

Challenges & Opportunities:

How the Law Impacts the University's Diversity & Inclusion Efforts

Division of Institutional Integrity Annual Legal Symposium

November 9, 2020

Topics for Today's Discussion

- ▶ An overview of the legal framework
- ▶ How the current legal landscape impacts the structure of our diversity & inclusion efforts
- ▶ A review of some current diversity & inclusion efforts within Academic Affairs and how you can help

The Legal Framework Surrounding University Diversity Initiatives, and Faculty Hiring Specifically:

- ▶ Title VII of the Civil Rights Act of 1964
- ▶ Applicable Executive Orders
- ▶ Equal Protection Clause Jurisprudence

Title VII of The Civil Rights Act of 1964

- ▶ Also known simply as “Title VII”
- ▶ Federal law that prohibits employment discrimination on the basis of membership in a “protected class:”
 - ▶ Race, color, religion, sex, national origin
 - ▶ Exception for Bona Fide Occupational Qualifications (BFOQ)
- ▶ Provided for the creation of the Equal Employment Opportunity Commission (EEOC)

Title VII of The Civil Rights Act of 1964

- ▶ Title VII is applicable to public and private Institutions of Higher Education
 - ▶ As amended by the Equal Employment Opportunity Act of 1972
- ▶ Title VII was originally intended to address historically discriminatory employment practices and underrepresentation of women and minorities

The Makings of a Title VII Claim

- ▶ Disparate treatment (intentional discrimination): someone claims to have been treated differently on the basis of their membership in a protected class
 - ▶ *McDonnell Douglas Corp. V. Green*, 411 U.S. 792 (1973)
- ▶ Disparate impact: someone claims that a facially neutral requirement or or rule tends to negatively impact members of a protected class
 - ▶ Generally requires some statistical evidence (4/5 rule)

Executive Order 11246

- ▶ Executive Order 11246: generally prohibits discrimination and requires that federal contractors who do over \$10,000 in government business in one year to take “affirmative action” to ensure that “employees are treated without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.”
 - ▶ *as amended
 - ▶ Originally published in 1965 by President Lyndon B. Johnson
 - ▶ Enforced by the Dept. of Labor’s Office of Federal Contract Compliance Programs (OFCCP)

Executive Order 11246

- ▶ Originally intended to allow for the implementation of affirmative action programs to specifically address discriminatory employment practices and underrepresentation
 - ▶ In response to the civil rights movement of the 1950's and 60's
- ▶ Case law has effectively limited the affirmative action provision
 - ▶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)

The Equal Protection Clause

- ▶ The Equal Protection Clause of the 14th Amendment of the U.S. Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”
 - ▶ UNCC is a public institution, and is, therefore, subject to the Equal Protection Clause as a state actor.

Equal Protection Jurisprudence: Strict Scrutiny

- ▶ Strict Scrutiny: Race-based classifications are subject to strict scrutiny. Strict Scrutiny is the highest level of constitutional scrutiny.
- ▶ Requirements:
 1. There must be a *compelling (state) interest*, and
 2. The law or rule must be *narrowly tailored* to achieve that interest.

Equal Protection Jurisprudence: Strict Scrutiny

- ▶ Strict scrutiny is applied regardless of whether the purpose of the rule or law is *invidious or benign*
- ▶ Remedial rules or numerical set asides require clear proof of *specific past discrimination*
 - ▶ See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)
- ▶ All racial classifications imposed by any government actor must be analyzed under strict scrutiny
 - ▶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)

Equal Protection Jurisprudence: Intermediate Scrutiny

- ▶ Intermediate Scrutiny: Gender-based classifications are subject to intermediate scrutiny. Lower level of scrutiny than strict scrutiny, but is more rigorous than rational basis review.
- ▶ Requirements:
 1. There must be an *important* goal, and
 2. The law or rule must be *substantially related* to the achievement of that goal
- ▶ *See Craig v. Boren*, 429 U.S. 190 (1976)

The Current Legal Landscape: Race/Ethnicity

- ▶ Any program that makes race or ethnicity a factor for employment decisions--such as hiring, promotion, or layoff--is “constitutionally suspect” under current Equal Protection Clause jurisprudence
- ▶ In order to survive constitutional review, the programs must be “narrowly-tailored” to meet a “compelling interest.”

“Compelling Interest”

- ▶ *Brown v. Board of Education*, 347 U.S. 483 (1954): Court concludes government-sanctioned segregation is inherently unequal and a violation of the Equal Protection Clause.
- ▶ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978): invalidates admissions program at UC Davis Medical School that reserved 16/100 places for qualified minorities in effort to address societal injustices. Court affirms that “diversity” is a compelling interest, but concludes racial balancing to address societal injustices is not a compelling interest.
- ▶ *Grutter v. Bollinger*, 539 U.S. 306 (2003): Forecasts that diversity as a compelling interest justifying race-conscious decision making may not be enduring and may “sunset” when the aims of the programs (achieving a critical mass of underrepresented students) are achieved.
- ▶ *Fisher v. University of Texas* (2016): Court reaffirms that diversity within the student body may still be considered a “compelling interest.”

“Compelling interest” continued

- ▶ Open question regarding whether diversity in academic workforce is considered a “compelling interest.”
- ▶ Addressing underutilization/manifest imbalance of race and ethnicity in an employer’s own workforce (rather than the workforce at large) is regarded as a “compelling interest.”

“Narrowly-tailored”

- ▶ Even if we satisfy the “compelling interest” standard, utilizing race or ethnicity as a factor in employment decisions must be “narrowly-tailored”
- ▶ According to Fisher, this means:
 - ▶ Specific acknowledgement of the value of diversity to the mission of our University, and
 - ▶ *Proving* that a 'nonracial approach' would not promote our interest in meeting the compelling interest 'about as well and at tolerable administrative expense.’”
 - ▶ In order to lawfully consider race or ethnicity of an applicant for admission, it must be “a 'factor of a factor of a factor' in the holistic-review calculus,” and “race, in this indirect fashion, considered with all of the other factors...can make a difference to whether an application is accepted or rejected.”

Title VII

- ▶ Continues to require equal opportunity to employment, without regard to an individual's protected status, including race, national origin, color, sex, religion
- ▶ The Act has not be interpreted to limit its protections to historically disadvantaged groups. Males, for example, have successfully utilized Title VII to seek redress for employment practices that discriminate based on sex.
- ▶ Continues to prohibit seemingly neutral policies or practices that have a “disparate impact” on members of a protected group.

Lawful consideration of race and ethnicity in hiring decisions to address workforce disparities

- ▶ Remedial justification arises *if* there is sufficient disparity in representation between
 - ▶ University's own workforce (by discipline/job category) and
 - ▶ Available qualified recruitment pool
- ▶ Generally must establish that the representation is less than 80% of the representation of the race/ethnicity in the qualified recruitment pool for consideration of race/ethnicity to be lawful
- ▶ Recall, however, that “balancing” is not a permissible objective. Remedial programs must be temporary and conclude when the underutilization statistic is no longer applicable.

How all of this impacts the UNC Charlotte's approach to diversity & inclusion

- ▶ Outside limited exceptions, utilizing race/ethnicity/sex as a basis for employment decisions is unlawful;
- ▶ Even when utilization of race/ethnicity/sex as a factor is lawful, the University generally must demonstrate:
 - ▶ Attempt to utilize neutral approaches that have been inadequate or that any such approaches are not administratively feasible, and
 - ▶ Its use of race/ethnicity/sex as a factor is indirect, not circumventing a holistic, individualized assessment of the candidate, applicant, or employee.

Communication is Key

Permissible: Using awareness of population demographics and issues of race and sex based inequities in society or a particular field as a context for examining how those issues may be reinforced by our current approaches to hiring and retention of employees.

Impermissible: Using racial balancing or righting societal wrongs as justification for decision-making that takes race into account.

Multi-prong Approach

- ▶ Institutional acknowledgement of the value of diversity and inclusion to the central mission of the University
- ▶ Engage affirmative action plans to identify underutilization in academic disciplines and establish strategies for remedying underutilization
- ▶ Seek to identify and remove barriers that may contribute to underrepresentation and prevent us from furthering diversity & inclusion
- ▶ Train decision-makers to be aware of the role of implicit bias in decision-making process
- ▶ Ensure that commitment to diversity & inclusion is integrated into employment decision-making processes—including the promotion and tenure process.

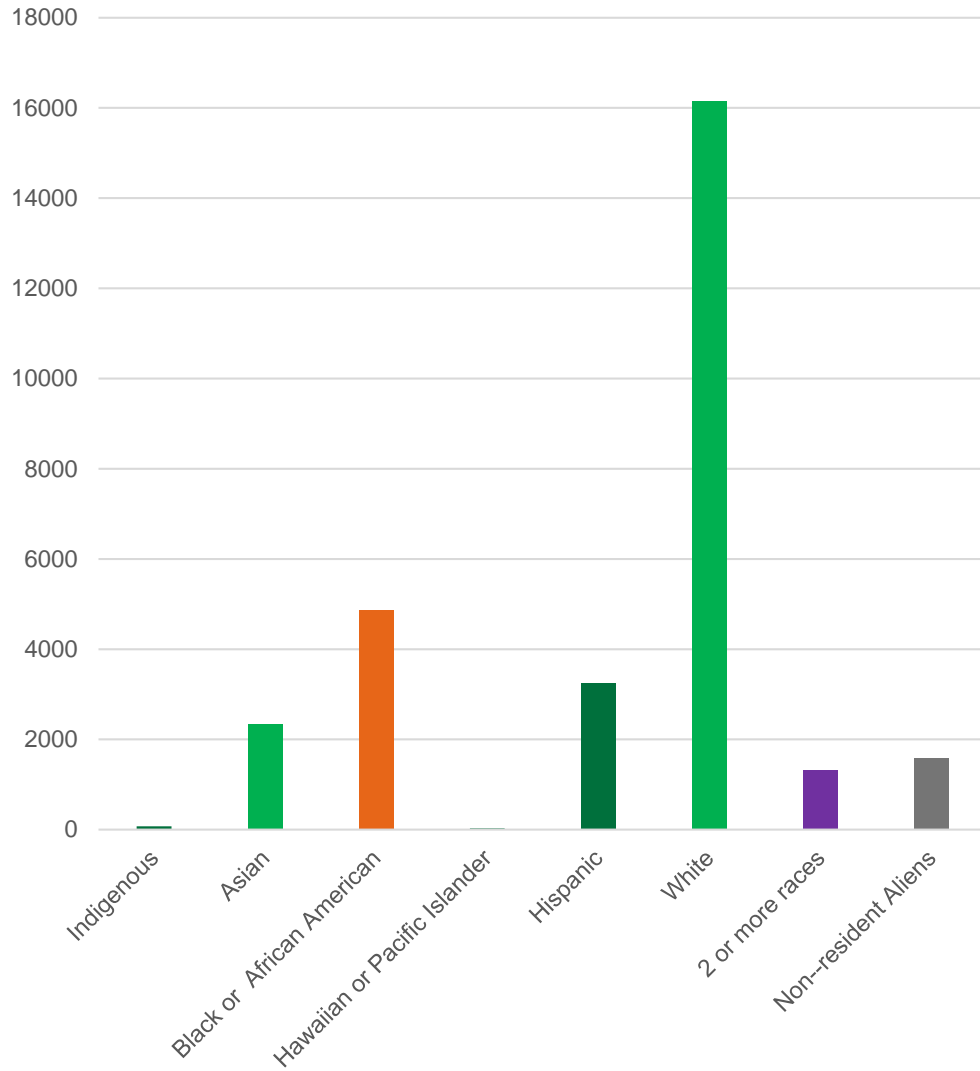
Title VII - requires equal opportunity to employment

- ▶ We know that data shows **diverse teams are more productive**.
 - ▶ And we know that minority professors had a positive impact on students education (retention rates and broadens the scope of classroom discussions).
 - ▶ That women faculty play a key role in the success of female graduate students
 - ▶ That women undergraduate students are more likely to take on a leadership role — even when partnered with male students — when a female role model is present.
 - ▶ So, how do we get to an answer for “is your university (Department) being as diverse as it could be?” and “Is the university (Department) being as productive as it could be?”
- ▶ Excerpted from: <https://www.nature.com/articles/d41586-020-01883-8>

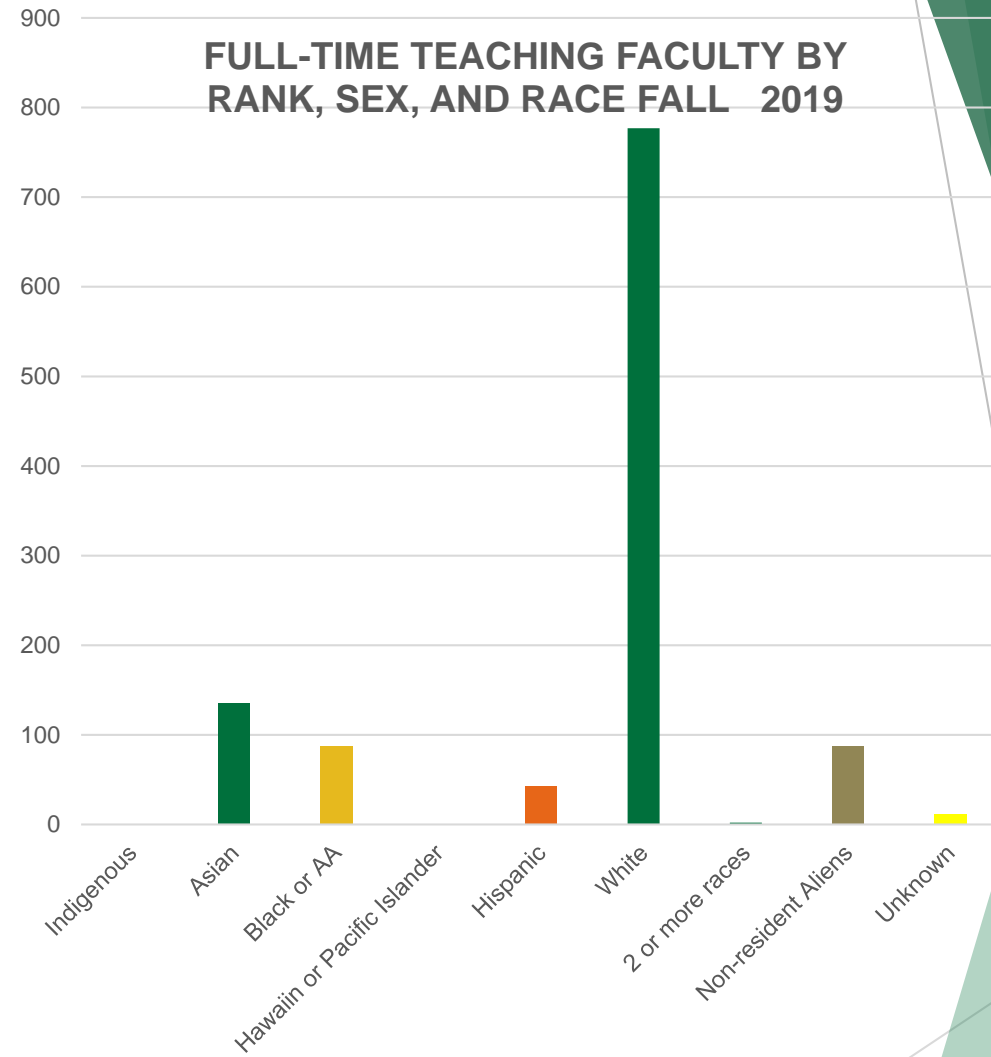
We integrate our work across many aspects of faculty and student success

- ▶ Diversity should not be an add on – it should be part of everything we do and if we make our climate, policies and practices equitable and inclusive, everyone benefits and more people will apply, attend, be hired, stay and be successful
- ▶ 27% of our students are from historically minoritized groups
- ▶ 11% of our faculty are from historically minoritized groups

ENROLLMENT SUMMARY



FULL-TIME TEACHING FACULTY BY RANK, SEX, AND RACE FALL 2019



- ▶ Recruitment training – best practices for hiring the ‘BEST’
- ▶ iChange Network is part of the APLU INCLUDES program
 - ▶ Recruitment, retention and success
- ▶ AGEP-NC and how that is focused on changing things in PhD programs in STEM for students.