disciplines gender diversity—have been more elusive and require focused efforts."

Sample evaluative questions to assess such conduct include:

- (i) Have you either experienced discrimination or barriers to achievement on any basis, felt isolated in your residential setting or educational or professional/work experience--or identified the existence of these or other barriers, and then removed such barriers and created an inclusive community, for others? Describe.
- (ii) Have you ever mentored or collaborated with a student/faculty member/staff member from a different background, perspective or experience than your own (e.g., a different race, gender, sexual orientation, socio-economic background, political perspective)? Was the collaboration, student/faculty member/staff member successful? Explain.
- (iii) How much and what kind of contact have you had as an educator/supervisor with students/faculty/staff of different backgrounds, perspectives and experiences than your own? Were you able to achieve equal success with students/faculty/staff of such differences? Explain.
- (iv) Have you experienced as a student close collaboration with faculty members of different backgrounds, perspectives, or experiences than your own? Were you able to successfully bridge any differences? Explain.
- (v) For people applying for higher level positions: Have you helped an undergraduate with a different background, perspectives, experiences than your own get into a Ph.D. program/a junior staffer with a different background advance his or her career? Mentored such a Ph.D. to conclusion? Hired such a post-doctoral associate into your laboratory? Describe.
- (vi) What is your experience educating people around you about the issues that people of different groups encounter in higher education/academic research?
- (vii) Are you the first in your family to pursue a STEM field and/or an academic career in any field?

The Kahlenberg model for determining socio-economic background is used to identify those from lower socio-economic groups. See Section V.C.1, *supra*.

**b. Target of Opportunity Funding and Positions For Those Having Strong Records of Inclusive Conduct and Multi-cultural Skills**

Special target of opportunity funding and/or the creation of a special position are provided through the Provost, a Dean or Department head to hire an individual as a faculty member who not only satisfies the usual academic requirements, but also can especially advance the institution's mission in important ways. Possessing a pronounced talent and distinguished record of inclusion of broadly diverse individuals and perspectives in teaching, research, mentoring or other workplace activities qualifies an individual -- regardless of race or gender -- for target of opportunity funding and positions. (Target of opportunity funding and positions may also be available to those from low socio-economic backgrounds, or who hold Nobel and other top prizes, or who bring another uniquely exceptional accomplishment in service, research or teaching to the institution.)

To the extent permitted in the jurisdiction and generally by law, race and gender may be factors considered, among others, that together enable an individual to contribute exceptionally to the institution.

**c. Research Funding**

Research funding is made available to individuals who bring a strong record of inclusive conduct/multi-cultural skills to the institution.

Below is an example of how a special endowment may be established to fund the research of individuals who bring a strong record of inclusive conduct and multi-cultural skills to a research center and thereby support greater gender or racial diversity.

The institution inserts the name of the center and the relevant disciplines, but may use the following as a description of the funding program:

The \_\_\_\_ Center at the University has determined that it has a compelling interest in producing excellent research and educational experiences that identify and develop solutions to problems involving \_\_\_\_\_ disciplines, and that the Center requires a broadly diverse faculty to achieve this compelling interest in an increasingly diverse society. While many aspects of diversity have been achieved at the Center and at the University, racial and gender diversity have not been adequately achieved in the Center's research faculty. Individuals with a strong record of including broadly diverse colleagues and students in research and mentoring activities, providing opportunities for multi-cultural issue identification, problem-solving and analysis, are recognized as employing workplace conduct that will foster greater diversity in all of its dimensions -- including, but not limited to, race and gender.

Donor has contributed a research endowment to stress the importance of and to support increasing racial and gender diversity in the following disciplines at the Center:\_\_\_\_\_.

This endowment will be used to support those research faculty at the Center in the relevant disciplines who, individually and as members of the community of researchers and students at the Center, can demonstrate that they actively include broadly diverse colleagues and students in research, mentoring and teaching activities and provide opportunities for multi-cultural issue identification, collaboration, and problem-solving that will enable them, through their research, mentoring and teaching, to foster broad diversity, including greater racial and gender diversity, at the Center and achieve excellence in research outcomes.

It is recognized that individuals of any race or gender may be able to do so.

**d. Other Programs**

A strong record of inclusive conduct/multi-cultural skills and socio-economic background may be used as criteria or prerequisites for participation in other programs for faculty and students. These may relate to employment, promotion, research support, and other benefits of employment, as well as to admissions, financial aid and mentoring for education and other educational programs.

## E. Diversity Considerations, the First Amendment and Academic Freedom

To understand appropriate implementation of diversity efforts in higher education, it is helpful to recognize the generally peaceful co-existence of such efforts with First Amendment rights and academic freedom principles -- a co-existence that reflects the necessary balance of academic freedom and responsibility.<sup>58</sup> Consideration of diversity in higher education reaches the fundamental purposes of the academic endeavor. Colleges and universities, whose multi-pronged educational missions embrace providing excellent educational experiences for all students, producing excellent research to increase and disseminate knowledge, increasing educational access, and serving the nation's needs for a well-prepared citizenry and workforce, have a compelling interest in creating a broadly diverse student body<sup>59</sup> and faculty.<sup>60</sup> Public colleges and universities play a special role in society by providing otherwise unavailable broadly affordable access to higher education.<sup>61</sup> Many public and private institutions of higher education require a broadly diverse community in order to provide excellent educational experiences and produce excellent research in a global, multi-cultural and diverse society.<sup>62</sup> A broadly diverse academic community is fundamental to higher education's endeavor to best serve all students, and to contribute to solutions that will enable our nation and society-at-large to progress and prosper. Many institutions' faculties have found and embraced this necessity.

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

Freedom to express ideas, however controversial and offensive, is also a deeply held value that defines great institutions of higher education, public and private.<sup>63</sup> This academic freedom,

<sup>58</sup> Arthur L. Coleman, *Live by the Score, Die by the Score: Academic Freedom and Responsibility in Admissions Decisions* (Diversity Digest, Summer 1998), available at <http://www.diversity.web.org/digest/Sm98/score.html>

<sup>59</sup> *Grutter*, 539 U.S. at 325, 330-32, 338-39.

<sup>60</sup> See *Walker v. Bd. of Regents of the Univ. of Wis. Sys.*, 329 F. Supp. 2d 1018 (W.D. Wis. 2004); *Univ. & Comm. College Sys. of Nev. v. Farmer*, 930 P.2d 730 (Nev. 1997) (faculty diversity is a compelling interest in a manner similar to student body diversity in higher education that may justify consideration of race in faculty hiring), *cert. denied*, 523 U.S. 1004 (1998); cf. *Rudin v. Lincoln Land Comm. College*, 420 F.3d 712, 719 (7th Cir. 2005) (district court had granted summary judgment for the college, which argued that compelling diversity interests justified consideration of race in a faculty hiring decision, but this argument was not made in the appeal).

<sup>61</sup> See *Grutter*, 539 U.S. at 331-32.

<sup>62</sup> This is particularly the case in 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, 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. If higher education fails to meet this national need, the nation's leadership in higher education, innovation and the global economy, as well as our national security, may be expected to decline. See Section III.A.2, above.

<sup>63</sup> See, e.g., YALE UNIVERSITY, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE, 5 (1975) ("The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think

which extends to the institution itself as well as to faculty and students, is a fundamental policy governing academic life. Academic freedom is accompanied by the countervailing policy of academic responsibility, which is also a foundation of academic culture and is embedded in many institutions' internal regulations and, indeed, in federal research funding agencies' requirements.<sup>64</sup> 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.

Neither free speech rights protected by the First Amendment to the U.S. Constitution that apply in public educational institutions,<sup>65</sup> nor principles of academic freedom that apply in most public and private institutions of higher education, are offended when the institution appropriately considers whether faculty and students practice conduct of *inclusion and non-discrimination on the basis of race, gender, other specified bases and perspectives* to achieve essential educational benefits of, and the rich discourse that results from, broad diversity. This tenet is true in the context of employment, the classroom and the research laboratory. Consideration of faculty and student *workplace conduct* required by the institution to achieve its educational mission does not regulate viewpoint or diminish principles of academic freedom. Hence, the institution may consider whether a faculty member, regardless of his or her viewpoint on race or gender (and regardless of his or her race and gender) -- through conduct in class, research, advising or other relevant workplace activities with students and colleagues -- has a record of success in including and fostering full participation of broadly diverse individuals of different perspectives, socio-economic backgrounds, races, genders, ethnicities and experiences that will provide opportunities for multi-cultural analysis, issue identification, collaboration and problem-solving. This consideration does not judge the viewpoint or subject that a faculty member or student may possess or pursue in research or, in most situations, in didactic pursuits or as a citizen.

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

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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).

<sup>64</sup> See, *e.g.*, *id.*; 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS ("AAUP 1940 Statement")("Institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole" and academic freedom in teaching and learning is accompanied by "duties correlative with [such] rights."); 42 C.F.R. Parts 50, 93 (Public Health Service, Office of Research Integrity regulations); 2 C.F.R. Part 180.

<sup>65</sup> The First Amendment applies through the 14th Amendment of state institutions of higher education. See *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925); see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993).

## VI. RELEVANT STATE LAWS: VOTER INITIATIVES AND ADMINISTRATIVE RULES<sup>66</sup>

A threshold question that must be addressed by higher education institutions that seek to pursue racial, ethnic, or gender preferences is whether relevant state laws permit consideration of race, ethnicity and gender within the limits of federal law.

In a number of states, voters (or the executive branch) have promulgated rules that limit the consideration of race, ethnicity and gender in education (among other activities such as employment and contracting). These prohibitions may not trump, and in fact may include exemptions for, federal law that mandates certain race-conscious action (such as where remedial obligations exist to address the present effects of an institution's own past discrimination or underutilization of minorities and women, and race-conscious policies are required to address those interests). However, nothing in federal law compels the institutional pursuit of non-remedial interests such as the educational benefits of diversity. Thus, to the extent that voter initiatives or other state law rules legitimately dictate higher education policy under state laws, then nothing in the Court's diversity opinions to date prohibits the enactment of state constitutional, statutory, or regulatory provisions that forbid the use of race or ethnicity in public higher education. In short, federal law establishes a "floor" upon which state law may, in appropriate circumstances, "build."

The language adopted in the four states where, as of October 2009, voters have approved statutory or state constitutional restrictions on the consideration of race, ethnicity and gender -- Nebraska, Michigan, Washington and California -- prohibits: "Public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes." Exceptions are provided for certain federal mandates. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges and school districts.

Nebraska's law, Michigan Proposal 2, and California Proposition 209 were adopted as constitutional amendments. Washington I-200 was adopted as a state statute.<sup>67</sup> None of these prohibitions extend to private institutions.

<sup>66</sup> The effect of First Amendment interests of institutions of higher education on the viability of state restrictions has not been fully explored by the courts. This section is derived from and synthesizes *From Federal Law to State Voter Initiatives: Preserving Higher Education's Authority to Achieve the Educational, Economic, Civic and Security Benefits Associated with a Diverse Student Body* (College Board, 2008).

<sup>67</sup> Initiative 200 differs from other state initiatives in several other ways: (1) Initiative 200 contains additional language expressly stating that "this section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin"; and (2) the official ballot statement accompanying Initiative 200 included language emphasizing that it "does not end all affirmative action programs" but "prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant." Noting these differences, the Washington Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 72 P.3d 151 (2004), adopted a more liberal reading of Initiative 200, holding in that case that the Seattle School District could consider race as a tie-breaker in student assignment. This decision thus played an important role in establishing the record that was ultimately addressed by the U.S. Supreme Court in 2007.

The One Florida Initiative was adopted in November of 1999, when then Florida Governor Jeb Bush issued Executive Order No. 99-281. As a result of this initiative, a regulation was added to Florida's administrative code and its Board of Governors' regulations prohibiting the use of race, national origin, or sex in university admissions, as well as in employment and contracting by state agencies including state universities. The regulation added pursuant to Governor Bush's executive order states: "Neither State University System nor individual university admissions criteria shall include preferences in the admissions process for applicants on the basis of race, national origin or sex."