

Wise Courage

A Framework for Higher Education Leadership in the Face of Federal Overreach

There is nothing “normal” about now. The Trump Administration has initiated a period of federal overreach against efforts by higher education institutions to advance core values related to building inclusive and accessible environments, advancing equitable opportunity, and promoting the benefits of diversity. The Administration began by branding these efforts as “illegal DEIA”ⁱ and is now taking multiple actions to bar pursuit of these values as if virtually all were outlawed when they are not. This new federal campaign uses agency guidance and enforcement to try to eliminate inclusion, equity, and diversity initiatives in the federal government and in “influential institutions of American society,” including, among others, institutions of higher education (IHEs).¹ The Administration’s enforcement actions seem designed to so weaken IHEs’ academic freedom as to present a grave threat to this bedrock principle that is enshrined in the First Amendment and undergirds higher education’s ability to fulfill its purpose in our democracy, economy, and society.

Navigating this period presents an unprecedented challenge to IHEs and their leaders. It requires *wisdom* to separate the (legal) signal from the (policy preference) noise. And it requires *courage* to remain committed to an institution’s educational mission and values amid the risks associated with such stunning federal overreach.

To help leaders act with **wise courage**, this document first summarizes the existing **legal parameters** that demonstrate why the Administration’s anti-DEI policy agenda is not equivalent to, and does not supersede, federal law that permits a wide array of actions by IHEs to advance their core missions. It then provides a three-part **framework** for advancing effective, legally defensible access and opportunities for all students and faculty, including:

- 1. Ground Risk Assessment in Mission, Law, and Context**
- 2. Communicate Proactively to Increase Understanding**
- 3. Take Strongly Defensible, Mission-Advancing Actions**

The framework rests on two baseline principles:

- Those who already have access to and are thriving in higher education must have the opportunity to continue to do so, *and*
- Barriers that have unjustly impeded others must be removed to achieve fair access, opportunity, and competition for all.

A commitment to these principles is not factually or legally discriminatory. Rather, it is fundamental to the mission and role of most IHEs. When IHEs successfully align actions with these principles, the result is inclusion of people of all experiences and identities—not because an unfair advantage is at play but because barriers have been removed and fair access and opportunity have been advanced, as intended by the Constitution and federal law.

ⁱ The “A” is for accessibility, which the Administration sometimes includes in its statements and guidance about “DEI.”

Legal Parameters: Anti-DEI Policy Views are not Federal Law

Despite the Trump Administration’s statements and enforcement actions, federal nondiscrimination laws in effect before January 2025 have not materially changed. The truth is that there are many lawful avenues available to IHEs to advance their inclusion-, equity-, and diversity-based missions.

The President and federal agencies lack authority to unilaterally change the Constitution, federal statutes, or judicial interpretations, whether by Executive Orders (EOs) or agency guidance, regulations, or other actions. Executive branch officials are charged with implementing federal laws and acting within authority conferred on them by those laws. The Administration’s interpretation of what is lawful or unlawful must follow the Constitution, federal statutes, and any binding court rulings.² The Executive Branch may act based on its reasonable interpretation of the law, but it is Congress that enacts the laws and the courts that decide the best and binding meaning of those laws.³

To navigate the current chaotic and confusing terrain, IHE leaders and policymakers should keep in mind several legal parameters that undergird lawful policies and practices. Below we provide brief overviews of five **substantive** parameters for thinking about whether something is or is not allowable under federal antidiscrimination law. We then discuss two parameters that govern lawful federal government **enforcement** actions.

SUBSTANTIVE LEGAL PARAMETERS

1. **“DEIA” is not inherently unlawful.** As a general matter, federal law prohibits actions that discriminate by denying a person (or have the effect of denying them) an educational benefit or opportunity based on consideration of their racial or ethnic status (i.e., group membership). But this prohibition is inapplicable to situations that do not involve conferral or denial of benefits on the basis of a person’s racial or ethnic status. There is a broad array of educationally and legally sound actions that IHEs may take to advance their mission-based interests in promoting inclusion, equity, diversity, and accessibility.ⁱⁱ

In EOs, guidance documents, and enforcement actions, the Trump Administration has mischaracterized this first parameter—at times directly and at times by using vague, overbroad terms regarding “DEI” that have the effect of encouraging preemptive compliance. A touchstone for the Administration has been an overly broad interpretation of what the Supreme Court ruled is discriminatory in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*—while omitting what the Court expressly endorsed as nondiscriminatory.⁴ This next group of substantive legal parameters summarizes more fully and accurately the Court’s ruling and the parameters of current law.

2. **A diversity-dependent mission is “worthy,” not outlawed.** For almost 50 years prior to *SFFA*, the Supreme Court held in multiple cases that the interest of IHEs in promoting the educational benefits of diversity was so central to their mission and vital to society that it constituted a “compelling state interest.”⁵ The Supreme Court in *SFFA* abandoned that position, but the Court still expressly

ⁱⁱ When factors such as race, ethnicity, sex, or gender are involved, federal law does create design parameters for the *means* that IHEs can use to achieve these aims. See J.L. Keith and A. Coleman, [Navigating the Post-SFFA Landscape: Advancing Equity-Minded, Law-Attentive Priority Actions in Graduate, Undergraduate and Professional Higher Education](#) (EducationCounsel, 2024).

characterized those diversity-related interests as “commendable” and “plainly worthy” elements of an IHE’s mission. The Court did *not* outlaw a diversity-dependent mission and instead affirmed prior rulings that IHEs deserve deference to “define their missions as they see fit” within constitutional boundaries.⁶

3. **Considering lived experience or subject matter based on race is still permissible in higher education.**

Contrary to the Administration’s assertions, there are still multiple ways that race-related experiences and content can shape institutional decisions and offerings in the higher education context. Here are two important examples squarely within current legal parameters:

- **Lived Experiences:** Importantly, the Court in *SFFA* expressly endorsed as nondiscriminatory IHEs’ consideration of students’ mission-related competencies and qualities gained from their own lived experiences, even when conferring benefits and opportunities such as in admissions. In particular, the Court cited skills, lessons learned (e.g., knowledge), character, inspirations, and aspirations. The Court explicitly acknowledged that these mission-related gains that students derived from their lived experiences of many kinds—including experiences related to race—can be considered in these decisions. However, IHEs must evaluate such personal gains and related experiences on an individual basis, without making assumptions based on societal racial inequities. In the admissions context, for example, the Court did not prohibit admissions essays that speak to what students gained from their lived experiences just because those experiences may be of race.⁷ (Note that, similar to other nondiscrimination principles, this general principle that considering a person’s relevant competencies and interests gained from their lived experience is nondiscriminatory should also apply to employment decisions.^{iii, 8})
- **Programming:** Race can still serve as the focus or content of a program or the subject of a person’s area of public service, study, or expertise, as long as it is not assumed to be their focus based on their personal identity. As just some illustrative examples, nothing in *SFFA* or civil rights laws would prevent an IHE, its faculty, or its students from hosting a conference, teaching a course, or conducting research on the topic of race or even on one particular racial group’s historical or current experiences or contributions to a field. In fact, an IHE’s ability to do this is protected by the First Amendment and its “special concern” for academic freedom.⁹

ⁱⁱⁱ For example, an IHE seeking to create an academic community where all talent can thrive may value faculty candidates of any identity with the capacity to advance that aim. It might find evidence of that capacity from a person’s leadership in celebrating their own heritage or from their understanding of barriers faced by people based on race, gender, socio-economic, and other backgrounds or experience—whether that understanding is developed through their own experience overcoming discrimination or from their scholarly expertise, long study, or long service of communities facing barriers. The IHE may find evidence of a person’s passion to apply those skills and knowledge from, among other things, the actions a faculty candidate has taken such as mentoring students or creating pedagogy that is relatable and effective for everyone.

Note, however, that *SFFA*’s ruling is about the educational benefits of diversity, which is an educational policy. Contrary to the Administration’s recent assertions, *SFFA*’s primary holding about Title VI and the mission-related diversity rationale does *not* relate directly to employment decisions because employment is subject to a different federal legal regime that has a remedial (not educational mission-related) focus. The Court in that case also made clear that it was not ruling on remedial justifications for considering race in the student context. 600 U.S. at 227, n.8; see also Keith and Coleman, Navigating the Post-SFFA Landscape; Coleman, Overreaching and Misleading. (See endnote 8 for more detail.)

4. **Institutions of higher education can remove barriers and consider neutral criteria.** The Supreme Court left untouched—and thus available to IHEs—many barrier-removing and neutral means of advancing inclusion, equity, and diversity as part of an IHE’s educational mission. Equal protection principles do not bar designing or changing policies and practices to best serve these educational goals with a myriad of authentic criteria, while not conferring or denying benefits based on racial status. Some examples, among others, include seeking geographical diversity and providing greater access for students from low socio-economic and low-wealth backgrounds or students who are in the first generation of their families to attend college.¹⁰ Importantly, this includes efforts to consider and *avoid unjustified* race-based disparities when designing facially race-neutral programs, in part to prevent either discriminatory impact or intentional discrimination.¹¹ Rather than prohibit such efforts, federal law contemplates—and in some cases requires—attentiveness to the barriers and opportunity gaps that are too often associated with race, ethnicity, and sex.¹² Indeed, without such ongoing examination and efforts to mitigate such patterns, IHEs would risk “turn[ing] the...status quo into an immutable quota” of exclusion.¹³
5. **But diversity interests are *legally* insufficient to justify conferring or withholding benefits for students on the basis of their *racial status*.** The *SFFA* Court, applying equal protection principles of “strict scrutiny” under the Fourteenth Amendment (that applies to state institutions) and Title VI of the Civil Rights Act of 1964 (that applies to *all* federal funding recipients), ruled that educational diversity *interests*, as long defined,¹⁴ are no longer *legally* “compelling.” It applied the longstanding rule that a compelling interest is always required to consider an individual’s racial status *when conferring or withholding benefits*.¹⁵ And the Court ruled that because long-defined educational diversity benefits for all students are not legally compelling, they cannot be achieved using *means*¹⁶ that consider a student’s *racial status* (i.e., their group membership) in admissions.¹⁷

As noted above, this holding is limited in its contours in that it does not mean all DEI efforts are illegal. On the other hand, those contours are likely not so narrow as to only apply to admissions. Instead, the Court’s reasoning in *SFFA* likely affects other *student* programs such as financial support, mentoring, and pathways *if IHEs design these programs in ways that consider students’ racial or ethnic status in determining who receives or is denied these benefits*. It is important to note, however, there are often inclusive design options available to IHEs for these kinds of programs that *can* satisfy legal parameters post-*SFFA*. Indeed, these programs typically lend themselves to a larger array of defensible design options than are practical in the admissions context.¹⁸

ENFORCEMENT PARAMETERS

With those substantive parameters in mind, IHE leaders should also understand the following two parameters governing proper federal government enforcement. These are particularly critical as IHEs consider various courses of action to take (or not to take) in response to the Administration's enforcement efforts, whether individually or collectively with other IHEs.

6. **Civil rights enforcement must not violate other aspects of federal law.** The appropriate goal for the federal government when enforcing nondiscrimination laws is to prevent or remedy discrimination. It is not to use that enforcement authority as means to promote unrelated policy goals. This is especially true when doing so might violate other constitutional or statutory rights. For example, conditioning an IHE's federal funding on relinquishing its academic freedom to make judgments about its educational programs implicates the IHE's First Amendment and Fifth Amendment Due Process rights. There are also federal statutes banning federal interference in educational curriculum, programs, personnel, administration, and instructional materials that may serve to limit the Administration's enforcement actions. Finally, any withholding of federal funding must also comply with relevant federal court rulings against federal coercion in this context.¹⁹
7. **Civil rights enforcement must follow established procedures.** Federal nondiscrimination statutes like Title VI (and their legally binding regulations) require both specific facts to support credible compliance questions and due process to resolve them. In its administrative enforcement actions, the U.S. Department of Education's Office of Civil Rights must follow several relevant statutorily mandated federal regulations, including the requirement of specific notice to the IHE, with a meaningful opportunity for negotiated voluntary compliance regarding a federal agency's factual findings. Even if a violation is found and not voluntarily resolved, Title VI's language limits any loss of federal funding to the specific program "or part thereof" where the violation is found to have occurred. It is unlawful to cut federal research funding, for example, without *both* a specific finding of a violation of Title VI (or other covered law) *and* a specific finding that the research project or projects whose funding is being cut was involved in the violation. Further, funding cuts are authorized only after the opportunity for an administrative hearing and appeal process, as well as provision of notice and a report to Congress. An IHE may also challenge any finding of a violation of law in federal court.²⁰

Framework: A Three-Part Framework for Wise Courage

With these basic parameters of federal non-discrimination law in mind, the following three-part framework is designed to help promote wise and courageous leadership in higher education.

PART I: Ground Risk Assessment in Mission, Law, and Context

Every organization must determine its own risk tolerance. In so doing, mission should be a fundamental consideration. Risk assessment is a comprehensive exercise, where legal risk is but one component. Good practice begins with consideration of an IHE's mission and the significance of a particular policy or program to the IHE's ability to preserve its foundational principles and achieve its educational goals.²¹ IHEs must of course follow clear legal requirements. Failure to do so might violate rights and expose the particular IHE to intrusive and costly enforcement actions. Further, this can result in court rulings that create worse law and affect the overall higher education endeavor. That said, when the law clearly permits a policy, or the law is not clearly settled and the policy is supported by a principled legal position, the wise course of action may be to assume some *reasonable* legal risk to counteract *unreasonable* risk to the IHE's mission. Particularly problematic is failing to take or maintain a strongly defensible action that is closely tied to the IHE's mission.

The potential harm in not defending a defensible policy or practice is most acute—and the situation most complex—when overreaching federal enforcement threatens the bedrock foundations and purpose of higher education, such as academic freedom and inclusion of all talent. Unfortunately, this is precisely where IHEs may find themselves in this moment, with significant threats to their federal funding and tax-exempt status. Comprehensive risk assessment in this situation can be exceedingly fraught. However, it is also worth considering that substantial compromise on bedrock principles may not actually preserve funding in the context of the current approach to federal enforcement. And there are significant process and substantive protections that govern before any withholding or loss of funding or exempt status should take place.²²

PART II: Communicate Proactively to Increase Understanding

IHEs must communicate with clarity about *what* they are doing (and not doing) to further their missions. This must also include explaining *why* and *how*. Effective, proactive communications must be understandable to a variety of audiences and cover both what an IHE is doing on its own as well as in concert with others. Avoiding mischaracterizations of an IHE's words and deeds will help reduce risk and, at the same time, increase broad understanding of what is really meant by advancing inclusion, equity, diversity, and accessibility, and other less-contested interests. It is also essential to explain the relationship of these interests to educational, workforce, economic, health, civic, and other outcomes associated with excellence, innovation, and prosperity that benefit everyone.

IHEs must also communicate—and persuade—about *why* they are adopting certain policies and taking certain actions. The rationales driving mission-aligned work are often lost amid the current discourse. For example, “DEI” has been mischaracterized as “anti-merit” and as favoring certain racial groups over others. But a common starting point for this work is exactly the opposite: *people of all identities, experiences, beliefs, and backgrounds have great potential and are individually unique; no group is inherently superior.* This is confirmed by science and serves as a bedrock principle in law.

If IHEs can better establish this as a shared understanding, they can then communicate that significant disparities in education warrant assessment of root causes and removal of *barriers* that have impeded some from achieving their full potential. At the same time, IHEs must assure their communities that it is equally important and mission-aligned to keep providing those who are *already* thriving the opportunities they need to continue to do so. With these foundational truths embedded in their narratives, IHEs can better assure everyone that this work is truly about providing equitable access and opportunities, with fair competition, for all. Personal storytelling that humanizes these truths can particularly help elevate understanding and buy-in.

PART III: Take Strongly Defensible, Mission-Advancing Actions

IHEs should continue to take legally defensible actions to advance their mission, including with respect to inclusion, equity, diversity, and accessibility. By using the legal parameters described above and recognizing where federal guidance and enforcement are or may be at odds with federal law, IHEs can move forward even in this fast-changing federal landscape. This final part of the framework identifies three kinds of inclusion-, equity-, and diversity-advancing actions worth considering:

- The first catalogues a spectrum of mission-aligned policies and programs (with some illustrative examples) that IHEs can design and implement in legally defensible ways, within the parameters discussed above.
- The second two highlight more strategic decisions that IHEs should consider when navigating these exceptionally fraught times.

Although the mix of actions will vary from IHE to IHE—after all, comprehensive assessments are institution-specific—*wise courage* demands that IHEs take strongly defensible actions that are central to their mission and fit within their context.²³

First, there are actions that are fully inclusive because they authentically benefit everyone, including by increasing accessibility and effectiveness for all talent. These might include, among other things, effective pedagogical approaches, quality mentoring programs, transparency about pathways and enrichment opportunities, flexible academic and career trajectories, and aligning timing and terms of offers with financial support so that candidates have full information about affordability before deciding. When these policies are made available to anyone who may benefit, regardless of their racial status, they should not implicate legal limitations. The fact that IHEs may adopt some of these policies or practices in part because of evidence that they help remove barriers to access and attainment for particular student groups should not undercut their inclusive effect and legality. To the contrary, such actions may be necessary under existing nondiscrimination law to eliminate unjustified race-based gaps in access and opportunity, as discussed above in Legal Parameter #4. In any event, they do not exclude anyone. Although it may be difficult to predict with certainty the Administration’s enforcement decisions, these barrier-removing actions are among the most legally defensible under current law.

There are additional inclusive actions that may be viewed as more explicitly tied to inclusion, equity, and diversity aims. These actions also do not confer individual benefits or determine who can participate based on individuals’ racial status. IHEs should prepare to defend these types of actions if wrongfully enforced against. They include:

(i) Selection Criteria that are Authentic, Mission-Related & Experience-Based and/or Race-Neutral²⁴

As endorsed by the Supreme Court in *SFFA*, IHEs can incorporate into selection processes an assessment of someone's **mission-related gains** (e.g., skills, knowledge, character, inspirations, and aspirations) from their own **lived experiences**. These experiences may be of many kinds, *including those related to race*.

Another type of legally defensible selection criteria is **facially race-neutral criteria** that are authentically aligned with the IHE's mission, pursued for their own sake, and not used as a proxy for race. Importantly, IHEs may use these criteria even if they are aware of—and even if they welcome—the fact that the criteria's inclusion might increase racial diversity. These could include criteria such as access for those from low-income and low-wealth backgrounds, qualifying as first-generation college students, attending under-resourced secondary schools, or hailing from urban or rural backgrounds. When using these neutral priorities, IHEs should document appropriate statements, staffing, and funding, in part to help demonstrate their authenticity.

(ii) Programs or Practices that Focus on Race and Related Issues as Subject Matters

IHEs' programs or practices that focus on race and related issues—when authentically open and available to all—should also be legally defensible. For example:

- Programs that focus on race, gender, or any equity or diversity-related *content* without limiting participation or providing a benefit or harm on the basis of a person's racial status (e.g., curriculum, conferences, student orientations, cultural or arts programs, etc.);
- Race- or gender-themed groups that are authentically open and available to all who are interested regardless of identity and that offer any attendant benefits to all who participate; and
- Training or other capacity-building programs that ensure members of the academic community have the necessary role-related expertise, interest, and ability to serve all students, faculty, and staff well (e.g., professional development about unconscious bias or inclusive pedagogy).

(iii) Fair Access and Effective Outreach and Communication for Everyone

IHEs may engage in outreach activities to help build an inclusive candidate pool, which is distinct from decisions about who is interviewed or selected. Outreach that conveys core information and a sense of welcome in a variety of ways that will resonate with a range of audiences is permissible. Note that this may include both broad general outreach as well as *targeted* communications and recruitment programming, so long as the IHE is not conferring or withholding material benefits to any person based on their racial status. For example, it should be permissible for an IHE's Black Alumni Association to send communications to Black high school students in their members' hometowns, encouraging them to apply, speaking to the benefits of the IHE, and sharing links to application materials that are being made available to all applicants.

(iv) Data-Informed Decision-Making

Evidence is important for demonstrating why an action is inclusive. It is legally permissible to collect and disaggregate data by race or other characteristics and backgrounds to identify *all* gaps that exist. It is similarly permissible to then use those data-informed insights to identify and remove *barriers* (in legally defensible ways) and to conduct program evaluations more broadly.

The second kind of action is a strategic one: if an IHE needs to pause an existing action or program, it should do so in a thoughtful way. Pausing may be needed to assess the meaning, impact, and limits of changes to the legal landscape. This assessment may conclude that the change does indeed constitute new, legally binding federal law. Alternatively, it may conclude that the change is an overreaching federal policy or enforcement initiative that is not required or is at odds with law. In that case, it may be wise to pause an affected activity while deciding when and how to push back. But IHEs should not act precipitously in ways that would make it difficult to refine or resume action, within legal parameters, once the way forward becomes clear, or when a court halts federal overreach. In any event, it is critically important to avoid preemptively complying with a threatened-but-not-yet-implemented overreaching federal policy or enforcement initiative. IHEs should, of course, prepare for what they might do if such policies or initiatives are implemented. But leading with wise courage means both avoiding preemptive compliance with policies that are at odds with law and resisting the tendency to over-rotate when some changes are necessary.

The third kind is also about strategy: IHEs need to act individually and *collectively* to defend higher education's most fundamental mission priorities. It can be difficult for an isolated IHE to fight back under the threat of losing millions or billions of dollars of federal funding and tax-exempt status. But IHEs must find a way to push back if and when federal overreach threatens a particular institution's priority mission interests or the national higher education endeavor's bedrock foundations, such as academic freedom and inclusion of all talent. IHEs can often act most effectively by forming coalitions of higher education associations and institutions to develop strategy and take action. There is strength in numbers, both reputationally and positionally.²⁵

Although every organization with a stake in higher education may not be able to directly pursue all options for action, organizations of all kinds can contribute in different ways. Some may access the courts as amici or plaintiffs; some may provide funding; others may convene their members, grantees, or other affiliates to support them in strategizing for action; some may provide substantive legal, science, or policy expertise on the issues; and some may be able to communicate effectively with members of Congress, State Attorneys General, or other local leaders who may be able to elevate concerns and influence outcomes.

Concluding Reflections

Recent federal actions are jeopardizing the foundations of academic freedom and inclusion of all talent that undergird the exceptionalism of American higher education, including its research and international engagement. Higher education is not perfect. But the measure of excellence and success, or even legal compliance, is not perfection. There are many higher education leaders who are committed to acting with wise courage. They are working to create and strengthen the necessary conditions for people who are already thriving to continue to do so, while also addressing any significant barriers so that people of all experiences, perspectives, and identities can realize their promise. To effectively remove these barriers, IHEs must use data and evidence to identify them, determine their relative severity, and allocate resources accordingly. That active commitment to inclusion is ongoing work for higher education, as it is for all pillars of our society.

Normally, policy disagreements between the federal government and higher education are resolved through constructive engagement. But in these times of existential threats to higher education's bedrock foundations, the *normal* course corrections and strategies for navigating challenges may prove unavailable or inadequate. **This is a time for leaders to embrace wise courage to meet a new reality.** That means internalizing the understanding that federal policy initiatives at odds with the Constitution or existing federal law are not the same thing as federal law. And wise courage also means acting on the realization that both individual and collective actions are needed to overcome the pressure to capitulate on fundamental or other priority interests.

No IHE is insulated. The decisions facing leaders of higher education today are among the most vexing and consequential in recent history. The framework outlined above is one tool to support the wise and courageous leadership that is needed to meet the challenges of these extremely unusual times.

ENDNOTES

¹ [Exec. Order 14173](#), 90 Fed. Reg. 8633 (January 21, 2025); *see also* [Exec. Order 14151](#), 90 Fed. Reg. 8339 (January 20, 2025). These EOs are amplified by the U.S. Department of Education's recent policy documents. *See* A. Coleman, [The Reality Behind the Rhetoric: The Full Picture of the U.S. Department of Education's March 1, 2025 "Frequently Asked Questions About Racial Preferences" Document and Related Actions](#) (EducationCounsel, 2025); A. Coleman, [Overreaching and Misleading: An Analysis of the U.S. Department of Education's February 14, 2025, "Dear Colleague" Letter on Diversity, Equity and Inclusion Policies and Programs](#) (EducationCounsel, 2025).

² The Supreme Court's rulings are binding nationwide. The rulings of each U.S. Court of Appeals are binding only on the states within its federal circuit.

³ *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); [Executive Orders: An Introduction](#), Congressional Research Service Report R46738 (March 29, 2021).

⁴ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023). Note that this opinion resolved two consolidated cases; the defendant in the second case was the University of North Carolina.

⁵ *See, e.g., Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Texas*, 570 U.S. 297 (2013); *Fisher v. Texas*, 579 U.S. __ (2016).

⁶ *Students for Fair Admissions*, 600 U.S. at 214 (noting diversity interests are "commendable"), 215 ("plainly worthy"), 217 (noting IHEs "may define their missions as they see fit" within constitutional bounds).

⁷ *Id.* at 230-31 ("[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.... 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...the student must be treated based on his or her experiences as an individual—not on the basis of race."); *see also id.* (contrasting discrimination based on race with permissible consideration of "skills built, or lessons learned").

⁸ In employment, Title VII is the primary federal statute that governs all employers of 15 or more employees. It applies the same conditions to the use of "sex" as apply to race and national origin in the conferral of employment opportunities and benefits for almost all purposes. 42 U.S.C. § 2000e-2. But the Supreme Court has not decided whether Title VII applies less rigorous conditions than the Equal Protection Clause. *See Ricci v. DeStefano*, 557 U.S. 557, 594-96 (2009) (Scalia, J., concurring). Also note that the general principles of equal treatment of people based on "sex" under Title VII include sexual orientation and gender identity, as decided by the Supreme Court in *Bostock v. Clayton County*, 590 U.S. 644 (2020), an employment case. *See* J.L. Keith and A. Coleman, [The Evolving Definition of "Sex" Under Federal Non-Discrimination Law](#) (American Association for the Advancement of Science, 2024).

President Biden's [Executive Order 13988](#) applied those principles to the education context under Title IX. President Trump, by [Executive Order 14168](#), rescinded Biden EO 13988. The Supreme Court has not ruled on this issue.

⁹ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); *see Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose a straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.... Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."). Justice Frankfurter, in his concurring opinion in *Sweezy*, enumerated "the four essential freedoms" of higher education: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 354 U.S. at 263 (citations omitted).

¹⁰ Justice Kavanaugh stated in his *SFFA* concurrence: “To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. Federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination. And governments and universities still ‘can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.’” 600 U.S. at 317 (quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in judgment)). Furthermore, the Court in multiple cases has embraced authentic mission-advancing neutral strategies that do not consider an individual student’s racial status when conferring benefits. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Texas*, 570 U.S. 297 (2013); *Fisher v. Texas*, 579 U.S. __ (2016); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (Kennedy, J., concurring). The Court in *SFFA* did not overrule *Grutter*, as the plaintiff had requested. Its ruling focused on what interests are legally compelling and what the design requirements are for narrow tailoring of the means used to achieve compelling interests—two requirements that must be met under any strict legal scrutiny to justify considering an individual’s racial status when conferring material opportunities and benefits.

¹¹ There are even contexts in which an IHE may use or be required to use *racial status-conscious* remedies to address its own intentional discrimination that is having continuing effects. The Supreme Court has long held that this is a legally compelling interest. *Students for Fair Admissions*, 600 U.S. at 207. Cause and effect are key considerations. Actions that eliminate *intentionally* discriminatory barriers for some races with continuing effects, while correspondingly ending advantages for other races, require designs that are attentive to additional and still-developing legal design parameters. See Keith and Coleman, *Navigating the Post-SFFA Landscape*, p.19.

Note also that higher education leaders should pay close attention to developments in the disparate impact standard for identifying discrimination under Title VI and other applicable laws. This longstanding standard prohibits policies and practices that have a significant, unjustified adverse impact based on race. In an EO issued on April 23, 2025, “[Restoring Equality of Opportunity and Meritocracy](#),” President Trump asserted a new federal policy to “eliminate disparate-impact liability in all contexts to the maximum degree possible,” taking the position that this is “to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.” The EO directs the Attorney General to “initiate appropriate action to repeal or amend implementing regulations for Title VI of the Civil Rights Act of 1964 for all agencies to the extent they contemplate disparate-impact liability” and to end federal civil rights enforcement of such liability. (Note that Title VII includes a disparate impact standard in statute.) This new EO likely represents a consequential development in antidiscrimination law that will ultimately be adjudicated in federal courts.

Whatever that outcome may be, IHEs currently have the right and responsibility under federal law to identify and eliminate both *intentional* discrimination that may be revealed in part by evidence of impact and *disparate impact* discrimination that is avoidable and should be eliminated to assure fair access, opportunity, and experience for everyone in higher education. See, e.g., 42 U.S.C. § 2000e–2(a) and 2(k)(1)(A) (Title VII disparate treatment and impact provisions); *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009) (noting that “Title VII prohibits both intentional discrimination (known as ‘disparate treatment’) as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as ‘disparate impact’)” if the practice is not a business necessity or a less adversely impactful alternative is available but not used); 42 U.S.C. § 2000d (Title VI dictates: “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.”); 42 U.S.C. § 2000d-1 (Title VI expressly authorizing and directing agencies to promulgate rules “consistent with the achievement of the objectives of the statute authorizing the financial assistance”); 34 CFR § 100.3(b) (U.S. Department of Education Title VI regulations prohibiting discrimination “directly” or by “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin”); *Alexander v. Sandoval*, 532 U.S. 275, 280–82, 281 n.1 (2001) (limiting a private right of action under Title VI to intentional discrimination but not invalidating disparate impact regulations).

¹² For example, the purpose of Title I of the Every Student Succeeds Act (ESSA), the major federal law for K-12 education, is “to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.” 20 U.S.C. § 6301. Other ESSA provisions related to statewide accountability systems and improving the lowest-performing schools depend on states and districts collecting and acting upon data disaggregated by race and other characteristics. The more recently-enacted and bipartisan CHIPS and

Science Act of 2022, Public Law No. 117-167 (August 9, 2022), mandates and funds, among other actions, the pursuit of diversity-, equity-, and inclusion-advancing efforts to increase the participation of minorities, women, people in rural communities, and other underrepresented groups in science education and the science workforce (both academic and business sectors), as well as a Chief Diversity Officer at the National Science Foundation, to address the national imperative for a strong American computer chips industry.

¹³ *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for the City of Boston*, 89 F.4th 46 (1st Cir. 2023), *cert. denied*, 604 U.S. ___ (2024).

¹⁴ The educational benefits of diversity for all students have long been defined to incorporate several benefits, including enhanced learning and teaching, civic and workforce readiness, leadership skills development, empathy and cross-racial understanding, and reduced stereotyping. See Keith and Coleman, Navigating the Post-SFFA Landscape.

¹⁵ *Students for Fair Admissions*, 600 U.S. at 206-208. The Equal Protection Clause and Title VI apply the same “strict scrutiny” legal conditions to the consideration of race or ethnicity to confer opportunities or benefits on individual students. Sex and gender are also subject to rigorous conditions, similar to those that apply to race but somewhat less strict, called “heightened scrutiny.” The Supreme Court has not clearly defined the difference and federal appellate courts across the country that have ruled on the issue are split as to whether there is a meaningful difference. See J.L. Keith and A. Coleman, [Diversity and the Law: 2024, Federal Non-Discrimination Law on Sex & Gender...Compared to Law on Race & Ethnicity](#) (American Association for the Advancement of Science, 2024).

¹⁶ Even when there is a legally compelling *interest*, any racial-status-based *means* to achieve it must be “narrowly tailored,” which includes several factors: workable race-neutral strategies must be used but be insufficient alone to achieve the compelling interest; racial status must not be used to a greater extent or for a longer time than needed to achieve the compelling interest; use of racial status must not stereotype and must not be a negative factor for any race; racial status must not be used in “zero sum” decisions (i.e., where one race’s or ethnicity’s gain is another’s loss); and the use of racial status must have an ascertainable end date. See Keith and Coleman, Navigating the Post-SFFA Landscape.

¹⁷ The SFFA Court did not foreclose the elevation or development of *new* legally compelling interests that could justify considering a student’s racial status, if neutral strategies alone do not suffice to achieve the interest. See Keith and Coleman, Navigating the Post-SFFA Landscape. In such circumstances, higher education institutions and their stakeholders should work to identify those interests, as it is not true that “strict scrutiny is ‘strict in theory, but fatal in fact.’” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (citation omitted). Such new interests should be based on evidence, measurable in terms of both progress and achievement (including by a court), and accompanied by a determinable sunset review or end date.

¹⁸ See the resources available at [AAAS Diversity and the Law](#). See also Keith and Coleman, Navigating the Post-SFFA Landscape.

¹⁹ Statutory bans on federal interference in higher education are included in the General Education Provisions Act (GEPA), 20 U.S.C.A. § 1232a, and the Department of Education Organization Act (DEOA), 20 U.S.C.A. § 3403. See also [Exec. Order No. 13791](#), 82 Fed. Reg. 20427 (April 26, 2017); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575-581 (2012) (characterizing Congress’s spending power as “in the nature of a contract,” where the potential funding recipient has a meaningful option to agree to the terms or forgo the contract, and ruling that federal conditions to State Medicaid funding are unconstitutionally coercive where forgoing the funding would account for about ten percent of many states’ total annual revenues). Adding coercive conditions to federal funding to punish disfavored speech and direct educational policy would likely be a violation of an IHE’s and its faculty’s academic freedom, which is a “special interest” of the First Amendment. *Keyishian*, 385 U.S. at 603; see *Sweezy*, 354 U.S. at 261-63.

The choice between loss of mission priorities, including academic freedom, and loss of billions of dollars in research and other funding by even a highly resourced IHE, may be viewed as rising to the level of coercion for two reasons, either of which alone may be sufficient. First such a major funding loss is likely to be a significant percentage of an IHE’s total annual operating budget and an overwhelming percentage of its annual research budget, especially where research is a fundamental part of its mission and operations. And just as (or more) importantly, the loss of academic freedom is a loss of the IHE’s bedrock foundation for virtually all purposes and violates fundamental speech rights

under the Constitution. See *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 204 (2013) (finding that funding conditions can be unlawful under the First Amendment when the government imposes conditions that “seek to leverage funding to regulate speech outside of the contours of the federal program itself” as opposed to conditions that define the limits of the spending program). The Court in *Agency* also cautioned against overbroad interpretations of the limits of a spending program, “lest the First Amendment be reduced to a simple semantic exercise.” *Id.* At 215 (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001)). This is an area of law likely to develop further in these times.

²⁰ 42 U.S.C. § 2000d-1; see, e.g., 34 C.F.R. §§ 100.6(a), 100.7(d)(2), 100.8(c)-100.11. Even when the federal government satisfies the procedural requirements and finds a specific violation, after voluntary resolution fails, the “pinpoint” provision of the Civil Rights Restoration Act of 1987, which covered Title VI, limits the effect of any loss of federal funds to the program or part of the program where the specific violation occurred. See *Bd. of Pub. Instruction of Taylor Cnty., Fla. v. Finch*, 414 F.2d 1068 (5th Cir. 1969) (“The procedural limitations placed on the exercise of such power were designed to insure that termination would be ‘pinpoint(ed)...to the situation where discriminatory practices prevail.’”).

²¹ Education First offers a useful approach to help decision-makers balance legal and mission risks. See [Facts in the Flood](#) (Education First, 2025), slides 8-16.

²² See, e.g., E.P. Aprill, [Revoking Tax-Exemption For Pursuit of DEI](#), Loyola Law School, Loyola Marymount University, Los Angeles, Legal Studies Research Paper no. 2025-13, UCLA School of Law Public Law & Legal Theory Research Paper Series no. 2025-15 (2025) (addressing the limited grounds and high bar that govern revocation of federal tax exempt status for violation of fundamental public policy or substantial illegal purpose).

²³ Some individual states have laws (or individual IHEs have policies) that impose *greater* limitations than exist under federal law, varying in scope by state, on the use or consideration of race, ethnicity, and gender—as identity or as subject matter. Some also place state-specific limits on certain equity- and diversity-related policies and practices. Public institutions in those states need to determine whether some of the examples included in this framework are adaptable to their legal context.

²⁴ Keith and Coleman, Navigating the Post-SFFA Landscape.

²⁵ The American Association of Colleges and Universities (AAC&U) recently published a [letter](#) calling for “constructive engagement” by the Administration with IHEs and pushing back on infringements of academic freedom. As of May 23, 2025, signatories included 655 college presidents. At the same time, 679 philanthropies whose missions span a wide range of perspectives, values, and priorities have signed onto [A Public Statement From Philanthropy](#), collectively defending their First Amendment-protected freedom to give according to their respective values and missions.