

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**

EducationCounsel
Policy | Strategy | Law | Advocacy

NADOHE

Panelists



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



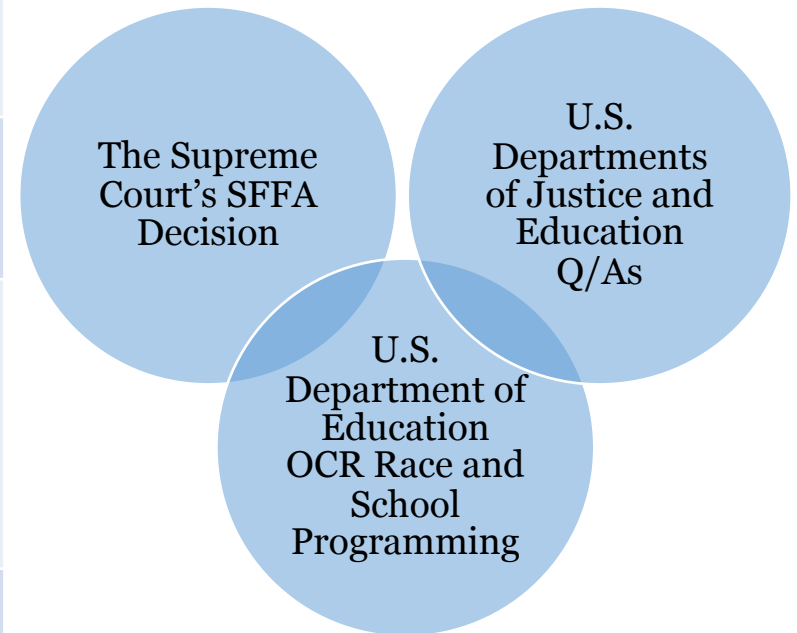
**Caroline Laguerre-Brown
Vice Provost for Diversity, Equity
and Community Engagement
The George Washington
University**



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

Introductions & Overview

Segment	Time
Introductions & Overview	10'
Meeting the Moment: A Time for Leadership	10'
The Legal Landscape: The Racial Status-Experience Divide	20'
Policy and Practice Implications: Admissions; Aid & Scholarships, Outreach, Recruitment & Pathways; and Affinity Groups+	20'
Reflections and Questions	25'
Wrap-Up	5'



Preliminary Analysis on Which Presentation is Based



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

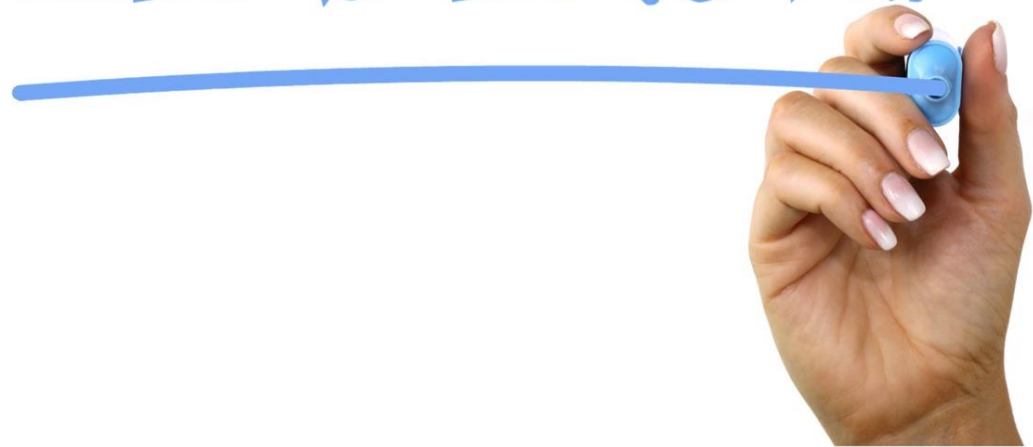


The views and
perspectives today...
NOT legal advice.

Consult with your
institution's legal counsel
on all policy/program
issues.

**Part 1—
Meeting the
Moment: A
Time for
Leadership**

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
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SFFA (2023)

A higher education
loss...

A Moment for Leadership

In the face of new challenges, we have opportunities. Seize them.



Be Bold

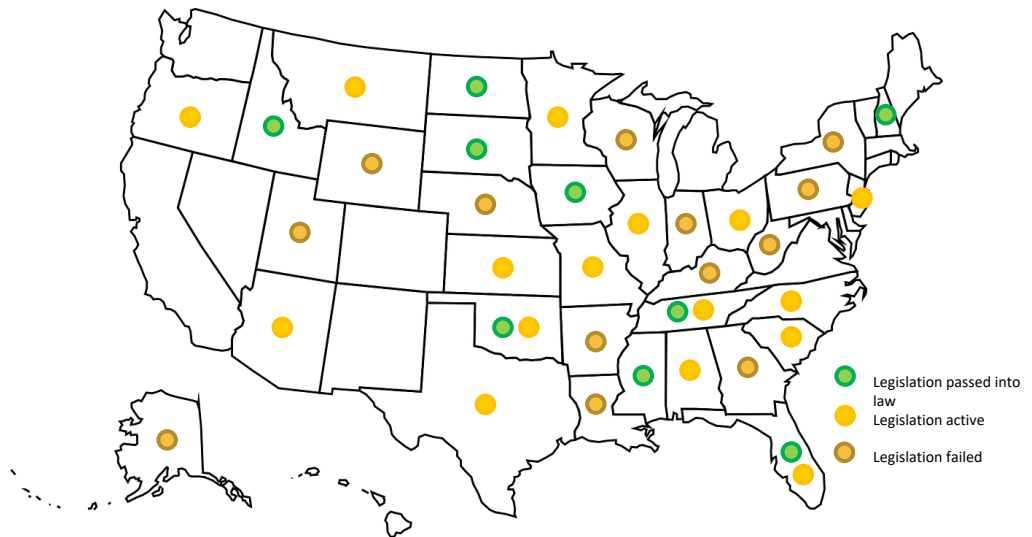
Re-calibrate

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 LSAT 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 school 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.

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

Erin Heffernan, Annika Merrilees Jun 30, 2023 81

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

JD VANCE
OHIO

United States Senate
WASHINGTON, DC 20510

COMMITTEE ON BANKING, HOUSING,
AND URBAN AFFAIRS
COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
SPECIAL COMMITTEE ON AGING
JOINT ECONOMIC COMMITTEE

July 6, 2023

Mr. Christopher Eisgruber
President
Princeton University
1 Nassau Hall
Princeton, NJ 08544

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

Dear College and University Presidents:

I write to express concern about your institutions' openly defiant and potentially unlawful reaction to the Supreme Court's landmark decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,¹ which reaffirmed the bedrock constitutional principle of equality under the law and therefore forbade invidious race-based preferences in college admissions. As you know, the Court has instructed you to honor the spirit, and not just the letter, of the ruling. Going forward, the Court explained, "universities may not simply establish through application essays or other means the regime we hold unlawful today."²

However, within hours of the decision's pronouncement, you and your institutions expressed open hostility to the decision and seemed 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.³ Below, I have highlighted a few alarming excerpts from your responsive statements:

- Princeton President Eisgruber complained that the Court's decision was "unwelcome 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."

¹ 600 U.S. ____ (2023).

² Slip op. at 39.

³ Christopher F. Rufo @realchrisrufo, Twitter (June 29, 2023), <https://twitter.com/realchrisrufo/status/1674548940522549248>.

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

Compelling Interest

- The educational benefits of diversity (previously recognized) are no longer compelling to justify race-conscious action.
- Too “amorphous” & “elusive.” ❗ Not “sufficiently measurable” or “coherent.”

Negative Effect/ Stereotypes

- The “classification” of race was “used as a negative” and impermissibly “stereotyped” applicants based on race.
- College admissions are “zero-sum.” ❗ Admission involved “preferences on the basis of race alone”

End Point in Time

- Admissions programs “lacked a logical end point.”
- Process of periodic review isn’t sufficient for satisfying durational requirement; need specific end point to the consideration of racial status

The Majority Opinion

**“Universities may define their missions
as they see fit.”**

The Majority Opinion

“[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.

What the Court Did Not Address

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.

U.S. Department of Justice and Education Guidance Documents

 U.S. Department of Education

[Student Loans](#) [Grants](#) [Laws](#)

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 14, 2023

Contact: Press Office, (202) 401-1576, 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's (ED) Office for Civil Rights and the U.S. Department of Justice's Civil Rights Division are jointly releasing two resources to help colleges and universities understand the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina et al.* (collectively "*FFA*"). These resources will help colleges and universities as they work to lawfully pursue efforts to achieve a student body that is diverse across a range of factors, including race and ethnicity.

"For higher education to be an engine for equal opportunity, upward mobility, and global competitiveness, we need campus communities that reflect the beautiful diversity of our country," said U.S. Secretary of Education Miguel Cardona. "The resources issued by the Biden-Harris Administration today will provide college leaders with much-needed clarity on how they can lawfully promote and support diversity, and expand access to educational opportunity for all following the Supreme Court's disappointing ruling on affirmative action. This is only the first step and our Administration will continue to work to ensure we prepare students of all backgrounds and income levels to lead our multiracial democracy together."

"Ensuring access to higher education for students from different backgrounds is one of the most powerful tools we have to prepare graduates to lead an increasingly diverse nation and make real our country's promise of opportunity for all," said Attorney General Merrick B. Garland. "These resources provide universities with the information they need to determine what lawful tools remain 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 background."


On June 29, 2023, the Supreme Court held in *FFA* 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, a law that 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 *FFA*, [President Biden](#) and Vice President Harris called on colleges, universities, and other stakeholders to seize the opportunity to expand access to educational opportunity for all students, and to build diverse student bodies, including by recognizing and valuing students who have overcome adversity. The Administration remains committed to advancing access to education for all Americans and to promoting diversity in higher education consistent with the law. The Administration has taken [swift action](#) to support our Nation's colleges and universities so they can continue building pathways to upward mobility and preparing students from all backgrounds to thrive in our workforce.

In light of the *FFA* decision, the Departments today issued a [Dear Colleague Letter](#) and a [Questions and Answers](#) resource to help colleges and universities understand the Court's decision as they continue to pursue campuses that are racially diverse and that include students with a range of viewpoints, talents, backgrounds, and experiences.

"Even after the Court's decision sharply limited a tool that colleges and universities with selective admissions practices have used to create vibrant, diverse campus communities, colleges and universities may still lawfully work to admit, support, retain, and graduate racially diverse student bodies," said Assistant Secretary for Civil Rights at ED Catherine E. Lhamon. "Today's resources explain practices that remain legally viable and confirms 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. We remain firmly committed to equitable educational opportunities for all students, and ensuring that students of color are not denied opportunities to participate in the robust exchange of ideas and experiences that are the keystone of college and university life," said Assistant Attorney General for Civil Rights Kristen Clarke. "How an applicant's racial identity – as well as other aspects of their social identity – impact their development, goals, or educational interests remain important considerations in university admissions."

 U.S. Department of Education

[Student Loans](#) [Grants](#) [Laws](#)

U.S. Department of Education's Office for Civil Rights Issues Resource on Race and School Programming

AUGUST 24, 2023

Contact: Press Office, (202) 401-1576, press@ed.gov

Today, the U.S. Department of Education's Office for Civil Rights (OCR) released a [Dear Colleague Letter](#) (DCL) on Race and School Programming to guide schools on lawful programs to promote racially inclusive school communities. This resource clarifies the circumstances under which schools can – consistent with Title VI of the Civil Rights Act of 1964 and its implementing regulations – develop curricula and programs or engage in activities that promote racially inclusive school communities.

Title VI, a law enforced by OCR, prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance, including public schools serving students in pre-K through grade 12 and colleges and universities.

"Today's resource shares with school communities practical guidance about whether and when federal civil rights laws permit – and in some cases require – schools to take actions related to race, as well as whether and when these same laws may require that schools not act based on race," said Assistant Secretary for Civil Rights Catherine E. Lhamon. "This resource aims to assist our nation's schools to fulfill Congress' longstanding promise that no student experience discrimination based on race."

The DCL includes hypothetical examples to help schools assess their Title VI legal obligations and protections concerning school-sponsored curricula and programming. This resource clarifies circumstances under which schools may be in violation of Title VI when they separate students based on race or treat individual students or groups of students differently based on race. It clarifies that schools may also violate Title VI when they create, encourage, accept, tolerate, or fail to correct a racially hostile educational environment.

Additionally, the DCL underscores that Title VI generally does not restrict schools from holding assemblies, meetings, focus groups, or listening sessions that relate to students' experiences with race in their school or community. The resource also states that school-sponsored or recognized groups or programs with a special emphasis on race, such as a student club or mentorship opportunity, that are open to all students, typically do not violate Title VI simply because of a race-related theme.

This letter follows the release of a January 2023 OCR [Diversity & Inclusion Activities Under Title VI](#) fact sheet that confirmed for educators, parents, and students that diversity, equity, and inclusion training and similar activities generally are consistent with Title VI.

OCR is available to provide technical assistance to institutions, organizations, and members of the public that request assistance in complying with any aspect of the civil rights laws OCR enforces, including those issues addressed in the resource.

If individuals within a school community have questions or would like technical assistance, they may contact the OCR office serving their state or territory by visiting <https://ocrcas.ed.gov/contact-ocr>.

Check-in: Points of Clarification

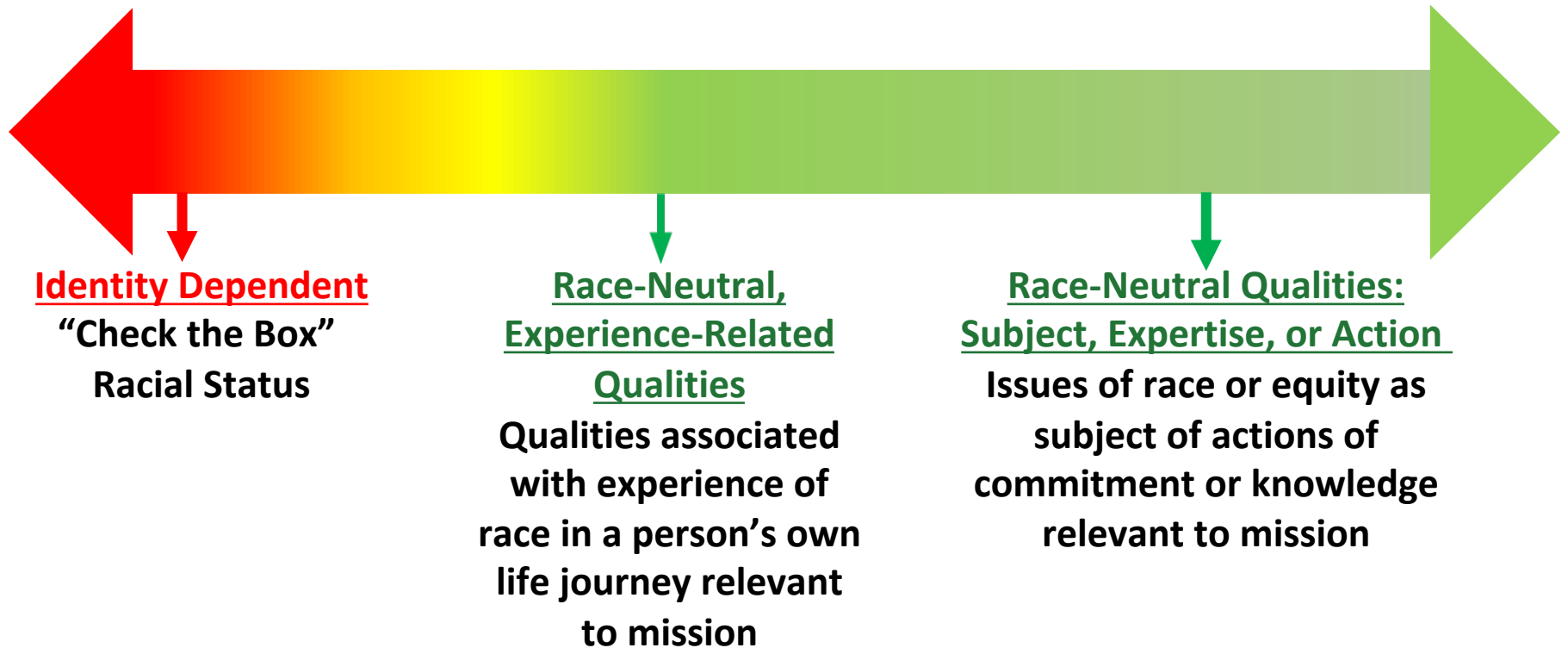


Part 3— Policy and Practice Implications



The Race Continuum:

The Relevance of Race In Applications



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

Chief Justice Roberts During October, 2022 Oral Argument



“[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

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

Parting Thoughts

[S]tudent 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

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