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Webinar

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Race-Conscious Admissions Guidance Post-Students for Fair Admissions (Part III)

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Agenda

- Introduction
- Recap of the Supreme Court's *SFFA vs. Harvard & UNC* Ruling
- Subsequent Developments
  - Joint Guidance
  - Selected Institutional Responses
  - Selected Complaints and Litigation
- Next Generation Legal Issues
- Scenarios
- Audience Q&A and Closing Remarks

Recap of the U.S. Supreme Court's Ruling

Lawsuits Filed by Students for Fair Admissions, Inc.

- Challenged race-conscious undergraduate admissions policies
- Both cases involved allegations of Title VI and Equal Protection Clause (EPC) violations
- Bench trials held in each case upheld the admissions program

Relevant Legal Precedents

- *Bakke*, *Grutter*, and *Fisher* cases
  - Prohibited the use of quotas
  - Affirmed diversity as a compelling interest in higher education
  - Defined the permissible boundaries of race-conscious admissions
    - Strict scrutiny
    - Narrow tailoring

Lower Court Rulings

- **Harvard's program upheld by lower courts**
- **UNC's case appealed directly to U.S. Supreme Court**

U.S. Supreme Court's Decision - Overview

- **Harvard**
  - **6-2**
  - **Admissions policies found to violate Title VI**
- **UNC**
  - **6-3**
  - **Admissions policies found to violate the EPC and Title VI**
- **Majority found the EPC requires the eradication of "all governmentally imposed discrimination based on race."**

Lack of Measurable Justifications

- **Universities' justifications lacked "focused and measurable objectives"**

- **Goals like training future leaders and promoting diversity deemed commendable but not sufficiently coherent**

Lack of Connection Between Means and Goals

- **No meaningful connection found due to imprecise race categories**
  - **Racial categories used by the courts found to be simultaneously “ imprecise,” “overbroad,” and “underinclusive”**
  - **Failed to establish how these categories advanced the educational benefits envisioned**

Race as a “Plus” Factor in Zero-Sum Contexts

- **EPC does not permit universities to use race in a negative matter or a stereotype.**

- **“College admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.”**

Lack of Meaningful Endpoints

- **Harvard and UNC's programs lacked plans to sunset race-based admissions decisions**

- **Majority noted this was contrary to the expectations noted by former Supreme Court Justice O'Connor in *Grutter*.**

Race-Related Considerations Not Prohibited

- **"Nothing 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."**

- ***BUT*** **"universities may not simply establish through application essays or other means the regime we hold unlawful today."**

Notable Language Shift Re Compelling Interest

- **Legal precedents affirmed diversity as a compelling interest backed by science**
- **The majority notably described the *"interests of the universities"* as the compelling interest, noting that "[u]niversities may define their missions as they see fit."**
- **Stark rejection of the "diversity as a compelling interest" precedent**

Issues Not Addressed

U.S. military academies (explicit carve out)

Employment

Scholarships and Financial Aid

Justice Thomas's Concurrence

- Justice Thomas questioned the educational benefits of racial diversity, primarily equating them with increased test scores.
- He argued that the interest in training students to "live together in a diverse society" is a social goal, not an educational one.
- He noted that universities may offer admissions preferences to students from disadvantaged backgrounds but cannot assume that all members of certain racial minorities are disadvantaged.

Justice Jackson's Dissent

- **Emphasized the universal benefits of considering race in university admissions.**
- **Argued that holistic admissions programs that consider all factors, including race, provide universal benefits and condemned the majority's "let-them-eat-cake obliviousness" in "pull[ing] the ripcord and announc[ing] 'colorblindness for all' by legal fiat."**
- **Expressed concern that the decision would make it more challenging to address race-based disparities in the country calling the majority opinion "truly a tragedy for us all."**

Subsequent Developments

Joint Guidance

- Issued August 14, 2023, (in fulfillment of Presidential promise) by OCR/DOJ
- Urged institutions to continue lawful efforts to promote racial diversity, as well as to reconsider approaches that might hinder that objective
- Indicated *not* required to remove demographic data from applications
  - Must make sure admissions officers do not *use*, though
  - Could be useful to assess efficacy of institutional approaches
- Addressed pathway programs, but not financial aid

Selected Institutional Responses

- Review of Admissions Policies/Procedures
- Essay Prompts – Sarah Lawrence
- Removal of Demographic Data – Harvard
- Discontinuation of Legacy/Donor Preferences – Wesleyan
- Development of Other “Compelling Interests”?
- Expansion to Other Areas/Contexts?

Selected Complaints and Litigation

- **Warning Letters**
- **OCR Complaint vs. Harvard**
- ***SFFA* Suits**
  - **Yale – settled**
  - **West Point**
  - **Expansion to other, non-higher ed frontiers ….**
- ***Thomas Jefferson* Cert. Petition**

Next Generation Legal Issues

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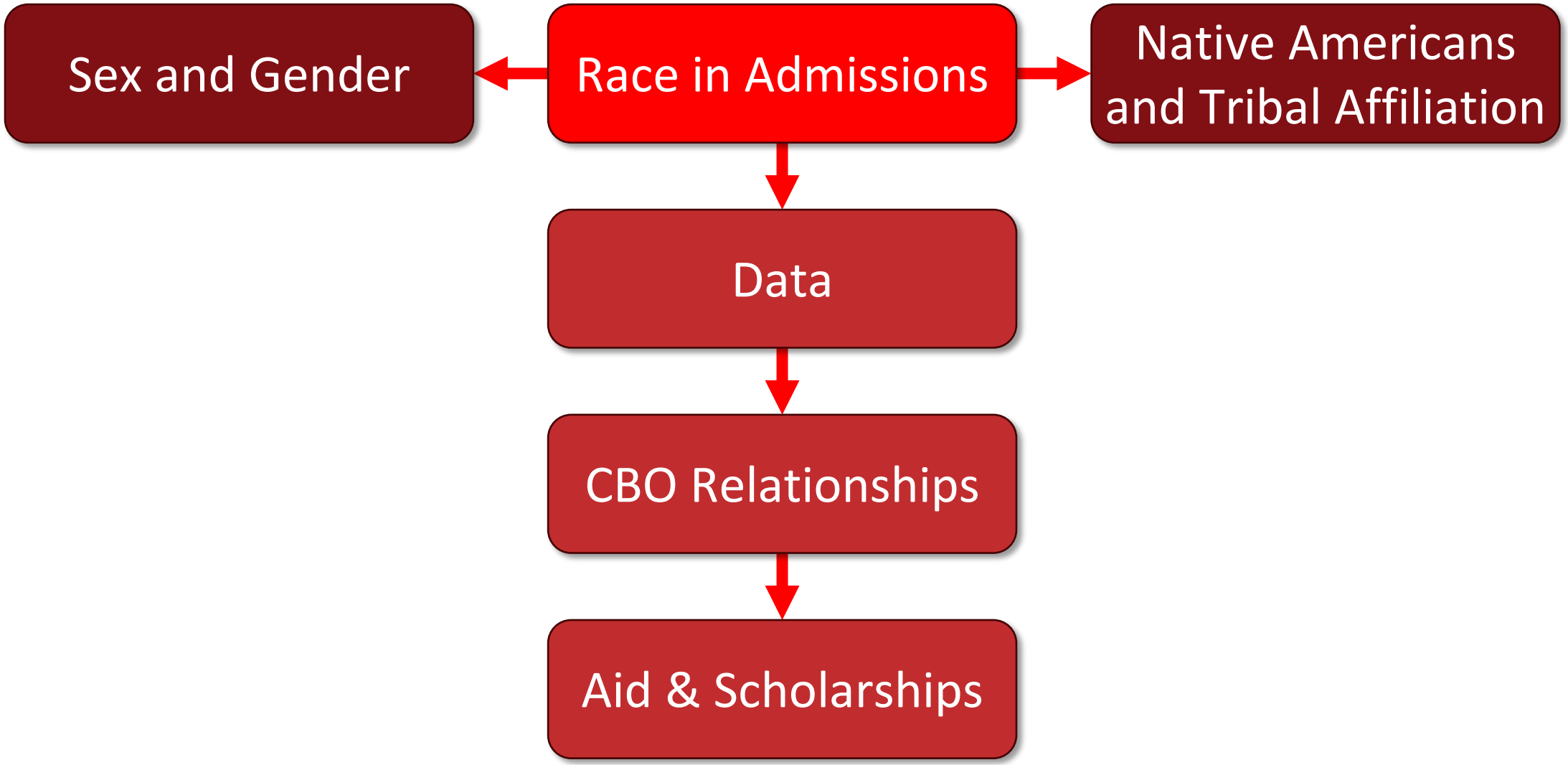
Sex and Gender
Race in Admissions
Native Americans and Tribal Affiliation
Data
CBO Relationships
Aid & Scholarships

Data Collection

LAW:

- **IHEs may (and sometimes must) collect disaggregated data by race and ethnicity for multiple purposes, including research, program evaluation, and federal/state policies and programs.**
- **The *SFFA* decision did not address data collection or use.**

BUT

- **There are implications from the *SFFA* decision prohibiting the consideration of an applicant's racial status in admissions.**

- **Optimal, but very much a function of relevant size and design of the relevant unit:**
  - ❑ **Insulating admission officials involved in selection decisions from awareness of (evolving) class composition by race/national origin (with, e.g., rolling admission process) is a wise decision. Awareness of class composition re race/ethnicity should not influence individualized holistic review.**

CBO Relationships

LAW:

- **The *SFFA* decision did not address recruitment or CBO relationships.**
- **Federal nondiscrimination law tends to provide more latitude with respect to DEI/race-related "inclusive" recruitment practices when compared to admissions and aid.**

BUT

- **Attention to the details of any IHE relationship with a race-exclusive CBO is warranted, particularly where that relationship leads to any specific individual benefits to some students and not others.**

- **As a general matter, engagements with CBOs can be understood to advance, and to be part of, broad-based and multifaceted recruitment efforts. Relationships inherent in those efforts, therefore, should not be considered high risk.**
- **If such relationships generate tangible admission or other individual student benefits beyond general awareness and networking, then further evaluation is warranted.**

Aid and Scholarships

LAW:

- **The *SFFA* decision did not address aid or scholarships.**

BUT

- **The Court's evisceration of previously recognized compelling interests that could support the consideration of an applicant's racial status in admissions likely means that any aid program that involves consideration of an applicant**

- **Optimal low-to-medium risk strategies involve:**
  - ❑ **Tailoring aid policies around mission-aligned DEI interests, which may include consideration of a student's DEI and race-related experience, expertise, and commitment.**
  - ❑ **Pursuing a pool and match strategy that honors donor race-related bequests but does so through race-blind decisions.**

Access for Native American Students

LAW:

- **The *SFFA* decision did not address issues of tribal affiliations (vs. a race/ethnic considerations) and the precise circumstances in which such relationships might be categorically favored in admissions as a political (vs. racial designation), which are not subject to strict scrutiny under federal non-discrimination law.**
- **Leading authority: *Morton v. Mancari* (1974)**

- **Key question is whether and under what circumstances policy design might be framed in light of tribal affiliation (vs. Native American status) to permit status considerations that are considered to be political classifications, not racial/ethnic classifications.**
- **A judgment of risk/benefit in light of absence of directly controlling authority.**
- **Optimal to consider design strategies associated with experience, expertise, passion, etc. where possible.**

Issues of Sex and Gender

LAW:

- **The *SFFA* decision did not address issues of sex/gender discrimination.**
- **The relevant legal framework regarding sex/gender discrimination is similar to but distinct from the race/ethnicity framework: Intermediate scrutiny vs. strict scrutiny.**
  - **Is there an important or "exceedingly persuasive" (vs. compelling) interest?**
  - **Is there a substantial relationship between the interest and the particular design of the policy/program?**
  - **Vs. is it necessary and narrowly tailored to advance relevant goals?**

- **Key question is whether sex/gender status may be considered in realm of enrollment decisions (e.g., admissions, aid, etc.).**
- **A judgment of risk/benefit in light of absence of directly controlling authority.**
- **Optimal to consider design strategies associated with experience, expertise, passion, etc. where possible.**

Race-Neutral Policies and Programs

LAW:

- **The *SFFA* decision did not address race-neutral policies.**

BUT

- **The practical net effect of the Court's ruling is that the vast majority of the viable legal landscape moving forward for now must be race-neutral. The determination of race neutrality is a function of policy and program design and operation—inclusive of underlying intent and policy/program impact.**
- **Race-neutral under federal law is not the equivalent of race-blind.**

- **To assure that any pursuit of policies and programs is considered "race-neutral" under federal law, the interests advanced should be authentic and tied to the attainment of mission-related goals.**
- **Note that several pending cases in federal courts address this issue.**

Race Neutral Policies and Programs: A Spectrum of Analysis

Neutral Articulation and Purpose

Neutral Articulation and Purpose—with Awareness of Racial Benefits

Mixed Motive—with Secondary Racial Purpose Affecting Policy Design or Impact

Neutral Articulation as (Inauthentic) Proxy for Race-Related Purpose

Determination of "race neutrality" under federal nondiscrimination law is a function of policy articulation and underlying intent informed by evidence of disparate impact.

Petition for Cert. filed in *Coalition for TJ v. Fairfax County School Board* (4th Cir.)

Scenarios for Discussion

Scenario #1

- **Imagine you are a general counsel at a private research institution in a blue state. Following the recent Supreme Court decision in the *SFFA vs. Harvard and UNC* cases, which declared race-conscious admissions policies unconstitutional, your university is at a critical juncture. The institution has a long-standing commitment to diversity and inclusion but must now navigate the legal landscape to adapt its admissions policies.**

- **Your role, as a senior legal advisor, involves collaborating with university leadership to ensure that any changes to the admissions policies not only comply with the new legal framework but also maintain the institution's dedication to diversity and equity.**

Scenario #1 Questions

- **In your capacity as general counsel, how do you propose guiding your university through the complex process of adapting admissions policies in response to the Supreme Court's decision?**

- **What legal considerations, strategies, and best practices would you recommend to university leadership to ensure compliance with the new legal framework while safeguarding the institution's commitment to diversity and inclusivity?**

- **How does your answer change if your university is in a red state that recently enacted bans on state funding for DEI?**

Scenario #2

Your institution is both highly selective and deeply committed to DEI. You expect significant declines in racial diversity post-*SFFA*, and campus leadership is brainstorming ways to address/prevent that.

Ideas generated so far include the following:

- **Test different admissions models and adopt the one that gives you the most racial diversity**
- **Create new pipeline program for first-gen students at racially diverse schools and give admissions preferences to applicants who successfully participate**
- **Adopt a percentage plan allocating spots to students from selected demographically diverse feeder schools**
- **Fund scholarship for students with demonstrated commitment to DEI**
- **Create mentoring and support program only for Native American students to encourage their retention through graduation**
- **Establish BIPOC student affinity group to promote sense of community**

How would you advise your institution on each proposal?
How does your answer change based on your institution's legal landscape?


Questions?

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