

Navigating & Innovating for Equitable & Diverse Pathways

Maximizing the Law of “Can Do”



Equitable Pathway
Partners Program (EPP)

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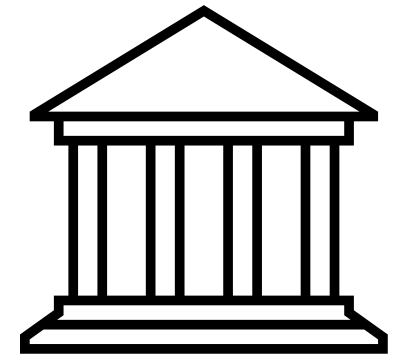
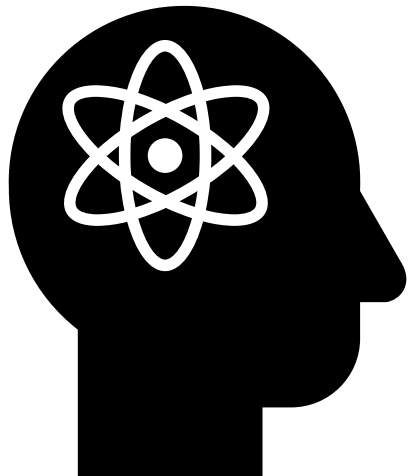
Convening, October 8, 2024

3 Topics Today

Mindset:
Legal Design
Parameters &
Risk-Reward

Court's Ruling:
Baselines

Maximizing
the Can Do's:
What Now?

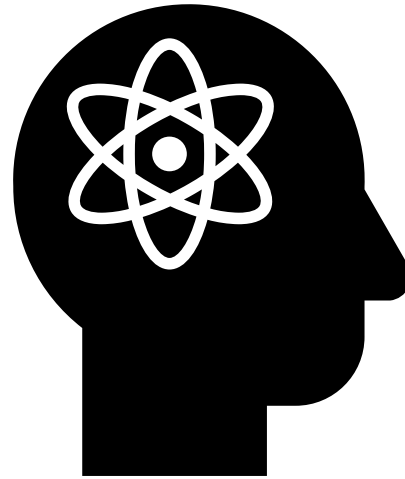


5 Key Points

1st: Assume a Science Innovator's Mindset

Law—
design parameter
for DEI innovation

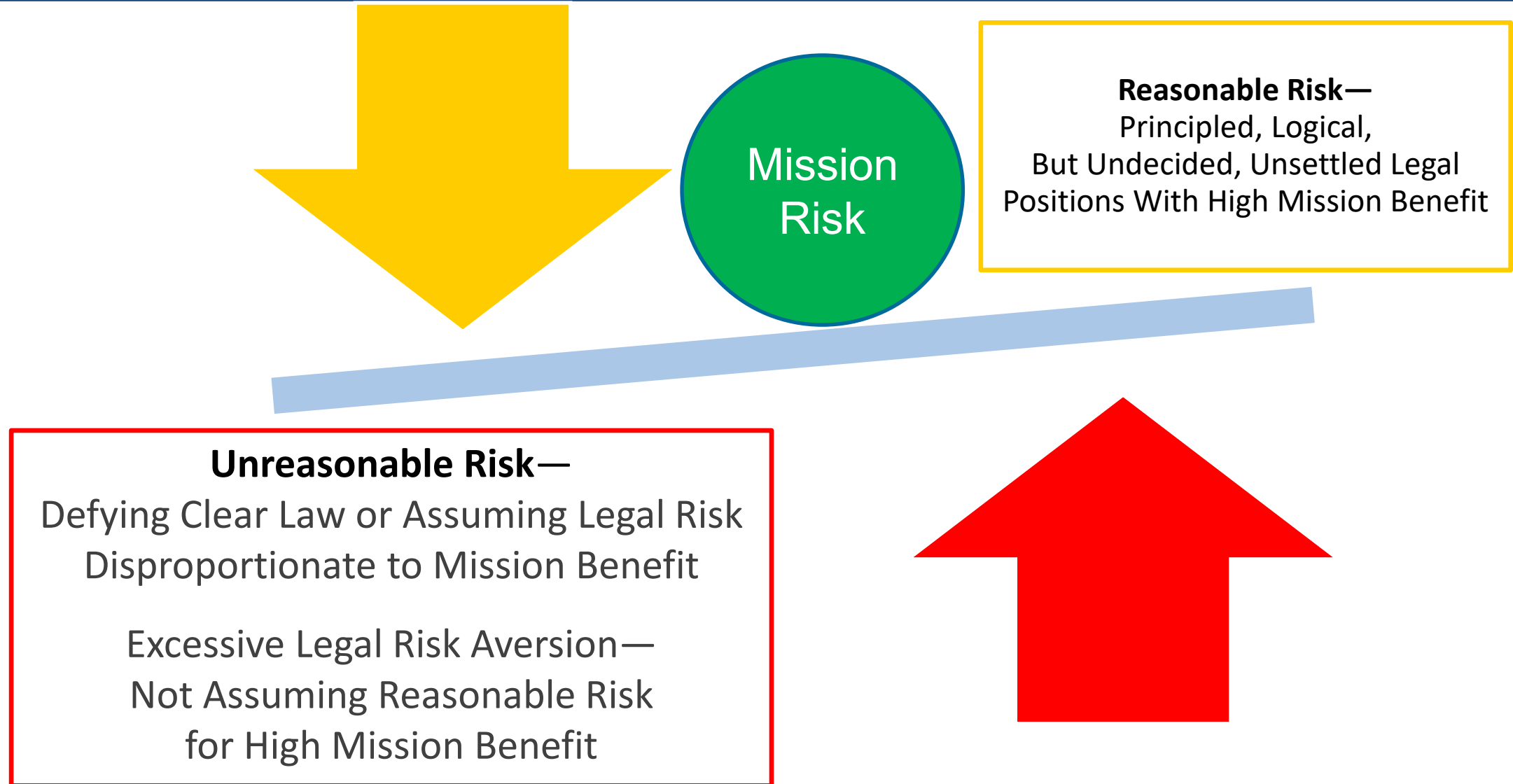
Academics—
navigate design
parameters



Risk Tolerance—
another design
parameter

Don't— be
intimidated by
law . . . innovate

View Legal Risk In Light of Mission: Risk-Reward Balance



2nd: Supreme Court Baselines



Students for Fair Admissions v. Harvard-UNC

June 2023

**Must Adhere—
Don't Over-read**

Federal Nondiscrimination Law

**Prohibits racial status-
based differential
conferral of benefits**

. . . *with exceptions*



Federal Nondiscrimination Law

Exceptions Require #1:

***a legally compelling,
measurable AIM***



Federal Nondiscrimination Law

Exceptions Require #2:

***Precision in race status-
based MEANS to AIM
..“narrow tailoring”***



Federal Nondiscrimination Law

*****Mission to Seek Diversity
Benefits & End Societal Inequity
Not Outlawed—but *NOT legally
compelling; DON'T justify race
status.***

*****Personal Gains from
Experience of Race Endorsed,
without needing a compelling aim.**



Federal Nondiscrimination Law

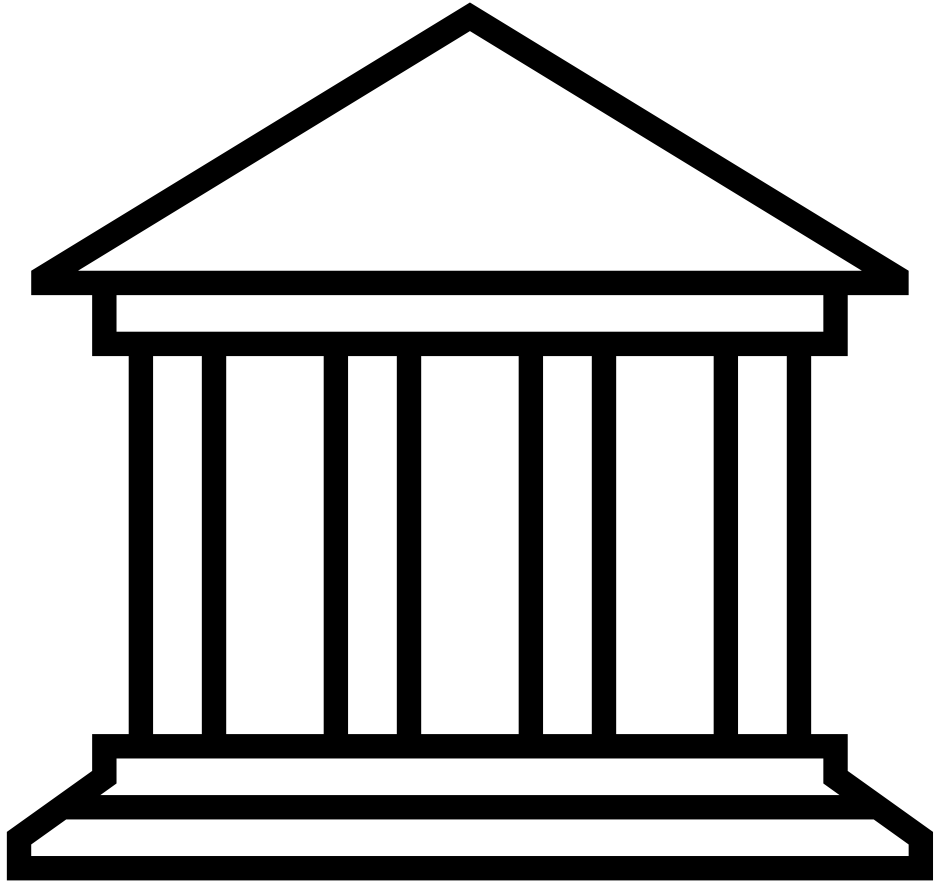
Different Employment Laws:

***Require a remedial justification comparing racial group % in employer's workforce vs. % in available qualified labor pool**

***Low % in pool results lack of justification in many STEMM fields**



3rd: Maximizing the Can Do's

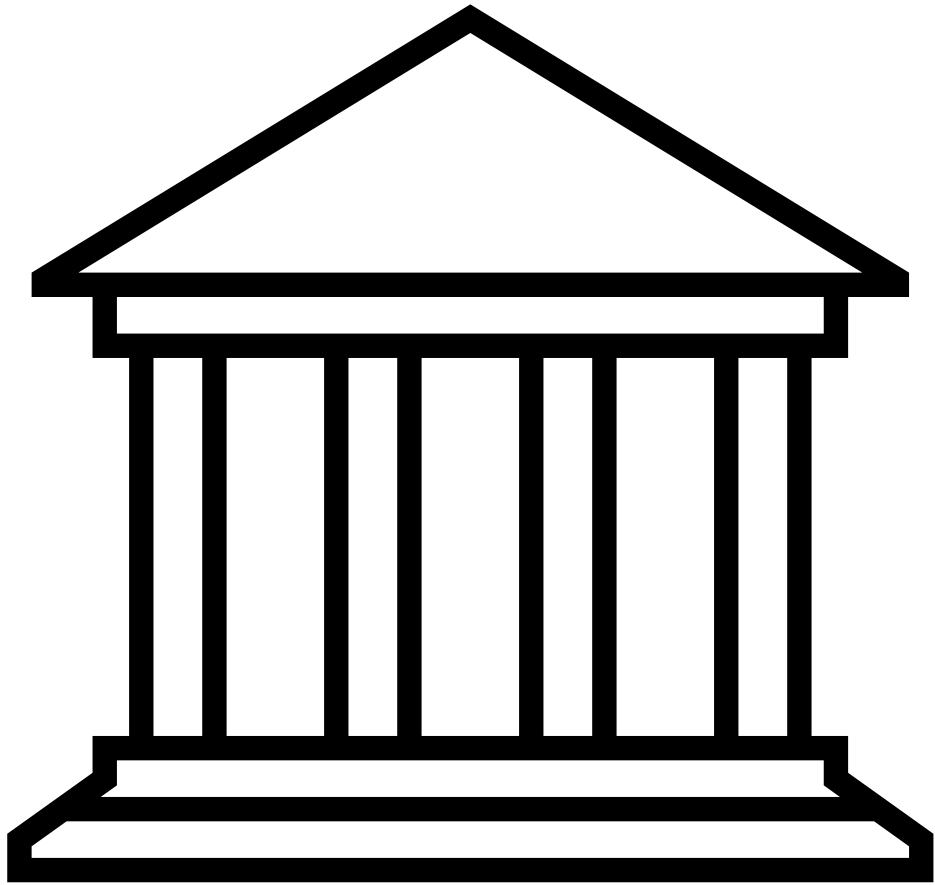


What Now?

**Reflections for an
Equitable Future**

5 Key Points

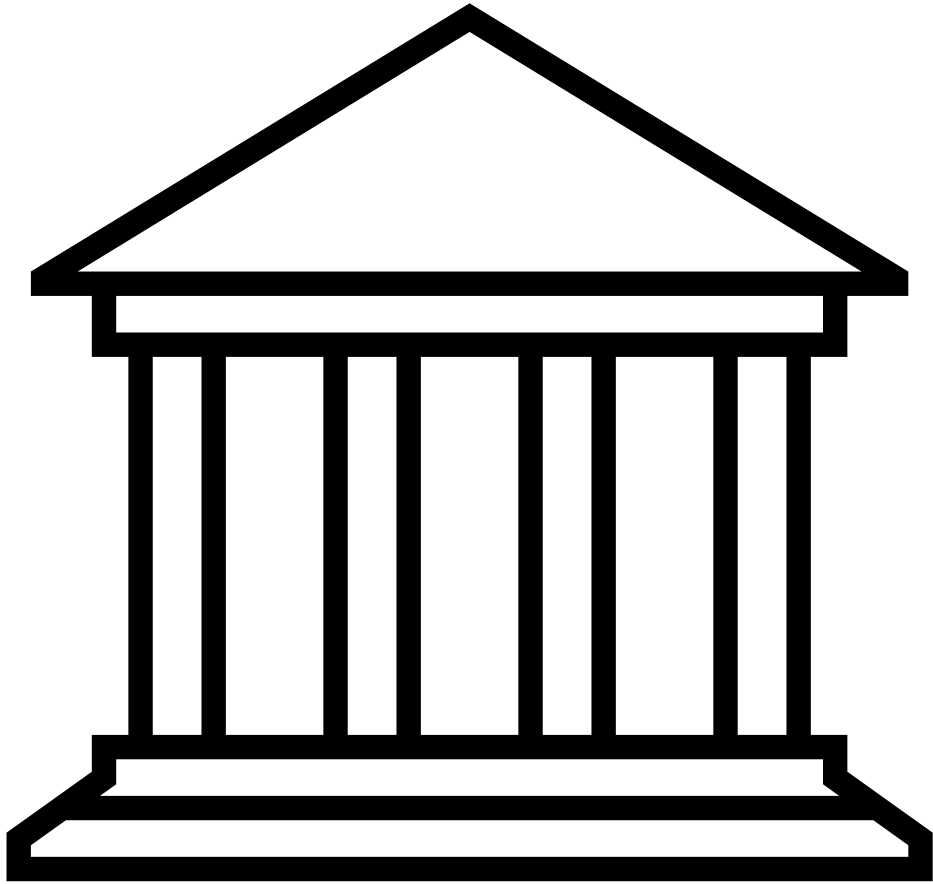
Maximizing the Can-Do's—Point #1



Adhere to the Ruling, But It Lacks Integrity . . . Don't Give It More Effect Than Required

**That Long-Defined Diversity Is Not Legally Compelling
Likely Has Effects Beyond Student Admissions
But Design Options Reduce Impacts on Other Programs**

Maximizing the Can-Do's—Point #2



**IHE Can Affirm DEI as
Core to Its Mission & Role**

**IHEs Can Define Their
Missions . . . & DEI is
“Commendable” & “Worthy”**

Can Welcome All Students

Maximizing the Can-Do's—Point #3



Legally Compelling Aim Not Needed, If Mission Related:

1. Aspiration, Inspiration, Knowledge, Skills, Character ✓

From a Person's Own Lived Experience of Race

2. Race Subject Matter Focus ✓

Of Person's Expertise, Studies,
Action-Based Commitment . . . or Of a Program

3. Race-Neutral & Inclusive ✓

Selection Criteria, Systems Change, & Barrier Removal

1. Person's "Check the Box" Racial Identity Status ✗

Criteria Considered . . . or Required

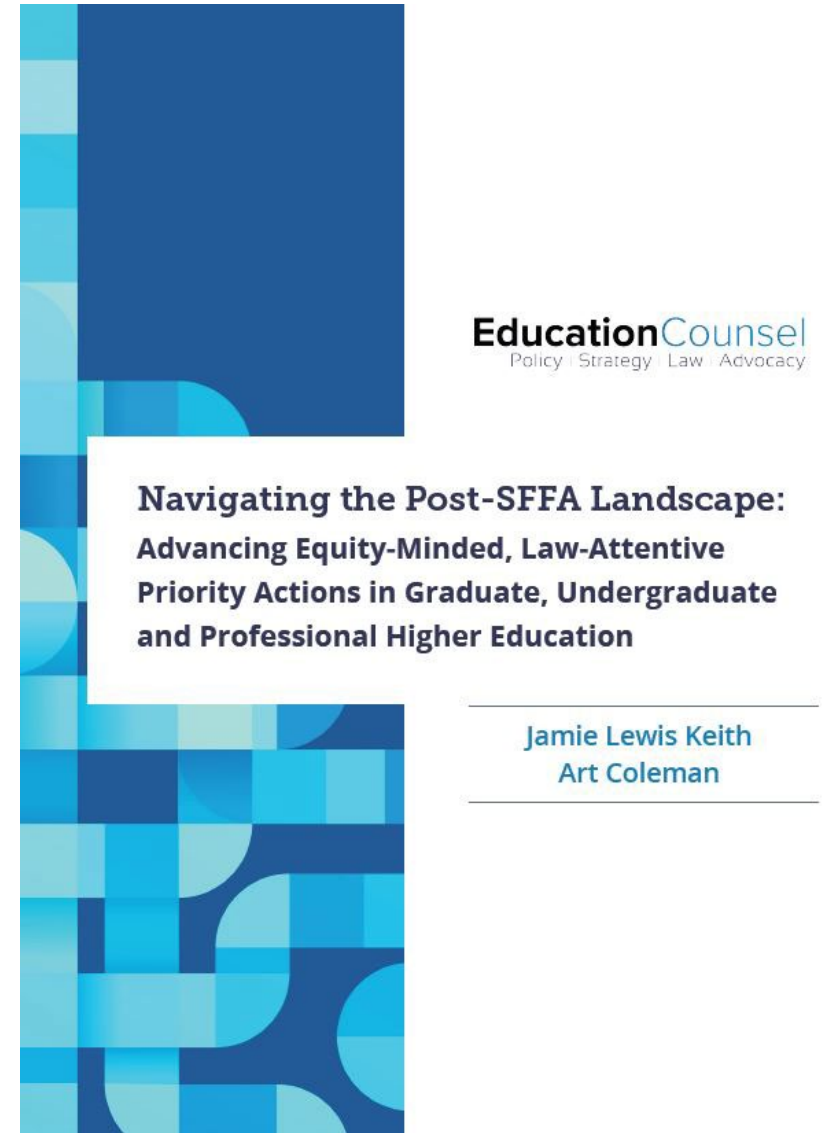
New Foundational Resource

✓ 26 “green light” & 9
“yellow light” actions

✓ within the 7 avenues

to advance DEI aims

<https://rb.gy/pwxs2z>



7 Avenues for Green and Yellow-To-Green Light Action

Inclusive, Systemic Barrier
Removal

Partnering for HBCU Expertise

Race as Subject Matter of
Programming or
Person's Expertise Criteria

Race-Themed Student Groups/ Housing/
Spaces/ Programs—Without Race-Based
Qualifications for Access;
Person's Experience- or Action- Based
Expertise re: Race

DEI-
Dependent
Mission

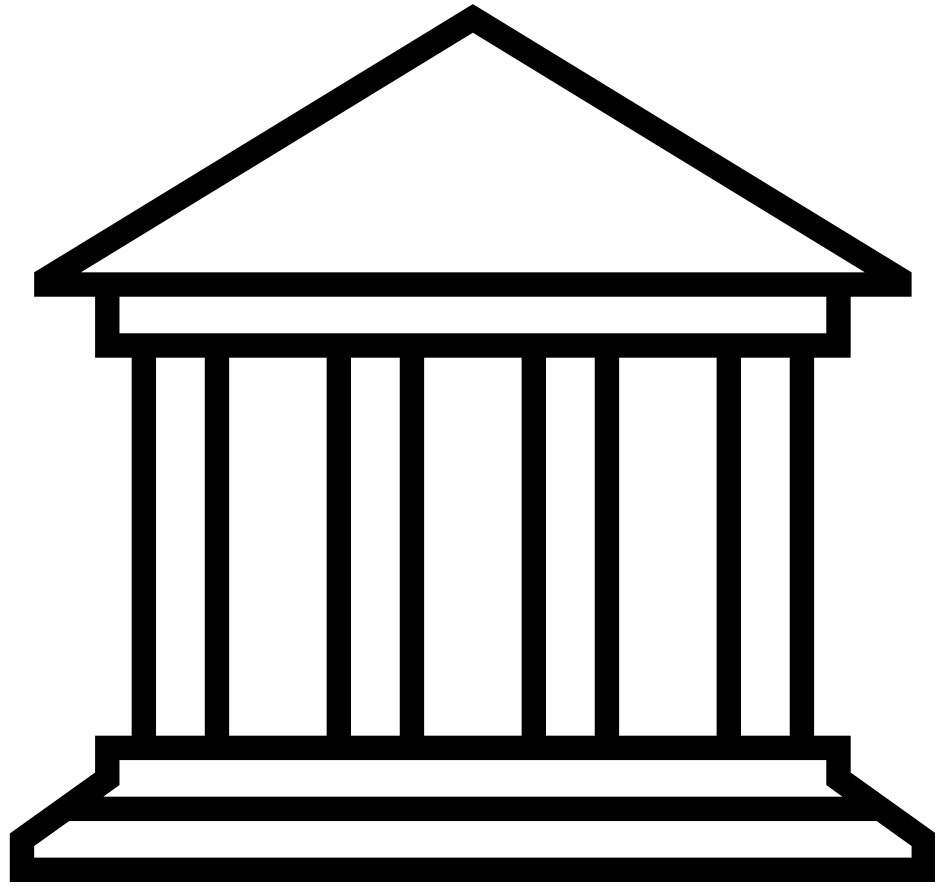
Inclusive Outreach and
Recruitment

Neutral Selection Criteria
Including Person's Gains from
Experience of Race

Inclusive Program Design
Structures

Demographic Data
to Reach & Serve All Students Well

Maximizing the Can-Do's—Point #4



**Diversity & Inclusion are—>
Symptoms of Equity**

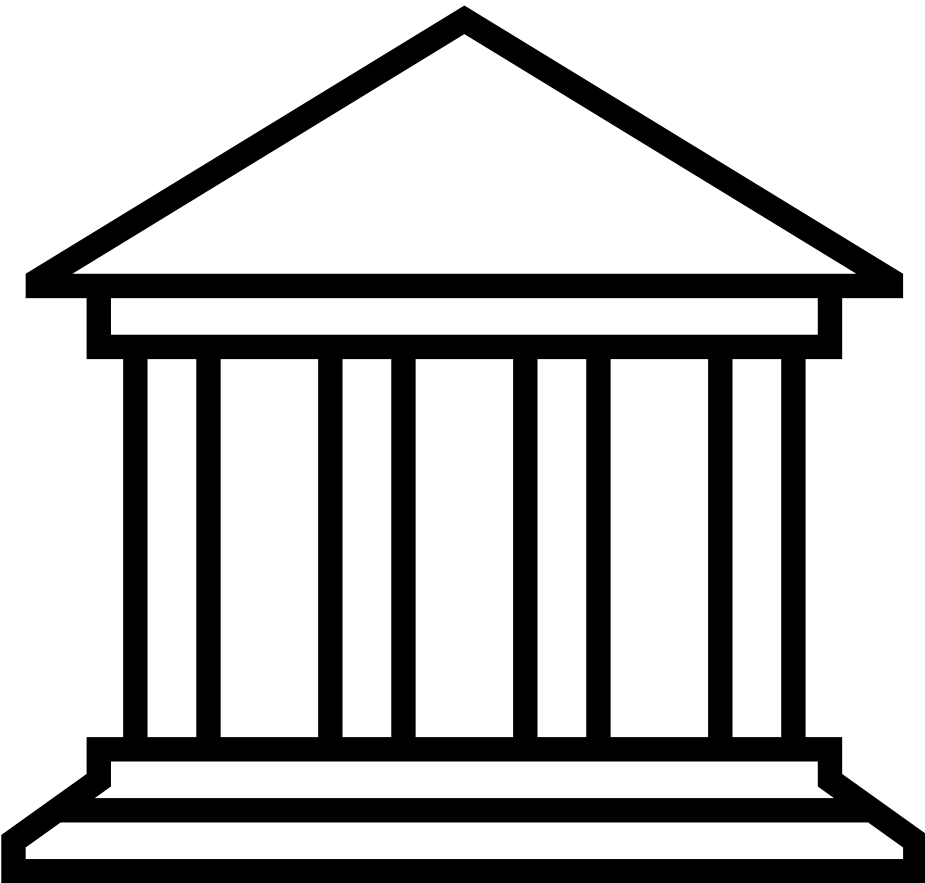
Equity is—>Root of Mission

Court Challenge is Lever for—>

***Pro-DEI *Long-term* Strategic Plan**

***Barrier Removal, Systemic Change,
Centering Minoritized Groups &
Serving *All* Students *Now***

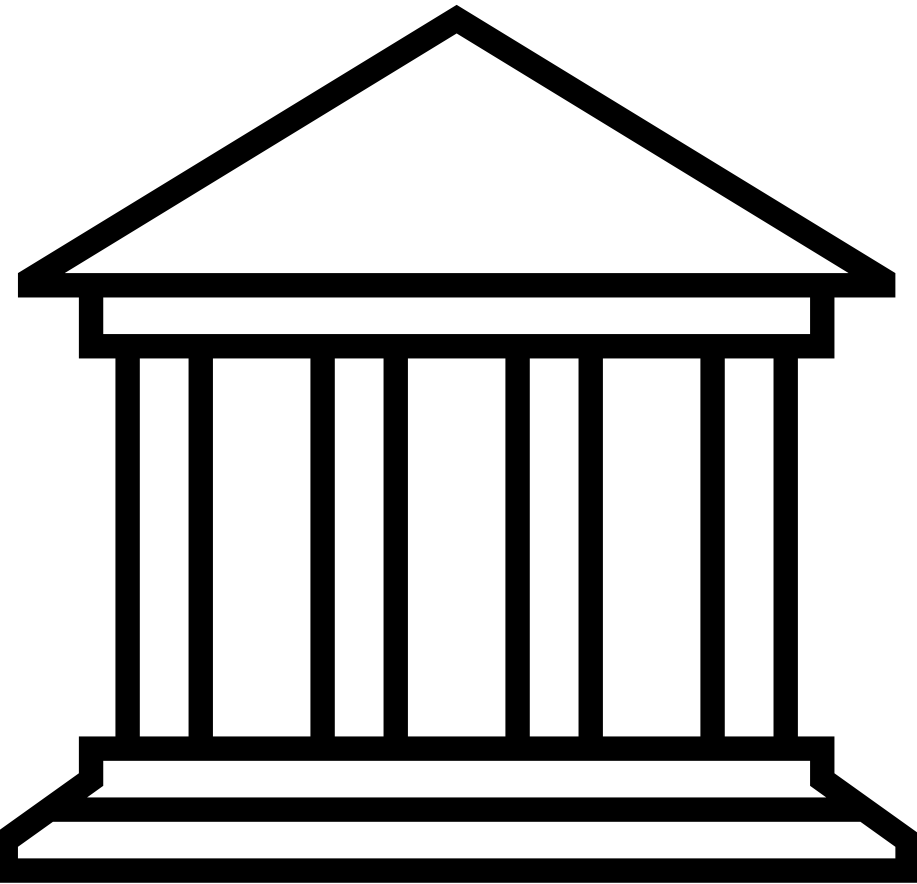
Maximizing the Can-Do's—Point #5



Opportunity/Questions in Developing Law & Suits:

1. **Possible New Legally Compelling Interests**
(Testing Military Academies-National Security)
2. **First Amendment Likely Protects DEI Content of Programs & People's Expertise & Conduct**
(Anti-Woke Prohibitions Temporarily Enjoined)
3. **What's Neutral & What Racial Disparities Can Be Remedied vs. Illegal Racial Balancing**
(Public K-12 Exam School Access Upheld)
4. **Expanding *SFFA* Ruling's Scope**
(To Minority Owned Business Benefits & Other Contracts under Section 1981 & Employment)

Closing Reflections & Actions for Leaders



1. **Stay Committed—Use Many Available DEI Tools!**
2. **Work with Your Lawyers to Understand Legal Design Parameters for DEI Innovation**
3. **Embrace Green & Yellow Legal Risk, with High DEI Mission Reward**
4. **Resist Being Intimidated By Weak Legal Positions in Suits—But Track Developments**
5. **Prioritize Systems Change Toward Equitable Learning & Research for All—Law Is Less Impactful & Benefits Are Most Impactful**
6. **Focus on Mid- & Long- Term Pro-DEI Plan**

Resources

- **American Association for the Advancement of Science Diversity and the Law Webpage** [Diversity and the Law 2024](#)
- **EducationCounsel Green-Yellow Legal Risk Guidance (“can do” examples)**
[Navigating the Post-SFFA Landscape: Advancing Equity-Minded, Law Attentive Priority Actions](#)
- **EducationCounsel’s Preliminary SFFA v. Harvard/UNC Guidance**
<https://highered.collegeboard.org/media/pdf/sffa-case-preliminary-summary-analysis.pdf>
- ***Chronicle of Higher Education*** [DEI Legislation tracker](#) and [PEN America](#)

THANK YOU . . . QUESTIONS ???

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This deck offers general directional guidance, not legal advice

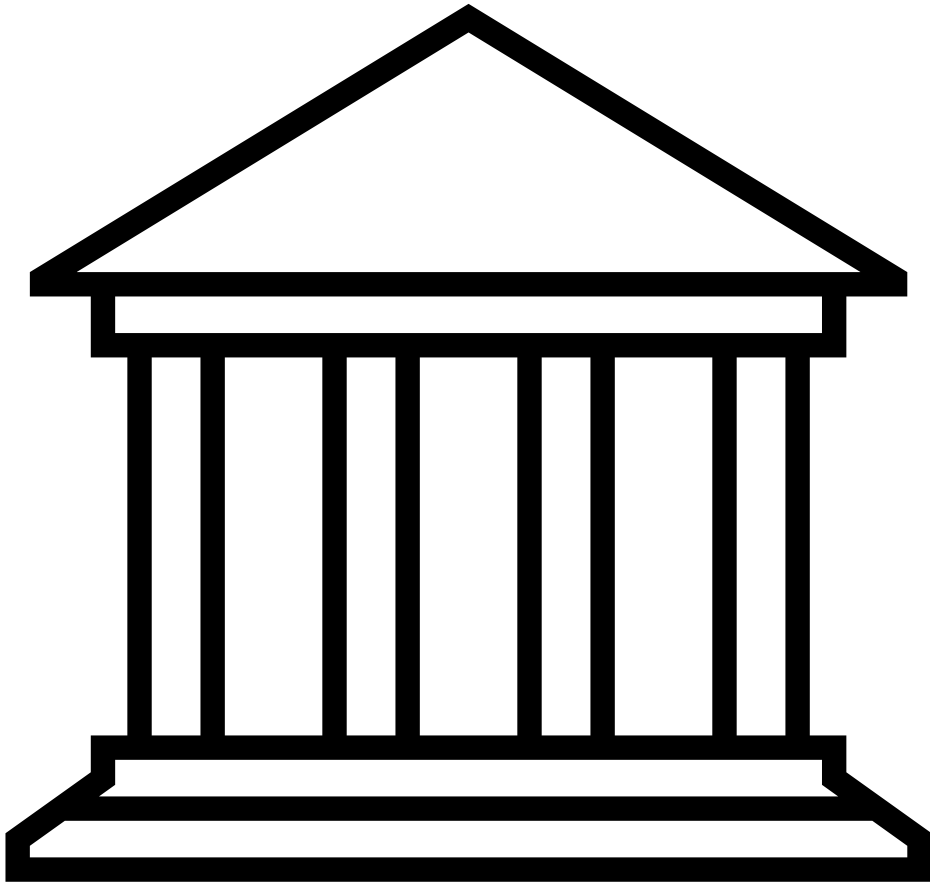
APPENDIX— More on Point #5

Opportunities & Awareness Re: Developing Law & Litigation

Examples of Areas of Focus for Anti-DEI Litigation

State Anti-DEI Action

More on Point #5—Opportunities & Awareness Re: Developing Law, Litigation



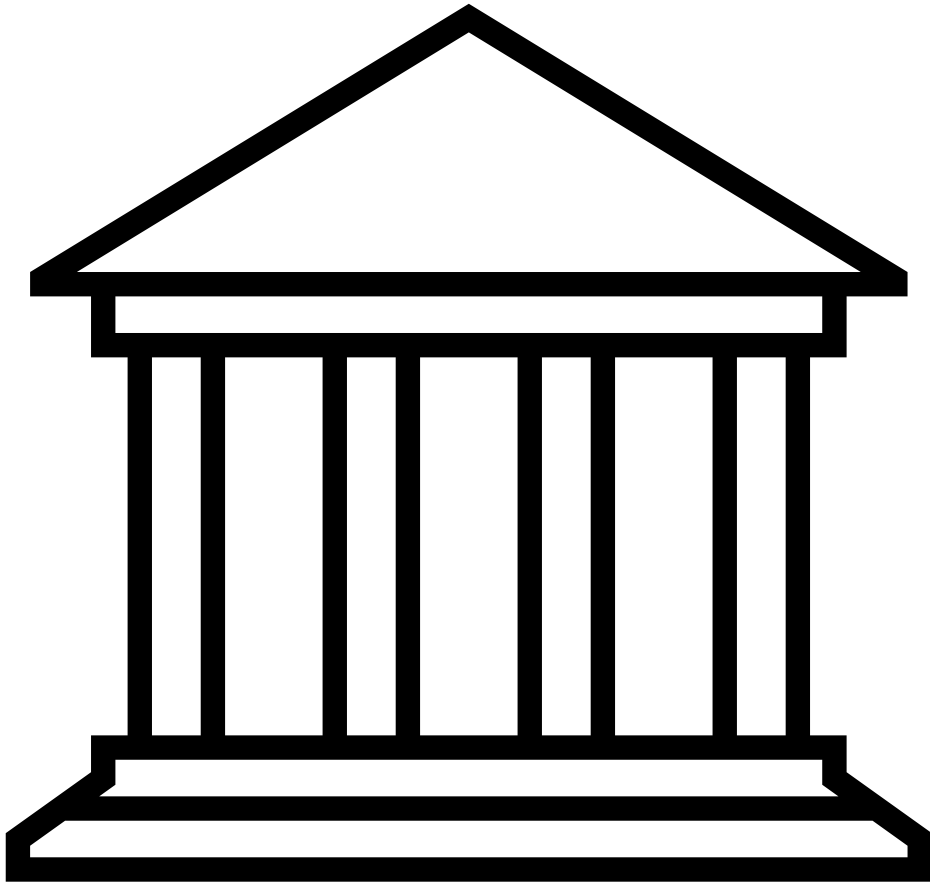
1. New Legally Compelling Interests to Justify Racial Status Consideration

SFFA v. West Point (U.S. Dist. Court, SDNY)

SFFA v. Naval Academy (U.S. Dist. Court,
District of MD)

*(Test national security interest in race in
military academy admissions—TBD but
Supreme Court indicated openness)*

More on Point #5—Opportunities & Awareness Re: Developing Law, Litigation



2. 1st Amendment & Academic Freedom Likely Protect DEI as the Subject of: Mission & Role-Related Program Content, Expertise, Conduct (*not identity status or beliefs*)

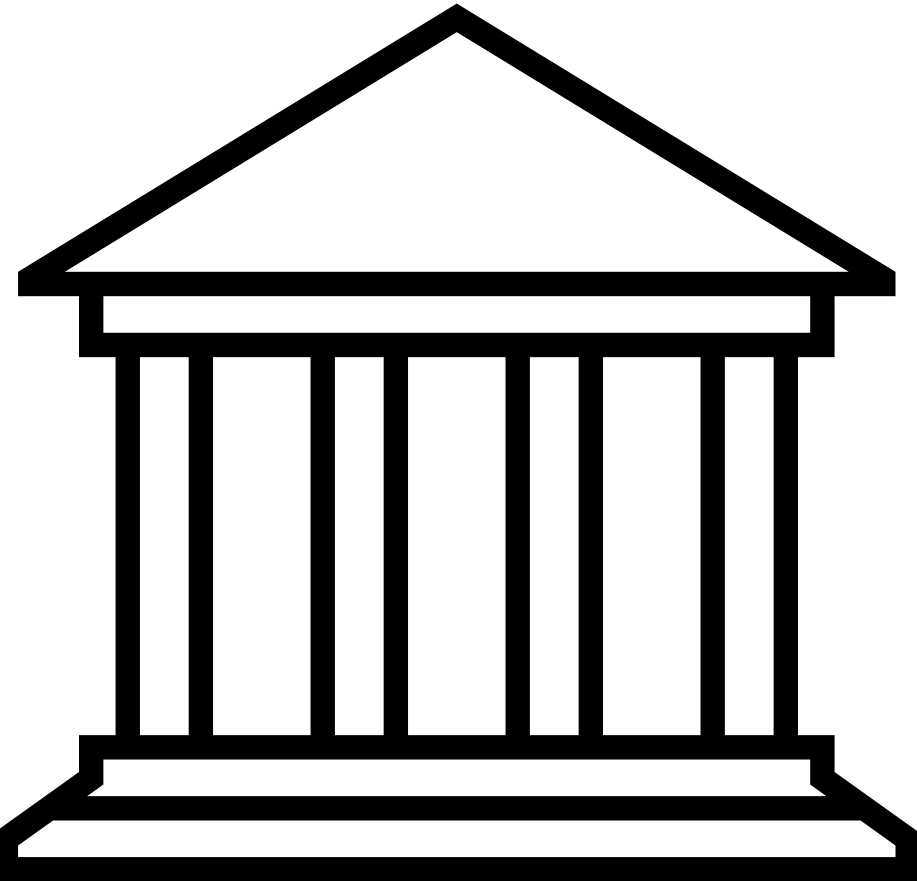
Pernell v. Lamb; HONEYFUND.Com v. DeSantis, U.S. Court of Appeals (11th Cir.) (Injunction *against* FL anti-woke law in education and employment; final ruling TBD)

More on Point #5—Opportunities & Awareness Re: Developing Law, Litigation

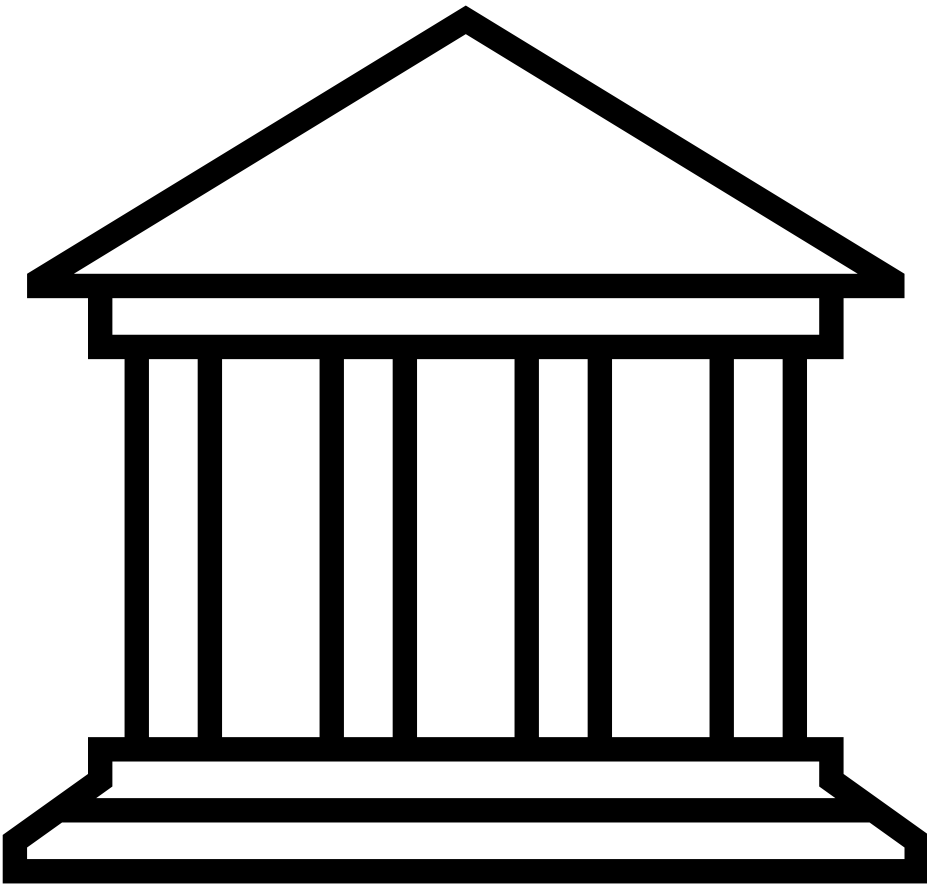
3. K-12 Admissions: What's Neutral ... What Racial Gaps Can Be Remedied vs. Illegal Racial Balancing?

Boston Parent Coalition for Academic Excellence
(U.S. Court of Appeals, 1st Cir. ruled for public exam
schools; TBD whether U.S. Supreme will review)

*Coalition for TJ (Thomas Jefferson High School for
Science)* (U.S. Court of Appeals, 4th Cir. ruled for
school; Supreme Court denied review)



More on Point #5—Opportunities & Awareness Re: Developing Law, Litigation



4. Claims to Expand UNC/ *Harvard* Ruling Against Use of Racial Status to Contracts (Fellowships, Philanthropy, etc.) & Employment

E.g.: *Nuziard v. Minority Business Development Agency* (US Dist. Court, NDTX) (minority business contracting challenged, enjoined—not appealed);

E.g.: *Other cases opposing corp. fellowships* *Section 1981* (prohibits race discrimination in contracting)—*American Alliance for Equal Rights v. Fearless Fund* (U.S. Court of Appeals, 11th Cir. enjoins venture fund for Black women entrepreneurs—settled with program ended)

Anti-DEI Laws or Policies Apply to Institutions in 23 States

