



Preparing for Court Action in Admissions – Policy, Practice, Implementation

Art Coleman, Managing Partner and Co-Founder, EducationCounsel LLC

Lorelle L. Espinosa, Program Director, Sloan Foundation

Shannon Gundy, Assistant Vice President of Enrollment Management,
University of Maryland

Setting the Stage: Important Policy and Legal Foundations



Over Four Decades: Aligned Supreme Court Precedent

1978: Bakke

- J. Powell
- EBD = Compelling Interest **Concept**

1994: USED Title VI Aid Policy

*Rescinded in 2020,
under review*

2013: Fisher I

- Majority
- Rigor on Inquiry/ **Evidence** re Necessity/Race-Neutral Strategies

1980: USED Title VI Regulations

2003: Grutter/ Gratz

- Majority
- EBD=
- Compelling Interest
- Strict Scrutiny **Framework**

2016: Fisher II

- 4-3 Majority
- Emphasis on **Evidence**

 NACUA

Over Four Decades: Aligned Supreme Court Precedent

1978: Bakke

- J. Powell
- EBD = Compelling Interest **Concept**

1994: USED Title VI Aid Policy

*Rescinded in 2020,
under review*

2013: Fisher I

- Majority
- Rigor on Inquiry/ **Evidence** re Necessity/Race-Neutral Strategies

1980: USED Title VI Regulations

2003: Grutter/ Gratz

- Majority
- EBD=
- Compelling Interest
- Strict Scrutiny **Framework**

2016: Fisher II

- 4-3 Majority
- Emphasis on **Evidence**

 NACUA

SFFA's Ultimate Aim: Reverse Decades of Settled Precedent



<p>Grutter:</p> <ul style="list-style-type: none"> • was "grievously wrong" • "rests on a lie" • "endorsed...amorphous and unmeasurable" racial objectives • Reflects "affirmative action gone wild" (Alito quote) 	<p>Legal standards under Grutter and progeny are "unworkable in practice" and have not been relied upon by the field</p>
<p>SFFA's Argument</p>	
<p>"Our Constitution is colorblind."</p>	<p>Also: Institutions of higher education can't be trusted; they'll take advantage of any leeway.</p>



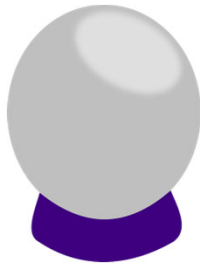
Questions on Appeal



<p>Both Cases</p> <p>Whether the Supreme Court should overrule Grutter v. Bollinger and hold that institutions of higher education cannot use race as a factor in admissions.</p>	<p>Harvard</p> <p>Whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.</p>	<p>UNC</p> <p>Whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.</p>
---	--	---



Possible Outcomes



Harvard/UNC win *and one of the following occurs:*

Broad ruling/Major impact

Narrow ruling/Important impact

Harvard/UNC lose *and one of the following occurs:*

Narrow ruling/Important impact

Broad ruling/Major impact

Case resolution not on the merits, with:

Case resolved on procedural grounds or returned for further lower court proceedings



2022 U.S. Supreme Court: The Compositional Shift is Stark



Clarence Thomas



John Roberts
Chief Justice



Elena Kagan



Samuel Alito



Sonia Sotomayor



Neil Gorsuch



Brett Kavanaugh



Amy Coney Barrett



Ketanji Brown Jackson





The Research Landscape and Considerations

Then and now...



Impacts of Policies and Political Maneuvers

- State bans on race-conscious strategies
- State-wide race-neutral approaches
- Preparing for upcoming Supreme Court cases
- "Divisive concepts" laws and executive orders



Relationship between Existing Assessments and Race/Ethnicity

- Relationship between ACT/SAT and race/ethnicity
- Relationships between GRE/LSAT/MCAT and race/ethnicity
- Impact of moving away from such assessments
- Post-pandemic approaches



Impacts of Institutional-Level Admission Policies

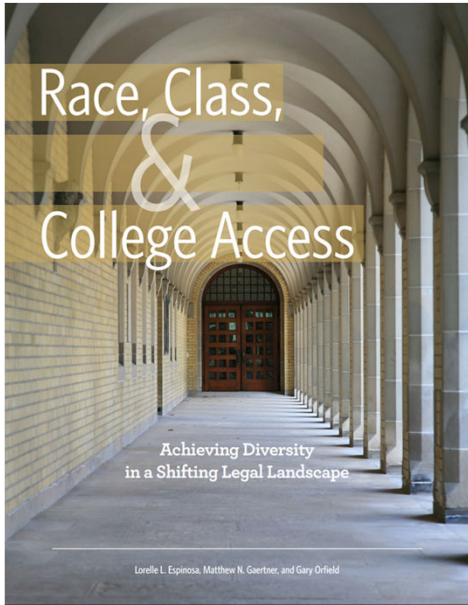
- Test-optional policies
- Socioeconomic approaches
- Holistic admissions at the graduate level
- Policy changes during the pandemic



Psychosocial Approaches to Understanding Student Persistence

- Measuring "grit" or determination
- Other non-cognitive assessments
- As informing student support post-admission
- As informing retention, graduation

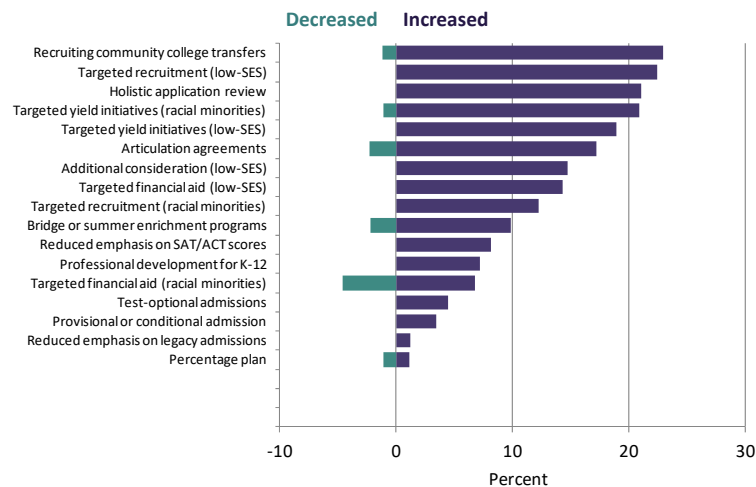




- 2015 Study by the American Council on Education (i.e., *Fisher*)
- National survey study of admissions and enrollment management leaders
- Examined how legal challenges to race-conscious admissions have changed and are changing practices at 4-year U.S. institutions

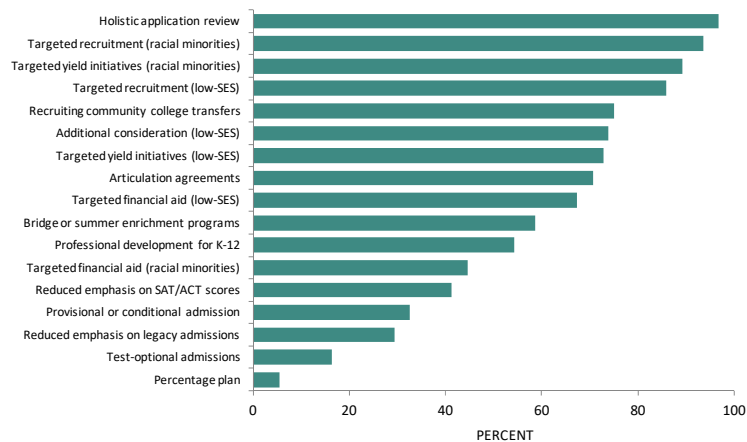


How Did Admissions Factors Change After *Fisher*?

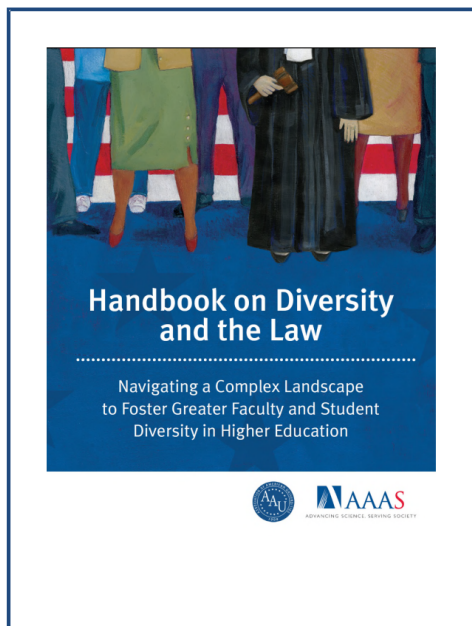


How Often Are Diversity Strategies Used...

...at Schools that Do Not Consider Race in Admissions?



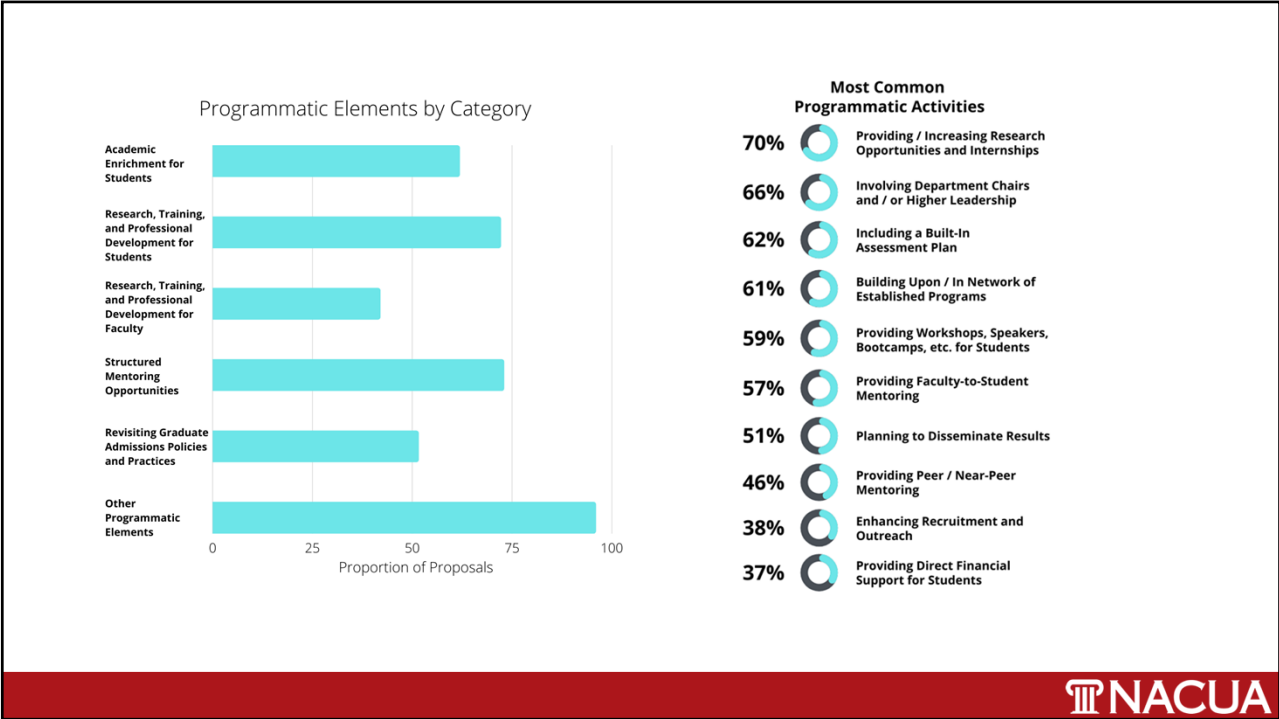
#1 Research Need = How to assess the diversity effects of alternatives to race-conscious admissions



- Sloan-funded since 2002
- Handbook + many other resources, for example:
 - *5-STEP Guides to Effective, Law-Attentive Design of Diversity and Equity Policies—Faculty & Students*
 - *Quick Study & Key Issue Resources*
 - *Adaptable models (e.g., Sample Target of Opportunity Policy for Faculty)*

Sloan Equitable Pathways to Graduate STEM Education

- Invests in Minority Serving Institution (MSI) pathways to graduate STEM education
- 20 grants in 2021 totaling \$5m, supporting 60 institutions
- Similar investment coming in 2022
- Institutional partnership model with various activities



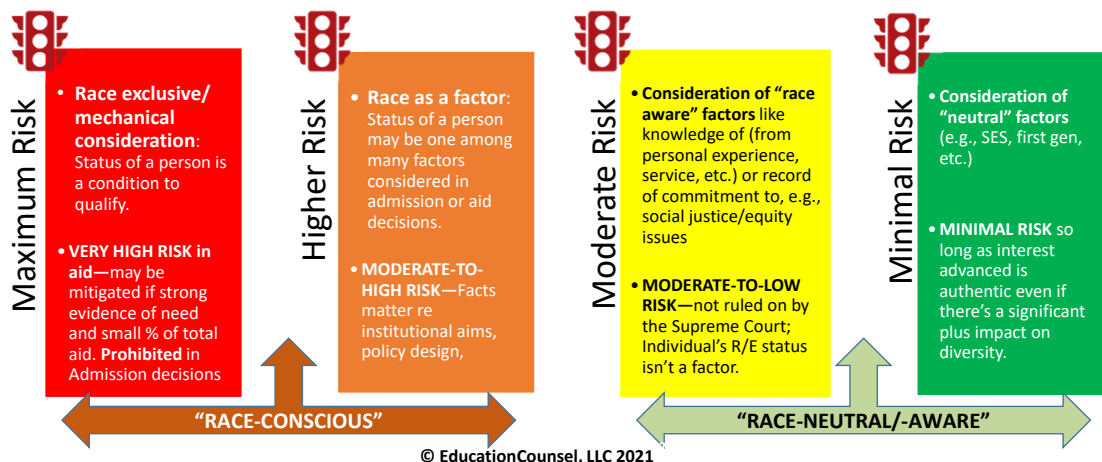
Scenario Planning

We can project a range of potential outcomes, with two that are the most consequential. What does institutional action look like if:

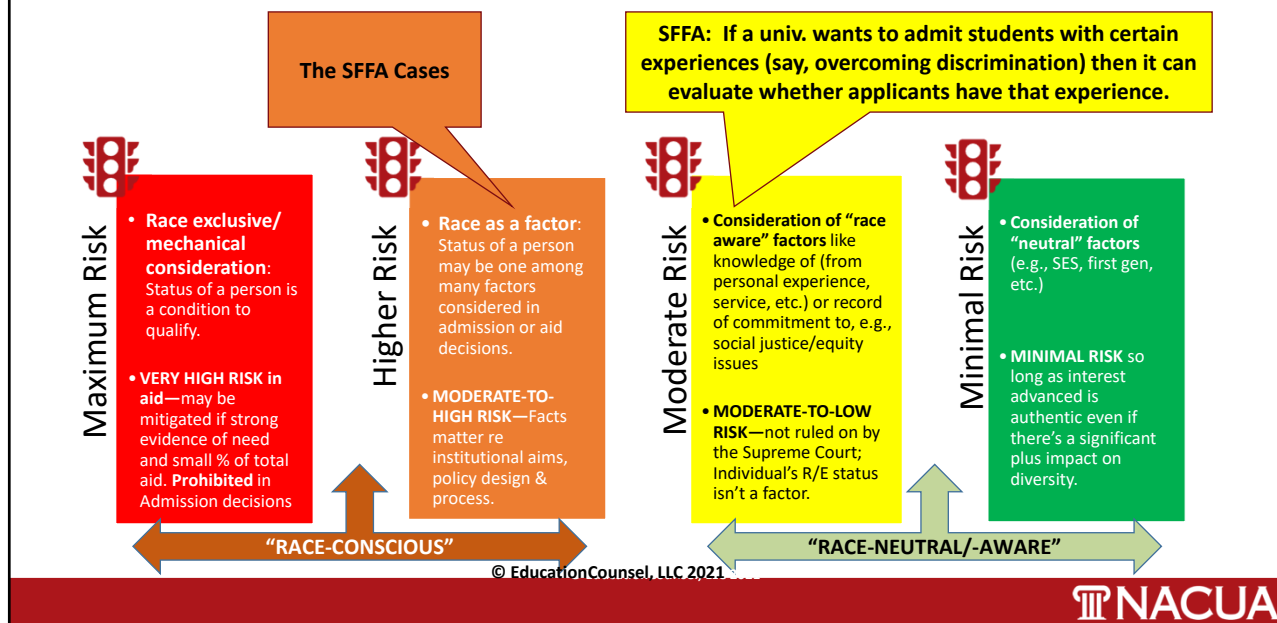
1. The Court eliminates the ability to pursue race-/ethnicity-conscious action?
2. The Court preserves the ability of IHEs to employ race-conscious practices but under conditions that require enhanced levels of evidence and/or clearer records of process/decision-making.



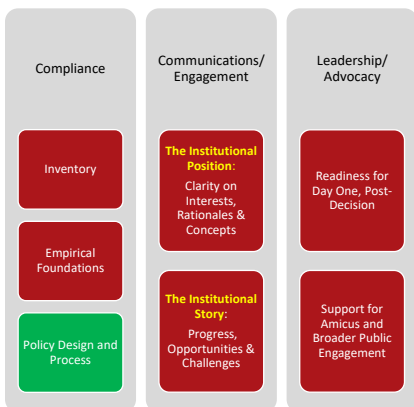
Legal Baselines: The Relevant Risk Spectrum



Legal Baselines: The Relevant Risk Spectrum



Point of Focus

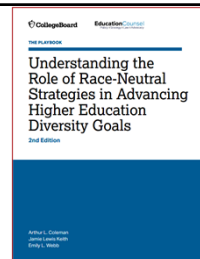


Policy Design and Process

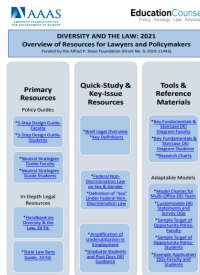
Clarity on **policy and process**

Inventory of all policies and programs that advance diversity goals, with special attention to race-, ethnicity-, sex- and gender-conscious policies and programs

Evaluation of empirical foundations (e.g., research, surveys, focus group reports, faculty/other committee reports, etc.)



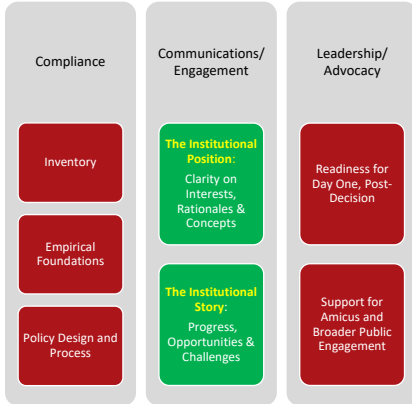
<https://www.aas.org/programs/diversity-and-law>



<https://www.aas.org/programs/diversity-and-law>



Point of Focus



Your Institution's Story and Position

What are the issues directly relevant to your institution?

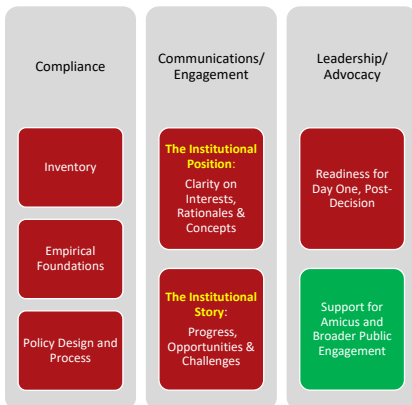
Assure that your story reflects a comprehensive DEI lens

What reflects commitment to continuous improvement?

[https://www.collegeboard.com/engaging-campus-stakeholders-on-enrollment-issues-associated-with-student-diversity-a-communications-primer](#)



Point of Focus



Amicus Support & Public Engagement

Public communications around shared interests and commitment on DEI issues

Opportunity to help 'make the case'—move from conceptual/policy realm to practical

Transmittal of research/data to leading advocates engaged in amicus efforts

Amicus participation

The Practitioner Perspective: Untangling and Working Toward the Many Goals of Diversity in Admissions

 NACUA

Inward Focus



Position
Upgrades

Position
Creation

Programmatic
Additions

Marketing
Initiatives

Outward Growth

Relationship
Building

Legislative
Outreach

 NACUA

Moving Forward

- Resources
- Consistency and Commitment
- The Clarion Call



NACUA materials, PowerPoint slides and recordings available as part of this program are offered as educational materials for higher education lawyers and administrators. They are prepared by presenters and are not reviewed for legal content by NACUA. They express the legal opinions and interpretations of the authors.

Answers to legal questions often depend on specific facts, and state and local laws, as well as institutional policies and practices. The materials, PowerPoint slides and comments of the presenters should not be used as legal advice. Legal questions should be directed to institutional legal counsel.

Those wishing to re-use the materials, PowerPoint slides or recordings should contact NACUA (nacua@nacua.org) prior to any re-use.