
***Students for Fair
Admissions v. Harvard:*
Understanding What the
Court Said and What It
Means for Higher Education**

**An Access & Diversity Collaborative
Webinar**

In collaboration with EducationCounsel, LLC

October 23, 2019

Introductions



- **Wendell Hall, Moderator**
 - Senior Director, Higher Education, The College Board

- **Art Coleman**

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- Managing Partner, EducationCounsel, LLC.
- Former U.S. Department of Education Deputy Assistant Secretary for Civil Rights

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- Partner, EducationCounsel, LLC
- Former Primary Counsel, MIT; Vice-President, General Counsel and Secretary, University of Florida



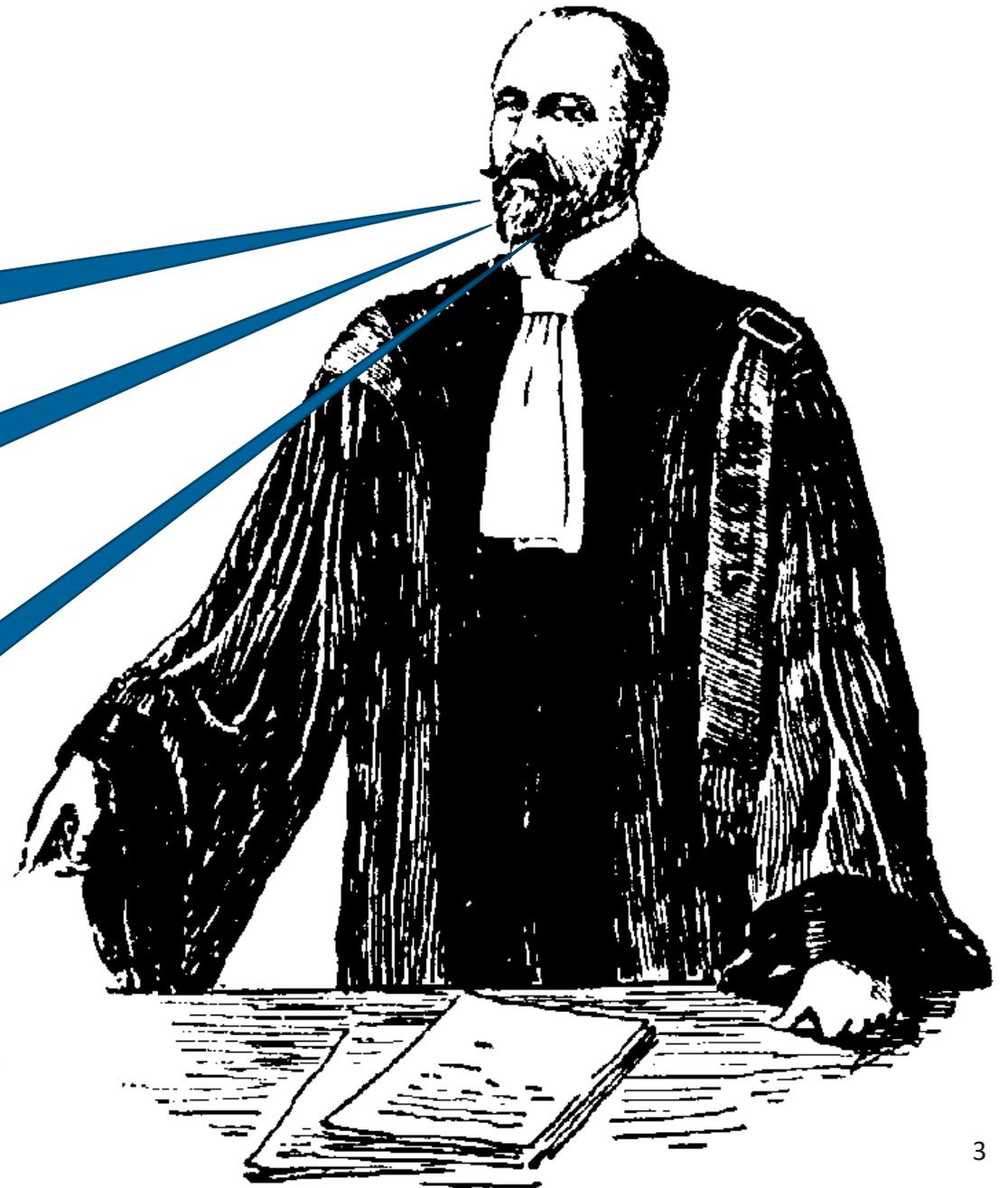
Disclaimers

Lawyers...just sayin'

It depends.

It's a
question of
evidence.

Facts
matter.



(Nothing in this discussion constitutes institution-specific legal advice.)

Thanks to our superstars!!



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Superstar	Affiliation
Alexandra Schimmer	Denison University General Counsel
Frank Trinity	Association of American Medical Colleges Chief Legal Officer
Peter McDonough	American Council on Education Vice President and General Counsel
Holly Peterson	NACUA Associate Director of Legal Resources
Kedra Ishop	University of Michigan Vice Provost for Enrollment Management
Wendell Hall	College Board Senior Director, Higher Education

‘Everything Is Not Sunshine’: What the Harvard Decision Means for Race-Conscious Admissions

Harvard Won a Key Affirmative Action Battle. But the War’s Not Over.

More than 40 years after the Supreme Court first weighed in on race-conscious admissions, the fight remains as fractious as ever.

Students for Fair Admissions Files Notice of Appeal in Harvard Admissions Case

EDUCATION

Harvard Won This Round, but Affirmative Action Is Weak

A judge ruled that the university’s use of race in admissions was not discriminatory. But decades of case law have already severely limited the scope of such policies.

Judge Rules Harvard’s Race-Conscious Admissions Policy Constitutional

Federal judge finds university doesn’t intentionally discriminate based on race in admissions

Harvard doesn’t discriminate against Asian-Americans in admissions, judge rules

Overview and Themes

- I. Harvard: The Big Picture
- II. Harvard: The Details
- III. UNC: A Postscript
- IV. Areas of Focus
- V. Resources



SFFA v. Harvard

Appropriate consideration of race in admissions

- No goals associated with racial balancing
- Race not considered as a mechanical factor in the admissions process

No intentional discrimination against Asian American applicants

- Absence of evidence of racial animus, no pattern of stereotyping, etc.
- Statistical models inconclusive; bias could surface from other sources—indeterminate

No failure to pursue viable race-neutral alternatives

- Ample investment in outreach, recruitment, aid, and consideration of neutral admission criteria
- Rejection of SFFA's proposed alternatives



I. The BIG Picture

40 years of aligned precedent

1978: Bakke

- J. Powell
- EBD = Compelling Interest
Concept

1994: USED Title VI Aid Policy

1980: USED Title VI Regulations

2003: Grutter/Gratz

- Majority
- EBD=Compelling Interest
- Strict Scrutiny
Framework

2013: Fisher I

- Majority
- Rigor on inquiry/
Evidence re Necessity/Race-Neutral

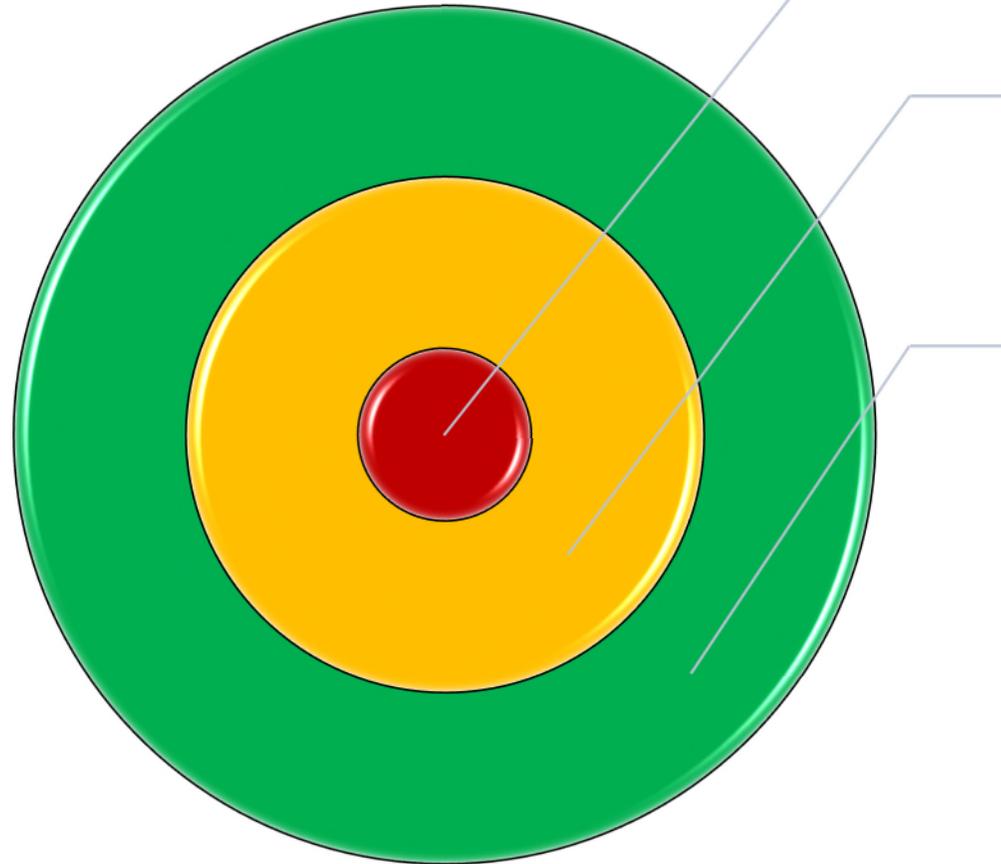
Pay attention to THESE cases and rules

2016: Fisher II

- Small Majority
- Emphasis on
Evidence

Mission matters

...even when it's in the background



Mission

Policy,
Practice &
Process

Educational
Outcomes



Harvard is like—and not like—past cases

No copy and paste here!



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Issue	<i>Harvard D.Ct. 2019</i>	<i>Fisher 2016</i>	<i>Grutter 2003</i>
Named, harmed student	No	Yes	Yes
Reliance on stats	Extensive	Very limited	Limited
Neutral context	Clear investment	Clear investment + 7 years w/o race	Not evident
Tracking of race	Yes	No	Yes
Policy design	Individualized holistic review	Individualized holistic review -25% of class - Race a “factor of factor of factor”	Individualized holistic review

Facts Matter

...but data isn't everything.



Although statistics “perhaps tell ‘what,’ they do not tell ‘why.’”

Harvard

SFFA

Fact witnesses

Record of decision-making

Statistics/Data

Expert witnesses

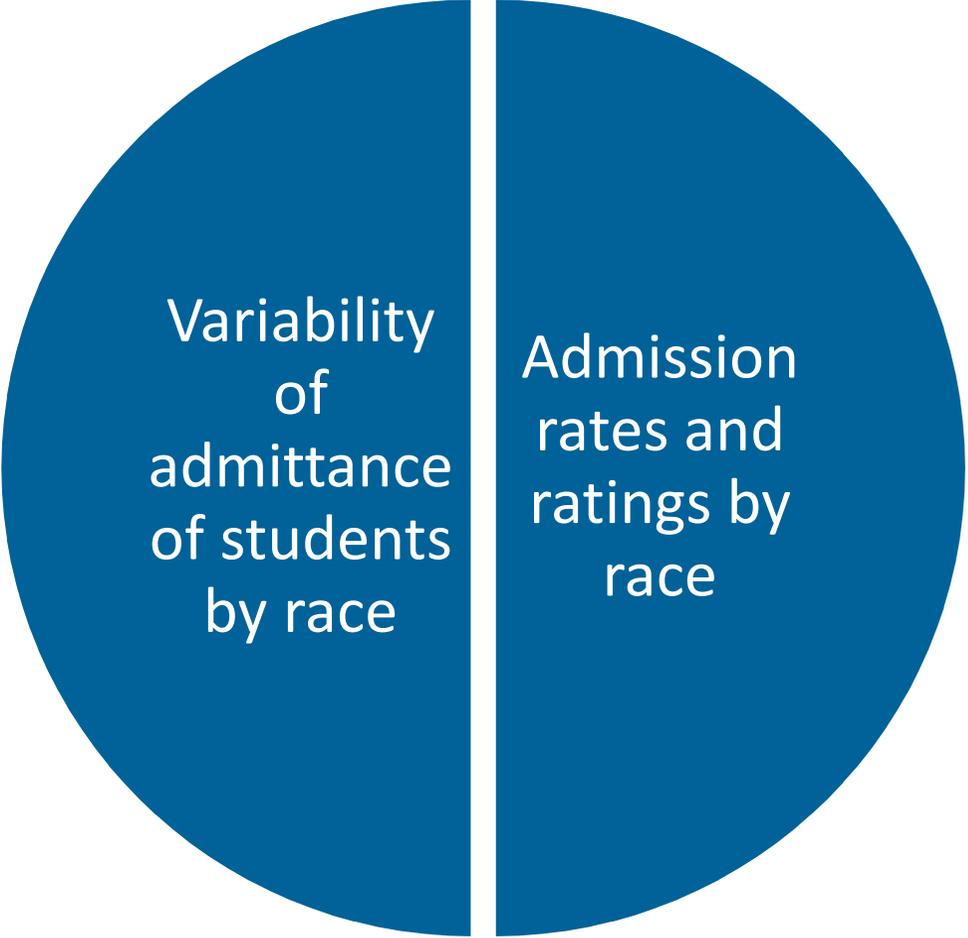
Isolated emails re Asian American applicants

Statistics/Data

Expert witnesses

But statistics *can* be important...

“Statistical evidence is perhaps the most important evidence in reaching a resolution of this case, given SFFA’s heavy reliance on the data to make out its claims.”

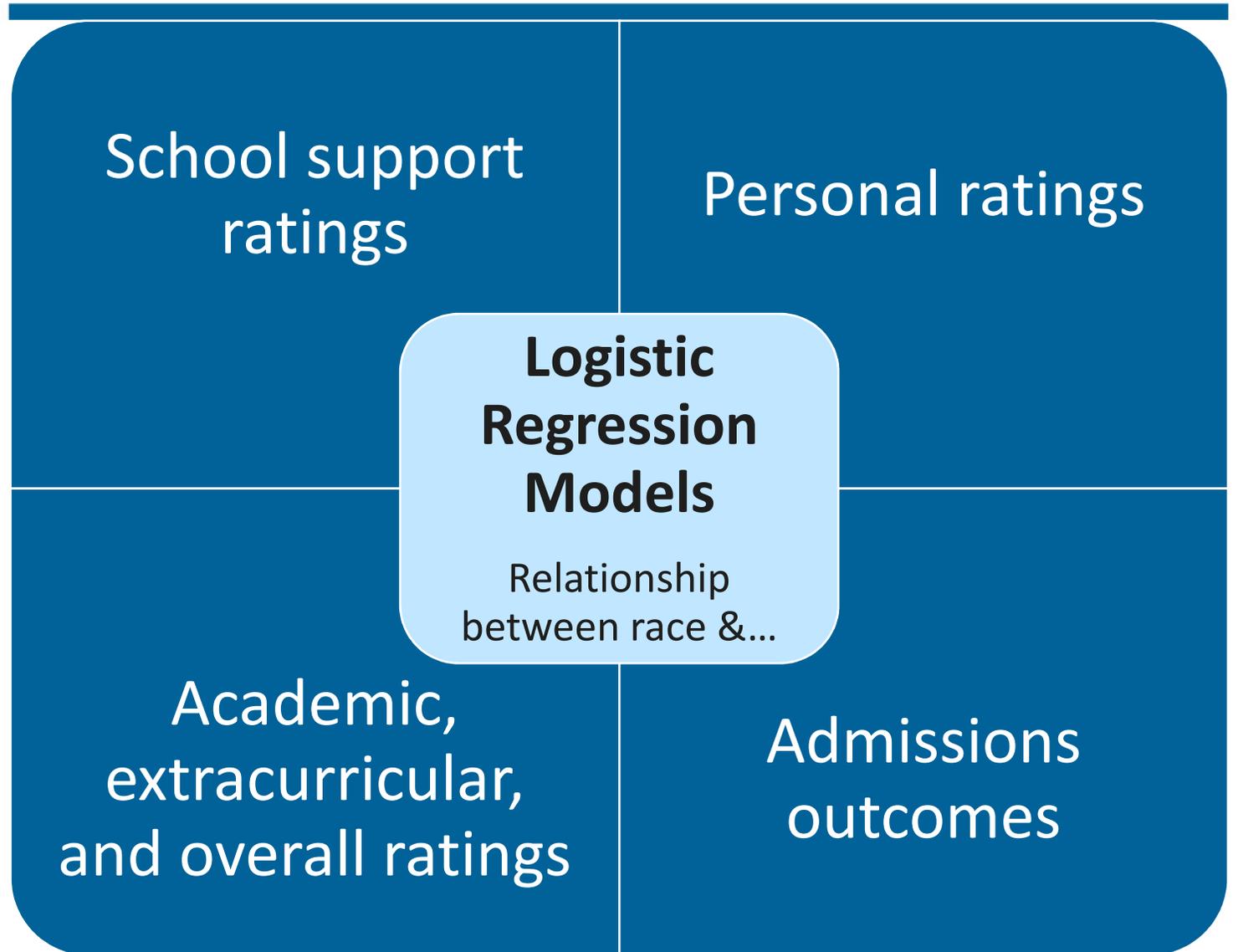


Variability
of
admittance
of students
by race

Admission
rates and
ratings by
race

But statistics *can* be important...

“Statistical evidence is perhaps the most important evidence in reaching a resolution of this case, given SFFA’s heavy reliance on the data to make out its claims.”



Grades and test scores don't = merit...

...as important as test scores and grades may be.



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Applications and Enrollment

- 35,000 applications
- 2000 admitted
- 1600 enrolled

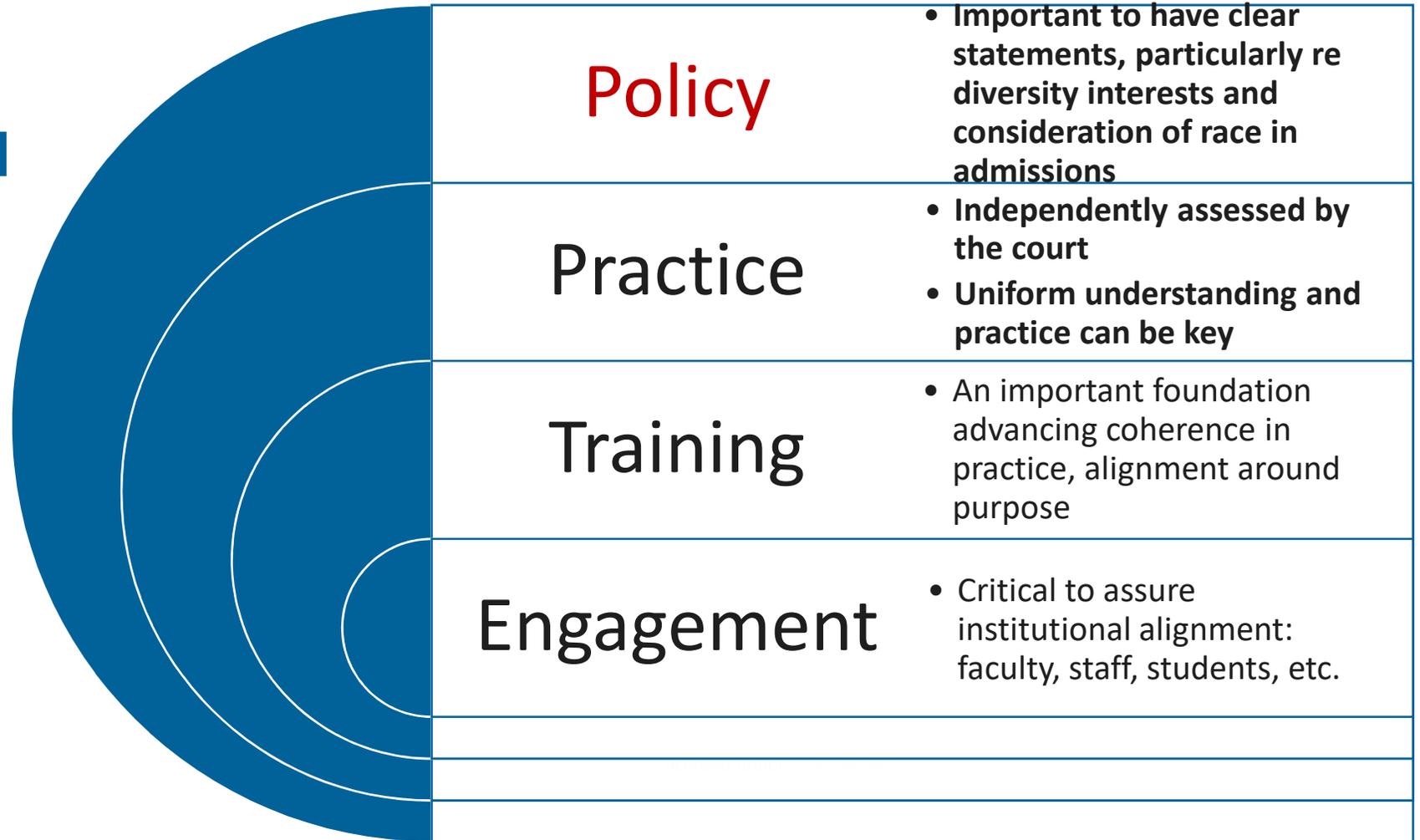
Perfect scores

- 8000: GPAs
- 2700: Verbal SATs
- 3400: Math SATs

- All applicants were “academically prepared...”
- “Most” from “every racial group” had “roughly similar level of academic potential”
- SAT scores and grades of applicants “from each racial group differ[ed] significantly”

“Policy, meet
practice...

...and training...and
engagement.”

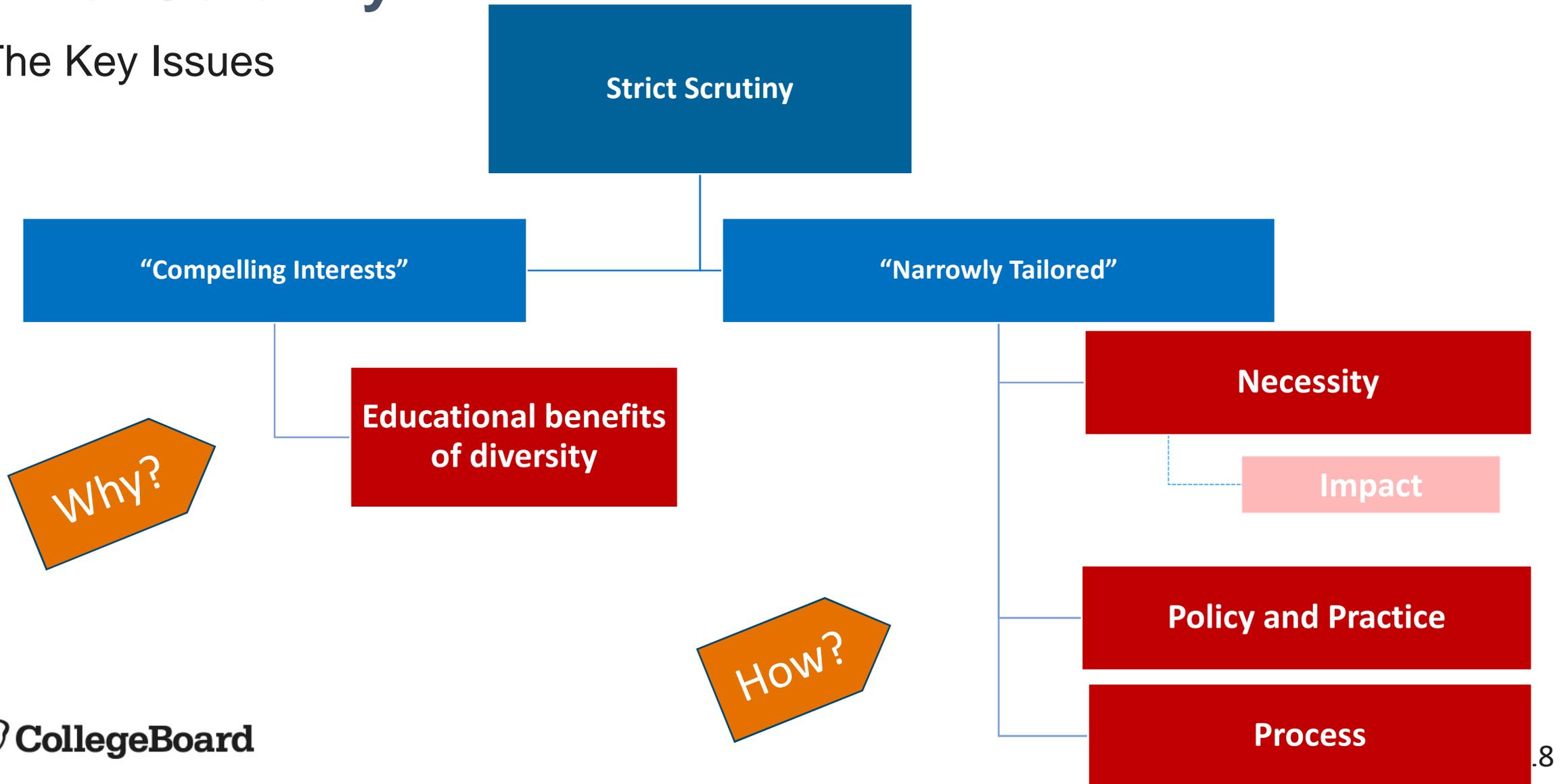


II. The Details



Strict Scrutiny

The Key Issues



Takeaways

Educational Benefits of Diversity

- **Precedent-aligned**
- Harvard-specific
- Key issues

EBD =
compelling
interest

- Improved teaching and learning
 - More robust academic environment w/ enhanced breadth and depth of learning
- Workforce readiness
- Civic readiness/leadership
- Eliminating stereotypes, etc.

Evidence of
authenticity
is essential

- Mission tied to curricular and co-curricular program and investments
- Research committee findings
- Shared views of faculty, staff, students, alumni

Takeaways

Educational Benefits of Diversity

- Precedent-aligned
- **Harvard-specific**
- Key issues

Implementation

Teaching students to engage across differences through immersion in diverse community

Broaden faculty perspectives to expand reach of curriculum and range of scholarly interests

Takeaways

Educational Benefits of Diversity

- Precedent-aligned
- Harvard-specific
- **Key issues**

Clarity on mission-aligned concept

- Benefits of broad diversity, including racial and ethnic diversity

Application of framework

- Improved teaching and learning
- Workforce readiness
- Civic readiness/leadership
- Eliminating stereotypes, etc.

Evidence of authenticity

- Mission and related policy statements
- Evidence of research
- Evidence of program investment & design

Takeaways

Necessity

- **Precedent-aligned**
- Harvard-specific
- Key issues

Process of consideration of neutral alts./ judgment

- Record of process and documentation of consideration of neutral alternatives' viability
- The Smith Committee deliberations

Feasibility of neutral alts.— based on mission & cost

- No obligation to sacrifice mission, including assuring opportunity to all races
- “Tolerable” administrative expense to be considered

Evidence of impact

- Student, alumni testimony on realized benefits
- Smith Committee (academic) findings that diversity is critical to mission/success

Takeaways

Necessity

- Precedent-aligned
- **Harvard-specific**
- Key issues

Compare to
Fisher I

“Workable” neutral alternatives

Only if

- Harvard can achieve benefits derived from current degree of diversity and alts are--
- Practicable
- Affordable
- Don’t require decline in academic quality or other valued excellence

Takeaways

Necessity

- Precedent-aligned
- **Harvard-specific**
- Key issues

Existing neutral investments

- Reached or nearly reached “maximum returns”
- Significant outreach
- Exceptionally generous financial aid

Alternatives’ negative impact

- **On Diversity:** eliminating early action and tips for ALDC
- **On Mission/Academic Standards:** eliminating standardized testing
- **Feasibility:** Admitting top-ranked HS students or by zip code (leads to over-enrollment)

No go on proxies for race

- EX: “neighborhood cluster” “seemingly designed to achieve racial diversity based on SES”; logistical challenges and proxy questions

Takeaways

Necessity

- Precedent-aligned
- Harvard-specific
- **Key Issues**

Process and evidence

- Committee convened to regularly review of existing policy/programs and emerging alternatives
- Documentation of deliberations, conclusions with rationales, underlying evidence

Evaluation on merits in light of IHE aims, feasibility, relative cost

- Framework of evaluation that tracks *Fisher I* standards.

Coming Soon!
The Playbook
2d Ed.
November 2019

Takeaways

Policy & Practice

- **Precedent-aligned**
- Harvard-specific
- Key issues

Individualized
holistic
review

- Contextual consideration of range of many factors related to all applicants

The value of
considering
race

- “Vital” that SoC “be able to discuss their racial identities”--
- can profoundly influence applicants sense of self and outward perspective;” applicants have “right to advocate the value of their unique background, heritage, and perspective.”
- applicants have “right to advocate the value of their unique background, heritage, and perspective.

Takeaways

Policy & Practice

- Precedent-aligned
- **Harvard-specific**
- Key issues



Consideration
of “non-
academic
factors”

- ALDCs: Athletes, legacies, applicants on the deans and directors list; children of faculty/staff
- Applicants who offer diverse perspective, leadership, creativity, geography, economics, race

Merit

- Every admitted student is “academically prepared”
- Most admitted students from all races have “roughly similar levels of academic potential, although the average SAT scores and high school grades...from each racial group differ significantly.”

Takeaways

Policy & Practice

- Precedent-aligned
- **Harvard-specific**
- Key issues

Holistic review and race

- **Race never a defining feature** of application; magnitude of “race tips” = modest
- “Overall rating” comprised of first reader academic, extracurricular, personal ratings—as well as high school support ratings. Race only enters at “overall rating”
- **Holistic review maintained throughout despite tracking** of racial composition through “one pagers”

Takeaways

Policy & Practice

- Precedent-aligned
- **Harvard-specific**
- Key issues

Intentional
discrimination
against Asian
Americans

- **Rejection of claim** that Harvard should admit Asian American applicants at a higher rate than white applicants
- **There was no evidence of “any racial animus whatsoever;”** no pattern of stereotyping of any kind
- **SFFA failed to produce a single applicant “overtly discriminated against”** or “better qualified” than admitted white applicants; no evidence that “any particular decision was negatively affected by Asian American identity;”
- **Statistical models were “inconclusive”**—not telling the entire story: Any bias in personal ratings yielding “slight statistical differences” in personal ratings (white vs. Asian American) could have come from HS recommendations

Takeaways

Policy & Practice

- Precedent-aligned
- Harvard-specific
- **Key issues**

Individual holistic review

- Consideration of applicants individually re all relevant factors, where race may be one of many considerations
- Clarity in policy language regarding the substance of decision-making (what factors) and process by which decisions are rendered (how considered?)
- Well-trained staff to understand clear parameters re decision-making, even if policy not spelled out

Key points of focus

- Establishment of diversity interests as part of coherent set of admissions aims
- Quality of admitted students should not vary by race: all students admitted should reflect comparable potential as determined by relevant mix of factors (that need not be just test scores and grades)
- Recognition that test scores and grades should be assessed in the context of an applicant's high school and circumstance can be important

Takeaways

Process

- **Precedent-aligned**
- Harvard-specific
- Key issues

Periodic
review of
relevant
policies
and
practices
is
essential

- A university’s “ongoing obligation [is] to engage in constant deliberation and continued reflection regarding its admissions policies” [quoting *Fisher II*]

Takeaways

Process

- Precedent-aligned
- **Harvard-specific**
- Key issues

Collaborative engagements involving faculty and staff can establish important foundations for key decisions

- Decision grounded in part on various Harvard committee actions re importance of diversity and assessment of race-neutral alternatives
 - Ryan Committee, 2014
 - Khurana Committee, 2015
 - Smith Committee, 2017

Takeaways

Process

- Precedent-aligned
- Harvard-specific
- **Key issues**

Coherent,
regular
process of
review and
evaluation

- Importance of diversity in achieving mission
- Progress re overall education goals over time
- Impact of consideration of race
- Viable race-neutral alternatives

Multiple
stakeholders

- Leadership
- Faculty
- Student affairs
- Researchers
- Counsel

III. UNC Headlines



SFFA v. UNC

Summary judgment denied on all counts to all parties.

...on to trial!!!

SFFA: Failure to articulate with sufficient clarity and precision diversity objectives

SFFA: Any consideration of race in admissions is unlawful

- If allowed, failure to use race as a plus factor in admissions

SFFA: Failure to pursue viable race-neutral alternatives



Admissions at UNC



Admissions Policy and Process

- **Individual, holistic evaluation of applicants**
 - How will applicants “contribute to the kind of campus community ...[in furtherance of UNC’s] mission?”
 - Examination of achievements, potential, and context
- **>40 criteria in 8 categories:** academic program; academic performance; standardized testing; extracurriculars; special talents; essays; background; and personal attributes.
- **Multiple levels of readers**, including School Group Review, which includes quality control function and examination of high schools from which applicants hail.

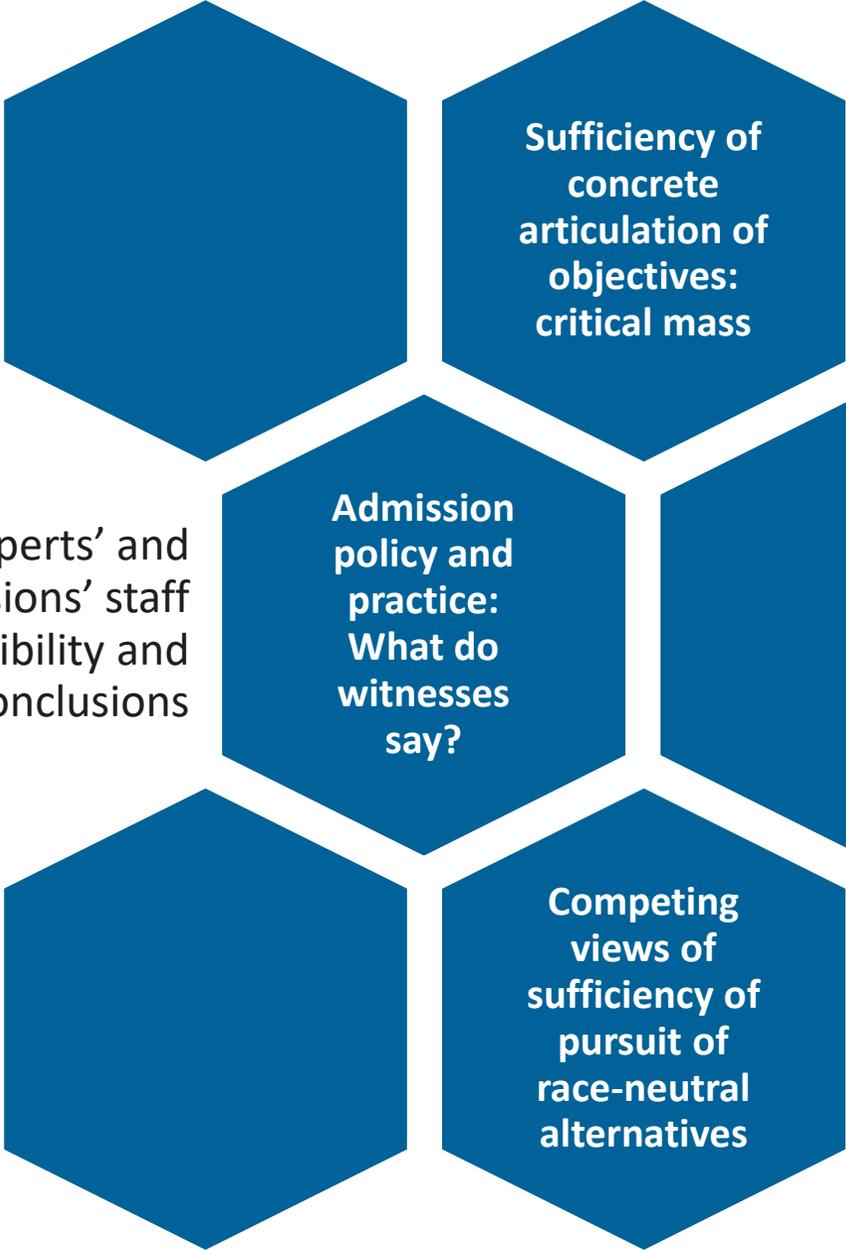
Consideration of Race

- Readers are trained to consider “an applicant’s self-disclosed race or ethnicity...as one factor among many based on a holistic review of all circumstances relevant to an individual applicant.”
- Race can be considered at any stage of the process.

UNC Major Trial Issues



Evaluate experts' and admissions' staff credibility and conclusions



Sufficiency of concrete articulation of objectives: critical mass

Court signals (without deciding) sufficient expression of goals and objectives based on: Mission Statement; Academic Plans; Diversity Plan Report; senior leadership declarations; Faculty Council Resolutions; Chancellor and Vice Chancellor for Student Affairs testimony.

Admission policy and practice: What do witnesses say?

Competing views of sufficiency of pursuit of race-neutral alternatives

UNC: SES, % plans, additional consideration of school curriculum, automatic test score cuts
SFFA: SES, aid, recruitment, geography, eliminate legacy preferences/early action, CC xfers, HS partnerships



IV. Areas of Focus



Key Points of Action

Mission-related goals and objectives associated with the benefits of student diversity



The **necessity of any consideration of race** in admissions (as a matter of process and substantive decision-making over time)

Key point of focus: race-neutral alternatives



Policy design and integration of race as an element of individualized holistic review that involves the intersection of many admissions factors important to an institution; and

With clarity regarding policy, focus on practice, implementation, etc.

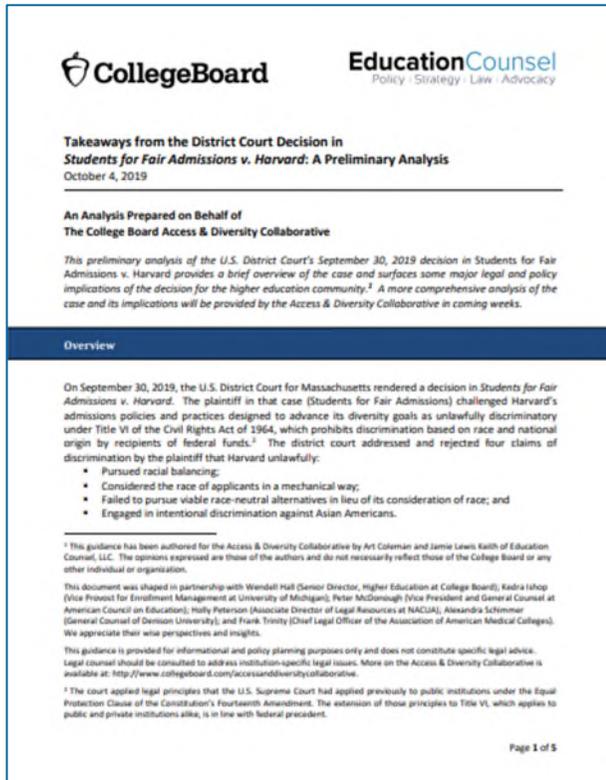


Periodic review and data-informed evaluation of policies and practices over time that documents judgments that address issues presented under prevailing non-discrimination standards

V. Resources

New ADC Publication

October 2019



Takeaways from the District Court Decision in *Students for Fair Admissions v. Harvard*: A Preliminary Analysis

- This preliminary analysis provides a brief overview of the case and surfaces some major legal and policy implications of the decision for the higher education community.
- A more comprehensive analysis of the case and its implications will be provided in coming weeks.
- Available at: <https://bit.ly/2oiRWjZ>.

College Board Forum

November 6-8, 2019

Washington, D.C.



ADC Sponsor Breakfast

November 6, 2019, 8:00-9:00 am

Major Federal Developments Affecting Higher Education Diversity and Admission

November 6, 2019, 1:15-2:15 pm

Race-Neutral Strategies Under Federal Nondiscrimination Law: An Evolving Lens

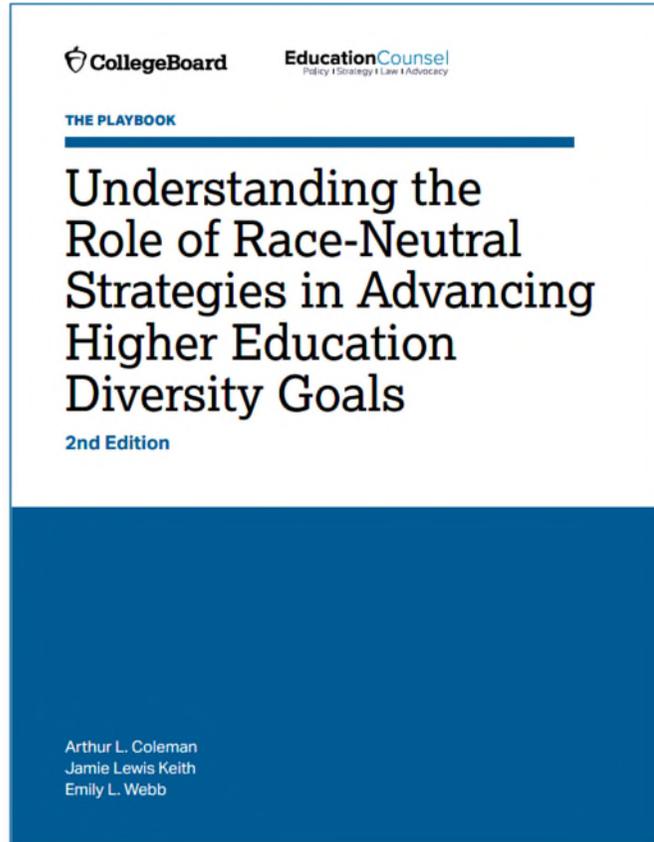
November 8, 2019, 8:00-9:15 am

More information and registration at

<https://forum.collegeboard.org/>

New ADC Publication

November 2019



The Playbook: Understanding the Role of Race-Neutral Strategies in Advancing Higher Education Diversity Goals

Will provide a significant update to *The Playbook* (2014), which will:

- Amplify and expand on the material in the 2014 version, including by providing numerous additional strategies and examples for institutions to consider when setting or revising diversity-aimed, race-neutral policies.
- Expand awareness of the range of effective strategies for increasing diversity that may be considered “race-neutral”.
- Discuss the importance of considering both intent and effect when deciding if a strategy is actually race-conscious or neutral.
- Emphasize the imperative of periodic review of policies that consider race in some aspect of the enrollment process for all IHEs.

Access & Diversity Collaborative

Who We Are & What We Do

For more information on the ADC and on sponsorship, please visit

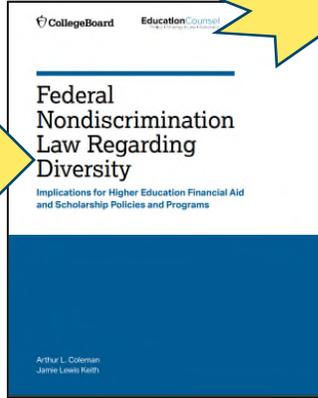
www.collegeboard.org/accessanddiversity or email accessanddiversity@collegeboard.org.

- **Established in 2004**, the College Board's Access & Diversity Collaborative (ADC) provides national leadership and institutional support focused on higher education diversity goals. The ADC serves as:
 - A **voice of national advocacy**,
 - A **resource** for sophisticated and pragmatic policy and practice guidance and actionable research, and
 - A **convener for thought leadership and collaborative engagement** on policy and practice development.
- **Almost 60 institutions of higher education and 15 national organizations sponsor the ADC**, which relies heavily on the support and guidance of its sponsors to identify key “on the ground” issues to address, and make recommendations regarding strategic directions.

Key Resources

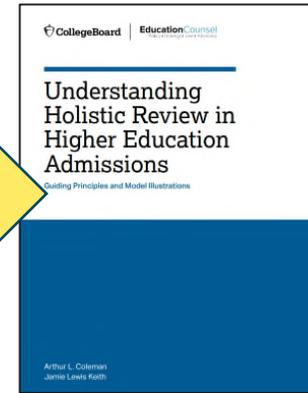
New

Financial Aid



Federal Nondiscrimination Law Regarding Diversity
(College Board, EducationCounsel, NASFAA 2019)

Holistic Review



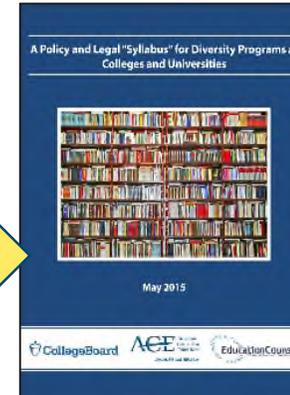
Understanding Holistic Review in Higher Education Admissions
(College Board, EducationCounsel, 2018)

Evidence



Building an Evidence Base
(College Board, 2017)

Key Resources



A Policy and Legal "Syllabus" for Diversity Programs at Colleges and Universities
(ACE, College Board, EducationCounsel, 2015)

Questions



Thank you!

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