The Supreme Court’s Ruling: Race in Admissions...and Beyond

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A Moment for Leadership

Now is the time for leadership, not retrenchment.

In the face of new challenges, we have opportunities. Seize them.
The Court’s opinion is complex and our analysis is preliminary, still subject to further refinement.

Nothing in this presentation should be construed as legal advice, which is highly fact- and context-specific. We elevate key points of interpretation and practice as general guidance to consider as you consult with your counsel.
Preliminary Analysis on Which Presentation is Based

EducationCounsel
Policy | Strategy | Law | Advocacy

Preliminary Guidance Regarding the U.S. Supreme Court’s Decision in SFFA v. Harvard and SFFA v. UNC
July 6, 2023

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.

The Court’s Ruling
The Top Takeaways

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<th>Issue</th>
<th>Legal Impact</th>
<th>Practical Direction</th>
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<td>The Educational Benefits of Diversity As Support for Race-Conscious Action</td>
<td>As Asserted, Not Compelling</td>
<td>On Life Support</td>
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<td>Consideration of Race in Admission</td>
<td>Racial Status is Prohibited</td>
<td>Qualities Associated with Individual’s Racial Experience May Be Considered</td>
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<td>Race-Neutral Strategies</td>
<td>The New Landscape; Know the Definition</td>
<td>Think Big</td>
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The educational benefits of diversity (previously recognized) are no longer compelling to justify race-conscious action.

• Too “amorphous” & “elusive.” Not “sufficiently measurable” or “coherent.”
• Note: “worthy” and “commendable”

Compelling Interest

The “classification” of race was “used as a negative” and impermissibly “stereotyped” applicants based on race.

• Led to 11% decrease in number of Asian American students admitted.
• College admissions are “zero-sum.” Admission involved “preferences on the basis of race alone”

Negative Effect/Stereotypes

Admissions programs “lacked a logical end point.”

• Tight percentage bands by race, from year to year implicated “[o]utright racial balancing.”
• Process of periodic review isn’t sufficient for satisfying durational requirement; need specific end point to the consideration of racial status

End Point in Time
The Court Ruling

Institutional Mission

• “Universities may define their mission as they see fit” within broad legal parameters.
• Significant deference is afforded to higher education institutions on this issue.

Qualities from Student Racial Experience

• “[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…”
• 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.
What the Court Did Not Expressly Address

- Scholarships and Financial Aid
- Outreach and Recruitment
- Pipeline and Pathways Programs
- Data Collection
- Employment
- Race-Neutral Strategies
“Political Strict Scrutiny”: Anti-DEI Bills Have Been Introduced In 35 States

Legislation passed into law
Legislation active
Legislation failed
Definitions
<table>
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<th>Race-conscious</th>
<th>Race-neutral</th>
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<td>Express-Intent-Effect-Individual Benefit</td>
<td>Intent-Effect (Often) Broad-based/Inclusive</td>
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<td><em>E.g.</em>, <em>Fisher II Majority:</em> Texas Top 10% Plan</td>
<td><em>E.g.</em>, General Recruitment &amp; Outreach</td>
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How Definitions May Translate

**Race-conscious**

Involves consideration of applicant’s racial status

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**Race-neutral**

Involves consideration of an individual’s qualities associated with experience relating to race

Other qualities and characteristics like first generation, low income/wealth, etc.
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
Quality 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
### Key Qualities Associated with Experience

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<tr>
<th>Expertise or Record</th>
<th>Commitment</th>
<th>Knowledge</th>
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| • Formal expertise in race issues/inequities  
• Record of elevating others’ understanding, creating welcoming climate for all | Commitment to ameliorate racial injustice | • Deep knowledge of issues of race in society, community, or education; or from other meaningful engagement with communities |
Implications: Admissions

Holistic Review
• No consideration of racial status
• Consideration of mission-aligned skills, knowledge, and character qualities associated with actual student experience of race

Essay Questions
• An important avenue to elicit mission-aligned information about skills, knowledge and character qualities

Monitoring Class Composition
• Assure complete segregation between information on rolling admissions trends by race and decision-makers involved in holistic review
• (Nothing prohibits collection of disaggregated data for research, evaluation, etc. purposes.)

Shaping the Class
• Not specifically addressed, but problematic to ‘shape’ class with categorical focus on applicant’s racial status
• Consider new models, including identity-neutral DEI factors derived from holistic review analysis
Implications: 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 and/or 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 and institutional aid: Pooling and Matching
Implications: Outreach and Recruitment

**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, and with self-selection
Strategies and Action Steps
A Comprehensive Enrollment Policy Evaluation

Pathways
- Outreach
- Recruitment
- Pipeline Programs

Barriers
E.g.,
- Legacy
- Early Decision
- Test Use
- Transfer Policies

Admission
- Holistic Review
- Articulation of Desired Qualities
- Legally Neutral, DEI Focused Qualities

“Race-Neutral” Strategies
- Authentic
- Breadth of Enrollment Policy/Practice
- Secondary +DEI Effects

Mission-Focused, Aligned and Integrated
### Key Strategies and Action Steps

#### Policy Decisions
- Make changes re: compliance/legal risk and impact

#### 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)

#### 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.