Checklist of Institution Action Post-Fisher I and Fisher II:  
Supporting Strong, Effective and Sustainable Diversity Strategies

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1. **The Right Team:** Assess whether the institution has the right team of experts—undergraduate enrollment management professionals and faculty, graduate student dean and faculty who recruit graduate students, legal experts—an covers the full enrollment management spectrum (recruitment, admission, mentoring, experiential learning, financial support, etc.) to design, implement and periodically assess actually effective, and legally sustainable, institutional mission- and educational outcome- tied, diversity strategies.

2. **A Policy Focus, With Awareness of Legal and Resource Design Parameters:** Focus on good policy objectives consistent with the institution’s mission. But keep the law and institutional resources in mind as design parameters for development of means that will be successful and sustainable—much as gravity and budget are design parameters for aircraft development.

3. **Establish and Evidence The Purpose of Diversity, Tied To Institutional Mission and Particular Outcomes:** As a matter of good policy, as well as legal imperative, consider whether the institution knows WHY broad diversity—including but not limited to racial, ethnic and gender diversity—is important to achieve the institution’s mission.

What is the institution’s mission—both unique to it and common to other institutions of higher education (IHEs)? What are the educational outcomes and policy-based, but legally permissible, contributions to society that the institution seeks? Why are broad student body diversity—and faculty diversity—needed to achieve them?

Consider these questions in a deliberative process. Document:
(a) the process and when it is conducted, and at what intervals it is repeated,
(b) the overall institutional mission,
(c) the related educational and societal outcomes sought, and
(d) the reasons broad diversity is needed to achieve those outcomes.

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Regarding the first—objective focused prong of strict judicial scrutiny—Supreme Court Justice Kennedy makes clear in Fisher I and Fisher II that an IHE must articulate a “reasoned, principled explanation” of the connection between broad student body diversity and the legally recognized, mission-tied educational and societal outcomes the institution seeks, if race will be considered at all (or as much) in admissions. (This standard applies whenever race is considered in conferring other educational benefits, but the factual context and burdens on non-minorities may differ.)

If that is done, Fisher I and Fisher II hold that a court should defer to an IHE’s academic judgment as a “special concern of the 1st Amendment” in this objective-focused 1st prong of strict scrutiny.

The legally recognized diversity interest is not diversity as an end in and of itself. Rather, diversity is compelling as a critical component of the means of delivering excellent educational outcomes and other mission-tied goals for all students and society.

The Court has long held that mirroring societal demographics—or seeking to remedy societal discrimination (as opposed to an institution’s own discrimination)—are unconstitutional and cannot be a goal.

But, demographics are relevant—as a matter of good policy and law—as a context for legally recognized, good policy-based goals. Considering that there were more babies of color born in 2013 than white babies, that racial minorities and women have long been the fastest growing segments of the college-age population, and that global interactions and influences are profound and increasing, the society in which our students will live, work, and be citizens is a global and diverse society. IHEs seek to provide a learning environment and experiences that will prepare all students well.

Document the experience of faculty, students, alumni and employers that a robust, broadly diverse academic environment is most conducive to learning, creativity, high quality work, and contributions to a well-prepared workforce, full participation of individuals as students, workers, citizens and leaders in U.S. democratic and global society, and breaking down stereotypes that undermine the fabric of the learning community and society. Document that diversity is used to achieve outcomes. This need not be done in a scientific study, but testimonials and opinion surveys are helpful.

4. **Evidencing the Need To Consider Race, Ethnicity, Gender As A Means Of Achieving Missing Aspects Of Broad Diversity and the Outcomes To Which It Contributes:** As a matter of good policy, as well as legal imperative, consider what means are needed and effective to achieve the broad diversity required to support the educational and societal outcomes sought by the IHE.
Devise and implement a deliberative process to—
(a) inventory the bundle of race- and gender- neutral and race- and gender- conscious enrollment management practices being used together to achieve, maintain, and utilize the needed diverse undergraduate student body or graduate students—as a whole and in appropriately clustered courses of study—from outreach and recruitment, to admissions, to bridging and mentoring, to financial support, to community building;

(b) assess their effectiveness alone and together—using both anecdotal, opinion based evidence and quantitative evidence—to (i) achieve broad diversity, (ii) maintain that diversity, and (iii) deploy that diversity to create valuable educational experiences for all students and to achieve the outcomes sought;

(c) shed those strategies that are not effective (as a matter of policy, they are a waste of resources and, if race conscious, they reflect high legal risk for low reward); and

(d) seriously consider and implement any additional workable neutral alternatives that will not change the character of the institution or foreclose the assessments needed to build the desired student body composition—and will not threaten the financial stability of the institution.

To satisfy the second—means to end--prong of strict scrutiny, Fisher I and Fisher II make clear that courts are not permitted to defer to an IHE’s mere good faith opinion that race must be considered as a means to achieve the broad diversity in support of mission-tied educational and societal outcomes.

An IHE must have evidence to back its conclusion that considering race and ethnicity at all (even as one of many factors)—or considering race and ethnicity as much as it is being considered—is necessary—which means that the strategies are effective to achieve diversity and related educational and societal outcomes sought, are not overly burdensome on non-minorities, and race is used as little as possible.

The deliberative process to assess the need to use race and ethnicity (at all or as much) and the effectiveness of strategies, must be undertaken on a regular basis, not only initially, taking into account changes in the institution’s and society’s needs and the composition of the student body. Use of race must be time-limited to when the need is evidenced.

Don’t sacrifice success to perfection. Document the process, the frequency conducted, and the evidence amassed. Use existing outreach for efficiency: student class surveys; faculty assessments; HERI surveys; alumni surveys. Use software to model the effect of not considering race and ethnicity along with neutral approaches to demonstrate the need to consider race and ethnicity.
Have good training programs and calibration processes to demonstrate the expertise and fairness of the professionals, deans, department chairs implementing the admissions or recruitment process.

Avoid numerical goals that appear quota-like, in favor of tracking progress numerically on an annual basis (backward looking), and identifying areas where more progress is needed.

5. **What Neutral Means:** Make sure your institution’s team understands what “neutral” means. Consider the following—

(a) Neutral strategies do not on their face—or in their purpose or aim—prefer individuals of a particular race.

(b) They serve authentic—mission tied purposes—other than preferring a particular race.

(c) If they do have an authentic, non-race or ethnicity based, mission-tied purpose, the fact that they may also increase the racial and ethnic diversity of the undergraduate student body or graduate students in a discipline—as a welcome ancillary benefit—is allowed.

(d) Some neutral strategies do not appear neutral on their face—such as targeted outreach—but if they do not allocate significant benefits to individuals based on race or ethnicity, and have an inclusive (rather than exclusive) effect—they are still neutral.

(e) Fisher II makes clear that Percentage Plans applied to racially segregated school systems are not neutral.

6. **10 Neutral Strategies:**

**Strategy #1 Neutral Outreach:** Conduct robust general outreach to all qualified potential applicants—and also use some targeted outreach to minority applicants if there is a gap in this aspect of broad diversity at the institution.

- In your targeted outreach, don’t use disproportionate resources—or confer what amounts to a real benefit on individuals based on their race or ethnicity. (University visits to institutions and conferences, communications, web-based resources, when applied broadly, as well as tailored to minority groups, is not a real benefit based on race.)

- Be sure your general outreach is truly robust and aimed at reaching anyone who is interested and may be qualified—and that your targeted outreach is not the predominant outreach—but is aimed at making sure communications are effective and welcoming for all.
• Outreach is unlikely to trigger strict scrutiny.
• But if you have programs to help students fill out applications or to bring them to campus for recruitment weekends, that is unlikely to be considered just outreach—but, rather, to be a real benefit to the individual.
  o If an IHE takes race into account to select students for these programs, it needs to satisfy strict scrutiny.
• If the institution is in a voter referendum state that prohibits any racial preference, even in the limited circumstances allowed under federal law—it is prudent to do some surveying or interviewing to actually demonstrate that targeted outreach to racial minorities is needed—in addition to robust general outreach—because the IHE’s general outreach is not reaching minorities well, and its targeted outreach is merely creating equally effective communications, not a preference.

Strategy #2 The Inclusion Criterion: Regardless of an individual’s own race, ethnicity or gender, use an individual’s commitment to and record of breaking down barriers and including racial minorities and other underserved people—in learning, work, research, co- and extra-curricular activities, social activities—as a plus factor in admissions and other programs. This can be a very important criterion that can be explored through essays or interviews.

• If the institution needs broad diversity to achieve compelling educational outcomes, it needs students who will create a welcoming and inclusive environment where a broad diversity of individuals, including racial minorities and others, will be able to fully participate, interact and thrive.
• Seeking individuals who will foster that environment—regardless of their own race—is an authentic, race-, ethnicity- and gender-neutral, mission-driven goal for the recruitment, retention and success of a broadly diverse undergraduate student body or graduate students in a discipline or cluster of related disciplines that interact.
• Do not assume that minorities or women will have this attribute—and non-minorities and men will not.
• And be sure to apply this criterion to all applicants equally so that the IHE is truly seeking individuals with a neutral attribute—regardless of an individual’s own race, ethnicity or gender.
• At the same time, as long as race and gender still matter in the world and many minorities and women have experienced the need for inclusive conduct and have helped break down barriers first-hand, it is likely that use of this criterion will also enhance racial and gender diversity.
• See the attached AAAS Target of Opportunity template that uses this criterion in hiring faculty. This could be used in selecting graduate students for experience-building appointments.
Strategy #3 (a Variant of #2)—The Experience Criterion: Regardless of an individual’s own race, ethnicity or gender, focus on each individual’s experiences with race, ethnicity or gender in society, what was learned, and how this experience will contribute to the learning and living environment on campus or in a discipline or related disciplines.

- In using this strategy, don’t consider the racial or gender status of the applicant—don’t consider racial minorities or women to necessarily have more valuable experience than others.
- Instead, focus on climate issues at the institution or in a discipline or cluster of related disciplines and assess each individual’s ability to learn from his or her experiences involving cross-racial and gender misunderstanding, insensitivity or tensions and to apply lessons learned to the institution’s community.

Strategy #4 True Socio-economic Background: Use low socio-economic background as a plus factor. Century Foundation’s Richard Kahlenberg’s model considers the concentration of poverty in the individual’s residential and school district under the U.S. Census, and total wealth as well as annual income, yielding a more meaningful measure of low socio-economic background. Due to residential and school segregation and the history of slavery in the U.S., these considerations also yield significant racial diversity.

Strategy #5 Macro Race Consciousness (raising questions regarding the boundaries of race neutral and race conscious approaches): Use diverse zip codes—or other macro-level (not individual) race consciousness—as a plus factor.

- Justice Kennedy’s and Justice Ginsburg’s Fisher II discussions of percentage plans as race conscious raises serious questions on whether this strategy is neutral—and the same may be asked about recruiting from HBCUs, high minority concentration urban neighborhoods, and certain high schools with high minority concentrations. Justice Ginsburg expresses her opinion that percentage plans are not neutral.

- In the Parents’ Involved In Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007), Justice Kennedy’s concurring opinion notes that a zip code does not associate race with an individual. He indicates that strict scrutiny may not apply when general awareness of the demographics of a zip code is considered in school assignments aimed at creating an integrated and diverse public school class. Justice Kennedy is clearly more comfortable with macro-race-consciousness than micro-individual race consciousness.

- If an institution is authentically seeking students from inner-city urban areas because that is a particular life experience of value to the institution that can be articulated—and if the institution is consistent in this purpose and documents it—I’d say this is a neutral strategy.
Alternatively, these approaches may be the equivalent of neutral if the Court were to decide more definitively that general race consciousness—without consideration of race tied to an individual—does not trigger strict scrutiny. I like the authenticity of this interpretation—particularly when macro-race consciousness is also education-access-consciousness in a country with a widening poverty and education gap.

**Strategy #6 Racial Program Focus, Not Participation:** Use issues of race in the subject of a program—but invite anyone who is interested to attend. This is an approach to campus weekends or sessions within campus weekends.

**Strategy #7 Race Blind Decision-making, Neutralizing Race-based Resources:** Make decisions on who deserves aid or financial support and how much—or who should participate in a program—without considering race at all. But once selected, assign fungible restricted dollars or position titles (e.g., NSF Minority Scholar) to minorities.

- Make your advertising clear that anyone who is interested may apply to a program, show selection criteria that are not race-based, and encourage everyone, including minorities and underserved individuals, to apply.

- Also note, once selected on neutral bases, that minorities and other underserved individuals will be in positions named by a funder or donor. This is a means of encouraging their interest and creating a sense of welcome to the program.

**Strategy #8 Aggregating Programs:** Rather than stand-alone race- or gender-conscious programs for mentoring, experiences in the field, and community-building, create a single larger neutral program that includes a smaller number of more focused groups.

- Put aside any race- or gender-based selection criteria that may apply in some programs. Then inventory all programs that offer similar benefits or experiences and (aside from race or gender) have similar selection criteria. Combine all of the programs into a larger program available to all.

- Advertise the large program to all who may be interested and qualified.

- Then create focus groups within the larger program that are open to all but address issues of race or gender that are authentic concerns to the institution (such as accomplishments of minorities or women in certain fields and barriers for minorities or women and the resulting issues), and that are likely to be of great interest to minorities or women, as well as to some others concerned about race and gender issues.
• Targeted outreach and invitations to minorities or women for the focus groups may be justified, if there is robust general advertising, benefits are widely available to others and evidence shows minorities or women have a disparate need for or knowledge of programs. For example, disparate need could be shown if you have evidence through surveys or multi-variable regression analyses that—all other factors being equal—minorities or women statistically (not individually) have less knowledge of and access to information and fewer resources than others, or are more isolated, or have lower success rates.
  ▪ This evidence may also justify limited consideration of race or gender in selection. But once an institution considers race in selection criteria for programs that offer a significant benefit, strict scrutiny will apply, and once gender is considered, heightened scrutiny will apply.
  ▪ Note, however, that having a small community building program for minorities or women that requires minimal resources, with strong evidence of racial or gender isolation as compared with others, may arguably be an inclusive, not exclusive program, and therefore be neutral in effect and not trigger strict or heightened scrutiny.

**Strategy #9 Articulation and Collaboration:** A longer term strategy is investment in building pathways through educational collaborations and recruitment consortia among like and complementary institutions.
  • Refer to AAAS’ *Smart Grid for Institutions of Higher Education and the Students They Serve*, for a comprehensive explanation and relevant forms.
  • Attached is a description of a recruitment consortium.

**Strategy #10 Quantitative Evidence:** Use multi-variable regression analyses and surveys to determine whether—all other factors being equal—mere membership in a minority race or a particular gender statistically (not in the case of a particular individual) creates disparities in grade point average, graduation rate, major, pursuit of graduate school in a discipline, knowledge of important experience opportunities, processes and resources for success in particular fields, programs or pursuits, and isolation. These data may justify consideration of race or gender as one of many factors in selection of participants in mentoring, research experiences, and other capacity and community-building programs in the relevant disciplines—while retaining opportunities for non-targeted groups to compete and participate. Community building programs for isolated minorities or women may be justified and shown to be inclusive, not exclusive in effect, and therefore to not trigger strict scrutiny, through surveys and regression analyses.