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***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**

[art.coleman@educationcounsel.com](mailto:art.coleman@educationcounsel.com)

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

- **Jamie Lewis Keith**

[jamie.keith@educationcounsel.com](mailto:jamie.keith@educationcounsel.com)

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



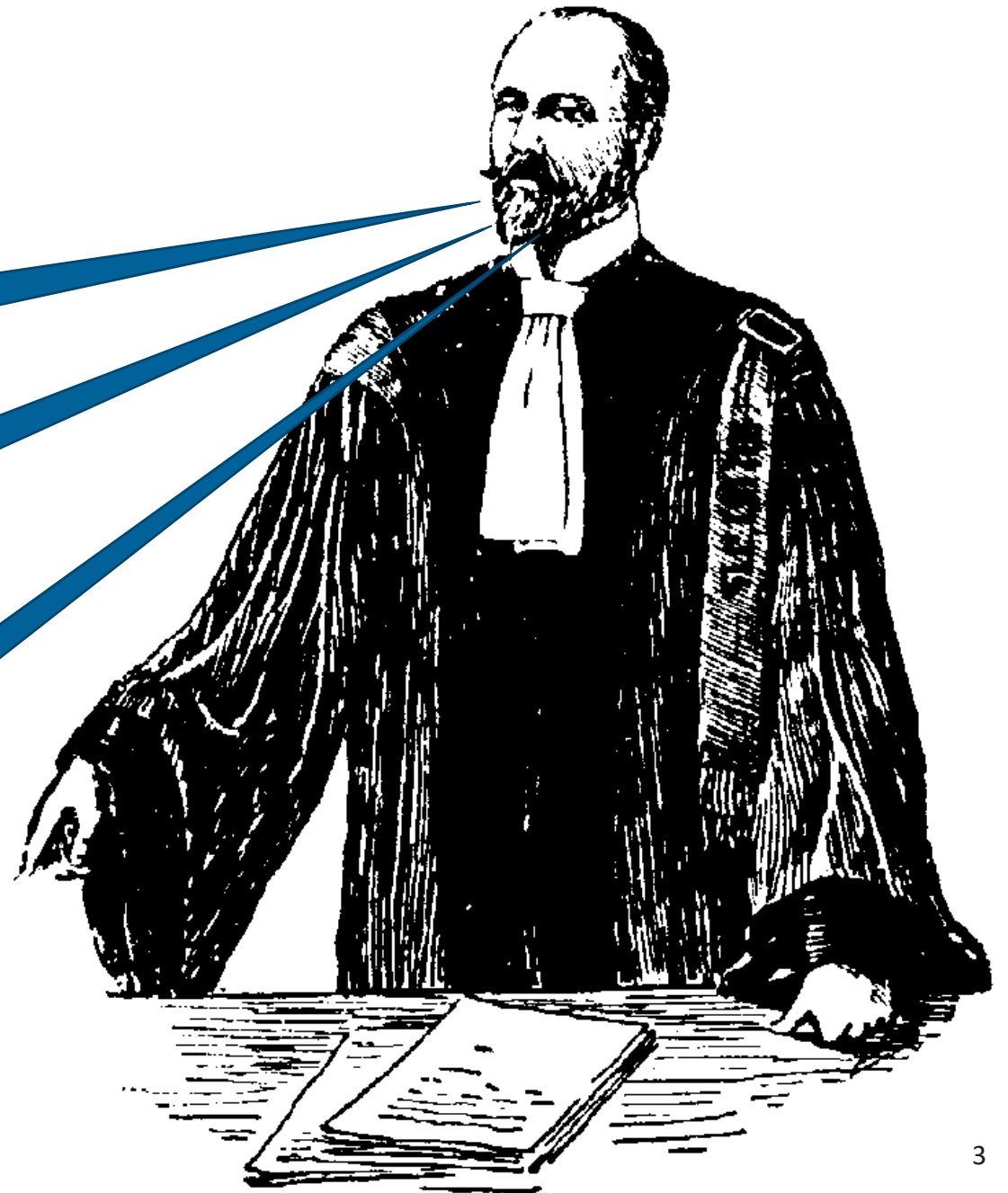
# Disclaimers

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

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## **‘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.

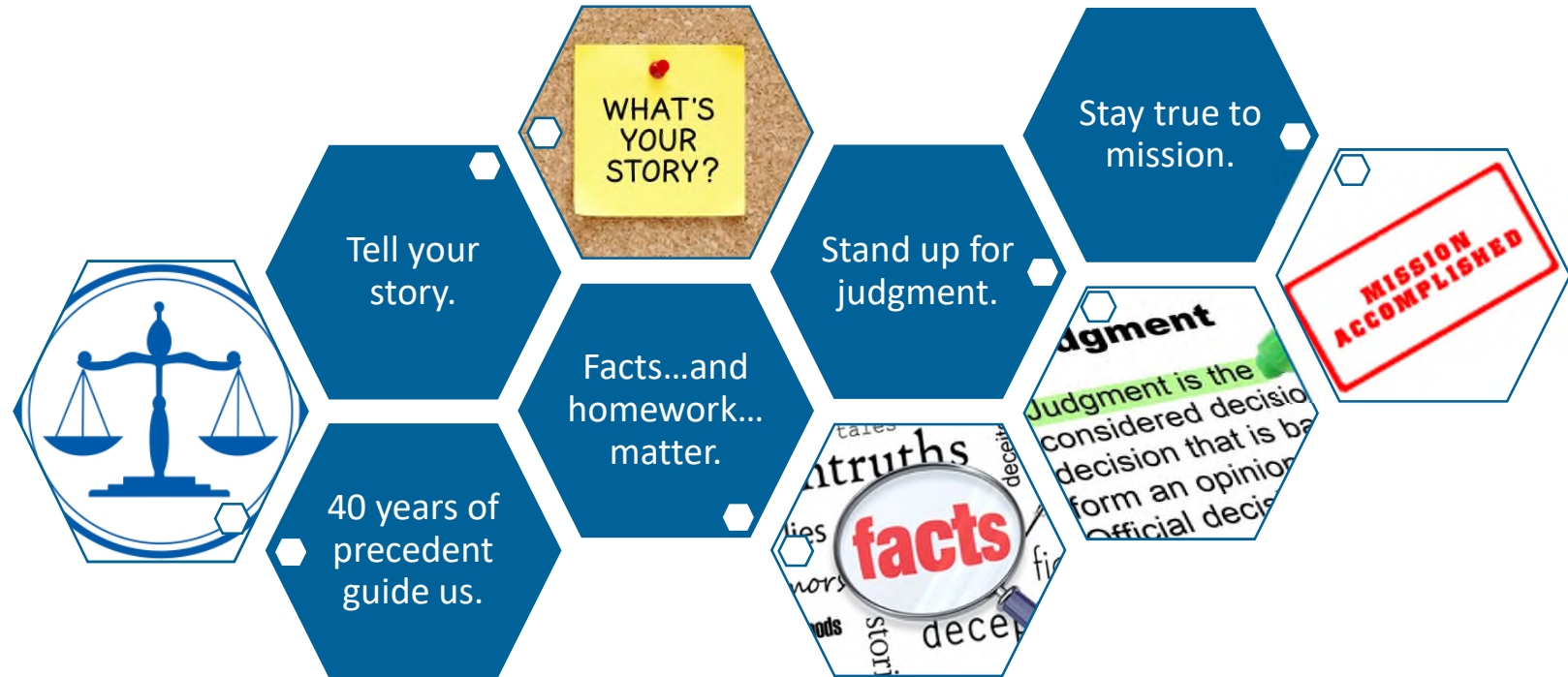
### **Judge Rules Harvard’s Race-Conscious Admissions Policy Constitutional**

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



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# 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

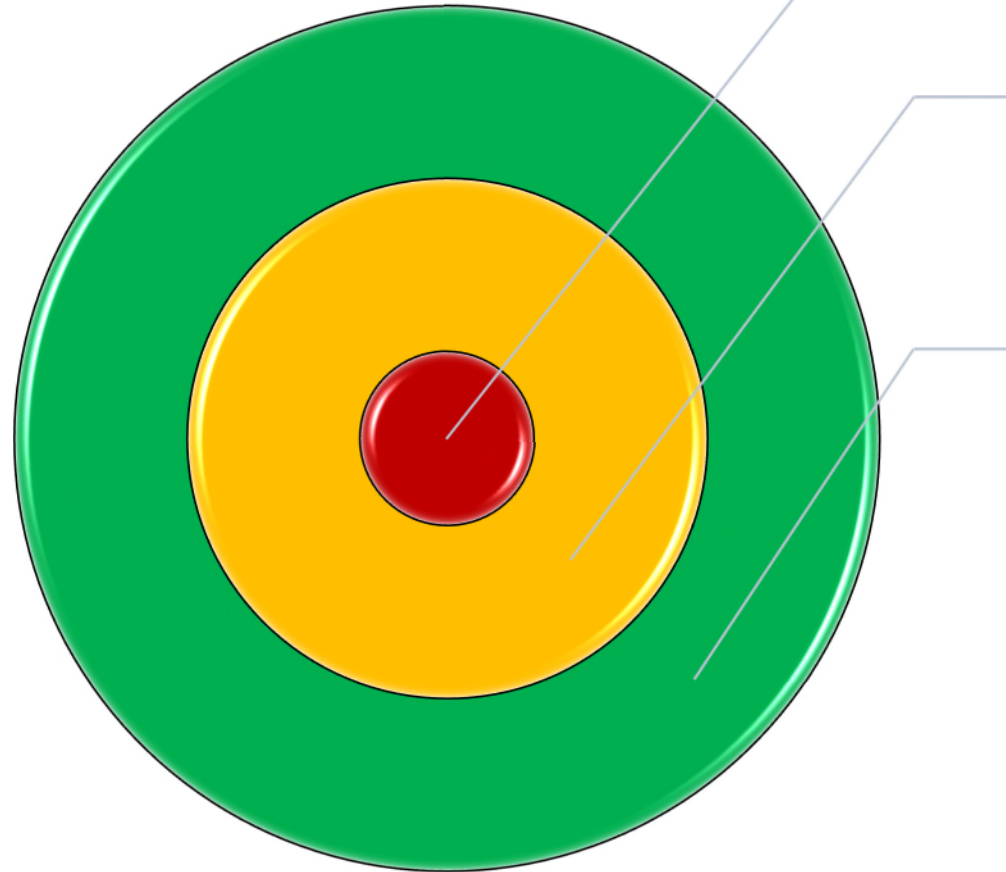
Pay attention to THESE cases and rules

## 2016: Fisher II

- Small Majority
- Emphasis on  
**Evidence**

# Mission matters

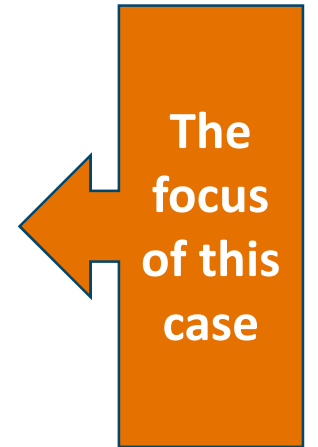
...even when it's in the background



Mission

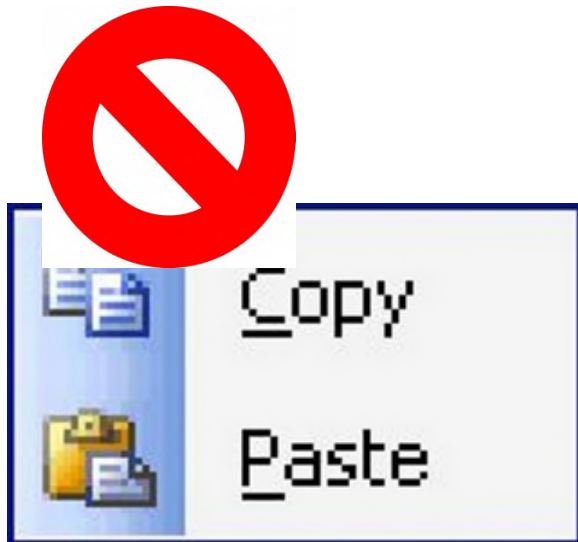
Policy,  
Practice &  
Process

Educational  
Outcomes



# Harvard is like—and not like—past cases

No copy and paste here!



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

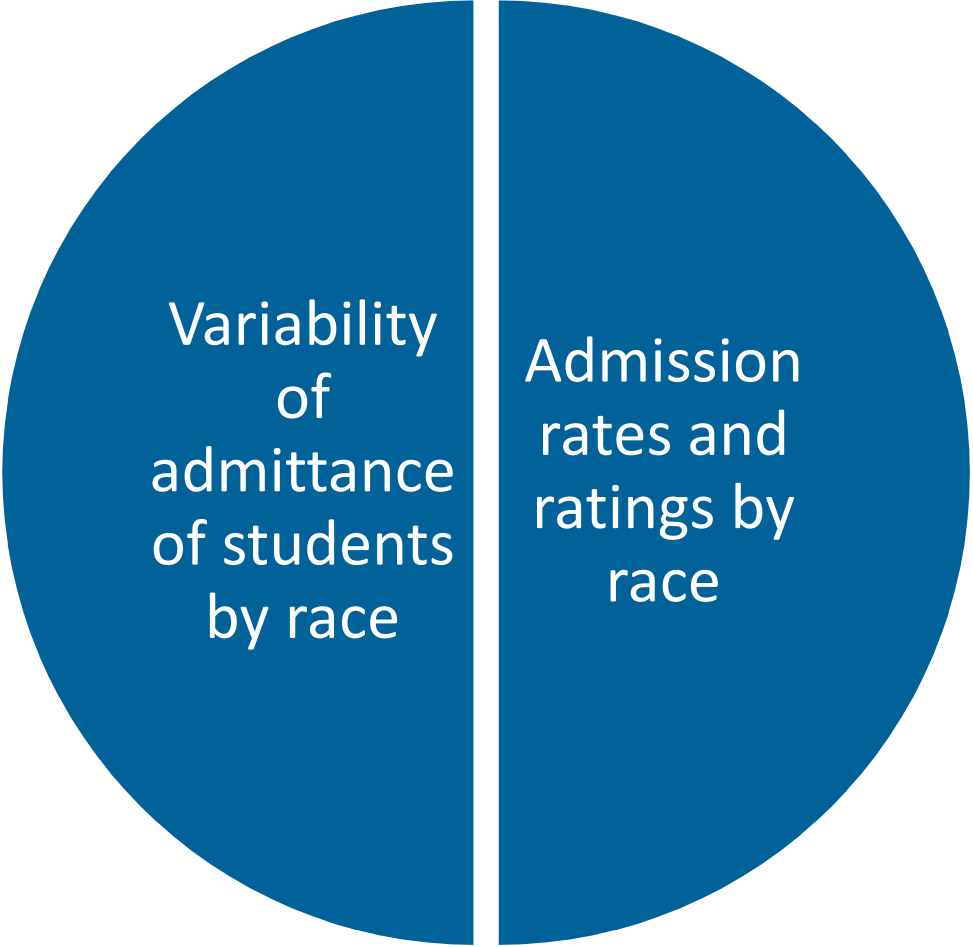
Expert witnesses

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## 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.”**

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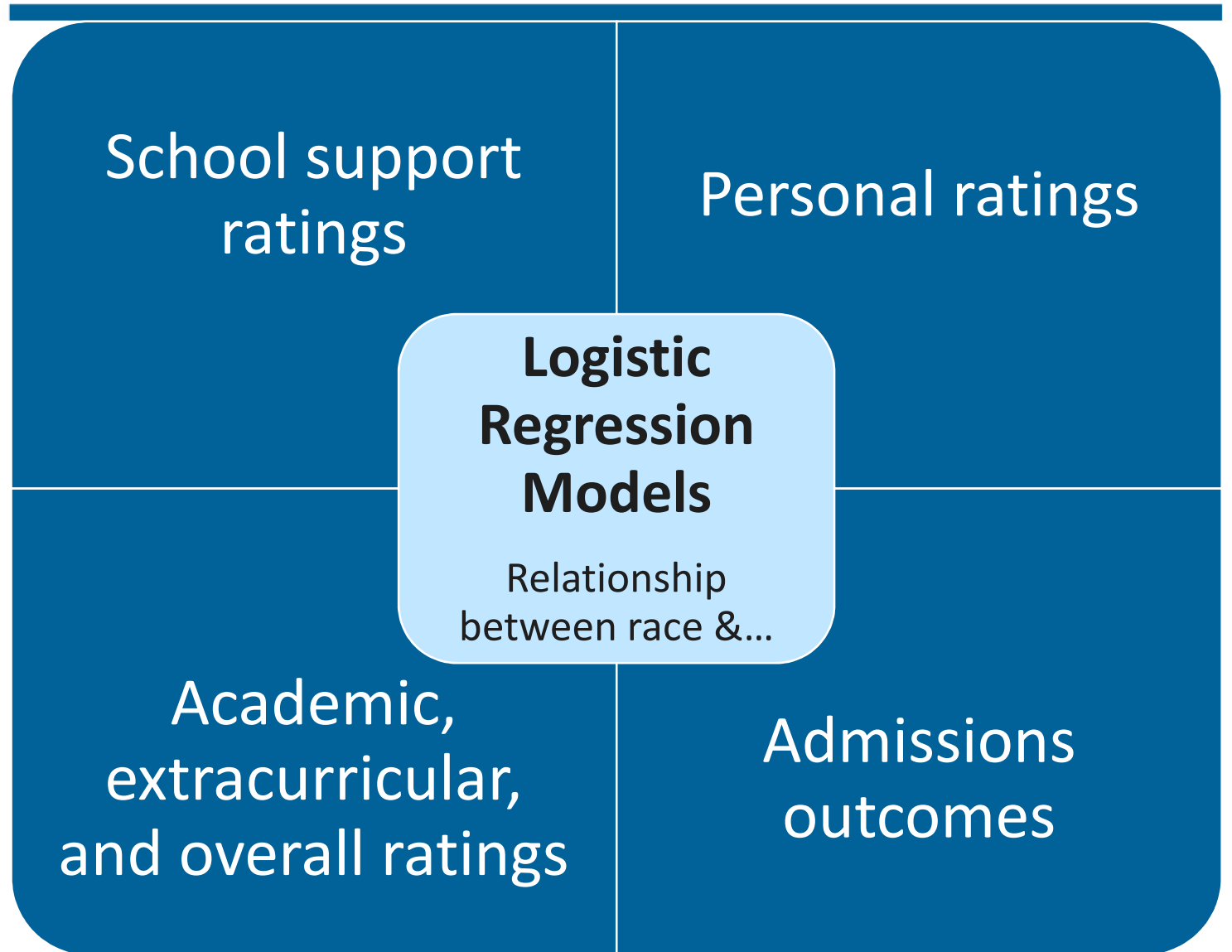
Variability  
of  
admittance  
of students  
by race

Admission  
rates and  
ratings by  
race



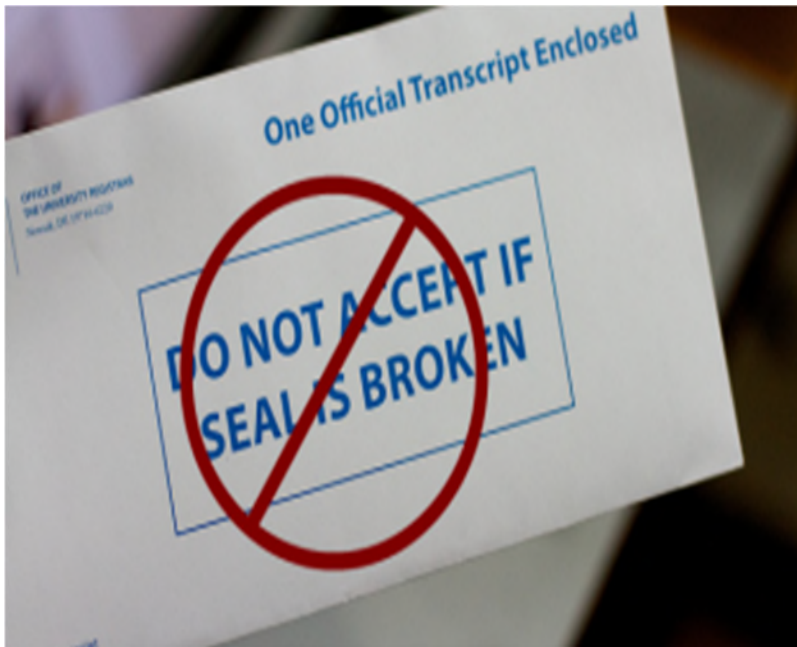
## But statistics *can* be important...

**“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

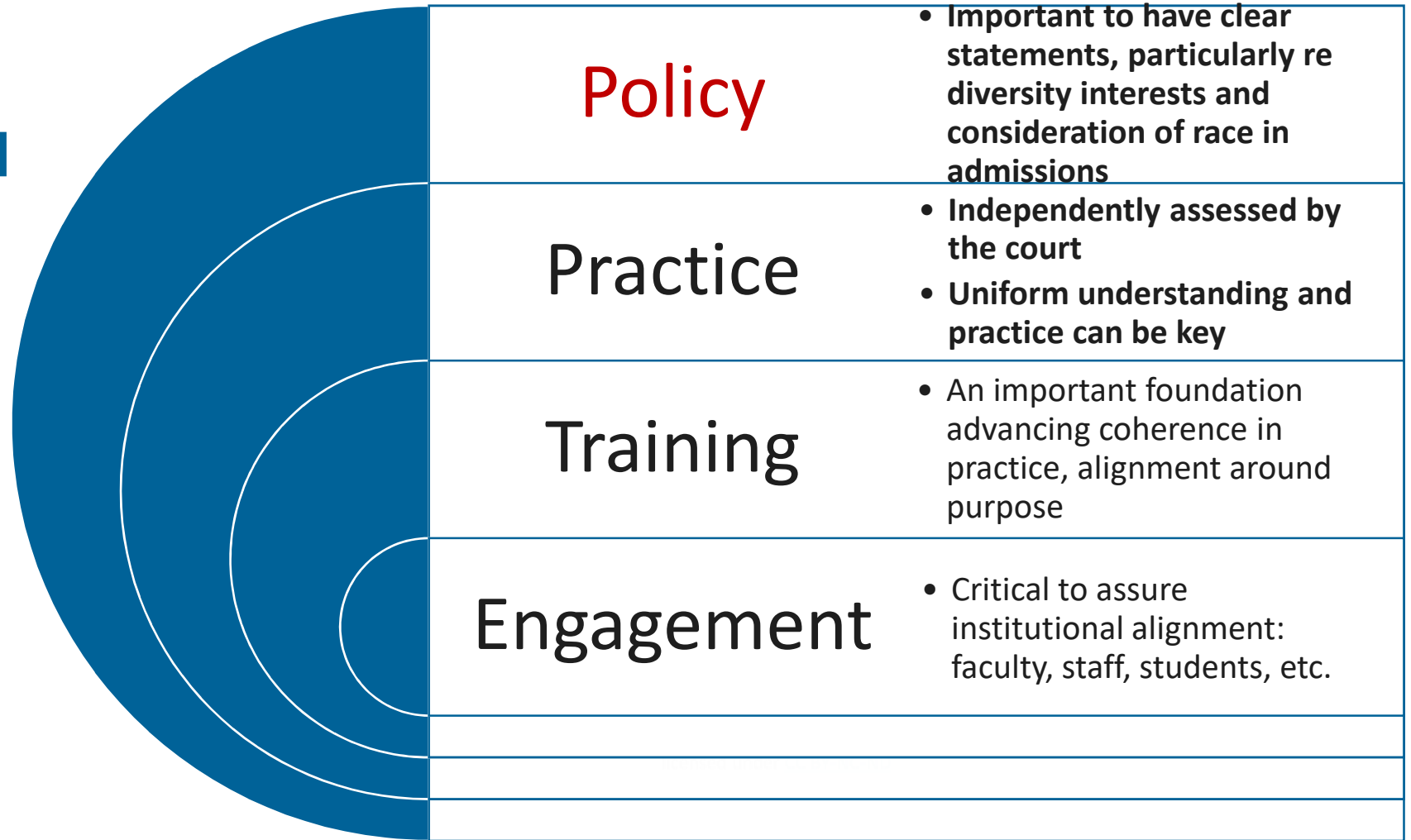
## Perfect scores

- 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.”



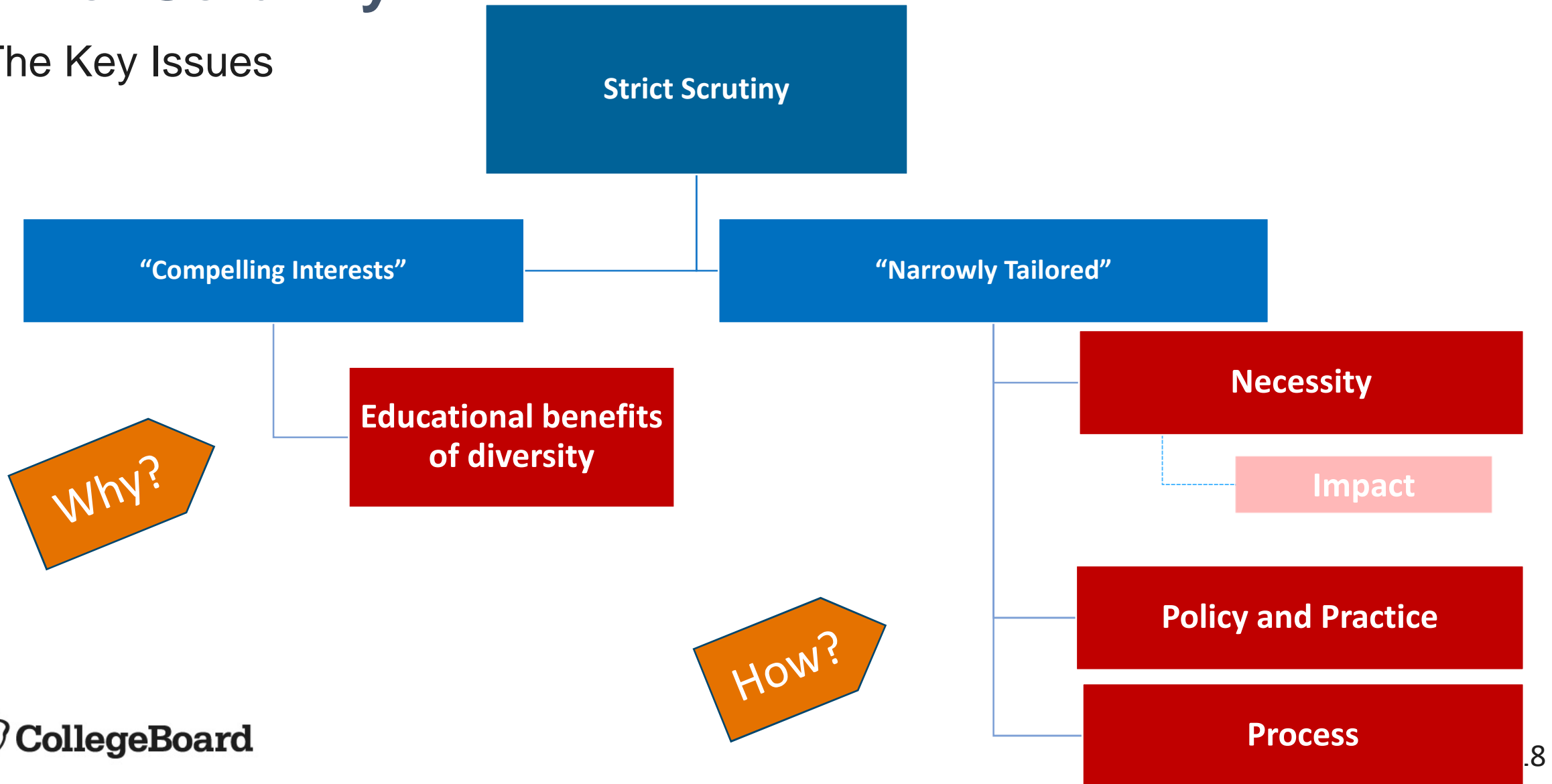
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## II. The Details



# 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

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## 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

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# 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

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## 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.

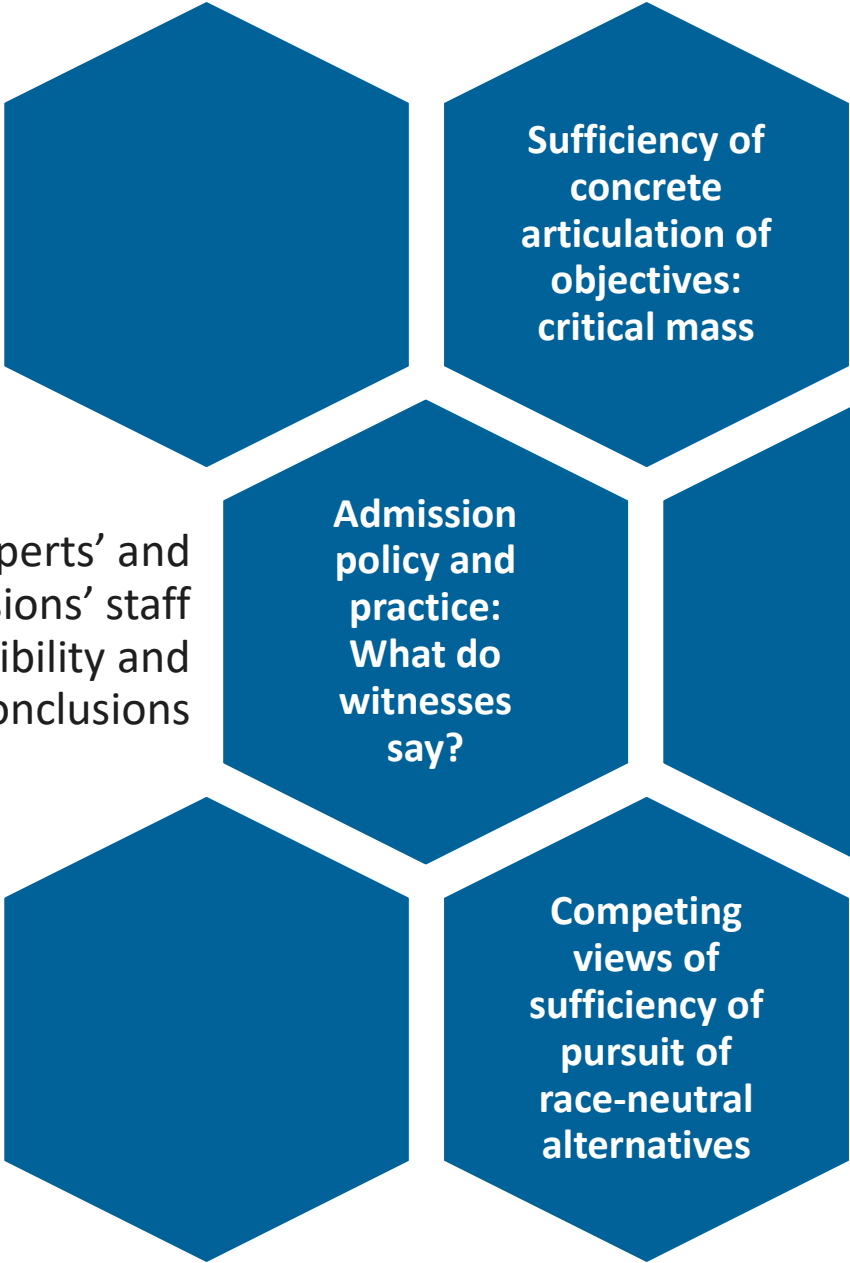
## Consideration of Race

- 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



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## 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

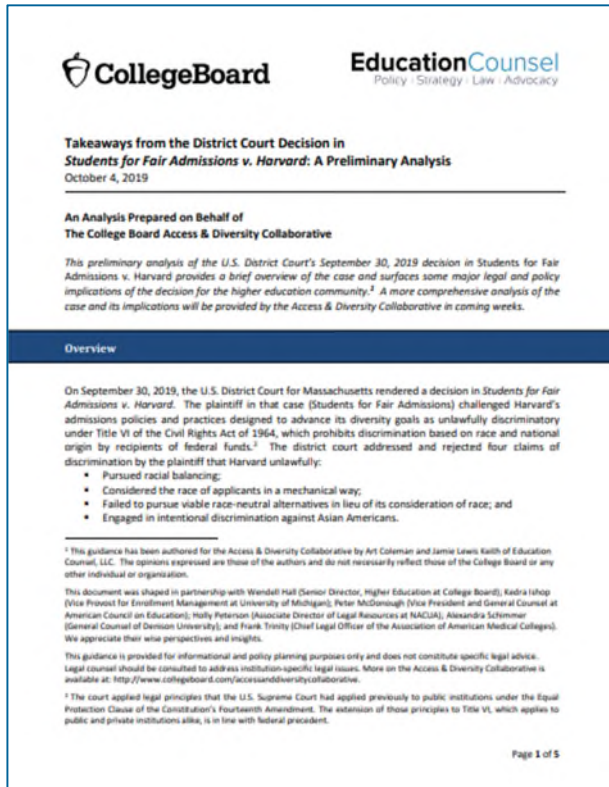
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# V. Resources



# 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**

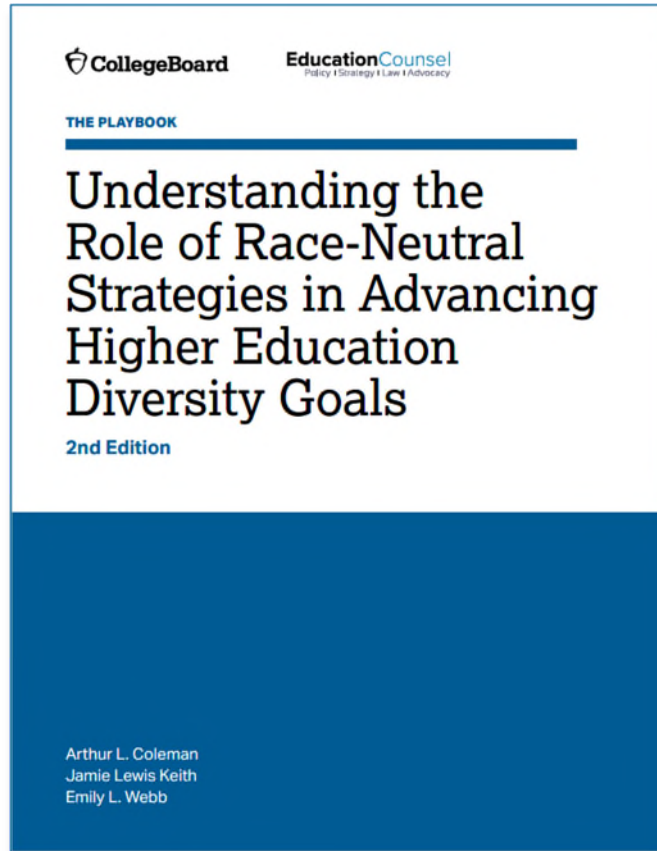
*November 8, 2019, 8:00-9:15 am*

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

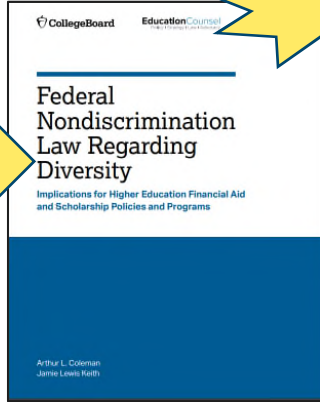
[www.collegeboard.org/accessanddiversity](http://www.collegeboard.org/accessanddiversity) or email [accessanddiversity@collegeboard.org](mailto:accessanddiversity@collegeboard.org).

- **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.
- **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

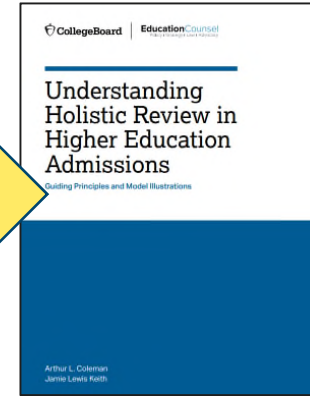
New

Financial Aid



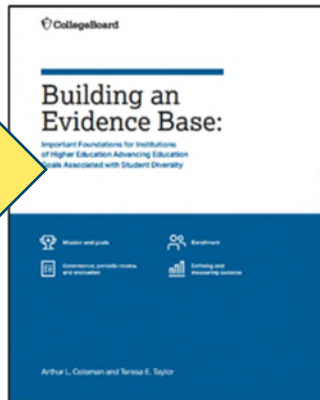
**Federal Nondiscrimination Law Regarding Diversity**  
(College Board, EducationCounsel, NASFAA 2019)

Holistic Review



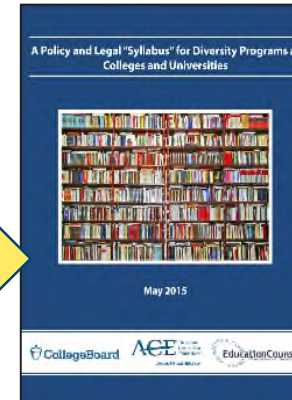
**Understanding Holistic Review in Higher Education Admissions**  
(College Board, EducationCounsel, 2018)

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)

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# Questions



# Thank you!

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Wendell Hall | [whall@collegeboard.org](mailto:whall@collegeboard.org)

Art Coleman | [art.coleman@educationcounsel.com](mailto:art.coleman@educationcounsel.com)

Jamie Lewis Keith | [jamie.keith@educationcounsel.com](mailto:jamie.keith@educationcounsel.com)