

Understanding SFFA and Its Potential Implications

Defining a New Higher Ed Equity Agenda

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A Time for Leadership



Source: Georgia State University

Now is the time for leadership, not retrenchment.

We believe SFFA was wrongly decided (as a matter of evidence, reasoning, law, etc.), but it is the law.

There remain many opportunities to advance diversity and equity.

Some things under the law are knowable and some are unsettled. This presentation does not provide specific legal advice.

The Court's SFFA Decision – Background

Under 14th Amend EPC and TVI, distinctions based on race are deemed "pernicious," "odious," and inherently suspect *regardless of which racial group is favored or disfavored.*

"Race-conscious" actions will only be upheld where they pass "**strict scrutiny**," which requires a "**compelling interest**" plus "**narrowly tailored**" to achieve that interest

Prior to SFFA, SCt had found few interests sufficiently "compelling," including remedying specific policies related to an institution's own discrimination (not "societal discrimination") and *promoting educational benefits of diversity in HEd.*

The Court's SFFA Decision – Holding

SCt held unlawful Harvard/UNC's admissions policies under 14th Amend and TVI – finding for several reasons that they did not pass strict scrutiny, including that programs/rationale:

- Lacked “coherence” and “sufficiently focused and measurable objectives”
- Used race in a negative manner in “zero-sum” decisions and promoted racial stereotypes
- Lacked “meaningful endpoints”

This effectively overruled prior precedent in Bakke, Gratz/Grutter, Fisher, etc.

The Court's SFFA Decision – Holding

SCt did recognize: “[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,” such as “a benefit to a student who overcame racial discrimination... tied to *that student’s* courage and determination” or “a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal... tied to *that student’s* unique ability to contribute to the university.”

The Court's SFFA Decision – Key Questions on Reach

- How does SFFA affect HEd programs beyond admissions where they consider racial status on their face?
- How does SFFA affect facially race-neutral programs/policies that may be motivated in part by race-based intent?
- How might SFFA relate to other contexts (and other laws), such as K12 under 14th Amend/TVI, employment under TVII, or private contracts under §1981?

Three key questions under 14th Amend/TVI:

1. Is the action “race-based” under law?
2. If so, does it confer cognizable “benefit or harm”?
3. If so, is it supported by a compelling interest and narrowly tailored to achieve that interest?

A Key Moment for HEd (and Broader) Leadership

Nothing in the Court's decision should affect higher education's authentic, core commitment to educational diversity and equity – including for students of color and students from other marginalized groups. This moment calls for leadership, not retrenchment – and the rise of a new, broader agenda.

A Potential Framework (and Examples) to Promote Hed Diversity and Equity

System-level Strategies

- Increase investment in IHEs, including IHEs that serve large numbers of students of color/marginalized groups
- Increase transparency, timeliness, and amount of financial aid for low-income students
- Align pathways from K12 through postsecondary education and the workforce

Outreach, Recruitment, and Pathways

- Partnerships with community colleges, college access organizations, and employers
- Dual enrollment
- Pre-college counseling
- Pathways & bridge programs

Admissions, Need-Based Aid & Affordability

- New admissions models
- Eliminate legacy preferences
- Reconsider early action/decision practices and test use policies
- Streamline transfer

Supports for Belonging and Completion

- Culturally-relevant curriculum and pedagogies
- Emergency financial aid
- Campus climate assessments
- Advising, mentorship, and co-curricular engagements

Removing Barriers and Enhancing Opportunities