



Recruitment After *SFFA v. Harvard*

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What was the holding of *SFFA v. Harvard*?

- The Constitution's Equal Protection Clause (and Title VI of the 1964 Civil Rights Act) compel strict scrutiny of classifications based on race
- Strict scrutiny requires the classifications to serve a compelling state interest
- The educational benefits of a diverse student body may no longer serve as a compelling state interest
- Does this mean diversity is now illegal? No. But it does need the means chosen to pursue it may need to change.



The Case

SFFA v. Harvard (S. Ct. 2023) (on the U.S. Const. & Title VI), at 39-40 :

At the same time, as all parties agree, 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. See, *e.g.*, 4 App. in No. 21–707, at 1725–1726, 1741; Tr. of Oral Arg. in No. 20–1199, at 10. But, despite the dissent’s assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) “[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,” and the prohibition against racial discrimination is “levelled at the thing,

not the name.” *Cummings v. Missouri*, 4 Wall. 277, 325 (1867). A benefit to a student who overcame racial discrimination, for example, must be 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 must be tied to *that student’s* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.



The Statutes (Title VI)

Title VI of the 1964 Civil Rights Act:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.



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Title VI, Civil Rights Act of 1964 | U.S. Department of Labor



The Statutes (Title VII)

Title VII of the 1964 Civil Rights Act:

SEC. 2000e-2. [Section 703]

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual's race, color, religion, sex, or national origin . . .



The Statutes (Title VII, pt. 2)

Title VII of the 1964 Civil Rights Act: What does “because of” mean?

SEC. 2000e-2 [Section 703]

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a **motivating factor** for any employment practice, even though other factors also motivated the practice.



Hiring & Diversity Consideration

“[W]e remain firm in our belief that our academic community is at its best when it is diverse across many dimensions. . . . Bringing together individuals who have wide-ranging experiences that inform their approach to their time at Penn is fundamental to excellent teaching, learning, and research.” --President Liz Magill & Provost John L. Jackson, Jr.

Q3: Can institutions of higher education continue to take other steps to achieve a student body that is diverse across a range of factors, including race and ethnicity? If so, how?

Yes, institutions of higher education may continue to articulate missions and goals tied to student body diversity and may use all legally permissible methods to achieve that diversity. As noted above, schools can continue to use strategies that remove barriers and expand opportunity for all. This includes considering the full range of circumstances a student has faced in achieving their accomplishments, including financial means and broader socioeconomic status; information about the applicant's neighborhood and high school; and experiences of adversity, including racial discrimination. In particular, nothing in the *SFFA* decision prohibits institutions from continuing to seek the admission and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions. Indeed, seeking to enroll diverse student bodies can further the

https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf



Hiring & Diversity Consideration

Undergraduate essay example:

Harvard has long recognized the importance of student body diversity of all kinds. We welcome you to write about distinctive aspects of your background, personal development or the intellectual interests you might bring to your Harvard classmates.



Examples of Application Questions

1. Did you grow up in a medically underserved community or as a member of a medically underserved population as defined by HRSA?
(<https://data.hrsa.gov/tools/shortage-area/by-address>)
2. Did the environment in which you grew up present significant challenges on your journey towards becoming [x]? If yes, and you feel comfortable sharing, please describe here.
3. Do you qualify, or have you in the past qualified, for educational need-based grants from the federal government (e.g. PELL, FSEOG, BIE) or your state's educational need-based grant system?
4. Has individual or **systemic racial** discrimination impacted your journey to [] so far? If so, please share an example of its influence. [**bold** added: this language is *not recommended*; the focus of the inquiry must be on the individual student's experiences]



Recruitment

Targeted Outreach, Recruitment, and Pathway Programs

To promote and maintain a diverse student applicant pool, institutions may continue to pursue targeted outreach, recruitment, and pipeline or pathway programs (referred to here as “pathway programs”). These programs allow institutions to take active steps to ensure that they connect with a broad range of prospective students—including those who might otherwise not learn about these institutions and their educational programs or envision themselves as potential candidates for admission. By ensuring that the group of applicants they ultimately consider for admission includes a robust pool of talented students from underrepresented groups, institutions

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NIH Training, Workforce Development, and Diversity

<https://www.nigms.nih.gov/training/diversity>

- Programs for recruiting students with disabilities are fine and do not need review as a result of *SFFA*
- Programs for recruiting students with disadvantaged backgrounds are fine and do not need review as a result of *SFFA* (provided they are not using race-conscious criteria)
- Programs for recruiting students from underrepresented racial and ethnic groups should be reviewed: targeted outreach is fine but eligibility criteria and any final selection/admission/hiring cannot be motivated by race or ethnicity



NIH Training, Workforce Development, and Diversity

<https://www.nigms.nih.gov/training/diversity>

- Design recruitment activities uniquely appropriate to the program
 - consider diversity of current pool



NIH Training, Workforce Development, and Diversity

<https://www.nigms.nih.gov/training/diversity>

- Targeted Recruitment Activities
 - Consider recruiting at institutions with students from underrepresented groups



NIH Training, Workforce Development, and Diversity

- Penn T32 Diversity Plans
 - History and achievements with data