

SUMMARY AND HIGHLIGHTS

OF THE

***HANDBOOK ON DIVERSITY AND THE LAW:
NAVIGATING A COMPLEX LANDSCAPE TO FOSTER GREATER
FACULTY AND STUDENT DIVERSITY
IN HIGHER EDUCATION***

Second Edition

With Supplementary Guidance Based on New Federal Cases and New Resources

Arthur L. Coleman, Jamie Lewis Keith, and Daryl Chubin



This publication has been produced as part of the American Association for the Advancement of Science [AAAS] Diversity and Law Project, in which the Association of American Universities participates. More specifically, it has been produced as part of the second phase of this project that focuses on science, technology, engineering and math [STEM]-related access and diversity-related law, policy, and programmatic issues. Focused on providing institutions of higher education with in-depth legal analysis and guidance tied to program models, this second phase of work will facilitate the development and implementation of key strategies and approaches in STEM (and other) fields that can be successful because they are both effective and legally sustainable.

AAAS leads the second phase of this project with the participation of several national organizations that serve a wide range of higher education institutions, including: The American Council on Education, the Association of American Medical Colleges, the National Association of College and University Attorneys, the College Board, the American Association of Community Colleges, the Institute for Higher Education Policy, the Thurgood Marshall College Fund, the Association of Public and Land-Grant Universities, and the primary funder of phase one of the project, the Alfred P. Sloan Foundation. The Association of American Universities continues as an inaugural participant.

Project leadership has been provided by Dr. Daryl Chubin, Director of the AAAS Center for Advancing Science & Engineering Capacity, and Jamie Lewis Keith, Vice President and General Counsel of the University of Florida, both Co-Project Directors; and Art Coleman, Managing Partner of EducationCounsel LLC, Project Counsel. Dr. Shirley M. Malcom, Head, Education and Human Resources Programs, AAAS, has also provided policy advice and support. An advisory board, co-chaired by Bob Burgoyne and Columbia Law School Professor Theodore Shaw of Fulbright and Jaworski, LLP, has offered overall expert input and guidance. EducationCounsel LLC has provided policy, legal, and overall support for phase two of the project.

These materials represent the views and analyses of the authors and contributors, and do not necessarily reflect the views or analyses of the American Association for the Advancement of Science, the Association of American Universities, the Alfred P. Sloan Foundation, the National Science Foundation, the University of Florida, or any participating institution, organization, or representative attending any related workshop or contributing to the project. AAAS acknowledges the generous support of the Alfred P. Sloan Foundation, which funded the 2009-2010 workshops and preparation of all materials through multiple awards (2007-5-51 UGSP, B2008-52, 2008-5-35 UGSP, and 2009-5-33 UGSP) and the National Science Foundation (NSF), which provided supplementary funding in 2009-2010 and is funding the second phase of the project (HRD-1038753). Special thanks to Sabira Mohamed of AAAS for assistance in producing this publication.

The Handbook and other project resources are available for free downloading at <http://php.aaas.org/programs/centers/capacity/publications/complexlandscape/>. Project resources may be copied and adapted for internal use by public and tax-exempt private institutions of higher education. © American Association for the Advancement of Science

About the Authors

Arthur L. Coleman is co-managing partner of EducationCounsel, LLC; he served as deputy assistant secretary for civil rights and senior policy advisor to the assistant secretary for civil rights in the U.S. Department of Education from 1993 to 2000. He serves as chairman of the Board of Directors for the Institute of Higher Education Policy.

Jamie Lewis Keith is Vice President and General Counsel of the University of Florida. She was Senior Counsel (the primary inside counsel) of the Massachusetts Institute of Technology from 1999 to 2006. She is a member of the American Association for the Advancement of Science Capacity Center Advisory Board and a member of the Legal Advisory Committee of the Association of American Universities.

Daryl Chubin is Director of the AAAS Center for Advancing Science & Engineering Capacity at the American Association for the Advancement of Science, which he established in 2004. His career extends from faculty member in four universities to federal staff in the legislative and executive branches of government to nonprofit executive. He is the author of eight books and numerous reports.

The American Association for the Advancement of Science (AAAS) is the world's largest general scientific society and publisher of the journal *Science* (www.sciencemag.org). AAAS was founded in 1848 and includes some 262 affiliated societies and academies of science, serving 10 million individuals. The non-profit AAAS (www.aaas.org) is open to all and fulfills its mission to "advance science and serve society" through initiatives in science policy; international programs; science education; and more. The AAAS Center for Advancing Science & Engineering Capacity provides institutions of higher education with assistance in improving delivery of their educational mission. The Center works to improve campus climate and increase recruitment, retention, and advancement of U.S. students and faculty in STEM fields, especially those from traditionally underrepresented groups.

EducationCounsel, LLC, is an innovative law, policy, strategy, and advocacy organization committed to strengthening education systems, closing achievement gaps, and expanding access to educational opportunities. The firm collaborates with education leaders from across the country, including state and local leaders, higher education officials, associations, foundations, and pioneering private and public entities to improve educational outcomes for all students. EducationCounsel's higher education work centers on policy and legal issues associated with access and diversity, as well as college completion. It also counsels and advocates for clients on issues of federal legal compliance (with a focus on non-discrimination and accreditation issues). EducationCounsel is an affiliate of Nelson Mullins Riley & Scarborough, LLP, a national law firm of over 400 attorneys who serve clients on issues relating to complex litigation, corporate services, intellectual property, employment, government relations, regulatory, and more. For more information, please visit www.educationcounsel.com.

I. Background and Overview

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

The *Handbook* provides a detailed analysis of the many complex legal regimes that govern access and diversity efforts for both faculty and students, reflecting the challenges associated with that legal context. The *Handbook* provides in-depth, pragmatic legal analysis, with on-point resources, tied to specific types of diversity-enhancing program models that are both effective in enhancing diversity and legally sustainable. Appendix A to this document provides a concise guide for designing effective and legally sustainable access and diversity programs. Appendix B provides the Table of Contents and resources provided in the *Handbook*. Neither the *Handbook* nor this supplement is intended to provide a legal opinion or to substitute for legal counsel.

This document distills the key legal and policy principles as they relate to many of the program examples provided in the *Handbook* (with cross-references)—all of which are designed to support institutional efforts to expand access and improve diversity, particularly in STEM disciplines. In addition, it provides new information and resources to assist institutional efforts, all of which have been produced during the 2010-2011 second phase of the project. Additional project resources, intended to be used with this document and as stand-alone resources, are listed in Appendix C and are available on the AAAS website for free.

Specifically:

- ◆ Section II provides a comprehensive overview of the economic and national security-based imperative to enhance access and broaden diversity in STEM fields. It includes an updated and streamlined amplification of that imperative that reflects key national data and demographic trends—Making the Case: The STEM Access and Diversity National Imperative at a Glance.
- ◆ Section III provides a brief but comprehensive overview of the key legal principles that should guide institutional action associated with access and diversity-broadening policies and programs, with analysis of the relevant federal legal regimes applicable to students (subsection A) and faculty (subsection B).

- ◆ Section IV provides an overview and analysis of recent and significant federal cases of relevance, including the panel and en banc decisions in *Fisher v. Texas* (5th Cir. 2011) and the panel decision on *Coalition to Defend Affirmative Action et al. v. Regents of the University of Michigan et al.* (6th Cir. 2011).
- ◆ Section V outlines key program examples that may be considered by institutions of higher education that are pursuing STEM-focused access and diversity goals. Examples reflect a range of race-, ethnicity- and gender-neutral and -conscious methods, with consideration of both effectiveness and legal sustainability. They include in-depth discussions of:
 - A. Inclusive Workplace Conduct Criterion
 - B. Low Socio-Economic Background and Other Disadvantage Criteria
 - C. Inclusive Outreach and Barrier Removal in the Faculty Hiring Process
 - D. Recruitment Consortia
 - E. Education Collaboration Agreements
 - F. Community Building, Mentoring and Capacity Building Programs
 - G. Target of Opportunity Approaches

Appendices to this document include:

- A. Guide To Law-Attentive Design Of Campus Diversity and Access Strategies
- B. The *Handbook* Table of Contents
- C. A Faculty Recruitment Tool Kit, including
 - 1. Search Guidance
 - 2. Target of Opportunity Sample Policy
 - 3. Search Waiver Sample Policy and Process
- D. List of Additional Project Resources

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

Industry leaders heavily invested in STEM education and professions have noted that, irrespective of one's political or social viewpoint, the U.S. must increase participation of minorities and women in STEM fields or we can soon expect to see an adverse effect on U.S. economic strength, leadership in innovation, and national security.ⁱ Observing that students educated in STEM fields in China and India often lack creative and collaborative abilities that are well-developed in students educated in American institutions of higher education, these industry leaders note that China and India realize the need to foster such creativity and collaboration in STEM education and are working on enhancing their approach. These leaders warn that if we fail to make significant progress in increasing participation of minorities and women in U.S. STEM higher education and industry in the next several years, the nation's economic strength, leadership in innovation, and security may be expected to decline appreciably, just as other countries' effectiveness and creativity in STEM education is expected to ascend. As noted by the National Academies, in a global and highly connected world, the U.S. government and its institutions of higher education should and do welcome the success of other nations and the participation of international students in U.S. higher education. In so doing, however, we must also ensure that U.S. citizens are equipped to satisfy U.S. national security needs and to succeed in a global economy.

Institutions of higher education serve critical roles in society, as most of them have an educational mission that encompasses delivering excellent educational experiences for all of their students; producing excellent research to increase knowledge; and serving society's greatest needs, including preparing students to participate in the workforce and citizenry and fueling innovation, the economy, and national security. Thus, these industry leaders have challenged institutions of higher education to do more to help the nation meet the bipartisan need for greater access to and diversity in STEM higher education. That challenge is the driver for the AAAS Diversity and the Law Project and its development of resources reflected in this document.

Technology is "increasingly recognized as a key determinant of economic growth by most nations,"ⁱⁱ and NSF has emphasized that our "international economic competitiveness ... depends on the U.S. labor force's innovation and productivity" and that a "diverse, globally-oriented workforce of scientists and engineers" is needed to support continued U.S. economic leadership.ⁱⁱⁱ Importantly to all U.S. citizens, STEM education and skills contribute to success and increase earning capacity in many fields (not just STEM fields).^{iv} It is projected that many jobs (within and outside STEM fields) will require STEM education and skills in the future.^v

Yet, the NSF, the President's Council of Advisors on Science and Technology (PCAST), and the Commission on Professionals in Science and Technology (CPST) all report a negative trend in the first decade of the 21st Century: U.S. students' interest in STEM careers and their performance in science and mathematics continue to decline, while foreign students' interest and performance in these areas continue to increase. Only about one-third of the baccalaureate degrees earned in the United States in 2005 to 2006 were in STEM fields, whereas 53% of the baccalaureate degrees earned in China and 63% in Japan in 2005 were in STEM fields. Furthermore, in the U.S., about five percent of all bachelor's degrees are awarded in engineering, compared to 20% in Asia.^{vi} Overall, the United States trailed 16 countries in Europe and Asia in the proportion of each country's college population who earned degrees in science and engineering in 2001.^{vii}

Compounding this challenge, demographic trends in the U.S. demonstrate that minorities and women, while being highly underrepresented in STEM fields that drive economic growth, represent the nation's largest source of American intellectual resources for the not-so-distant future. Specifically, data from the U.S. Census Bureau and NSF demonstrate that individuals who today are referred to as minorities will soon constitute the majority of the college-age population and then the majority of the total population of the United States. Minorities constituted one in three members of the college-age population and about 24% of the total population of the U.S. in 2000. By 2025, NSF projects that minorities will constitute 38% of the college-age population. Minorities are projected to surpass Caucasians in the U.S. population soon after 2050.^{viii} At the same time, women already constitute over half of the total U.S. population. Women also represent half and non-Asian minorities (who are under-represented in STEM fields) represent over one-third – and together they represent the fastest growing segments – of the U.S. college-age population.^{ix} In light of these realities, the persistent gaps in American talent reflected at every stage of the STEM pipeline must be addressed or U.S. citizens ultimately will have fewer job opportunities in the global economy and enjoy less prosperity than the citizens of other nations. While the gender gap in high school preparation in science and mathematics has largely been eliminated, wide racial and ethnic gaps persist. African American, Hispanic, and American Indian and Alaska Native students are less likely than Asian and non-Hispanic Caucasian students to take key advanced mathematics, chemistry, and physics courses in high school.^x This evidence signals the beginning stage—and without prompt action, perpetuation—of a severe pipeline problem for American talent in STEM and STEM-dependent fields.

In higher education, African American, Hispanic, and Native American individuals are underrepresented in both STEM degrees and all degrees at the college and graduate school levels. Women are underrepresented in STEM degrees at all levels. Women have outnumbered men in undergraduate education since 1982 and earned 58% of all baccalaureate

degrees in 2005, but earned only about half of all baccalaureates in science and engineering since 2000, and less than 20% of U.S. engineering degrees in 2005-06.^{xi} African Americans, Hispanics, and Native Americans together accounted for only 17.3% of all baccalaureate degrees (all fields), and 16.7% of U.S. baccalaureate degrees in all STEM fields combined (natural sciences, engineering and social sciences) in 2005-06.^{xii} Of PhDs awarded between 2005 and 2006 in the U.S. in STEM fields, only 20% were earned by women, and only 6% were earned by African Americans, Hispanics, and Native Americans.^{xiii}

Women's robust representation in college generally also should not obscure their lesser representation in PhD programs, STEM fields in higher education, and the workforce at all levels. Data on freshman "intentions" to major in a field, actual enrollments, and degree completions show wide variations by gender and broad field. The sex ratio (male to female) of interest ranges from 9:1 in computer science, to 6:1 in engineering, and 1.5:1 in physical sciences.^{xiv} Women's interest outpaces men's only in the biological sciences.^{xv} These patterns persist in enrollments and degree completion with the gap in retention rates narrowing to parity in many fields, but not in all (e.g., the retention ratio is 4:1 male to female in engineering).^{xvi} The impact of these differentials on the composition of the American STEM faculty and national workforce is clear.

Predictably, the patterns at the end of the pipeline—in the workforce, including academia—persist. More particularly, the relative dearth of science and technology degrees earned by minorities and women has led to severe underrepresentation in academia and the workforce. Only 9.1 to 10% of the science and engineering workforce comprise African Americans, Hispanics, and Native Americans.^{xvii} Underrepresented minorities, women, and persons with disabilities represent two-thirds of the U.S. workforce, but hold only one-fourth of the science and technology jobs that drive the global economy.^{xviii} Caucasians and Asians, who represent the vast majority of this workforce and have the most experience, are aging.^{xix} Underrepresentation of non-Asian minorities and women in STEM higher education and STEM and STEM-dependent fields is a persistent problem. The university faculty looks glaringly unlike the undergraduate student body. In the context of these demographics, *all* students and the entire nation will suffer if we do not address quality of and access to STEM education, and do not increase the racial and gender diversity of the U.S. workforce available to STEM and STEM-dependent fields.^{xx}

Academic research institutions educate our nation's STEM workforce and increase fundamental knowledge needed by industry to develop practical solutions to the needs of a rapidly changing, diverse, and global society. In the STEM pipeline, a broad range of colleges and universities serve critical roles in generating a well-prepared STEM workforce, both in academia and industry. This is the incomparable U.S. partnership of higher education, academic research,

government, and industry that has resulted in innumerable advances in knowledge and improvements in the quality of life, health, and productivity of society in this country and around the world.^{xxi}

Beyond the U.S. demographics-driven needs of industry for a more diverse and larger STEM-educated labor pool of American citizens, it is important to recognize, in a broadly diverse and global society, that *all students* (regardless of race or gender) must have meaningful educational experiences. All students need the opportunity to learn to work productively and creatively with, to be supervised in their work by, and to live with individuals from a broad range of backgrounds, cultures, races, ethnicities, genders, and experiences, or they—non-minority and minority, women and men—will not be well-prepared to enter the workplace or contribute as citizens in the 21st Century.

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

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

Until our nation can provide access to high quality public K-12 science and mathematics education to a high percentage of all segments of our society, including underrepresented minorities and women, institutions of higher education—particularly selective institutions—will

have to continue to take race and gender into account to achieve the racial and gender components of the broad diversity in STEM undergraduate and graduate student bodies and faculties that they require to achieve their educational missions and satisfy the nation's economic, national security, and citizenry needs. Until we confront the root causes of our nation's deficiency in STEM fields, our businesses and industries will continue to struggle to build a sufficiently diverse workforce, including American citizens, that effectively identifies our society's needs, develops products and services to address those needs, and competes in the world's markets to produce those products and services. Higher education institutions of different types and offering different levels of education will need to collaborate to help students enter, stay in, and transition through the STEM pipeline. This inter-generational pipeline problem is one of the greatest challenges facing institutions of higher education, our nation, and all Americans in the 21st Century. U.S. colleges and universities must respond creatively and unequivocally to increase access to education and broaden the diversity of our student bodies and faculties.

**American Association for the Advancement of Science
and
Association of American Universities**

Making the Case: The STEM Access and Diversity National Imperative at a Glance

Given America’s Demographics, Demand For Intellectual Resources In STEM Fields, and The Need For STEM-Educated Workers In Many Fields, Expanding Access To and Diversity In STEM Is A Bipartisan National Imperative For The Competitiveness, Economic Strength, and National Security of the United States and Its Citizens.

Regardless of one's political or social viewpoint, and fundamental to the strength of the U.S. economy and the prosperity of Americans, [1] U.S. K-12 public education must expand access to and improve the quality of science and mathematics preparation for all segments of U.S. society—including students from low socioeconomic backgrounds and students from minority groups; and [2] U.S. higher education must increase production of STEM degrees overall—and, in particular, increase participation and retention of under-represented minorities (URMs)¹ and women in STEM higher education at all levels.² Otherwise, we can soon expect to see the acceleration of adverse effects on U.S. innovation, economic strength, and national security to the detriment of all U.S. students and citizens—who can expect to experience a decline in their employment opportunities and prosperity, as compared to citizens of other nations.³

STEM fields drive innovation, economic competitiveness, and national security, and STEM education and skills are fundamental to success in many fields.⁴ Yet the U.S. is wasting its most abundant American intellectual

¹ Hispanic and Latino Americans, African Americans, Native Americans, Alaskan Natives, Hawaiian Natives, and Pacific Islanders are under-represented in STEM fields. Asian Americans are well represented in STEM fields but are aggregated with Pacific Islanders in National Science Foundation (NSF) data. See NAT'L ACADS., EXPANDING UNDERREPRESENTED MINORITY PARTICIPATION: AMERICAN'S SCIENCE AND TECHNOLOGY TALENT AT THE CROSSROADS 16 n.9 (2010) [hereinafter Crossroads], available at http://www.nap.edu/catalog.php?record_id=12984. Consequently, both NSF data and Census data available through the Federal-State Cooperative for Population Estimates in collaboration with the U.S. Census Bureau at <http://www.census.gov/popest/overview.html> and <http://www.census.gov/population/www/coop/fscpe.html> ("Fed-State Coop") are provided when available.

² See *id.*

³ "The three principal ingredients of innovation and competitiveness [are] Knowledge Capital [i.e., investment in increasing basic knowledge through research], Human Capital [i.e., a well-prepared workforce which derives from Kindergarten through 12th grade, college and graduate education, teachers and faculty], and a creative Ecosystem. [Since the 2005 initial pre-publication by the National Academies of *Rising Above the Gathering Storm: Energizing and Employing America for a Brighter Economic Future* (2007)], the nation's outlook has worsened [and] has shown little sign of improvement, particularly in mathematics and science [while] many other nations *have* been markedly progressing, thereby affecting America's relative ability to compete effectively for new factories, research laboratories, administrative centers—and *jobs*. While this progress by other nations is to be both encouraged and welcomed, so too is the notion that Americans wish to continue to be among those peoples who do prosper. [Innovation is the key and the U.S. has] increasingly placed shackles on [investment in basic technology research, preparation of human resources, and opportunities for a creative 'Ecosystem'] such that, if not relieved, the nation's ability to provide financially and personally rewarding jobs for its own citizens can be expected to decline at an accelerating pace." NAT'L ACADS., RISING ABOVE THE GATHERING STORM, REVISITED: RAPIDLY APPROACHING CATEGORY 5 4-5(2010), (Gathering Storm Category 5), available at http://www.nap.edu/catalog.php?record_id=12999.

⁴ While scientists and engineers comprise about 4% of the U.S. workforce, they disproportionately generate jobs for the other 96%. *Id.* at 2-3 ("Importantly, leverage is at work here. It is not simply the scientist, engineer and entrepreneur who benefit from progress in the laboratory...; it is also the factory worker . . . the advertiser . . . the truck driver . . . the salesperson . . . the maintenance person . . . not to mention the benefits realized by the user [of new technology and its products]. Further, each job directly created in the chain of manufacturing . . . generates, on average, 2.5 jobs in . . . unrelated endeavors."). A new study from the Georgetown University Center on Education and the Workforce shows that science and engineering graduates enjoy high demand in a variety of fields—both science and non-science. ANTHONY P. CARNEVALE, NICOLE SMITH, AND MICHELLE MELTON, GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, STEM 23, 76 (2011), available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/stem-complete.pdf> ("We find that the disagreement between those who argue that STEM workers are undersupplied and those who argue they are oversupplied can be resolved by the fact that large numbers of people with STEM talent or degrees divert from STEM occupations either in school or later in their careers."); see NAT'L SCI. BD., NAT'L SCI. FOUND., SCIENCE AND

resources—including women and under-represented minorities (in STEM fields, minorities other than Asians)—by failing to adequately prepare, attract, and retain qualified persons in STEM higher education and careers.

Industry and government depend on U.S. higher education for a well-prepared workforce of American scientists and engineers for STEM and other fields.⁵ STEM education provides needed skills and increases individual earning capacity in STEM and other careers.⁶ Women represent half and URM's represent over one-third—and together they are the fastest growing segments—of the U.S. college-age population.⁷ Thus, for the foreseeable future, women and URM's offer abundant intellectual resources and the greatest potential American talent for the U.S. and global workforce. But URM's are highly under-represented in U.S. higher education overall. And URM's and women are highly under-represented at every level of STEM higher education. URM's constitute less than 10% of the STEM workforce, and women, URM's, and people with disabilities together constitute two-thirds of the U.S. total workforce but only about one quarter of the U.S. STEM workforce.⁸ In light of these trends, the U.S. has an already serious and rapidly increasing "pipeline" problem of American talent in STEM and other fields, and *all* students and the entire nation will suffer if we do not address it without delay.⁹

Overall, U.S. students' interest in core STEM careers and their preparation for and performance in science and

ENGINEERING INDICATORS 2010 Figure 3-3 (2010) [hereinafter SEI 2010], available at <http://www.nsf.gov/statistics/seind10>. Technology is "increasingly recognized as a key determinant of economic growth by most nations," NAT'L SCI. BD., NAT'L SCI. FOUND., SCIENCE AND ENGINEERING INDICATORS 2002 5-44 (2002) [hereinafter SEI 2002], available at <http://www.nsf.gov/statistics/seind02/>; see Brief for Mass. Inst. of Tech., Leland Stanford Jr. Univ., E. I. DuPont De Nemours and Co., Int'l Bus. Machines Corp., Nat'l Action Council for Minorities in Eng'g, the Nat'l Acad. of Scis., and the Nat'l Acad. of Eng'g as Amici Curiae at 15 and n.26, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) and Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) [hereinafter MIT Brief], available at <http://web.mit.edu/newsoffice/nr/2003/amicus-brief.pdf>. NSF has emphasized that our "international economic competitiveness . . . depends on the U.S. labor force's innovation and productivity" and that a "diverse, globally-oriented workforce of scientists and engineers" is needed to support continued U.S. economic leadership. SEI 2002, at 3-15–3-29, 5-29–5-30; MIT Brief, at 12-13 .

⁵ MIT Brief, *supra* note 4, at 4-6, 18-20.

⁶ "Our education system is not producing enough STEM-capable students to keep up with demand both in traditional STEM occupations and other sectors across the economy that demand similar competencies. The demand for STEM competencies outside STEM occupations is strong and growing. While STEM earnings are high, the earnings of comparably skilled workers in many other high-skill occupations are higher and increasing faster." Carnevale, Smith, and Melton, *supra* note 4, at 10.

⁷ See Federal-State Coop, *supra* note 1; see also NAT'L SCI. FOUND., WOMEN, MINORITIES, AND PERSONS WITH DISABILITIES IN SCIENCE & ENGINEERING t.1-2 (2011) [hereinafter WMD 2011], available at <http://www.nsf.gov/statistics/wmpd/pdf/tab1-2.pdf> ; NAT'L CTR. FOR EDUC. STATISTICS , DIGEST OF EDUCATION STATISTICS t.6 (2006) [hereinafter NCES 2006], available at http://nces.ed.gov/programs/digest/d06/tables/dt06_006.asp?referrer=list (reporting that in 2006 women already constituted 57% of the U.S. college age and over 50% of the U.S. total populations).

⁸ WMD 2011, *supra* note 7, at t. 1-2, t. 9-7; Gathering Storm Category 5, *supra* note 3, at 49; NAT'L SCI. FOUND., NSF 10-300, SCIENCE AND ENGINEERING DEGREES BY RACE/ETHNICITY: 1997-2006 t.4 (2009) [hereinafter Science and Engineering Degrees 1997-2006], available at http://www.nsf.gov/statistics/nsf10300/content.cfm?pub_id=3786&id=2; COMM'N ON PROF'LS. IN SCI.AND TECH., PROFESSIONAL WOMEN AND MINORITIES: A TOTAL HUMAN RESOURCES DATA COMPENDIUM Ch. 5, Figure 3-1 (17th ed. 2008) [hereinafter CPST 2008] (10% of the STEM workforce in 2006 was comprised of URM's); see also T.B. HOFFER, M. HESS, V. WELCH, JR., AND K. WILLIAMS, DOCTORATE RECIPIENTS FROM UNITED STATES UNIVERSITIES: SUMMARY REPORT 2006 (2007) [hereinafter Doctorate Recipients U.S. Universities 2006] (reporting on data collected in the Survey of Earned Doctorates, conducted for six federal agencies, NSF, NIH, USED, NEH, USDA, and NASA by NORC); SEI 2010, *supra* note 4, at Appendix Table 2-12, available at <http://www.nsf.gov/statistics/seind10/append/c2/at02-35.pdf> (9.1% of the STEM workforce in 2006 was comprised of URM's); WORKFORCE/EDUC. SUBCOMM., PRESIDENT'S COUNCIL OF ADVISORS ON SCI. AND TECH., SCIENCE AND ENGINEERING CAPABILITIES Part 3 [hereinafter PCAST 2004], available at <http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-04-sciengcapabilities.pdf>.

⁹ See Remarks of the Chief Exec. Officer of Northrop Grumman Corp., Exec. Vice President of IBM Corp., and President of the Nat'l Acad. of Eng'g in CHUBIN, MALCOM, KEITH., AND BOBB, A SUMMARY OF THE MEETING: AAAS-NACME ROUNDTABLE STANDING OUR GROUND II: EFFICACY OF UNIVERSITY-BASED S&E PROGRAMS DESPITE LIMITATIONS OF 'STRICT SCRUTINY' 6-7 (Jan. 15, 2008), available at http://php.aaas.org/programs/centers/capacity/07_Engagement/07_LawPolicyPractice.php; S.A. JACKSON, BUILDING ENGINEERING AND SCIENCE TALENT, THE QUIET CRISIS: FALLING SHORT IN PRODUCING AMERICA'S SCIENTIFIC AND TECHNICAL TALENT, (2004), available at http://www.bestworkforce.org/PDFdocs/Quiet_Crisis.pdf; AM. ASS'N FOR THE ADVANCEMENT OF SCI. AND NAT'L ACTION COUNCIL FOR MINORITIES IN ENG'G, STANDING OUR GROUND: A GUIDEBOOK FOR STEM EDUCATORS IN THE POST-MICHIGAN ERA (2004) [hereinafter Standing Our Ground] , available at <http://www.aaas.org/standingourground/>; Gathering Storm Category 5, *supra* note 3, at 4-5. Demographic data are from Federal-State Coop, *supra* note 1.

mathematics continue to decline, while foreign students' interest, preparation, and performance in these fields continue to increase. While in our global society, we embrace the success of other nations and the participation by foreign students in U.S. higher education and must continue to do so, the trend of inadequate proportions of American students participating in STEM higher education to build a STEM and broader workforce of American talent must be reversed for the benefit of *all* U.S. citizens.¹⁰

- The U.S. is ranked 20th among industrial nations in high school graduation rates.¹¹ The quality of U.S. K-12 education lags behind many industrialized nations, but costs more than any other Organization for Economic Cooperation and Development (OECD) country.¹²
- The U.S. is ranked 48th in quality of mathematics and science education by the World Economic Forum.¹³ The U.S. trailed 26 developed countries in the proportion of each country's college population who earned degrees in science and engineering in 2009.¹⁴ The U.S. ranked 20th out of 24 nations, in the percentage of its 24-year-olds who earn a first degree in natural sciences (physical and biological sciences) or engineering.¹⁵
- Only 32% of the baccalaureate degrees earned in the U.S. in 2006 were in all STEM fields combined, compared to 53% in China and 63% in Japan in 2005. Only 4.5% of U.S. college students earn engineering baccalaureate degrees, compared with 33% in China, 25% in South Korea, and 14% in France.¹⁶
- The demand for workers with STEM education and skills is growing for certificate holders and PhDs alike - both within *and* outside of traditional STEM fields.¹⁷
 - People with STEM degrees are paid higher than the average of other workers in all fields at the same educational level; those with STEM college degrees earn more in their lifetime in all fields than those earning other college degrees.¹⁸
 - American citizens will have fewer job opportunities than the citizens of other nations if U.S. citizens are less well prepared than the nationals of other countries to compete for and satisfy U.S. and global workforce needs.
- America cannot rely on foreign nationals for some national security and defense industry jobs; we need U.S. citizens for these roles. Yet, in 2000, foreign students outnumbered U.S. students studying physical sciences

¹⁰ See JAMIE LEWIS KEITH AND DARYL E. CHUBIN, AM. ASS'N FOR THE ADVANCEMENT OF SCI., ASS'N OF AM. UNIVS., HANDBOOK ON DIVERSITY AND THE LAW SUMMARY AND HIGHLIGHTS 2, n. 4, n. 5 (ed. Arthur L. Coleman, 2011) [hereinafter Handbook Summary], available at http://php.aaas.org/programs/centers/capacity/documents/LawDiversity_SUMMARY.pdf; Crossroads, *supra* note 1, at 1-3, 16-17, 26-27, 41-46; Gathering Storm Category 5, *supra* note 3, at 4-5.

¹¹ Gathering Storm Category 5, *supra* note 3, at 50; ORG. FOR ECON. COOPERATION AND DEV., EDUCATION AT A GLANCE 2009: OECD INDICATORS Chart A2.1 (2009) [hereinafter OECD Indicators 2009], available at <http://www.oecd.org/edu/eag2009>.

¹² Gathering Storm Category 5, *supra* note 3, at 4; SEI 2010, *supra* note 4, at Appendix Tables 1-9, 1-10, 1-11, available at <http://www.nsf.gov/statistics/seind10/append/c2/at02-35.pdf>; OECD Indicators 2009, *supra* note 11, at t.B-1.

¹³ Gathering Storm Category 5, *supra* note 3, at 6; SOUMITRA DITTA AND IRENE MIA, WORLD ECONOMIC FORUM, THE GLOBAL INFORMATION TECHNOLOGY REPORT 2009-2010, at <http://reports.weforum.org/global-information-technology-report/>.

¹⁴ Gathering Storm Category 5, *supra* note 3, at 8; OECD Indicators 2009, *supra* note 11, at t.A-3.5.

¹⁵ Gathering Storm, *supra* note 3, at 98; Crossroads, *supra* note 1, at 3, 27.

¹⁶ SEI 2010, *supra* note 4, at Appendix Table 2-35, available at <http://www.nsf.gov/statistics/seind10/append/c2/at02-35.pdf>

¹⁷ See Carnevale, Smith, and Melton, *supra* note 4, at 23, 76, 77-78.

¹⁸ ANTHONY P. CARNEVALE, STEPHEN J. ROSE, AND BAN CHEAH, GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, EXECUTIVE SUMMARY: THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS (2011), available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/collegepayoff-summary.pdf>.

and engineering in U.S. graduate schools. Today, more than half (55%) of those who receive PhDs in engineering in U.S. universities are not U.S. citizens.¹⁹

- Statistically, after their K-12 educational experience, URM students in the aggregate are less well-prepared to succeed in STEM higher education than other students, signaling a persistent U.S. pipeline problem in STEM and STEM-dependent fields. (This is not the case for women, as the gender gap in high school science and mathematics has been largely eliminated.)²⁰
- Attrition of women and URMs from STEM fields increases after high school, exacerbating the pipeline problem for STEM and the general workforce. URMs and women are highly under-represented at all levels of U.S. STEM higher education (with the notable exception in biological sciences for women), as well as in the U.S. workforce in STEM and STEM-dependent fields.²¹
 - While URMs already comprise nearly 40% of the U.S. college-age population, African American, Hispanic, and American Indian and Alaskan Native students together earned only 17.3% of the total U.S. baccalaureate degrees (all fields) in 2005-06, and they earned only 16.7% of the U.S. baccalaureate degrees in all STEM fields combined (including natural sciences, engineering, and social sciences) in 2005-2006.²² Of 24 year olds, only 2.7% of African Americans, 2.2% of Hispanic and Latino Americans, and 3.3% of Native Americans and Alaskan Natives have earned a first degree in natural sciences or engineering.²³ African Americans, Hispanic and Latino Americans, and Native American and Alaskan Native students earned only 6% of the U.S. STEM PhD degrees (all STEM fields) in 2005-2006.²⁴
 - While earning 58% of all U.S. baccalaureate degrees overall in 2005, women earned about 50% of all U.S. science and engineering baccalaureate degrees since 2000, less than 20% of U.S. engineering degrees, and 20% of U.S. science and engineering PhDs in 2005-2006.²⁵
 - The sex ratio (male to female) of interest in STEM ranges from 9:1 in computer science, to 6:1 in engineering, to 1.5:1 in physical sciences. Women's interest outpaces men's only in the biological

¹⁹ Gathering Storm Category 5, *supra* note 3 at 4; TASK FORCE ON THE FUTURE OF AM. INNOVATION, MEASURING THE MOMENT: INNOVATION, NATIONAL SECURITY, AND ECONOMIC COMPETITIVENESS, available at <http://www.innovationtaskforce.org/docs/Benchmarks%20-%202006.pdf>; NAT'L CTR. FOR SCI. AND ENG'G STATISTICS, NAT'L SCI. FOUND., DOCTORATE RECIPIENTS FROM US UNIVERSITIES: 2009 (2010), available at http://www.nsf.gov/statistics/nsf11306/data_table.cfm#20.

²⁰ African American, Hispanic, and Native American and Alaskan Native students are less likely than Asian and non-Hispanic Caucasian students to take key advanced mathematics, chemistry, and physics courses in high school. CPST 2008, *supra* note 8, at Chapters 1-2.

²¹ See ROBERT BURGOYNE, RALPH C. DAWSON, ARTHUR L. COLEMAN, SCOTT R. PALMER, THEODORE M. SHAW, WITH JAMIE LEWIS KEITH, AM. ASS'N FOR THE ADVANCEMENT OF SCI. WITH AM. ASS'N OF UNIVS., HANDBOOK ON DIVERSITY AND THE LAW: NAVIGATING A COMPLEX LANDSCAPE TO FOSTER GREATER FACULTY AND STUDENT DIVERSITY IN HIGHER EDUCATION 16-17 and accompanying notes (ed. Jamie Lewis Keith 2010) [hereinafter Handbook], available at <http://php.aaas.org/programs/centers/capacity/publications/complexlandscape/PDFs/LawDiversityBook.pdf>.

²² Science and Engineering Degrees 1997-2006, *supra* note 8, at t.4.

²³ Crossroads, *supra* note 1, at 27-28; WMD 2011, *supra* note 7.

²⁴ CPST 2008, *supra* note 8, at Figure 3-1; see also Doctorate Recipients U.S. Universities 2006, *supra* note 8 (reporting on data collected in the Survey of Earned Doctorates, conducted for six federal agencies, NSF, NIH, USED, NEH, USDA, and NASA by NORC); SEI 2010, *supra* note 8.

²⁵ CPST 2008, *supra* note 8, at Figure 3-1; see also Doctorate Recipients U.S. Universities 2006, *supra* note 8; SEI 2010, *supra* note 8.

- sciences.²⁶ Once beginning a degree program, the gap in retention rates narrows to parity in many STEM fields, but not in all (e.g., the retention ratio is 4:1 male to female in engineering).²⁷
- Caucasians and Asians represent the vast majority of the U.S. STEM workforce, which is aging, and they have the most experience.²⁸ There is significant attrition from STEM fields for all groups, though attrition rates for women and URM students at all degree levels are significantly greater than for all workers.²⁹ Evidence points to STEM graduates having opportunities in many lucrative areas.³⁰
 - **Beyond the U.S. demographics-driven needs for a larger and more diverse STEM-educated labor pool, in a broadly diverse and global society all students (regardless of race or gender) must have meaningful educational experiences working and living with, and being supervised by, people different from themselves if they are to succeed after graduation.**
 - Science and technology should be understood as evolving (not static) analytical fields, requiring creative and collaborative undertakings (not merely rote memorization and application of formulas and data, for instance) in a world that is increasingly connected and multicultural.³¹ Thus, broadly diverse and inclusive learning environments are vital settings for enhancing relevant knowledge and skills, and U.S. higher education must provide such settings inside and outside the classroom and laboratory. Broadly diverse faculties and student bodies are thus critical to the success of the higher education/academic research endeavor in the U.S. and its partnership with government and industry, benefiting all in our nation and society in general.³²
 - **The inter-generational pipeline problem for American talent in STEM and STEM-dependent fields, as well as in higher education in general, is one of the greatest challenges facing colleges and universities, our nation, and all Americans in the 21st Century.**
 - Government, industry, and U.S. institutions of higher education must respond creatively and unequivocally to improve access to education, increase pathways into STEM and related careers, and broaden the diversity of our student bodies and faculties in the best interests of all citizens and

²⁶ JOHN PRYOR, SYLVIA HURTADO, VICTOR V. SAENZ, JOSE LUIS SANTOS, AND WILLIAM S. KORN, HIGHER EDUCATION RESEARCH INSTITUTE, UNIV. CAL.- LOS ANGELES, THE AMERICAN FRESHMAN – FORTY YEAR TRENDS: 1966-2006 (2008), available at <http://heri.ucla.edu/PDFs/pubs/briefs/40yrTrendsResearchBrief.pdf>.

²⁶ *Id.*

²⁷ Estimated from data in CPST 2008, *supra* note 8, at Chapters 2-4.

²⁸ SEI 2002, *supra* note 4, at 3-12, 3-15 to 3-24, 3-27, 5-29; WMD 2011, *supra* note 7, at 20-22, 52, Text Table 5-2. Only 9.1% of all higher education faculty are members of non-Asian minority groups so the percentage who are faculty in science and technology fields is even less. See NCES 2006, *supra* note 7, at t.229, available at http://www.nces.ed.gov/programs/digest/d06/tables/dt06_229.asp; see also Crossroads, *supra* note 1, at 28-29 and accompanying notes.

²⁹ See Carnevale, Rose, and Cheah, *supra* note 18, at 7.

³⁰ *Id.*; ANTHONY P. CARNEVALE, JEFF STROHL, AND MICHELLE MELTON, GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, SELECT FINDINGS FROM WHAT'S IT WORTH? THE ECONOMIC VALUE OF COLLEGE MAJORS (2011), available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/whatsitworth-select.pdf>.

³¹ Handbook Summary *supra* note 10, at 4-5 and n. 19; Handbook *supra* note 21, at 12-14 and accompanying notes; MIT Brief, *supra* note 4, at 12-14 and accompanying notes.

³² Handbook Summary *supra* note 10, at 4-5; MIT Brief, *supra* note 4, at 14-15, 17-20, and accompanying notes.

the nation.³³

- **The pipeline problem in STEM and STEM-dependent fields starts with education and ends in the workforce, yet certain parameters govern expansion of the pipeline depending on whether education or employment is involved.** While this creates unavoidable challenges, it is possible to increase access to and diversity in STEM fields by focusing on outreach, barrier-removal, and capacity-building programs that are both effective and legally sustainable.

³³ Handbook Summary, *supra* note 10, at 5. Further, NSF finds that black scholars were likelier than Hispanics, Asians, or whites to work at master's-granting universities and less likely to have earned their doctorates from U.S. universities with high research intensity. JOAN S. BURRELLI, NSF 11-320, ACADEMIC INSTITUTIONS OF MINORITY FACULTY WITH SCIENCE, ENGINEERING, AND HEALTH DOCTORATES (2011), available at http://www.nsf.gov/statistics/infbrief/nsf11320/?WT.mc_id=USNSF_178.

III. Overview of Federal Law^{xxiv}

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

A number of general "rules of the road" relevant to both faculty and student issues are important to keep in mind.

1. The federal legal regimes that govern access and diversity efforts in educational programs and employment are different. The employment context, which is grounded in a remedial or equal opportunity justification, is much more complex, with less recent Supreme Court guidance.^{xxvi}
2. In California, Washington, Michigan, Nebraska, Arizona, and Florida, state law or an executive order prohibits in most instances even the limited consideration of race or gender that federal law *permits*—providing exceptions only when *required* by federal law. Further guidance is provided in the Project's publication, *Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, And Sex Among Public Education Institutions*.^{xxvii}
3. In situations where the consideration of race, ethnicity, or gender has an inclusive (not exclusive) effect—and under limited exceptions to the general prohibitions with appropriate justification (e.g., to appropriately promote equal employment access and opportunity or to obtain the educational benefits of diversity) and an evidentiary foundation of need—race, ethnicity, and gender may be voluntarily considered in limited ways in admitting or conferring educational benefits on students or in hiring or conferring benefits of employment on faculty.^{xxviii}

4. Effectiveness of an approach and its legal sustainability are closely related.

A. Student Diversity and the "Diversity Rationale" For Race-, Ethnicity- and Gender-Conscious Action^{xxix}

Taking race-, ethnicity-, or gender-conscious action to achieve diversity in the student body of an institution of higher education may be justified under the "diversity rationale," or, alternatively, when necessary to remedy the institution's own discrimination. However, race-, ethnicity-, and gender-conscious diversity efforts are not legally justifiable to remedy discrimination by society-at-large or simply for the purpose of achieving in the student body the same representation of minorities and women as exists in the overall population of a state or the nation (i.e., "racial balancing").

The diversity rationale for institutions of higher education is associated with core educational benefits for *all* students (such as those related to improved teaching and learning, research, access to and preparation for the workforce and citizenship, and economic and national security interests) recognized by the courts as compelling. Consequently, those interests have the potential to satisfy strict judicial scrutiny and survive a legal challenge to race- and ethnicity-conscious action. (Under existing case law, if gender is considered, the standard should be an important interest or objective in the educational benefits of diversity, with an exceedingly persuasive – not hypothetical, stereotyping or speculative – justification.)

In order to survive strict scrutiny of race- or ethnicity-conscious action or heightened scrutiny for gender-conscious action, the manner in which race or ethnicity is used must be "narrowly tailored" or, in the case of gender "substantially related," to achieving the compelling or, in the case of gender important, educational benefits of broad diversity—i.e., the reliance on race, ethnicity, or gender must not be overbroad. In addition to being time-limited to the period of need, in order to avoid being overbroad, use of race, ethnicity, and gender should occur: where there is no workable alternative that relies less on race and gender (and this determination is periodically reviewed); and where these criteria (in most settings) are applied in a flexible manner (not uniformly to all applicants of a particular race, ethnicity, or gender), as part of an individualized, holistic review of each applicant under the same criteria and process, thus allowing all to compete on equal footing and not over-burdening non-minorities and men. This is a difficult, but not impossible, legal standard to satisfy, and requires careful design and implementation of race-, ethnicity-, or gender-conscious diversity-enhancing approaches.

The "broad diversity" recognized by the courts as conferring compelling educational benefits is not limited to racial, ethnic, and gender diversity. Rather, such broad diversity means all aspects of individuals that contribute to a robust academic environment including experience, perspectives, disciplines, geographic background, talent, family socio-economic background, disability, ethnicity, race, gender, and other characteristics, depending on the institution's own academic, research, access, and service mission. However, when some aspects of broad diversity have been easily achieved, and others—including racial, ethnic, and, in some

disciplines, gender diversity—are more elusive, narrowly tailored race-, ethnicity-, and gender-focused efforts may be justified to fill in the gaps and achieve the broad diversity required to further the institution’s academic, research, access, and service mission.

Meanwhile, in some jurisdictions, state laws, constitutions, or executive orders prohibit consideration of an applicant’s race, ethnicity, or gender when public institutions make admissions decisions (and possibly when they confer other educational benefits), unless such consideration is required by federal law. In these jurisdictions, even when the U.S. Supreme Court and federal law would *allow* limited consideration of race, ethnicity, and gender, state law may not because the U.S. Supreme Court and federal law do not *require* such consideration. In these jurisdictions, racial-, ethnic-, and gender-neutral approaches that legitimately serve other institutional needs (e.g., seeking individuals who practice inclusive, multi-cultural conduct or including those from low socio-economic backgrounds)—but have an ancillary positive effect on racial, ethnic and gender diversity—are critical.^{xxx}

B. Faculty Diversity and the "Remedial" Justification for Race, Ethnicity-, and Gender-Conscious Action in Employment^{xxxii}

In ways distinguishable from student diversity efforts, the legal justification for taking race-, ethnicity-, and gender-conscious action to achieve broad faculty diversity has a "remedial" basis. Federal law generally prohibits racial and gender discrimination (including considering race or gender in decision-making and conferring benefits) in employment and employment benefits. To qualify for an exception from this general prohibition, it is necessary under existing U.S. Supreme Court decisions to establish a remedial justification that furthers Title VII’s equal opportunity in employment purposes. The boundaries of what is "remedial" and what furthers Title VII’s equal opportunity purposes are determinative, and yet the U.S. Supreme Court has not comprehensively and definitively drawn these boundaries.^{xxxii}

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

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

(b) a *manifest imbalance* in the representation of minorities or women at the institution in that discipline as compared to their representation in the available and qualified labor pool, which is a court-recognized but not precisely defined, somewhat lesser but still substantial disparity; or

(c) an *underutilization* of minorities or women at the institution in that discipline, which is measured under a number of regulatory tests, including the most popular and reasonably

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

In fields such as science, technology, engineering, and mathematics, where there is a "pipeline problem" because there are very few minorities or women in the available and already qualified labor pool, there may be a "trainable cohort" of graduate students, fellows, or junior faculty who could be prepared to compete successfully for tenure-track positions and tenure. Limited, targeted, appropriately designed and implemented capacity-building programs for this cohort (e.g., certain time-limited assistantships, fellowships, visiting appointments) may be justified with appropriate evidence of need, but require jurisdiction and institution-specific analysis, justification, and legal advice.^{xxxiii}

Except for OFCCP's required affirmative action goals and where actual discrimination must be remedied, federal law and the U.S. Constitution *permit* remedially based affirmative action in employment, but *do not require* affirmative action in employment. (In jurisdictions with state laws that prohibit consideration of race or gender in hiring, unless *required* by federal law, it is OFCCP's required affirmative action—which does not apply to the hiring decision itself—that justifies race- and gender-targeted faculty diversity efforts in those disciplines where there is a legally recognized underutilization at the institution.) A stepwise approach is good practice in all jurisdictions and is particularly important in states that prohibit race-, ethnicity-, and sex-based preferences as well as discrimination in public institutions of higher education. Race-, ethnicity-, and gender-neutral approaches; neutral barrier removal; outreach; and targeted barrier removal provide a good progression and bundle of approaches to remedy underutilization. In California and any other state that has a similar law and is influenced by California's judicial interpretations, documentation that neutral strategies are being used and are inadequate is part of the justification for special outreach, such as invitations or personal contact to encourage applications, if used only with certain races or gender. Institution- and jurisdiction-specific legal advice is needed.

While the logically strong argument exists that faculty are as critical as students to the achievement of educational benefits at colleges and universities, the U.S. Supreme Court has not yet addressed the question of whether the "diversity rationale" can justify consideration of race and gender in faculty employment actions. Also, the interplay of Title VII and Equal Protection/Title VI/Title IX principles has not been fully decided. Strong logical arguments building on—but not addressed by—U.S. Supreme Court decisions exist for the proposition that the purposes of Title VII are served in a higher education context by extending the diversity rationale to employment of faculty.^{xxxiv} While colleges and universities are well-advised to articulate their compelling, mission-driven educational interest in having a broadly diverse faculty as one basis for faculty diversity efforts, it is prudent to also have a corresponding and

aligned remedial basis for race-, ethnicity-, or gender-conscious actions regarding faculty employment and related benefits. (Thus, prudence would call for the justification to include a showing of discrimination, manifest imbalance, or underutilization, as described above, that is being remedied.)

The Equal Employment Opportunity Commission Regulations on Affirmative Action and Diversity at a Glance

The EEOC regulation at 29 C.F. R. 1608.3(c) (limited labor pools) addresses circumstances under which *voluntary* affirmative action in capacity-building/training programs is appropriate. This regulation may be useful in addressing pipeline problems in higher education, particularly in STEM fields, as follows^{xxxv}:

EEOC regulations already permit certain voluntary affirmative action when underutilization is evidenced by an artificially created pipeline problem. Specifically, regulations permit "voluntary affirmative action [through] training . . . programs . . . providing [trainable] minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled . . . professions" when the "available pool . . . of minorities and women for employment and promotional opportunities is artificially limited" due to a history of "restrictions by employers . . . and others."

Capacity-building programs in disciplines where minorities and women are not well represented but there is a larger number who have the capability, with further training and experience, to compete for faculty positions and tenure may be considered "appropriate affirmative action" programs that, properly designed, may be implemented in response to the artificially limited availability of minorities and women. Under older Supreme Court case law,^{xxxvi} it may be possible to determine underutilization of women and minorities in a discipline at the institution by considering the history of their exclusion from the relevant position category and by comparing their representation in that discipline at the institution with their representation in each of the pools of (i) already qualified, available individuals in the discipline's labor market where they could be recruited and (ii) those employed or in fellowships or graduate courses at the institution who are capable of being trained for a tenure track position or tenure in the discipline. Limited availability in many STEM disciplines is at least in part a result of historic stereotyping and restrictions by educational institutions at all levels and by employers that limited participation of minorities and women in STEM fields. These capacity-building programs may include time-limited and appropriately designed graduate student, post-doctoral fellow, and junior faculty research support, experiences, and internships; fellowships; post-doctoral appointments; graduate research assistantships; and special junior or visiting faculty appointments. These may also include community-building programs and mentoring programs, some of which (as described below) may be inclusive in effect and not raise Title VII concerns and others of which may be time limited and appropriately designed under Title VII.

When institutions follow EEOC guidance, the existing provisions of Title VII provide a defense to liability in employment discrimination lawsuits.^{xxxvii} Further clarity on this existing regulation for the higher education context would be helpful, but the regulation, by its terms, should cover appropriately designed and justified capacity-building at colleges and universities.

Also, an existing April 2006 EEOC compliance manual,^{xxxviii} while not definitive in the appropriate boundaries, "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" and recognizes in employment at institutions of higher education an intersection of Title VII with Title VI, Title IX, and the Equal Protection Clause. There is a strong logical position grounded in, but not yet decided under, existing case law principles, that colleges and universities may decide, in their Supreme Court-recognized academic discretion, that a diverse faculty is necessary to deliver excellent education for all students and produce excellent research for the nation in a global society.^{xxxix} Students must have experience working productively with and being supervised by people different from themselves, and faculty research must support industry's imperative to identify and serve the needs of—and market their products and services to—a multi-cultural, diverse society.

There are strong logical arguments, also not yet decided, that such diversity interests further Title VII's purposes and justify capacity-building programs to increase access for minorities and women to compete on equal footing for positions on faculties—and, possibly, justify limited consideration of race and gender in hiring when outreach is inadequate to address underutilization (such as when there is an artificially limited labor pool).^{xl} The "diversity rationale" (which, on the basis of compelling educational interests and outcomes, justifies considering race and gender as one of many factors holistically and flexibly in college admissions) may therefore apply as compellingly to faculty employment. Faculty are undeniably an integral and essential part of the educational and research endeavor, leading and shaping pedagogical perspectives and the educational dialog and process, while actively interacting with and supervising students.

OFCCP Regulations for Federal Contractors at a Glance

Each federal contractor is required to establish flexible goals (not quotas) and plans, and to use good faith efforts, to increase opportunities for minorities and women when they are underutilized in the contractor's workforce in a particular discipline, relative to their availability in the relevant labor pool.^{xli}

A strong logical argument exists under OFCCP's existing regulations and procedures,^{xlii} that under-utilization of minorities and women at institutions of higher education includes an "artificially limited" pool of minorities and women within the meaning of this phrase under EEOC's regulations. This interpretation is consistent with the spirit of the existing OFCCP guidance, which recognizes as "underutilization" when there is "any numerical difference between incumbency and availability" or "a numerical difference of one person or more," among other measures.^{xliii} Federal contractors are *required* to have affirmative action plans and

to take good faith actions aimed at remedying underutilization of minorities and women in employment. Capacity-building programs for minorities and women, such as those recognized by EEOC regulations, should be viewed as appropriate affirmative action to fulfill federal contractor obligations in response to artificially limited pools (i.e., pipeline problems such as those that exist in most STEM fields). OFCCP requirements apply to all federal contractors, including institutions located in those states with laws or executive orders that prohibit the consideration of race or gender in employment unless *required* by federal law.

IV. New Federal Cases

In 2011 (following the publication of the first edition of this guide), two federal circuits rendered consequential decisions that may have lasting impact on questions of access and diversity in STEM fields.

U.S. Court of Appeals for the 5th Circuit

***Fisher v. Texas* (5th Cir. 2011)^{xliv}**

On January 18, 2011, a three-judge panel of the Fifth Circuit Court of Appeals ruled unanimously in *Fisher v. University of Texas* that the University's challenged admissions policy, which included consideration of race as part of a holistic assessment of applicants, was lawful. Applying the U.S. Supreme Court's 2003 decision in *Grutter v. Bollinger*, which upheld the University of Michigan law school's race-conscious admission policy to achieve compelling educational outcomes, the Fifth Circuit panel upheld the challenged undergraduate admissions policy, finding that it "map[ped] on *Grutter*" in its evaluation of each application "using a holistic, multi-factor approach, in which race [was] but one of many considerations."

Overview of the Case in the 5th Circuit

On September 15, 2011, the unsuccessful plaintiffs filed a petition for certiorari with the U.S. Supreme Court. The Court decided, in February 2012, to take the case. Arguments before the Court will be heard November 2012.

The central issue in the case before the 5th Circuit had less to do with the challenged policy's adherence to a Michigan-like model, and more to do with whether UT *needed* a race-conscious admissions policy in the first place as needed to satisfy strict scrutiny's narrow tailoring requirement. The question of necessity was central to the case because the University of Texas's consideration of race was part of a policy adopted years after passage of the State's "Top Ten Percent Law," under which the top 10% of each high school class was guaranteed admission to UT. That facially race-neutral law had been enacted to "increase minority enrollment" as a large, if not primary, purpose.

Relevant Facts

Two Texas residents, both white women, who were denied undergraduate admission to the University of Texas at Austin (UT), filed suit alleging that UT's admissions policy discriminated against them on the basis of race. The challenged race-conscious portion of the larger UT admissions policy, which considers race as one of many factors for admission, was implemented in 2004, largely in response to *Grutter*.^{xlv}

To analyze the challenged portion of the admissions policy, the circuit court examined the larger admissions policy at UT, which reflected the following parameters and elements:

- UT allots 90% of all freshman seats to Texas residents.
- Texas's Top Ten Percent Law (Law) mandates that Texas high school seniors in the top 10% of their classes be automatically admitted to any Texas state university. (In 2008, 81% of the entering UT class was admitted under the Law, accounting for 88% of the seats allotted to Texas residents.)
- Remaining Texas residents compete for admission based on Academic and Personal Achievement Indices. The Academic Index (AI) formula uses standardized test scores and class rank; some applicants score high enough on AI to receive admission on that basis alone. The Personal Achievement Index is based on three scores – two essays and a personal achievement score.
- The personal achievement score is designed to recognize qualified applicants whose merit was not fully reflected by the AI. As part of the personal achievement score, UT admissions staff members consider the applicant's leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service. Additionally, the personal achievement score considers "special circumstances," including the socioeconomic status of the applicant or his high school, the applicant's family status and responsibilities, the applicant's standardized test scores compared to her high school's average, and – beginning in 2004 – the applicant's race.^{xlvi} No element of the personal achievement score is considered separately or given a separate numerical value. Additionally, UT does not monitor the aggregate racial composition of the admitted applicant pool during the admissions process.

Reviewing UT admissions, the Fifth Circuit determined that UT evaluates each applicant "using a holistic, multi-factor approach, in which race is but one of many considerations."

The Circuit Court's Holding

The federal circuit upheld the UT challenged policy in Fisher based on the "compelling" educational ends and the admissions policy design that the court viewed as appropriate ("narrowly tailored") to achieve those goals. Specifically, the court concluded:

- The University sought to achieve educational benefits that were "essential to its mission"—including those associated with promoting cross-racial understanding, preparing students to function in a multi-cultural workforce, and cultivating leadership. Those goals were distinguished from the pursuit of racial balancing or efforts to ensure that the University's population "directly mirror[ed] the demographics of Texas"—either of which would have been viewed as unconstitutional (and quota-like) had they served as the basis for the University's policy.

- The University appropriately "devoted special attention to those minorities that were most significantly underrepresented on its campus" inasmuch as a "critical mass" of those students (in order to achieve the educational benefits of diversity) had not been achieved.
- The University of Texas' decision to "reintroduce race-conscious admissions" was the product of "serious, good faith consideration" as required by *Grutter*.
- The University appropriately tailored its admissions policy "to consider all pertinent elements of diversity in light of the particular qualifications of each applicant" and "gave appropriate attention to those educational benefits identified in *Grutter* without overstepping any constitutional bounds." While the Top Ten Percent Law diminished to some extent the University's claims that it had not yet achieved critical mass, the University could show that it had not achieved critical mass for individual groups, demonstrating that it had given "appropriate consideration to whether aggregate minority enrollment transl[ed] into adequate diversity in the classroom."
- The University evaluated critical mass of minorities in particular disciplines which align with the educational benefits conferred.

The Circuit Court's Analysis

In evaluating the race-conscious policy, the Fifth Circuit traced the strict scrutiny analysis employed by the Supreme Court in *Grutter*. Applying the *Grutter* opinion, the circuit court identified the following three compelling educational objectives served by student diversity:

- 1) *Increased perspectives* that improve the quality of the educational process of teaching and learning by ensuring experiences, outlooks, and ideas that enrich the classroom,
- 2) *Professionalism* by better preparing students for work and citizenship in an increasingly diverse workforce that values both exposure to widely diverse people and cross-racial understanding, and
- 3) *Civic engagement* to cultivate a set of legitimate leaders of all races and maintain a visibly open path to leadership for individuals of all races through access to higher education.

Likewise, UT's *2004 Proposal to Consider Race and Ethnicity in Admissions*, which incorporated the findings of two studies that led to the institution's adoption of the challenged portion of the admissions policy, concluded that diverse student enrollment results in a robust exchange of ideas, breaks down stereotypes, promotes cross-racial understanding, and prepares students for an increasingly diverse workforce and society – and the circuit court observed that these reasons "mirror those approved by the Supreme Court in *Grutter*."

The court next analyzed whether UT's policy was narrowly tailored to achieve these compelling goals. It determined that UT was not engaged in racial balancing, a patently unconstitutional exercise; rather, "UT's system was modeled after the *Grutter* program" because UT employed a flexible, holistic approach to consider pertinent elements of diversity – with attention to its particular institutional mission and the community it served.

Evaluating the interplay between the race-conscious policy and Texas's Top Ten Percent Law, the court agreed with the plaintiff-appellants that the Law's "substantial effect on aggregate minority enrollment at the University . . . places at risk UT's race-conscious admissions policies" because the Law might serve as an effective-race-neutral alternative to the race-conscious policy at issue. Ultimately, however, the court concluded that the Law was not a sufficient race-neutral alternative to disqualify the race-conscious policy at this time. The court first noted that it was difficult to quantify the increases in minority enrollment attributable to the Law. Further, the circuit court observed that the Court in *Grutter* held that percentage plans were not a workable race-neutral alternative because "they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."^{xlvii} Inherently, the Court appeared to recognize UT's educational judgment concerning the need for diversity in particular disciplines, not only across the institution.

Additionally, in its evaluation of critical mass, the circuit court distinguished the aggregate number of underrepresented minorities (which "may be large," as impacted by the Law) with the enrollment statistics for individual minority groups when UT decided to implement the race-conscious portion of the admissions policy. The court found that UT acted with "appropriate sensitivity to these distinctions."^{xlviii}

The Fifth Circuit panel thus found that UT's race-conscious admissions policy satisfied strict scrutiny. Specifically, it held that the admissions policy served compelling interests and that UT's procedures were narrowly tailored to achieve those interests. However, the court was reserved in its holding, noting at the outset of the opinion that the Top Ten Percent Law "casts a shadow on the horizon" for the race-conscious policy and in its conclusion, cautioning that "we cannot bless the university's race-conscious admissions program in perpetuity."^{xlix} The Court thereby underscores the need for periodic review of necessity and corresponding adjustments when the need no longer exists.

A Noteworthy "Special Concurrence"

In a lengthy special concurrence, Judge Garza agreed with the opinion insofar as it complied with *Grutter* but opined that *Grutter* had been incorrectly decided—and called on the U.S. Supreme Court to overrule it. Regarding the compelling interest component of strict scrutiny, Judge Garza contended that *Grutter's* identification of educational benefits of diversity rested on hypothesis, speculation, and intuition, which cannot satisfy strict scrutiny analysis. He therefore concluded that the Supreme Court's "failing" was that "it approved the use of race in university admissions as a compelling state interest at all."^l Having questioned institution-wide

diversity as a compelling educational interest, Judge Garza rejected any notion that discipline- or classroom-specific diversity could be a compelling educational need.

Next, on the narrow tailoring component, Judge Garza found that *Grutter* set a "peculiarly low bar" for universities to show serious good-faith consideration of race-neutral alternatives and made impossible a court's review of the narrow tailoring requirement by "reward[ing] admissions programs that remain opaque." On this point, he framed the relevant constitutional inquiry as one about whether a challenged race-conscious policy "meaningfully furthers its intended goal of increasing racial diversity." Here, Judge Garza observed that UT's enrollment numbers belied the contention that the race-conscious policy was effective in accomplishing its claimed compelling interest as UT appeared capable of enrolling 96% of African-American and Hispanic students through race-neutral means.ⁱⁱ Judge Garza also commented that higher education does not have a monopoly on furthering the societal goals of fostering participation in America's citizenry and faith in our leaders.ⁱⁱⁱ

Nonetheless, because UT had complied with *Grutter's* "amorphous, untestable, and above all, hopelessly deferential standard," Judge Garza joined the majority and upheld the UT policy. As an undisguised appeal to the Supreme Court, Judge Garza contended, "The Supreme Court has chosen this erroneous path and only the Court can rectify the effort."

A Divided En Banc Court of Appeals Affirms the Panel Decision

In June 2011, in a 9-7 decision, the Fifth Circuit denied an en banc rehearing. In one dissenting opinion, five judges argued that the original panel 1) provided total deference to the University and thus watered down the narrow tailoring component of strict scrutiny review, 2) authorized a race-conscious policy when a race-neutral policy (Texas's Ten Percent Law) already fostered increased diversity (further noting that the race-conscious policy resulted in no more than 200 out of more than 6000 new students), and 3) approved of an unachievable goal of racial diversity *at the classroom level*.

***Coalition to Defend Affirmative Action et al. v. Regents of the University of Michigan et al.* (6th Cir. 2011)ⁱⁱⁱⁱ**

On July 1, 2011, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit in *Coalition to Defend Affirmative Action et al. v. Regents of the University of Michigan et al* held 2-1 that Michigan's voter-initiated ban on the consideration of race and gender in public university admissions and government hiring violated the Equal Protection Clause because it "unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities." On September 9, 2011, a rehearing in the case by the full en banc Sixth Circuit was granted. That full court vacated the decision reflected below.

Under the political restructuring theory of the Fourteenth Amendment, the Sixth Circuit panel considered whether Proposal 2 impermissibly restructured Michigan's political process along racial lines. The court examined two cases – *Hunter v. Erickson*^{liv} and *Washington v. Seattle*

School District No. 1^{lv} – in which the Supreme Court overturned referendums that dealt with racial issues. In *Hunter*, the Court rejected an amendment to the city charter that required an additional step of a voter referendum to change local housing laws regarding race and religion discrimination, where other changes required only a city council vote. In *Seattle*, the Court overturned a referendum in Washington State that effectively abolished voluntary busing plans designed to promote racial integration, as adopted by school districts.

Applying these cases, the two-judge majority explained that the Equal Protection Clause not only guarantees equal protection under the law but "is also an assurance that the majority may not manipulate the channels of change in a manner that places unique burdens on issues of importance to racial minorities." Examining Proposal 2, the majority noted that no other admissions criteria (e.g., "grades, athletic ability, or family alumni connections") were affected by Proposal 2's prohibition. The majority further observed that Proposal 2, by entrenching the prohibition in the Michigan constitution, prevented the public or institutions of higher education from revisiting the issue, short of a constitutional repeal, the type of procedural requirement that constituted "a considerably higher hurdle," as compared to the available avenue of petitioning university admissions bodies for all other admissions changes. The majority thus concluded that "Proposal 2 targets a program that 'inures primarily to the benefit of the minority' and reorders the political process in Michigan in such a way as to place 'special burdens' on racial minorities."

The majority rejected the Michigan Attorney General's argument that Proposal 2 did not have a "racial focus" because it also addressed gender preferences, finding that the political restructuring theory requires only that the law targets policies that minorities *may* consider in their interest. The majority further noted that its decision was "not impacted by the fact that increased representation of racial minorities in higher education also benefits students of other groups and our nation as a whole," expressly accepting the compelling interest asserted by advocates of race-conscious admissions policies.

The majority also rejected the Attorney General's distinction between enactments that burden racial minorities' ability to obtain protection from discrimination through the political process ("discrimination") and policies that burden racial minorities' ability to obtain preferential treatment ("preference"). The Attorney General largely relied on the Ninth Circuit's analysis of California's comparable Proposition 209 in *Coalition for Economic Equity v. Wilson*,^{lvi} which distinguished "preferential treatment" (even within the limited and well-justified exceptions to the general prohibition against discrimination on racial or gender bases under federal law and the Equal Protection Clause) from "equal treatment" (to which all individuals are entitled under the Equal Protection Clause). The Michigan district court decision, which the Sixth Circuit was reviewing, as well as an earlier Sixth Circuit decision – *Coalition to Defend Affirmative Action v. Granholm*^{lvii} – cited *Wilson* to find that although Proposal 2 had a racial focus and burdened minorities, the Equal Protection Clause was not violated because it created a burden on racial minorities to obtaining legally permissible preferential treatment; the district court (and Ninth Circuit) had found that *Hunter* and *Seattle* should be interpreted to apply only to burdens affecting "equal treatment," and not to those acting in pursuit of "preferential treatment."

The Sixth Circuit majority rejected this interpretation, notably couching the relevant terminology as "discrimination" and "preference" (rather than "equal treatment" and "preferential treatment"). Specifically, the majority found that the Attorney General's position would make superfluous the governing political process theory, which was created to address state action that is constitutionally permissible (rather than constitutionally mandated under the traditional equal protection analysis). The majority observed that *Seattle* most clearly involved constitutionally-permissible state action—namely a voluntary, ameliorative effort to reduce the impact of *de facto* segregated housing patterns. The majority concluded, "[W]hat matters is if racial minorities are forced to surmount procedural hurdles in reaching [a process-based right] over which other groups do not have to leap."

Judge Gibbons dissented. She noted the limiting language in *Grutter* that cautioned that race-conscious measures are "a highly suspect tool" and that such measures be limited in time. Noting that the Supreme Court acknowledged state-law prohibitions on the use of racial preferences in admissions in California, Florida, and Washington, Judge Gibbons contended that the Equal Protection Clause was not violated where race-related policies, not required by the U.S. Constitution, are repealed.

Judge Gibbons further distinguished the Supreme Court opinions in *Hunter* and *Seattle* in which lawmaking authority was reallocated from a politically accountable legislative body to a more complex government structure: "these program-specific faculty admissions committees are far afield from the legislative bodies from which lawmaking authority was removed in *Hunter* and *Seattle*. The most crucial and overarching difference, of course, is that the faculty admissions committees and individual faculty members are not politically accountable to the people of Michigan." (The majority opinion characterized the dissent as arguing that "political process" requires an electoral component and disagreed with this position, noting "the abundance of language to the contrary in those [Supreme Court] cases." Further, even if the political restructuring theory requires an electoral connection, the majority opinion identified the connection between the admissions processes at the Michigan universities and Michigan's electorate political process.)

The majority did not reach the "traditional" argument under the Fourteenth Amendment that Proposal 2 violates the Equal Protection Clause by impermissibly classifying persons on the basis of race, but Judge Gibbons's opinion found that Proposal 2 was constitutional under this analysis.

In late July, Michigan's attorney general filed a petition to request a rehearing en banc before the full, 15-member Sixth Circuit. On September 9, 2011, that petition was granted, and the opinion of the panel was overturned.

V. Key Program Examples

Developed in light of the legal principles discussed above, this section provides an overview of key program examples that may be considered by institutions of higher education that are pursuing STEM-focused access and diversity goals. (These examples are relevant to other fields as well). Examples reflect a range of race-, ethnicity-, and gender-neutral and -conscious methods that may help achieve institutional access and diversity goals in an effective and legally sustainable manner. These examples provide a starting point but do not constitute or substitute for jurisdiction and institution-specific legal advice as part of the design of particular diversity and access programs. The fact that a strategy is not listed here is not an indication as to its effectiveness or legal sustainability.

The examples and models are arranged and described as [A] race/gender-neutral programs; [B] outreach or barrier removal programs; or [C] race/gender-conscious programs. The different meaning of each of these categories is important to understand in light of relevant legal principles.

- A. **Neutral programs** are programs that do not use race, gender, or other legally "suspect" criteria and for which there are authentic, institution mission-driven purposes. Examples are programs for inclusion of those from low socio-economic backgrounds or programs seeking faculty and students with records of broadly inclusive workplace conduct. As long as there is any legitimate purpose for such a program (which is not race-, ethnicity-, or sex-based), it, as a general rule, is more likely to survive a legal challenge because the legal inquiry relevant to such a program (is there a rational relationship to the legitimate objective of the program?) is an easy standard to satisfy.

To be legally recognized as neutral, there must be a legitimate mission-driven objective apart from race or gender, not an intent (even if not explicit) to prefer a particular race or gender. If a neutral program has a disparate impact on individuals of a particular race, ethnicity, or gender, the neutral criterion should be (a) job-related and serve a business necessity in connection with faculty employment decisions (and there should be no known alternative that has less racial or gender impact and serves the need equally well); or (b) serve an educational necessity in connection with student and faculty education decisions. Neutral criteria authentically tied to the institution's mission should be viewed as serving a business or educational necessity.

- B. **Inclusive outreach and barrier removal programs** reflect race- and gender-targeted outreach and barrier removal (community building and information providing) efforts that supplement general outreach and community-building to include those who may not be as well captured by general outreach efforts and to integrate and inform those who are otherwise isolated in the institution's community. To be viewed as inclusive, it is helpful to have evidence that general outreach is not effective (or is significantly less effective) for the targeted groups and that the targeted groups are isolated and less knowledgeable than others in the community. With evidence of the inclusive effect,

including the general and substantial outreach to and opportunities for all, the applicable legal inquiry should be whether there is a rational relationship to the legitimate objective of the program and is an easy standard to satisfy

- C. ***Race-conscious programs*** are programs that consider race in selection of participants or to confer a not insignificant benefit. These programs are legally "suspect" and subject to strict judicial scrutiny. Satisfying this judicial standard and sustaining these programs is difficult. However, if there is adequate evidence that the consideration of race is necessary and the manner of considering race is narrowly tailored to achieve a legally recognized compelling purpose (i.e., there is no workable alternative that uses race less or not at all), it is possible to satisfy the standard.^{lviii}

- D. ***Gender-conscious programs*** are programs that consider gender in selection of participants or to confer a not insignificant benefit. These programs are subject to heightened judicial scrutiny and require a showing that gender is considered only as needed and in a manner that is substantially related to achieving an important objective. Heightened scrutiny requires there to be "an exceedingly persuasive justification" for gender-based action and rejects sexual stereotyping about "talents, capacities, or preferences of males or females." While the heightened scrutiny that applies to gender is, in theory, easier to satisfy than the strict scrutiny that applies to race and ethnicity, it is still a high standard, and the differences between heightened and strict scrutiny have not, in practice, been delineated recently by the Supreme Court.^{lix}

Some program examples are reasonably easy to sustain legally. Subject to jurisdiction-specific analysis, many neutral outreach and barrier removal programs that have an authentic, institutional mission-driven purpose apart from race, ethnicity, or gender diversity should be suitable even in jurisdictions that are subject to executive orders or voter referendum-initiated laws prohibiting any consideration of race and gender in hiring, admissions, and contracting. (Neutral programs, while aimed at important objectives other than racial and gender diversity may, as an ancillary benefit, also enhance racial and gender diversity. However, it is important to show the neutral criterion is job-related and satisfies a business or educational need, and that there is no known alternative that will equally satisfy the need without having as much impact on those who are in the majority or men. It is also helpful to show the neutral criterion serves a compelling educational purpose.)

Other programs that take race, ethnicity, or gender into consideration (or that, in duly limited situations, are race- or gender-exclusive) may be legally sustainable in jurisdictions where such consideration is permissible. In those cases, the factual foundations that justify the limited use of those factors, as well as the design, implementation, and actual effectiveness of the programs are critical to their legal sustainability. The institution may need to assess the proposed program and the effectiveness of other alternatives.

1. Inclusive Conduct/Multi-cultural Skills as Criterion in Hiring, Program Participation, and Support [Neutral]^{lx}

Academic and research excellence, accomplishments, and promise, as well as traditional service contributions, are maintained as important criteria for faculty employment decisions and benefits. In holistically assessing all qualifications of each applicant or employee (regardless of race, ethnicity, or gender), however, whether an individual has a record of including racial minorities, women, other underserved individuals, and individuals with different perspectives, experiences, and backgrounds, in educational, research, mentoring, and/or other workplace activities or of breaking down barriers for self or others is favorably factored. This "inclusive workplace conduct" criterion may be included and considered in faculty position and program descriptions; hiring, tenure, and promotion criteria; criteria to evaluate institutional and professional service contributions; selection criteria for fellowships, assistantships, research, and other funding or gifts; participation in mentoring, bridging, research, and other programs; and related advertisements. Inclusive conduct in the workplace provides experiences and opportunities for all students and faculty to develop multi-cultural skills needed to succeed in a diverse, global society. (This includes working with and being supervised by or supervising those different from oneself.) Inclusive conduct provides opportunities to utilize individuals' differences to foster effective, multicultural, and multi-perspective collaborations; issue identification; creativity; and problem-solving in classroom, research, laboratory, and mentoring activities. Inclusive conduct also provides opportunities to break down stereotypes that assume all individuals of a particular race, ethnicity, gender, or socio-economic group, or who have a disability, share the same views, personal qualities, and experiences. (Student admissions, employment, research programs, and other benefits may also include this criterion among preferred criteria.) This criterion is not a proxy for any one political viewpoint, and focuses on and evaluates workplace conduct, not viewpoint. This is a race and gender-neutral quality that individuals of any race or gender may possess—or lack. Notably, there isn't another known neutral, equally effective, option to considering whether each individual—of any race or gender—has such a record of inclusion. (In fact other options would be more, not less, impactful on non-minorities and men.)

An institution may have an authentic, mission-critical interest in building a faculty and student body who, among other core strengths, exhibit inclusive workplace conduct and possess multicultural skills. For example, an institution may determine that individuals with such conduct are needed to expand opportunities for excellence in research and teaching in a broadly diverse society. Such individuals create a more robust intellectual environment; provide multicultural and multi-perspective experiences for all students and faculty that they need to succeed in a global, broadly diverse society; and create a more broadly welcoming academic community for research and learning. An ancillary, albeit welcome, benefit may be to increase racial and gender aspects of broad diversity (i.e., as long as racial minorities and women have different life experiences, they may have to overcome barriers, acquire multi-cultural skills, and exhibit inclusive conduct to succeed). However, not all women and minorities exhibit such conduct and possess such skills, and it should not be assumed they do. There are men and non-minorities who possess these skills and others who don't. It depends

on the individual. Neutral criteria authentically tied to the institution's mission should be viewed as serving a business or educational necessity. With an authentic, mission-critical basis for seeking individuals—of any race or gender—with records of such inclusive conduct and multi-cultural abilities, the institution can serve a business necessity in connection with faculty employment decisions or an educational necessity in connection with student and faculty education decisions.

Subject to individual institutional and specific jurisdiction analysis, advice of counsel, and careful design, this should be a suitable, neutral criterion even for referendum and executive order states. Search committee training is helpful for implementation. See Appendix B (Faculty Recruitment Tool Kit), parts I.A and B, for sample statement of objectives and position qualifications and criteria, which incorporate the workplace conduct of inclusion criterion. These materials' treatment of this criterion is also useful in student recruitment.

2. Low Socio-economic Background or Other Disadvantage as Criterion [Neutral]^{lxi}

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

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

Low socio-economic status and other disadvantage criteria will often have the ancillary benefit of creating more racial diversity. This is the case for the expanded definition of low socio-economic status due to the history of slavery, residential and school segregation, and discrimination in the U.S. which may result in a disparity in total wealth between individuals of the same income but different minority-majority racial status. This definition of socio-economic status considers appropriate and relevant factors in defining wealth and class in the U.S. and there is no option to considering this criterion that would be less impactful on non-minorities and satisfy the institution's need. With an authentic, mission-critical basis for seeking individuals who satisfy such disadvantage criteria, apart from race or gender, the

institution can serve a business necessity in connection with faculty employment decisions or an educational necessity in connection with student and faculty education decisions and overcome any disparate impact.

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

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

Before closing an applicant pool (those submitting applications) or candidate pool (those selected from the pool to interview), a determination is required on the adequacy of a search committee's outreach efforts. The objective and focus are on the adequacy of *outreach*—not on whether the applicant or candidate pool itself is diverse enough.^{lxiii} Appendix B, part C, provides a sample process for assessing the adequacy of outreach in the search process.

Examining the undertaken outreach is one important data point as to whether outreach is sufficient. Has all outreach that has a possibility of being productive been done? The diversity of the still-open applicant and *potential* candidate pools are two additional data points. If all reasonably possible outreach that has the potential to be productive has *not* been undertaken and the still-open pool of applicants—or the still-open pool of potential candidates identified from individuals who apply—is not broadly diverse, including minorities and women, then the *outreach* (not the diversity of the pool of applicants or candidates) may be inadequate, and the search committee should be required to continue outreach before the applicant pool is closed and the potential candidate pool is complete.

In such event, the instruction to the search committee is to do additional outreach, including both additional targeted and general outreach, to broaden the still-open applicant pool and provide an opportunity to broaden the inclusiveness of the potential candidate pool—*not* to add minorities or women to the list of candidates to be interviewed.

At this point, there has been no communication made to any applicant or member of the applicant or candidate pool that leads him or her to believe that the outreach or application period has been closed or that the complete candidate pool has been chosen, and in fact, the process of defining these pools is not yet completed. It may be helpful to determine adequacy of outreach before any deadline for completing outreach or closing the application period occurs, and to include in initial advertisements that a notice will be posted on a web page with the date when the application period is closed (which is determined after completion of adequate outreach).

If all reasonably possible outreach that has the potential to be productive has been undertaken and the pools of applicants and potential candidates to be interviewed do not include minorities and women, then it is reasonable to conclude that there is likely a significant deficit of qualified and available minorities and women (i.e., a severe "pipeline problem"), the outreach process nevertheless ends, and the hiring process proceeds.

Alternatively, applications may be accepted until a hiring decision is made. In such event, if a determination of adequacy of outreach is to be made, it may be helpful to make that determination prior to beginning review of applications or at least before beginning interviews.

Outreach should not continue after the application period has been closed. But if the application period remains open and outreach will continue after the outreach is determined to be adequate, or after interviews begin, it may be helpful to ensure that such additional outreach includes both general, broad-based outreach, as well as (i.e., not only) targeted outreach (and that there is serious consideration of additional applicants from all additional outreach efforts, not only targeted efforts).

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

Other good outreach and barrier removal practices include the following:

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

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

4. Recruitment Consortium [Outreach and Barrier Removal]

One of the outreach approaches that may be useful in recruitment of students, post-doctoral fellows, and entry-level tenure-track faculty is the creation of a recruitment consortium whose members are institutions that may produce promising candidates. For students, institutions of different educational levels (e.g., two-year, four-year, undergraduate-serving, research and graduate serving, and minority-serving institutions) may find it helpful to participate in a consortium based on the similarity, compatibility, or progression of the participating

institutions' academic program quality, curriculum subject matter, and quality of faculty, post-doctoral fellows, and students. Each participating institution invites its students, recent doctoral recipients, and post-doctoral fellows to register basic information (institution, course of study, degrees earned, honors, faculty mentors, research subjects, publications, contact information, membership in underserved groups in particular disciplines if the individual desires, etc.) on a consortium website (and perhaps through a Facebook page). Participating institutions may sort students in various ways, including by level of educational attainment and discipline, sort post-doctoral fellows by area of research, and access their information to support outreach efforts. Institutions are also able to send emails and text messages to particular individuals or categories of students, recent graduates and fellows through the Consortium Website.

All students, recent graduates, and post-doctoral fellows/associates in relevant disciplines have the opportunity to register in the database. Individuals are given the option to designate whether they are from an underserved group (such as women and non-Asian minorities in specified STEM fields) at the institution. Participating institutions that seek to recruit students, post-doctoral fellows/associates, or junior faculty are able to search the Consortium Website database for *any* interested and qualified individuals, as well as for individuals of groups that are underserved at their institutions. (For example, Historically Black Colleges and Universities may use the consortium to reach those of other races who are not well-represented in their student bodies and/or faculties.) For a particular recruitment, a participating institution uses the recruitment consortium for general as well as for targeted outreach—and combines use of the consortium for targeted outreach with other substantial general outreach. If a number of substantial outreach approaches are used and effectively reach anyone who may be qualified and interested (for example, a general email is sent to *all* students in the relevant discipline and at the relevant educational level who have registered in the consortium database), some use of the recruitment consortium in the same recruitment could be targeted to underserved populations. Such use of the consortium would have an inclusive, rather than exclusive, effect.

A similar approach may be used for recruitment of doctoral degree recipients and post-doctoral fellows into the professoriate. The Project's *The Smart Grid for Institutions of Higher Education and the Students They Serve: Developing and Using Collaborative Agreements to Bring More Students into STEM* provides a sample design.^{lxv}

Subject to individual institutional and specific jurisdiction analysis, advice of counsel, and careful design, this outreach and barrier removal tool should be viewed as inclusive, not discriminatory, and should be suitable even in voter referendum and executive order states.

5. Education Collaboration Agreements [Outreach and Barrier Removal]

Institutions of progressive educational levels, complementary curriculum in all or specified STEM fields, and complementary populations (e.g., minority and non-minority serving, undergraduate and graduate serving, etc.), whether private or public, may voluntarily enter into education collaboration agreements to facilitate transitions of students from one institution to

the next. Institutions, according to their own missions and character, may choose to retain the discretion to apply their own admissions criteria and process in the usual manner and simply facilitate applications from collaborating institutions' students through the dissemination of information, academic counseling support, and summer or other special research experiences and interventions—or they may choose to deem a student qualified for admission if the student achieves a specified grade point average in a specified level and course of study and/or particular courses at a collaborating institution. There are many variations of these voluntary arrangements.

With varying success and failure, state governments have historically called one category of such arrangements "articulation." However, restrictive regulatory models are not representative of the creative, customized, and effective voluntary collaboration agreements that institutions may craft with one another. The Project's *Smart Grid* guidance includes a sample form of educational collaboration agreement that may be used as a starting point and customized.^{lxvi}

This method of facilitating transitions by students from one institution to the next is race and gender neutral and should be suitable even in voter referendum and executive order states.

6. Removal of Unnecessarily Restrictive Qualification Criteria [Barrier Removal]^{lxvii}

To remove barriers to employment of minorities and women, the qualification prerequisites in position descriptions and advertisements, as well as in the minds of the search committee members, are challenged to ensure that they are not unnecessarily limiting and that they include sufficient flexibility to consider individual situations (e.g., non-traditional background, training in more than a small group of institutions, a justifiably longer period of development of scholarship, family obligations, etc.), while maintaining the institution's applicable standards for intellectual, academic, and/or professional achievement and promise. This approach requires a close and individual assessment of the accomplishments and promise of applicants and candidates, rather than reliance on generalizations (such as the generalization that only a handful of doctoral programs produce qualified academics in a field). This review and establishment of qualification prerequisites is done before the relevant positions are advertised; changes in qualification prerequisites related to or affecting race, ethnicity or gender diversity are not made once the hiring process has attracted applicants for the applicant pool. The same criteria are applied to all applicants and candidates, but they are sufficiently flexible to favorably consider non-traditional as well as traditional backgrounds. Appendix B, parts (A) and (B), provide samples and guidance.

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

7. Community Building, Mentoring, Capacity-Building [Ranges from Barrier Removal to Race/Gender-Conscious] ^{lxviii}

The following program examples can support the success of minority and female graduate students, post-doctoral fellows, and junior faculty members in pursuing faculty appointments and tenure by redressing isolation and disparities in access to relevant knowledge.

a. Facilitate creation of peer communities [Barrier Removal]

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

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

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

These programs are staffed by senior faculty, peers, and administrators to provide advice on grant-writing, research and academic politics, career counseling, and emotional and professional support to *all* junior faculty, post-doctoral fellows and associates, and graduate students who are interested in help to better prepare to compete for fellowships, faculty appointments, and tenure.

The institution collects data (e.g., via junior faculty, post-doctoral fellow/associate, 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 fellowship and/or faculty appointment and tenure processes. A regression analysis that demonstrates that minority, women, or others of targeted status statistically (not in an individual case) have less likelihood of success, all other factors being equal (i.e., without other "risk" factors being present), will provide a helpful evidentiary foundation for necessity. If so, that status may be identified for some targeted support using some (but not greatly disproportionate) resources, as long as others in need also have comparable opportunities for support. Targeted efforts and encouragement are necessary to put minorities and women on

equal (not better) footing and 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. Encourage participation by minority and female graduate students, as well as by other individuals in demonstrably underserved groups. Also, within and as a component of the overall program, provide options for focus groups for minorities and women and members of other underserved groups, such as disabled individuals. Practical, political, discipline-centric, and social advice and support are provided. Occasional informal get-togethers and meals are offered. An annual reception may be provided to acknowledge the participants. Focus groups for minorities and women and targeted encouragement of participation in generally available as well as targeted mentoring programs are justified where minorities and women are not well represented at the institution and would otherwise be more isolated, less well-informed, and less prepared than others.

If there are focus groups for minorities and women—with an undetermined and variable number of places assigned to them—within and comprising a part of a single larger mentoring program that is open to all who may need such assistance (e.g., all junior faculty, post-doctoral fellows/associates, and graduate students, or at least all those who are first in family to pursue a STEM or any academic career or satisfy other disadvantage criteria), and if the institution can demonstrate the availability of mentoring for others, then this program is likely to be regarded as barrier removal—inclusive, not discriminatory. Institution-wide programs are, in effect, clustered so that the needs of all are met, including but not limited to minorities and women. Institution-wide assessment and combination of all available mentoring programs are helpful. *(Subject to individual institutional and specific jurisdiction analysis, advice of counsel and careful design, this program may be suitable for junior faculty and post-doctoral fellows, as well as students, even for referendum and executive order states.)* Where effectiveness would not be compromised, a mentoring program may be designed and described as focused on issues of particular importance to minorities or women, without prohibiting the participation of others. The only or predominant participants in such a program likely will be minorities or women as well as others who are sincerely interested in learning about such issues and fostering an inclusive community.

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

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

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

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

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

In the employment context, these programs are reasonable, time-limited, capacity-building programs that do not overburden men or non-minorities. They are aimed at remedying the current effects of an employer's own prior discrimination (the two or more standards of deviation disparity in particular employer's workplace vs. labor pool representation that the Supreme Court has found constitutes a *prima facie* case of discrimination) or a manifest imbalance in the employer's workforce in a particular discipline (a substantial disparity, but somewhat less than a showing of actual discrimination) or other substantial underutilization (e.g., the OFCCP 80% measure).^{lxx} 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 perhaps in the field, in relevant educational programs and the workforce (so that little or no representation of women or minorities in a discipline at the institution does *not* constitute a manifest imbalance or other underutilization under Title VII and OFCCP tests, when compared with their representation in the qualified available pool). If the trainable cohort employed by or in fellowships and graduate programs at the institution is considered, with the outside labor market in the discipline and a history of exclusion in the discipline and position category, to define the available pool under EEOC regulations, under-utilization may be found. In jurisdictions that do not locally prohibit a justifiable consideration of race or gender, training or other capacity-building programs such as these may expand the qualified pool, where targeted outreach, barrier removal, and race-, ethnicity-, and gender-neutral efforts are inadequate and a "trainable cohort" exists but has been excluded. In such event, it is prudent to use race and gender as factors among many that

are flexibly considered in a holistic individualized assessment of all applicants to these capacity building programs.

The EEOC has recognized this justification, when needed and appropriately structured, under Title VII in the employment context,^{lxxi} and following EEOC's guidance is a defense to claims of discrimination under Title VII.^{lxxii} It is possible that OFCCP would also recognize these capacity-building programs as appropriate affirmative action to satisfy OFCCP requirements for federal contractors in situations where a pipeline problem exists and the 80% test of underutilization isn't met, but less than the expected representation of women or minorities exists in an employer's workforce because there is a larger cohort of trainable women and minorities.^{lxxiii}

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

d. Target of Opportunity Models

- i. Unit-wide benefits [neutral].** Benefits such as administrative support, equipment, graduate assistants, and funding are provided to those units that demonstrate exemplary outreach efforts, barrier removal, and other inclusive practices to foster faculty and/or student diversity. These benefits are not provided particularly to any individual (i.e., a person hired, a member or chair of a search committee), but inure to the benefit of the whole or a significant portion of the unit. The benefit is based on the outreach, not necessarily the hiring results.

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

- ii. Funding for a cluster of positions in multiple and flexibly defined disciplines [neutral].** Funding is provided by the Provost/Dean to simultaneously hire several faculty who are less traditional in their individual disciplines or interactions with other disciplines. Creative, interdisciplinary approaches to research are authentic, mission-critical activities because they support excellence in research. Race and gender are not factors, but the flexibility of discipline definitions, openness to non-traditional backgrounds, and simultaneous availability of multiple positions, with good outreach practices (see III.C.1, 3 and 4 above), increase the potential for competitiveness of minorities and women within the cluster. Record of inclusive conduct and multi-cultural skills in the workplace (see III.C.1 above) may also be a consideration.

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

- iii. Funding/position to hire faculty who especially advance priority objectives of the institution [neutral].** The Provost/Dean provides funding to hire Nobel and other top

prize winners; National Academy members; those (of any race or gender) who are otherwise exemplary even among the usual high standards of the institution; and those (of any race or gender) with proven records of exemplary inclusive (multi-cultural) conduct in teaching, research, and/or mentoring (i.e., mission-critical workplace behavior—see III.C.1 above). Holistic, individualized assessment is undertaken.

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

- iv. See 9 below concerning use of race or gender considerations in a holistic assessment to identify some individuals who particularly advance the priority, mission-driven interests of the institution in a target-of-opportunity program. Such considerations would supplement those in iii above, and would not identify all individuals selected in a target of opportunity program.
- v. **ALL:** The institution maintains a written policy setting forth hiring procedures which, among other things, include target of opportunity hiring as an essential, although not regular, tool for obtaining faculty who possess assets and characteristics that specially advance the institution’s mission. The protocol makes clear that in any given search the target of opportunity option may be utilized if circumstances warrant, or a special position may be created to hire a particular individual. Target of opportunity hiring affords the institution resources and flexibility to move expeditiously to hire faculty who would otherwise be beyond reach. Processes and criteria are not changed once a hiring process commences and individual candidates are identifiable, as the policy pre-dates the particular hiring and overlays the whole process.^{lxxiv} See Appendix B for a sample target of opportunity policy, as well as a sample search waiver policy and process providing for use of the target of opportunity policy to determine exceptions for the full search process (i.e., where there is justification to exempt a recruitment from the full search process or to conduct an expedited search to serve important institutional, mission-driven goals).

8. A General Note about Outreach and Barrier Removal in Referendum and Executive Order States—and Data Collection in All Jurisdictions

Targeted outreach, mentoring, and community building are generally regarded as inclusive and not discriminatory, as long as good general outreach that reaches anyone who may be qualified is also undertaken, and as long as mentoring and community building opportunities are available to all who have a need and the particular need of women and minorities is evidenced.

However, in California and any state that has a similar law prohibiting both discrimination *and* preferential treatment in public employment, contracting, and education on the basis of race,

ethnicity, national origin, or sex, public institutions need to use particular care when designing targeted outreach, mentoring, and community building strategies and working with the institution's counsel is important. As of December 2011, California, Arizona, Nebraska, and Washington have either constitutional bans or state laws with such bans. Michigan does as well, but, as discussed above, its law was held unconstitutional by a federal appeals court panel, though the decision and the issue were later vacated by the full court. Florida has an executive order and administrative regulation using similar language relating to admissions at public universities and state agency employment and contracting. (These state laws and executive order, as interpreted by courts and attorneys general, prohibit preferences and discrimination on the basis of race, ethnicity, and sex in covered public section institutions, even where federal law would permit (but does not require) such preference or consideration in limited ways and under well-justified circumstances.)

In states where limitations are imposed, it is a good practice to do the following (the data collection in the last two bullets is helpful in any jurisdiction):

- As in all jurisdictions, use very robust general outreach targeting all interested and qualified potential applicants (e.g., advertise in broadly accessed media and discipline-specific journals or organization communications; contact other institutions and colleagues to ask about any good potential candidates and reach out to these referenced prospects – both minorities/women and non-minorities/men—individually).
- Also, use special outreach to targeted groups of both general relevance and diversity relevance (e.g., send an email to all members of a general engineering society to tell them about an opportunity and encourage and inform those with the relevant expertise to apply, including standard equal employment opportunity language – and also send an email, using similar but tailored language, to all members of a targeted engineering society of minorities or women to provide them with the same information, and include a statement that the institution welcomes and values a broadly diverse campus community and provides relevant climate-enhancing programs).
- Where remediation of under-utilization of women and minorities by an institution or efforts to increase participation of women and minorities is required by federal law outright or as a condition to receipt of federal funding (e.g., OFCCP's regulations and the executive orders it administers that apply to federal contractors), use neutral criteria before considering race or gender even to the extent required by federal law in connection with outreach and barrier removal. Or demonstrate that race and gender neutral strategies are inadequate alone. (See data collection below.) This good practice for any jurisdiction is of even greater importance where state law imposes greater limitations than federal non-discrimination standards, prohibiting both discrimination and preferences based on race, ethnicity and sex.

- As part of a periodic process unrelated to a particular search or program selection, conduct surveys, or otherwise develop and document data, showing that general outreach (advertisements in journals and media) in STEM disciplines is effective with men and non-minorities and is significantly less effective or ineffective with women, minorities, and some other underserved groups. Include in such surveys inquiries documenting that men and non-minorities (as compared with women and minorities) have greater access to and information about the academic achievement, advancement and tenure "system" and its culture, expectations and requirements; obtaining research opportunities and funding; publishing in respected journals; accessing mentoring and information. Do multi-variable regression analyses showing—all other variables being equal (i.e., parental level of education, family pursuit of STEM degrees or careers, socio-economic status, parent(s) in the household, grades and standardized test scores, etc., being equal)—that women and minorities (statistically, not on an individual basis), are significantly less likely than men and non-minorities to avoid academic probation, earn above a certain tenure-track position in STEM fields. These data may help demonstrate that women and/or minorities are not receiving a preference—but rather are being put on equal footing with men and non-minorities—when the institution undertakes some limited targeted outreach and barrier removal in addition to the general outreach aimed at all interested and qualified individuals. And when using some special outreach targeted to women and minorities, do some special outreach targeted to those men and non-minorities who also may not be as effectively reached as most. Also, when offering focus groups targeted to women and minorities within mentoring and community building programs that are available to all, include or also make focus groups available to individuals who need mentoring and community building on bases other than race or gender (e.g., first generation to college, rural upbringing where the college is in a city, low socio-economic background, etc.).

9. Race- or Gender-Conscious Faculty Hiring or Promotion^{lxxv}

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

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

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

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

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

10. Race- or Gender-Conscious Layoffs

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

APPENDIX A

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

A. Threshold Mission Determinations and Evidentiary Foundations

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

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

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

3. How to Make These Determinations:

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

¹ Broad diversity refers to multiple aspects of an individual or individuals that contribute to a robust academic environment including experience, perspectives, disciplines, geographic background, talent, childhood socio-economic background, disability, ethnicity, race, gender, and other characteristics. Some aspects of broad diversity have been easily achieved, while others—including racial and, in some disciplines, gender diversity—have been more elusive and require focused outreach, capacity-building, and barrier removal efforts.

- b) Testimonials and reports of alumni in leadership positions and in the workforce confirm these determinations.
- c) The determinations are documented.
- d) Specific elements of the mission or goals that are advanced by diversity are identified.
- e) Institutional and unit assessments of inadequacy of representation by minorities, women, and/or others to achieve goals are conducted, relying on professional judgments of faculty and administrators and, possibly, input from students.
- f) See **Attachment 1**, *Surveys Regarding Educational Excellence and Benefits of Broad Diversity of Students and Faculty*.

STEP 2: Determine Whether There Is *Adequate Utilization/Representation* (among employees) or "*Critical Mass*" (among students) of Minorities, Women, And Other Under-served Groups To (a) Achieve Institutional and Unit Goals of Excellence in Education, Service and, As Applicable, Research² and (b) Avoid Under-utilization of Minorities and Women on the Faculty.³

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

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

- a) Critical mass is "adequacy" of representation to foster participation individually and collectively (see Part A, STEP 1(1) above). This may be measured as described below through an established periodic process.
- b) Data are collected by the Institutional Research Department, College, and/or Department to determine how well-represented women, men, minority races, majority races, foreign nationals, individuals with low socio-economic backgrounds, and others as known are and whether the representation is enough to foster individual participation.
- c) Informal Approach: Professional judgments of faculty and administrators and opinions of students are collected by interviews of a sample (whether or not statistically significant),

² For students and faculty, this concerns the experiences and other benefits *derived from* broad diversity—not diversity as an end in itself.

³ This is a requirement of law.

informal surveys, or evaluations on a periodic basis to determine (i) whether individuals of less well represented groups are marginalized, isolated, represent their group—or whether they are able to fully participate as individuals and (ii) whether individuals of all groups are experiencing broad cultures and perspectives different than their own, in their curricular and co-curricular activities.

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

3. Legally recognized Underutilization of Minorities and Women in Faculty Employment:

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

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

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

- Comparing minority or female representation in a discipline and job category in the institution's own workforce to their representation in the available, qualified market from which they could be recruited, consider discipline/position/category-specific data on the following measures of "under-utilization":
 - **Discrimination** = rebuttable presumption, evidenced by 2 or more standard deviations of disparity and may be (voluntarily) remedied under Title VII. (Actual present discrimination must cease of course, and may be the subject of a court order to take particular remedial action.)
 - **Manifest Imbalance** = a Supreme Court-recognized (*Weber and Johnson*), somewhat lesser, but still substantial disparity under the main federal employment statute, Title VII, likely roughly equivalent to the OFCCP "80% measure"--and may be (voluntarily) remedied.
 - **Underutilization** = (OFCCP/Executive Orders and regulations) evidenced by a representation of women or minorities in a discipline and job category at the employer that is <80% of their representation in the available and qualified labor market from which they could be recruited. Federal contractor/employers must (mandatory) annually assess, and establish goals and plans and use good faith efforts to remedy, underutilization.

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

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

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

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

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

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

opportunity in society—if neutral criteria, barrier removal and outreach are inadequate. But this is unresolved by the courts.)

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

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

1. State Law Restrictions: Determine whether your state prohibits or more strictly restricts consideration of race, ethnicity, and gender in education, employment, contracting (including the scope of any prohibition)—even when federal law would *allow* but would not *require* such consideration with adequate evidence of legal justification.

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

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

(a) Document that strategies with the least burden on those of the non-benefited race or gender are used. (E.g., neutral strategies and neutral barrier removal are used; general outreach with, if needed, targeted outreach and targeted barrier removal are used; and if they are inadequate alone or in combination, and if the state allows, then race or gender is considered as one of many factors and are not always determinative; and racial and gender exclusive criteria and quotas for participation are not used unless state law allows, there is no other alternative, and adequate evidence of a legally-recognized strong justification exists.)

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

(b) *Neutral Criteria*: Use neutral criteria applied neutrally, with authentic, mission-driven institutional objectives when making program participation, benefit awards, or hiring or promotion decisions. Neutral criteria (i) do not consider race, ethnicity, or gender (or are clearly inclusive in effect, without excluding anyone) and (ii) are aimed at achieving

authentically important institutional goals apart from race, ethnicity, and gender (see Part B on neutral strategies) and (iii) also may produce the ancillary benefit of helping to fill racial and gender gaps in the broad diversity needed to achieve institutional and/or unit goals (and there aren't means with less disparate impact on race and gender that are known and would achieve the main aim). Determine whether these neutral strategies are inadequate alone and in combination with outreach and barrier removal efforts to achieve missing aspects of needed broad diversity.

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

Examples:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Reward Neutral Encouraged Behavior and Success:

(a) A unit (not an individual hiring authority, hired person, or search committee) that demonstrates excellence in (i) robust outreach undertaken to build as broadly inclusive a qualified applicant pool as possible or (ii) success in hiring individuals with excellent records of inclusive conduct or other truly exceptional professional accomplishments, will receive a financial supplement, staff supplement, or piece of equipment. The award for excellent outreach is based on outreach efforts only, not actual hiring results (although results may be one—not the only—way to show that good outreach occurred).

STRATEGY 3: Pool Funds That Have No Race, Ethnicity, or Gender Restrictions With Some Restricted Funds—To Expand The Pool Available To Recipients Qualified On Neutral Bases.

Similarly, Select Participants Using Neutral Criteria, And Once Selected, Name Positions For Minorities/Women (Neutral Decision, Neutral Effect)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Race/ gender-exclusive programs are hardest to sustain (i.e., to be considered for participation or to receive a benefit, an individual must be a member of a specified race or gender group) and should not be used in admission of students or in layoff of employees.
- Race/gender-conscious programs also must satisfy strict judicial scrutiny. They require a compelling/important, legally recognized goal (e.g., the educational benefits of diversity for students —or educational benefits together with remedying legally recognized underutilization for faculty) and a carefully tailored approach (i.e., necessary—neutral, inclusive/barrier removal, and lesser use of race or gender have not been adequate; not overbroad, but narrowly tailored to achieve the legally recognized compelling goal; not over-burdening others who also may compete for participation/the benefit; time limited to period of need and neutral or lesser alternatives are periodically evaluated accordingly; and *effective to achieve the compelling goal*). These are programs open to all, where race or gender will be considered flexibly as one of many factors in determining who may participate or receive a benefit (i.e., race and gender will not be weighed the same for all candidates of a particular race or gender but will be viewed as

part of an individual's total profile with many other attributes—and race/gender will not be the factor that tips the balance for selection in all cases).

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

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

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

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

1. Cluster Programs To Create One Large Inclusive Program, Rather Than Isolated Race- Or Gender- Exclusive Programs. **Identify and cluster programs** (e.g., financial aid, or scholarships, or fellowships, or research experiences, or supplementary or special research funding, or mentoring) that offer similar benefits and have similar qualification criteria (putting aside whether some have also considered, or been exclusively available to those of a particular race or gender) to create a large and comprehensive single program, and avoid race or gender based stand-alone programs.

(a) Within a single program available to all:

- **Offer focus groups available to anyone who is interested that address issues of relevance to women and minorities.** (Neutral-suitable in all states)

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

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

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

2. Create Education Collaborations. Institutions collaborate through formal contracts and informal programs to open and facilitate pathways for students to enhance preparation and progress through increasing levels of education at participating institutions. Institutions may collaborate because they have different but complementary programs on various bases (demographics, level of program, quality of curriculum and faculty, undergraduate and graduate focus, etc.). (For detailed background, see Coleman et al., *The Smart Grid for Institutions of Higher Education and the Students They Serve* (AAAS and EdCounsel, 2012).) Institutions may also collaborate because they are similar and want to provide opportunities for their students to train elsewhere before recruiting them for faculty roles. Curriculum at participating institutions in identified programs is assessed, articulated and coordinated; academic counseling and dissemination of information for students equip them to access opportunities. Oversight committees assess and identify degree programs that articulate from one to another participating institution well and measure outcomes. Institutions may apply normal admission processes and standards and decide whether to accept credits on a case-by-case basis. Or institutions may agree to admit and accept credits for students who achieve a specified level of course and grade at participating institutions.

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

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

1. Review diversity- and access-related questions and institution-specific data from HERI and other surveys in which the institution participates (and include additional questions as needed—see (2) below), consider differences for freshmen and seniors;
2. Survey alumni, seniors and freshmen (on a blind basis, but identifying degree major and minor, racial/ethnic group, gender, and graduating class) regarding
 - a. whether, for example, in their experience at the institution on a regular basis, they have (or had) opportunities to learn from, interact with, and be supervised by faculty and other instructors (e.g., teaching assistants) of races, the gender, sexual orientation, nationalities, ethnicities, cultures, perspectives, and experiences different than their own;
 - b. whether, in their experience at the institution on a regular basis, they have (or had) opportunities to work, collaborate, and interact on campus and in their classroom, laboratory and other academic activities with students of races, the gender, sexual orientation, nationalities, ethnicities, cultures, perspectives, and experiences different than their own,
 - c. whether they feel they gained a greater understanding of the individuality of each person and the cultures of people of racial groups, gender, sexual orientation, nationalities, ethnicities, and cultures different than their own during their experiences at the institution;
 - d. whether they feel broad diversity of students on campus and in the classroom, laboratory, and other academic activities is (or was) important to the quality of their educational experience;
 - e. whether broad diversity of students on campus and in the classroom, laboratory, and other academic activities will be, is (or was) important to their preparation for and success in work and leadership after graduation in a global and diverse society—what about broad diversity of faculty—and whether the campus and their classes and other academic activities were adequately diverse for this purpose;

- f. whether they felt isolated or marginalized on campus, whether they felt they could fully participate in class and other academic activities (what about in co-curricular activities), and whether they could represent themselves as individuals or felt they were representing their racial or gender group; or
 - g. whether they had opportunities to participate fully in other experiences that would be considered an important part of the culture, academic life, and social fabric of the institution.
3. Interview groups of faculty to get their judgment as educators about whether "critical mass" of women and minorities has been achieved in a class, discipline, college and what the effect is on the experience for all students and excellence of teaching and learning.

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

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

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

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

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

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

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

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

APPENDIX B

HANDBOOK ON DIVERSITY AND THE LAW: *Project Team and Table of Contents*

Primary Handbook Authors and Project Counsel

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

and

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

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

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

Co-Project Directors and Contributors

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

and

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

Project Liaison

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

TABLE OF CONTENTS

VOLUME I

I.	PREFACE AND PROJECT OVERVIEW.....	1
II.	HISTORICAL CONTEXT.....	6
III.	THE COMPELLING CASE FOR DIVERSITY.....	9
A.	The Diversity Imperative in 21 st Century STEM Education.....	9
1.	Background.....	9
2.	Diversity and STEM Education.....	10
a.	Educational and Civic Outcomes.....	10
b.	Economic and National Security Outcomes.....	13
c.	Conclusion: Benefits to All.....	13
3.	The Challenges We Face.....	13
4.	Moving Forward.....	18
IV.	KEY DEFINITIONS.....	21
A.	Race-, Ethnicity-, and Gender-Conscious, -Exclusive and -Neutral Policies.....	21
B.	Intentional and Impact Discrimination.....	22
1.	Intentional discrimination or Disparate Treatment.....	22
2.	Disparate impact.....	22
C.	Strict, Intermediate and Rational Basis Scrutiny.....	22
1.	Strict scrutiny.....	22
a.	A compelling interest.....	22
b.	Narrow tailoring.....	23
2.	Intermediate scrutiny.....	23
3.	Rational basis scrutiny.....	23
D.	Diversity Interests.....	24
1.	Diversity.....	24
E.	Remedial Interests.....	24
F.	Critical Mass and Racial, Ethnic, or Gender Balancing.....	25

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

A.	Overview of Governing Legal Principles	42
1.	Equal Protection Clause (U.S. Constitution, 14 th Amendment)	42
2.	Title VI (42 U.S.C. § 2000d)	43
3.	Title IX (20 U.S.C. §§ 1681-1688)	48
B.	The Importance of Mission Alignment	50
C.	Issues Related to Enrollment	53
1.	In General	53
2.	Admissions.....	54
3.	Financial Aid and Scholarships	56
a.	Financial Aid for Disadvantaged Students	58
b.	Financial Aid Authorized by Congress.....	59
c.	Financial Aid to Remedy Past Discrimination	59
d.	Financial Aid to Create Diversity	60
4.	Outreach and Recruitment.....	61
5.	Student Mentoring, Retention, and Enrichment	62
D.	Student-Related Policy and Program Principles and Program Illustrations	63
1.	Key Elements of Legally Sustainable Policies and Programs.....	63
a.	Relationship to Institutional Mission	64
b.	Minimal Adverse Impact of Eligibility Criteria	64
c.	Assessment of Effect	65
2.	Illustrative Program Examples.....	66
a.	Holistic Admissions Program.....	66
b.	Introductory or Preview Minority Weekend	68
c.	Bridge/Mentoring/Scholarship Programs.....	69
d.	Summer Research Program (University or Industry).....	71
e.	Partner Schools for Undergraduate and Graduate Program Preparedness and Recruitment	72
VIII.	LEGAL ISSUES ASSOCIATED WITH FACULTY DIVERSITY (Some duplication of material in the student and faculty diversity sections exists so that each section may stand alone as a resource.).....	74
A.	Overview of Governing Legal Principles	74
1.	Equal Protection Clause (U.S. Constitution, 14 th Amendment)	74

	a. Race: Strict Scrutiny Analysis.....	75
	b. Gender: Intermediate Scrutiny Analysis	77
	2. Title VI (42 U.S.C. § 2000d)	78
	3. Title VII (42 U.S.C. § 2000e)	80
	4. Title IX (20 U.S.C. §§ 1681-1688)	92
	5. Executive Orders 11246 and 11375 and the OFCCP	93
	6. Conclusion and Analysis	95
B.	Extending the <i>Grutter</i> Rationale to Faculty Hiring.....	98
C.	Reasonable Affirmative Action Under Title VII, OFCCP and Title VI/Equal Protection	101
D.	Post-Doctoral Fellows	102
E.	Policy and Program Principles and Illustrations	108
	1. In General: Importance of Relationship to Mission	109
	2. Specific Program Examples.....	109
	a. Awareness-Raising and Monitoring Programs.....	109
	b. Race and Gender-Targeted Outreach and Barrier Removal Efforts	111
	c. Affirmative Action To Address Underutilization or a Manifest Imbalance in the Faculty Workforce, To Remedy Present Effects of Institution's Own Prior Discrimination, or to Address a Pipeline Problem Where a Compelling Need Exists	117
	d. Inclusive Conduct and Multi-cultural Skills and Other Race and Gender-Neutral Approaches.....	122
	3. Assessment of Impact.....	122
IX.	AVAILABILITY OF BROADER DISCRETION WHEN JUSTIFIED	124
	A. Congress' Broader 14 th Amendment, Section 5 Authority	124
	B. Private Foundations	125
X.	ENFORCEMENT	127
	A. U.S. Department of Education Office for Civil Rights Under Title VI and Title IX: Educational Programs and Employment	127
	B. Private Rights of Action Under Titles VI and IX: Educational Programs and Employment.....	129
	C. U.S. Department of Justice Under Title VI and Title IX: Educational Programs and Employment.....	131

D.	Equal Employment Opportunity Commission: Employment.....	131
E.	Office of Federal Contract Compliance Programs: Employment.....	132

VOLUME II

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

APPENDIX C

Faculty Recruitment Tool Kit

This Faculty Recruitment Toolkit provides guidance and sample policies and practices to foster successful searches for highly qualified faculty. In defining merit—or what it means to be "highly qualified" for a particular faculty position—criteria always include evidence of the level of intellectual accomplishments and promise that is required to be a respected member of the institution's faculty, in combination with evidence of other accomplishments and promise needed to achieve the institution's educational, service, and (if part of the institution's mission) research missions. To be "successful," the search must yield a well-qualified candidate who accepts the institution's offer, and the process and practices used must be sustainable under applicable federal and state law. To be legally sustainable, the process and practices would ideally not attract legal challenges at all and, at the very least, would be strongly defensible if challenged.

Although sample processes, practices, criteria, and policies are described in this Toolkit, they are not the only effective and legally sustainable approaches. The fact that a particular process, practice, criterion, or policy is not described has no relevance as to whether it is also effective and legally sustainable.

Toolkit Contents

I. Search Guidance

A. Objectives of the Search

B. Assessment of Qualifications for a Faculty Position

C. Including Adequate Outreach—And An Assessment of the Adequacy of Outreach—In The Search Process

D. Hiring Decisions

E. Suggested College/Unit Equity Officer Qualifications

F. Search Waivers

II. Target of Opportunity Sample Policy

III. Search Waiver Sample Policy and Process

I. Search Guidance: The Process and Criteria For Conducting Successful Searches

A. Objective of the Search: Seeking Individuals Who Demonstrate Key Qualifications, Including "Workplace Conduct of Inclusion"

1. As a first step in the search process, search committees are oriented to the following institutional objectives and related qualifications (including a record of "workplace conduct of inclusion") that are applicable to all faculty searches:

The University seeks to increase the diversity of its undergraduate and graduate student populations and its professoriate and workforce because broad diversity (including all aspects of individuals that contribute to a robust academic environment)¹ is critical to achieving the University's mission of excellence in education, research, educational access and service in an increasingly diverse and global society. **Therefore, in holistically assessing many qualifications of each applicant—of any race or gender—we would factor favorably an individual's record of conduct in the workplace to include in educational, research, or other work activities students and colleagues with broadly diverse perspectives, experiences, races, ethnicities, genders, socio-economic statuses, and other backgrounds.** Among many qualifications (of course including academic/intellectual strengths), we would factor favorably professional accomplishments that demonstrate excellence, such as high professional honors, a record of academic accomplishments, a record of conduct of inclusion in the workplace, and experience overcoming or helping others overcome barriers to an academic career. An individual who practices conduct of inclusion in the workplace and has experience overcoming or helping others to overcome barriers provides opportunities to enhance educational, research, and other work outcomes for everyone by increasing opportunities for a broad range of individuals to fully participate. This increases the potential to expand issue identification, collaboration, and problem-solving for everyone, as well as giving everyone experience working in multi-cultural, multi-perspective settings. (See I.B(2) below for sample interview questions to assess this conduct and experience in candidates.)

2. **Shortened versions of this statement** for use in position advertisements are:

Short: "Among other qualifications, we will favorably consider *any* applicant's record of including individuals of diverse backgrounds, experiences, races, ethnicities, genders, and perspectives in research, teaching, service, and other work activities."

More: "To support all students and faculty and foster excellence in a diverse and global society, we will favorably consider, among other qualifications, *any* applicant's record of including individuals of diverse backgrounds, experiences, races, ethnicities, genders, and perspectives in research, teaching, service, and other work activities."

Full: "The College's excellence in a diverse and global society depends in part on welcoming a broadly diverse faculty and student body. Among other qualifications, we will favorably consider *any* applicant's record of including individuals of diverse

backgrounds, experiences, races, ethnicities, genders, and perspectives in research, teaching, service, and other work activities."

3. **Job descriptions also may include this criterion as a performance measure.** If workplace conduct of inclusion will be factored in job performance, it is a good practice for the service aspect of job descriptions to note that such conduct, among other types of service, factor favorably in performance considerations.

B. Assessment of Qualifications for a Faculty Position

1. The Provost, Academic Vice President, and Dean challenge all hiring authorities and search committees—**before** they finalize, approve, and issue job specifications and advertisements—to review their definition and conception of qualifications for any new faculty position in order to avoid unnecessarily restrictive definitions (which have the effect of limiting the prospective candidates and unnecessarily excluding qualified minorities, women, and individuals of other underserved groups). Search committees should undertake the hard work of individualized holistic assessment of the accomplishments, intellectual capacity, and promise for the professoriate of prospects and applicants. (The record of conduct of an applicant—of any race or gender—to include broadly diverse students and colleagues in teaching or learning activities, administering a laboratory, mentoring, or other work, as well as experience overcoming or helping others overcome barriers, would be one of many qualities factored favorably in holistically assessing the qualifications of applicants.) Of course, the academic/intellectual standards of the institution will not be compromised, but qualifications that restrict candidates to the graduates of a small number of programs or are similarly unnecessarily restrictive are strongly discouraged.

2. Sample considerations and interview questions to assess applicants' and candidates' conduct of inclusion/experience overcoming barriers include the following:

- Have you either experienced discrimination or barriers to achievement on any basis, felt isolated in your residential setting or educational and professional/work experience—or identified the existence of these or other barriers for others—and then removed such barriers and created an inclusive community for all? Describe.
- Have you mentored or collaborated with a student/faculty member/staff from a different background, perspective, or experience from your own (e.g., different race, gender, sexual orientation, socio-economic background, political perspective)? Was the collaboration successful? Explain.
- How much and what kind of contact have you had as a teacher/supervisor with students/staff of different backgrounds, perspectives, and experiences from your own? Were you able to achieve equal success with students/staff of such differences? Explain.

- Have you experienced as a student close collaboration with faculty members or peers of different backgrounds, perspectives, or experiences from your own? Were you able to successfully bridge any differences? Explain.
- For people applying for higher level jobs: Have you helped an undergraduate with a different background, perspectives, experience from your own get into a PhD program/a junior staffer with a different background advance his or her career? Mentored such a PhD to conclusion? Hired such a post-doc into your lab? Describe.
- What is your experience educating people around you about the issues that people of different groups encounter in higher education and research?

C. Adequate Outreach—And Assessment of the Adequacy of Outreach—In The Search Process

1. **Objective: Robust Outreach Before Interviews.** The Provost's Office, Academic Vice Presidents, Deans, and unit heads require hiring authorities and search chairs to **plan and conduct robust outreach** for each search **at the beginning of the search** process. (See Attachment A, which may be used as a tool if desired by the search chair. It is not intended to limit or define all reasonably possible outreach.) Outreach planning seeks to identify means and sources for meaningful, feasible outreach to build a broadly inclusive pool of applicants from which candidates to be interviewed will be identified. In addition to regular broad-based and other specific and personal outreach, focused outreach—including personal contact—to encourage applications by racial and ethnic minorities, women (or men in fields where they are not well represented), individuals of other groups that are not well represented, and, for Science, Technology, Engineering, and Mathematics (STEM) and Social and Behavioral Science (SBE) fields, graduates of NSF-sponsored Alliances for Graduate Education and the Professoriate (AGEP) institutions who participated in AGEP-supported programs, are included. Each search chair and all members of the committee must complete the institution's official training within two years prior to beginning a search. If the institution participates in a recruitment consortium, the search committee will use the consortium data for general and targeted outreach, or will use such data for targeted outreach while undertaking other substantial general outreach.

2. **Interplay: Adequacy of Outreach Determination and Application Deadline.** Establish the application deadline, closing the application period, **only after** determining the adequacy of outreach. Search advertisements and a search Web page note from the start either: (a) a Fixed Application End Date: "The end date for accepting applications will be no sooner than [date] and the actual date will be posted at [URL]." or (b) Open Until Filled: "Applications will be accepted until the hiring decision is made, and that end date will be posted at [URL]. The earlier date when review of applications will begin, will be posted at [URL]."

3. **Process: Outreach Adequacy Determination.** Prior to determining the end date for receiving applications, completing a list of potential candidates to be interviewed, or beginning

interviews, the search committee chair prepares a list specifying the outreach that has been undertaken and confers with the "reviewer." At the Dean's option, the "reviewer" is (a) local—a Dean's designee or unit's equity officer (if s/he is not on the search committee) or (b) central—the person to whom the hiring authority reports (e.g., Provost's or other Sr. VP's office if the Dean is the hiring authority, and otherwise Dean or unit head). Also, the reviewer consults Human Resources (HR) for any then-available information on whether or not the applicant pool and potential candidate list are broadly diverse, including racial minorities and women or men (in fields where one sex is not well represented), AGEP graduates (for STEM/SBE fields), and any other missing aspects of broad diversity. HR doesn't give the reviewer details on race, ethnicity, or gender of particular applicants. **At the conclusion of the search, the search chair forwards the list of outreach done to the Dean's office for recordkeeping.** (The form for the list is up to the search chair.)

If there is more reasonable outreach that could be done—including for STEM and SBE fields robust outreach to AGEP schools and AGEP graduates--and the applicant pool or potential candidate list is not (or may not be) broadly diverse but more outreach is feasible and could expand the pool--the reviewer, consulting with the search chair, finds the outreach inadequate. The search chair instructs the committee to conduct additional outreach (general and targeted) to expand the inclusiveness of the applicant pool and the process is repeated **before** the application period ends, the interview list is completed, or interviews begin. (The **outreach**—not the **diversity** of the applicant pool or potential interview list—is inadequate. Search committees are **not instructed** to find diverse candidates to be interviewed, but rather to do additional outreach to potentially broaden the inclusivity of the applicant pool.)

However, if and when all reasonable and productive outreach has been completed, the reviewer, consulting with the search chair, finds the outreach adequate, interviews begin, and the rest of the process proceeds, regardless of whether broad diversity has been achieved. (Any further outreach, after efforts are deemed adequate, is both general and targeted, and all additional applications are reviewed.) Any pipeline problem is noted for the Dean, Provost's Office, and HR Equal Employment Opportunity Office to build capacity over time.

D. Hiring Decisions

Hiring decisions (including decisions on whom to interview) must not consider race, ethnicity, or gender (or AGEP status) or the political orientation of the applicant or candidate. If your jurisdiction permits limited consideration of race, ethnicity, and gender with appropriate evidence of need and justification, modify this guidance to add at the end "except with consultation and sign-off by the Offices of the Human Resources Vice President and the Vice President/General Counsel."

E. Suggested College/Unit Equity Officer Qualifications

An Equity Officer can be any race or gender and would generally satisfy the following criteria—

- s/he is respected/has clout within the college or unit,
- s/he is committed to broad diversity,
- s/he has direct access to the Department Chair or Dean,
- s/he is trained through the University's official search training program, and
- s/he is interested in and provided time to perform the function.

It is important not to assign all diversity-oriented responsibilities to, or to assume the interest or ability in such responsibilities by, women and minorities. The objective is for those of all backgrounds, races, ethnicities, and genders to share this commitment.

F. Search Waivers

Search waivers, permitting an exemption from the usual search process or an expedited process, must be approved by the Provost's Office and Vice President for Human Resources, and should be limited and well-justified in accordance with University policy. See [insert URL].

©AAAS. Versions of portions of this document were first developed for use at workshops in the first phase of the American Association for the Advancement of Science (AAAS) Diversity and the Law project funded by the Alfred P. Sloan Foundation with supplementary funding by the National Science Foundation. This draft was further developed and piloted at a university and was then further developed in the second phase of the AAAS Diversity and the Law project funded by NSF (Navigating the Legal and Higher Education Landscapes to Foster and Sustain Greater Faculty and Student Diversity, NSF (HRD-1038753)). It is being provided with consent of the AAAS, and will be further developed and finally published in the materials for the project. Use of this document for internal purposes by tax-exempt private and public institutions of higher education is permitted by the AAAS.

II. Sample Target of Opportunity Policy

The following document is a sample Target of Opportunity Policy which may be adopted by an institution as a policy that overlays all searches and is applied to help achieve priority institutional objectives in any search where a candidate satisfies the applicable criterion.

TARGET OF OPPORTUNITY HIRING FOR ACADEMIC PERSONNEL

This target of opportunity policy overlays and makes target of opportunity considerations and actions available in any competitive faculty search, waiver, or other hiring process at the University. It is an essential tool for obtaining faculty who can especially advance priority mission-driven goals, affording the institution flexibility to expeditiously hire mission-critical faculty who would otherwise be beyond reach or unavailable.

The University requires a broadly diverse¹ faculty to fulfill its mission. In accordance with state and federal law and University regulations, the University is committed to providing equal opportunity in employment through inclusive, non-discriminatory recruitment and hiring practices. Target of opportunity hiring furthers the critical goals of broad diversity and inclusiveness.

How to use the target of opportunity consideration in the hiring process: Considering as a whole all of the candidate's many qualifications and anticipated contributions to the University community as is always done, it is determined that the individual not only satisfies usual [*for elite institutions*: high] academic and intellectual standards for membership in the University's faculty in a discipline of need or interest to the institution, but also is expected to uniquely or especially advance the University's priority mission-driven goals based on particular accomplishments.

Examples include, but are not limited to:

Extraordinary Professional Distinction. The candidate demonstrates truly exemplary promise or truly extraordinary accomplishments in and contributions to a field based on high-honor prizes or professional memberships, or other evidence. Or the candidate is the only, or one of the few, experts in the field.

Outstanding Record of Conduct of Inclusion in the Workplace. Regardless of the candidate's own race or gender—and in addition to many other qualifications (of course including academic, intellectual, and professional strengths), the candidate has a record of including (in teaching, learning, research or mentoring, etc.) a broad diversity of individuals; breaking down barriers for colleagues and/or students; working, teaching, or learning with others who are different from self in key ways; and/or providing opportunities for students and/or colleagues to gain experience working in a multi-cultural, multi-perspective setting. This criterion

considers the candidate's conduct, not other characteristics. If used other than to fill a single position in a full search process, this criterion is generally used in an expedited or internal search process. See related sample interview questions below.

Use:

1. Under this policy, target of opportunity considerations may be among the many qualifications considered in any full search process **without involving the Office of Provost.**
2. Target of opportunity considerations may justify filling an additional position to hire a candidate identified in any full search process without a further search process. (This is a kind of expedited search.) Confirmation that a candidate meets the criterion must be obtained from the Office of Provost in consultation with the Office of Institutional Equity and Diversity and, as needed, the Office of the Vice President and General Counsel.
3. Target of opportunity considerations may partly justify the grant of a waiver or approval to conduct an expedited or internal search by the Office of Provost in consultation with the Office of Institutional Equity and Diversity and, as needed, the Office of the Vice President and General Counsel.
4. Once approved to conduct an expedited or internal search, target of opportunity considerations may be among the many qualifications considered when evaluating each candidate to make a hiring decision, **without further involvement of the Office of Provost.**

Use of target of opportunity considerations is not a change in the basic hiring process being employed. This policy overlays and applies to all searches and hiring from the start, allowing target of opportunity considerations to be factored in hiring decisions and decisions on whether to grant a waiver or approve an expedited or internal search process.

If requesting a waiver or internal or expedited search using the target of opportunity criterion, follow the **waiver approval process** at [insert URL].

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

- Have you either experienced discrimination or barriers to achievement on any basis, felt isolated in your residential setting or educational and professional/work experience—or identified the existence of these or other barriers for others—and then removed such barriers and created an inclusive community for all? Describe.
- Have you mentored or collaborated with a student/faculty member/staff from a different background, perspective or experience from your own (e.g., a different race, gender, sexual orientation, socio-economic background, political perspective)? Was the collaboration successful? Explain.

- How much and what kind of contact have you had as a teacher/supervisor with students/staff of different backgrounds, perspectives and experiences from your own? Were you able to achieve equal success with students/staff of such differences? Explain.
- Have you experienced as a student or post-doctoral fellow/associate close collaboration with faculty members or peers of different backgrounds, perspectives, or experiences from your own? Were you able to successfully bridge any differences? Explain.
- For people applying for higher level jobs: Have you helped an undergraduate with a different background, perspective, experience, from your own get into a PhD program/a junior staffer with a different background advance his or her career? Mentored such a PhD to conclusion? Hired such a post-doc into your lab? Describe.
- What is your experience educating people around you about the issues that people of different groups encounter in higher education and research?

© American Association for the Advancement of Science. This draft document was developed for the American Association for the Advancement of Science (AAAS) Diversity and the Law Project funded by the National Science Foundation (Navigating the Legal and Higher Education Landscapes to Foster and Sustain Greater Faculty and Student Diversity, NSF (HRD-1038753)) and is being provided with consent of the AAAS. It will be further developed and finally published in the materials for the project. Use of this document for internal purposes by tax-exempt private and public institutions of higher education is permitted.

III. Search Waiver Sample Policy and Process

The following form is a sample search waiver policy and process, providing for exemptions from the full search process and for expedited and internal searches when justified. One justification is to pursue a candidate who satisfies the Target of Opportunity criterion under the policy summarized in part II, above.

Each institution must define its recruitment reach, whether national, international, or regional, and the language in the form should be customized accordingly for the institution's use. Similarly, the manner in which academic standards are described, the adjectives used, should be tailored to the type of institution.

SEARCH WAIVER PROCEDURE FOR ACADEMIC PERSONNEL

The University requires a broadly diverse¹ faculty to fulfill its mission. In accordance with state and federal law and University regulations, the University is committed to providing equal opportunity in employment through inclusive, non-discriminatory open recruitment, and hiring practices. Exceptions from otherwise applicable search procedures are therefore permitted only with appropriate justification.

Exceptions to applicable procedures for recruitment may be permitted when they are in the best interests of the University, as determined by the Office of the Provost and the hiring authority, in consultation with the Office of Institutional Equity and Diversity and, as needed, the Office of the VP/General Counsel. **Please initiate a waiver or expedited or internal search request (Request) as soon as you anticipate a potential need. Last minute Requests may cause delays in hiring. Every effort is made to process Requests within 5 to 7 working days.**

Generally, Academic Personnel positions are to be filled only by published national and international [*or insert search region*] searches unless a waiver is requested and granted or an expedited or internal search is approved. Waivers are usually not granted if the hiring authority had sufficient notice (more than 45 days) of the vacancy.

Guidelines for requesting a waiver of recruitment procedures or an expedited or internal search:

- ✧ The candidate for the position must be qualified for the position.
- ✧ Each request must be submitted on an approved "Request Form."
- ✧ In determining the appropriateness of the Request, factors considered include, but are not limited to: the special need in the particular instance; the hiring department's past practices with respect to competitive hires and waivers; whether aspects of broad diversity are

missing in the discipline at the University; whether, considering their representation in the recruitment market, minorities, or women are underrepresented in the department/discipline at the University, and whether with robust outreach the full search process reasonably could be expected to yield a broadly diverse qualified applicant pool; and opportunities for internal promotions within the units.

- ✧ When hiring foreign nationals, additional information may be required.
- ✧ This procedure generally should apply to no more than 5% of all hires made by the college or unit per year.
- ✧ **No verbal or written offers should be made to any candidate unless and until final approvals are granted.**

Academic Administrative Appointments:

- A: Assistant/associate dean, department chair, director of a major program, etc: The preferred strategy is a published, competitive national/international search. However, a waiver of a national/international competitive search may be granted when there are constraints such as funding, timing, available candidates, etc. If this is the case, submit a Request Form and check relevant boxes. Specify circumstance/s under "Explanation of Request".
- B. Compensated Administrative Title (at any FTE): Even if the addition of administrative duties is limited to current employees, a Request for an internal and/or expedited search is required.
- C: Uncompensated Administrative Title: A position and change in title that carries no administrative supplement, and is limited to current employees in the unit is generally viewed as a change in assignment. No Request or approval is required.

Acting, Interim or Visiting Appointment:

This applies to the appointment of an individual to temporarily fill a position when the regular incumbent is expected to return (Acting) OR there is appointment of an individual to a position for which a search is to be conducted within one year (Interim) OR the appointment is for a faculty member to visit for ≤ 1 year. Submit a Request Form with the appropriate box checked. Specify the circumstance/s under "Explanation of Request Type" section.

Other Requests:

Other requests will be considered on a case-by-case basis in the following instances or circumstances:

1. **Degree Waiver:** The appointment of an individual without the usual required academic degree to a non-tenure accruing position for one semester of a nine-month position, or six months or less of a twelve month position. (Degree waivers are rare and require compelling rationale.)

2. **Named in a Contract or Grant Award:** The appointment of an individual or individuals specifically named in a contract or grant award as Principal Investigator or similar role, and paid 100% from the contract or grant. (The portion of the grant which names the Principal Investigator or Co-Principal Investigators must be included with the Request Form.)
3. **Spouse or Domestic Partner Hire:** The appointment of an individual in a dual career family or domestic partnership in order to enhance and support the recruitment, hiring and retention of a fully qualified faculty member.
4. **Target of Opportunity Criterion¹:** Seeking or appointing an individual who has extraordinary or unique professional distinction (considered for a waiver or expedited or internal search) and/or an outstanding record of conduct of inclusion in the workplace¹ (generally considered for an expedited or internal search). (This criterion may be used in any full search without approval.)
5. **Critical Hire/"Team" Requirement:** Following a full competitive national/international search (or in some instances, expedited search) for a position deemed critical to the overall advancement of the University by the Provost or another Senior VP, a waiver may be granted for the team members who accompany the critical hire. Generally, these would be individuals deemed essential to advancing the research or other work of the critical hire.
6. **Time, Financial or Other Significant Constraints:** These are to be specified by the requesting unit.

An Expedited Search requires advertising for a minimum of 14 days. Another type of expedited search is when, in the course of a full search process, a strong candidate is identified who, among other qualifications, satisfies the target of opportunity criterion, and a second position is filled without further process.

An Internal Search indicates internal posting only, and is generally intended to target current permanent faculty.

In an expedited or internal search, there should be a review of all submitted applications by a designated search committee. Do not include candidate information on the Request Form, unless expressly required by the form.

REQUEST FORM (Check One: waived, expedited, internal search) For Academic Personnel

POSITION INFORMATION

DATE: _____

Department / School / Unit: _____

College: _____

Position Title: _____ Position Number: _____

Rank: _____ Proposed Salary: _____
Per Academic Year Semester/Summer

Appointment Dates: Begin _____ End _____

Full Time or Part Time: _____ FTE _____

Funding Source & Percent: Grant _____% Name of Grant _____

State _____% Aux _____% Other _____%

Position Type: Replacement Position Temporarily Funded Incremental (New) Position

CANDIDATE INFORMATION (FOR WAIVED SEARCH)

Name: _____

Current University Employee: Yes No

If yes: University ID _____ Title _____ Dept. _____

INFORMATION (CHECK ALL THAT APPLY):

- | | |
|--|---|
| <input type="checkbox"/> Acting, Interim or Visiting | <input type="checkbox"/> Uncompensated Administrative Title |
| <input type="checkbox"/> Degree Waiver | <input type="checkbox"/> Extraordinary Professional Distinction |
| <input type="checkbox"/> Named in Contract/Award – applies to <u>PI ONLY</u> (100%) | <input type="checkbox"/> Critical Hire / "Team" Requirement |
| <input type="checkbox"/> Spouse or Domestic Partner Hire | <input type="checkbox"/> Time, Financial, Other Constraint |
| <input type="checkbox"/> Expedited Search (at least 14 days) | <input type="checkbox"/> Internal Search (Internal Jobs posting only) |
| <input type="checkbox"/> Record of Conduct of Inclusion in Workplace (generally with expedited or internal search) | |

Explanation of/Justification For Request: (attach additional information as needed) _____

APPROVALS

Requesting Dept. Chair/Hiring Authority Name: _____

Signature: _____

Department or Unit: _____ Date: _____

Dean Name: _____ Signature: _____

College: _____ Date: _____

Provost or Designee (Associate Provost for Faculty Development): _____ Date _____

Email address for return of approved waiver: _____

Send this form to: Office of the Provost ✧ [Address] ✧ [e-mail]

© American Association for the Advancement of Science. This draft document was adapted and further developed for the American Association for the Advancement of Science (AAAS) Diversity and the Law Project funded by the National Science Foundation (Navigating the Legal and Higher Education Landscapes to Foster and Sustain Greater Faculty and Student Diversity, NSF (HRD-1038753). It is being provided with consent of the AAAS. It will be further developed and finally published in the materials for the project. Use of this document for internal purposes by tax-exempt private and public institutions of higher education is permitted.

ATTACHMENT A – FACULTY SEARCH OUTREACH TOOL and COMPLETION CHECKLIST

Search Committee Chair: _____ Hiring Authority: _____ Reviewer: _____

Completion

Checklist

1) Advertise in journals, organizations and websites.

a) General: _____

b) Diversity Specific: _____

2) Consult relevant publication lists and databases.

a) General: _____

b) Diversity Specific: _____

3) Consult with University faculty members (attach any letter/e-mail sent).

a) List Minority/Women Faculty: _____

b) List other Faculty: _____

4) Contact colleagues elsewhere (attach any letter/e-mail sent).

a) List Minority/Women Faculty: _____

b) List other faculty: _____

5) Contact dept. alums and post doc (attach any letter/e-mail sent).

a) List Minority/Women Alums: _____

b) List Other Alums: _____

6) Contact dept. chairs at relevant universities (attach any letter/e-mail sent).

a) Top URM Producers (including HBCUs, Hispanic-serving, Tribal): _____

b) Other Universities: _____

7) Other.

a) General: _____



b) Diversity Specific: _____

Include outreach to AGEP institutions, students and graduates if STEM/SBE field and to other missing aspects of broad diversity

This form is a tool to help plan and track outreach. It isn't intended to limit or define all reasonable outreach. After performing initial outreach, please confer about the completed outreach with the reviewer identified by the Dean (i.e., either the unit's equity officer if s/he isn't on the search committee, or the person to whom the hiring authority reports —Provost's Office if a Dean is the hiring authority and otherwise the cognizant Dean or department head). The reviewer, consulting with the search chair, will determine adequacy of outreach before the application period ends or interviews begin. Keep a copy of this tool with search files.

APPENDIX D

List of Additional Project Resources

1. *Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, And Sex Among Public Education Institutions*
2. *The Smart Grid for Institutions of Higher Education and the Students They Serve: Developing and Using Collaborative Agreements to Bring More Students into STEM*
 - a. Sample Educational Collaboration Agreement Template
 - b. Sample Recruitment Consortia
3. Program Design Guidelines

ⁱ See Remarks of the Chief Exec. Officer of Northrop Grumman Corp., Exec. Vice President of IBM Corp., and President of the Nat'l Acad. of Eng'g in CHUBIN, MALCOM, KEITH, AND BOBB, A SUMMARY OF THE MEETING: AAAS-NACME ROUNDTABLE STANDING OUR GROUND II: EFFICACY OF UNIVERSITY-BASED S&E PROGRAMS DESPITE LIMITATIONS OF 'STRICT SCRUTINY' 6-7 (Jan. 15, 2008), available at http://php.aaas.org/programs/centers/capacity/07_Engagement/07_LawPolicyPractice.php. **!**

ⁱⁱ NAT'L SCI. FOUND., SCIENCE AND ENGINEERING INDICATORS 2002 (2002) [hereinafter SEI 2002], available at <http://www.nsf.gov/sbe/srs/seind02/start.htm>; NAT'L ACADS., RISING ABOVE THE GATHERING STORM: ENERGIZING AND EMPLOYING AMERICA FOR A BRIGHTER ECONOMIC FUTURE (2007) [hereinafter Gathering Storm], available at http://www.nap.edu/catalog.php?record_id=11463.

ⁱⁱⁱ SEI 2002, *supra* note ii, at 3-15 to 3-29, 5-29 to 5-30; NAT'L SCI. FOUND., WOMEN, MINORITIES, AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING 1 (2000) [hereinafter WMD], available at www.nsf.gov/sbe/srs/nsf003271.

^{iv} While scientists and engineers comprise about 4% of the U.S. workforce, they disproportionately generate jobs for the other 96%. *Id.* at 2-3 ("Importantly, leverage is at work here. It is not simply the scientist, engineer and entrepreneur who benefit from progress in the laboratory...; it is also the factory worker . . . the advertiser . . . the truck driver . . . the salesperson . . . the maintenance person . . . not to mention the benefits realized by the user [of new technology and its products]. Further, each job directly created in the chain of manufacturing . . . generates, on average, 2.5 jobs in . . . unrelated endeavors."). A new study from the Georgetown University Center on Education and the Workforce shows that science and engineering graduates enjoy high demand in a variety of fields—both science and non-science. ANTHONY P. CARNEVALE, NICOLE SMITH, AND MICHELLE MELTON, GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, STEM 23, 76 (2011), available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/stem-complete.pdf> ("We find that the disagreement between those who argue that STEM workers are undersupplied and those who argue they are oversupplied can be resolved by the fact that large numbers of people with STEM talent or degrees divert from STEM occupations either in school or later in their careers."); see NATIONAL SCIENCE FOUNDATION, NATIONAL SCIENCE BOARD, SCIENCE AND ENGINEERING INDICATORS 2010 Figure 3-3 (2010) [hereinafter SEI 2010], available at <http://www.nsf.gov/statistics/seind10>. Technology is "increasingly recognized as a key determinant of economic growth by most nations," NATIONAL SCIENCE FOUNDATION, NATIONAL SCIENCE BOARD, SCIENCE AND ENGINEERING INDICATORS 2002 5-44 (2002) [hereinafter SEI 2002], available at <http://www.nsf.gov/statistics/seind02/>; see Brief for Mass. Inst. of Tech., Leland Stanford Jr. Univ., E. I. DuPont De Nemours and Co., Int'l Bus. Machines Corp., Nat'l Action Council for Minorities in Eng'g, the Nat'l Acad. of Scis., and the Nat'l Acad. of Eng'g as Amici Curiae at 15 and n.26, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) [hereinafter MIT Brief], available at <http://web.mit.edu/newsoffice/nr/2003/amicus-brief.pdf> (*Grutter* upheld University of Michigan Law School's holistic assessment of each candidate for admission, taking race among other factors into account; *Gratz* struck down as unconstitutional University of Michigan's automatic award of 20 points to minorities in an undergraduate admissions evaluation process).. NSF has emphasized that our "international economic competitiveness ... depends on the U.S. labor force's innovation and productivity" and that a "diverse, globally-oriented workforce of scientists and engineers" is needed to support continued U.S. economic leadership. SEI 2002, *supra* note ii, at 3-15–3-29, 5-29–5-30; MIT Brief, at 12-13 .

^v See Carnevale, Smith, and Melton, *supra* note iv, at 23, 76, 77-78.

^{vi} NAT'L SCI. FOUND., SCIENCE AND ENGINEERING INDICATORS 2010 Appendix Table 2-33(2010) [hereinafter SEI 2010], available at <http://www.nsf.gov/statistics/seind10/append/c2/at02-33.pdf>.

^{vii} WMD, *supra* note iii, at 20; MIT Brief, *supra* note iv, at 12-13; WORKFORCE/EDUC. SUBCOMM., PRESIDENT'S COUNCIL OF ADVISORS ON SCI. AND TECH., SCIENCE AND ENGINEERING CAPABILITIES Parts 3 and 4 (June 2004) [hereinafter PCAST 2004]. For a more recent analysis and updated statistics, see Appendix B and sources cited therein, including Gathering Storm, *supra* note ii.

^{viii} U.S. CENSUS BUREAU, U.S. SUMMARY 2000 (2002), available at <http://www.census.gov/population/cen2000/phc-t08> (Tables 3 and 4 averaged)(15-24 year-olds in the U.S. population based on 2000 census data); SEI 2010, *supra* note vi, at t.2-2, available at <http://www.nsf.gov/statistics/seind10/c2/tt02-02.htm>; see also MINORITY BUS. DEV. AGENCY, U.S. DEP'T OF COMMERCE, MINORITY POPULATION GROWTH: 1995 TO 2050 1-3 (1999); U.S. CENSUS BUREAU, DYNAMIC DIVERSITY: PROJECTED CHANGES IN U.S. RACE AND ETHNIC COMPOSITION 1995-2050 1 (1999).

^{ix} See NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2006, t.6 (2006) [hereinafter NCES 2006], available at http://nces.ed.gov/programs/digest/d06/tables/dt06_006.asp; U.S. Census Bureau, The Federal-State Cooperative for

Population Estimates, <http://www.census.gov/population/www/coop/fscpe.html> (current and projected U.S. demographic data on minorities and women, aggregating the Fed-State Coop's data for 15-19 year olds and 20-24 year olds as the college-age population); see also WMD, *supra* note iii, at t.1-2 (resident U.S. population, 2008), available at <http://www.nsf.gov/statistics/wmpd/pdf/tab1-2.pdf> (note that college-age population is defined as 18-24 year olds).

^x COMM'N ON PROF'LS IN SCI. AND TECH., PROFESSIONAL WOMEN AND MINORITIES: A TOTAL HUMAN RESOURCES DATA COMPENDIUM Chapters 1-2 (17th ed. 2008) [hereinafter CPST 2008].

^{xi} SEI 2010, *supra* note vi; CPST 2008, *supra* note x, at Figure 3-1; see also T.B. HOFFER, M. HESS, V. WELCH, JR., AND K. WILLIAMS, NAT'L OPINION RESEARCH CENTER, DOCTORATE RECIPIENTS FROM UNITED STATES UNIVERSITIES: SUMMARY REPORT 2006 (2007) [hereinafter Doctorate Recipients] (reporting on data collected in the Survey of Earned Doctorates, conducted for six federal agencies, NSF, NIH, USED, NEH, USDA, and NASA by NORC).

^{xii} SEI 2010, *supra* note vi, at Appendix Table 2-17, available at <http://www.nsf.gov/statistics/seind10/append/c2/at02-17.pdf>; WMD, *supra* note iii, at 20; MIT Brief, *supra* note vii; PCAST 2004, *supra* note v, at parts 3 and 4; see also NCES 2006, *supra* note vi, at t.274, available at http://www.nces.ed.gov/programs/digest/d06/tables/dt06_274.asp; CPST 2008, *supra* note viii, at Figure 3-1; NAT'L SCI. FOUND., SCIENCE AND ENGINEERING DEGREES BY RACE/ETHNICITY: 1997-2006 t.4 (2009), available at http://www.nsf.gov/statistics/nsf10300/content.cfm?pub_id=3786&id=2; NAT'L ACADS., EXPANDING UNDERREPRESENTED MINORITY PARTICIPATION: AMERICA'S SCIENCE AND TECHNOLOGY TALENT AT THE CROSSROADS 27-28 (2010) [hereinafter Crossroads], available at http://www.nap.edu/catalog.php?record_id=12984.

^{xiii} CPST 2008, *supra* note x, at Figure 3-1; see also Doctorate Recipients, *supra* note xi; SEI 2008, *supra* note vi.

^{xiv} JOHN PRYOR, SYLVIA HURTADO, VICTOR V. SAENZ, JOSE LUIS SANTOS, AND WILLIAM S. KORN, HIGHER EDUCATION RESEARCH INSTITUTE, UNIV. CAL.-LOS ANGELES, THE AMERICAN FRESHMAN – FORTY YEAR TRENDS: 1966-2006 (2008), available at <http://heri.ucla.edu/PDFs/pubs/briefs/40yrTrendsResearchBrief.pdf>.

^{xv} *Id.*

^{xvi} Estimated from data in CPST 2008, *supra* note x, at Chapters 2-4. See CPST 2008, *supra* note x, at Chapters 2-4.

^{xvii} CPST 2008, *supra* note x, at Chapter 5 and Figure 3-1 (10% of the STEM workforce in 2006 was comprised of URMs); WMD, *supra* note iii, at t.1-2 (resident U.S. population demographic data, 2008) (college-age population is defined as 18-24 year olds) and t.9-7; Gathering Storm, *supra* note ii, at 49; Science and Engineering Degrees 1997-2006, *supra* note xii; see also Doctorate Recipients, *supra* note xi; SEI 2010, *supra* note vi, at Appendix Table 2-12, (2010), available at <http://www.nsf.gov/statistics/seind10/append/c2/at02-35.pdf> (9.1% of the STEM workforce in 2006 was comprised of URMs); PCAST 2004, *supra* note vii, at part 3.

^{xviii} PCAST 2004, *supra* note vii, at part 3. See also *supra* note xvii.

^{xix} SEI 2002, *supra* note ii, at 3-12, 3-15 to 3-24, 3-27, 5-29; WMD, *supra* note iii, at 20-22, Text Table 5-2 at 52. As only 9.1% of all higher education faculty are members of these minority groups, the percentage of those who are faculty in science and technology fields is even less. See NCES 2006, *supra* note ix, at t.229, available at http://www.nces.ed.gov/programs/digest/d06/tables/dt06_229.asp.

^{xx} S.A. JACKSON, BUILDING ENGINEERING AND SCIENCE TALENT, THE QUIET CRISIS: FALLING SHORT IN PRODUCING AMERICA'S SCIENTIFIC AND TECHNICAL TALENT (2004), available at http://www.bestworkforce.org/PDFdocs/Quiet_Crisis.pdf; Standing Our Ground, *supra* note i.

^{xxi} See MIT Brief, *supra* note vii.

^{xxii} See, e.g., SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES (2008); Patricia Gurin, et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 3, 330-36 (2002); Helen Lippman, *Variety is the Spice of a Great Workforce*, BUSINESS & HEALTH, May 1, 2000; and Somnath Saha, Gretchen Guiton, Paul Wimmers, and LuAnn Wilkerson, *Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in U.S. Medical Schools*, 300 J. AM. MEDICAL ASS'N 1135-1145 (2008).

^{xxiii} *Id.*; see also ROBERT BURGOYNE, RALPH C. DAWSON, ARTHUR L. COLEMAN, SCOTT R. PALMER, THEODORE M. SHAW, WITH JAMIE LEWIS KEITH, AM. ASS'N FOR THE ADVANCEMENT OF SCI. WITH AM. ASS'N OF UNIVS., HANDBOOK ON DIVERSITY AND THE LAW: NAVIGATING A COMPLEX LANDSCAPE TO FOSTER GREATER FACULTY AND STUDENT DIVERSITY IN HIGHER EDUCATION Appendix IX (ed. Jamie Lewis Keith 2010) [hereinafter *Handbook*], available at <http://php.aaas.org/programs/centers/capacity/publications/complexlandscape/PDFs/LawDiversityBook.pdf>; SEI 2008, *supra* note vi; MIT Brief, *supra* note vii.

^{xxiv} It may be helpful to the reader to review the Key Definitions section in the *Handbook*, *supra* note xxiii, at 23-29 (Chapter IV) before reading Section III of this Summary and Highlights.

^{xxv} JAMIE LEWIS KEITH AND DARYL E. CHUBIN, AM. ASS'N FOR THE ADVANCEMENT OF SCI., ASS'N OF AM. UNIVS., *HANDBOOK ON DIVERSITY AND THE LAW SUMMARY AND HIGHLIGHTS* 6-9 and accompanying notes, 45-51 (Chapter VII), 77-104 (Chapter VIII), and Appendix 1 (ed. Arthur L. Coleman, 2011) [hereinafter *Handbook Summary*], available at http://php.aaas.org/programs/centers/capacity/documents/LawDiversity_SUMMARY.pdf; *Handbook*,

^{xxvi} See *Handbook Summary*, *supra* note xxv, at 6-9; *Handbook*, *supra* note xxiii, at 45-51 (Chapter VII), 77-104 (Chapter VIII), and Appendix 1. Note also that where a remedial justification is required for race or gender conscious action in employment, such justification may be viewed to include both situations in which the need for remediation is evidenced by discrimination, a manifest imbalance or underutilization of women or minorities by an employer—as well as actions that further the equal opportunity objectives of Title VII, such as capacity building programs when there is an artificially limited labor pool of women or minorities. In fields such as STEM disciplines, where there is a “pipeline problem” because there are very few minorities or women in the available and qualified labor pool, there may be a “trainable cohort” of women or minority graduate students, fellows, or junior faculty who could be prepared to expand the available and qualified labor pool and compete successfully for tenure and tenure-track positions. Limited, targeted, appropriately designed, and implemented capacity-building programs for this cohort (e.g., certain time-limited assistantships, internships, fellowships, visiting and junior appointments) are justified.

^{xxvii} See *Handbook*, *supra* note xxiii, at 43-44 (Chapter VI) and 153 (Appendix I); *Handbook Summary*, *supra* note xxv, at 9; ARTHUR COLEMAN, KATHERINE LIPPER, AND JAMIE LEWIS KEITH, *BEYOND FEDERAL LAW: TRENDS AND PRINCIPLES ASSOCIATED WITH STATE LAWS BANNING THE CONSIDERATION OF RACE, ETHNICITY, AND SEX AMONG PUBLIC EDUCATION INSTITUTIONS* (2011) [hereinafter *Beyond Federal Law*].

^{xxviii} *Handbook Summary*, *supra* note xxv, at 6-9; *Handbook*, *supra* note xxiii, at Chapters VII, VIII, and Appendix 1.

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

^{xxx} See *Beyond Federal Law*, *supra* note xxvii.

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

^{xxxii} See *Handbook*, *supra* note xxiii, at 93-105 (Chapter VIII), Appendix I, and Appendix III.

^{xxxiii} See *Handbook*, *supra* note xxiii, at 93-94 (Chapter VIII) and Appendix B, part II.

^{xxxiv} See *Handbook*, *supra* note xxiii, at 182-85 (Appendix III, Section 3.a, U.S. Solicitor General’s arguments to the U.S. Supreme Court at its invitation while considering whether to grant certiorari in *Taxman v. Bd. of Ed. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997)).

^{xxxv} See also *Handbook, supra* note xxiii, at 89-91, 93-94 and Appendix, at 173-76, addressing *Johnson v. Transp. Agency*, 480 U.S. 616, 632-34, 642 (1987) (Supreme Court upheld the consideration of race and gender as one among many factors in promotion decisions to achieve affirmative action goals where there was a manifest imbalance of women and minorities in a skilled role in the employer's workforce, using the trainable cohort of women and minorities in the general labor pool in the area to determine the manifest imbalance); *Steelworkers v. Weber*, 443 U.S. 193 (1979) (Supreme Court upheld reserving 50% of places in a skilled craft training program for trainable Black workers at the plant to build capacity in a traditionally segregated field where representation was not in line with the relevant labor pool, the local trainable labor market).

^{xxxvi} *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

^{xxxvii} Under 42 U.S.C. § 2000e-12(b), "[i]n 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." An institution may 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 requirements that are set-forth in the EEOC regulations.

^{xxxviii} EEOC, Directives Transmittal No. 915.003, Compliance Manual: Race and Color Discrimination, at 15-31 – 15-34 (April 19, 2006)(citations omitted), available at <http://www.eeoc.gov/policy/docs/race-color.html>; see also *Handbook, supra* note xxiii, at 182-85 (addressing *Brief for the United States as Amicus Curiae, Piscataway Twp. Bd. Ed. v. Taxman*, 519 U.S. 1089 (1997)(No. 96-679), 1997 WL 33561365, at *9 (citations omitted) in which the Solicitor General opined that non-remedial affirmative action to achieve a diverse faculty does not violate Title VII where there are specific facts, not just broad assertions, that support the government's compelling need for a diverse workforce to achieve the government's mission—other than diversity as an end in itself—and where narrowly tailored consideration of race furthers that compelling mission); *Handbook supra* note xxiii, at 173-74 (addressing *Steelworkers v. Weber*, 443 U.S. 193, 202, 208 (1979) in which the Supreme Court upheld an employer's training program that reserved 50% of the craft training spots for trainable black employees until the percentage of black craft workers was in line with their representation in the relevant labor pool—the local labor market—as appropriate, time-limited, voluntary affirmative action that implemented Title VII's purpose to break down racial hierarchy in occupations that have been traditionally segregated without barring advancement by non-minorities).

^{xxxix} The Supreme Court has recognized a First Amendment-protected interest of institutions of higher education to exercise their academic discretion. It is this interest upon which Justice O'Connor relies to find a context in which the Court will recognize the compelling educational interest in a broadly diverse student body that can survive strict judicial scrutiny on Equal Protection grounds and justify the appropriate consideration of race in student admissions. See *Grutter v. Bollinger*, 539 U.S. 306, 329, 331-32 (2003).

^{xl} *Brief of the Solicitor General, Taxman v. Bd. of Educ. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (Nos. 94–5090, 94–5112).

^{xli} *Handbook Summary, supra* note xxv, at 9; *Handbook at supra* note xxiii, at Chapter VIII, 96-98, and Appendix I.

^{xlii} See 41 C.F.R. 60-2.10-2.17 (2011); U.S. DEP'T OF LABOR, TECHNICAL ASSISTANCE GUIDE FOR FEDERAL SUPPLY AND SERVICE CONTRACTORS TECHNICAL ASSISTANCE GUIDE FOR FEDERAL SUPPLY AND SERVICE CONTRACTORS 21-22 (Aug. 2009); and 65 Fed. Reg. 68,022, 68,033-34 (Nov. 13, 2000) (to be encoded 41 C.F.R. parts 60-1 and 60-2).

^{xliii} *Id.*

^{xliv} Analysis largely reproduced, with permission, from ARTHUR COLEMAN AND KATHERINE LIPPER, LEGAL UPDATE: *FISHER V. TEXAS CASE SUMMARY* (2011).

^{xlv} The circuit court observed, "This objective calls for a more tailored diversity emphasis. In a state as racially diverse as Texas, ensuring that graduates learn to collaborate with members of racial groups they will encounter in the workplace is especially important." *Fisher v. Univ. Texas at Austin*, 631 F.3d 213, 237 (2011).

Though the challenged portion was enacted relatively recently, a historical review of UT's admissions process reveals a longstanding, institutional commitment to student diversity, including racial diversity, to serve UT's stated goal to "produce graduates who are capable of fulfilling the future leadership needs of Texas." *Id.* (quoting UT's 2004 *Proposal to Consider Race and Ethnicity in Admissions*).

Notably, UT's mission-based commitment to diversity has been reflected in institutional policies and programs beyond admissions, including targeted scholarship programs, expanded outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools.

^{xlvi} Before including race in the "special circumstances" consideration, UT commissioned two studies to determine whether it was enrolling a critical mass of underrepresented minorities. The first study determined that minority students were significantly underrepresented in undergraduate classes of "participatory size" (defined by UT as having between 5 and 24 students). The second reported that minority students felt isolated and insufficiently represented in classrooms. Following more than a year of study, UT adopted the policy to include race and now formally reviews the race-conscious measure every five years. *Fisher*, 631 F.3d at 225.

^{xlvii} The court also contended that the Law negatively impacted minority students, who nationally have lower standardized test scores, in the second decile of their classes at competitive high schools. *Id.* at 241.

One of the three circuit judges declined to join those portions of the opinion that discussed the validity or wisdom of the Law, stating that the panel had not been briefed on those subjects. *Id.* at 247 (King, J., concurring).

^{xlviii} The majority opinion recognized that institutions of higher education need not determine critical mass by aggregating all minority groups in the student body but rather might adopt a more nuanced approach. *Id.* at 246. For example, considering whether critical mass of each minority group has been achieved in particular disciplines, in addition to whether such critical mass has been achieved in the student body as a whole, fits well with *Grutter*'s articulation of the requirement to narrowly tailor a race-conscious policy to achieve educational goals. College students have important, albeit different, educational experiences in the classroom and in extracurricular and living activities. Yet some disciplines do not interact broadly with others. Achieving critical mass of a particular minority group in certain disciplines may not provide important educational experiences for students in other disciplines. Whether critical mass in the student body is enough or whether consideration of critical mass in certain disciplines also may be necessary to achieve desired educational outcomes depends on the particular educational mission of a college or university and the manner in which it delivers its educational programs.

The issue of critical mass was, notably, one on which the U.S. Supreme Court majority in *Grutter* did not devote substantial attention. In contrast, the *Grutter* dissenters devoted substantial attention to the issue, articulating major concerns regarding the University of Michigan's relevant policy and its application. See ARTHUR COLEMAN AND SCOTT PALMER, *ADMISSIONS AND DIVERSITY AFTER MICHIGAN: THE NEXT GENERATION OF LEGAL AND POLICY ISSUES* Chapter 4 (2006).

^{xlix} This caution is reminiscent of Justice O'Connor's reflection in *Grutter* that, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 343. The UT court's concern may be for the shorter term, however.

ⁱ *Fisher*, 631 F.3d at 246. Judge Garza's concurring opinion does not acknowledge what the majority opinion and a number of U.S. Supreme Court cases, including *Grutter*, consider key: that providing broad diversity in the student body of institutions of higher education is critical to the quality of the educational experience for all students, regardless of race, in an increasingly diverse and global society. *Id.* at 247-66 (Garza, J., concurring).

ⁱⁱ In contrast, the majority opinion noted that the policy "has produced noticeable results." The court observed that the 2008 student enrollment included 335 black students and 1,228 Hispanic students – in contrast to only 275 black students and 1,024 Hispanic students in 2004, the last year the Top Ten Percent Law operated without the race-conscious portion of the admissions policy. *Id.* at 226. The majority opinion also noted that minority students admitted under the Law, which mandates only general admission, rather than admission to certain programs or majors, "remain clustered in certain programs, limiting the beneficial effects of educational diversity." *Id.* at 240.

ⁱⁱⁱ However, while higher education does not hold a monopoly on the means to achieve these goals, the concurrence appears to give short shrift to longstanding Supreme Court jurisprudence, recently but not uniquely endorsed by Justice O'Connor in *Grutter*, that recognizes the special societal role of institutions of higher education. *Grutter*, 539 U.S. at 331-32 (e.g., "[U]niversities . . . represent the training ground for a large number of our Nation's leaders.>").

ⁱⁱⁱⁱ Analysis largely reproduced, with permission, from ARTHUR COLEMAN AND KATHERINE LIPPER, *LEGAL UPDATE: COALITION TO DEFEND AFFIRMATIVE ACTION ET AL. V. REGENTS OF THE UNIVERSITY OF MICHIGAN ET AL. CASE SUMMARY* (2011), available at

<http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/coalition-to-defend-affirmative-action-case-summary.pdf>.

^{liv} Hunter v. Erickson, 393 U.S. 385 (1969).

^{lv} Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

^{lvi} Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).

^{lvii} Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237, 248-49 (6th Cir. 2006).

^{lviii} As a subset of *race-conscious programs*, *race-exclusive programs* are programs that condition participation or receipt of a benefit on membership in a particular race. These programs are legally “suspect” and correspondingly are subject to strict judicial scrutiny. As a general rule, they are the hardest programs to sustain, although it is not impossible to satisfy the standard.

^{lix} As a subset of *gender-conscious programs*, *gender-exclusive programs* are programs that condition participation or receipt of a benefit on membership in a particular sex. As a general rule, they are harder than more general gender-conscious programs to sustain, although it is not impossible to satisfy the standard.

^{lx} See *Handbook*, *supra* note xxiii, at 31-40 (Chapter V).

^{lxi} *Id.*

^{lxii} RICHARD KAHLBERG, AFFIRMATIVE ACTION IN HIGHER EDUCATION AFTER THE SEATTLE AND LOUISVILLE DECISIONS: REEXAMINING THE SOCIO-ECONOMIC ALTERNATIVE (2008), available at http://php.aaas.org/programs/centers/capacity/documents/Kahlenburg_Post-Seattle.doc.

^{lxiii} See Appendix B, *infra*, (Search Guidance); *Handbook*, *supra* note xxiii, at Parts B and C, Chapter V, and 77-105, 111-125 (Chapter VIII).

^{lxiv} See, e.g., Office of the Press Sec’y, *The White House and National Science Foundation Announce New Workplace Flexibility Policies to Support America’s Scientists and Their Families*, WHITE HOUSE (Sept. 26, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/26/white-house-and-national-science-foundation-announce-new-workplace-flexi>.

^{lxv} ARTHUR L. COLEMAN, KATHERINE E. LIPPER, JAMIE LEWIS KEITH, DARRYL E. CHUBIN, AND TERESA E. TAYLOR, THE SMART GRID FOR INSTITUTIONS OF HIGHER EDUCATION AND THE STUDENTS THEY SERVE: DEVELOPING AND USING COLLABORATIVE AGREEMENTS TO BRING MORE STUDENTS INTO STEM (2011).

^{lxvi} See *id.*

^{lxvii} See Appendix B, *infra*, (Search Guidance); *Handbook*, *supra* note xxiii, at Chapter VIII.

^{lxviii} See *Handbook*, *supra* note xxiii, Chapter VII (students), Chapter VIII (faculty), and Chapter VI (state restrictions).

^{lxix} Title IX allows some gender exclusive programs under some circumstances. See *Handbook*, *supra* note xxiii, at Chapter VII (students) and Chapter VIII (faculty).

^{lxx} See 41 C.F.R. 60-2.10-2.17 (2011); U.S. DEP’T OF LABOR, TECHNICAL ASSISTANCE GUIDE FOR FEDERAL SUPPLY AND SERVICE CONTRACTORS TECHNICAL ASSISTANCE GUIDE FOR FEDERAL SUPPLY AND SERVICE CONTRACTORS 21-22 (Aug. 2009); and 65 Fed. Reg. 68,022, 68,033-34 (Nov. 13, 2000) (to be encoded 41 C.F.R. parts 60-1 and 60-2).

^{lxxi} See 29 C.F.R. 1608, 1608.3(c) (2011).

^{lxxii} See 42 U.S.C. 2000e-12(b) (2006); *Handbook*, *supra* note xxiii, at 93-105 (Chapter VIII).

^{lxxiii} See *Making the Case*, *supra*, at pages 11-15.

^{lxxiv} See *Handbook*, *supra* note xxiii, at Chapter VIII (faculty) and Chapter VI (state restrictions).

^{lxxv} See *Handbook*, *supra* note xxiii, at Chapter VIII (faculty), Chapter VI (state restrictions), Appendix I (relevant Constitutional, Statutory and Regulatory Authority), and Appendix III (case summaries on employment).