VII. LEGAL ISSUES ASSOCIATED WITH STUDENT DIVERSITY[68]

A. Overview Of Governing Legal Principles

Federal constitutional and statutory provisions, along with corresponding legal principles regarding the consideration of race, ethnicity and gender in educational programs govern many student diversity efforts at institutions of higher education and are summarized below. (*See* Appendix 1 for additional background information regarding federal laws.[69])

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

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

Public institutions are subject to Constitutional restrictions; private institutions are not. However, Title VI has been held to be coextensive with the Equal Protection Clause as it relates to race discrimination. Title IX also tracks equal protection principles on key points with respect to sex discrimination, although some differences exist between those two laws. Consequently,

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[68] This section is based upon and adapted from various publications of the College Board's Access & Diversity Collaborative, with express permission of the College Board. Those publications include: *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* (College Board, 2006); *Federal Law and Financial Aid: A Framework for Evaluating Diversity-Related Programs* (College Board, 2005); *Federal Law and Recruitment, Outreach and Retention: A Framework for Evaluating Diversity-Related Programs* (College Board, 2005); and *An Action Blueprint: Key Principles and Model Practices for Achieving the Benefits of Diversity in Higher Education* (College Board, in press). Information on the Access & Diversity Collaborative can be found at www.collegeboard.com/diversitycollaborative.

This section is also based upon and adapted from two publications of the Association of American Medical Colleges, with express permission of the AAMC. Those publications include: *Roadmap to Diversity: Key Legal and Educational Policy Foundations for Medical Schools* (AAMC, 2008), and *Roadmap to Diversity: Effective, Efficient and Sustainable Enrollment Policies that Promote Mission-Related Goals* (AAMC manuscript). These and other diversity-related resources can be found at www.aamc.org.

[69] The relevant federal statutory provisions that are summarized in Appendix I, with applicable citations, include the *Civil Rights Restoration Act of 1987* (applying various federal anti-discrimination laws to an entire institution when any part of the institution receives federal financial assistance); *Title VI of the Civil Rights Act of 1964* (prohibiting racial, color and national origin discrimination by covered recipients of federal funds, which may extend to certain employment that is the primary objective of the funding or affects educational benefits); *Title VII of the Civil Rights Act of 1964* (prohibiting race, color, sex, religion and national origin discrimination by public and private employers, which applies to faculty and staff and may apply to certain student employment); *Title IX of the Education Amendments of* 1972 (prohibiting sex discrimination by education programs or activities operated by recipients of federal financial assistance); *Section 1981* (proscribing private as well as public racial discrimination in the making and enforcement of contracts); *Section 1983* (providing additional remedies for individuals whose civil rights are violated by government officials and representatives); *Section 1985*(3)(proscribing private as well as public conspiracies to intentionally discriminate on the basis of race by interfering with civil rights created by other laws); *Section 1988* (authorizing court-awarded attorneys' fees to prevailing parties in actions under Titles VI and IX, *Sections 1981 and 1983* and various other civil rights laws); and *Executive Orders 11246 and 11375* (which together prohibit covered federal contractors from discriminating on the basis of race, color, religion, national origin, and sex).

private institutions that receive federal funds are effectively subject to the same restrictions as those that arise under the Equal Protection Clause in their educational programs (under Title VI respecting race and under Title IX respecting gender).[70]

2. Title VI (42 U.S.C. § 2000d)

Title VI prohibits discrimination on the basis of race, color and national origin by public and private recipients of federal funds: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[71] Title VI applies with respect to all aspects of an institution's operations, including its educational program and certain employment matters (the latter being addressed in Section VIII, *infra*.)

As interpreted by the agencies and the courts, Title VI prohibits both intentional discrimination (disparate treatment) and the use of facially neutral procedures or practices that have the effect of subjecting individuals to discrimination based on their race, color or national origin (disparate impact). The analysis of intentional discrimination claims under Title VI is similar to the analysis of disparate treatment under the Equal Protection Clause,[72] and can be proved through direct evidence of discriminatory motive or intent; or in the absence of such evidence, using an analysis similar to Title VII burden-shifting analysis[73] -- requiring the establishment of an "educational necessity" similar to Title VII's business necessity standard to justify disparate impacts. (As discussed below, compelling educational interests in broadly diverse student bodies and faculties should establish an educational necessity.) Meanwhile, the Supreme Court has held that there is a private right of action under Title VI as to disparate treatment claims, but not disparate impact claims.[74]

Strict scrutiny and other standards of review. Federal legal principles regarding the consideration of race and ethnicity when conferring educational opportunities and benefits to students appear well settled. Under the Equal Protection Clause of the 14th Amendment of the United States Constitution and Title VI of the Civil Rights Act of 1964, higher education institutions that include racial or ethnic preferences[75] in their programs and policies must ensure

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

[71] 42 U.S.C. § 2000d.

[72] *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

[73] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (discussed in Section VIII, *infra*, in connection with employment discrimination and Title VII).

[74] *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

[75] Ethnicity, or national origin, refers to heritage, nationality group, lineage, or country of birth of the person or the person's parents or ancestors before their arrival in the United States. *See* American Community Survey, U.S. Census Bureau, Subject Definitions, www.census.gov/acs/www/UserData/Def/Hispanic.htm. *See also Dawavendewa v. Salt River Project*, 154 F.3d 1117 (9th Cir. 1998) (ruling that "national origin" includes "the

that they comport with strict scrutiny standards -- ensuring that those programs and policies are supported by a compelling interest and that the policy and program design is narrowly tailored to achieve those compelling goals.[76] In addition, the status of the entity responsible for making the race- or ethnicity-conscious decisions is unlikely to affect the level of legal scrutiny applied. The 14th Amendment of the U.S. Constitution, which applies to "state actors" or public entities, is coextensive with Title VI, which applies to any recipient of federal education funds, public or private. Therefore, a college or university's status as public or private is unlikely to affect the determination regarding whether strict scrutiny applies to a particular policy or practice.

Although strict scrutiny standard is the most probing standard applicable to preferences that may be provided to some students, the rigor of the analysis does not result in an impossible hurdle. In Justice O'Connor's words, "strict in theory does not mean fatal in fact" -- as the University of Michigan's Law School demonstrated in its successful defense of its race-conscious admissions policies. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context. The higher education context -- an institution's mission, its academic freedom interests, and role in society -- do matter to the analysis.[77]

Compelling interests. Federal courts have expressly recognized a number of interests that can be sufficiently compelling to justify the consideration of race or ethnicity -- ranging from remedial interests in multiple settings to a university's interest in promoting the educational benefits of a diverse student body on its campus.[78] With respect to this latter interest, it is important to note

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country of one's ancestors" in a Title VII employment discrimination case); Office of Management & Budget, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

[76] In the landmark decision of *Adarand v. Pena*, the U.S. Supreme Court explained why strict scrutiny is "essential" when reviewing classifications based on race and ethnicity:

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

515 U.S. 200, 226 (1995) (citations omitted).

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

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

> Even though an applicant or recipient has never used discriminatory policies … [the] benefits of the program or activity it administers may not in fact be equally available to some racial or

the centrality of the educational aims. The interest in diversity is not "diversity for diversity's sake" nor can the interest be one of "racial balancing" -- mirroring the representation of certain racial or ethnic groups in relevant service areas or society at large -- or remedying societal discrimination. In addition the compelling interest recognized by law requires a broader focus, encompassing the educational benefits of nonracial and non-ethnic diversity as well as of racial and ethnic diversity. The type of diversity at the core of a compelling educational interest is a diversity of individuals -- their backgrounds, cultures, and life experiences -- of which race and ethnicity may be only two of several determinants.

Although some judicial hostility to expanding the list of compelling interests is apparent[79], the U.S. Supreme Court in the University of Michigan decisions did not address (and did not rule out) other interests that might justify race- and ethnicity-conscious practices in the higher education context. The Court's decision may also be viewed as having recognized a broader definition of educational benefits that encompasses a university's multi-pronged teaching, research, access, and service mission. (Moreover, the U.S. Department of Education in federal policy guidance has expressly declined to "foreclos[e] the possibility that there may be other bases [in addition to remedial and diversity-related interests] on which a college may support its consideration of race or national origin in awarding financial aid."[80])

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

- The flexibility of use of race in the program,
- The necessity of using race or ethnicity at all (which includes an examination of viable race-neutral alternatives) and the necessity of the extent to which race or ethnicity is used (which considers whether a lesser use -- *e.g.*, as one factor of many rather than as an exclusive requirement -- would be adequate),
- The effectiveness of the program and the benefit to those who are targeted for assistance, as well as the burden imposed on non-beneficiaries of the racial/ethnic preference, and

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> nationality groups. In such circumstances an applicant or recipient may properly give special consideration to race, color or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

34 C.F.R. § 100.5(i).

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

[80] United States Department of Education, Notice of Policy Guidance, 59 Fed. Reg. 8756, n.1 (Feb. 23, 1994), available at www.ed.gov/about/offices/list/ocr/docs/racefa.html

- 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).

As reflected in various federal court opinions, narrow tailoring factors generally should not be viewed or applied in a rigid mechanical way, but rather, they should be considered in light of each other, as part of a comprehensive assessment. It is possible for instance, that the relative strength of one or more factors might offset weaker support related to another of the narrow tailoring factors.[81] Of course, when strict scrutiny applies, it is helpful to have a reasonably strong position on each factor.

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

Moreover, in the context of efforts to achieve the educational benefits of diversity, federal law requires that race- and ethnicity-conscious admissions policies be flexible enough to take into account all pertinent elements of educational diversity (not merely race and ethnicity) that each applicant may bring to an institution. As a result, and as the Court in the University of Michigan cases explained, applicants' files in the admissions process should be subject to a "highly individualized, holistic review," with "serious consideration" to "all the ways an applicant might contribute to a diverse educational environment." In short, admissions practices should not result in an applicant's race becoming "the defining feature of his or her application."[82]

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

Necessity. As with other elements of the narrow tailoring analysis, the necessity of maintaining race- or ethnicity-conscious practices should be evaluated in the context of the goals the institution seeks to achieve with those practices. Specifically, race and ethnicity may be used only to the extent necessary to achieve the institution's compelling interest -- in many cases, the educational benefits of diversity.

[81] *Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Pena*, Department of Justice, Memorandum to General Counsels (June 28, 1995).

[82] *Grutter*, 539 U.S. at 337. Thus, the use of points assigned to members of minority races on the basis of race, coupled with the "relative weight" of the totality of points assigned, was found to be unconstitutional in *Gratz*, 539 U.S. 244 (2003).

Correspondingly, federal courts have insisted that institutions give "serious, good faith consideration [to] workable race-neutral alternatives that will achieve the diversity they seek." To this end, the Supreme Court in *Grutter* admonished that higher education institutions "draw on the most promising aspects of . . . race-neutral alternatives as they develop" -- specifically pointing to experimentation in states where race- and ethnicity-conscious admissions practices had been banned as a matter of state law.[83]

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

Similarly, higher education institutions are not faced with an "either-or" choice when it comes to the use of race-neutral alternatives when pursuing access and diversity-related goals. On many campuses where consideration of race is not prohibited by state law and educational goals associated with student body diversity are paramount, enrollment management, student affairs, and academic officials are pursuing *both* race-neutral *and* race-conscious practices. The two can often work together to help institutions achieve their diversity-related goals *and* to help institutions demonstrate that their strategies are narrowly tailored toward the achievement of their goals.[84]

Undue Burden. Under federal law, race- and ethnicity-conscious policies must not "unduly burden individuals who are not members of the [policy's] favored racial and ethnic groups." As a general rule, the less severe and more diffuse the burden on individuals who do not benefit from a race- and ethnicity-conscious policy, the more likely the policy will pass legal muster. As the Supreme Court in the University of Michigan cases recognized, for example, the use of race and ethnicity as "plus" factors in admissions in the context of an "individualized consideration" of all applicants under the same criteria did not disqualify non-minority applicants from competing for every seat in the class and did not result in undue harm to non-minority candidates.[85]

Periodic Review. The Supreme Court in the University of Michigan decisions, recognizing that a "core purpose of the 14th Amendment was to do away with all governmentally imposed discrimination based on race," ruled that "all governmental use of race must have a logical end point." In the context of higher education, the Court established that this "durational requirement" can be met by sunset provisions and "periodic reviews to determine whether racial

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[83] *Id.*

[84] *See generally* Coleman, Palmer and Winnick, *Race Neutral Policies in Higher Education: From Theory to Action* (College Board, 2008).

[85] *Grutter*, 539 U.S. 306 (2003).

preferences are still necessary to achieve student body diversity." (Notably, the inclusion of a sunset provision is not a categorical requirement imposed by federal law; the University of Michigan in *Grutter* successfully defended its law school policy, which did not include a sunset provision.)

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

3. Title IX (20 U.S.C. §§ 1681-1688)

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

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[86]

Title IX applies to all aspects of "education programs or activities" that are operated by recipients of federal financial assistance, including admissions, educational programs and benefits, and employment. Moreover, Title IX is not limited in its application to colleges, universities, and elementary and secondary schools. It applies to "any education or training program operated by a recipient of federal financial assistance. For example, Title IX would cover such diverse activities as a forestry workshop run by a state park receiving funds from the Department of Interior … [or] state and local courses funded by the Federal Emergency Management Agency in planning how to deal with disasters …."[87]

Title IX was modeled after Title VI and much of the Title VI case law is broadly applicable in Title IX cases. There are important differences between the statutes, however. Title IX includes various statutory exemptions that are absent under Title VI. For example, Title IX does not prohibit single-sex admissions policies of public and private elementary and secondary schools or private undergraduate schools.[88] The Title IX regulations provide additional exemptions of possible relevance to the present analysis, including one that permits affirmative action to

[86] 20 U.S.C. § 1681.

[87] U.S. DOJ, "Title IX Legal Manual," at 6 (Jan. 11, 2001), available at www.usdoj.gov.

[88] *Id.* at 10.

overcome the effects of conditions that result in limited participation in a program by persons of a particular sex, and one that requires appropriate remedial action if an agency finds that a recipient has discriminated against individuals on the basis of sex.[89]

Notably, public entities do have a constitutional duty not to discriminate on the basis of sex, even if conduct is carved out of Title IX's general prohibition on sex discrimination.[90] Even if Title IX has been satisfied, equal protection obligations still apply to public institutions. Like Title VI, Title IX recognizes three general types of discrimination: (1) disparate treatment, (2) disparate impact, and (3) retaliation. The analysis of Title IX disparate treatment and disparate impact claims essentially tracks the analysis of such claims under Title VI, which is discussed above -- but with a different level of scrutiny.

Gender: Intermediate Scrutiny Analysis. In contrast to the strict scrutiny that applies to race-conscious policies and programs that condition opportunities or benefits, policies and programs based on gender or sex trigger "intermediate scrutiny," which means that such programs must:

- Serve "important" or "exceedingly persuasive" (rather than "compelling") governmental objectives; and
- Be "substantially related" (rather than "narrowly tailored") to the achievement of those objectives.

Major legal challenges to diversity efforts in higher education have focused on race, largely in the context of admissions. Gender is also an important element of diversity, however.

"Without equating gender classifications, for all purposes, to classifications based on race or national origin, the [Supreme] Court in [recent] decisions, has carefully inspected official action that closes a door to women (or to men)."[91] Under the applicable intermediate scrutiny standard, a governmental actor making gender-based decisions must demonstrate an important governmental objective. The Supreme Court has stressed that to rise to the level of an "important governmental objective," a justification "must be genuine not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males or females."[92]

In invalidating VMI's all-male admissions policy in 1996 in *United States v. Virginia*, the Supreme Court noted, "once again, the core instruction of th[e] Court's pathmaking decisions: Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[93] The Supreme Court has expressly stated that "[s]ex

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[89] *Id.* at 11.

[90] *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (nursing school policy that excluded male applicants violated 14th Amendment notwithstanding the applicability of a Title IX exemption).

[91] *United States v. Virginia*, 518 U.S. 515, 532 (1996) (invalidating the Virginia Military Institute's all-male admissions policy on Equal Protection grounds).

[92] *Id*. at 532-33.

[93] *Id.* at 531 (citations omitted). In theory, then, it should be easier to sustain gender-based affirmative action or diversity efforts than race-based. But, in practice, a court might treat gender diversity efforts as it would those based

classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,'…'to promot[e] equal employment opportunity,'…[and] to advance full development of the talent and capacities of our Nation's people."[94]

Classifications Other than Race, Ethnicity, and Gender. Still further removed from the rigor of strict scrutiny review, federal courts will employ a "rational basis" standard for most other classifications (such as when students receive opportunities or benefits based on income or special talents). As the least rigorous federal standard of review applicable to classifications of individuals, the rational basis analysis requires only that the purpose or interest be "legitimate," and that the means be "rationally related" to the accomplishment of that interest.[95]

B. The Importance of Mission Alignment

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

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

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

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on race and apply what amounts to strict scrutiny. Moreover, the context of a given case might make the challenged action more difficult to defend even if a lower standard is applied.

[94] *Id.* at 533-34 (citations omitted).

[95] *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *New Orleans v. Dukes*, 427 U.S. 297 (1976).

> [T]he overall quality of the educational program is affected not only by the academic and personal qualities of the individual students who are enrolled, but also by the characteristics of the entire group of students who share a common educational experience. …In a residential college setting, in particular, a great deal of learning occurs informally …through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. ... People do not learn very much when they are surrounded only by the likes of themselves... In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth…These kinds of learning experiences, sometimes very satisfying and sometimes very painful, are important not only for particular students in an immediate sense but also for the entire society over time. Our society -- indeed our world -- is and will be multiracial. We simply must learn to work more effectively and more sensitively with individuals of other races, and a diverse student body can contribute directly to the achievement of this end. [96]

Importantly, the U.S. Supreme Court's recognition of the "substantial" and "real" educational benefits associated with student diversity in *Grutter*, while significant, does not eliminate the advisability for institutions to address the question, more specifically, of how *their particular programs* advance the diversity interests that are central to their mission. To that end, a good practice in developing mission statements and related policies associated with STEM objectives is to reflect:

1. That the benefits of diversity, including those associated with STEM and other disciplines, are a core institutional value and priority;
2. A concrete articulation of the benefits of diversity associated with STEM and other disciplines -- including educational, civic, economic/workforce and national security benefits, as appropriate to the institution -- that will explain the connections between the diversity of a student population and the educational success of the institution;
3. The importance of multiple facets of diversity in achieving institutional goals (not just a focus on race, ethnicity and gender);
4. Any unique institutional history that may bear on the institution's mission regarding access and diversity-related goals, including a history of discrimination or exclusion; and
5. As applicable, the process leading to policy approval, including the role of faculty and students in affirming the importance of access and diversity to their individual and collective educational success associated with STEM and other disciplines.[97]

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[96] Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly, at 9-10 (Sept. 26, 1977) (portions cited in *Bakke*, 438 U.S. at 313, n.48 (1978) (Powell, J.)).

[97] *See Grutter*, 539 U.S. at 314-15 (observing that in 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to achieve its goals - including seeking "a mix of students with varying

Institution-specific research -- ranging from student and faculty surveys to data regarding the association between diversity and desired educational outcomes -- should be gathered and evaluated over time in light of policy statements of relevance. Generally, narrow tailoring requires that a program aimed at increasing diversity to provide certain compelling benefits to the institution be effective in advancing that aim. It is important to measure the effectiveness of an institution's diversity programs to achieve the intended educational and other benefits.

PERSPECTIVES: Yale University's Commitment to Diversity

"Yale University, in order to secure its place as a leading research institution, and situated in an increasingly competitive, globalized, multiethnic and multiracial environment, has adopted an inclusive strategy . . . [that] conveys to our potential as well as current faculty, students, and staff, and our institutional and business partners, Yale's readiness to compete successfully in a world demanding intercultural skills. It is imperative for Yale not only to employ measures to attract persons who bring diversity, but also to avoid discouraging and losing underrepresented minorities, women, and others who contribute to diversity at Yale. We are convinced that academic excellence is impaired as much by unintentional hurdles as by intentional neglect of individuals and groups who face structural impediments to academic opportunity. Yale's admissions and personnel search processes attach value to diverse backgrounds and life experiences that broaden the repertoire of ideas and ways of thinking available to the entire University community….

Ethnic, gender and other kinds of diversity among the faculty increases the diversity in perspectives and approaches shared with students including those in the cultural majority. Yale is committed to providing an environment in which all members of the academic community can grow and flourish as scholars. Failure to do so would place a large tax on the possibilities for excellence at Yale."

Yale University's Commitment to Diversity: A Report Prepared for the American Association for the Advancement of Sciences

backgrounds and experiences who will respect and learn from each other" - and that upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.)

C. Issues Related to Enrollment

1. In General

Comprehensive review. Although never definitively addressed by federal courts, the logic of the strict scrutiny analysis suggests that policies and programs should be evaluated in the context of all others that are designed to operate in tandem as part of a comprehensive effort to achieve access and diversity goals.[98] Simply put, higher education institutions should not evaluate access- and diversity-related programs in isolation.

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

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

Importantly, no federal case or Department of Education rule categorically rejects all race- or ethnicity-exclusive practices under strict scrutiny standards, except in admissions. Indeed, as explained below, federal guidance regarding financial aid and scholarships specifically contemplates the legal defensibility of such aid (in limited, appropriate circumstances). In the end, the core legal question to be posed is one of whether the exclusive nature of any program or policy is demonstrably necessary to achieve legally-recognized, compelling institutional goals (with no viable and less extreme or less categorical use of race or ethnicity promoting

[98] Notably, through its enforcement of Title VI, the U.S. Department of Education's Office for Civil Rights has in fact inquired about the range of enrollment practices that bear on diversity interests, even in cases where Title VI complaints relate only to, e.g., a race-conscious financial aid policy. *See, e.g., Federal Law and Financial Aid: A Framework for Evaluating Diversity Related Programs,* at Appendix D (Sample OCR Data/Information Request) (College Board, 2005).

achievement of the goals).[99] In any event, exclusive programs attract challenges, warrant careful, evidence-based justification, and are best used judiciously.

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

2. Admissions

In contrast to other facets of enrollment-related policies, where there is a dearth of on-point U.S. Supreme Court guidance, the U.S. Supreme Court has on three occasions addressed the merits of questions related to discrimination in higher education admissions. In the seminal 1978 decision in *Bakke*, the U.S. Supreme Court struck down a medical school policy in which sixteen out of 100 positions were reserved for minority students. Twenty-five years later, the Court addressed two University of Michigan policies -- upholding its law school admissions policy in *Grutter*, characterized by individualized, holistic review; and striking down its undergraduate admissions policy in *Gratz*, characterized by a point system in which race and ethnicity were significantly weighted (20 points out of a potential total of 150, and where 100 points for any applicant practically ensured admission). Taken together, these landmark decisions highlight the importance of the following principles,[100] which should inform the development and

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

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

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

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

• Only 7-8% of the University's scholarship financial aid was allocated to race-targeted programs, and there was "no indication that these programs created an undue burden" on the University's ability to offer scholarship aid to non-minority students.

[100] Many of these principles are, in various ways, reflected in sources listed in n. 67, supra.

implementation of admissions policies that include voluntary consideration of race and ethnicity (and in all likelihood, gender)[101]:

In General

1. Institutional, mission-driven foundations (i.e., educational benefits) should also drive the scope and substance of admissions policies;
2. Admissions policies should provide for the assessment of the merit of students the institution seeks to admit holistically, with a focus on all relevant qualifications and characteristics -- those related to numerical as well as more qualitative academic preparation and potential (*e.g.*, standardized test scores and grades, as well as drive, dedication, ability to overcome set-backs, creativity, etc.), *and* those related to other student qualities that the institution values such as aptitude for and interest in STEM fields, inclusive conduct and multi-cultural skills, experiences and talents, as set forth in mission-related policies;
3. All applicants who are admitted, regardless of background, must be qualified.
4. Good educational and psychometric foundations should inform judgments regarding students who are deemed qualified and those who are not similarly evaluated;
5. Admissions policies should be integrated and aligned with related enrollment policies;
6. The weighting of race, ethnicity and gender (among other factors) should not fundamentally undercut the value of individualized holistic review; or create rigid or quota-like mechanisms as part of the admissions process;
7. Each applicant should be evaluated in light of all criteria, all of the applicant's attributes, and the many kinds of diversity that together create educational benefits, so that all applicants are on the "same footing for consideration."
8. All applicants should be evaluated under the same criteria without separate evaluation criteria or admissions tracks based on race. Each member of the same race should not have his or her race weighted in the same way or to the same extent.
9. Qualified, non-minority applicants who bring other particular attributes should have the opportunity to be admitted over minority applicants with higher grades and scores;[102]

The Necessity of Considering Race, Ethnicity and/or Gender

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

[101] Given the relationship between "strict scrutiny," which applies to race- and ethnicity-conscious policies, and "intermediate scrutiny," which applies to gender-conscious policies, references to the latter have been included in principles discussed below, despite the absence of on-point federal guidance.

[102] *Gratz* provides an example of how the existing student body and the applicant pool may influence the consideration of race and other attributes in admissions decisions. An individual who is African American from a wealthy and well-educated family would contribute differently to the student body than would an African American applicant who is from an inner city ghetto. Another student who is an exceptional artist would bring something else. The school should look at each individually for all attributes each would bring to the student body and consider what attributes, including what aspects of diversity, are most needed at the time in order to select among the three.

a. A process of individualized, holistic review, through which candidates are evaluated based on their background and record, is followed;
b. That diversity-related attributes are valued as part of the admissions process but are not limited to race, ethnicity, and/or gender;
c. That neither race, ethnicity, nor gender operates as a driving force in selection such that the admissions of all minimally qualified minority students is explainable by the consideration of race, ethnicity or gender in the selection process;
d. A periodic evaluation of the policy with a focus on its effectiveness in the achievement of diversity-related compelling educational goals (serving as a foundation for policy changes over time, as appropriate); and
e. The evolution of the policy to reflect changing circumstances, including shifts in applicant pools and the evolution of institutional goals.[103]

How Race, Ethnicity and/or Gender May Be Considered

11. Race, ethnicity and/or gender may be considered as one, but may not be the only, diversity "plus" factor in evaluating all attributes of each and every applicant. Race may not be given the same weight in relation to all applicants of a particular race -- or at all times. Consideration of race should be flexible, taking into account the educational needs of the student body as they may change over time and the many attributes of each applicant.
12. Race ethnicity and/or gender may be weighted more heavily than other diversity "plus" factors in a particular case, but not for all applicants of a particular minority group. Race may not be the only defining or outcome-deciding feature for applicants of a particular race. All members of a minority group may not be assumed to offer the same contribution to the student body based on their race.
13. Race, ethnicity and/or gender may be "outcome determinative" by "tipping the balance" when it is considered with all other attributes of a particular applicant who is academically qualified but isn't in the top range of grades and scores; and there may be more minority applicants than non-minority applicants who aren't in the top range of grades and scores and are offered admission.

3. Financial Aid and Scholarships

Unlike in the admissions setting, discussed above, there is a notable lack of widespread federal caselaw that relates specifically to race- and ethnicity-conscious financial aid and scholarships. No U.S. Supreme Court decision has comprehensively addressed the lawfulness of race-, ethnicity- or, gender-conscious financial aid and scholarships, and only a few lower court

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

decisions have included such analysis. Four reported cases have addressed race, ethnicity or gender preferences in some fashion; in apparently every setting, the relevant legal analysis was shaped in the context of remedial (as opposed to non-remedial diversity-related) interests.[104] The one case on financial aid and scholarships considered by many to be the leading decision -- the 1994 Fourth Circuit decision in *Podberesky v. Kirwan* -- was by its terms highly fact-based and limited to the remedial justifications asserted by the University of Maryland; the University of Maryland did not assert (and the court did not address) the educational benefits of diversity rationale.

U.S. Department of Education Guidance. The dearth of federal caselaw of relevance to aid issues associated with the educational benefits of diversity stands in contrast to the comprehensive federal guidance on the topic -- federal policy guidance promulgated by the U.S. Department of Education in 1994. A brief history of that policy, and of its substantive parameters, is important:

> On December 4, 1990, an official of the U.S. Department of Education's Office for Civil Rights declared "that Title VI categorically prohibited colleges and universities from awarding scholarships on the basis of race." Two weeks later, however, OCR issued a press release announcing a substantially more tolerant policy on minority scholarships…. On March 20, 1991, Secretary of Education Lamar Alexander … announced in a press conference that he had withdrawn both policy statements and indicated that [the Department of Education] would continue to interpret Title VI as permitting federally funded institutions to provide minority scholarships."[105]

Then, on December 10, 1991, the U.S. Department of Education issued for notice and comment Proposed Policy Guidance on Title VI's applicability to race- and national origin-conscious scholarship awards.[106] That guidance indicated that:

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[104] In *Flanagan v. President & Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976), the court found that a minority financial aid policy that arbitrarily set aside 60% of its financial aid dollars for the 11% minority population in its freshman class violated Title VI.

In *Knight v. Alabama*, 900 F. Supp. 272 (N.D. Ala. 1995), the court recognized the viability of race-conscious scholarships.

In *Sharif v. New York State Education Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989), an action in which female plaintiffs alleged that the State's gender-neutral use of the SAT in the award of State scholarships violated the Equal Protection Clause and Title IX, the court enjoined the particular "discriminatory practice" at issue and stated: "It is undisputed…that the SAT predicts the success of students differently for males and females." Males outscore females on the verbal and math sections of the SAT, and the "probability that these score differentials happened by chance is approximately one in a billion and the probability that the result could consistently be so different is essentially zero."

In *Podberesky v. Kirwan* (discussed in Appendix II, *infra*), a case involving two federal district court decisions (in 1991 and in 1993) that were reversed by the Fourth Circuit (in 1992 and in 1994), the appellate court considered the constitutionality of a scholarship program that "exclude[d] all races from consideration but one," African Americans and ruled that the program was unlawful. *See* 38 F.3d 147 (4th Cir. 1994).

[105] *Washington Legal Foundation v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993).

[106] *See* 56 Fed. Reg. 64,548 (1991).

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

Subsequently, pending the issuance of a Congressionally-directed General Accounting Office Report on race-conscious scholarships, the Department of Education deferred final issuance of its policy. Then, on February 23, 1994, the Department of Education issued its final policy guidance.[107] Among the salient points of that Guidance were the following principles:

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

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

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

- Although many schools used race- or ethnicity-conscious scholarships, a "relatively small proportion of scholarship dollars" were devoted to race- or ethnicity-conscious scholarships. At undergraduate schools, the proportion was about four percent.
- Higher education institutions reported that such scholarships were "valuable tools for recruiting and retaining" minority students. (They identified the help scholarships provided in "overcom[ing] the traditional difficulties…in enrolling and graduating minority students, such as financial hardships and a perception of cultural isolation.")
- Some higher education officials concluded that such scholarships "help[ed] build a critical mass of minority enrollment and sen[t] a message that the school sincerely want[ed] to attract [minority] students."

See GAO Report at 11.

The Department of Education subsequently concluded that the GAO report did "not indicate the existence of serious problems of noncompliance with the law in postsecondary institutions," finding that "race-targeted scholarships constitute[d] a very small percentage of the scholarships awarded to students at postsecondary institutions." *See* United State Department of Education Policy Guidance, Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756 (Feb. 23, 1994).

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

b. Financial Aid Authorized by Congress -- A college may award financial aid on the basis of race or national origin if the aid is awarded under a federal statute that authorizes the use of race or national origin

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

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

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

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

d. Financial Aid to Create Diversity -- A college should have discretion to weigh many factors, including race and national origin, in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures -- provided that the use of race or national origin is a narrowly tailored means to achieve the goal of a diverse student body[108]

Pursuant to Principle 4, and based on the application of principles derived from Justice Powell's opinion in Bakke, the Department concluded that a higher education institution can consider race and national origin as: (1) "one factor, with other factors, in awarding financial aid if necessary to promote diversity"; and (2) "as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity."[109]

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

- Unlike admissions policies which have "the effect of excluding applicants...on the basis of race," race-conscious financial aid "does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race."

- Unlike "the number of admissions slots," the amount of financial aid available to students is not necessarily fixed.[110]

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[108] Consistent with Titles VI and IX, U.S. Department of Education regulations provide that: "*Even in the absence of prior discrimination*, a recipient [of federal funds] in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin." 34 C.F.R. §100.3; 34 C.F.R. §106.3(b) (emphasis added). The Department of Education reviewed its Title VI regulations after the Supreme Court's *Bakke* opinion and concluded that "no changes in the regulations are required or desirable. The Court affirmed the legality of voluntary affirmative action…. The Department…encourages the continuation and expansion of voluntary affirmative action programs." 45 C.F.R. Part 80 (1991).

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

[110] Notably, the Department in its Final Title VI Guidance framed the question as whether the effect of the use of race or ethnicity (in this case, for minority students) was "sufficiently small and diffuse so as not to create an undue burden on [non-qualifying, majority students'] *opportunities to receive financial aid."* United States Department of Education Race-Targeted Scholarship Policy, 59 Fed. Reg. 8756 at 8757 (Feb. 23, 1994) (emphasis added).

4. Outreach and Recruitment

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

The U.S. Department of Education's Office for Civil Rights has not promulgated policy guidance regarding race-conscious recruitment, outreach, and retention programs as it has with respect to financial aid. However, Department regulations that address Title VI standards comport with the federal caselaw relating to recruitment and outreach practices: Under Title VI regulations, recipients of federal funds are prohibited from engaging in "specific discriminatory actions," including denying "services" or "benefits" on the basis of race or national original (except in limited circumstances).

In different settings, federal courts have addressed the particulars of recruitment and outreach programs with respect to these guiding principles.[111] In higher education, employment and contracting contexts (among others), federal courts have tended to rule that strict scrutiny principles do not in the first instance apply to race- or ethnicity-conscious recruiting and outreach programs *so long as* those programs do not confer tangible benefits upon individuals based on their race or national origin, to the exclusion of other individuals. In these situations, federal courts have upheld such programs against charges of illegal discrimination, frequently characterizing such race-conscious measures as "inclusive" (and, in legal terms, race-neutral) rather than "exclusive." In an admissions context, for example, one federal district court stated that "[r]acial classifications that serve to broaden a pool of qualified applicants and to encourage equal opportunity but do not confer a benefit or impose a burden do not implicate the Equal Protection Clause."[112]

Expanding on this principle in a fair housing marketing challenge, another district court reasoned that while the recruitment of minority applicants might be "race-conscious," that action -- standing alone -- would not constitute a "preference" within the meaning of federal authorities on

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[111]"Mere outreach and recruitment efforts…typically should not be subject to the *Adarand* [strict scrutiny] standards." *Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Pena*, Department of Justice, Memorandum to General Counsels (June 28, 1995) (cited in *Raso v. Lago*, 958 F. Supp. 686 (D. Mass. 1997), *aff'd* 135 F.3d 11 (1st Cir.), *cert. denied* 525 U.S. 811 (1998)); *see also Sussman v. Tanoue*, 39 F. Supp. 2d 13 (D.D.C. 1999); *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535 (M.D. Ala. 1995); *Honadle v. Univ. of Vermont*, 56 F. Supp. 2d 419 (D. Vt. 1999). Note that, by contrast, federal courts that have addressed governmental rules regarding recruitment and outreach have tended to be more exacting in their analysis. *See MD/DC/DE Broadcasters Assn. v. FCC*, 236 F.3d 13 (D.C. Cir. 2001); *Bowen Engineering Corp. v. Village of Chammalion*, 2003 WL 21525254 (N.D. Ill. 2003).

[112] *Weser v. Glen*, 190 F. Supp. 2d 384, 399 (E.D.N.Y. 2002) (*internal quotations omitted*).

the subject. It stated: "The crucial distinction is between expanding the applicant pool and actually selecting from that pool. Expanding the pool is an inclusive act. Exclusion [based on race]…can only occur at the selection stage."[113]

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

- The extent to which recruitment or outreach practices are balanced -- that is, if they include a focus on certain populations, there are corresponding practices that reach groups of individuals beyond the race, ethnicity or gender focus of the particular practice.
- The extent to which recruitment and outreach efforts (including through the establishment of relationships with other institutions, participating in forums, and contacting professional organizations) do not "confer a benefit or impose a burden" on students based on race, ethnicity or gender -- but merely extend opportunities more broadly.
- The extent to which recruitment and outreach efforts merely articulate diversity-related goals, without more (*e.g.*, without quotas).

By contrast, programs that compel certain race-conscious actions in the context of limited resources and that result in more limited information being provided to certain parties based on race or in influencing ultimate selection decisions based on race are likely subject to strict scrutiny.[114]

5. Student Mentoring, Retention, and Enrichment

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

However, where regression analysis demonstrates that, all other factors (*e.g.*, parental educational attainment, standardized test scores, grades, etc.) being equal, minority racial group membership or gender statistically result in a lower success rate at the institution, it may be

[113] *Raso v. Lago*, 958 F. Supp. 686, 702 (D. Mass. 1997), *aff'd* 135 F.3d 11 (1st Cir. 1998).

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

justifiable to focus targeting efforts for students of the relevant race and gender, so long as the program is inclusive, with participation by other students who demonstrate need.

D. Student-Related Policy and Program Principles and Program Illustrations

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

This section provides an overview of key principles that should be considered in policy and program design, as well as descriptions of specific types of programs and initiatives that are framed in ways likely to be legally sustainable while advancing educational, STEM-related goals. Notably, this section does not describe *all* legally sustainable approaches to diversity efforts on campus. Institutions have constructed (and undoubtedly will construct) other approaches to achieving their diversity goals, consistent with their educational missions and applicable law. [115]

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

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

1. Key Elements of Legally Sustainable Policies and Programs

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

[115] Moreover, the absence of an approach—or a variation on an approach—from this guide, is not an indication that the approach or variation is legally unsustainable. Similarly, the discussion of the approaches addressed is not intended to substitute for legal advice on the particular programs implemented by an institution. That analysis must be context-specific and should be undertaken by the lawyers for the institution.

a. Relationship to Institutional Mission

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

b. Minimal Adverse Impact of Eligibility Criteria

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

Criteria for Admission to Program of Study:

Grades and standardized test scores, as well as challenging coursework are frequent baseline requirements, but may not generate the otherwise qualified and diverse student body (particularly in certain STEM fields) that the institution is seeking. Additional, important criteria may include: personal attributes, interest and motivation, ability to overcome adversity, talents, experiences, accomplishments, conduct that demonstrates an active orientation toward inclusion, interest in and proclivity towards STEM fields, service to the community, geography, age,[116] and demonstrated success in collaborating and fostering full participation by broadly diverse people (inclusive conduct and multi-cultural skills) are also considered to identify qualified students. These criteria may be evidenced through essays, recommendations, and interviews. An institution may find that it could populate its student body with individuals having the highest range of test scores and grades, but that such students would not be as qualified to contribute to

[116] 34 C.F.R. Part 110 sets out the U.S. Department of Education's rules for implementing the Age Discrimination Act of 1975. If a school or college uses factors other than age as criteria for admission to a program (such as requiring applicants to have graduated from their previous school within 2 years), and it has the effect of excluding older people who may have graduated many years ago, the Act may prohibit this if the requirement being questioned is not needed for the normal operation of the program being offered.

and benefit from the educational experience as the more broadly qualified students it seeks to select.[117]

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

i) *Disadvantage criteria* (low socio-economic background and financial need; first in family to attend college or enter a STEM field; single parent household; English as a second language; weaker than desired preparation in last educational institution; other statistically significant barriers to overcome);

ii) *Ability to contribute to program objectives* (the applicant demonstrates that, as an individual and as one of the group selected to participate, s/he would contribute the most to and derive the most from the program and its objectives -- and it is recognized that individuals of every race or gender may contribute even where the primary objective of the program is to increase diversity, as individuals of any race or gender may foster inclusiveness, break down barriers for others, and build multi-cultural understanding);

iii) S*pecial talents, achievements or demonstration of interest* (is particularly relevant to programs around STEM fields as students may have not been exposed to rigorous STEM-related work, but have a strong interest that if fostered could reap benefits for the student and the institution*)*;

iv) *School partnership* (student has an already-established association with the institution or program through a partner high school or community college*)*.

c. Assessment of Effect

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

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

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

[117] *See Bakke*, 438 U.S. at 316 (opinion of Powell, J.) (approving discussion of the Harvard plan).

perceptions. Alumni are surveyed on the importance to their professional success of diversity in their student experience.

Data Collection: (a) for Admissions, Financial Aid, Bridging and Retention/Mentoring Programs -- GPA, graduation rates, presence or absence of academic probation, attainment of STEM degree, pursuit of STEM graduate or professional school; and (b) for Recruitment and Bridging Programs -- number or percentage of participants in the program who are from minority groups or are women and are successfully recruited to this institution or to any institution to study in a STEM field and success (GPA, absence of academic probation, pursuit and achievement of STEM degree, graduation rate) are measured for program participants as compared with non-program participants.

Regression Analysis: Performed for a list of characteristics of students (*e.g.*, high or lower SAT scores and high school grades, educational attainment of parents, socio-economic background, race, gender, quality of high school, etc.) to evaluate the statistical effect of race on GPA, graduation rate, and field of study. (If, even in the absence of disadvantage criteria, there is a statistical correlation between minority status and lower GPA, lower graduation rate, and participation in STEM fields, consideration of race, even without disadvantage criteria, may be justified when selecting participants for mentoring and retention programs.)

2. Illustrative Program Examples

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

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

Overview

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

Each applicant who has adequate quantitative measures to indicate the possibility of success in further study is then reviewed more holistically, considering many personal attributes, accomplishments and experiences, including but not limited to race and gender, to determine which applicants best embody the total person and contribute to the right mix of persons needed to serve the institution's educational, research and service needs. Every applicant is also reviewed in the same process and under all of the same criteria to assemble an entire "class" that,

with the existing student body, reflects a broadly diverse, richly talented community that actively contributes to the learning and living environment on campus.

Different personal attributes distinguish one student from another with similar quantitative statistics and may in certain cases "tip the balance"[118] in favor of admission. It is hard to determine which attribute was determinative in any case because the whole package of each individual is so different. There are no quotas, reserved spaces or automatic and uniformly applied point systems or numerical values assigned on the basis of race or gender. (The Supreme Court has rejected these more rigidly race-conscious approaches to admissions.)

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

Variations

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

Discussion

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

[118] *See Grutter*, 539 U.S. at 339, referencing Justice Powell's approving discussion of the Harvard plan in *Bakke*, 438 U.S. at 316 ("'When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor.'").

all students because they do not achieve the full range of diversity within each racial group and gender and do not fully break down stereotypes.

Whether or not permitted to consider race or gender in selection, institutions may include essay questions that address the applicant's perceptions of the role of race and gender in society or that are aimed at identifying inclusive conduct and multi-cultural experiences and skills, in order to build a student body that will create an inclusive environment for a broadly diverse campus community. (*See* Section V.D.4, *supra*, regarding interview questions for consideration of inclusive conduct and multi-cultural skills in hiring faculty that are also useful in admissions and include examples.)

b. Introductory or Preview Minority Weekend

Overview

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

Variations

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

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

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

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

Discussion

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

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

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

c. Bridge/Mentoring/Scholarship Programs

Overview

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

Variations

i) Room and board are provided for a period of weeks between high school and the first year of college (hence a "bridge" between high school and college) for admitted students who meet one or more of the criteria listed above.

ii) The program could also include 4-year scholarship support. Tutoring, counseling, and resources are available during academic years, and possibly summers, through graduation. Performance in mathematics and science courses is tracked by the program to provide timely intervention if needed. Participation in workshops on living skills (financial management, safety in social situations) and writing are required of participants.

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

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

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

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

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

Discussion

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

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

d. Summer Research Program (University or Industry)

Overview

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

Variations

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

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

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

Discussion

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

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

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

Overview

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

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

Variations

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

ii) The institution partners with community colleges in its local community to provide a pipeline to four-year colleges and recruit students in STEM fields. Curriculum coordination opportunities are provided through institutional agreements. Opportunities for campus visits and exposure to cutting edge research are also provided. The institution sends representatives to the partner community colleges to provide information and counseling to students and parents on completing applications to college.

iii) Partner school students who participate in the program may apply to participate in summer STEM and research experiences at the institution, "science camps" for younger students and pre-college programs for high school students.

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

Discussion

College scholarship recipients and summer program participants are selected by the institution based on GPA, standardized test scores, interest, teacher recommendations, promise, and disadvantage factors (low socio-economic background and financial need; first in family to attend college or enter a STEM field; single parent household; English as a second language;

weaker than desired preparation in last educational institution; or other significant barriers to overcome). If the institution has done a regression analysis showing a statistical correlation between minority status and challenges to success and is not in a jurisdiction where race may not be considered, minority status may be considered.

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

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

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

VIII. LEGAL ISSUES ASSOCIATED WITH FACULTY DIVERSITY

A. Overview of Governing Legal Principles

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

> ***"Grounded in First Amendment-protected academic freedom interests, the diversity rationale applied in Grutter with respect to student admissions should logically extend to faculty hiring and related employment issues."***

This section addresses the employment law framework and its implications for affirmative action related initiatives involving faculty hiring. More detailed information about the relevant federal constitutional and statutory provisions is provided in Appendix I.[119]

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

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

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

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

Public institutions are subject to Constitutional restrictions; private institutions are not. However, Title VI (regarding race), when it applies to employment as addressed below, has been held to be coextensive with the Equal Protection Clause. Title IX (regarding gender) also tracks equal protection principles on key points, although some differences exist between those two laws. Consequently, private institutions that receive federal funds are effectively subject to the same restrictions as those that arise under the Equal Protection Clause when Title VI or IX applies. [120]

a. Race: Strict Scrutiny Analysis. When the government classifies individuals based on race, courts will apply strict scrutiny to the classification under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. Thus, an affirmative action program implemented by a public institution must be narrowly tailored to promote a compelling state interest. Remedying the present effects of the institution's own past discrimination is a compelling interest sufficient to support a race based classification under the Equal Protection Clause of the 14th Amendment.[121]

In *Wygant v. Jackson Board of Education*,[122] the Supreme Court considered for the first time whether racial preferences are appropriate in the employment context. The Court applied strict scrutiny to an affirmative action plan that protected minorities from layoffs. In examining the interests asserted by the Board of Education, the Court held that there was insufficient evidence that remedial action was necessary to remedy prior discrimination, as there was no evidence that the Board had engaged in prior discriminatory hiring practices.[123] The Court declared that "societal discrimination alone is insufficient to justify a racial classification."[124] The Court also rejected the lower courts' reasoning that providing minority role models for minority students is a valid basis for using racial classifications in the layoff context.[125] The Court stated that the Board's goal of linking the percentage of minority teachers to the percentage of minority students had no logical stopping point.[126]

The Court expanded on the permissible contours of prior discrimination as a compelling interest in *Richmond v. J.A. Croson*,[127] where it held that a public entity can assert remediation as a compelling interest when its race-conscious affirmative action program was designed either to

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

[121] *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492, 503-04 (1989).

[122] 476 U.S. 267 (1986).

[123] *Id.*

[124] *Id.* at 274.

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

[126] *Id.* at 274.

[127] 488 U.S. 469.

(1) remedy the public entity's own discriminatory practices or (2) dismantle a system of discrimination in which the entity has been a 'passive participant.' A public entity has been a passive participant when a system of discrimination exists and public dollars perpetuated that system of discrimination.[128] The Court ultimately struck down the plan in *Croson*, finding that there was no direct evidence of race discrimination on the part of the city in letting contracts, or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors.[129]

Assuming that an institution demonstrates a compelling interest in implementing a race-conscious program, the institution must also narrowly tailor that program in order to survive the strict scrutiny analysis.[130] (*See* Section IV.C, *supra*.) In *Wygant*, the Court held that the race-conscious layoff provision was not a narrowly tailored remedy because it imposed the entire burden of the remedy on specific individuals, those laid off, rather than diffusing the burden.[131] The Court noted that race-conscious hiring, which forecloses only one of several opportunities, is less burdensome and thus potentially more narrowly tailored than layoff schemes, which impose the entire burden of achieving racial equality on particular individuals, often resulting in "serious disruption" of their lives.[132]

In *Croson*, the Supreme Court held that narrow tailoring requires the consideration of race-neutral means to increase minority participation, and that rigid numerical quotas will not be considered a narrowly tailored remedy.[133] The Court indicated that quotas and other race-exclusive approaches preclude the individual treatment of candidates and instead make the color of an applicant's skin the controlling consideration.[134]

In conclusion, the cases as a whole indicate that although the courts will apply strict scrutiny to any race-conscious programs challenged as violating the Equal Protection Clause of the 14th Amendment, such programs can withstand strict scrutiny when (1) the institution can articulate a compelling interest, and (2) the programs are narrowly tailored so as not to unnecessarily

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

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

[130] *Wygant*, 476 U.S. 279 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980)).

[131] *Id.* at 282-83.

[132] *Id.* at 283-84.

[133] *Croson*, 488 U.S. at 507.

[134] *Id.*

trammel upon the rights of non-minorities. Remedying the institution's own past discrimination or a "manifest imbalance" in the applicable workforce is a compelling interest. Other compelling interests (*e.g.*, educational benefits of diversity or operational necessity in higher education) may also be recognized, although they have not been tested in the employment context in the Supreme Court. It is also clear that, in assessing narrow tailoring, the courts will consider whether there are race- or gender-neutral means to increase minority and women (or male) participation that could be used in lieu of, or to reduce the burdens of, the race- or gender-conscious approach. Courts will also consider whether race and gender are factors among many rather than exclusive prerequisites.

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

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

Until 1971, the 14th Amendment had not been held to address gender discrimination. In *Reed v. Reed*,[135] the Court struck down an Idaho statute that preferred males over females to administer decedents' estates. The Court concluded that the state statute did not bear "a rational relationship to [the] state objective that is sought to be advanced by the operation of [the statute]."[136] And, as Justice Ginsburg later observed, "[w]ithout equating gender classifications, for all purposes, to classifications based on race or national origin, the Court in post-*Reed* decisions has carefully inspected official action that closes a door to women (or to men)."[137]

The Court has adopted a standard of intermediate scrutiny with respect to gender-based classifications. Under "intermediate scrutiny," a governmental actor making gender-based decisions must demonstrate an important governmental objective. In the words of the Court in the VMI case, there must be an "exceedingly persuasive justification" for gender-based governmental action. [138] This standard is somewhat lower than that which applies to race-based classifications. In theory, then, it should be easier to sustain gender-based affirmative action or

[135] *Reed v. Reed*, 404 U.S. 71 (1971).

[136] *Id.* at 73.

[137] *United States v. Virginia*, 518 U.S. 515, 532 (1996) (invalidating VMI's all-male admissions policy).

[138] *Id.* at 531 (citing *J.E.B. v Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 and n.6 (1994), and *Mississippi Univ. Women v. Hogan*, 458 U.S. 718, 724 (1982)).

diversity efforts than race-based. But the context of a given case might make the challenged action more difficult to defend even if a lower standard is applied.

2. Title VI (42 U.S.C. § 2000d)

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

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[139]

Title VI applies with respect to all aspects of an institution's operations. However, for the most part, Title VI restricts claims of employment discrimination to instances in which the "primary objective" of the federal financial assistance is to provide employment.[140] (No such restriction applies with respect to employment claims brought under Title IX.) Thus, "where the primary purpose of the Federal assistance is to provide employment, the recipient may not discriminate on the basis of race, color or national origin against applicants for employment or employees in that program. For example, Title VI prohibits discrimination against applicants for or participants in 'work study' programs that receive Federal assistance."[141] The Department of Education's Title VI regulations also forbid employment discrimination in a second situation: "discrimination against employees or applicants for employment is prohibited by Title VI when the discriminatory practice results in discrimination against the program beneficiaries, usually the students."[142] Where faculty are critical to the delivery of educational programs and benefits to students, discrimination against faculty may be seen to carry through to students. When Title VI applies in the employment context, it "encompasses, but is not limited to, recruitment, advertising, employment, layoffs, firing, upgrading, demotions, transfers, rates of pay and other forms of compensation, and uses of facilities. The regulation applies to all employment decisions and actions made directly by the Department of Education's recipients, as well as those made indirectly through contractual arrangements or other relationships with organizations such as employment agencies, labor unions, organizations providing or administering fringe benefits, and organizations providing training and apprenticeship programs."[143]

As interpreted by the agencies and the courts, Title VI prohibits both intentional discrimination (disparate treatment) and the use of facially neutral procedures or practices that have the effect of subjecting individuals to discrimination based on their race, color or national origin (disparate impact). (Neutral policies that expand opportunities for some without excluding non-targeted individuals are generally regarded as inclusive and non-discriminatory under federal law.) The

[139] 42 U.S.C. § 2000d.

[140] *See* 42 U.S.C. § 2000d-3.

[141] U.S. Dept. of Education, Office for Civil Rights, "Non-discrimination in Employment Practices in Education," at 2 (Aug. 1991) ("ED Pamphlet").

[142] ED Pamphlet at 2. *See* 34 C.F.R. § 100.31(c)(3); *see also* 28 C.F.R. § 42.104(c)(2) (DOJ regulation).

[143] *Id*.

analysis of intentional discrimination claims under Title VI is similar to the analysis of disparate treatment under the Equal Protection Clause,[144] and can be proved through direct evidence of discriminatory motive or, in the absence of such evidence, using the Title VII burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*[145] (discussed below, in connection with Title VII). Title VI disparate impact claims are also analyzed using principles similar to those used under Title VII and require establishment of an "educational necessity" similar to Title VII's business necessity standard to justify disparate impacts. When an educational institution establishes that a broadly diverse faculty is necessary to achieve its First-Amendment protected educational mission, and establishes that many aspects of that broad diversity have been achieved, but not racial diversity, the necessity test should be satisfied to justify the disparate impact of an employment program that considers race as a factor for this purpose.

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

> The Secretary [of Education] believes that a college's academic freedom interest in a robust exchange of ideas also includes an interest in the existence of a diverse faculty and, more generally, in diversity of professors nationally, since scholars engage in the interchange of ideas with others in their field, and not merely with faculty at their particular school.[146]

Moreover, the Department of Education's Title VI regulations authorize "a recipient to take additional steps to make the benefits of Title VI fully available to racial and nationality groups previously subject to discrimination."[147] The regulations also recognize that affirmative steps may be needed, and appropriate, in situations where there has been no prior discrimination:

> Even though an applicant or recipient has never used discriminatory policies … [the] benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances an applicant or recipient may properly give special consideration to race, color or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.[148]

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[144] *See Alexander v. Choate* 469 U.S. 287, 293 (1985).

[145] 411 U.S. 792 (1973).

[146] 59 F.R. 8756, 8761 (1994).

[147] 34 C.F.R. § 100.5(h).

[148] 34 C.F.R. § 100.5(i).

Similarly, an Appendix to the regulations contains Guidelines that include a section on the "Employment of Faculty and Staff."[149] The Appendix states:

> Recipients may not engage in any employment practice that discriminates on the basis of race, color or national origin *if* such discrimination tends to result in segregation, exclusion or other discrimination against students.[150]
>
> * * *
>
> Recipients may not limit their recruitment for employees to schools, communities or companies disproportionately composed of persons of a particular race, color, national origin, sex, or handicap *except* for the purpose of overcoming the effects of past discrimination.[151]

Another subpart, entitled "The Effects of Past Discrimination," states:

> Recipients must take steps to overcome the effects of past discrimination in the recruitment, hiring and assignment of faculty. Such steps may include the recruitment or assignment of qualified persons of a particular race, nation origin or sex, or who are handicapped.[152]

Taken as a group, these provisions suggest that a college or university receiving federal funds may give special attention to race or sex if it reasonably concludes that it is not adequately serving persons of that race or sex, and may undertake outreach and recruitment efforts to achieve adequate service to underserved groups even when the institution "has never used discriminatory policies." This is implicit recognition that, under Title VI, an educational institution may engage in outreach and recruitment activity to address a pipeline problem in minority communities not being adequately served.

3. Title VII (42 U.S.C. § 2000e)

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

Under Title VII:

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

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[149] The guidelines are applicable to vocational education programs. *See* 34 C.F.R. Part 100, App. B. Nevertheless, they provide some guidance on what may be appropriate in the college and university setting.

[150] *Id.*, App. B, at VIII.A (emphasis added).

[151] *Id.*, App. B, at VIII.B (emphasis added).

[152] *Id.*, App. B, at VIII.F.

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[153]

To succeed on a claim under this provision, which prohibits disparate treatment, a plaintiff must show that the employer intentionally discriminated on the basis of a protected trait. Under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*,[154] a plaintiff may prove that an employment practice was intentionally discriminatory by first making a *prima facie* case sufficient to support an inference of discrimination (*e.g.*, that the plaintiff was a member of a protected class; that the plaintiff was eligible and applied for the position or program in question; that he or she was rejected; and that the defendant selected individuals outside the protected class, or the position or program remained open and the defendant continued to accept other applications). If a *prima facie* showing is made, the defendant may rebut that showing by offering a legitimate, non-discriminatory reason for the employment action. The plaintiff then has the ultimate burden of persuasion and must show that the employer's proffered reason is pretextual -- *i.e.*, that the employer's true reason for the practice was discriminatory on the basis of race or gender (or other protected characteristics). Of course, "if a plaintiff is able to produce direct evidence of discrimination," he can prevail without using the *McDonnell Douglas* framework.[155]

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

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise….[156]

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[153] 42 U.S.C. § 2000e-2(a).

[154] 411 U.S. 792, 802-05 (1973)

[155] *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

[156] 42 U.S.C. § 2000e-2(e)(1).

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

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

> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party [proves that] an alternative employment practice [is available that has less disparate impact] and the respondent refuses to adopt such alternative employment practice.[157]

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

> A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.[158]

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

> Nothing contained in this subchapter shall be interpreted to require any employer … to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[159]

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

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[157] 42 U.S.C. § 2000e-2(k)(1)(A).

[158] 42 U.S.C. § 2000e-2(k)(2).

[159] 42 U.S.C. § 2000e-2(j).

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

> (d) Training programs
>
> It shall be an unlawful employment practice for any employer … to discriminate against any individual because of his or her race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.
>
> * * *
>
> (l) Prohibition of discriminatory use of test scores
>
> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.
>
> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.[160]

"It is important to note that the constitutional standard for justifying racial preferences is more stringent than the Title VII standard."[161] It is also important to note that "[p]olicies that affect actual employment decisions, such as hiring, promotions, and layoffs, have been treated differently than policies that do not affect actual employment decisions, such as targeted recruitment and outreach designed to increase the pool of qualified applicants, and data collection and analysis conducted to ensure compliance with anti-discrimination laws."[162] Layoffs have been treated most strictly under the case law. Note that, while increasing the applicant pool has not generally been regarded as part of the employment decision-making process, selecting candidates to interview from the applicant pool has been regarded as part of that process.

Of particular significance for present purposes, Title VII includes a provision that shields from liability any person who "pleads and proves that the act complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [EEOC] …." *See*

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[160] 42 U.S.C. § 2000e-2(d), (l), (m).

[161] S. Licht, "*Analyzing Racial Classifications in Employment Discrimination Litigation*," 52 U.S. Attorneys' Bulletin 10, 11 (May 2004).

[162] *Id.*

42 U.S.C. § 2000e-12(b). This provision is discussed further in the "Agency Guidance" section, below.

Case law. The Supreme Court has held that Title VII affords more room than the Constitution for "voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."[163] However, there are limits on such efforts.

Ricci v. DeStefano. The Supreme Court recently revisited Title VII for the first time in over a decade, in a case that potentially implicated -- but did not overrule -- well-established Title VII case law. Decided in June 2009, *Ricci v. DeStefano* involved a challenge to New Haven, Connecticut's decision to abandon the results of a standardized test that it had administered for promotions within the fire department because of the disparate impact that the results would have had on black and Latino firefighters.[164] Seventy-seven candidates (43 white, 19 black and 15 Hispanic) tested for 8 vacancies as lieutenants; 34 passed (25 white, 6 black, 2 Hispanic). Ten were eligible for immediate promotion. Forty-one candidates (25 white, 8 black, 8 Hispanic) tested for 7 vacancies among the ranks of captain; 22 passed (16 white, 3 black, 3 Hispanic). Nine were eligible for immediate promotion. African Americans and Hispanics comprise nearly sixty per cent of New Haven's population, and there was a history of discrimination (unaddressed by the majority but cited by the dissenters) against minorities in the fire department that had been litigated and settled in the 1970's.

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

The Court began its legal analysis by noting that "Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')."[165] The Court then wrestled with what it saw to be a conflict between these two statutory bases of discrimination. As the Court framed the conflict, the City intentionally discriminated against white firefighters who scored well on the tests and were deprived of the opportunity to be promoted, in order to avoid the disparate effects of the promotion exam on minority firefighters who did not score as highly. A narrow majority of the Court sided with the white firefighters. New Haven argued that it abandoned the test results because of its belief that it might be sued by minority firefighters. The Court said that fear of such exposure is not enough; the City would have to show that there was a "strong basis in evidence" that it was in violation of the disparate impact provisions of Title VII. In other words, it would have to show that it would likely lose to minority plaintiffs because the test was not job-

[163] *Weber*, 443 U.S. at 204; *Johnson*, 480 U.S. at 628-29, 630 & n.8, 640, 642 (1987).

[164] *Ricci v. DeStefano*, 557 U.S. ___, 129 S. Ct. 2658 (June 29, 2009).

[165] *Id.*, 129 S. Ct. at 2672.

related or, even if job related, there were other measures that would have less of an adverse impact.

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

Ricci thus appears to expand the zone of protection afforded to non-minorities and males (or females if they are the majority in some fields) affected by race- or gender-conscious measures. In *Wygant,*[166] the Supreme Court effectively removed lay-off situations from the arena of affirmative action. White employees with seniority could not be terminated in order to protect minority teachers from the "last hired, first fired" phenomenon. The *Wygant* Court recognized the vested interest of white teachers with more seniority, who would lose if a minority teacher retention plan trumped traditional protections of collective bargaining agreement, when it distinguished hiring from layoff scenarios:

> In cases involving general hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.[167]

After *Ricci*, an employer cannot abandon a qualification measure that has been used to rank identifiable candidates for promotion (or possibly to make other employment-related decisions, although the case did not go so far), unless it has a "strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[168] It is unclear whether this same standard would apply if an employer takes such action to achieve diversity in its workforce, rather than to avoid disparate-impact liability -- the City disclaimed any reliance on the diversity rationale to justify its actions in *Ricci*,[169] and the Supreme Court did not consider the viability of this potential rationale in its opinion.

In all events, it is clear that *Ricci* did not overrule *Griggs* or any other Title VII precedent that undergirds disparate impact statutory, regulatory, or case law. *Ricci* resolved a Court-perceived conflict between disparate treatment and disparate impact provisions of Title VII in the context of an employer's use of an employment test; it is not an affirmative action case. Justice Kennedy, writing for the majority, rejected the argument that "under Title VII, avoiding

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[166] 476 U.S. 267 (1986).

[167] *Id*., at 283-83.

[168] *Ricci*, 129 S. Ct. at 2677.

[169] *Ricci*, Tr. of Oral Argument, at 56-57 (Apr. 22, 2009).

unintentional discrimination cannot justify intentional discrimination."[170] Nor did the Court accept the argument that "an employer in fact must be in violation of the disparate impact provision before it can use compliance as a defense in a disparate treatment suit."[171] The Court made clear that it was not undercutting Congress's intent that employers should voluntarily comply with Title VII disparate impact standards. And the majority did not address the constitutional question framed by Justice Scalia in his concurrence: "Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[172] In sum, *Ricci* did not upset existing law governing Title VII other than to hold that, where identifiable individuals have been determined to satisfy the criteria that applied when they went into an employment process (and thereby have an entitlement of sorts), "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe that it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[173]

In a dissenting opinion in *Ricci*, Justices Ginsburg, Stevens, Souter and Breyer again noted that "'[c]ontext matters'" in assessing claims of race discrimination (quoting *Grutter*). They also noted that, "in Title VII cases involving race-conscious (or gender-conscious) affirmative-action plans, the Court has never proposed a strong-basis-in-evidence standard," and instead "simply examined the [government] employer's action for reasonableness…."[174]

Other Supreme Court Opinions. Given *Ricci's* limited and context-specific holding, earlier Title VII cases continue to provide the more relevant guidance in this area. In *United Steelworkers of America v. Weber*,[175] the Supreme Court held that an affirmative action-based training program which reserved 50 per cent of the training positions on the basis of race did not violate Title VII. The employer, an aluminum manufacturer, had a manifest imbalance in its workforce relative to African American workers in higher skilled jobs. The Court concluded that it was not unlawful under Title VII for the employer to open training opportunities for African Americans to allow them to compete for jobs at the plant. The Court undertook a comprehensive analysis of the legislative history of the statute and determined that Title VII's goal of expanding employment opportunities for groups that had traditionally been denied such opportunities was consistent with affirmative action efforts by employers. The Court noted that Congress's primary concern in enacting the prohibition against racial discrimination in Title VII was with expanding employment opportunities for Blacks in occupations that had traditionally been closed to them.[176] The Court stated that the House Report which accompanied Title VII demonstrated that Congress did not intend to wholly prohibit private and voluntary affirmative action efforts as one

[170] *Id.*, 129 S. Ct. at 2674.

[171] *Id*.

[172] *Id*., 129 S. Ct. at 2682 (concurring op. of Scalia, J.).

[173] *Id*., 129 S. Ct. at 2677.

[174] *See* 129 S. Ct. at 2689, 2701 n.6 (dissenting op. of Ginsburg, J.) (citing *Johnson v. Transportation Agency).*

[175] 443 U.S. 193 (1979).

[176] *Id.* at 202-3 (discussing remarks of Senator Humphrey at 110 Cong. Rec. 6548 (1964)).

method of solving this problem.[177] Significantly, the Court also noted that Congress did not intend to prohibit the private sector from taking effective steps to accomplish the goal of eliminating, so far as possible, "the last vestiges" of discrimination in this country.[178]

The Supreme Court reaffirmed *Weber's* interpretation of Title VII in *Johnson v. Transportation Agency,*[179] which upheld a public employer's affirmative action program that gave a preference to gender as one factor in determining promotions. Recognizing the legitimacy of the Agency's long-term goal of attaining a workforce that mirrored in its major job classifications the percentage of women in the area labor market, the Court stated:

> *Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation on its part.' Rather, it need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories. Our decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts.[180]

The *Johnson* Court looked to whether the affirmative action plan was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in traditionally segregated job categories.

In determining whether a manifest imbalance exists, employers should compare the percentage of minorities or women in the employer's workforce with their percentage in the relevant labor market or general population.[181] Where a job requires special training, such as a professional or research job, the comparison should be with those in the labor force who possess the relevant qualifications.[182] The Supreme Court has not specifically defined a "manifest imbalance," but has stated that the standard is not as high as it would be to establish a *prima facie* case for discrimination. [183]

When examining a race-conscious hiring plan under Title VII, the Supreme Court also looks to whether the plan creates "an absolute bar to the advancement of white employees."[184] This factor needs consideration in the context of faculty hiring at higher education institutions if vacancies or opportunities come up infrequently and such institutions are looking to fill only one position.[185] When pursuing hiring programs which take race and gender into consideration,

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[177] *Id.* at 203-4.

[178] *Id.* at 204.

[179] 480 U.S. 616 (1987).

[180] *Id.* at 629-30.

[181] *Id.* at 632.

[182] *Id.*

[183] *Id.*

[184] *See Weber*, 443 U.S. at 208.

[185] William Kaplan & Barabara A. Lee, THE LAW OF HIGHER EDUCATION § 6.5 (4th Ed. 2006).

careful crafting is in order to ensure that such considerations do not wholly predetermine the outcome of the hiring decision even if they are factored in.

Federal Appellate Decisions. Intermediate appellate courts have dealt with Title VII challenges to employment-related affirmative action programs in the education context, and have attempted to limit the reach of such programs. For example, in *Hill v. Ross*,[186] the Seventh Circuit held that a state university may not require that each department's faculty mirror the gender makeup of the pool of doctoral graduates in its discipline. The court found that such a policy is not narrowly tailored to remedy past sexual discrimination and violates Title VII. The suit was brought by a male psychology professor, recommended for a tenure-track position, whose appointment was blocked because a dean said that the department "needs 3.23 women to reach its target" of 62% women in the department. The appellate court held that race or gender could be used "only as factors in a more complex calculus, not as independently dispositive criteria."[187] The court held that the dean had used gender as the "sole basis" for the hiring decision, and thus a jury could conclude that the dean had created a quota system for hiring in the psychology department.[188]

In *Rudin v. Lincoln Land Community College*,[189] the Seventh Circuit denied summary judgment for the college on plaintiff's race and sex discrimination claims under Title VII. There, the college had implemented a race-conscious faculty hiring plan whereby a screening committee would review applications and recommend a pool of candidates to be interviewed.[190] The pool was then sent to an "Equal Opportunity Compliance Officer" for review who could then (1) proceed with the candidates selected by the committee, (2) add minority candidates to the pool, or (3) halt the screening process.[191] The officer's role was to '"determine if there was sufficient diversity among the interviewees."'[192] The court held that, under Title VII, the addition of minority candidates into the interview pool, when considered with other facts and circumstances of the case, constituted circumstantial evidence of racial discrimination sufficient to require a trial as to whether the college had a discriminatory motive when it chose to hire a minority candidate over a non-minority candidate.[193] The court noted that the college's stated policy explicitly favored minority over non-minority job applicants and that non-minority candidates were effectively allowed to bypass the first elimination.[194]

The foregoing practice should be distinguished from the practice of ensuring the adequacy of the outreach process used to build an applicant pool from which the candidate pool of those to be interviewed is derived. (*See* discussion of specific types of programs and approaches, below, for

[186] 183 F.3d 586 (7th Cir. 1999).

[187] *Id.* at 588-89.

[188] *Id.* at 588.

[189] 420 F.3d 712 (7th Cir. 2005).

[190] *Id.* at 716.

[191] *Id.*

[192] *Id.*

[193] *Id.* at 721.

[194] *Id.* at 722.

a more extensive treatment of this distinction.) An educational institution may engage in the broadest possible outreach to identify, notify and encourage qualified minority and women applicants in addition to other applicants to pursue faculty openings. Courts and administrative agencies have recognized that such activity is "pool expanding" inclusionary rather than exclusionary activity, and consistent with providing equal opportunity to all applicants. *See Duffy v. Wolle*, 123 F.3d 1026, 1039 (8th Cir. 1997); *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535, 1553 (M.D. Ala. 1995).

In *Taxman v. Piscataway Board of Education,*[195] the Third Circuit concluded that the language and legislative history of Title VII indicated a congressional intent to limit affirmative action only to remedial purposes, and struck down a school's affirmative action plan which made race a factor in selecting which of two qualified employees to lay off. The school articulated the purpose for the affirmative action plan as one of achieving racial diversity for education's sake and specifically disclaimed any remedial purpose.[196] The Third Circuit held that educational faculty diversity could not justify a race-conscious faculty termination decision under Title VII.[197] The Third Circuit also held that the affirmative action plan in *Taxman* unnecessarily trammeled the interests of nonminority employees because it established a program of an unlimited duration, to be resurrected when the Board of Education believed that the ratio between blacks and whites was skewed.[198] The court also noted that the harm imposed upon nonminority employees by the loss of their jobs is especially substantial where the nonminority employees are tenured.[199]

In conclusion, the Supreme Court has held that race-conscious hiring plans are valid under Title VII when they: (1) share Title VII's statutory goals of breaking down patterns of discrimination or opening employment opportunities to minorities or women that were once closed to them; (2) are designed to eliminate a manifest imbalance that reflects underrepresentation of minorities or women in traditionally segregated job categories (i.e., a significant disparity but something less than a statistically significant disparity of two or more orders of magnitude); and (3) avoid unnecessarily trammeling the interests of nonminority and male (or, if males are the minority in some fields, female) employees or applicants.[200] In training and, where justified, hiring decisions or promotions, the characteristics of workplace affirmative action plans that are permissible under Title VII may include the use of race or gender as a "'plus' factor" among several criteria in appropriate circumstances.[201] However, all such programs must satisfy the three requirements set forth by the Supreme Court in *Weber* and *Johnson* (*i.e.*, they must mirror the purposes of

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[195] 91 F.3d 1547 (3rd Cir. 1996), *cert. dismissed*, 527 U.S. 1010 (1997).

[196] *Id.* at 1558.

[197] *But see Univ. & Cmty. Coll. Sys. of Nevada v. Farmer*, 930 P.2d 730 (Nev. 1997), *cert. denied*, 523 U.S. 1004 (1998).

[198] *Taxman*, 91 F.3d at 1564.

[199] *Id.* In a brief field in the Supreme Court on a petition for certiorari in *Taxman*, the Solicitor General argued that the appellate holding in *Taxman* was erroneous in key respects, as discussed *infra* in Appendix III to this guide.

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

[201] *See Johnson*, 480 U.S. at 657.

Title VII, they must not unnecessarily trammel the interests of non-minority or male employees, and they must be temporary measures). Plans involving "preferential hiring" (or preferential decisions concerning training and capacity-expanding programs), rather than "preferential layoffs or terminations," are more likely to be upheld,[202] because "while hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals."[203] The Supreme Court has favored temporary affirmative action plans that seek to attain, rather than maintain, a "permanent racial and sexual balance."[204] Further, in light of *Ricci*, it is important to identify the relevant criteria up front, and not change them on the basis of race or gender later in the process, unless there is a strong basis in the evidence to believe that, absent such a race- or gender-conscious change, the employer would be subject to disparate impact liability.

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

> 1608.1 Statement of purpose.
>
> *****
>
> Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII. Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity.
>
> *****
>
> 1608.3 Circumstances under which voluntary affirmative action is appropriate.
>
> (a) Adverse effect.... Employers ... may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.
>
> (b) Effects of prior discriminatory practices. Employers ... may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.
>
> (c) Limited labor pool. Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers ... may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

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

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

[204] *Johnson*, 480 U.S. at 640.

> (1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;
>
> (2) Extensive and focused recruiting activity;
>
> (3) Elimination of the adverse impact caused by invalidated selection criteria (*see* sections 3 and 6, Uniform Guidelines on Employee Selection Procedures ....);
>
> (4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

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

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

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

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

> **DIVERSITY AND AFFIRMATIVE ACTION**
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> *** * ***
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> Title VII permits diversity efforts designed to open up opportunities to everyone. For example, if an employer notices that African Americans are not applying for jobs in the numbers that would be expected given their availability in the labor force, the employer could adopt strategies to expand the applicant pool of qualified African Americans such as recruiting at schools with high African American enrollment. Similarly, an employer that is changing its hiring practices can take steps to ensure that the practice it selects minimizes the disparate impact on any racial group…. A need for diversity efforts may [also] be prompted by a change in the population's racial demographics, which could reveal an underrepresentation of certain racial groups in the work force in comparison to the current labor pool.
>
> Affirmative action, in contrast, "means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." Affirmative action under Title VII may be (1) court-ordered after a finding of discrimination, (2) negotiated as a remedy in consent decrees and

> settlement agreements, or (3) conducted pursuant to government regulation. Also, employers may implement voluntary affirmative action plans in appropriate circumstances, such as to eliminate a manifest imbalance in a traditionally segregated job category. In examining whether such a voluntary affirmative action plan is legal under Title VII, courts consider whether the affirmative action plan involves a quota or inflexible goal, whether the plan is flexible enough so that each candidate competes against all other qualified candidates, whether the plan unnecessarily trammels the interests of third parties, and whether the action is temporary, *e.g.*, not designed to continue after the plan's goal has been met.
>
> An affirmative action plan implemented by a public sector employer is subject to both Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution. Some federal courts have held that public law enforcement agencies may satisfy the Equal Protection Clause if an "operational need" justifies the employer's voluntary affirmative action efforts. In the higher education context, the Supreme Court decided in *Grutter v. Bollinger* that attaining a diverse student body can justify considering race as a factor in specific admissions decisions at colleges and universities without violating the Equal Protection Clause or Title VI of the Civil Rights Act of 1964. The Supreme Court has not yet ruled on whether an "operational need" or diversity rationale could justify voluntary affirmative action efforts under Title VII, but a number of legal scholars and practitioners have debated the issue.
>
> The Commission encourages voluntary affirmative action and diversity efforts to improve opportunities for racial minorities in order to carry out the Congressional intent embodied in Title VII. Further, the Commission believes that "persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes" of the statute. However, employers are cautioned that very careful implementation of affirmative action and diversity programs is recommended to avoid the potential for running afoul of the law.[205]

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

4. Title IX (20 U.S.C. §§ 1681-1688)

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

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[206]

[205] EEOC, Directives Transmittal No. 915.003, Compliance Manual, "Race and Color Discrimination," at 15-31 - 15-34 (April 19, 2006) (citations omitted) (available at www.eeoc.gov/policy/docs/race-color.html).

[206] 20 U.S.C. § 1681.

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

Title IX was modeled after Title VI and much of the Title VI case law is applicable in Title IX cases. There are important differences between the statutes, however, and Title IX includes various statutory exemptions that are absent under Title VI. For example, Title IX expressly permits affirmative action to overcome the effects of conditions that result in limited participation in a program by persons of a particular sex, and requires appropriate remedial action if an agency finds that a recipient has discriminated against individuals on the basis of sex.[207] However, even if conduct is carved out of Title IX's general prohibition on sex discrimination, public entities also have a constitutional duty not to discriminate on the basis of sex.[208] Equal protection obligations still apply to public institutions even if Title IX has been satisfied.

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

5. Executive Orders 11246 and 11375 and the OFCCP

Executive Order 11246 (1965)[209] provides that federal contracts of a certain amount must contain provisions that prohibit discrimination on the basis of race, color, religion or national origin. (Executive Order 11375 (1967) added sex discrimination provisions to the provisions required in applicable federal contracts under Executive Order 11246.) It requires not only equal employment opportunity, but also affirmative action: federal contractors are required to develop, and update annually, an Affirmative Action Plan which includes goals and timetables for the increased utilization of minorities and women.

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

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

> Non-construction (service and supply) contractors with 50 or more employees and government contracts of $50,000 or more are required, under Executive Order 11246, to develop and implement a written affirmative action program (AAP) for each establishment. The regulations define an AAP as a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The AAP is developed by the contractor (with technical

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[207] U.S. DOJ, "Title IX Legal Manual," at 11 (Jan. 11, 2001).

[208] *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (nursing school policy that excluded male applicants violated 14th Amendment notwithstanding the applicability of a Title IX exemption).

[209] Set out as a note in 42 U.S.C. § 2000e.

assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The AAP is kept on file and carried out by the contractor; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.

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

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

* * *

Executive Order numerical goals do not create set-asides for specific groups, nor are they designed to achieve proportional representation or equal results. Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. The Executive Order and the supporting regulations do not authorize OFCCP to penalize contractors for not meeting goals. The regulations at 41 C.F.R. 60-2.12(e), 60-2.30 and 60-2.15, specifically prohibit quota and preferential hiring and promotions under the guise of affirmative action numerical goals.[210]

Note that the OFCCP uses the phrase "underutilization" of women and minorities as the trigger for establishing "goals" and initiating "efforts" to increase the number of women and minorities in an employer's workforce.[211] OFCCP does not use the phrase "manifest imbalance," which is the term used by the Supreme Court in *United Steel Workers v. Weber*, 443 U.S. 193, (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), in upholding the affirmative action

[210] OFCCP, "Facts on Executive Order 11246 -- Affirmative Action," at ¶¶ C and D (Jan. 4, 2002) (available at www.dol.gov/ofccp/regs/compliance/aa.htm).

[211] Under current OFCCP procedures, a contractor may use a variety of methods to determine what constitutes "underutilization", including: (1) any numerical difference between incumbency and availability, (2) a numerical difference of one person or more, (3) minority or female incumbency that is less than 80% of availability (i.e., less then 80% of their representation in the available and qualified labor pool), (4) a disparity between the actual representation and expected representation for minorities and women that is statistically significant – namely -2.00 standard deviations or more. *See* 65 Fed. Reg. 68, 022, 68,033-34 (Nov. 13, 2000); *see also* U.S. Dep't of Labor, OFCCP, "Technical Assistance Guide for Federal Supply and Service Contractors," at 21-22 (Aug. 2009). Applied broadly and in good faith, any of these approaches to underutilization should afford educational institutions opportunities to engage in affirmative action that is as least as extensive as the affirmative action that is authorized under OFCCP regulations.

plans at issue in those cases relative to Title VII. The Supreme Court did not define "manifest imbalance" in either case, or indicate how much of an imbalance is necessary to create a manifest imbalance. However, the Court did state that a manifest imbalance could be found without the statistical disparity rising to the level of a *prima facie* pattern and practice case under Title VII. *Johnson*, 480 U.S. at 632.[212] A *prima facie* pattern and practice case is made under Title VII by showing a sufficient disparity between the minority composition of the applicable employer workforce and the qualified labor pool that a court can infer an intent to discriminate. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (utilizing a standard deviation analysis to analyze statistical disparities and suggesting that a standard deviation that exceeds two is sufficient to create an inference of discrimination); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (*prima facie* case made out by showing that the percentage of minorities in the employer's work force is significantly lower than the percentage of minorities in the general population). Thus, under the holding in *Johnson*, an affirmative action plan would be proper on the basis of a "manifest imbalance" if something less than a statistical disparity of at least two orders of magnitude is present. Whether this is a more demanding showing than the OFCCP's 80 percent "under-utilization" standard is unclear.[213]

6. Conclusion and Analysis

Under Title VII, EEOC's regulations and affirmative action guidelines (note particularly the April 2006 Agency Guidance on Diversity and Affirmative Action and 29 C.F.R. § 1608.3 and *see* Section VIII.A.3, *supra),* and the Equal Protection Clause (*see* Section VIII.A.1), affirmative action *may* be voluntarily taken by public and private institutions to remedy the present effects of the institution's prior discrimination, or when there is a manifest imbalance in the representation of minorities or women in the institution's faculty within a particular discipline as compared with their representation in the available qualified labor pool. (A manifest imbalance is significant, but something less than the two or more orders of magnitude that courts have found establish a *prima facie* case of discrimination.)

Some consideration of race or gender in hiring, awarding funding or other benefits of employment, promotion and tenure is permissible as part of a voluntary and reasonable

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

[213] *See* note 209, supra. On the general question of establishing a "manifest imbalance" in a given workforce, *see* K. Davis, "*Wheel of Fortune: A Critique of the 'Manifest Imbalance' Requirement for Race-Conscious Affirmative Action Under Title VII,*" 43 Ga. L. Rev. 995 (Summer 2009); *and* Note, "*Finding a 'Manifest Imbalance': the Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII,*" 87 Mich. L. Rev. 1986 (1989).

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

While permissible affirmative action may be voluntary under Title VII, institutions that receive federal contracts (*i.e.*, virtually all colleges and universities) are *required* by the OFCCP to prepare affirmative action plans and goals, which they must update annually, and to take affirmative steps in good faith to address any underutilization of women and minorities, a concept similar to manifest imbalance. Under OFCCP's regulations, *see* Section VIII.A.5, *supra*, affirmative action plans and goals, and associated good faith actions, *must* be made by federal contractors to remedy underutilization in the representation of minorities or women in the institution's faculty within a particular discipline as compared with their representation in the available qualified labor pool. Underutilization includes but is not limited to a manifest imbalance and other Title VII measures. More permissive measures of underutilization also apply under OFCCP. (*See* footnote 209, *supra*.) One of OFCCP's underutilization measures -- whether there is a representation of minorities or women in the institution's workforce in a particular discipline that is less than 80 percent of their representation in the available qualified pool -- is often used to measure underutilization and may generally align with notions of manifest imbalance under Title VII. OFCCP's requirements provide that the actual hiring and promotion decision "is to be made on a non-discriminatory basis." Consequently, when using OFCCP's more permissive measures of underutilization -- or when using any OFCCP measures in referendum or Executive Order states -- to justify consideration of race or gender, it may be prudent to focus on outreach, barrier removal, training/access, and mentoring, rather than considering race in the actual hiring or promotion decision.

In some fields, including many STEM fields, there may not be a manifest imbalance under Title VII, and there may not be underutilization as measured under the OFCCP 80 percent test, and minorities and women may not be otherwise underutilized under OFCCP requirements, even when minorities and women are not well represented (or they are not represented at all) in the faculty of a particular department at the institution. Instead, a "pipeline" problem may exist which has resulted in little or no representation of women or minorities in the qualified and available labor pool in the discipline. Thus, the absence of, or a very limited representation of, women or minorities in the discipline at the institution may not constitute a manifest imbalance or other underutilization as compared with their representation in the qualified and available labor pool. In such cases, it is helpful to determine whether there is an available pool of "trainable" minorities and women who, with better access to fellowships, mentoring and other access-enhancing programs, could acquire the additional preparation to compete more effectively for full faculty positions. In such circumstances, and possibly others, affirmative action may also mean taking an action to remedy a pipeline problem by providing opportunities for minorities and women to become better prepared to compete for faculty positions in the field, where minorities and women have been historically excluded at the institution or where the institution,

at least passively, participated in creation of the pipeline problem in a field that requires training. (*See* Section VIII.A.3 EEOC April 2006 Agency Guidance on Diversity and Affirmative Action and 29 C.F.R. § 1608.3(c), *supra,* addressing limited labor pools, and Section VIII.A.1, *supra,* discussing the *Weber* case regarding available trainable workers and training programs and the *Croson* case, strict scrutiny and passive participation in perpetuating discrimination.)

Under *Croson,* higher education employers, and especially state colleges and universities, may take steps to avoid being a "passive participant" in discrimination by others *(e.g.,* state educational systems or elementary and secondary schools). To do so, they would have to demonstrate, with a good evidentiary basis, that they need to consider race or gender in order to avoid being part of a system of racial or gender exclusion through their own financial or other support of entities that have excluded minorities or women.

The courts have not resolved whether the First Amendment-protected, compelling interest of an institution of higher education to deliver excellent education to all students, produce excellent research, and serve the nation's security and workforce needs, may allow race and gender to be considered -- in the Title VII context -- as one of many factors in a holistic assessment of the qualifications of a particular candidate for employment or a particular employment benefit, under a Title VI and Equal Protection Clause analytic model. The EEOC has acknowledged that this is possible, but has not taken a definitive position. (*See* April 2006 Agency Guidance on Diversity and Affirmative Action, Section VIII.A.3.) Such an approach would have to satisfy strict judicial scrutiny (at least in the case of race and intermediate heightened scrutiny in the case of gender) and be educationally mission-driven, and it would complement the remedial justification generally required under Title VII or OFCCP's 80 percent measure of underutilization. Where there would otherwise be an undue burden on others, race and gender would have to be factored flexibly in each decision, not uniformly for all members of the same race or gender and opportunities to compete would generally have to be provided to others. (*See* the sections on employment under Title VI and Title VII and obtain legal guidance.)

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

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

helps to expand the pipeline where it has been artificially restricted. In academia, such training programs may include time-limited fellowship programs, summer and other time-limited research opportunities for graduate students and junior faculty, and the like. (*See* Section VIII.A.3, EEOC April 2006 Agency Guidance on Diversity and Affirmative Action, and 29 C.F.R. § 1608.3(c), *supra*, addressing limited labor pools; Section VIII.A.5, *supra*, on OFCCP requirements; and Section VIII.A.1, *supra*, discussing the *Weber* and *Croson* cases, strict scrutiny and passive participation in perpetuating discrimination. *See also* 42 U.S.C. § 2000e(d), which generally prohibits race and gender discrimination in "Training programs", quoted at Section VIII.A.3, *supra*, and the EEOC's regulatory implementation of Title VII, at 29 C.F.R. § 1608.3(c), which permits affirmative action through training programs where there is an artificially limited labor pool due to historic exclusion and the pool may be expanded.)

B. Extending the *Grutter* Rationale to Faculty Hiring

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

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

Arguments for expanding the *Grutter* diversity rationale to the sphere of employment law are particularly compelling in the context of higher education. Justice O'Connor's opinion for the five-justice majority in *Grutter* affirmed Justice Powell's opinion in *Bakke* that student body diversity constitutes a compelling educational interest for institutions of higher education, rooted in First Amendment academic freedom. The same First Amendment right of academic freedom that the Court emphasized in *Bakke* arises in the context of faculty hiring. Indeed, the *Bakke* Court identified the "four essential freedoms" that constitute "academic freedom": the freedom of an institution to determine for itself, on academic grounds, *who may teach*, what may be taught, how it shall be taught, and who may be admitted to study.[214] Logic dictates that if an institution has a strong educational interest in selecting students that it believes will further its

[214] *Bakke*, 438 U.S. at 312 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., joined by Harlan, J., concurring in the result)) (emphasis added).

educational mission, and if diversity has a positive impact on the quality of education, an institution has a similarly strong interest in selecting its faculty to further the same ends. Faculty have at least as much impact as students in the classroom and laboratory dynamic and the learning process.[215]

Many of the arguments reaffirmed and expanded in *Grutter* apply to diversity in faculty hiring, as increased faculty diversity would contribute to the "robust exchange of ideas" in the classroom.[216] For example:

> [A] student's stereotypical assumptions can be challenged effectively by exposure to an Asian-American art history professor who specializes in Western Renaissance art, even if the class discussions do not address issues of race and ethnicity. An African-American medieval historian or Hispanic professor of English literature can also challenge assumptions and subtle forms of prejudice precisely by defying stereotypes. If students enter college with preconceived notions of intellectual abilities and interests based on race or national origin, these prejudices can be overcome by exposure to individuals who provide living demonstrations of the falsity of race-based notions. Such direct personal experience might be the most effective teaching tool available.[217]

A racially diverse faculty would also promote cross-racial understanding and contribute to breaking down racial stereotypes, prepare students for "work and citizenship" in a global economy, and improve civic legitimacy by increasing the number of minorities in positions of business and political leadership.[218] The *Grutter* Court also noted that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[219] While the Court noted that this benefit is a product of a diverse student body, it is equally the product of a diverse faculty. A diverse faculty can help create a network of future leaders in all academic disciplines. Moreover, in STEM fields, diverse faculties are part of the workforce whose research increases fundamental knowledge that is used by industry to create products supporting our nation's economic strength and national security.

At least one court has concluded that the interest in racial diversity in higher education, as outlined in *Bakke*, applies with equal force to a race-conscious hiring plan that aims to achieve diversity among the faculty of institutions of higher education. In *University and Community College System of Nevada v. Farmer*, the Nevada Supreme Court held that the University had a

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[215] Even prior to the *Grutter* decision, legal scholars argued that the *Bakke* opinion paved the way for race-conscious faculty hiring in institutions of higher education. *See, e.g.*, Jonathan Alger, *When Color-Blind is Color-Bland: Ensuring Faculty Diversity in Higher Education*, 10 STAN. L. & POL'Y REV. 191 (1998-99).

[216] *See Bakke*, 438 U.S. at 312 ("[The] Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

[217] Alger, *supra* note 213, at 194.

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

[219] 539 U.S. at 331.

compelling interest in fostering a culturally and ethnically diverse faculty.[220] The court held that the University's affirmative action plan, which allowed a department to hire an additional faculty member following the placement of a minority candidate, was constitutional. In so holding, the court stated: "We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court."[221] The court noted that a failure to attract minority faculty perpetuates the University's "white enclave" and limits student exposure to multi-cultural diversity.[222] The court also noted that the affirmative action plan was narrowly tailored to promote diversity and that the plan satisfied the *Bakke* command that race be only one of several factors in evaluating applicants.[223]

Grutter enumerated characteristics of admissions approaches which were constitutionally permissible. If applied to affirmative action in faculty employment, such characteristics would include: (1) using good outreach and barrier removal and considering workable neutral alternatives, if available; (2) if such actions and neutral criteria are not available or adequate, assigning a "plus" to the race or gender of a candidate when it contributes to the diversity of the discipline at the institution; (3) weighing race or gender as heavily, or even more heavily, than other qualities in assessing a particular individual if that individual contributes to the diversity of the faculty in the discipline, but not so much as to guarantee hiring or a similar employment benefit; (4) not giving race or gender equal weight for all members of a particular race or gender; (5) considering race or gender after weighing several additional qualities of the candidate, as long as the consideration of race or gender does not guarantee hiring or a similar employment benefit; (6) striving for a flexible "critical mass" or variable goal of minorities or women that breaks down stereotyping, promotes the expression of different perspectives, and thereby enhances learning and research; (7) conducting a full comparison of each and every candidate's qualities under the same criteria, including his or her race and gender, with those of other candidates; and (8) periodic review of the demographic composition to evaluate the status of goals or critical masses.[224]

Thus, the reasoning in *Grutter* provides multiple bases for asserting that the same notions of academic freedom that apply to the admission of students apply to the employment of faculty in colleges and universities. The overarching goal of colleges and universities implementing race- or gender-conscious hiring plans should be the careful identification of their particular compelling educational or national service interest, and the implementation of initiatives that are narrowly tailored so as not to unduly burden nonminority or male job candidates. [225] Such an approach would have to satisfy strict judicial scrutiny (at least with respect to race) and be

[220] 930 P.2d 730 (Nev. 1997), *cert. denied*, 523 U.S. 1004 (1998).

[221] *Id.* at 735.

[222] *Id.*

[223] *Id.*

[224] *Grutter*, 539 U.S. 306.

[225] "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.… [It] does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id*. at 339. Gender-based decisions are subject to a lesser standard of review. *See Craig v. Boren*, 429 U.S. 190 (1976).

mission-driven. Race and gender would have to be factored flexibly, not uniformly for all members of the same race or gender, in each decision. It is also prudent to consider application of Title VII in such analyses and to seek expert counsel. Assuming that faculty diversity is recognized as a compelling educational interest, that interest should, at the very least, serve as complementary support for Title VII and OFCCP-sanctioned affirmative action, providing a basis for satisfying corresponding Equal Protection requirements.

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

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

Reasonable affirmative action under Title VII and OFCCP (and, to the extent applicable, diversity efforts under Title VI and the Equal Protection Clause), should be aimed at remedying discrimination, a manifest imbalance, or significant underutilization and achieving mission-critical diversity, and should not extend beyond the necessary time period or be overly broad. It is a good practice to identify workable race- and gender-neutral alternatives and approaches that break down barriers or constitute outreach (as distinguished from employment benefits) and to use them first if they are available. It is also a good practice to consider race or gender first in training, mentoring and other access-building programs. Race or gender may be used under Title VII, if justified (and if legally permitted in a jurisdiction), in hiring and promotion decisions where there is the need to remedy an institution's own discrimination or its present effects or there is a manifest imbalance. All use of race and gender should be limited to the period of time in which the manifest imbalance, other significant underutilization or effect of discrimination exists under Title VII (or, to the extent applicable, the time in which inadequate representation exists under Title VI and is required to support the institution's mission), and such consideration is warranted. An employer should not discharge or lay off non-minorities or men to hire minorities or women; should not have quotas; and should not bar non-minorities or men from all opportunities to compete for positions or promotion; or otherwise unduly burden non-minorities or men. However, an employer should be able to take race or gender into account as a factor among many in determining which qualified applicants to include in the candidate pool to be interviewed, in hiring and in other employment decisions under Title VII (and Title VI and Equal Protection if they apply) if lesser efforts (*e.g.*, removing barriers, more effective targeted outreach to build a more diverse applicant pool, or neutral approaches) are inadequate to remedy the underutilization.

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

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

D. Post-Doctoral Fellows

The discussion above focuses on faculty members. It is also relevant, however, with respect to other individuals at colleges and universities who are treated as "employees" by the school, or who might be so characterized by a court. Schools sometimes treat postdoctoral fellows[226] as employees. The same may be true for graduate students, at least for some purposes.[227] In all events, there is a chance that the courts will view post-doctoral fellows and graduate students acting as research or teaching assistants as employees, at least when the conduct that is challenged in the lawsuit relates to teaching, research, or other activities for which the individual receives a stipend or other monetary consideration.[228] In contrast, courts are less likely to treat

[226] "Postdoctoral students or 'post docs' as they are frequently called are recently graduated Ph.D.'s who wish to acquire additional research experience before beginning their scientific careers in academe or industry…. Postdoctoral students typically identify a mentor and research area based on their past and current interests and technical expertise. Two or three year appointments are the norm for these positions. In some fields such as biology postgraduate students may pursue two or more postdoctoral fellowships before starting their own independent research careers. In other fields such as chemistry, postgraduates usually complete one postdoctoral fellowship before looking for full time employment. Although there are teaching postdoctoral fellowships, the majority of postdoctoral students spend most of their time working on one or more research projects with a strong interest in bringing their projects to full fruition -- presenting and publishing as much of their work as possible in the highest quality technical journals." *See* www.webguru.neu.edu/research_team/postdoctoral_students.

[227] "Students who have successfully completed their undergraduate study in science, technology, engineering and mathematics frequently continue their education for two or more years in order to obtain an advanced degree. There are two advanced degrees commonly awarded in this country, the Master of Arts (M.A.) or Master of Science (M.S.) degree and the Doctor of Philosophy (Ph.D.) degree. An important component of most M.S. and Ph.D. programs is the completion of a thesis or dissertation that documents the completion of an original research project. In the sciences and engineering students pursuing an advanced degree often receive financial support in the form of a teaching … or a research assistantship. Students supported on a teaching assistantship receive a stipend in exchange for teaching one or more sections of a recitation or laboratory section of one or more courses each semester. Students supported on a research assistantship receive a stipend in exchange for performing research that is frequently related to their thesis research." *See* www.webguru.neu.edu/research_team/graduate_students.

[228] *See, e.g., Seaton v. Univ. of Pennsylvania*, 2001 U.S. Dist. LEXIS 19780, **23-26 (E.D. Pa. 2001) (noting that "courts have carefully delineated between graduate students' academic activities and employment activities, and deemed them to be employees only with respect to what they do in employment," and holding that plaintiff's Title VII claim was not actionable because it did not relate to his status as an employee); *Annett v. Univ. of Kansas*, 82 F. Supp. 2d 1230, 1237 (D. Kan. 2000) (allowing a professor's Title VII retaliation claim to proceed where the claim involved her opposition to certain graduate student financial support policies, and rejecting the school's argument that her opposition was not protected under Title VII because the "policies affect graduate students, not employees of the University"); *Ivan v. Kent State Univ.*, 863 F. Supp. 581, 585-86 (N.D. Ohio 1994) (holding a graduate student who lost her graduate assistant position was properly viewed as an employee under Title VII), *aff'd mem*, 92 F.3d 1185 (6th Cir. 1996); *Mohankumar v. Kansas State Univ.*, 60 F. Supp. 2d 1153, 1160 (D. Kan. 1999) ("The

postdoctoral fellows or graduate students as employees when the basis for the challenged action is academic in nature, such as a dismissal from a program or school because of academic deficiencies.[229] This is especially true if the schools treat the individual more like a student than an employee in terms of administrative classification, characterization of any monetary payments, eligibility for benefits, purpose of activities, etc.

Courts will undertake a fact-based inquiry to determine whether a plaintiff should be viewed as an employee or a student with respect to the school conduct that is challenged in a given case. For example, in *Cuddeback v. Florida Bd. of Education*, the 11th Circuit applied an "economic realities test" in determining whether a graduate research assistant was an "employee" for purposes of Title VII:

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

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court will assume … that by virtue of her agreement to teach classes … in exchange for a stipend, plaintiff was an employee covered by Title VII and that the discontinuation of a stipend was either a refusal to hire her or a denial of a term or condition of her employment."); *see also United Faculty of Florida, Local 1847 v. Bd. of Regents, State Univ. Sys.*, 417 So.2d 1055, 1061 (Fla. App. 1982) (holding that "graduate assistants" are employees for collective bargaining purposes); *Regents of the Univ. of Michigan v. Empl. Rel. Comm'n*, 254 N.W.2d 218 (Mich. 1973) (holding that "interns, residents and post-doctoral fellows" were reasonably treated as employees for collective bargaining purposes, after noting that a portion of their compensation was withheld for federal and state tax purposes, they received "fringe benefits available only to regular [UM] employees," and they received W-2 forms).

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

> as students, and have typically refused to treat them as "employees" for Title VII purposes only where their academic requirements were truly central to the relationship with the institution. In this case, the court concluded that the plaintiff was properly viewed as an employee, and thus could pursue a gender discrimination claim under Title VII.

381 F.3d 1230, 1234-35 (11th Cir. 2004) (citations omitted).[230]

There are very few published opinions that involve employment-based discrimination claims asserted by postdoctoral fellows, and they are not very informative on the issue of "student vs. employee."[231] Guidance can be found, however, in the cases that involve graduate students. In addition, numerous court cases have considered whether medical residents are properly viewed as employees or as students. Residents have been characterized as students in some contexts even though they receive monetary payments (stipends) and perform services. For example, several courts have held that post-graduate medical residents may qualify as "students" for purposes of a statutory exception that exempts from FICA payroll taxes "students" who are "in the employ of a school, college or university" and "enrolled and regularly attending classes at such school, college or university."[232] There are also cases which have characterized medical residents as students, rather than employees, with respect to due process challenges that they asserted to their dismissal from a residency program.[233] But residents have also been treated as employees in some contexts.[234]

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

[231] *See, e.g., Sizova v. Nat'l Inst. of Stds. & Technology*, 282 F.3d 1320, 1328-29 (10th Cir. 2002) (affirming summary judgment for a university which hosted a research fellow who sued the university and NIST under Title VII, on the grounds that NIST selected the fellowship recipient and supervised her work and thus was her employer, not the school, but treating the fellow as an employee); *Hankins v. Temple Univ.*, 829 F.2d 437 (3d Cir. 1987) (treating a plaintiff who was terminated from a fellowship program as an employee for purposes of her discrimination claims under Title VI, Title VII and Section 1981, without considering whether she should be treated as a student, but characterizing plaintiff as a student rather than an employee for purposes of her due process claim); *Brewer v. Bd. of Trustees of the Univ. of Illinois*, 407 F. Supp. 2d 946, 962-70 (C.D. Ill. 2005) (considering a Title VII discrimination claim asserted by a fellow who had a paid, one-quarter time research assistantship, and applying Title VII without suggesting that the plaintiff could be characterized as a student not an employee).

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

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

[234] *See, e.g., Lipsett v. Univ. of Puerto Rico*, 864, F.2d 881, (1st Cir. 1988) (evaluating a Title IX claim of a discriminatory discharge from a residency program, and holding that because the plaintiff was both a student and an employee, Title VII's substantive law should be applied to her Title IX claim); *Regents of the Univ. of Calif. v. Pub.*

The question of how to classify postdoctoral fellows and graduate students is one that institutions routinely confront for purposes of structuring their relationships with the fellows and graduate students. A broad range of administrative policies can be implicated by the classification, such as policies relating to compensation and withholdings, eligibility for benefits, intellectual property rights, and so forth. As a result, schools often have manuals or other policy statements in place that identify the various graduate and postdoctoral positions that exist at the school and the administrative implications of each category. For example, Purdue University appears to draw a bright-line distinction between graduate assistants and graduate fellows relative to their employment status and has manuals for both categories.[235]

The classification for postdoctoral fellows is often driven by the mechanism by which the fellows are paid. If they receive a salary from the institution, which is typically derived from a supervisor's grant or other funds, they are generally classified as an employee with the attendant right to participate in the school's benefit programs. If they receive a stipend, however, based upon independent funding from a fellowship or other external source, they are often not treated as employees, or at least not employees who are entitled to all the benefits provided by the school to its regular employees. Indeed, a range of classifications is possible.[236]

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

Emp. Rel. Bd., 41 Cal. 3d 601, 604 (Cal. 1986) (upholding agency determination that "housestaff, who are paid by the University while participating in residency programs …, are 'employees'" for collective bargaining purposes).

[235] *See* Purdue University, *Graduate Student Employment Manual*, at 4 (May 2005; Updated Feb. 2009) ("The University makes assistantships and fellowships available as forms of financial aid to support graduate study. Employment is incident to graduate study. Graduate students who are employed by the University provide services (teaching, research, administrative/professional) that further the missions of the University while providing students with valuable professional experience and financial remuneration in the form of tuition remission and a salary. These students are considered employees and are subject to the policies and procedures outlined in this manual. Students who receive fellowships are not employees and are not obligated to provide services to the University. The purpose of fellowships is to recognize outstanding graduate students and to support their education. While there are broad policies and procedures covered in this document that may apply to fellowships, in general, these guidelines are intended to address graduate student employment. For more information about fellowships, see the *Purdue University Graduate School Fellowship Manual*, available on the Graduate School's Web site.").

[236] The National Postdoctoral Association has suggested, for example, that several different classifications have been used by institutions as part of strategies for offering health benefits to postdoctoral fellows: (1) "Classify all postdocs as students;" (2) "Create a new category for the postdoc that is not staff, employee or student;" (3) "Create multiple new postdoc categories based on funding source," (4) "Classify fellows and paid directs as employees by paying them a small salary;" (5) "Offer a small stipend to non-employee postdocs to cover insurance costs;" or (6) "Ignore funding source, and put all postdocs in the employee payroll." *See* www.nationalpostdoc.org (click on the link for the PDO Toolkit, and go to "Providing Benefits for Postdocs").

In this regard, it should be noted that the U.S. Department of Justice has challenged certain diversity-based fellowship programs under Title VII. DOJ sued Southern Illinois University in 2006, alleging that the school was violating Title VII by operating various "paid fellowship programs [that were] open only to undergraduate, prospective graduate and doctoral students who are either of a specific race and/or national origin or who are female."[237] The lawsuit was resolved by way of a Consent Decree. Among other things, the Decree enjoined SIU from "setting aside, reserving or in any way restricting any paid fellowship positions … on the basis of race, national origin or sex;" from establishing or maintaining "any paid fellowship positions in any fellowship programs that … are set aside, reserved or in any way restricted on the basis of race, national origin or sex;" from failing to "consider, hire, employ, compensate and provide terms, conditions and privileges of employment to persons for any paid fellowship position without discriminating on the basis of race, national origin or sex in violation of Title VII;" and from limiting "recruitment for any paid fellowship positions to members of any particular groups on the basis of race, national origin or sex."[238] At a minimum, the SIU Consent Decree confirms that at least some diversity-based fellowship programs may be subject to challenge under Title VII (by the government or by private individuals).

The government's claims in the SIU case were not litigated, of course, and counter arguments can be made in support of such programs. Moreover, for some programs, an institution may be able to argue that Title VII does not apply because the program has a predominantly educational purpose and participants are not properly characterized as employees. If an institution treats a given fellowship as establishing a student rather than an employee relationship, and/or if an external funding source does so,[239] the institution can argue that any discrimination challenge to the program must be evaluated under Titles VI or IX (as applicable), or under the Constitution's Equal Protection Clause (in the case of state institutions).

Recognizing that other considerations will likely dictate how an institution structures its relationship with postdoctoral fellows or graduate student assistants, certain factors can nonetheless be identified that would improve an institution's ability to argue against the

[237] *See United States v. Bd. of Trustees of Southern Illinois Univ.*, Complaint at ¶ 7, No. 4:06-cv-04037 (S.D. Ill.) (filed Feb. 8, 2008, and available on PACER).

[238] *Id.*, Consent Decree at 4 (available on PACER).

[239] For example, under NIH policies, recipients of Kirschstein National Research Service Awards are not to be treated as employees of "either the Federal government or the sponsoring institution," and institutions "may not seek funds, or charge individual fellowship awards, for costs that normally would be associated with employee benefits (for example, FICA, workmen's compensation, and unemployment insurance)." *NIH Grants Policy Statement*, Part II: Terms and Conditions for Certain Types of Grants, Grantees, and Activities, "Employee Benefits" (Dec. 2003) (available at www.grants.nih.gov). NRSA fellows are allowed to supplement their stipends, however, by way of "part-time employment," so long as the compensation is "supported by acceptable accounting records that reflect the employer-employee relationship agreement. Under these conditions, the funds provided as compensation (salary, fringe benefits, and/or tuition remission) for services rendered, such as teaching or laboratory assistance, … are allowable charges to Federal grants…." *Id.*, "Supplementation of Stipends, Compensation, and Other Agreements." *See also Coordinating Officials' Guide, NSF Graduate Research Fellowships*, at D.13 ("Fellows are not in any sense salaried employees of the National Science Foundation nor of their affiliated institutions. Therefore, no funds will be deducted from the stipends [for tax purposes]; no W-2 Forms will be issued; and provision must be made by the Fellow for … payment of all income taxes that may become due.").

application of Title VII to a discrimination challenge to a given fellowship or assistantship program:

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

This is not an exhaustive list, and there is no assurance that the existence of any one or more of these factors would tip the scale in favor of -- or against -- a "not an employee" finding.

It is clear that an individual whose relationship to the college or university is primarily that of a student does not lose his or her "student status" merely because that relationship includes some aspects of employment. Moreover, an individual may be characterized as both a student and an employee in his or her relationship with the institution, depending on the particular aspect of the relationship at issue.

Challenges may arise to a particular aspect of a program, or to the initial selection process for participation in a program. The list above illustrates the type of factors that a federal agency (*e.g.*, Department of Justice) or a court might look to in evaluating whether a given program, or some aspect of a program, is governed by and subject to challenge under Title VII because it essentially involves employment, or Title VI or IX because it essentially involves academic matters.[240] If an institution intends to rely on a diversity rationale, it is very helpful to make clear that a program exists primarily for educational, rather than employment, purposes when that is the case, even if elements of both may arguably exist. When there is a challenge to the selection of an individual to participate in a program, the predominant purpose and characteristics of the program are likely to drive which legal regime governs, although there is not much guidance from the courts. When a particular aspect of a program is challenged (*e.g.*, level of payment), both the predominant nature of the program and of the particular aspect challenged are likely to be considered.

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

E. Policy and Program Principles and Illustrations

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

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

The absence of an approach -- or of a variation on an approach -- from this guide is not an indication that the approach or variation is legally unsustainable. Similarly, our discussion of various approaches is not intended to substitute for legal advice on the particular programs implemented by an institution. That analysis must be institution and context-specific and should be undertaken by the lawyers for the institution.

[240] Other relevant factors that an agency or court might look to include the tax treatment of fellowship awards by the IRS (*see, e.g.*, I.R.C. § 117 *and* IRS Publication 520, "Scholarships and Fellowships"); and the treatment of graduate students, externs, and residents by the DOL for FLSA purposes. *See, e.g.*, DOL Field Operations Handbook at paragraphs 10618-620 and 10624 (1993).

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

1. In General: Importance of Relationship to Mission

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

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

2. Specific Program Examples

a. Awareness-Raising and Monitoring Programs

<u>Mission-related purpose; benefits to participants; institutional resources committed</u>

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

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

2. *Diversity Council.* The President appoints a diversity council to serve as policy and legal experts and to coordinate and monitor diversity efforts university-wide. The Council may collect data and report annually on progress, conduct faculty and student body surveys and focus groups,

champion new initiatives, and provide support, resources, training and expertise. The Council may be sponsored by and report to a Diversity Cabinet.

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

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

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

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

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

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

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

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

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

2. *The President's annual evaluation* process for the Provost, Deans and Vice Presidents includes consideration of some of these efforts, as part of their overall evaluation. The Trustees' evaluation of the President annually includes consideration of some of these efforts, as part of the President's overall evaluation.

3. *Self assessments* may be conducted.

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

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

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

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

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

Outreach and the elimination of unnecessary barriers to employment create more opportunities for minorities and women to compete for positions at the University and to receive and accept offers. There is a distinction between outreach and breaking down barriers, on the one hand (which do not trigger Title VII prohibitions or strict scrutiny), and the employment process and

decisions (which may trigger such legal constraints), on the other. These programs address outreach and barrier removal, not employment or benefits associated with employment. The institution provides funding for general as well as targeted advertisements, personnel and other resources to contact prospects and individuals for referrals; for transportation and small honoraria for general as well as targeted lectures or other non-employment, relationship-building programs; for general as well as targeted recruitment travel (*e.g.*, to meetings of professional societies targeted to minorities and women); and for benefits programs that are available to all employees but that also remove barriers to the employment and success of minorities and women.

Outreach

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

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

Barrier removal

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

Pure outreach and barrier removal

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

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

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

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

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

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

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

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

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

8. *Improving Climate for Women and Minorities Through Benefits, Flexibility and Relocation Programs.* Have and communicate the availability of family leave, career support for dual-career couples, work schedule and other programs that provide flexibility and support for all faculty, but that have particular importance to women or minorities, and break down barriers to their pursuit of success in academic careers, particularly at research universities. These measures will also increase the likelihood that individuals will accept offers of employment.

Examples of these climate-enhancing measures that are available to all faculty, regardless of race or gender, are: a) offer employment counseling and assistance to help spouses and domestic partners of new faculty to find a position in the area; b) offer adjunct faculty and lecturer roles for spouses and domestic partners; c) form a consortium of regional businesses and academic

institutions to provide a Web site with available positions and networking opportunities in the area; d) offer participation in a regional recruiting organization; e) offer programs that provide family leave and flexible schedules for any faculty member who needs to care for infants or ill children, or ill spouse or parents; f) provide health insurance and possibly other benefits to domestic partners. These programs have been particularly helpful to women, but as gender roles evolve, they are increasingly important to many relocating faculty, regardless of gender or gender orientation.

Commentary. Where a college or university seeks to increase the diversity of its faculty, breaking down barriers to the employment of minorities and women and improving outreach are legally permitted and are a good first step. This is true whether the aim is to remedy the present effects of the institution's own prior racial or gender discrimination or the institution's passive participation in discrimination by others; to achieve its compelling educational interests; to remedy a manifest imbalance or underutilization of minorities or women in its workforce; or to attract minorities and women who are not effectively reached by other means.[241] Such efforts may avoid or limit the need for affirmative action in the actual employment process or in connection with awarding significant benefits of employment. Outreach and barrier removal need only satisfy the "rational basis" standard of judicial review. Under this standard, an outreach and barrier removal program need only avoid being arbitrary and capricious. That standard will clearly be met if there is any relationship between the institution's mission and fostering an environment of inclusiveness for a broad range of individuals.

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

Additional Variations/Examples of Outreach and Barrier Removal

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

Minorities, women and certain other under-served individuals are not well represented at the institution and would otherwise be isolated and impaired in accessing community-building opportunities. The institution has determined that others build community more easily. It is

[241] *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997); *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535 (M.D. Ala. 1995).

prudent to periodically evaluate the need and effectiveness of the practice, which is used as long as the need exists.

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

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

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

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

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

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

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

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

Assessment of Impact

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

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

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

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

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

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

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

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

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

These programs involve conferring significant benefits and require justification.

These programs further the achievement of missing aspects of mission-critical broad faculty and student diversity. They are time-limited, capacity-building programs aimed, in the employment context, at remedying prior discrimination or a manifest imbalance in the workforce of a particular discipline (a significant disparity, but somewhat less than the 2 or more orders of magnitude that the Supreme Court has found constitutes a *prima facie* case of discrimination) or other substantial underutilization (*e.g.*, the OFCCP 80 percent measure, *see* 65 Fed. Reg. 68,022, 68,033-34 (Nov. 13, 2008); U.S. Dept. of Labor, OFCCP, "Technical Assistance Guide for Federal Supply and Service Contractors," at 21-22 (Aug. 2009); and 41 C.F.R. §§ 60-2.10-2.17 (collectively "OFCCP Guide").) The programs also further the institution's compelling educational interests and mission.

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

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

If an assistantship is structured as an educational program (or if *Grutter* is an additional justification for an employment program -- or if a public institution is involved in an employment program so that Equal Protection applies in any event), the program would be subject to the

requirements of *Grutter* for strict judicial scrutiny and narrow tailoring. (This means the program is tied to a compelling mission-driven interest; race and, possibly, gender are used only to the extent necessary to achieve that interest and are applied in a flexible manner that does not assign the same weight to race or gender for all applicants of the same race and gender; all candidates are evaluated under the same criteria; and the program is effective, time-limited to the period in which the need exists, and evaluated periodically).

(i) *Considering Race And Gender As One Of Many Factors In Employment Benefits, But Not For Layoffs*

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

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

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

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

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

Invite talented recent minority or female PhDs and junior and senior minority and female faculty to be post-doctoral fellows or visiting faculty in the department to build familiarity and relationships. Build capacity beginning in graduate school by providing some graduate research

assistantships to minorities and women. These programs demonstrate to minorities and women that they are welcome. They are time-limited positions that build capacity and relationships to help participants compete more effectively for permanent positions. These positions are focused, complementary efforts within the context of similar, generally available post-doctoral fellowships, visiting opportunities, and assistantships. (*See* Sections VIII.A.6 and B, *supra).* When a position opens, extend a personal invitation to apply to minorities and women of interest. Senior visiting faculty are not only prospects for appropriate positions, but also may be sources of nominations when junior positions open.

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

(iv) *Research Funding Supplements*

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

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

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

or informal fellowships, assistantships and professional development opportunities that are generally available to others. These positions complement and are available within the context of generally available fellowships, research assistantships, and junior faculty opportunities. (*See* Sections VIII.A.6 and B, *supra*.)

(vi) *Hiring Generally*

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

(vii) *Target of Opportunity Hiring*

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

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

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

[4] After a unit makes a decision to hire, without knowledge of whether or not target of opportunity funding will be provided, it may apply to the Provost/Dean for target of opportunity

funding if the individual hired especially advances priority objectives of the institution: *e.g.*, Nobel and other top prize winners; National Academy members; those (of any race or gender) who are otherwise exemplary even among the usual high standards of the institution; those (of any race or gender) with proven records of exemplary inclusive conduct providing multi-cultural opportunities in teaching, research and/or mentoring (i.e., mission-critical behavior); missing aspects of broadly defined diversity. There is no guarantee of funding and funding is not part of the hiring decision. Funding provided after the fact is not paid to the target of opportunity candidate, but increases the pool of funding available for all hiring.

The institution maintains a written protocol setting forth hiring procedures which, among other things, include target of opportunity hiring as an essential, although not regular, tool for obtaining faculty who possess assets and characteristics that specially advance institutional mission. The hiring protocol makes clear that in any given search the target of opportunity option may be utilized if circumstances warrant, or a special position may be created to hire a particular individual. Target of opportunity hiring affords the institution resources and flexibility to move expeditiously to hire faculty who, for a variety of reasons, would otherwise be beyond reach. Processes and criteria are not changed once a hiring process commences and individual candidates are identifiable, as the policy pre-dates the particular hiring and overlays the process.

The EEOC's affirmative action guidelines recognize that voluntary affirmative action may be appropriate to address an "actual or potential adverse impact" that is likely to "result from existing or contemplated practices;" to "correct the effects of prior discriminatory practices;" and to address an "artificially limited" labor pool that has resulted "[b]ecause of historic restrictions by employers." If neutral approaches (e.g., multi-cultural skills and conduct), outreach and barrier removal are inadequate to remedy the underutilization or discriminatory effects, reasonable, not overly burdensome consideration of race or gender may be permissible as part of affirmative action plans and efforts under Title VII and EEOC rules. In addition, OFCCP rules require an affirmative action plan and good faith steps to remedy a federal contractor's underutilization of minorities and women (although OFCCP rules also provide that the actual hiring or promotion decision must be made on a non-discriminatory basis).

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

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

3. Assessment of Impact

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

1) *Data are collected annually to identify any underutilization or manifest imbalance* in the representation of minorities and women in the faculty of each discipline at the institution, as compared with their representation in the qualified, available pool. Where a manifest imbalance

or underutilization is found, a remedial affirmative action plan is developed. Where a pipeline problem is found, it too is documented and an assessment may be made of whether the pool is artificially limited due to a history of exclusion, but could be expanded through training and other capacity building for individuals who would then be better able to compete.

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

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

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

IX. AVAILABILITY OF BROADER DISCRETION WHEN JUSTIFIED

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

The Supreme Court has recognized that Congress has greater latitude in taking race into account than state or local governments. In *Fullilove v. Klutznick*,[242] the Supreme Court found constitutional a Congressional program which required that 10% of federal construction grants be set aside and awarded to minority business enterprises. The Court held that Congress had been granted unique remedial powers under Section 5 of the 14th Amendment of enforce the equal protection guarantees of that Amendment, and that Congress could exercise that power where the legislative history had reflected a nationwide history of systemic discrimination against minorities seeking federal construction grants.[243] In *Croson*, *supra*, the Supreme Court distinguished the local ordinance at issue there from the set aside program in *Fullilove* established by Congress under its broader powers granted under Section 5 of the 14th Amendment, noting that a factor in the result in *Fullilove* was the Court's obligation to provide greater deference to the actions of the Congress, a co-equal branch of government.[244] Under *Adarand*, *supra*, strict scrutiny also applies to federal action. However, Section 5 may provide the necessary justification to survive strict scrutiny with a narrowly tailored approach.[245]

Fullilove and *Croson* suggest that Congress could adopt legislation enabling the National Science Foundation, National Institute of Health and other STEM research funding agencies to pursue more aggressively programs directly aimed at increasing the number of minority and female faculty and students in STEM fields. This is consistent with Congress' enactment of the Science and Engineering Equal Opportunity Act of 1981 ("SEEOA"), which gives the NSF "'standing authority' to encourage full participation of women, minorities and other groups currently underrepresented in scientific, engineering, and professional fields." The legislation also established the Committee on Equal Opportunities in Science and Engineering ("CEOSE") to advise the NSF concerning options for achieving full participation of minorities and women in those fields. Under this legislation, the NSF has provided fellowship grants through the Minority Postdoctoral Research Fellowship Program ("MPRF") to assist underrepresented minorities in preparing to compete for positions in academia and in industry. In its 2004 Report to Congress, the CEOSE reported on the MPRF's progress: from 1990 to 2002, 75% of the former fellows surveyed were employed at institutions of higher learning, mainly doctorate-level research universities. A large majority (80%) said the MPRF enabled them to develop professional experience they would not have otherwise developed and helped them to enhance their research skills and focus their research interests. This experience is an indication that affirmative action to include underrepresented minorities and women can make a real difference. In its most recent 2005-2006 Biennial Report to Congress, the CEOSE stated that it would refocus its priorities to include "institutional transformation," such that colleges and universities would become more

[242] 448 U.S. 448 (1980).

[243] *Id.* at 458-67.

[244] *Id.* at 488.

[245] *See also United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress overstepped its Section 5 authority in passing parts of the Violence Against Women Act of 1994, including its creation of a federal civil remedy to victims of gender-based violence).

inviting to, supportive of, and enabling of students and faculty from underrepresented groups both academically and socially.

The Supreme Court's holding in *City of Boerne v. Flores*[246] affects the analysis of the extent of Congress' authority under Section 5 of the 14th Amendment. If Congress chose to adopt additional legislation it would be on its strongest ground if it rested such legislation on hearings and findings that demonstrated nationwide problems in access to STEM fields resulting from discrimination against women and minorities, or another compelling governmental interest necessitating faculty and students in STEM fields. Use of the *Grutter* diversity rationale respecting students and an extension of the *Grutter* diversity rationale to faculty might suffice, as might a finding linking diverse faculty and students to the looming crisis in national security and world competitiveness as a result of shifting demographics and severe underrepresentation of minorities and, in many disciplines, women, in STEM fields. There are other fields in which Section 5 may apply if supported by a strong evidentiary foundation.

B. Private Foundations

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

Where the practices may fall between those two extremes, well-developed federal regulatory principles establish that institutions of higher education must satisfy relevant federal standards (under Title VI or Title IX, depending on the preference at issue) with respect to privately endowed aid in cases in which they administer or "significantly assist" in the administration of those funds. Thus, in cases where institutions of higher education that are recipients of federal funds provide administrative support (such as selection guidance) to separate private entities that fund certain scholarship recipients, they must be able to justify their participation in any such race-conscious program under Title VI legal principles.

[246] 521 U.S. 507 (1997). Under the authority granted to it by Section 5 of the 14th Amendment, Congress has broad enforcement power and can legislate beyond simply providing remedies for the constitutional violation. Congress can enact statutes with criminal and civil penalties. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). So far, the Supreme Court has not disturbed its holdings on congressional authority under the post-Civil War Reconstruction amendments to legislate against racial discrimination. In *City of Boerne*, however the Court struck down the Religious Freedom Restoration Act (RFRA), which it found was not sufficiently congruent and proportional to the problem it was enacted to address. RFRA was not a race case, and there is a strong argument that when Congress acts to address racial discrimination, it is at the height of its 14th Amendment powers. The *Boerne* Court did not overrule *Morgan's* interpretation of the broad power granted to Congress under the enforcement clause of the 14th Amendment; however, the Court did make clear there are limits to those powers. Consequently, when Congress acts pursuant to its Section 5 authority, it is on the most firm ground when it has a record that demonstrates "congruence" and "proportionality," regardless of *Morgan's* vitality.

More specifically, Title VI prohibits discrimination "directly or through contractual or other arrangements" and "in the administration" of financial aid programs. As applied by the U.S. Department of Education's Office for Civil Rights, potential Title VI liability (and, consequently, the application of strict scrutiny) extends to situations in which higher education institutions fund, administer, or significantly assist in the administration of private financial aid. In such cases, that action will likely be deemed to be "within the operations of the college" and, therefore, subject to strict scrutiny.[247]

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

- Institutional assistance in setting criteria for the selection of students eligible for private scholarships;
- Institutional assistance in selecting qualifying students for private scholarships; and
- Institutional assistance in supporting the external funder through advertising or promotion (beyond the general assistance provided to any outside entity that seeks to advertise its scholarship programs).

[247] The Office for Civil Rights has also confirmed that "individuals or organizations not receiving Federal funds are not subject to Title VI." *See* U.S. Department of Education's 1994 Title VI Final Policy Guidance (Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964 (Feb. 23, 1994)) at n.12; *see also In re Northern Virginia Community College*, Case No. 03962088 (Aug. 1, 1997) (approving the transfer of the "administration and award" of race-conscious scholarships to a private entity, where the higher education institution also "returned the funds for the scholarships to the [external] donors.") It is important to note, however, that "OCR may examine the relationship among potential 'external' funders or administrators to ensure that they are, in fact, separate from the higher education institution. In one case, OCR rejected as 'not a good choice' a proposal by a college to allow a separate foundation to administer race-conscious scholarships that were funded from another external source. OCR indicated that the college's 'extensive ties' to the foundation were problematic and would raise Title VI concerns." *In re Northern Virginia Community College, supra*. An example of such impermissible close ties would be where the college's Student Financial Aid Committee selected the scholarship recipients for the external, private foundation.

X. ENFORCEMENT

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

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

The U.S. Department of Education's Office for Civil Rights ("OCR") is a law enforcement agency, charged with the responsibility of ensuring that recipients of federal funds do not engage in discriminatory conduct. OCR enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; discrimination on the basis of gender is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and discrimination on the basis of age is prohibited by the Age Discrimination Act of 1975. OCR also has enforcement responsibilities under Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public entities, whether or not they receive federal financial assistance.[248] Most federal agencies have delegated certain compliance responsibilities pursuant to Title VI, Title IX, and other civil rights laws to the Department of Education to the extent they relate to educational institutions. As a result, the Department of Education is the lead agency for Title VI and Title IX compliance.[249]

The civil rights laws enforced by OCR extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums, as well as all private institutions that receive U.S. Department of Education funds and other agencies' funds through delegations to the Department of Education. Areas covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and

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

[249] 45 Fed. Reg. 54793 (Aug. 18, 1980).

guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment.

OCR investigates complaints filed by individuals and also conducts compliance reviews of institutions that OCR selects. When an individual complaint involves a claim of employment discrimination under Title VI or Title IX, the Department of Education generally refers the complaint to the Equal Employment Opportunity Commission ("EEOC").[250] Refer to Appendix 1 for a fuller discussion of the enforcement process. OCR itself handles complaints involving claims of discrimination in non-employment educational programs.

OCR is obligated by law to investigate, and resolve where possible, complaints filed with OCR that state a claim under various nondiscrimination laws.[251] There is no "standing" requirement.[252] OCR may also initiate investigations known as compliance reviews, which are agency-initiated investigations typically based on information suggesting potential noncompliance by a recipient of federal funds.

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

(Detailed procedures for evaluating, investigating, and resolving complaints, conducting compliance reviews, and initiating enforcement are contained in OCRs Case Processing Manual at www.ed.gov/about/offices/list/ocr/docs/ocrcpm.html.)

OCR has two basic avenues for enforcement if it finds non-compliance with Title VI or Title IX: (1) suspend or terminate federal funds to the institution, and/or refuse to provide prospective financial assistance to the institution; or (2) refer the matter to the Department of Justice with a recommendation that enforcement litigation be filed against the institution.[253] Termination of or a refusal to grant federal financial assistance may be effected only after notice, an opportunity for a hearing on the record, an opportunity to appeal that decision to a review board and the Secretary of Education, and filing of a report with the House and Senate Committees with jurisdiction over the program involved.[254]

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[250] *See generally* 28 C.F.R. §§ 42.601 - 42.613 *and* discussion of Title VII, *supra*.

[251] The Office for Civil Rights in recent years has received on average 5000-6000 complaints of discrimination a year, the great preponderance involving allegations of discrimination based on disability.

[252] 34 C.F.R. § 100.7

[253] *See* 34 C.F.R. § 100.8.

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

Although the Civil Rights Restoration Act redefined the terms "program or activity" for purposes of coverage under Title VI, Title IX, and other civil rights statutes to refer generally to all operations of an institution that receives federal financial assistance, it did not revise the so-called pinpoint provision in these laws that limits the effect of fund termination by providing that it "shall be limited to the particular political entity, or part thereof, or other recipient as to whom a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . . . "[255] "The procedural limitations placed on the exercise of such power were designed to insure that termination would be pinpointed . . . to a particular program that is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the [overall operation of an educational institution] that it thereby becomes discriminatory."[256]

In at least one respect, the Office for Civil Rights' jurisdiction over substantive issues of discrimination based on race, national origin and gender may be broader in scope than that of a court. That is because U.S. Department of Education regulations based on Titles VI and IX bar not only intentional discrimination, but also the use of criteria or methods of administration that have the effect of subjecting individuals to "disparate impact" discrimination in the absence of an educational necessity.[257]

B. Private Rights of Action Under Titles VI and IX: Educational Programs and Employment

In addition to agencies' enforcement of Titles VI and IX, private individuals (aggrieved students regarding educational programs and student and faculty regarding employment) can also assert Title VI and IX claims. The most common form of relief obtained through a private right of action is an injunction, but monetary damages can also be recovered for intentional discrimination under Title IX.[258] States do not enjoy Eleventh Amendment immunity from monetary liability under Title IX.[259]

The courts have generally held that Title VII's *substantive* standards apply when evaluating claims of employment discrimination under Title IX.[260] DOJ has taken the same view with

[255] 42 U.S.C. § 2000d-1; *see* S. Rep. No. 64 at 20, reprinted in 1988 U.S.C.C.A.N. at 22.

[256] *Board of Pub. Instruction v. Finch*, 414 F.2d 1068, 1075 (5th Cir. 1969).

[257] 34 C.F.R. § 100.3(b)(2). In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Supreme Court ruled that Title VI disparate impact regulations do not afford private litigants a remedy in federal court. However, this decision does not affect the authority or jurisdiction of the U.S. Department of Justice or the U.S. Department of Education's Office for Civil Rights to enforce these regulations. Additionally, some courts have held that a private right of action alleging disparate impact against public actors may be sustained under 42 U.S.C. § 1983 (prohibiting any person acting under color of state law from violating federal laws). *See, e.g., White v. Engler*, 188 F. Supp. 2d 730 (E.D. Mich. 2001). *But see S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 274 F.3d 771 (3rd Cir. 2001).

[258] *See Franklin v. Gwinett City Pub. Sch.*, 503 U.S. 60, 75 n.8 (1990).

[259] *See* 42 U.S.C. § 2000d-7.

[260] *See, e.g., Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1997) ("[W]hen a plaintiff complains of discrimination with regard to conditions of employment in an institution of higher learning, the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case.").

respect to agency investigations.[261] The same is not true with respect to the *procedural* requirements for cases brought by private individuals:

> The Supreme Court has yet to explicitly decide whether the far more detailed and comprehensive procedural requirements of Title VII are applicable to claims of employment discrimination brought under Title IX. The lower courts that have faced this question are divided. One view treats Title IX as an independent basis for finding discrimination based on the substantive standards of Title VII, but divorced from its administrative requirements. Under this view, complainants filing complaints under Title IX are not subject to Title VII's filing deadlines, exhaustion of administrative remedy requirements, and state referral requirements, but are still governed by Title VII's substantive standards. The other view is that the more focused and detailed enforcement scheme of Title VII preempts Title IX in the area of employment discrimination. Under this view, employees of federally assisted education programs operated by recipients of federal financial assistance have only a Title VII remedy for sex-based employment discrimination.
>
> The Department takes the position that Title IX and Title VII are separate enforcement mechanisms. Individuals can use both statutes to attack the same violations.[262]

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

> A recipient may take action otherwise prohibited … provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students or other persons….[263]

DOJ has cautioned that "BFOQ's are very narrow exceptions."[264]

A "common rule" has been adopted by numerous federal agencies to address the enforcement of Title IX. *See* "Nondiscrimination of the Basis of Sex in Education Programs or Activities

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[261] *See* U.S. DOJ, "Title IX Legal Manual," at 39 ("In conducting an investigation alleging employment discrimination [under Title IX], agencies shall consider Title VII case law and EEOC Guidelines, 29 C.F.R. parts 1604-1607, unless inapplicable, in determining whether a recipient … has engaged in an unlawful employment practice").

[262] U.S. DOJ, "Title IX Legal Manual," at 39 (citations omitted).

[263] 34 C.F.R. § 106.61.

[264] U.S. DOJ, "Title IX Legal Manual," at 41 (citing *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991)).

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

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

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

- The U.S. Department of Justice may enforce against possible discrimination based on referrals by the U.S. Department of Education under Title VI of the Civil Rights Act in connection with educational programs or covered employment. DOJ generally seeks to settle these cases prior to filing litigation, and its enforcement guidelines include alternative administrative options for seeking resolution. *See* 28 C.F.R. § 50.3.
- Under Title VI of the Civil Rights Act of 1964, DOJ may file or intervene in litigation if (among other things) the Department receives a written complaint that an individual has been denied admission, financial aid, or other educational benefit, or was not permitted to continue to attend a public college because of race, color, religion, sex, or national origin; the Department believes the complaint is meritorious, gives notice of the complaint to the college authority, and is satisfied that the college has had reasonable time to correct the condition alleged in the complaint; and the complainant is unable, in the Department's judgment, to maintain appropriate legal proceedings for relief. *See* 42 U.S.C. § 2000c-6.
- DOJ may file or intervene in litigation under Title IX alleging gender discrimination (whether in educational programs or employment) or denial of equal protection of the laws under the 14th Amendment of the Constitution based on race, color, religion, sex, or national origin; or in lawsuits brought under the statutes it administers or where the government has an interest or where a claim or defense has been raised based on a statute or regulation administered by a federal agency. DOJ also may file an *amicus curiae* ("friend of the court") brief or otherwise participate as an *amicus* in cases relating to enforcement of the civil rights laws.

D. Equal Employment Opportunity Commission: Employment

The Equal Employment Opportunity Commission ("EEOC") has enforcement authority under Title VII, and can initiate litigation directly or by way of a referral to DOJ.[265] Private individuals can also assert Title VII claims. The remedies available for Title VII violations include:

- Back pay for up to two years
- An order to hire, promote, or reinstate (courts have also ordered the demotion of someone whose promotion was the product of discrimination)

[265] *See* 42 U.S.C. § 2000e-5.

- Front pay (an equitable remedy and a substitute for reinstatement when reinstatement is unavailable)
- Other actions to make an individual "whole"
- Compensatory damages including various non-pecuniary losses (*e.g.*, emotional suffering) -- but available only in disparate treatment and not in disparate impact cases
- Punitive damages -- but available only in disparate treatment and not in disparate impact cases; requires a showing of malice or reckless indifference; cannot be awarded against federal, state or local governments
- Attorneys' fees and court costs "may" be allowed, to the "prevailing party"[266]

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

E. Office of Federal Contract Compliance Programs: Employment

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

OFCCP investigates violations of these Executive Orders through compliance evaluations or in response to complaints.[267] If a violation is found, OFCCP typically asks the federal contractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP can initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor, or it can refer the matter to the EEOC or to the DOJ. OFCCP can pursue (or refer) "individual" discrimination complaints, as well as "pattern and practice" discrimination complaints.

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

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

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[266] *See* 42 U.S.C. §§ 2000e-5(g), 5(k); 29 C.F.R. Parts 1600, 1604, 1691.

[267] *See* 41 C.F.R. Part 60; s*ee generally* www.dol.gov/ofccp/regs/compliance/ca_11246.htm