Unpacking *Fisher II* and its Possible Implications for Institutions

Webinar Sponsored by the Access & Diversity Collaborative
July 14, 2016
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Welcome

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This webinar is provided for informational and policy planning purposes only. It does not constitute specific legal advice.

Legal counsel should be consulted to address institution-specific legal issues.
Resources
All available online at diversitycollaborative.collegeboard.org

A Policy and Legal "Syllabus" for Diversity Programs at Colleges and Universities

Preparing for Fisher II: An Issue Brief from the Access & Diversity Collaborative

The Playbook

Bridging the Research to Practice Gap: Achieving Mission-Driven Diversity and Inclusion Goals (College Board, EducationCounsel 2016)

Lessons from Fisher II: (College Board, EducationCounsel 2016)
Outline of webinar

What we'll cover

1. *Fisher II*: The Decision and Implications
2. Action Steps to Consider as You Respond
3. Q&A
1. *FISHER II*: THE DECISION AND IMPLICATIONS
Fisher II
Pressures on the court from the parties and their amici

Pro-UT
- Holistic review
- Importance of academic freedom and judgment
- Research foundations
- Real-world implications

Pro-Fisher or Neutral
- Importance of income and class
- Complaints about the "black box" of admissions
- "Mismatch" theory
Fisher II
The decision

Majority
UT wins; Grutter preserved

Dissent
Fisher II

The decision addressed each element of the Grutter framework

- **Strict scrutiny**
  - **Compelling interest**
    - Educational benefits of diversity
  - **Narrow tailoring**
    - Necessity
    - Impact
    - Flexibility
    - Minimal adverse impact on non-beneficiaries
    - Periodic review / limited in time
"Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity."
Fisher II

Some deference on goals/objectives; fundamentally no deference on strategies/policy design.
Fisher II
UT's compelling interest

“Destruction of stereotypes.”

“Promotion of cross racial understanding.”

“Preparation of a student body ‘for an increasingly diverse workforce and society.”

“Cultivation of a set of leaders with legitimacy in the eyes of the citizenry.”

“An academic environment that offers a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.”
Fisher II
UT's compelling interest: Supporting evidence

A 39-page policy proposal

A yearlong study of many sources of "statistical and anecdotal" evidence and information

A dedicated stakeholder committee that reported to the president and board of trustees
Fisher II
Objectives: Beyond "critical mass" alone

Demographic changes

Anecdotal evidence and student perceptions

Statistical analysis of classroom diversity

Measuring UT's goals with multiple evidentiary sources
Fisher II

UT's narrow tailoring case for necessity

Demographic data and a host of neutral strategies not working

Reports of minority students' loneliness and isolation

Reintroduction of race led to limited but notable gains

(1) "intensified its outreach efforts;" (2) 3 new neutral scholarships; (3) new regional admissions centers; (4) $500,000 increase in its recruitment budget; and (5) more than 1,000 recruitment events.
Fisher II
UT's narrow tailoring case for **flexibility / limited use of race**

**Policy**
- Race a 'factor of a factor of a factor'
- Race a 'contextual factor'
- Race NOT a 'mechanical plus factor'

**Process**
- Race considered 'at one stage only'
- Extensive training for readers & admissions staff
- Reliability analyses
Fisher II
Justice Alito's dissent

"Affirmative action gone berserk."

Lack of transparency

Limited evidence

E.g., link between admissions and on campus behavior

Holistic review only a certain type of "diversity"

E.g., minority students from wealthy families

Concerns about children of donors

Policymaking

Holistic review "black box"
Fisher II
Don't forget about continuing legal questions . . .

“The Court's decision leaves plenty of room for future challenges to racial preference policies at other schools. The struggle goes on.”

- Roger Clegg, Center for Equal Opportunity
  (amicus of Abigail Fisher)
The Public on What Should Be Considered in Admissions

<table>
<thead>
<tr>
<th></th>
<th>Major Factor</th>
<th>Minor Factor</th>
<th>Not at All</th>
<th>No Opinion</th>
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<td>High school grades</td>
<td>73%</td>
<td>20%</td>
<td>6%</td>
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<tr>
<td>Standardized test scores</td>
<td>55%</td>
<td>33%</td>
<td>10%</td>
<td>2%</td>
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<tr>
<td>Types of courses students took in high school</td>
<td>50%</td>
<td>31%</td>
<td>19%</td>
<td>1%</td>
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<tr>
<td>Family*s economic circumstances</td>
<td>31%</td>
<td>30%</td>
<td>39%</td>
<td>1%</td>
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<tr>
<td>First-generation status</td>
<td>31%</td>
<td>27%</td>
<td>41%</td>
<td>1%</td>
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<tr>
<td>Athletic ability</td>
<td>15%</td>
<td>40%</td>
<td>44%</td>
<td>1%</td>
</tr>
<tr>
<td>Parent is a graduate</td>
<td>11%</td>
<td>35%</td>
<td>52%</td>
<td>2%</td>
</tr>
<tr>
<td>Race or ethnicity</td>
<td>9%</td>
<td>27%</td>
<td>63%</td>
<td>1%</td>
</tr>
<tr>
<td>Gender</td>
<td>8%</td>
<td>25%</td>
<td>66%</td>
<td>2%</td>
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Should Race/Ethnicity Be Considered, by Race

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<thead>
<tr>
<th></th>
<th>Major Factor</th>
<th>Minor Factor</th>
<th>Not at All</th>
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</thead>
<tbody>
<tr>
<td>White</td>
<td>3.9%</td>
<td>28.8%</td>
<td>66.6%</td>
</tr>
<tr>
<td>Black</td>
<td>16.7%</td>
<td>26.2%</td>
<td>57.1%</td>
</tr>
<tr>
<td>Latino</td>
<td>25.8%</td>
<td>19.8%</td>
<td>47.3%</td>
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### Fisher II
The amici landscape

<table>
<thead>
<tr>
<th>Briefs supporting Fisher</th>
<th>Neutral Briefs</th>
<th>Briefs supporting UT</th>
<th>823 scholars plus major research orgs</th>
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<tbody>
<tr>
<td>17</td>
<td>3</td>
<td>65</td>
<td>72 institutions</td>
</tr>
<tr>
<td>• Business and military leaders</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Civil rights groups</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Governmental actors (e.g., states, legislators)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Higher education institutions</td>
<td></td>
<td></td>
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<tr>
<td>• Higher education organizations</td>
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<td></td>
<td></td>
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<tr>
<td>• Individuals</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Research organizations or groups</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Other organizations (e.g., think tanks, legal or other professional membership organizations, law school clinics, religious organizations)</td>
<td></td>
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</tbody>
</table>

- 49 businesses
- 36 military leaders
- 8 religious orgs
- 18 states + DC
Fisher II Takeaways

Key ideas for institutions to consider

• **Goals and objectives associated student body diversity should be sufficiently precise**, without resort to numbers only, and based on evidence-centered academic judgments.

• **Institution-specific evidence should support the necessity of using race-conscious methods** for achieving these goals.
  
  – The entire spectrum of related enrollment policies and practices – from outreach to financial aid – should inform an institution's conclusion that other "workable" race-neutral efforts alone will not achieve its goals.
  
  – Race-conscious policies should have evidence of meaningful, if limited, positive impact on the achievement of the institution's goals.

• **Holistic review remains a cornerstone** for race-conscious admissions because it reflects flexible consideration of race through individualized evaluation and an institution's unique mission.

• The decision to consider race in enrollment decisions cannot be an isolated, one-time occurrence. Institutions have an "**ongoing obligation to engage in constant deliberation** and continued reflection" regarding their admissions and related policies.

• The **broader context** for postsecondary diversity and inclusion efforts counsels that institutions should use Fisher II as an impetus to recommitting to their institutional goals.
2. ACTION STEPS TO CONSIDER AS YOU RESPOND
Recommended institutional action steps

Reading the tea leaves

Assess
- Prepare institutional leaders and key stakeholders and build a response team
- Identify your policies and practices that may be implicated

Reflect
- Review guidance from the ADC and others
- Balance press coverage with internal analysis
- Communicate carefully but proactively with your institutional or organizational community
- Consider other contextual factors that may impact decisions (e.g., campus climate)

Act
- Create or revive an interdisciplinary working group
- Inventory policies and programs
A policy or practice is **race-conscious** when it confers a **tangible benefit to an individual with some consideration of his or her race or ethnicity**

**Race-neutral** policies may:
- Be neutral, both in intent and operationally (read: language);
- OR
- Be "inclusive" policies that may be race-conscious on their face and/or in intent, but do not confer material benefits to the exclusion of non-targeted students.

**Race-conscious** policies may:
- Involve explicit racial classifications (e.g., race as one factor in a holistic admissions policy);
- OR
- Be neutral on their face but motivated by a racially discriminatory purpose, which leads to racially discriminatory effects.
Assess

- Prepare institutional leaders and key stakeholders and build a response team
- Identify your policies and practices that may be implicated

"Race-Neutral"

- Race-Blind
- Race-Aware without Impact
- Actual Race-Neutral but with Racial Impact
- Inclusive Race-Targeted
- Facial Race-Neutral but with Some Racial Intent
- Express Race Consideration
- Race-Exclusive

"Race Conscious"

Strict scrutiny
• Review guidance from the ADC and others
• **Balance press coverage with internal analysis**
• Communicate carefully but proactively with your institutional or organizational community
• Consider other contextual factors that may impact decisions (e.g., campus climate)

• Headlines don't always capture the nuance of a court decision.
• Right now, almost everyone is saying (correctly) that this is a win. But there is real work to be done.

**Supreme Court gets it right on race, but how much does it matter?**

Supreme Court’s affirmative action ruling won’t affect Kansas schools

Will the Supreme Court ruling on affirmative action affect Harvard’s pending case? Probably.

**Supreme Court decision won't affect CU–Boulder's admissions process**
Reflect

- Review guidance from the ADC and others
- Balance press coverage with internal analysis
- **Communicate carefully but proactively with your institutional or organizational community**
- Consider other contextual factors that may impact decisions (e.g., campus climate)

Avoid under-reaction to the decision.

Let mission be your guide.

Confirm intention to act within the law.
Reflect

- Review guidance from the ADC and others
- Balance press coverage with internal analysis
- Communicate carefully but proactively with your institutional or organizational community
- **Consider other contextual factors that may impact decisions (e.g., campus climate)**

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**THE DEMANDS**

Across the nation, students have risen up to demand an end to systemic and structural racism on campus. Here are their demands.
• Review guidance from the ADC and others
• Balance press coverage with internal analysis
• Communicate carefully but proactively with your institutional or organizational community
• Consider other contextual factors that may impact decisions (e.g., campus climate)

Diversity
- Specific mission-driven diversity goals
- Race-conscious and race-neutral enrollment strategies designed to attract, admit, and enroll a diverse class
- Collaborative learning
- Intergroup dialogue opportunities

Inclusion
- Mission and goals
- Campus climate
- Pedagogy
- Faculty hiring
- Composition of the student body
- Recruitment messaging
- Peer effects
- Mentoring opportunities
- Support services specifically focused on certain student populations
- Student cultural or interest groups
- Summer bridge or other supports for the transition to college

Reflect
1. In response to student protests in fall 2015, Brandeis University created a Steering Committee on Diversity, led by the Provost's Office, and worked with multiple stakeholders to revisit its diversity statement and develop a revised action plan.

2. After black students issued a list of demands in fall 2015, Emory University's senior vice president and dean of campus life created working groups to examine each demand and make recommendations for possible institutional change. After several meetings of each individual group, all participants (more than 100 people) gathered for a "racial-justice retreat" in January 2016 to make recommendations for addressing each demand.


• Create or revive an interdisciplinary working group
• **Inventory policies and programs**

• Inventory and assess all policies and programs that contribute to an institution's diversity goals to determine what's working (and not working).
  – Think of it like an annual checkup.

• The inventory can encourage greater institutional coherence and connectivity.

• Sharing promising practices among institutions regarding such efforts can be helpful.
Sample Inventory 1
Findings in OCR's Resolution with Rice University

Outreach & recruitment

- Emphasis on the recruitment of applicants “who have distinguished themselves through initiatives that build bridges between different cultural, racial and ethnic groups.”
- New staff roles for minority and Hispanic recruitment
- Current students included on the Student Admission Council
- Enhanced recruitment efforts for underrepresented groups, including recruitment trips to "nonfeeder" schools; direct mail and telemarketing; community sponsored events; partnerships.
- More than 70 different outreach programs for K-12 students and teachers and 38 professional development programs for K-12 classroom teachers and administrators.

Admission

- Revised admission guidelines to include (1) potential contributions to enrich the educational experience of all students; (2) geographic, socioeconomic, and cultural origins; (3) first generation status; and (4) challenges faced in life.
  - Expansion of socioeconomic diversity within its student body, including through a need-blind admission process
  - Not workable: percent plan. Given its relatively small student body (with freshman class <700 students) and the competitive applicant pool, Rice concluded that a percent plan would "require sacrificing Rice’s mission of providing a top quality education to a purposefully small body."

Financial aid & scholarships

- New scholarship opportunities focused on students who have made efforts to help bridge racial and cultural divisions.
Sample Inventory 2
Findings in OCR's Resolution with Princeton University

• **Pursuit of a broad definition of diversity — and merit.** All applicants could describe how they believed they might contribute to diversity; and applications asked for information about extracurricular activities, employment, summer experiences, family background, artistic talents, athletic abilities, geographic residence, first-generation status, or significant hardships in life. Princeton also sought international diversity; no patterns based on country of origin were found in admissions statistics. Moreover, because admission to Princeton is so competitive, no single factor was predictive of admission, including perfect grades and test scores.

• **Participation in several developmental programs for promising low-income high school students,** including the Princeton University Preparatory Program (a comprehensive college prep program for local high-achieving, low-income students), a Summer Journalism Program, the W. E. B. Du Bois Scholars Institute summer program, the Princeton Prize in Race Relations, QuestBridge, and the Leadership Enterprise for a Diverse America

• **Recruitment and outreach** including visits by admissions staff to more than 400 high schools and hosted more than 60 evening information sessions in the U.S. for the class of 2010. Admissions staff made visits to high schools that had not received a Princeton visit before and participated in several community-sponsored events aimed at diverse populations of high school students. Princeton partners with more than 30 regional and national organizations (e.g., QuestBridge, College Match, Jack Kent Cooke Foundation Scholars). It also conducts extensive international outreach. Promoting its no-loan financial aid plan was an important message during these events.
3. Q&A