Race in Higher Education:
Analyzing the SCOTUS Opinion on Race-Conscious Admissions and Charting the Way Forward for DEI Professionals and Institutions

A National Webinar
August 30, 2023
Panelists

Paulette Granberry Russell, President, National Association of Diversity Officers in Higher Education (NADOHE)

Caroline Laguerre-Brown, Vice Provost for Diversity, Equity and Community Engagement, The George Washington University

Art Coleman, Managing Partner & Co-Founder, EducationCounsel
**Introductions & Overview**

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- The Supreme Court’s SFFA Decision
- U.S. Departments of Justice and Education Q/As
- U.S. Department of Education OCR Race and School Programming
Preliminary Analysis on Which Presentation is Based

![Image of EducationCounsel document regarding preliminary guidance on SFFA v. Harvard and SFFA v. UNC]

This preliminary working draft has been developed to provide initial guidance regarding the Supreme Court's SFFA opinions. We offer this draft, directional guidance to support understanding and leadership within the higher education community in light of immediate enrollment issues with which institutional leaders are grappling. Given the complexity of the decision and the issues implicated, this draft will be reviewed and supplemented in the coming weeks.1

INTRODUCTION AND OVERVIEW

On June 28, 2023, the U.S. Supreme Court issued its decision in the Students for Fair Admissions v. Harvard/UNC cases regarding the universities’ consideration of race as one factor among many in undergraduate admissions to advance their interests in promoting the educational benefits of diversity for all students. In a consolidated opinion (reflecting a 6-2 decision in the Harvard case, with Justice Jackson recused; and a 6-3 decision in the UNC case) the Court ruled that Harvard’s and UNC’s admissions programs violated federal non-discrimination law.2 While the Court did not expressly overrule past decisions that established a framework permitting the limited consideration of an applicant’s race to advance diversity interests, it significantly undercut that precedent to a point of eviscerating its continuing vitality—impeding efforts at many institutions to fully advance the research- and experience-demonstrated benefits of diversity that inure to all students in terms of educational, workforce, and civic aims.

This initial analysis provides a synthesis of the key points of the majority’s opinion in the two cases, followed by important actions for higher education institutions and leaders to take, which include policy and practice implications derived from the Court’s ruling. As part of the synthesis, we also offer commentary on each of the key segments of the Court’s opinion that

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1 Nothing in this document should be construed as providing institution-, organization-, or individual-specific legal advice. This guidance has been prepared to provide information to inform those conversations and judgments, which are inherently fact- and context-specific.
More than Admission: The Role of the CDO

Systems Design and Influence
- Enrollment policy/practice & programs
- Student affairs policy/practice & programs
- Curricular and program offerings

Communications and Stakeholder Engagement
- Mission-related DEIJ goals and objectives
- Your IHE story—successes, challenges, future aims

Strategy Development and Leadership
- The Narrative of Leadership
- Developing the Evidence Regarding Benefits and Impact
The views and perspectives today... NOT legal advice.

Consult with your institution’s legal counsel on all policy/program issues.
Part 1—
Meeting the Moment: A Time for Leadership
Opinion

By gutting Affirmative Action, the Supreme Court makes it easier to kill diversity | Opinion

Opinion

Affirmative Action Is Finally Dead. It's Time for Real Equality | Opinion

Affirmative Action Is Radical Supreme Court’s Latest Casualty

Affirmative-action ruling gives us a blank slate to plot a path forward to equality | Opinion
Bakke (1978)
A higher education loss from which major gains were achieved
**Bakke** (1978)
A higher education loss from which major gains were achieved

**SFFA (2023)**
A higher education loss...
A Moment for Leadership

In the face of new challenges, we have opportunities. Seize them.
Be Bold
Re-calibrate
Innovate
Invest in the Long Game
“Political Strict Scrutiny”—Anti-DEI Bills Have Been Introduced In 35 States
Attacks Already Launched in Response

June 30, 2023

Dean John F. Manning
Harvard University Law School
Wasserstein Hall, Suite 5027
1585 Massachusetts Avenue
Cambridge, MA 02138

Dear Dean Manning:

Yesterday, the Supreme Court declared racial preferences illegal in higher education. I write to inform you of the consequences that you and your institution will face if you fail to comply with or attempt to circumvent the Court’s ruling.

It is unlawful for Harvard University Law School to flout the Constitution and the unambiguous command of Title VI by admitting students with lower SAT scores and academic credentials than those demanded of others based on their race, sex, or national origin. It is unlawful for your school to violate Title VI, Title VII, and Title IX in its faculty hiring by discriminating in favor of female and minority faculty candidates at the expense of others. It is unlawful for your school to allow their student-run journals to give discriminatory preferences to women and minorities in membership and article selection.

You must immediately announce the termination of all forms of race, national origin, and sex preferences in student admissions, faculty hiring, and law review membership or article selection. And you must, before the start of the next academic year, announce an official policy that prohibits all components of the law school from giving preferential treatment to anyone because of that individual’s race, national origin, or sex.

There are those within and outside your institutions who will tell you that you can develop an admissions scheme through pretext or proxy to achieve the same discriminatory outcome. Anyone telling you such a thing is coaching you to engage in illegal conduct in brazen violation of a Supreme Court ruling, lawbreaking in which you would be fully complicit and thus fully liable.

After gutting affirmative action, Republicans target minority scholarships

The Wisconsin State Assembly’s speaker suggested college grants meant for minority students are on the chopping block.

Some Colleges Will No Longer Consider Race in Awarding Student Scholarships

By Kate Hidalgo Bellows | JUNE 30, 2023

University of Missouri system to end race-based scholarships after Supreme Court ruling

Dr. Lawrence Bacow
President
Harvard University
Massachusetts Hall
Cambridge, MA 02138

Dear College and University Presidents:

I write to express concern about your institutions’ open defiance of and potentially unlawful reaction to the Supreme Court’s landmark decision in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, which reaffirmed the foundational constitutional principle of equality under the law and therefore forbade admissions and law school admissions decisions based on the race, sex, and national origin of applicants.

As you know, the Court has instructed you to honor the spirit and letter of the ruling. Going forward, the Court explained, “unavoidably, universities may not simply establish through application essays or in other ways the regime we held unlawful today.”

However, within hours of the decision’s announcement, you and your institutions expressed open hostility to the decision and vowed to announce an intention to circumvent it. Statements along these lines are particularly disconcerting in light of recent revelations that proponents of unlawful affirmative action sometimes practice “unstated affirmative action,” in which hiring and admissions decisions are made on the basis of race in a covert and unspoken way, even when the relevant decisionmaker is placed under oath in a deposition.

Below, I have highlighted a few alarming excerpts from your responsive statements:

- Princeton President Eisgruber complained that the Court’s decision was “unseemly and disappointing” and vowed to pursue “diversity . . . with energy, persistence, and a determination to succeed despite the restrictions imposed by the Supreme Court in its regrettable decision today.”

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1 400 U.S. ___ (2023).
2 Slip op., at 39.
Part 2—
The Legal Landscape
The Court’s Ruling: In a Nutshell

Harvard and UNC may not consider an applicant’s racial status in admissions to advance the educational benefits of diversity.

Harvard’s and UNC’s Fatal Flaws:
- No compelling interest
- Racial “classifications” = stereotypes
- No definitive end date
## New Rules: What’s Changed

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<td><strong>Compelling Interest</strong></td>
<td>- The educational benefits of diversity (previously recognized) are no longer compelling to justify race-conscious action.</td>
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<td>- Too “amorphous” &amp; “elusive.” Not “sufficiently measurable” or “coherent.”</td>
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<td><strong>Negative Effect/Stereotypes</strong></td>
<td>- The “classification” of race was “used as a negative” and impermissibly “stereotyped” applicants based on race.</td>
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<td>- College admissions are “zero-sum.” Admission involved “preferences on the basis of race alone”</td>
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<td><strong>End Point in Time</strong></td>
<td>- Admissions programs “lacked a logical end point.”</td>
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<td>- Process of periodic review isn’t sufficient for satifying durational requirement; need specific end point to the consideration of racial status</td>
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“Universities may define their missions as they see fit.”
“[N]othing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise.”

The “touchstone of an individual’s identity [must be with respect to] challenges bested, skills built, or lessons learned”—not “the color of their skin.”
New Rules for Admission Officers: What’s Changed

No: Racial Status

• Admissions officials may not value or give preferences to an applicant because of their racial or ethnic status.

Yes: Valued Qualities Associated with Racial Experience

• Admissions officials may consider an applicant’s background—their experiences, characteristics, and aspirations that may be related to the mission-aligned qualities that they seek with respect to all students—which may include information about the applicant’s racial identity tied to experience, perspectives and goals.
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| Scholarships and Financial Aid   | • Potential distinction with admissions: Not “zero-sum”  
• If race conscious (status), need compelling interest.  
• Design options to consider include: Pool and Match. |
| Outreach and Recruitment         | • Inclusive practices still viable, even with focus on racial diversity.  
• More latitude than, e.g., admissions and aid |
| Pipeline and Pathways Programs   | • Inclusive practices still viable, even with focus on racial diversity.  
• More latitude than, e.g., admissions and aid |
| Data Collection                  | • No prohibition on collection, by race, for research, evaluation, and reporting purposes |
| Employment                       | • Title VII regime is remedial—unlike educational benefits of diversity. |
| Race-Neutral Strategies          | • The new landscape.  
• Authenticity of mission-aligned interests an imperative. No to proxies. |
Advance Diversity and Opportunity in Higher Education: Justice and Education Departments Release Resources to Advance Diversity and Opportunity in Higher Education

Resources Aimed to Assist Colleges and Universities in Response to the U.S. Supreme Court’s Decision on the Use of Race in Higher Education Admissions

August 31, 2023

Contact: Press Office: (202) 465-1578, press@ed.gov

Today, following the Biden-Harris Administration’s commitment to advance diversity and opportunity in higher education, the U.S. Department of Education (ED)’s Office for Civil Rights and the U.S. Department of Justice’s Civil Rights Division are jointly releasing free resources to help colleges and universities understand the U.S. Supreme Court’s decision in Students For Fair Admissions, Inc. v. University of North Carolina at Chapel Hill. These resources will help colleges and universities as they work to fulfill their promise to advance a student body that is diverse across a range of factors, including race and ethnicity.

“Higher education is an engine for equal opportunity, upward mobility, and global competitiveness. We need campuses that reflect the diverse breadth of our country,” said U.S. Secretary of Education Miguel Cardona. “Our resources provide universities with the information they need to determine what lawful race-conscious measures are available to them to promote diversity in higher education. The Justice Department remains committed to working with our partners across government to advance educational opportunity for all Americans, regardless of their backgrounds.”

On June 30, 2023, the Supreme Court held in Students for Fair Admissions, Inc. v. University of North Carolina at Chapel Hill that the consideration of race in the admissions practices of the University of North Carolina and Harvard College violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance, including those conducted by colleges and universities.

Following the Court’s decision in Students for Fair Admissions, the Departments today issued a Clear Callout Letter and a Questionnaire and Answers Resource to help colleges and universities understand the Court’s decision as they continue to pursue admissions that are race-neutral and that include students with a broader range of academic, personal, and social characteristics.

“Even after the Court’s decision sharply limited a tool that colleges and universities with selective admissions processes have used to create vibrant, diverse campus communities, colleges and universities now still have work to do to support, retain, and graduate racially diverse student bodies,” said Assistant Secretary for Civil Rights at the U.S. Department of Education Catherine E. Lhamon. “Today’s resources explain practices that remain legally valid and confirm the Federal government’s robust civil rights protections in schools.”

Educational institutions must ensure that their admissions practices do not create barriers for students based on any protected characteristics, including race. These resources provide a road map for educational institutions across the country to continue pursuing mission-aligned admissions practices that reflect the diversity of America’s student body.

Additional resources are available at the Department’s website: https://www.ed.gov/ocr/civil-right-schools.
Check-in: Points of Clarification
Part 3—Policy and Practice Implications
The Race Continuum: The Relevance of Race In Applications

- **Identity Dependent**
  - “Check the Box” Racial Status

- **Race-Neutral, Experience-Related Qualities**
  - Qualities associated with experience of race in a person’s own life journey relevant to mission

- **Race-Neutral Qualities: Subject, Expertise, or Action**
  - Issues of race or equity as subject of actions of commitment or knowledge relevant to mission
Admissions

Holistic Review

• Do not consider racial status of applicant
• Consider mission-aligned skills, knowledge, and character qualities associated with actual student experience of race

Essay Questions and Interviews

• Essay questions and interviews are important avenues to elicit mission-aligned information about skills, knowledge and character qualities

Monitoring Class Composition

• It is wise to assure complete insulation of information regarding rolling admissions trends by race from decision-makers involved in selection
• Nothing prohibits collection of disaggregated data for research, evaluation, reporting purposes, etc.

Shaping the Class

• Not specifically addressed, but potentially problematic to ‘shape’ class with categorical focus on applicant’s racial status
• Consider new models, including race-neutral DEI factors derived from holistic review analysis
Financial Aid and Scholarships

Big Picture

- Financial aid and scholarship decisions will be informed and shaped by principles in Court’s opinion
- Arguable distinction: scholarships do not operate as “zero-sum game”
- But, even there, challenge on racial status-based awards remain: what compelling interest?

Key Strategy

- Consider full array of neutral factors, including adaptation of the “experience associated with race” model for aid awards
- Focus: skills, knowledge, character qualities associated with race

Design Option

- For privately endowed scholarships: Pooling and Matching
Outreach, Recruitment, and Pathways Programs

**Big Picture**

- The Court’s decision did not address or change what is permissible in terms of recruitment: “Inclusive” programs should remain strategic focus

**General Direction**

- The subset of recruitment programs that confer a tangible/material benefits on students may be subject to strict scrutiny
- Where selectivity is relevant, consider neutral factors, including qualities associated with experience

**Design Options**

- Consider clustering similarly focused/designed programs under one “umbrella” with themed components
Affinity and Other Related Groups

Big Picture

- The Court’s decision did not address or change what is permissible in terms of student groups: Topics and themes may relate to issues of race and ethnicity, but participation should be open to all.

General Direction

- Ensure that rules establish openness to all students participating

USED OCR Guidance

- Important Title VI principles and illustrations help frame what’s permissible
A Framework to Promote Access, Diversity, and Completion

Targeted Recruitment, Outreach and Pathways

Improved Admissions, Affordability and Enrollment

Support for Student Belonging and Completion

Remove Barriers and Enhance Opportunities
Aligned and Integrated, Enhancing Equitable Learning Environments
### Key Issues Regarding Access, Diversity, and Completion

#### Recruitment, Outreach, and Pathways
- Under-resourced high schools & school districts
- College access organizations
- Community colleges
- Pathways & bridge programs
- Dual enrollment
- Pre-college counseling
- Labor and financial commitments

#### Admissions, Affordability, & Enrollment
- New admissions models
- Legacy preferences
- Early Action/Decision practices
- Standardized tests
- Transparency & alignment of admissions decisions & financial aid
- Need-based aid programs
- Streamlining transfer

#### Student Belonging and Completion
- Advising, mentorship, co-curricular engagements
- Emergency financial aid
- Students' basic needs
- Culturally-relevant classroom pedagogies
- Campus climate assessments
- Improved data infrastructure for timely academic, social, and financial interventions
A (Legally) “Race-Neutral” Landscape

“Race-Neutral” Strategies

- Authentic
- Breadth of Enrollment Policy/Practice
- Secondary +DEI Effects

Mission-Focused, Aligned and Integrated
“[If the practice of checking the box is taken away,] maybe there will be an incentive for the university to, in fact, truly pursue race-neutral alternatives, such as, you know, allowing...applicants to indicate experiences they have had because of their race.”
## Key Strategies and Action Steps

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<th>Engage early with key stakeholders on directional shifts and expected impact</th>
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<td>Research &amp; Data</td>
<td>Ground decisions in institutional experience and general research (key data, trends, projections)</td>
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<td>Policy Decisions</td>
<td>Make changes re: compliance/legal risk and impact</td>
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<td>Documentation</td>
<td>Assure policy clarity regarding any DEI element of policy and practice, with focus on clear distinction between status and experience-related qualities</td>
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<td>Training</td>
<td>Develop training materials (guides, tools, power points) that align with/track policy articulation</td>
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<td>Communications</td>
<td>Assure that key stakeholders know of policy decisions and directions; and all public discussion of policy/practice (including web site) reflects alignment.</td>
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Parting Thoughts

Student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."

These benefits are not theoretical but real [:] the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

The diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.

"[N]owhere is the importance of such openness more acute than in the context of higher education." ... Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.
Check-in:
Points of Clarification
Part 3—Reflections and Questions
Thank you for attending this Webinar
To view the recording please visit
www.nadohe.org/stories/webinars