

# The Consideration of Race in Admissions: The Legal Landscape, Policy Perspectives, and Practical Guidance

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AALS Annual Meeting  
Washington, D.C.  
January 4, 2020



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Policy | Strategy | Law | Advocacy

# Red Light Practices



Failure to have a clear statement re the importance of student diversity to law school mission, with rationales

Referring to student diversity-related policies as “affirmative action”

Defining success with respect to numbers only

Overreliance/Misuse of test scores

Mechanical consideration of applicants’ race/ethnicity/sex.

Evaluation of admissions in isolation.

Failure to annually review, assess, and document process re relevant policies, esp. re neutral strategies.

# Federal Nondiscrimination Law

## Equal Protection Clause/ Title VI

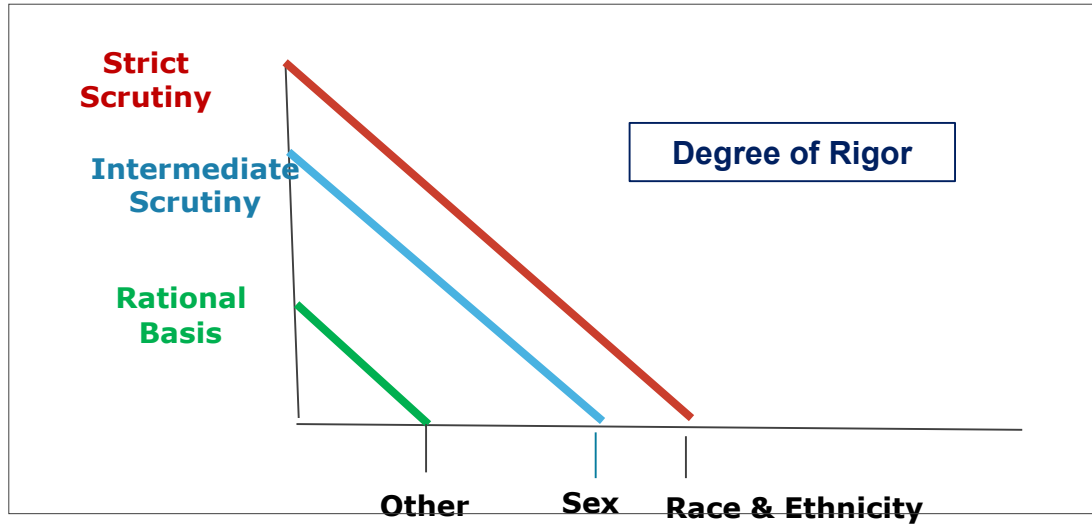
- **Prohibit discrimination on the basis of race and ethnicity**

## Equal Protection Clause/ Title IX

- **Prohibit discrimination on the basis of sex**
  - Emerging body of law to extend the reach of Title IX to discrimination based on sexual orientation and gender identity

**Many other factors are central to institutional diversity interests, but federal law imposes heightened scrutiny when race, ethnicity, and sex are considerations.**

# Federal Standards on Claims of Discrimination



- ❑ **Narrowly tailored to achieve a compelling interest – consideration of race necessary; effective; not overbroad; subject to periodic review and evaluation.**
- ❑ **Exceedingly persuasive justification substantially related to achieving important interest – consideration of sex necessary; not overbroad; not based on assumptions or stereotypes.**
  - ❑ **Any rational, not illegal, purpose**

# 40 years of 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**

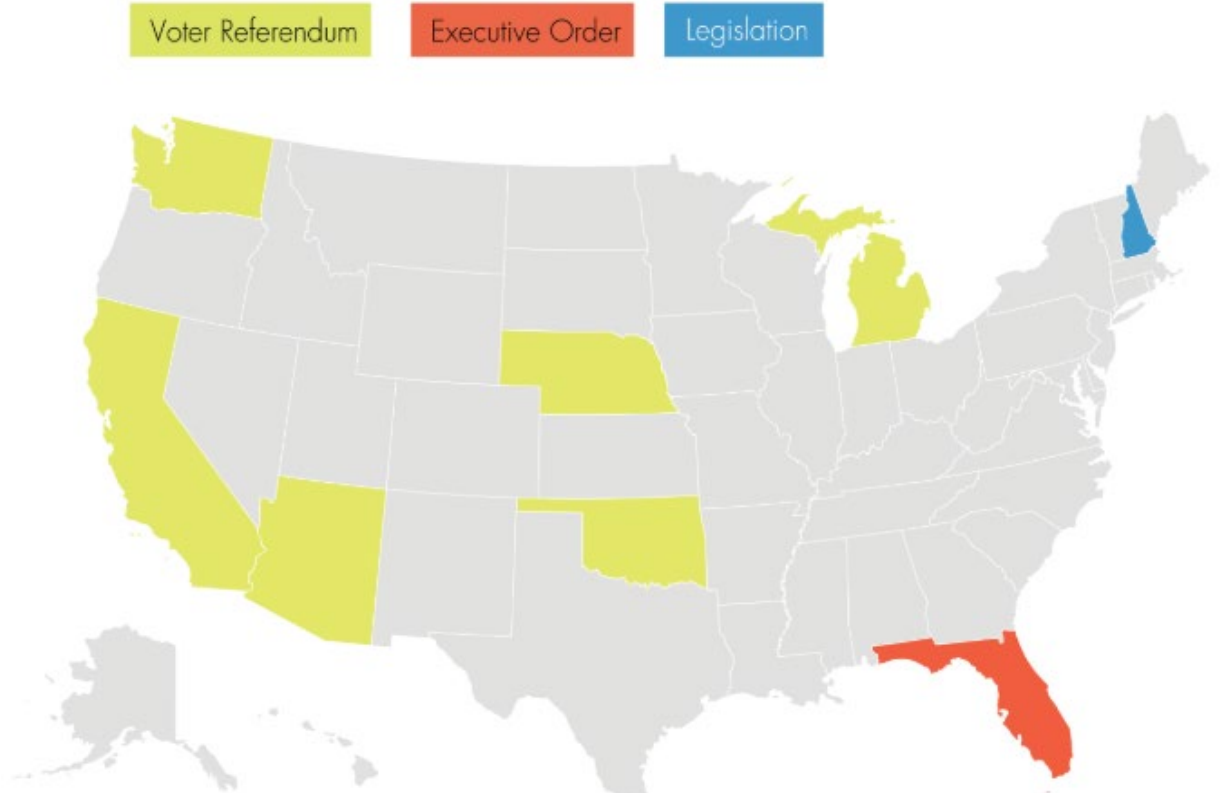
## 2013: Fisher I

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

## 2016: Fisher II

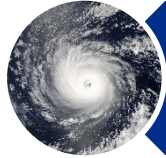
- Small Majority
- Emphasis on  
**Evidence**

# State Laws that Prohibit the Consideration of Race, Ethnicity, Sex



Source: Kahlenberg, R.D. 2014. *The Future of Affirmative Action*. (n.p.): Lumina Foundation and The Century Foundation, Inc. Available at: <https://tcf.org/content/report/future-of-affirmative-action/>

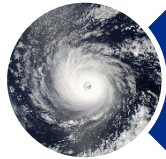
# Current Landscape: Active & Broadened Scope of Challenges



## Federal Trial Court Actions

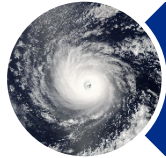
Harvard, UNC—Race & Admissions

Harvard, NYU—Race & Gender in co-curricular programs



## USED Policy

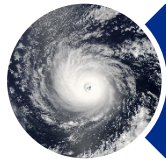
Rescission of OCR guidance on *Fisher*



## OCR & DOJ investigations & interventions

Harvard, Yale—Race & Admissions;

Yale, USC, Univ. of Michigan—Gender & Mentoring, Community Building, Aid Programs



## State Trial Court Actions

UC System—Public Records to Challenge Compliance with State Ban on Race & Sex Consideration

UT Austin—Challenge under State Constitution (initially dismissed re: standing)

# In a Nutshell: *SFFA v. Harvard*

Federal  
district court  
decision

Already  
appealed

## 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

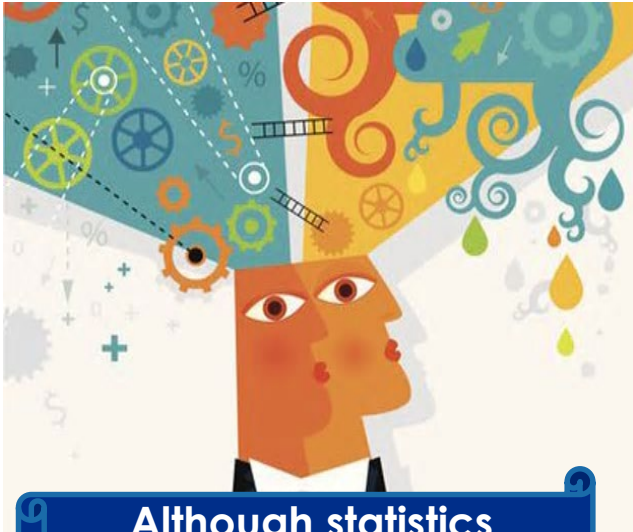
## No failure to pursue viable race-neutral alternatives

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



# Facts Matter

...and 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

130 page opinion--  
40 pages of  
statistical analysis

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

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



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## Applications and Enrollment

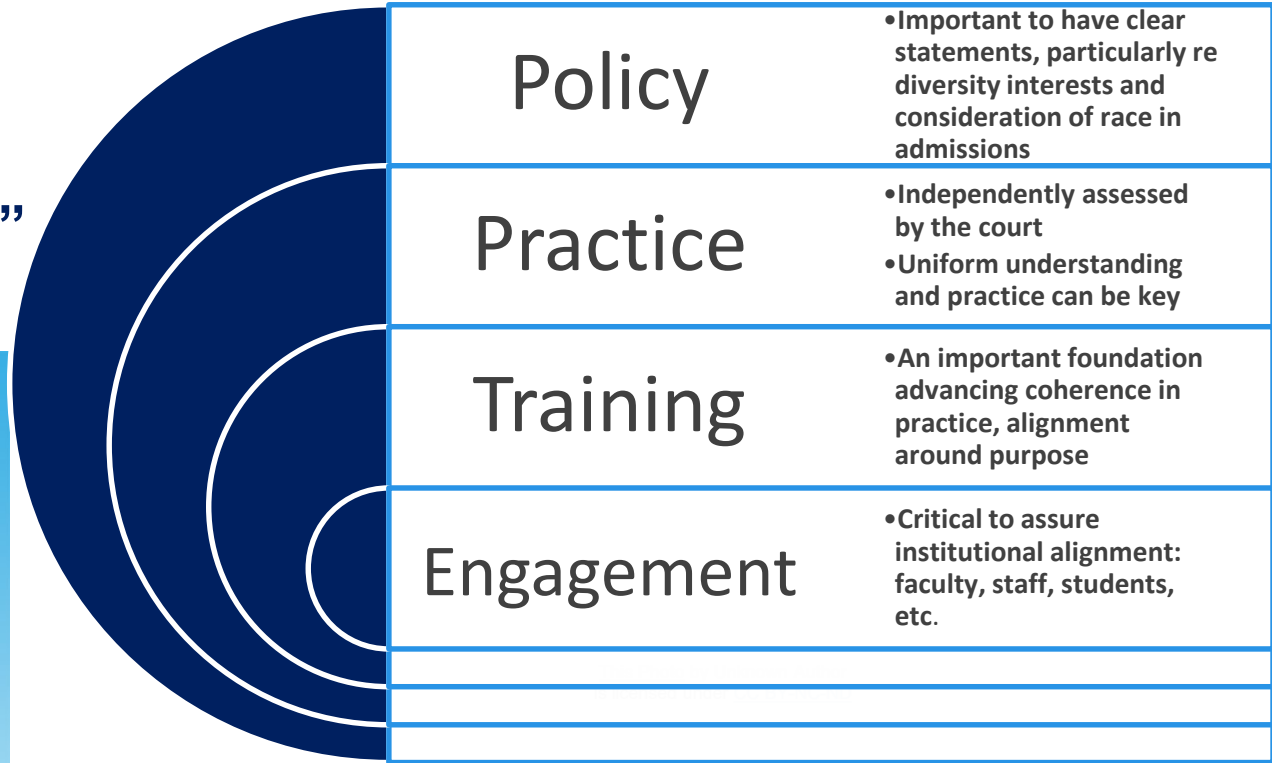
- 35,000 applications
- 2000 admitted
- 1600 enrolled

## 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.”**



# Practical Foundations



Mission Statement

Recruitment

Statement on the Philosophy of Undergraduate

Admissions

Application Review Factors



## Statement of the Philosophy of Undergraduate Admissions

*The undergraduate admission process, which reflects the University's educational Mission, seeks to identify those applicants, who as individuals and as a group, will enrich and benefit from the campus learning environment, and thus benefit the entire student body. The process is structured to build entering classes of students whose varied backgrounds and experiences provide substantial evidence of their potential to:*

1. Meet the University's requirements for academic success.
2. Enrich the University as a heterogeneous community.
3. Add new perspectives to the University's curriculum and scholarly pursuits.
4. Develop personal skills, including leadership, self-confidence, and intellectual engagement.
5. Contribute to the intellectual, cultural, social and political life of the University, State, and Nation.

## Statement of the Philosophy of Undergraduate Admissions



*As the University must make fine distinctions among large numbers of highly qualified applicants, the ability to assess consistently all information presented in the application becomes increasingly important. Therefore, the University employs a rigorous review process that engages the expertise of professional educators in performing individualized and holistic evaluations of each application. Each applicant is assessed on the basis of achievements and potential in a broad range of academic categories, viewed in the context of the opportunities and challenges the applicant faced. These categories include:*

1. Strength of educational performance, as measured by the nature and rigor of high school curriculum and academic achievements.
2. Potential for college success, as evidenced by performance on nationally normed standardized tests.
3. Potential to promote beneficial educational outcomes and to make a positive contribution to campus and community life.
4. Persistence, and commitment to educational excellence, as evidenced by demonstrated success in facing adversity and overcoming obstacles.



## Admission Review Factors

*Each category is assessed by a combination of quantitative and qualitative factors.  
These factors are flexibly applied, so the list does not reflect order of importance*

High School Achievement

Grades in Academic Subjects

Rank in Class (actual or percentile)

Written Expression of Ideas

(as demonstrated in the Essay)

Gender

Quality of Coursework

Work Experience

Recognition of Special Achievements

Extenuating Circumstances

Socio-Economic Background

Geographic Origin

Breadth of Life Experiences

Extracurricular Activities

Community Involvement

Community Service

Leadership

Academic Endeavors Outside the Classroom

SAT or ACT Scores

Residency Status

Race

Ethnicity

Family Educational Background

Learning Differences

English as a Second Language (Language Spoken at Home)

# Green Light Practices

## Team

**Multidisciplinary:  
All relevant facets of the law  
school/IHE covered**

## Goals and Objectives

Clarity on *educational* goals and objectives associated with mission

Foundations upon which success can be evaluated over time, to include:

- Diversity of class
- Student experience/inclusion
- Academic/professional success

## Policy Design

Limited, non-mechanical consideration of race

--Race associated with experience, perspective, etc.

--Intersectionality with all factors

Evidence of necessity *and + impact* re race, ethnicity, sex (includes neutral alternatives)



## Process Management

Periodic review, evaluation of

- Effectiveness
- Continuing need for consideration of race, ethnicity, gender
- Neutral strategies pursued and rejected (and why)

## Evidence

Inventory all relevant policies/practices and programs

Document decision making and assemble evidence



# College Board Access & Diversity Collaborative

Web:

[www.collegeboard.org/accessanddiversity](http://www.collegeboard.org/accessanddiversity)

Email:

[accessanddiversity@collegeboard.org](mailto: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.

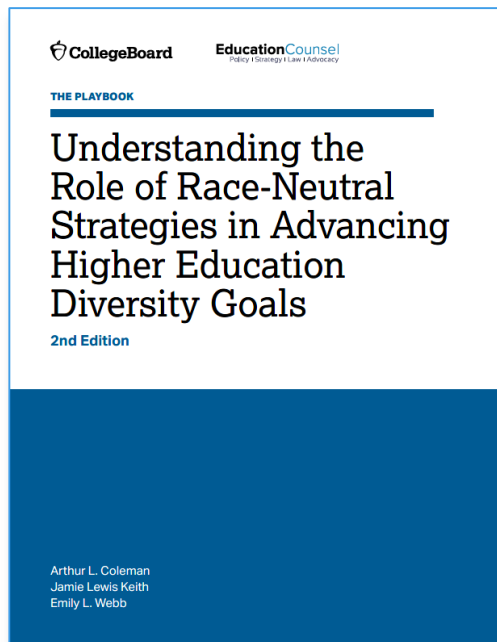
**Over 60 institutions of higher education and 15 national organizations sponsor the ADC.**

**Sponsors engage and make recommendations** regarding strategic directions and investments based on “on the ground” needs associated with law, policy, and practice diversity needs.



# New ADC Publication

## November 2019



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

Provides a significant update to *The Playbook* (2014) to:

- 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.
- Link to webinar on Race-Neutral Strategies from October 2019: <https://bit.ly/2JGH1bs>.