

Challenges to Race in Higher Education Admissions: Understanding the Issues and Getting Ready for the Supreme Court's Decisions in SFFA v. Harvard/UNC

The First of a Two-Part Series

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NADOHE

Panelists



**Paulette Granberry Russell,
President,
National Association of Diversity
Officers in Higher Education
(NADOHE)**



**Caroline Laguerre-Brown
Vice Provost for Diversity, Equity
and Community Engagement
The George Washington
University**

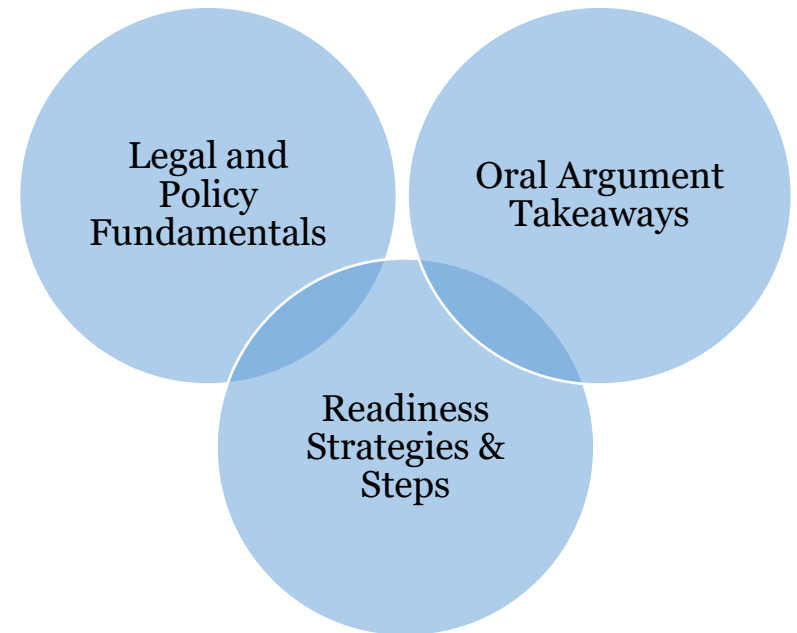


**Art Coleman
Managing Partner & Co-Founder,
EducationCounsel**

Introductions & Overview

Navigating Stormy Waters: Anchors, Sails & Maps

Segment	Time
Introductions & Overview	10'
Anchors: A Recap of Legal and Policy Basics from Webinar One	10'
Winds: Takeaways from SFFA v. Harvard/UNC Oral Arguments	20'
Maps: Charting Your Course with Strategy Development and Action Steps	20'
Engagement/Q & A	25'
Port of Call: Wrap-Up	5'



More than Admission: The Role of the CDO

Systems Design and Influence

Enrollment
policy/practice &
programs

Student affairs
policy/practice &
programs

Curricular and
program offerings

Communications and Stakeholder Engagement

Mission-related
DEIJ goals and
objectives

Your IHE story—
successes,
challenges,
future aims

Strategy Development and Leadership

Readiness for
decision-day

Readiness for
summer of 2023—
planning,
engagement,
action

**Part 1—
Anchors:
Legal Realities
to Ground You**



Over Four Decades: Aligned Supreme Court Precedent

1978: Bakke

- J. Powell
- EBD = Compelling Interest **Concept**

1994: USED Title VI Aid Policy

*Rescinded in 2020,
under review*

2013: Fisher I

- Majority
- Rigor on Inquiry/
Evidence re
Necessity/Race-Neutral
Strategies

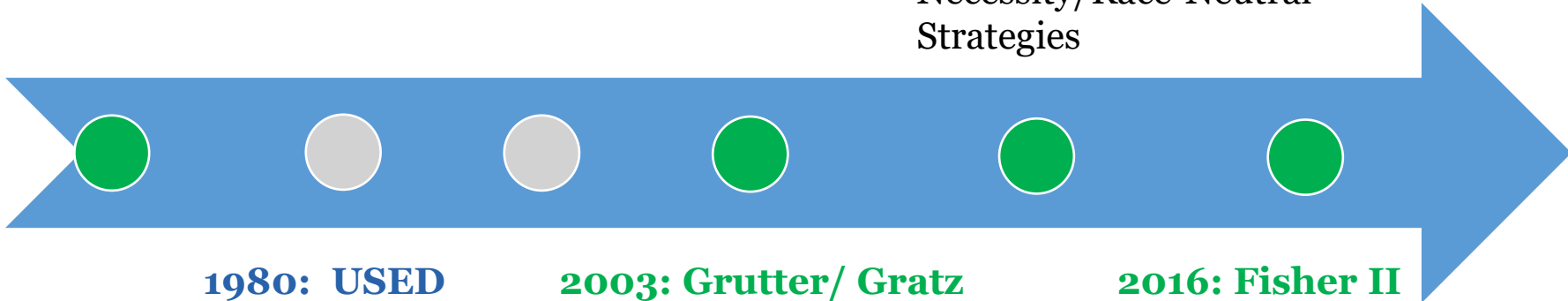
1980: USED Title VI Regulations

2003: Grutter/ Gratz

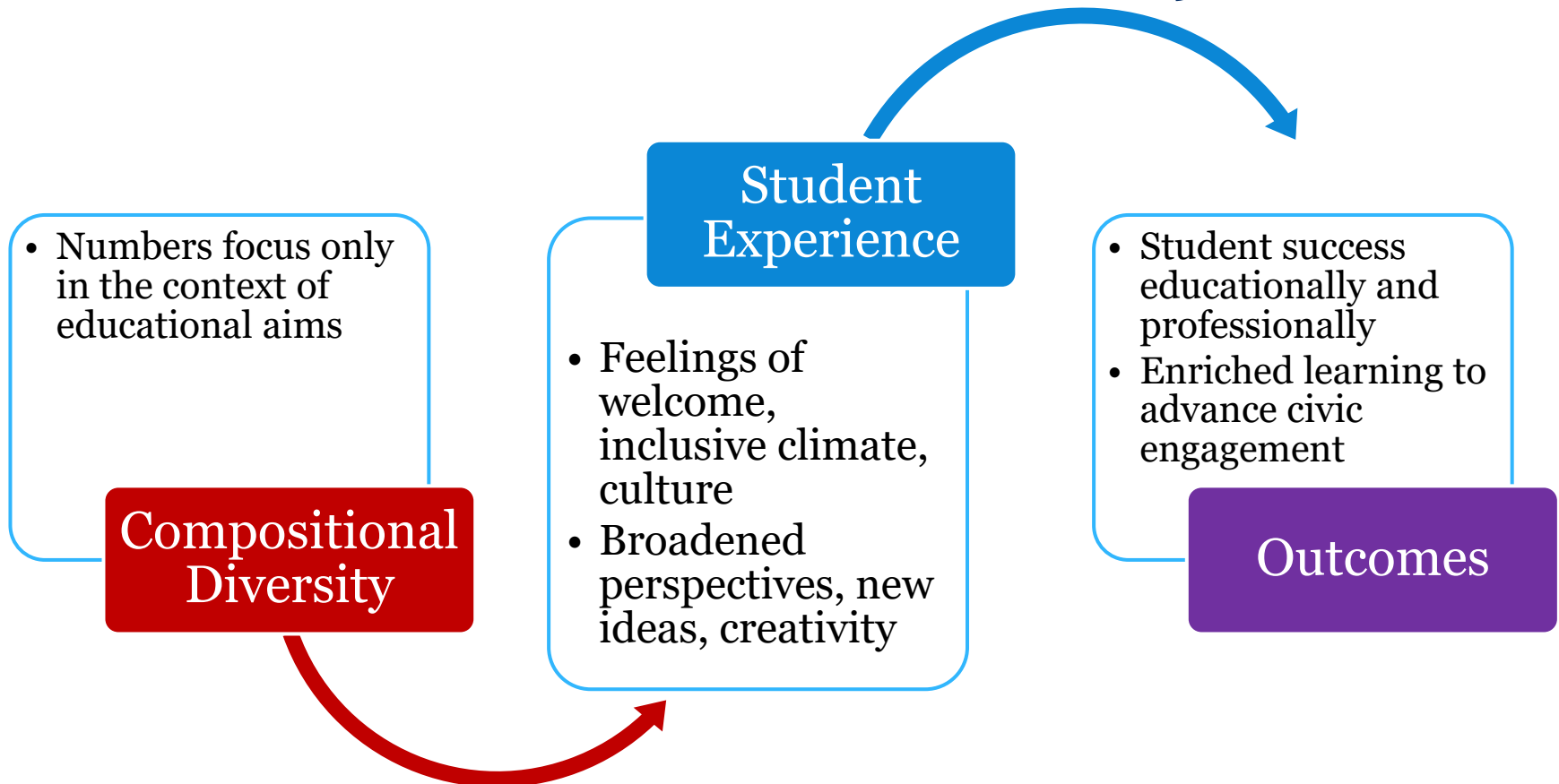
- Majority
- EBD=
- Compelling Interest
- Strict Scrutiny
Framework

2016: Fisher II

- 4-3 Majority
- Emphasis on
Evidence



The Theory of Action Behind the Educational Benefits of Diversity Aims

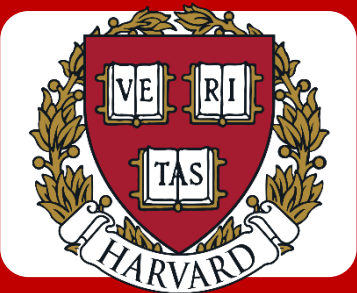


The SFFA Cases: Questions on Appeal



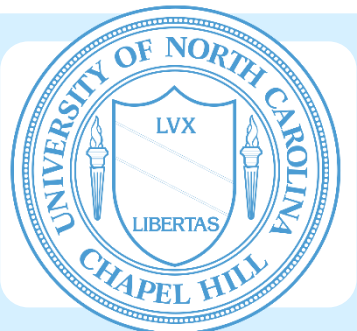
Both Cases

Whether the Supreme Court should overrule Grutter v. Bollinger and **hold that institutions of higher education cannot use race as a factor in admissions.**



Harvard

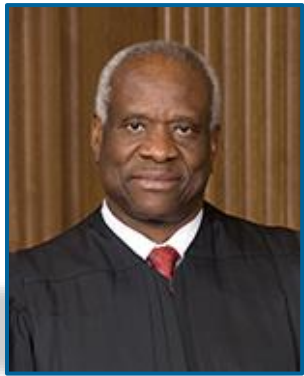
Whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.



UNC

Whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.

2022 U.S. Supreme Court: The Compositional Shift (vs. 2016) is Stark



Clarence Thomas



John Roberts
Chief Justice



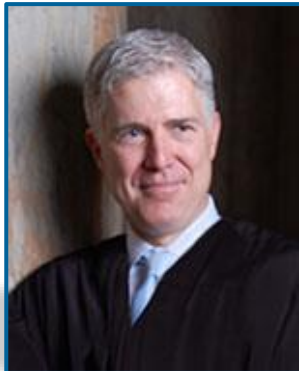
Elena Kagan



Samuel Alito



Sonia Sotomayor



Neil Gorsuch



Brett Kavanaugh



Amy Coney Barrett



Ketanji Brown Jackson

The SFFA Cases: Possible Outcomes

Contingency Planning

Harvard & UNC
Win

- Harvard/UNC prevail on all substantive issues

A Split Decision

- Echoes of *Grutter/Gratz*, SFFA wins one, loses one

SFFA Wins

- Court decides cases on narrow or procedural grounds—e.g. specific neutral strategy, process issue

SFFA Wins

- Court significantly limits precedent but permits consideration of race tied to individual identity/lived experience (vs. assumptions based on racial status)

SFFA Wins

- Court fully sides with SFFA and any consideration of race is prohibited

The SFFA Cases: Possible Outcomes

Contingency Planning

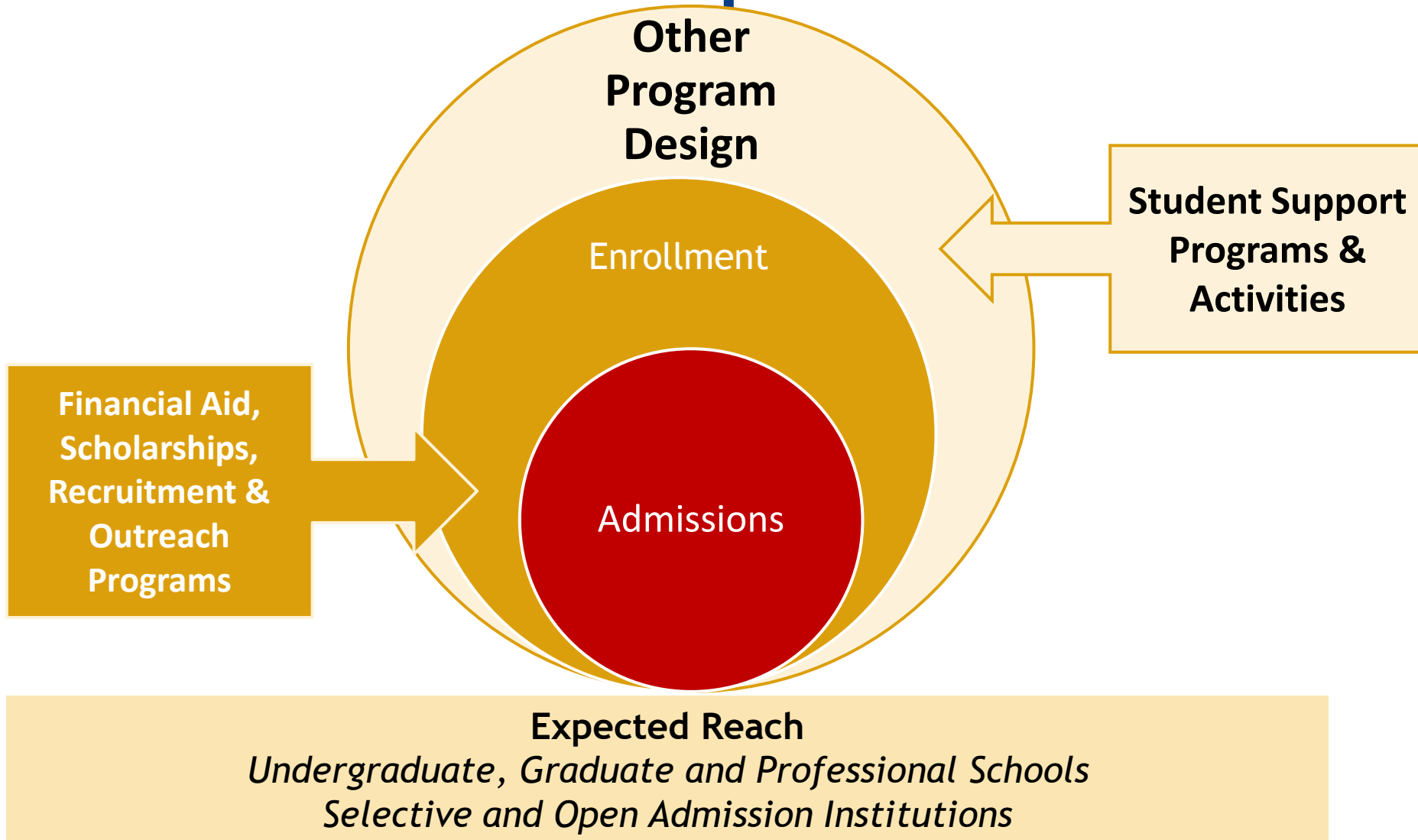
**SFFA
Wins**

- Court significantly limits precedent but permits consideration of race tied to individual identity/lived experience (vs. assumptions based on racial status)

**SFFA
Wins**

- Court fully sides with SFFA and any consideration of race is prohibited

Potential Implications?



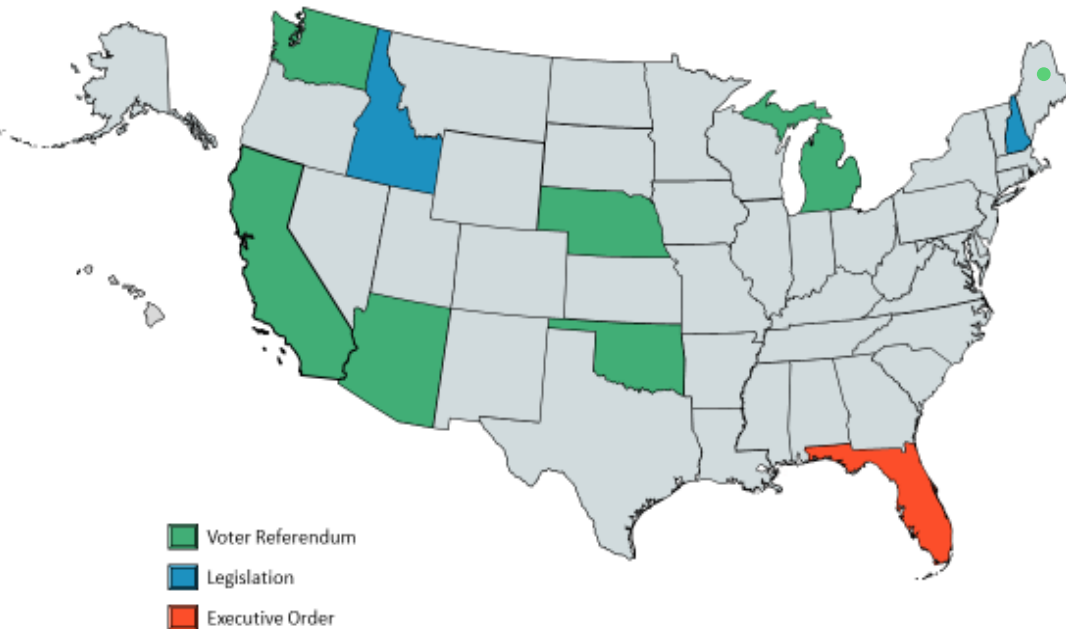
State Legal Landscape

13

- Nine states ban the consideration of race, ethnicity, and sex in public education, employment and contracting.

The *exceptions* to these prohibitions in most state bans are if the consideration of any of these factors is:

- *required* by federal law or to qualify for federal funding;
- to comply with a court order existing before the ban; or
- to address limited legally recognized bona fide sex differences.

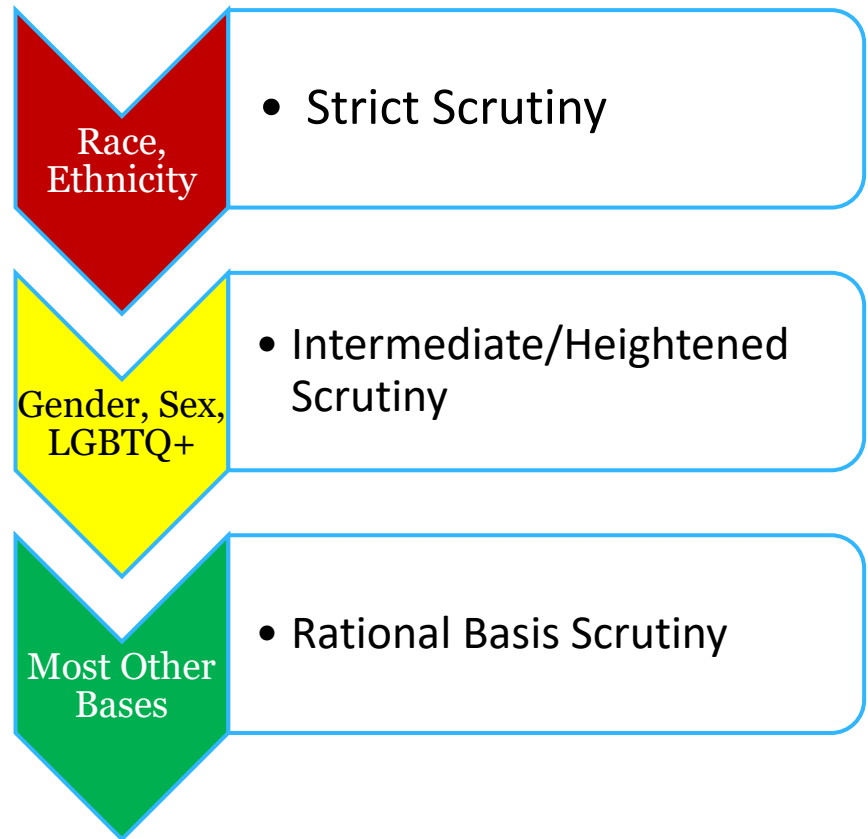


Federal Law—What's At Issue

Federal non-discrimination law applies to public IHEs and all IHEs that are recipients of federal funding

- **Differential treatment of *individual* applicants based on their race or ethnicity** when conferring benefits and opportunities
- **The aim is to achieve the educational benefits of diversity for all students**, which may justify race-/ethnicity- conscious action

Distinctions in standards of review



Race-Conscious vs. Race-Neutral

Race-, Ethnicity-
Conscious:
*Triggers Strict
Legal Standards*

- Consideration of individual's race or ethnicity when conferring an individual benefit or opportunity (facial or in practice)

Race-, Ethnicity-
"Neutral":
*Doesn't Trigger
Strict Legal
Standards*

- No consideration of individual's race or ethnicity when conferring benefits/opportunities
- Authentic aim other than increasing compositional diversity, but also has that known/welcome effect (e.g., socio-economic access/diversity)
- May target race and ethnicity with an inclusive design (e.g., outreach for effectively communicating same consequential info. to all)

Part 2— Winds: Takeaways from the SFFA v. Harvard/UNC Oral Arguments



After 5 Hours: Impressions



- You can't make firm predictions about case outcomes based on oral arguments. They are not necessarily predictive of decisions.
- Court addressed broad range of issues
- Many evident Court concerns about the consideration of race in admissions
- *But*, Court notably did not focus on key issues it must address if it is to fully overturn 40 years of precedent. E.g. Reliance of the field on Court precedent

Racial Classifications (Status) vs. Holistic Review Consideration (Identity)

“Check the box”
associated with race

- “Racial classifications” are the target of SFFA’s advocacy
- Surfaces the concern about making assumptions (stereotypes) about race.

Actual racial
identity/experience

- Conceded by SFFA as permissible—typically evident in, e.g., student application essays

Is There Ever an Endpoint?

“We expect that in 25 years...”

Is there a
categorical end
point?

- Suggestions that Justice O’Connor’s timeline operates like a light switch

The counter:
Strict scrutiny
provides that
limitation

- There’s no categorical end point for all institutions
- Institution-specific data/analysis should be driver [See Solicitor General argument]

Race-Neutral Strategies: When Is Enough Enough?

Ultimately, a highly
fact-based
judgment

- Institutional mission, context, data projections are key
- Fisher I (2013) provides the current, rigorous framework
- See *The Playbook* (2d ed. 2019)

What factors
should influence
decision about
viability and
sufficiency?

- What sacrifices in overall aims can be required?
- Targeted inquiries regarding squash players and legacies, as illustrative

Should Grutter Be Overruled?

Rhetoric vs. Reality

What are we talking about? I don't understand.--Thomas

- What do we mean by diversity?
- What are the benefits of diversity?

Court focus:
Discrete issues that *could* suggest reticence to overrule *Grutter* in entirety

- Check-the-box vs. holistic
- Timelines
- Race-neutral strategies
- MIA: Reliance

Counterpunch: True Equity

Equity implications of SFFA's position

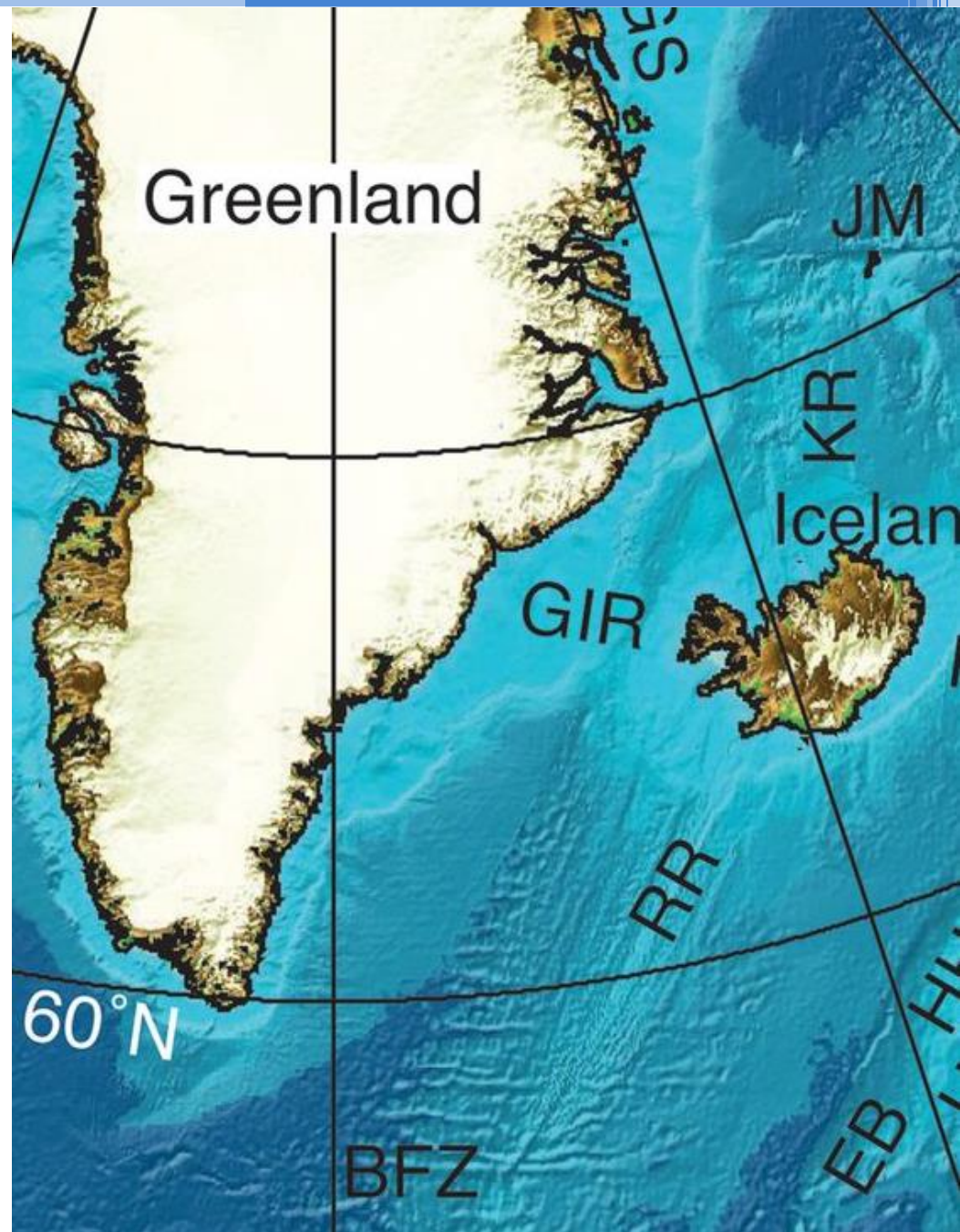
- Consider all background factors regarding an applicant *except* interests/experience associated with race???
- Raises equal protection concerns of a different ilk

Check-in: Points of Clarification



Part 3— Maps: Developing Navigation Strategies for Stormy Waters

Setting the Stage for
the Months Ahead



Tools and Resources

College Board Access & Diversity Collaborative Website

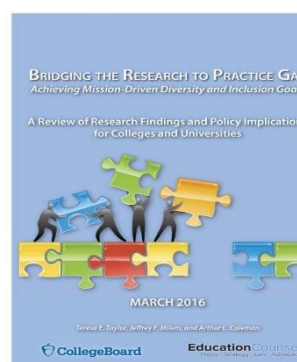
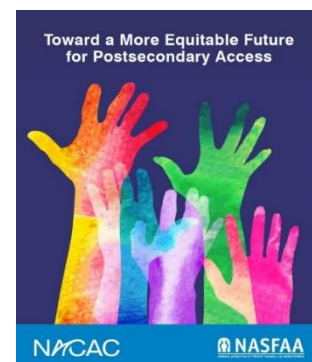
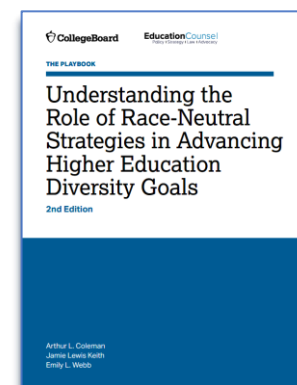
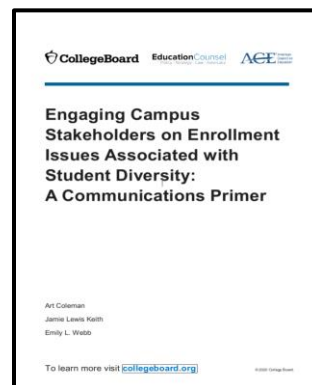
<https://professionals.collegeboard.org/higher-ed/access-and-diversity-collaborative>

NACAC, NASFAA: Toward a More Equitable Future

<https://www.nacacnet.org/about/toward-a-more-equitable-future-for-postsecondary-access/>

AAAS Diversity and the Law Website

<https://www.aaas.org/programs/diversity-and-law>

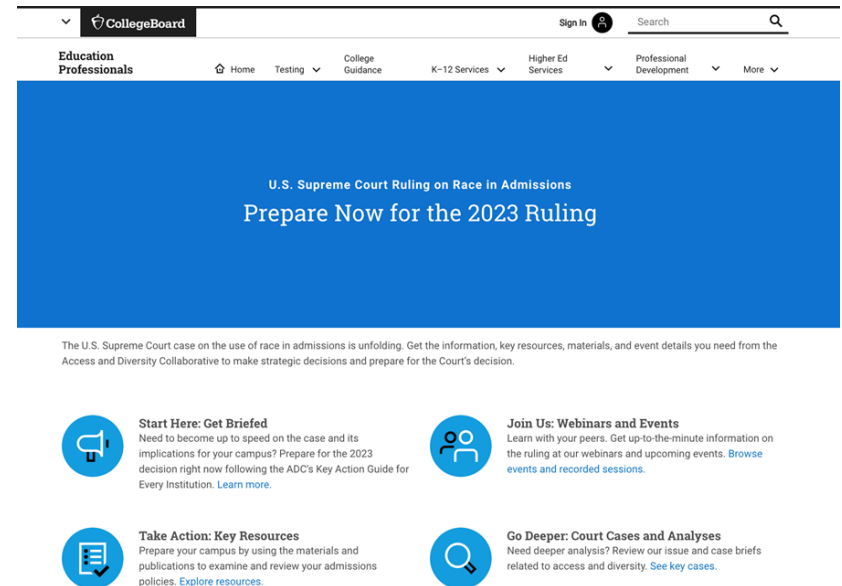


College Board Access & Diversity Collaborative

Web Hub to Support Institutional Readiness

New Digital Resource contains information on and links to:

- ADC Key Action Guide
- Webinars and Events
- Key Resources for Higher Education
- Court Cases and Analyses



<https://collegeboard.org/race-in-admissions>

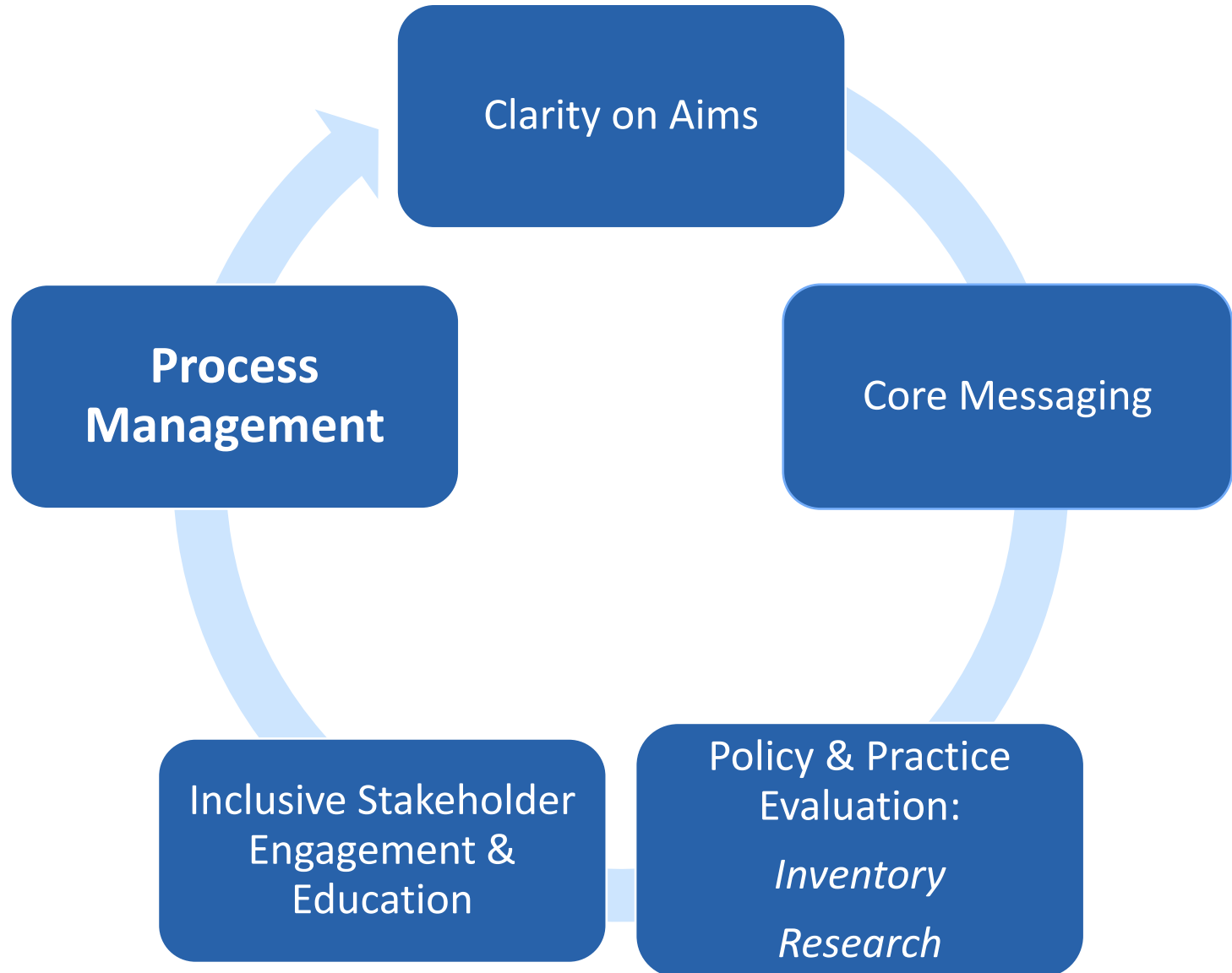
Meeting the Moment

Policy
Design &
Compliance

Community
Engagement
& Support

Leadership
&
Investment

Key Areas of Focus



Clarity on Aims

Understand context

Institutional position with respect to issues before the court

- Diversity as mission-related interest
- Prevalence of consideration of race in policies/programs

Establish relevance

Shared goals and objectives

Common policy design implications re student diversity

Community values

Illustrative Core Messaging

We will comply

We will comply with the Court's ruling

We will undertake a careful review of the Court's opinion with respect to policies that may be affected ...

We are pleased.../ disappointed ...

We are pleased that the Court recognized...
[based on research, institutional experience]

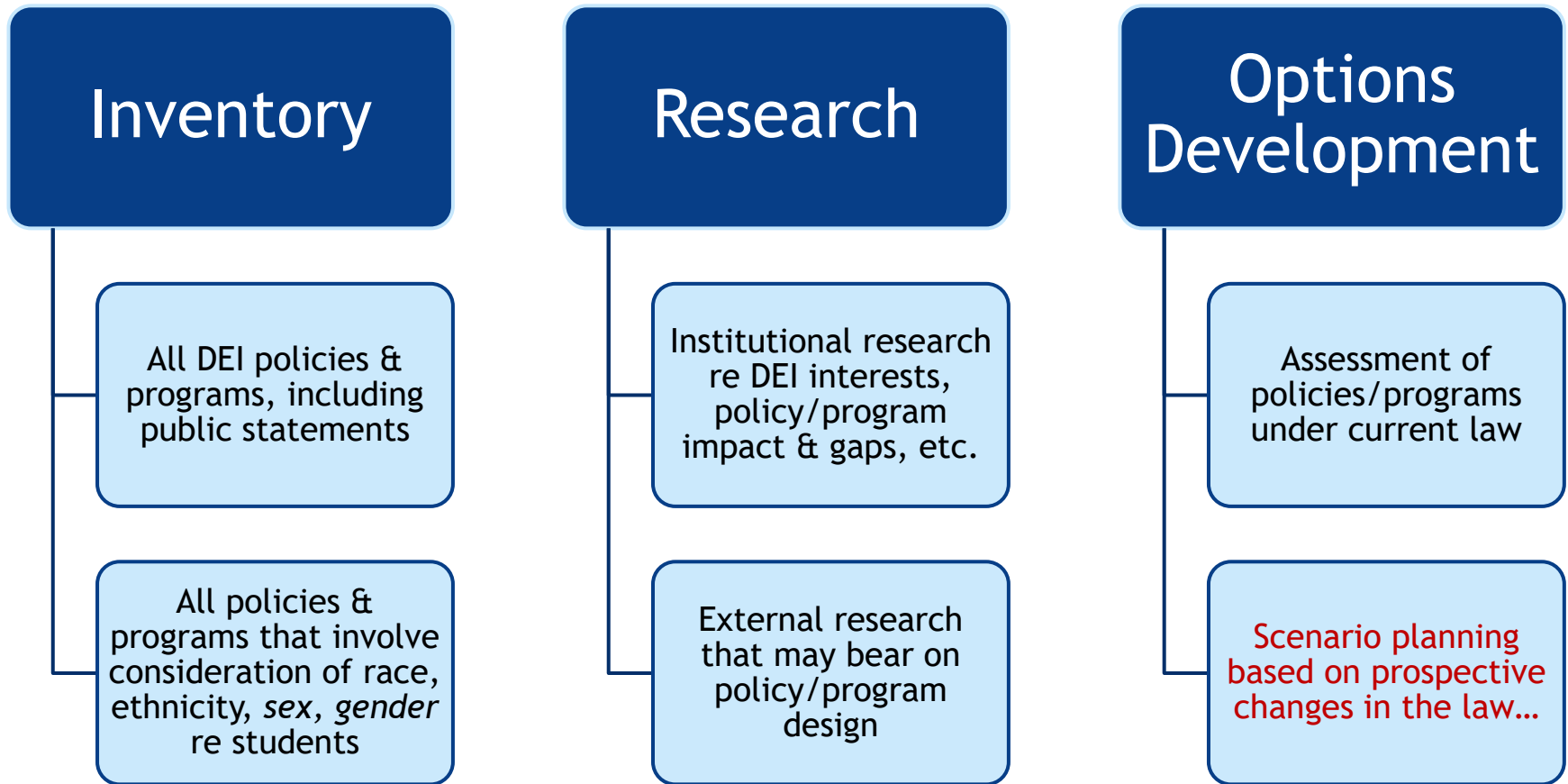
We are disappointed that the Court failed to recognize...Our experience is ...

Our commitment

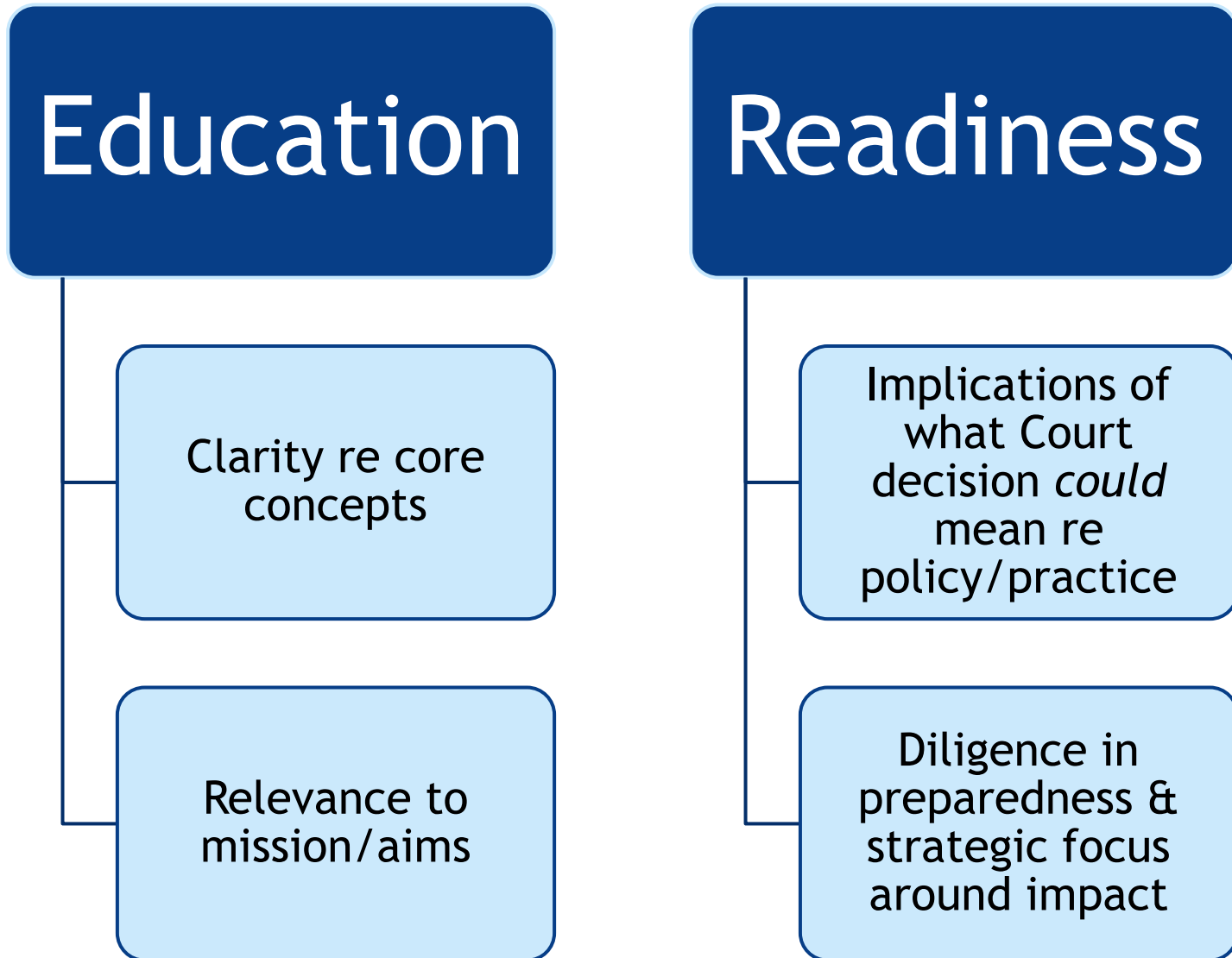
Nothing in the Court's opinion detracts from our commitment...

In fact, as we continue to address important DEI issues, here's what we plan [program, investment, etc.]

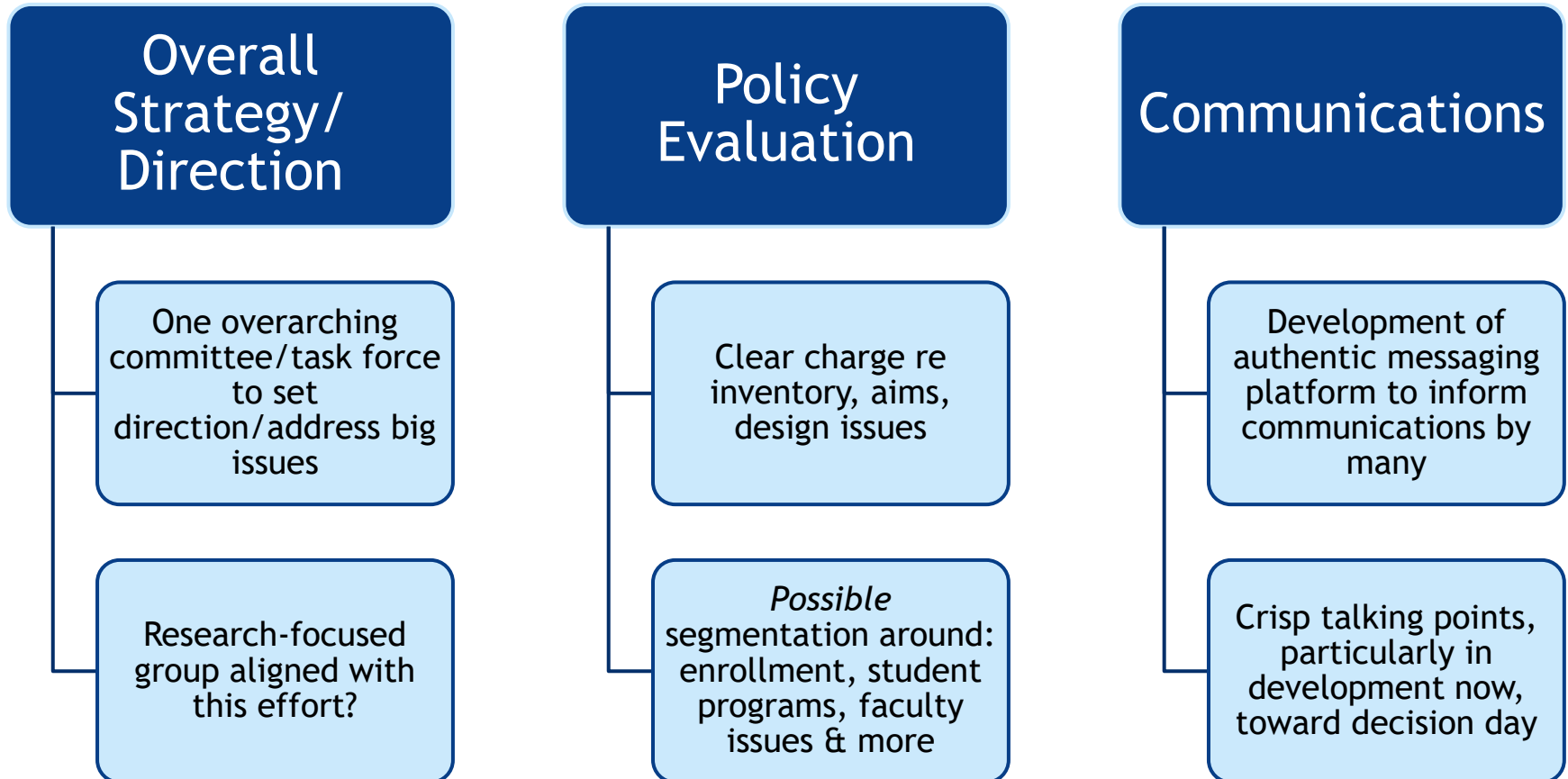
Policy and Practice Evaluation



Inclusive Stakeholder Engagement



Process Management



Timeline

Fall/Winter
2022

- Establish working groups
- Beginning campus conversations
- Begin inventory

Winter/Spring
2023

- Inventory and policy options development
- Stakeholder engagement
- Communications planning

Decision Day

- Decisions expected by June 30, 2023
- Could be rendered sooner—spring, 2023?

Summer 2023

- Policy/practice evaluation based on Court opinions
- Decisions on institutional DEI policy/program issues and potential changes implicated by Court decisions
 - Dual focus: Impact and compliance
- Stakeholder engagement, including plans for fall

**Our Current
Port of Call:
*Assess,
Strategize,
Engage &
Wait...***



Reflections and Questions

