

# The Legal Aspects of Diversity in Academic Pathology

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## Abstract

Diversity and inclusion in academic pathology center on building a diverse, inclusive pathology faculty. Understanding the basics of federal law, and the US Supreme Court cases that interpret those laws, allows one to consider good practices in diversity hire recruitment and retention that protects the pathology chair, the pathology department, and the institution. Consideration of inclusion and unconscious bias are helpful in building and sustaining robust, valuable academic pathology faculty diversity.

## Keywords

diversity, inclusion, African American, mentoring, unconscious bias

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It remains an enduring challenge to our nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.<sup>1</sup>

## Diversity Law

Diversity is a compelling governmental interest,<sup>2</sup> but it is discriminatory to use gender or race as the sole criteria in faculty hiring.<sup>3</sup> A homogeneous faculty does not provide the diversity of views and experiences fundamental for a broad education, rendering an institution vulnerable to damaging discrimination lawsuits<sup>3</sup>; however, institutions risk “reverse discrimination” claims if they fail to establish and follow good practices regarding diversifying their faculty.<sup>4</sup> For any faculty diversity issue, it is imperative that there be a good understanding of the law surrounding the recruitment, hiring, and retention of faculty.

The legality of considering gender and race in faculty employment decisions generally depends on whether an institution is acting on its employment decision in a remedial context or is acting in an attempt to enhance its overall faculty diversity in order to best realize its broad educational mission.<sup>5</sup> While the remedial rationale has been strongly established in Supreme Court precedent, the rationale of enhancing overall faculty diversity has gone unexamined by the Supreme Court.

As such, the diversity rationale applied today in the setting of student admissions, derived from Supreme Court precedent grounded in First Amendment-protected academic freedom interests, are assumed to logically extend to faculty hiring and relating faculty employment issues.<sup>5</sup> It is that reasonable assumption that currently informs institutional and good practices in academic faculty recruitment, hiring, and retention. That the Supreme Court has not to date addressed faculty hiring diversity strongly supports the reasonableness of extending its rationale in student admissions to faculty employment.

## Federal Law

Institutional efforts to diversity faculty are governed by federal constitutional and statutory provisions, the case law interpreting them, and corresponding legal principles regarding the consideration of gender and race in educational programs.<sup>5</sup> The

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principal legal standards informing employment discrimination law are those established under the Equal Protection Clause of the 14th Amendment to the Constitution, Titles VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and their related case law.<sup>4</sup>

### *Equal Protection Clause (US Constitution, 14th Amendment)*

The Equal Protection Clause is part of the 14th Amendment to the United States Constitution, which reads, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>6</sup>

### *Title VI (42 USC § 2000d)*

Title VI of the Civil Rights Act of 1964 states that no one in the United States can be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program receiving federal financial assistance, due to race, color, or national origin.<sup>7</sup> Courts and agencies interpret Title VI as prohibiting both disparate treatment discrimination—intentional discrimination—and disparate impact discrimination—the use of facially neutral procedures or practices that have the effect of subjecting a person to discrimination based on that person’s race, color, or national origin.<sup>5</sup>

### *Title VII (42 USC § 2000e)*

Title VII prohibits employment discrimination—regarding hiring, firing, wages, promotion, fringe benefits, job assignments, and other employment conditions—on the basis of race, color, sex, religion, or national origin; it applies to public employers, and to private employers with 15 or more employees.<sup>5,8</sup> All educational institutions are subject to Title VII; however, Title VII applies only to employment, whereas Titles VI and IX apply to all aspects of an institution’s operations.<sup>5</sup>

### *Title IX (20 USC §§ 1681-1688)*

Title IX prohibits sex/gender discrimination by education programs receiving federal financial assistance.<sup>5,9</sup> “Title IX applies to all aspects of ‘education programs or activities’ that are operated by recipients of federal financial assistance, including admissions, treatment of and programs for participants, and employment.”<sup>5</sup> As does Title VI, Title IX recognizes 3 general types of discrimination—disparate treatment, disparate impact, and retaliation.<sup>5</sup>

### *Private Institutions Receiving Federal Funds = Public Institutions*

All public institutions are bound by constitutional restrictions; that is not the case for private institutions. Courts, though, have

held Title VI to be coextensive with the Equal Protection Clause as it relates to race discrimination. Also, Title IX generally follows the 14th Amendment’s equal protection principles regarding sex discrimination. As such, private institutions receiving federal funds are subject in effective to the same restrictions as those arising under the Equal Protection Clause, under Title VI with regard to race, and under Title IX with regard to gender.<sup>5</sup>

### *Executive Orders 11246 and 11375*

In 1965, Executive Order 11246 stipulated that federal contracts of a certain dollar amount must contain provisions that prohibit discrimination based on race, color, religion, or national origin. Two years later, in 1967, Executive Order 11375 added sex discrimination provisions to the provisions required under Executive Order 11246. Further, it requires not only equal employment opportunity but also affirmative action. Under Executive Order 11246, federal contractors must develop and annually update an Affirmative Action Plan that includes goals and timetables for the increased women and minority utilization.<sup>5</sup> Affirmative Action concerns actions appropriate to overcome the effects of past or present practices or policies and may be court-ordered after a finding of discrimination, negotiated as a remedy in consent decrees and settlement agreements, or conducted pursuant to government regulation.<sup>5</sup> Employers may also effect voluntary affirmative action plans to eliminate a perceived manifest imbalance in a traditionally segregated job category.<sup>5</sup> Importantly, quotas and preferential hiring and promotions are specifically prohibited in an Affirmative Action Plan.<sup>5</sup>

### **Supreme Court History Regarding Diversity**

In 1954, the Supreme Court of the United States held, in *Brown v Board of Education*, that segregation by race in public schools was unconstitutional. Over the next 15 years, the Supreme Court issued several other landmark rulings involving race and civil liberties; however, it permitted lower courts to supervise southern school desegregation.<sup>10</sup>

“The first case taken by the Supreme Court on the subject of the constitutionality of affirmative action in higher education was *DeFunis v Odegaard* (1974)”; however, “the Supreme Court dismissed the case, 5-4, holding that as DeFunis had almost completed his studies, there was no longer a case or controversy to decide. Justice William Brennan . . . accused the court of ‘sidestepping’ the issues, which ‘must inevitably return to the federal courts and ultimately again to this court’.”<sup>10</sup> Indeed, 4 years later, the Supreme Court took on the challenge of affirmative action constitutionality.

*Regents of the University of California v Bakke*, 438 US 265 (1978) “was a landmark decision by the Supreme Court of the United States. It upheld affirmative action, allowing race to be one of several factors in college admission policy. However, the court ruled that specific racial quotas . . . were impermissible.”<sup>10</sup>

The Supreme Court's decision in *Grutter v Bollinger*, 539 US 306 (2003) "largely upheld the position asserted . . . in *Regents of the University of California v Bakke*, which allowed race to be a consideration in admissions policy, but held that quotas were illegal."<sup>11</sup> As the Court's decision in *Grutter* made clear, "[p]ublic universities and other public institutions of higher education [were] allowed to use race as a plus factor in determining whether a student should be admitted. While race may not be the only factor, the decision allows admissions bodies to take race into consideration along with other individualized factors in reviewing a student's application. [Justice] O'Connor's opinion answers the question for the time being as to whether 'diversity' in higher education is a compelling governmental interest. As long as the program is 'narrowly tailored' to achieve that end, it seems likely that the Court will find it constitutional."<sup>11</sup>

While it did not specifically address faculty diversity, the language in *Grutter* supports diversity in faculty hiring. ". . . *Grutter* upheld the use of race as a factor in the admissions program of the University of Michigan Law School. [And although] *Grutter* did not address whether this rationale extends to faculty diversity [s]cholars, lawyers[,] and commentators have widely discussed the issue . . . The same First Amendment right of academic freedom that the Court emphasized in *Bakke* arises in the context of faculty hiring. Indeed, the *Bakke* Court identified the 'four essential freedoms' that constitute 'academic freedom': the freedom of an institution to determine for itself, on academic grounds, who may teach, what may be taught, how it shall be taught, and who may be admitted to study."<sup>4</sup> The *Grutter* court clarified 3 things that touch on faculty diversity; first, is affirmed diversity as a compelling state interest. It found that "[t]he need for faculty diversity is another component of overall diversity on campus, and would this be supported by the courts finding educational diversity to be a compelling interest under federal law."<sup>4</sup> Second, "[t]he Court . . . endorsed the concept of giving deference to educators to make educational decisions. When the makeup of the faculty is tied to the educational mission and pedagogical decisions of the university and its faculty, faculty hiring should also be entitled to such deference."<sup>4</sup> Third, "[t]he Court stressed the importance of context in analyzing racial classifications, and that strict scrutiny was a framework for considering the importance and sincerity of the reasons for the use of race in that particular context. Given the Court's acceptance of the educational value of diversity, and deference to academic decisionmakers, this focus on context may apply beyond the student admissions scenario [into the faculty hiring scenario]."<sup>4</sup>

The Supreme Court in *Fisher v University of Texas*, 579 US (2016) (*Fisher II*) summarized . . . 3 controlling principles: strict scrutiny of affirmative action admissions processes, judicial deference to reasoned explanations of the decision to pursue student body diversity, and no judicial deference for the determination of whether the use of race in admissions processes is narrowly tailored."<sup>12</sup>

## Twenty-Five Years Later

"The [2003 *Grutter* opinion, authored by Justice O'Connor] read, 'race-conscious admissions policies must be limited in time.' 'The Court takes the [school] at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.' The phrase '25 years from now' was echoed by Justice Thomas in his dissent. Justice Thomas, writing that the system was 'illegal now', concurred with the majority only on the point that he agreed the system would still be illegal 25 years hence."<sup>2</sup> On July 3, 2018, the executive office reversed former President Obama's policy on affirmative action in schools, abandoning Obama administration policies that called on universities to consider race as a factor in diversifying their campuses, signaling that the administration will champion race-blind admissions standards."<sup>13</sup> "The Trump administration's decision . . . strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools."<sup>13</sup> This is occurring at a time when "[a] highly anticipated case is pitting Harvard against Asian-American students who say one of the nation's most prestigious institutions has systematically excluded some Asian-American applicants to maintain slots for students of other races. That case is clearly aimed at the Supreme Court."<sup>13</sup> It is through this prism of turbulence and uncertainty that decisions regarding faculty diversity must be considered and made.

## Successful Planning Is Necessary

Given the dynamic legal environment surrounding academic diversity, successful planning for faculty recruitment, hiring, and retention is critical. *Fisher II* remains the Supreme Court's current "final word" on diversity in academia; and it is to it *Fisher II* one can turn for some valuable cues. *Fisher II* suggests faculty diversity goals and policies be worded as precisely as possible, without resorting to numbers only. Further, the necessity for diversity action should be based on evidence-centered academic judgments.<sup>14</sup> The goals and policies should be as limited as possible; indeed, the entirety of the institution's policies, and resultant practices, should "inform an institution's conclusion that other 'workable' race-neutral efforts alone will not achieve its goals."<sup>14</sup> And these policies should have "evidence of meaningful, if limited, positive impact on the achievement of the institution's goals."<sup>14</sup> Finally, the institution should "engage in constant deliberation and continued reflection" to ensure that policies are appropriately focused and limited; indeed, "[t]he broader social context counsels that institutions should use *Fisher II* as an impetus for recommitting to their institutional goals."<sup>14</sup>

## Good Practices

Process and context are paramount for successful recruitment and retention of a diverse faculty. Isolated or individual

departmental programs and practices that are designed and meant to increase diversity do not help establish effective institutional practice or support in the community. These inconsistent, isolated, and scattered initiatives may be well meaning; however, they generally fail to support an institution's need to show compelling need and narrowly tailored action, as required by the Supreme Court.<sup>4</sup>

The institution must lead the way, with institution-wide policies, procedures, and programs, appropriately funded and appropriately accountable, and there must be expressed commitment from leadership—president and dean down to the department chairs—leading their teams toward a clearly expressed institutional diversity initiative. An institution's diversity policy should express the institution's strong commitment to using "legal means to achieve diversity," commitment to the importance of an expanding applicant pool (both of faculty and of students), and commitment to equal opportunity. These strong statements in support of institutional diversity are protective to the institution, as they provide evidence of an institution's strong, well-reasoned, and routinely reviewed commitment to diversity. Without institutional leadership, individual, sporadic efforts may appear noncompelling, and as such risk the allegation of reverse discrimination.<sup>4</sup>

Diversity officers or coordinators, and affirmative action offices, can assist in building and effecting institutional practices aimed at growing diversity; however, that assistance should be part of the overall institutional strategy, and not isolated, independent, or overly deferred to. While enlisting the assistance of the diversity officer can be extremely helpful and protective, diversity officer overinvolvement with specific faculty recruitment or retention situations may appear as undue influence or overinfluence and could arguably be evidence of reverse discrimination.<sup>4</sup> It is important to make clear to faculty that "[t]he intent of Affirmative Action is the hiring of competent people."<sup>15</sup>

Consider perceptions throughout the diversity hire recruitment process; it is critical to avoid any perception that any diversity hiring choice is not merit-based. If that perception develops, then diversity hires risk appearing to have been imposed upon the department, rather than chosen by the department for their merit. The diversity hire then risks being isolated, unsupported by the department, and without proper mentoring. This situation is unfair to both the diversity hire and to the department.<sup>4</sup>

## Recruitment

Some well-established tools used in building academic faculty diversity—expanding networks to bring in more potential applicants, well-crafted position descriptions, and wide advertising of positions—are not as relevant to pathologists as they are to others in academia. The pathology community is relatively small, position descriptions are often very standard, and positions are generally advertised in a relatively small number of well-known pathology journals and web sites.<sup>4</sup> One good opportunity for ensuring robust pathology diversity hire

recruitment is via the search committee. It is important to choose a search committee that is itself diverse and to educate the committee to understand and avoid stereotypical assumptions. Search committees can also benefit from a better understanding of what should and should not be said or asked in an interview and an understanding of how to conduct a search within legal boundaries. During the interview period, it is critical to demonstrate the true collegiality of the department to minimize the threat of isolation upon hiring. And it is important that the employment offer provides a competitive salary to counter any appearance of "low balling" the applicant. These methods are ultimately protective of the department and institution, diminishing the perception that the diversity hire is not merit-based.<sup>3,4,16</sup>

Beyond recruitment efforts, some institutional hiring programs that were specifically targeted to increase diversity have been attempted, sometimes successfully; however, care must be taken in their use. These programs are at tension legally with the laws and regulations regarding nondiscrimination, and the more clearly specific they are, the greater the risk such programs will be legally challenged as reverse discrimination. Although considering race or gender as one factor is currently legal under the holdings of the US Supreme Court, consideration of race or gender as a sole factor would violate the Constitution and Title VII.<sup>4</sup>

## Retention

The pathology chair leads the department and has the best opportunity to set a positive tone for diverse hire faculty retention and in fact to assist the institution in setting that tone. Critical for the success for all new faculty is strong mentoring on teaching, research, and the process of promotion and tenure. Promotion and tenure standards should be clearly communicated in writing, and the tenure process should be open and supportive, rather than adversarial. There should be formal mechanisms for assisting faculty as they progress toward tenure. It is very helpful if the department has the critical mass to provide a new diversity hire a like mentor. A lack of critical mass of other diverse faculty for new faculty support increases the likelihood that a new diversity hire will feel isolated; as such, new diversity hires can best be served by becoming integrated not only in the departmental but in the institutional, academic community. It is also important to ensure the new diversity hire has an appropriate and equitable service load.<sup>3,4,16</sup>

There are great risks of not acting. Hostile climate claims may arise from a faculty member's feeling of being unwelcome or unable to succeed, or from feeling that one is being overwhelming if one speaks up, while irrelevant if one does not speak up—a catch 22 problem. Further, institutional bias claims may arise from the feeling of bias, which may begin at the time of recruitment, with a continuing sense of "otherness," perhaps arising from other faculty's unconscious bias. It is also critical to understand that diversity hires may face greater pressures with work-life balance than other

**Table 1.** Summary of Key Points.

Diversity	<ul style="list-style-type: none"> <li>➤ Compelling governmental interest<sup>2</sup></li> <li>➤ Discriminatory to use gender or race as the sole criteria in faculty hiring<sup>3</sup></li> </ul>
The legal standards informing federal diversity law	<ul style="list-style-type: none"> <li>➤ The Equal Protection Clause of the 14th Amendment to the Constitution<sup>6</sup></li> <li>➤ Title VI of the Civil Rights Act of 1964<sup>7</sup></li> <li>➤ Title VII of the Civil Rights Act of 1964<sup>8</sup></li> <li>➤ Title IX of the Education Amendments of 1972<sup>5</sup></li> <li>➤ Executive Orders 11246 and 11375<sup>5</sup></li> <li>➤ Related case law</li> </ul>
US Supreme Court holdings	<ul style="list-style-type: none"> <li>➤ <i>Regents of the University of California v Bakke</i>, 438 US 265 (1978)—Upheld affirmative action; race is one factor to be considered in college admission policy<sup>10</sup></li> <li>➤ <i>Grutter v Bollinger</i> 539 US 306 (2003)—Upheld <i>Bakke</i>, reaffirming race is an allowable consideration for college admissions; held quotas are not permitted<sup>11</sup></li> <li>➤ <i>Fisher v University of Texas</i>, 579 US (2016) (<i>Fisher II</i>)—reaffirmed the key principles of strict scrutiny of affirmative action admission processes, judicial deference to well-reasoned explanations for pursuing student body diversity, and the lack of judicial deference in determining if the use of race in admissions processes has been as narrowly tailored as possible<sup>12</sup></li> <li>➤ It is reasonable to assume that the Supreme Court holdings regarding diversity in student admissions extends to faculty hiring<sup>4</sup></li> </ul>
Executive position	<ul style="list-style-type: none"> <li>➤ During President Obama’s administration, affirmative action was supported<sup>13</sup></li> <li>➤ President Trump has recently indicated the administration in the future will support race-blind student admission standards<sup>13</sup></li> </ul>
Good practices	<ul style="list-style-type: none"> <li>➤ Inconsistent, isolated, or scattered initiatives for diversity hiring generally fail to support an institution’s need to show compelling need and narrowly tailored action and put the institution at risk for allegations of reverse discrimination<sup>4</sup></li> <li>➤ Institutional diversity officers may be extremely helpful; however, their overinvolvement may appear as undue influence or overinfluence, putting the institution at risk for allegations of reverse discrimination<sup>4</sup></li> <li>➤ It is important to avoid any perception that diversity hiring choices are not merit-based<sup>15</sup></li> <li>➤ In the recruitment of diversity hires, it is important to choose a search committee that is itself diverse and to educate the committee to understand and avoid stereotypical assumptions<sup>16</sup></li> <li>➤ In the retention of diversity hires, it is important that promotion and tenure standards are clearly communicated in writing, that the tenure process is supportive, and that the diversity hire be offered a like mentor if possible<sup>16</sup></li> </ul>
Unconscious bias	<ul style="list-style-type: none"> <li>➤ Unconscious bias toward women in medicine can affect decisions regarding their hiring, promotion, and professional development<sup>22</sup></li> <li>➤ Women and minority faculty are especially vulnerable to unconscious bias due to long-standing stereotypes questioning their scientific and intellectual abilities<sup>24</sup></li> <li>➤ Pathologists can work to overcome unconscious bias and then help others learn about it<sup>25</sup></li> </ul>

faculty.<sup>17</sup> Departmental and institutional diversity itself brings unique benefits to new diversity hires, including opportunities for focused mentorship and particular networking opportunities.<sup>17</sup>

Pathologists must continue to strive to recruit and retain diversity faculty hires and can do more. For example, the Women in Science & Engineering Leadership Institute’s menu of recruiting resources, a valuable tool for women pursuing science careers, contains no pathology resources.<sup>18</sup>

## Unconscious Bias

“Stereotypes about many groups fall along two dimensions, one relating to agency/competence and the other morality/warmth.”<sup>19</sup> Educating a department’s faculty about unconscious (implicit) bias is paramount. “Unconscious bias includes opinions and attitudes that we are not consciously aware of having. Unconscious bias can be difficult to grasp because it contradicts what we intuitively believe about human behavior:

we tend to think that most of our behavior and our thoughts are intentional and chosen.”<sup>20</sup> Unconscious bias can arise from natural mental shortcuts. “. . . unconscious bias results from the way in which our brains process and store information . . . all of use mental shortcuts in order to quickly process new information about the world.”<sup>20</sup> Mental shortcuts are normal, and “. . . ‘not necessarily a bad thing. Without them we would be paralyzed by the amount of information that we receive from the outside world . . . [h]owever, mental shortcuts become a problem when they lead to stereotyping—when we make assumptions about an individual based on what we think members of that person’s social group are like.”<sup>20</sup> “. . . we learn [unconscious biases], starting at an early age, from our family, friends, teachers, and the media. There is evidence that young children often hold the same bias that adults do.”<sup>21</sup> “. . . our unconscious biases tend to be stable over time. They are so ingrained in us that at the fundamental level they are probably exceedingly difficult to change. However, by becoming more aware of them, we may be able to self-correct for their

influence on our behavior.”<sup>21</sup> “Although most people express a conscious desire to be fair and objective, unconscious bias influences the way [we] perceive other people.”<sup>21</sup>

“[Unconscious] bias against women in medicine is prevalent, affecting their hiring, promotions, development, and well-being.”<sup>22</sup> “In the context of academic medicine, women and minority faculty may be especially vulnerable to the effects of unconscious bias . . . [they] are at special risk because of longstanding stereotypes that question their scientific and intellectual abilities.”<sup>23</sup>

Pathologists “. . . can take steps to consciously self-correct for them, thereby limiting their influence on our thoughts and behavior; . . . the first step [is to become] more aware of what unconscious bias is and how it affects people’s behaviors. [Then, it] is also important to educate others about unconscious bias.”<sup>24</sup> It is important for a chair to help the department faculty, perhaps especially new diversity hires, to develop a growth mindset rather than maintaining a fixed mindset. “People with a fixed mindset tend to view human abilities, such as intelligence, as stable and difficult to change. In contrast, people with a growth mindset view human abilities as malleable and changeable through sustained effort.”<sup>25</sup> “These differences in mindset have particular relevance to people who belong to stereotyped groups. Because people with fixed mindsets view human traits as inherent and stable, they are more prone towards stereotyping others. They are also less likely to cope well in environments where stereotypes are pervasive.”<sup>25</sup>

“Adopting a growth mindset is helpful for many people, but it might be especially important for individuals who belong to negatively stereotyped groups.”<sup>25</sup> New diversity hires should pay close attention to what they are telling themselves—is success or failure indicative of your inherent ability? They should also recognize that they have a choice—failure can be interpreted in different ways, including as a challenge. New diversity hires who have a fixed mindset need to learn to talk back to the fixed mindset “voice”—instead of failure being proof that one should not pursue an academic career, remind oneself it is an opportunity to improve and grow. And as they learn to accept challenges and interpret the results within a growth mindset, they will learn that if it is ok to fail, then new challenges do not bring as much anxiety and fear.<sup>25</sup>

## Conclusion

Table 1 summarizes the key points. Faculty diversity law is essentially federal law, arising from the United States Constitution, Congressional law, and Executive orders, and their interpretation by the United States Supreme Court. The use of good practices can assist a department in legally meeting its faculty diversity needs. Successful diversity faculty recruitment and retention requires chair oversight, formal processes, and close attention to unconscious bias.

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