

**CERPP CONFERENCE 2021:
Making Equity **Real****

FEBRUARY 9 & 10, 2021

Welcome




Session 2: Building, protecting and defending racial and ethnic diversity in enrollments

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'Everything Is Not Sunshine': What the Harvard Decision Means for Race-Conscious Admissions

UT-Austin faces a third lawsuit claiming that white students were unfairly denied admission under affirmative action

U.N.C. Admissions Lawsuit Brings Another Attack on Affirmative Action

Justice Department increasing attacks on affirmative action in college admissions

Supreme Court to Weigh Race in College Admissions

DOJ lawsuit against Yale reveals claims of how race plays role in admissions

Today's Roadmap

THE CASES

THE ISSUES

THE COURTS

- Q/A

THE IMPLICATIONS

BEYOND THE LAW

- Q/A

Core Foundations for Court Decisions



**Consideration of
race, ethnicity
disfavored under
federal law**

**High burden to
justify**

**A focus on ends
(some deference)
and means (rigor
of review)**

**Ends: Educational
benefits of
diversity for all**

**Means: Policy
design must
precisely serve
institutional aims**

The Cases: Court Precedent

Bakke (1978)

Admissions quota struck down; societal discrimination not a sufficient justification for considering race.

Powell, single Justice “compromise” opinion

Concept of the educational benefits of diversity recognized

Harvard Plan cited with approval

Grutter/Gratz (2003)

Affirms EBD as compelling (6-3)

Upholds law school policy—individualized review

Strikes down undergraduate policy—mechanical point system

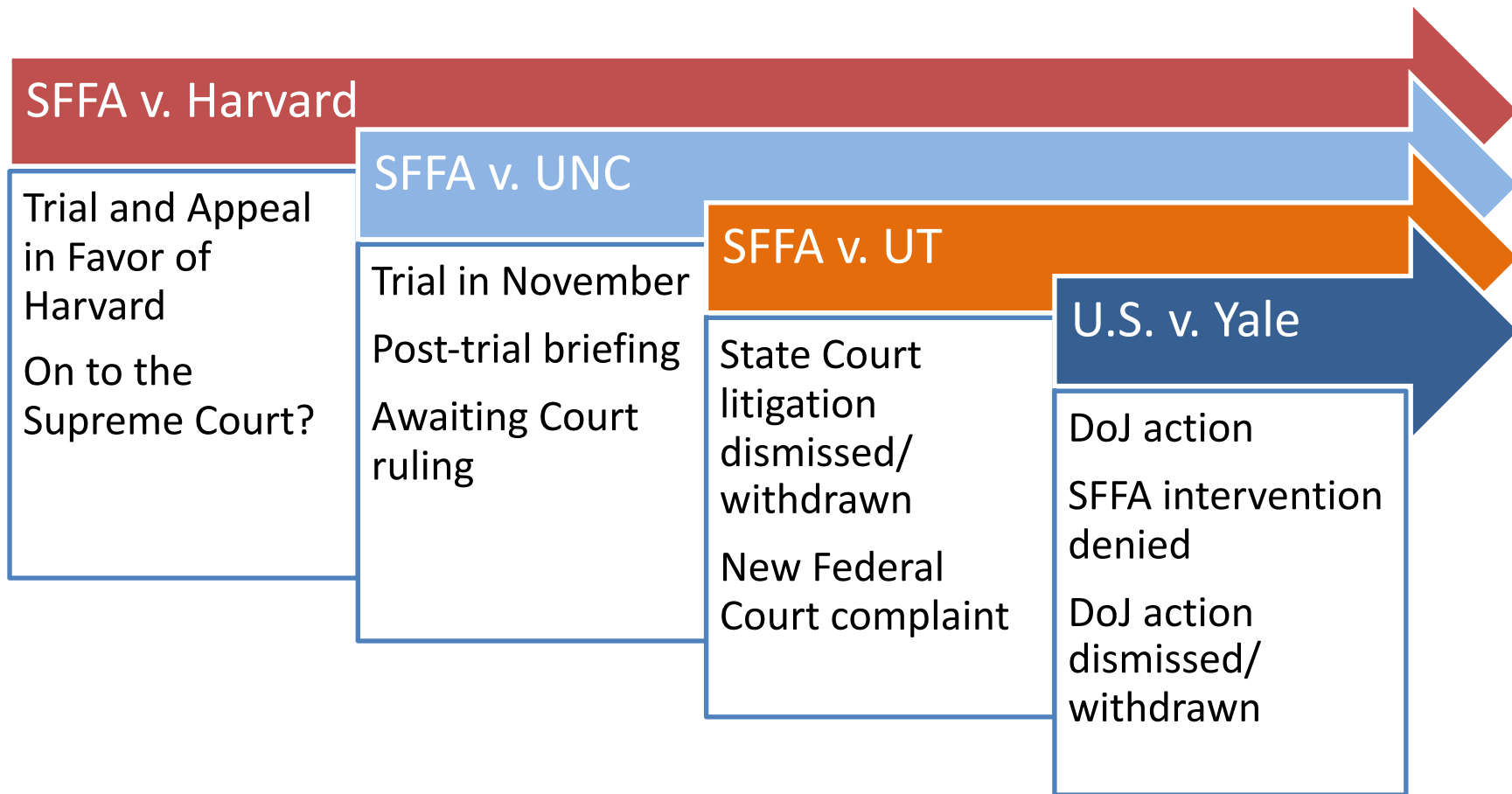
Fisher I & II (2013, 2016)

Builds on G/G, but with additional depth:

Rigor on race-neutral alternatives

Notably limited consideration of race—10% Plan and “factor of a factor”

The Cases: The New Wave



Federal Policy and Enforcement

USED Regulations and Policy (1979-2017)

**Title VI Regulations—
permissible “affirmative
action” based on certain
conditions**

**Title VI Scholarship Policy
(1994) [Notice and
Comment]**

Trump Administration Actions

**Withdrawal of numerous
Dear Colleague letters and
informal guidance**

**Withdrawal of Title VI
Scholarship Policy [Dear
Colleague]**

Biden Administration Actions

TBD

**DoJ change in position on
Yale case is first action of
consequence**

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What Plaintiffs Claim

You're not interested in educational diversity! All you care about is racial balancing.

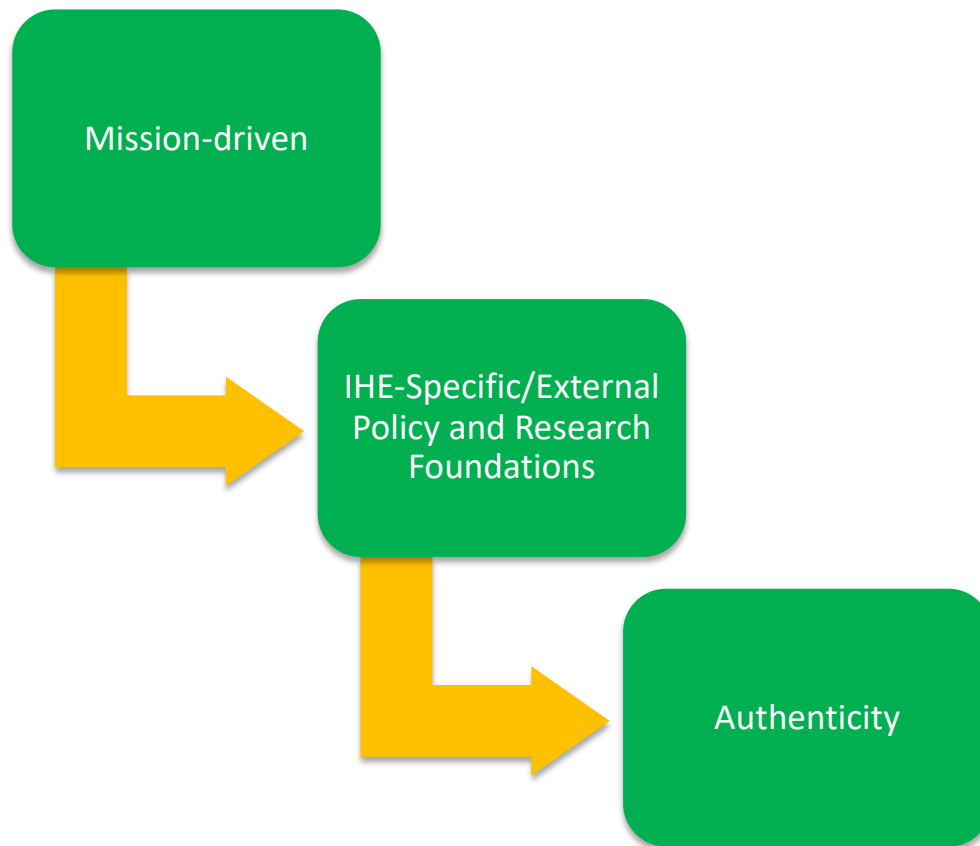


Best Practice Reality

Mission-driven

IHE-Specific/External
Policy and Research
Foundations

Authenticity



Policy Design— Necessity and Impact of Considering Race

What Plaintiffs Claim

There are equally effective or better race neutral alternatives. You don't NEED to consider race to achieve your goals!



Best Practice Reality

Consideration and Pursuit of Race-Neutral Avenues

Evaluation of necessity of considering race— are there comparably effective, workable alternatives?

Process Documenting Evaluation and Action on Alternatives

- Rigor
- Impact
- Implications for policy change

Policy Design—The Consideration of Race

What Plaintiffs Claim

Race is a “determinative factor” in admissions—not a “plus factor.”



Best Practice Reality

Race
as a
factor

- Race-associated factors in holistic review—not status
- Consideration of stages of transparency re race

Merit

- Mission alignment
- Holistic review—intersectionality of multiple factors
- Care on use of test scores and grades

What Underlies Plaintiffs Claims

Institutions of higher ed cannot be trusted; this is all a ruse to achieve racial balancing



Best Practice Reality

A process of periodic review, evaluation, and change as warranted

Multidisciplinary decision-making, grounded in academic judgments

Multiple sources and kinds of evidence

Rigorous deliberation when considering all evidence with implications re policy design

Documentation of decision-making

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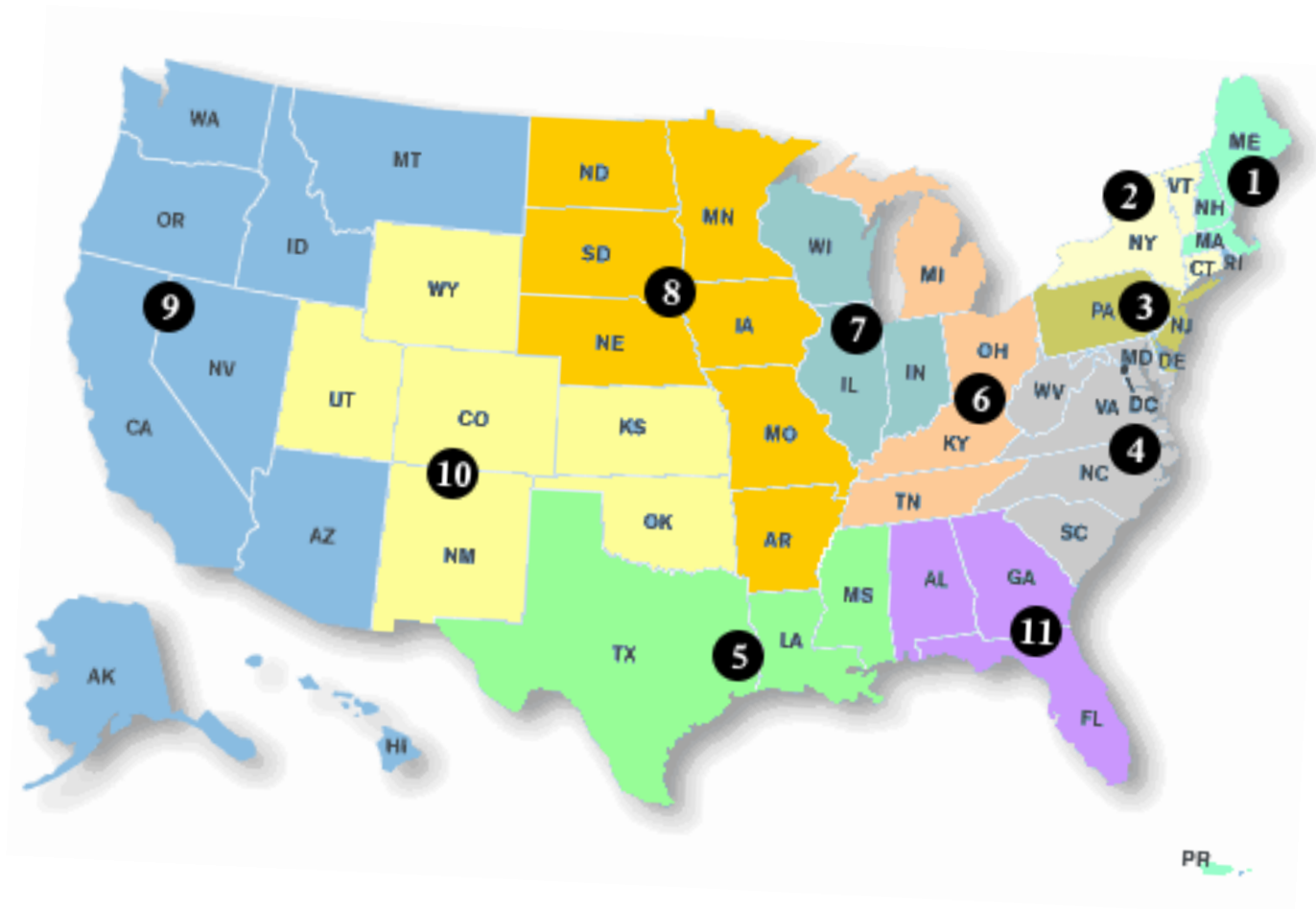
- Q/A

THE IMPLICATIONS

BEYOND THE LAW

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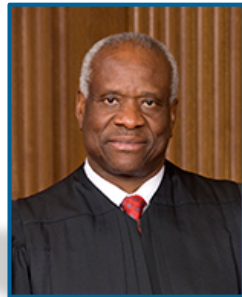
Federal Circuit Courts of Appeal



2021 Supreme Court



John Roberts
Chief Justice



Clarence Thomas



Stephen Breyer



Samuel Alito



Sonia Sotomayor



Elena Kagan



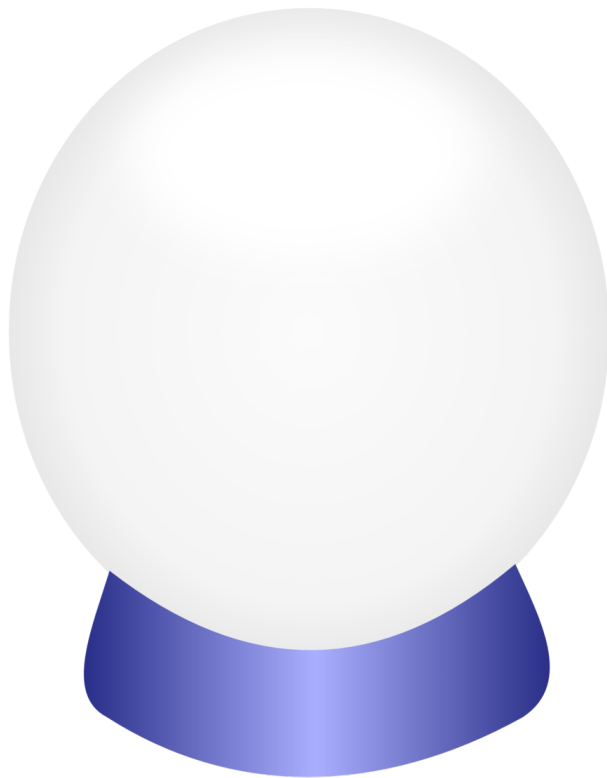
Neil Gorsuch



Brett Kavanaugh



Amy Coney Barrett



- Overrule 40 years of precedent?
 - Not a “conservative” position
 - Court factors counsel support of precedent: Longstanding, evidence of reliance in the field and success, change would be disruptive
- More likely focus on evidentiary hurdles—and narrowing of precedent?
- Harvard strengths
 - Complexity; heavily data-driven, evidence-based decision; well-reasoned
 - Bench trial, credibility of witnesses a factor
 - No named student plaintiff alleging specific harm

Q & A

Please submit your question in the Q & A section of the Zoom webinar.

OR

Add your questions on the *Uthova* platform on the right side of your screen.

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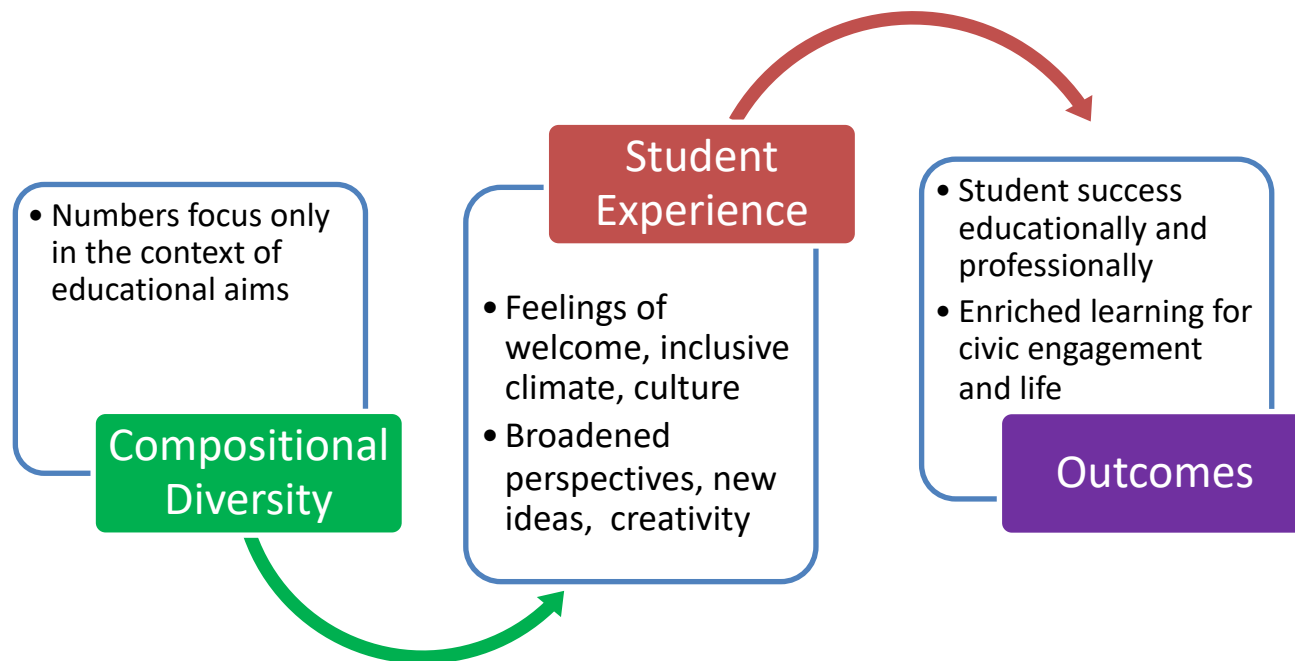
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THE IMPLICATIONS

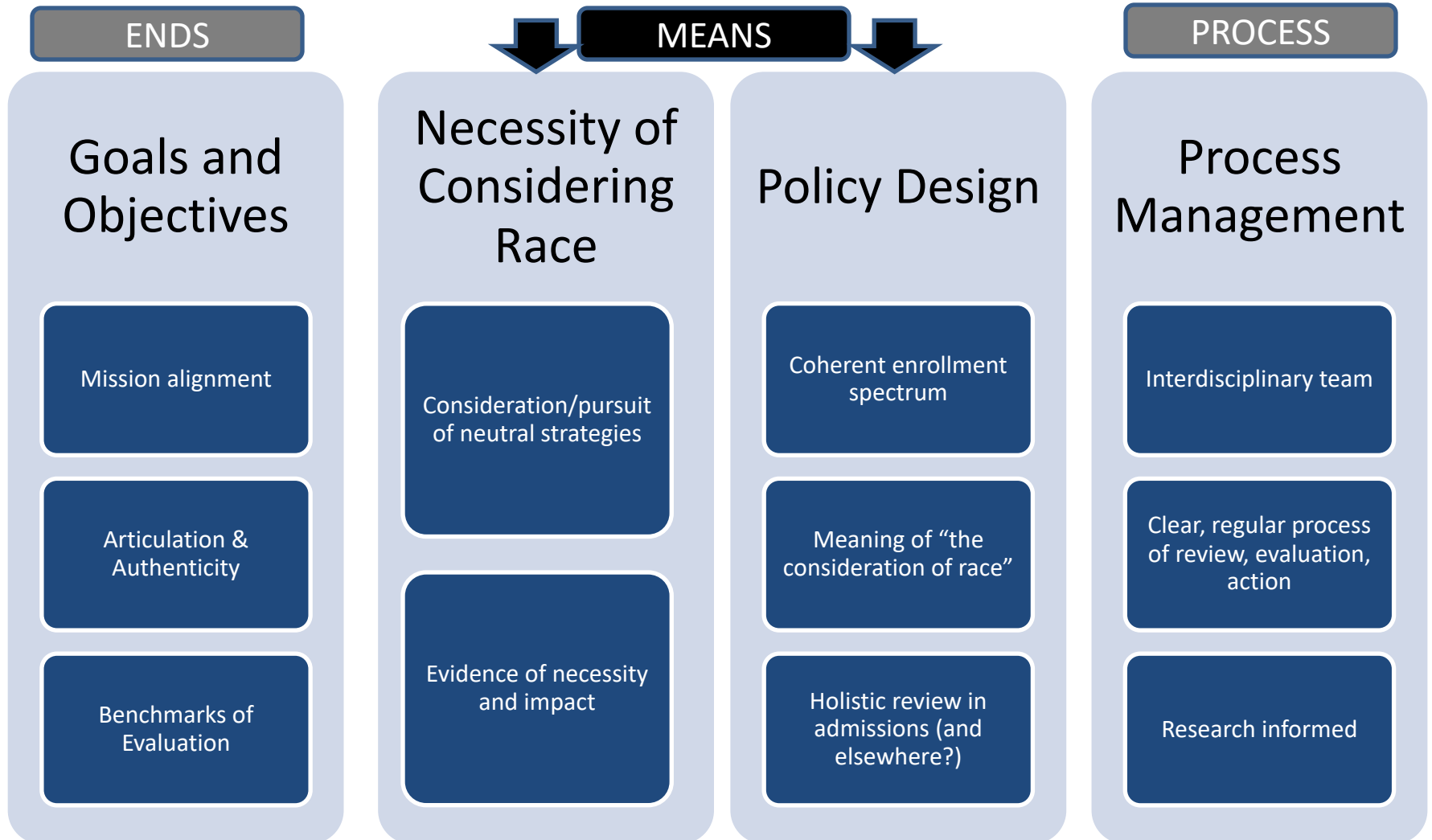
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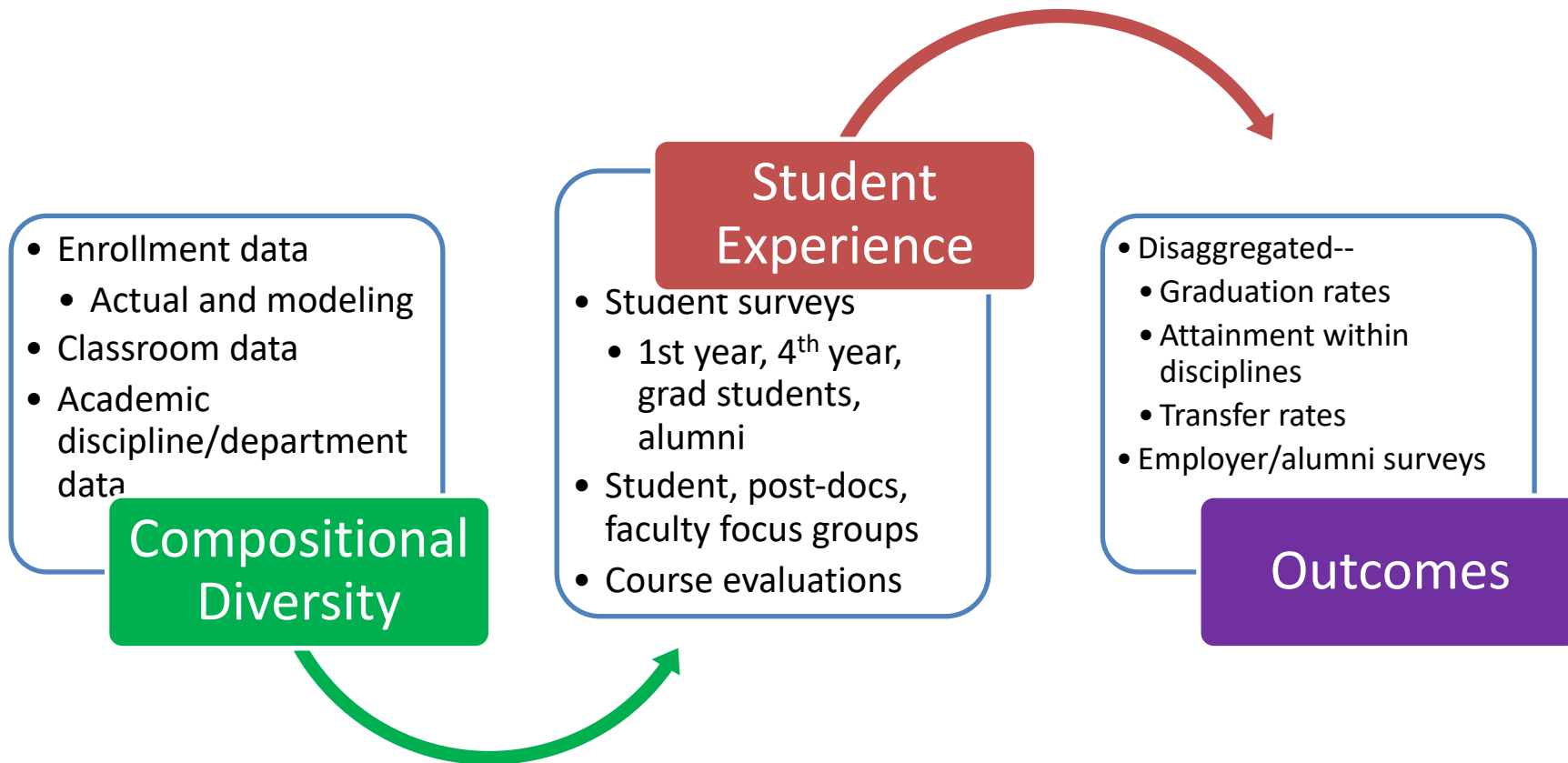
Defining Success



The Policy Action Blueprint



Communicating Success



The Communications Blueprint

Policy Clarity

Clear terminology and definitions

- **NOT** “affirmative action”
- The educational benefits of diversity
- Diversity
- Critical mass
- Race-aware, conscious, exclusive

Consistency

Alignment with goals

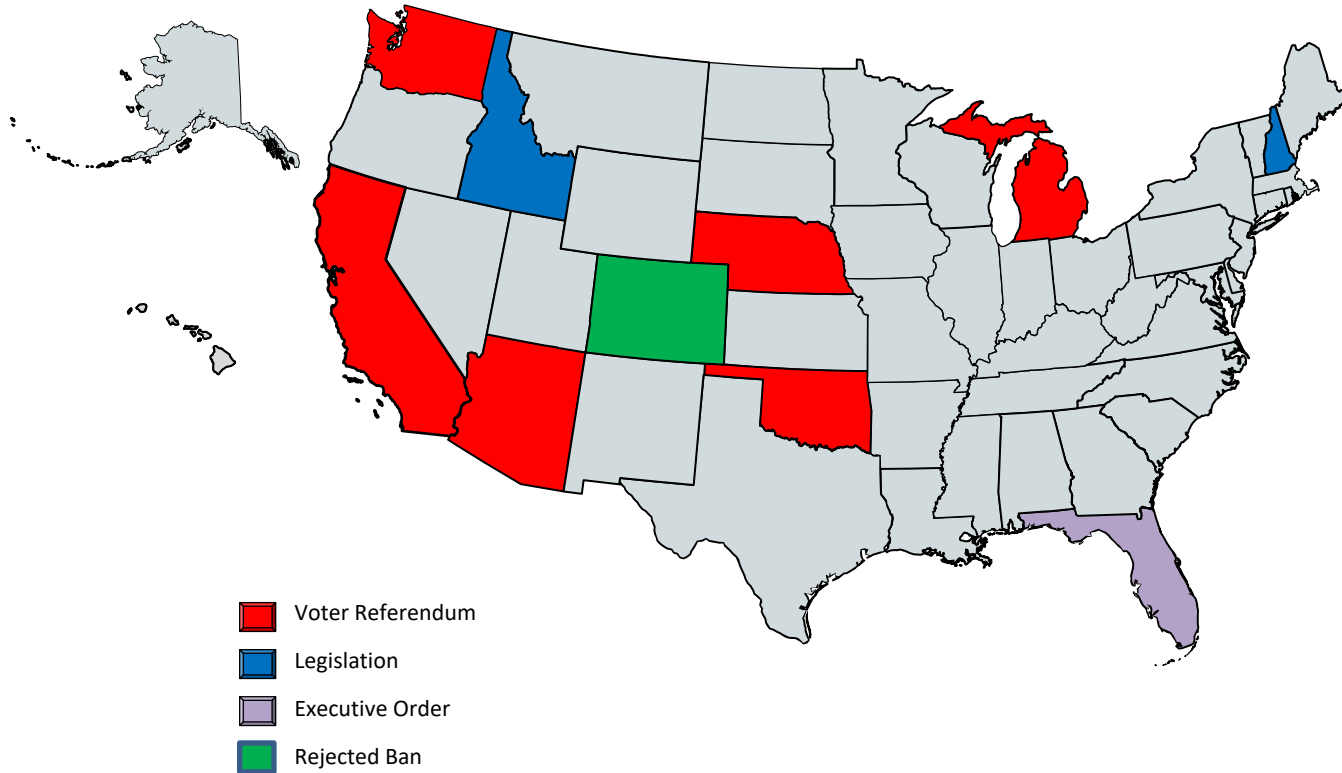
Use across EM spectrum
& in student/academic
affairs

Common terms, even if
adapted differently

Actionability

Ability to translate
concepts into action

State Bans on the Consideration of Race and Ethnicity in Public IHEs



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...and beyond



New
Paradigms?

The Broader
Equity Agenda

Legal Flexibility
Beyond
Enrollment

Q & A

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Thank you for an engaging Q&A session!

At this time, we will transition to
Group Discussions and Takeaways

Attendees, please return to the *Ukova* Agenda
And select the next session.

*(Note: Please wait in the Zoom waiting room
until the host starts the session at the scheduled time.)*