

REVERSING DEI: THE CONSEQUENCE – “IED” INDOCTRINATION AND ELIMINATION OF DIVERSITY

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INTRODUCTION

Attacks on Diversity, Equity, and Inclusion (“DEI”) efforts, from right-wing conservatives, are an attack on marginalized communities, specifically black and brown people and members of the LGBTQ+ community. Over the past five years, the world around us has changed. DEI initiatives that once offered a glimmer of hope for members of marginalized communities to finally access the American Dream, have been eviscerated with Anti-Woke, Anti-Critical Race Theory rhetoric, and more recently, the Supreme Court’s decisions in *Students for Fair Admissions v. Harvard*¹ and *Students for Fair Admissions v. UNC*.² These attacks originate from a false narrative that empowering marginalized groups results in the destruction of American values. They are also informed by a desire to maintain a status quo in America where the “haves” continue to have, and the “have nots” continue to reside at the bottom of America’s socio-economic hierarchy.

Part I of this Article will provide a historical background for the circumstances that led to the creation of DEI programs and their proliferation. Part II will discuss the critical role that DEI initiatives have played in helping to level the playing field in a way that anti-discrimination laws have failed to do so and are incapable of accomplishing. Part III will discuss the retrenchment of DEI initiatives. Finally, Part IV will discuss the future of DEI as well as provide practical solutions to leaders who value and understand the importance of DEI, to lawfully continue the fight to improve access to marginalized communities.

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1. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023).

2. *Id.*

I. FAILURE OF ANTI-DISCRIMINATION LAWS

On July 2, 1964, President Lyndon B. Johnson signed into law the Civil Rights Act of 1964 (“Civil Rights Act”) “which ended segregation in public places and banned employment discrimination on the basis of race, color, religion, sex or national origin.”³ Upon signing the bill, President Johnson remarked that,

We must not approach the observance and enforcement of this law in a vengeful spirit. Its purpose is not to punish. Its purpose is not to divide, but to end divisions—divisions which have all lasted too long. Its purpose is national, not regional. Its purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity. We will achieve these goals because most Americans are law-abiding citizens who want to do what is right. This is why the Civil Rights Act relies first on voluntary compliance, then on the efforts of local communities and States to secure the rights of citizens. It provides for the national authority to step in only when others cannot or will not do the job. This Civil Rights Act is a challenge to all of us to go to work in our communities and our States, in our homes and in our hearts, to eliminate the last vestiges of injustice in our beloved country.⁴

President Johnson’s remarks offered a hope that the Civil Rights Act would serve to eliminate discrimination and offer all Americans, regardless of their status, an opportunity to achieve human dignity.⁵ Approximately sixty years later, the Civil Rights Act has yet to fulfill its purpose.⁶ In light of its efforts, racial disparities continue to exist.⁷ Every opportunity, and dollar lost, as a result of continued discrimination, further widens the gap between America’s most vulnerable populations and those who continue to enjoy the privilege of being white and male.⁸

3. *Civil Rights Act of 1964 - Definition, Summary & Significance*, HIST. (Jan. 10, 2023), <https://www.history.com/topics/black-history/civil-rights-act>.

4. *Radio and Television Remarks Upon Signing the Civil Rights Bill*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/radio-and-television-remarks-upon-signing-the-civil-rights-bill> (last visited Dec. 27, 2023).

5. *See Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm> (last visited Dec. 27, 2023).

6. Ibram X. Kendi, *The Civil Rights Act was a Victory Against Racism. But Racists Also Won.*, WASH. POST (July 2, 2017, 3:18 PM), <https://www.washingtonpost.com/news/made-by-history/wp/2017/07/02/the-civil-rights-act-was-a-victory-against-racism-but-racists-also-won/> (“The legacy of the Civil Rights Act’s failures abound: America is still hemorrhaging from the racism of police bullets, health disparities and environmental catastrophes. The black unemployment rate has been twice the white unemployment rate for 60 years, segregation is on the rise in public schools across America, and an unprecedented number of black and brown bodies have been mass incarcerated as a result of the war on drugs.”).

7. *Id.*

8. Peggy McIntosh, “*White Privilege: Unpacking the Invisible Knapsack*” and “*Some Notes for Facilitators*”, NAT’L SEED PROJECT (1989), <https://nationalseedproject.org/key-seed-texts/white-privilege-unpacking-the-invisible-knapsack> (“White privilege [is] an invisible package of unearned assets that I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious.

The Civil Rights Act has yet to realize its promise and we do not live in a Post-Racial America.⁹ As evidence of this reality, consider the following:

- Minority applicants who “whiten” their resumes in the interviewing process are twice as likely to receive a call back interview in comparison to minority candidates that provide racially identifiable information in their resumes.¹⁰ Even more troubling is that this disparity was also true for companies that claimed to value diversity.¹¹
- According to the Center for American Progress (“CAP”), approximately 15 to 43% of gay people report experiencing some form of workplace discrimination.¹² For transgender workers, the statistics are more troubling.¹³ In fact, 90% of transgender workers report experiencing some form of workplace discrimination.¹⁴
- In a report from Glassdoor, 61% of U.S. employees have experienced or witnessed discrimination based on age, race, gender, or sexual orientation.¹⁵
- Based on a Gallup poll report from 2020, approximately 24% of Black and Hispanic employees in the U.S. reported experiencing discrimination in the workplace that year.¹⁶
- Finally, survey results from a joint research project between Harvard’s T.H. Chan School of Public Health, National Public Radio, and the Robert Wood Johnson Foundation found that “57% of black Americans reported discrimination in pay and consideration for promotions,” “51% of black Americans say they have personally experienced people using racial slurs against them,” “60% of women ages 18 to 29 report that they or a female family member have been sexually harassed,” and that “35% of Asian Americans report personally experiencing people making

White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks.”).

9. After Barack Obama was elected president, the term “post-racial” was coined. It signified a new era brought about by the election of the first African-American President of the United States where some believed that racial discrimination, preference, and oppression had come to an end. Rebecca Roberts, *The “Post-Racial” Conversation, One Year In*, NPR (Jan. 8, 2010, 1:00 PM), <http://www.npr.org/templates/story/story.php?storyId=122701272>. See also MICHAEL TESLER, POST-RACIAL OR MOST-RACIAL?: RACE AND POLITICS IN THE OBAMA ERA 4 (2016).

10. Dina Gerdeman, *Minorities Who “Whiten” Job Resumes Ret More Interviews*, HARV. BUS. SCH. (May 17, 2017), <https://hbswk.hbs.edu/item/minorities-who-whiten-job-resumes-get-more-interviews>.

11. *Id.*

12. Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (May 2011), <https://www.americanprogress.org/article/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>.

13. *Id.*

14. *Id.*

15. Amy Elisa Jackson, *New Study: 3 in 5 U.S. Employees Have Witnessed or Experienced Discrimination*, GLASSDOOR (July 22, 2020), <https://www.glassdoor.com/blog/new-study-discrimination/>.

16. Camille Lloyd, *One in Four Black Workers Report Discrimination at Work*, GALLUP (Jan. 12, 2021), <https://news.gallup.com/poll/328394/one-four-black-workers-report-discrimination-work.aspx>.

insensitive or offensive comments or negative assumptions about their race or ethnicity.”¹⁷

These statistics clearly reflect that the Civil Rights Act, as well as other laws prohibiting discrimination, have failed. That failure is attributable to several reasons.

First, while the Civil Rights Act was an important piece of legislation to end the evils of Jim Crow,¹⁸ from its inception, it was riddled with a history designed to undercut its power.¹⁹ Specifically, the 1964 Act did not allow for jury trials or for punitive damages.²⁰ Employees asserting violations under Title VII were limited to equitable damages, front pay, back pay, and injunctive relief.²¹ Employees were not entitled to receive compensatory damages which include damages for mental distress, loss of consortium, inconvenience, and emotional distress.²² In addition, employees had no right to seek a jury trial.²³ Without the legitimate fear of a true financial “stick,” Title VII was rendered a “paper tiger.”²⁴ It was not until the 1991 Amendments to the Civil Rights Act that these issues were remedied.²⁵

Second, the Civil Rights Act failed to specifically address the concept of intersectionality.²⁶ Thus, employers were free to discriminate against employees who represented multiple categories. For example, assume that an employer intentionally decided not to promote black women; however, the employer promoted black men and white women. A court’s failure to recognize that a person could be discriminated against because of multiple statuses would render the black woman’s claim void. She could not prove discrimination based on race because black men were promoted. Moreover, she could not establish a claim of discrimination based on her status as a woman because white women were promoted. In 1976, Judge Harris Wangelin reaffirmed the early interpretation that

17. Amy Roeder, *Discrimination in America*, HARV. PUB. HEALTH MAG. (2018), https://www.hsph.harvard.edu/magazine/magazine_article/discrimination-in-america/.

18. Jeff Wallenfeldt, *What is The Origin of the Term “Jim Crow”?*, ENCYCLOPEDIA BRITANNICA (Sept. 13, 2018), <https://www.britannica.com/story/what-is-the-origin-of-the-term-jim-crow>.

19. Means v. Shyam Corp., 44 F. Supp. 2d 129, 133 (D.N.H. 1999) (explaining that Congress’s “recognition that augmenting the amount of available damages would increase the volume of litigation affecting... employers.”).

20. *Violanti v. Emery Worldwide A-CF Co.*, 847 F. Supp. 1251, 1256-57 (M.D. Pa. 1994) (“Prior to the 1991 amendments to the Civil Rights Act of 1964, neither compensatory nor punitive damages were recoverable under Title VII. The relief available was in the nature of equitable relief only in the form of back pay, front pay or reinstatement, and attorneys’ fees.”).

21. *Id.*

22. *Id.*

23. See Michael A. Labriola et al., *Title VII and the “Right” of Trial by Jury*, 30 DUQ. L. REV. 961, 961 (1992).

24. “Paper Tiger” is a calque of the Chinese phrase *zhilǎohǔ*. The term refers to something or someone that claims or appears to be powerful but is actually ineffectual and unable to withstand challenge. Ben Zimmer, *The Chinese Origins of “Paper Tiger”*, WALL ST. J. (Feb. 23, 2017, 1:04 PM), <https://www.wsj.com/articles/the-chinese-origins-of-paper-tiger-1487873046>.

25. *Civil Rights Act of 1991 (Original Text)*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/civil-rights-act-1991-original-text> (last visited Dec. 28, 2023).

26. *Degraffenreid v. GM Assembly Div.*, 413 F. Supp. 142, 145 (E.D. Mo. 1976).

Title VII was not intended to address intersectionality claims out of a fear of “opening... Pandora’s box.”²⁷ According to Judge Harris

The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of “black women” who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora’s box.²⁸

Kimberle Crenshaw, the architect of the intersectionality theory describes it best. Intersectionality is not,

[I]dentity politics on steroids. It is not a mechanism to turn white men into the new pariahs. It’s basically a lens, a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other. We tend to talk about race inequality as separate from inequality based on gender, class, sexuality or immigrant status. What’s often missing is how some people are subject to all of these, and the experience is not just the sum of its parts.²⁹

While modern courts are more likely to consider intersectionality claims, these claims rarely prevail.³⁰ This failure results in a discrimination blind spot that prevents Title VII from truly accomplishing its intended purpose.

Third, anti-discrimination laws that were designed to remedy discrimination were left to be interpreted by a federal judiciary that lacked meaningful diversity and continues to lag.³¹ According to a report from the American Bar Association (“ABA”) in 2022, in 1980, approximately fourteen years after the Civil Rights Act was enacted, 91% of all federal judges were white compared to 78.1% in 2022.³² During the same comparison period, gender diversity was also abysmal considering that only 5% of all federal judges in 1980 were women compared to 29.5% in 2022.³³ Moreover, while 7.1% of the U.S. population identifies as

27. *Id.*

28. *Id.*

29. Katy Steinmetz, *She Coined the Term “Intersectionality” Over 30 Years Ago. Here’s What It Means to Her Today*, TIME (Feb. 20, 2020, 7:27 AM), <https://time.com/5786710/kimberle-crens-haw-intersectionality/>.

30. Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC’Y REV. 991, 992 (2011) (“[P]laintiffs who make intersectional claims, alleging that they were discriminated against based on more than one ascriptive characteristic, are only half as likely to win their cases as are other plaintiffs.”); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1440 (2009) (“A sample of summary judgment decisions reveals that employers prevail on multiple claims at a rate of 96 percent, as compared to 73 percent on employment discrimination claims in general.”).

31. *New ABA Profile of the Legal Profession Highlights Changing Federal Judiciary*, AM. BAR ASS’N (July 18, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/07/new-aba-profile-report-highlights-judiciary/>.

32. *See id.*

33. Debra M. Strauss, *Diversity in Judicial Clerkships and the Courts: Trends, Initiatives, and Resources*, FED. BAR ASS’N JUDICIARY DIVISION: FEDERAL JUD. L. CLERK COMM. (June 2023),

LGBTQ+, only 2.2% of federal judges share that identification.³⁴ Again, while judicial demographics have improved, marginalized groups continue to be underrepresented in relationship to U.S. population demographics. This lack of diversity among the federal bench has limited interpretation of the Civil Rights Act to a homogenous group of white men who do not have the same social context of experience that many marginalized communities share.

Fourth, the Supreme Court's decisions in *Twombly* and *Iqbal* have operated to amplify the difficulty of prevailing on employment discrimination-based claims.³⁵ According to Professor Patricia Moore,³⁶ who analyzed more than 1,200 cases decided between May 2005 and August 2009, she found strong evidence that *Twombly/Iqbal* made it more difficult to survive a 12(b)(6) motion.³⁷ Specifically, she discovered that pre-*Twombly/Iqbal* (from May 2005 to May 2007), under *Conley v. Gibson*,³⁸ 12(b)(6) motions were granted (with or without leave to amend) 46% of the time.³⁹ After *Twombly* was decided (May 2007 until May 2009), "the percentage of 12(b)(6) motions granted grew to 48%[.]"⁴⁰ However, after *Iqbal* was decided (from May 2009 to August 2009), the number of 12(b)(6) motions granted increased to 56%.⁴¹ Most importantly, she discovered "the largest category of cases in which 12(b)(6) motions were filed—constitutional civil rights cases—motions to dismiss were granted at a higher rate (53%) than in all cases combined (49%), and the rate 12(b)(6) motions were granted in those cases increased from *Conley* (50%) to *Twombly* (55%) to *Iqbal* (60%)."⁴² Based on these statistics, it is clear that *Twombly/Iqbal* had a damaging effect on discrimination claims.

These failures obviate the need for DEI efforts as DEI efforts operate to resolve inequality in ways that anti-discrimination laws have not. Much like labor unions operated in the early 1900s to make working conditions for employees

<https://www.fedbar.org/judiciary-division/wp-content/uploads/sites/5/2023/06/Excerpted-from-Behind-the-Bench-The-Guide-to-Judicial-Clerkships-Third-Edition-West-Academic-Publishing-2023-Debra-M.-Strauss.pdf>.

34. *New Report: Biden Continues to Fall Short on LGBTQ+ Representation in the Federal Judiciary*, LAMBDA LEGAL (Apr. 12, 2023), https://lambdalegal.org/newsroom/us_20230412_new-report-biden-continues-to-fall-short-on-lgbtq-representation-in-the-federal-judiciary/.

35. See Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (2009) ("[A] higher percentage of decisions... granted a motion to dismiss in the Title VII context when the courts relied on *Twombly*"). See also Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) ("The rate of dismissal in civil rights cases has spiked in the four months since *Twombly*").

36. Professor Patricia Moore is a Professor of Law at St. Mary's University School of Law. Patricia Moore, ST. MARY'S SCH. OF L., <https://law.stmarytx.edu/academics/faculty/patricia-moore/> (last visited Feb. 4, 2024).

37. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 555-56 (2010).

38. *Conley v. Gibson*, 355 U.S. 41 (1957).

39. Hatamyar, *supra* note 37, at 556.

40. *Id.*

41. *Id.*

42. *Id.*

safer, DEI initiatives have played a similar role in improving employment outcomes for marginalized groups in the workplace.

II. A HISTORY OF DEI IN AMERICA AND ITS PROLIFERATION IN THE WAKE OF AN INCREASED FOCUS ON SOCIAL JUSTICE

While anti-discrimination laws have yet to remedy the evils they were created to eradicate, they were successful in serving as fertile ground for the birth of DEI.⁴³ Although DEI has recently come under intense scrutiny, DEI initiatives find their historical beginnings in the mid-1960s, following the passage of the Civil Rights Act of 1964.⁴⁴ In response to the demands placed on Corporate America after enactment of the Civil Rights Act, employers began focusing on workplace diversity training in an effort to comply with anti-discrimination laws.⁴⁵ Early DEI initiatives were derived from human resources departments and their compliance with 1960's civil rights legislation.⁴⁶ The Equal Employment and Affirmative Action Laws that emerged during the civil rights movement activated workplace diversity training.⁴⁷ Following the civil rights movements of the 1960s, educators and social justice leaders devised programs to diversify K-12, higher education, and corporate spaces to make them more accessible to historically disenfranchised groups.⁴⁸

Social justice initiatives over the past twenty years have substantially increased the attention on the economic, cultural, social, and legal ramifications of discrimination in America. Lack of access and opportunity for marginalized groups forced a real conversation about how to remedy this problem. More importantly, these conversations forced action and promoted legitimate progress and change. Social justice movements including #MeToo, #BlackLivesMatter, #SayHerName, and #StopAsianHate harmonized to precipitate a recognition that more communities needed a place at the table. These are just some of the recent movements that have compelled Americans to reflect on the social injustices that exist in our country.

A. #MeToo

The #MeToo movement helped highlight women's struggles in the workplace in the broader context of DEI that is often more heavily focused on

43. Ariam Tesfaye, *What Is DEI? A Closer Look at DEI Strategies Throughout History*, COOLEAF (Jan. 24, 2023), <https://www.cooleaf.com/blog/a-history-of-corporate-dei-strategies>.

44. *Id.*

45. *Id.*

46. *See id.*

47. Sarah Dong, *The History and Growth of the Diversity, Equity, and Inclusion*, PRO. GLOB. RSCH. & CONSULTING GRP. INSIGHTS (June 2, 2021), <https://insights.grcglobalgroup.com/the-history-and-growth-of-the-diversity-equity-and-inclusion-profession/>.

48. Bradford Vivian, *DEI Education in America Actually Dates Back to the 18th Century*, WASH. POST (June 13, 2023, 8:00 AM), <https://www.washingtonpost.com/made-by-history/2023/06/13/dei-education-diversity-founders-antislavery/>.

addressing racial and ethnic disparities.⁴⁹ “Initiated by the social media activity of sexual assault survivor and activist Tarana Burke, the #MeToo movement began nearly twenty years ago in 2006 and gained increased prominence in the late 2010s with sexual assault allegations—and ultimately convictions—against media mogul Harvey Weinstein.”⁵⁰

Since #MeToo went viral in October 2017, there’s been progress at the state level to address workplace harassment: 22 states and the District of Columbia have passed more than 70 workplace anti-harassment bills, according to a new report by the National Women’s Law Center. Some reforms passed at the state level have focused on eliminating non-disclosure agreements, extending the statute of limitations for reporting harassment, and requiring workplace harassment training.⁵¹

The #MeToo movement has provided sexual harassment victims with an empowering voice by validating and humanizing their stories.⁵² In addition, it has also highlighted the overall mistreatment, discrimination, and limitations that women experience. The movement allowed women to join in a collective voice to highlight their stories of unfairness. Through use of the words, “Me Too,” women were able to affirm that the negative experiences of one woman, were the experiences of all women.⁵³ The movement has reaffirmed the power that a collective voice can have in bringing issues of concern to the world and importantly, to bring about positive change.

B. #BlackLivesMatter, George Floyd, and #SayHerName

The #BlackLivesMatter movement (“BLM”) began in 2013 when Alicia Garza, Patrisse Cullors, and Opal Tometi decided to use it as a mechanism to mobilize the black community in response to the acquittal of Trayvon Martin’s murderer.⁵⁴ The BLM and George Floyd’s death, worked together to amplify the concerns of blacks in America. Consider that from May of 2014 to May of 2020

49. Janice Gassam Asare, *Does DEI Focus Too Much On Black People?*, FORBES (Sept. 25, 2022, 05:13 PM), <https://www.forbes.com/sites/janicegassam/2022/09/25/does-dei-focus-too-much-on-black-people/?sh=67c6f81f26d9>.

50. Lin Gresing-Pophal, *How Has the #MeToo Movement Changed the Workplace?*, HR DAILY ADVISOR (Aug. 15, 2023), <https://hrdailyadvisor.blr.com/2023/08/15/how-has-the-metoo-movement-changed-the-workplace/>.

51. Holly Corbett, *#MeToo Five Years Later: How the Movement Started and What Needs to Change*, FORBES (Oct. 27, 2022), <https://www.forbes.com/sites/hollycorbett/2022/10/27/metoo-five-years-later-how-the-movement-started-and-what-needs-to-change/?sh=6caf36d85afe>.

52. See Terry M. Dworkin & Cindy A. Schipani, *The Times They Are A-Changin’?: #MeToo and Our Movement Forward*, 55 U. MICH. J. L. REFORM 365, 367 (2022).

53. Joanne Sweeny, *The #MeToo Movement in Comparative Perspective*, 29 AM. U. J. GENDER, SOC. POL’Y & L. 33, 34-35 (2020).

54. *A Brief History of Civil Rights in the United States: The Black Lives Matter Movement*, HOW. UNIV. SCH. L., <https://library.law.howard.edu/civilrightshistory/BLM> (last visited Dec. 28, 2023).

“#BlackLivesMatter was tweeted or retweeted 39.2 million times,”⁵⁵ while “the hashtag was shared more than 100 million times in the month after George Floyd was killed.”⁵⁶ Even more telling of the movements impact is the impact that it had on corporate America.

At least 62 Fortune 500 companies posted about Black Lives Matter on Facebook in the wake of the summer’s protests. And BLM Facebook posts by popular brands like Nordstrom, Ben & Jerry’s and others saw more engagement than usual posts.... Before the summer’s protests, just two Fortune 500 companies had posted about the movement, the report said.⁵⁷

In the wake of nationwide racial injustice protests stemming from the murders of Trayvon Martin and George Floyd, an influx of corporations have instituted DEI programs in an effort to acknowledge social disparities with regard to the treatment of Black people. “Companies scrambled to voice their support for Black Lives Matter, they created and filled new positions for chief diversity officers and announced their commitment to increasing their efforts to hire and retain more people from underrepresented, underprivileged, underappreciated segments of the population.”⁵⁸ After the widely publicized video of the murder of George Floyd, DEI efforts began to advance simply by the fact that they couldn’t be ignored. As Americans remained at home due to “State of Emergency” orders during the COVID-19 pandemic, they had no other choice but watch the physical manifestation of the racial disparity of this nation through the actions of Derek Chauvin who killed George Floyd. Through news and social media outlets, social justice calls for change in all facets of American life were resounding.

The #SayHerName movement was promulgated by the African America Policy Forum (“AAPF”) out of various incidents of police brutality against Black Women.⁵⁹ AAPF is a social justice think tank focused on issues of gender and diversity.⁶⁰ AAPF seeks to build bridges between arts, activism, and the academy to address structural inequality and systemic oppression. The AAPF published a “Take Action Guide” which included the following action items:

- Find ways to support all families who have lost a loved one to police violence.
- Create spaces to discuss how patriarchy, homophobia, and transphobia impact Black communities as a whole.

55. Char Adams, *A Movement, a Slogan, a Rallying Cry: How Black Lives Matter Changed America’s View on Race*, NBC NEWS (Dec. 29, 2020, 10:04 AM), <https://www.nbcnews.com/news/nbcblk/movement-slogan-rallying-cry-how-black-lives-matter-changed-america-n1252434>.

56. *Id.*

57. *Id.*

58. Paolo Gaudiano, *Two Years After George Floyd’s Murder, Is Your DEI Strategy Performative or Sustainable?*, FORBES (June 27, 2022, 10:15 AM), <https://www.forbes.com/sites/paologaudiano/2022/06/27/two-years-after-george-floyd-is-your-dei-strategy-performative-or-sustainable/>.

59. #SayHerName: *Our Demands*, AFR. AM. POL’Y F., <https://www.aapf.org/our-demands> (last visited Dec. 28, 2023).

60. *Our Mission*, AFR. AM. POL’Y F., <https://www.aapf.org/> (last visited Dec. 28, 2023).

- Develop skills to talk about the multiplicity of ways in which state violence affects all Black women and girls.... All Black women—transgender, non-transgender and gender-nonconforming[.]⁶¹

During the COVID-19 pandemic, discussions of inequities and the impact of COVID-19 focused on racial or gender disparities separately, but they failed to consider the intersection of the two.⁶² #SayHerName represents the need for social justice movements to be intersectional and to “hear the voices of those often silenced.”⁶³

C. #StopAsianHate

The COVID-19 pandemic also unearthed disparities with other racial identities. Donald Trump’s inflammatory statements that the COVID-19 virus originated at the Wuhan Institute of Virology in China, despite U.S. intelligence agencies’ conclusion that the virus was “not manmade or genetically modified”⁶⁴ caused his supporters to begin spewing hateful messages across social media to Asian Americans.⁶⁵ These hateful messages morphed into targeted violence toward Asian Americans.⁶⁶

#StopAsianHate or #StopAAPIHate (Asian American Pacific Islander) began as a call to action on social media. Stop AAPI Hate now operates as “the

61. #SayHerName: *Our Demands*, AFR. AM. POL’Y F., <https://www.aapf.org/our-demands> (last visited Dec. 28, 2023).

62. Jessica Schrader, #SayHerName: *Racial Healing for Black Women and Gender Expansive Folx*, PSYCH. TODAY (May 16, 2020), <https://www.psychologytoday.com/us/blog/healing-through-social-justice/202005/sayhername>.

63. *SayHerName: Building Community to Support Women of Color at OHIO*, OHIO UNIV., <https://www.ohio.edu/diversity/womens-center/say-her-name> (last visited Dec. 28, 2023).

64. Maanvi Singh et al., *Trump Claims to Have Evidence Coronavirus Started in Chinese Lab but Offers No Details*, THE GUARDIAN (Apr. 30, 2020), <https://www.theguardian.com/us-news/2020/apr/30/donald-trump-coronavirus-chinese-lab-claim>. See also *Campaigns*, STOP AAPI HATE, <https://stopaapihate.org/campaigns/> (last visited Dec. 28, 2023) (affirming that “A growing number of political leaders are using U.S.-China geopolitics as an excuse to promote anti-Asian political rhetoric, discriminatory land ownership bans, and warrantless surveillance measures targeting Asian immigrants. This is anti-Asian scapegoating, and it’s putting our safety and our rights in harm’s way. That’s why we’re joining forces with Chinese for Affirmative Action to launch a nationwide campaign to stop the blame and stop anti-Asian scapegoating.”).

65. Singh et al., *supra* note 64. See also Rebecca Shabad & Dareh Gregorian, *House Passes Anti-Asian Hate Crimes Bill*, NBC NEWS (May 18, 2021, 9:27 AM), <https://www.nbcnews.com/politics/congress/house-expected-pass-anti-asian-hate-crimes-bill-n1267732>. See generally *Many Asian Republicans Blame Trump, Not Their Party, for Discrimination*, S. CHINA MORNING POST (Oct. 5, 2021, 4:17 AM), <https://www.scmp.com/news/world/united-states-canada/article/3151188/many-asian-republicans-blame-trump-not-their-party> (“Throughout the pandemic, Trump’s use of derisive rhetoric about China was dubbed by many reporters, activists and lawmakers as both racist and directly contributing to xenophobia around the virus’ origins.”) (“New poll shows 56 per cent of Asian-American and Pacific Islander voters say the ex-US president was a ‘major reason’ for the spike in violence against Asians.”).

66. Mishal Reja, *Trump’s ‘Chinese Virus’ Tweet Helped Lead to Rise in Racist Anti-Asian Twitter Content: Study*, ABC NEWS (Mar. 18, 2021, 5:58 PM), <https://abcnews.go.com/Health/trump-chinese-virus-tweet-helped-lead-rise-racist/story?id=76530148>.

nation's largest reporting center tracking acts of hate against Asian Americans and Pacific Islanders.⁶⁷ Drawing from thousands of user-submitted experiences with racism, discrimination, xenophobia, and other forms of bigotry, AAPI's data and the stories they collected paint a vivid picture of anti-Asian American and anti-Pacific Islander hate. In addition, their research provides a unique insight about how hate is experienced and impacts Asian Americans.

Each of these movements has contributed to the advancement of social justice initiatives and more importantly, to the success of DEI efforts. They brought attention to marginalized groups and helped to place their concerns on the corporate agenda. In response, corporations were forced to create internal mechanisms, through DEI initiatives, to address their concerns and to level workplace opportunities.

III. DEI RETRENCHMENT

A. From "Stay Woke" to "Stop Woke"

The concept of "stay woke" is a slang term that finds its roots in black culture among young blacks that are highly in tune with the social, economic, and political landscape.⁶⁸ "The phrase means to remain aware of what is going on around you and in society, more specifically, to remain politically aware, or conscious."⁶⁹ The term serves as a reminder that blacks are consistently under attack by those wishing to subjugate them to second class citizens and that it is imperative to remain cognizant of that reality in order to combat it.⁷⁰ Historically, the term "woke" was interpreted to mean that one would avoid sleep.⁷¹ However, the earliest example of the word being used to mean that blacks should stay aware or conscious dates back to 1923 when Marcus Garvey⁷² remarked "Wake up Ethiopia! Wake up Africa! Let us work towards the one glorious end of a free, redeemed and mighty nation.

67. *Our Mission*, STOP AAPI HATE, <https://stopaapihate.org/our-mission/> (last visited Dec. 28, 2023).

68. See Elaine Richardson & Alice Ragland, *#StayWoke: The Language and Literacies of the #BlackLivesMatter Movement*, 12 COMM. LIT. J. 27, 43 (2018).

69. *Id.* at 42.

70. *Id.* at 43.

71. C. A. Bridges, *What Does It Mean to Be "Woke" and Why Does Florida Governor Ron DeSantis Want to Stop It?*, PALM BEACH POST (Apr. 14, 2022, 2:11 PM), <https://www.palmbeachpost.com/story/lifestyle/2022/04/14/woke-how-meaning-woke-evolved-and-where-its-going-next/7287343001/>.

72. See Marcus Garvey, HIST. (Nov. 9, 2009), <https://www.history.com/topics/black-history/marcus-garvey> ("Marcus Garvey was a Jamaican-born Black nationalist and leader of the Pan-Africanism movement, which sought to unify and connect people of African descent worldwide. In the United States, he was a noted civil rights activist who founded the Negro World newspaper, a shipping company called Black Star Line and the Universal Negro Improvement Association, or UNIA, a fraternal organization of black nationalists. As a group, they advocated for 'separate but equal' status for persons of African ancestry, and as such they sought to establish independent Black states around the world, notably in Liberia on the west coast of Africa.").

Let Africa be a bright star among the constellation of nations.”⁷³ Through these words, Garvey pled for black people to educate themselves about racial inequality and to get involved in the process for political change.⁷⁴ Approximately fifty years later, in 1938, blues musician, Huddie Ledbetter (“Lead Belly”),⁷⁵ at the end of his song entitled “Scottsboro Boys,” stated, “I advise everybody, be a little careful when they go along through there—best stay woke, keep their eyes open.”⁷⁶ The song chronicled the story of nine black boys who were wrongly accused of raping two white women and who were unjustly discriminated against by the criminal justice system.⁷⁷

The word continued to find validity in the rhetoric of frustrated blacks. In 1940, the leader of a black mine workers union in West Virginia, stated, “We were asleep. But we will stay woke from now on,” after black mine workers learned that they were discriminately paid less money than their white counterparts.⁷⁸ It later appeared in Barry Beckham’s 1972 play, *Garvey Lives!*, where Beckham contextualized that “I been sleeping all my life. And now that Mr. Garvey done woke me up, I’m gon’ stay woke. And I’m gon’ help him wake up other Black folk.”⁷⁹

The term finally entered the mainstream vernacular when Erykah Badu⁸⁰ used the word in the chorus of her song “Master Teachers.”⁸¹ In defining the term, Badu stated that,

73. AMY JACQUES GARVEY & TONY MARTIN, *THE PHILOSOPHY AND OPINIONS OF MARCUS GARVEY, OR, AFRICA FOR THE AFRICANS* 6 (1986).

74. *Id.*

75. See *Huddie Ledbetter*, SONGWRITERS HALL OF FAME, https://www.songhall.org/profile/Huddie_Ledbetter (last visited Dec. 28, 2023) (“Huddie Ledbetter, better known as Lead Belly, was one of the most powerful figures in the early years of the American folkmusic movement. He wasn’t tall or muscular, but his steel-wire energy as a ‘cotton-chopper’ gave him the nickname he bore most of his life. His performances radiated an overwhelming intensity that few artists have ever matched. His recordings were instrumental in the creation of Britain’s Skiffle movement, which produced the Beatles and many of the other rhythm and blues artists.”).

76. Bridges, *supra* note 71.

77. See *Scottsboro Boys*, HIST. (Feb. 22, 2018), <https://www.history.com/topics/great-depression/scottsboro-boys> (“The Scottsboro Boys were nine Black teenagers falsely accused of raping two white women aboard a train near Scottsboro, Alabama, in 1931. The trials and repeated retrials of the Scottsboro Boys sparked an international uproar and produced two landmark U.S. Supreme Court verdicts, even as the defendants were forced to spend years battling the courts and enduring the harsh conditions of the Alabama prison system.... In 2013, the Alabama Board of Pardons and Paroles voted unanimously to issue posthumous pardons to the Scottsboro Boys, bringing a long-overdue end to one of the most notorious cases of racial injustice in U.S. history.”).

78. Ishena Robinson, *How Woke Went From “Black” to “Bad”*, LEGAL DEF. FUND (Aug. 26, 2022), <https://www.naacpldf.org/woke-black-bad/>.

79. *Id.*

80. Erykah Badu is an American singer and songwriter. Her music is infused with elements of R&B, soul, and hip hop. Her debut album *Baduizm*, made her one of the crucial voices in the Neo-soul genre and helped to establish Neo-soul’s commercial relevance. As a result of this project, she affectionately became known as the “Queen of Neo Soul.” See Kelefa Sanneh, *Godmother of Soul*, THE NEW YORKER (Apr. 18, 2016), <https://www.newyorker.com/magazine/2016/04/25/erykah-badu-the-godmother-of-soul>.

81. Richardson & Ragland, *supra* note 68, at 43.

[I]t means we just pay attention to what's going on around us, and are not easily swayed by the media, or by the angry mob, or by the group. You know: Stay focused, pay attention.... Stay woke just means pay attention to everything, don't lean on your own understanding or anyone else's, observe, evolve, eliminate things that no longer evolve. That's what it means. Stay conscious, stay awake. It doesn't mean judge others. It doesn't mean gang up on somebody who you feel is not woke. That's not evolved.⁸²

After Badu's inclusion of the word, it became a central concept in the black community.

In the wake of the killing of Trayvon Martin in 2012, and the movement and protests that followed, the term woke experienced a modern resurgence. The Black Lives Matter movement widely used the term in order to succinctly communicate the need to be aware of the dangers Black people face on a regular basis. The term was used once again widely by BLM just two years later after the shooting of Michael Brown. Its use there was to make people aware of conscious of injustices caused by police brutality and the abuse of power inflicted on Black communities.⁸³

The "Stay Woke" ideology served as an essential tool in the fight to remedy injustice.⁸⁴ It facilitated a racial reckoning that forced America to think more critically about systematic racism.⁸⁵ Its success in accomplishing that objective has ushered in a ridiculous attack on marginalized communities by right wing conservatives looking to prohibit these groups from climbing the socioeconomic hierarchy. For some conservatives, the notion of "Stay Woke" creates an environment where they are regrettably forced to recognize their privilege. As a result, they perceive the concept as an oppressive tool to indoctrinate.

B. *Critical Race Theory and Its Opposition*

Critical Race Theory ("CRT") developed in the 1970s as a supplement to the efforts of the Civil Rights Movement.⁸⁶ The Civil Rights Movement, led by Dr. Martin Luther King, was successful in combating overt racism.⁸⁷ Dr. King's efforts were largely successful because of the brutal and overt nature of racism in America during the 1950s and 1960s. Eugene "Bull" Connor's actions during the 1960s

82. Reggie Ugwu, *Erykah Badu Helped Define "Wokeness." Now She's a Target*, N.Y. TIMES (Feb. 6, 2019), <https://www.nytimes.com/2019/02/06/movies/erykah-badu-what-men-want.html>.

83. Jordan Smart, *The Danger With Getting Caught in Cultural "Woke" Wars*, MESSAGE MAG. (June 11, 2021), <https://www.messagemagazine.com/articles/the-danger-with-getting-caught-in-cultural-woke-wars/>.

84. TEHAMA LOPEZ BUNYASI & CANDIS WATTS SMITH, STAY WOKE: A PEOPLE'S GUIDE TO MAKING ALL BLACK LIVES MATTER 121 (2019), <http://www.jstor.org/stable/j.ctv1f8869z>.

85. *Id.* at 42-43.

86. See Lauren Michele Jackson, *The Void That Critical Race Theory Was Created to Fill*, THE NEW YORKER (July 27, 2021), <https://www.newyorker.com/culture/cultural-comment/the-void-that-critical-race-theory-was-created-to-fill>.

87. Joseph E Luders, *Civil Rights Success and the Politics of Racial Violence*, 37 POLITY 108, 109, 113 (Jan. 2005), <http://www.jstor.org/stable/3877064>.

were emblematic of how racism was expressed in America.⁸⁸ Connor gained national and international infamy as a result of his harsh tactics in waging war on peaceful black protesters with high powered water hoses and vicious police dogs.⁸⁹ The brutality of Connor's tactics dramatized the plight of blacks in America and highlighted America's inhumanity to the entire world. This attention helped to pave the way for enactment of the Civil Rights Act. President John F. Kennedy once famously remarked, "The civil rights movement should thank God for Bull Connor. He helped as much as Abraham Lincoln."⁹⁰ While there is truth in his statement, it is also true that racism in America became synonymous with Bull Connor racism, that is, some began to define racism as only those acts that were consistent with Connor's brutality. If, however, brutalization was absent, then any resulting discrimination was purely a function of happenstance and not racism. For example, if an employer adopted a policy that was not job related or consistent with the essential functions of the job, and that policy served to exclude qualified blacks, many perceived that this was not racism and instead a function of "the natural order of things." CRT served to highlight that the natural order of things, was underscored by a racial reality that whites in America operated from a position of privilege that disproportionately placed them in a superior position in accessing and maintaining power and wealth. CRT, from its inception, operated as a lens to evaluate why systems operated in America to the disadvantage of blacks.⁹¹ It teaches that we must look beneath the surface to explore the root causes of inequality.⁹² Professor Derrick Bell, the architect of CRT, understood that CRT was an important tool in helping to realize that "[n]ew approaches were needed to understand and come to grips with the more subtle, but just as deeply entrenched, varieties of racism."⁹³

As Professor Cummings posited, CRT grew "[o]ut of this disaffect, and a realization that the Critical Legal Studies movement did not significantly factor race and racism into its legal status quo critique, Critical Race Theory was founded."⁹⁴

After realizing the success and impact of CRT as a means of forcing institutional change and accountability, Republican leaders acted swiftly to tamp it down. Specifically, Republican legislators began proposing legislation to ban teaching CRT in educational settings. Interestingly, many of the legislators that supported such legislation had no idea what CRT meant or encompassed.

For example, Alabama State Representative, Chris Pringle, ignorantly and incorrectly told Alabama Media Group columnist, Kyle Whitmire, that CRT

88. *Id.* at 110.

89. *Black Children Begin Movement Protesting Segregation; Face Police Brutality*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/may/02> (last visited Dec. 29, 2023).

90. Olivier Maheo, *The Enemy Within: The Long Civil Rights Movement and the Enemy Pictures*, *Angles* (Apr. 01 2020), <https://journals.openedition.org/angles/471#quotation>.

91. André Douglas Pond Cummings, *A Furious Kinship: Critical Race Theory and the Hip Hop Nation*, 48 U. LOUISVILLE L. REV. 499, 501 (2010).

92. *Id.* at 501-02.

93. RICHARD DELGADO & JEAN STAFANCIC, *CRITICAL RACE THEORY: THE CUTTING EDGE* xv-xix (2d ed. 2000).

94. Cummings, *supra* note 91, at 501.

“teaches that certain children are inherently bad people because of the color of their skin, period.”⁹⁵ This is NOT what CRT teaches. Instead, CRT challenges people to think critically about why racial stratification exists in America and forces a practical discussion about the reality that white privilege continues to provide a set of invisible benefits to white people that everyone else can observe yet, the beneficiaries of this privilege cannot.

As further evidence of his ignorance, Pringle also claimed that people who didn’t “buy into” critical race theory are being sent to government “reeducation camps.”⁹⁶ When Whitmire asked for evidence, Pringle cited an unspecified report he read and remarked that it did not “say who it was, it just says a government that held these—these training sessions” then claimed he couldn’t find the link.⁹⁷

We also saw the same attack at the federal level. Senators Marco Rubio (R-Fla.), Kevin Cramer (R-N.D.), and Mike Braun (R-Ind.) introduced “The Protect Equality and Civics Education Act,” which seeks to ban federal funding for teaching CRT.⁹⁸ In support of the legislation, Senator Rubio specifically remarked, “The story of our nation is under attack as the radical left continues to attempt to rewrite American history and categorize our citizens into an oppressor and oppressed class.”⁹⁹

While CRT has been around for decades, and for the majority of its history was largely dismissed by white scholars and politicians, its role in successfully inspiring the ethos of the BLM Movement at reminding its leaders that discrimination is deeply rooted in America has placed it under attack. Racism is no longer as overt as it was in the past and as a result, we need to think deeper and more critically about its continued impact. CRT provides the necessary framework to help deconstruct it.

At its core, legislation against CRT, especially given the current success of the BLM Movement, is a direct effort to deprive people of the ability to appreciate that many aspects of America’s racist past still remain in both our criminal justice and economic systems. The frustration from some conservatives is that CRT posits that many of their success are due to white privilege and not their own work ethic. The fact that CRT has now moved mainstream is proof that its message is viable, accurate, and true.

Florida Governor, Ron DeSantis, is largely regarded as one of the central opponents of CRT. He specifically remarked that Florida will take “a stand against the state-sanctioned racism that is critical race theory.”¹⁰⁰ He added that he will not,

95. Kyle Whitmire, *Whitmire: Alabama Lawmaker Wants to Ban Critical Race Theory, So I Asked Him What It Is*, AL.COM (June 15, 2021, 6:15 PM), <https://www.al.com/news/2021/06/whitmi-re-alabama-lawmaker-wants-to-ban-critical-race-theory-so-i-asked-him-what-it-is.html>.

96. *Id.*

97. *Id.*

98. Press Release, Rubio, Cramer, Braun Introduce Legislation to Prohibit Federal Funding of Critical Race Theory in American History and Civics Education (Aug. 09, 2021).

99. *Id.*

100. *Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations*, FLA. GOVERNOR RON DESANTIS (Dec. 15, 2021),

[A]llow Florida tax dollars to be spent teaching kids to hate our country or to hate each other. We also have a responsibility to ensure that parents have the means to vindicate their rights when it comes to enforcing state standards. Finally, we must protect Florida workers against the hostile work environment that is created when large corporations force their employees to endure CRT-inspired ‘training’ and indoctrination.¹⁰¹

C. *The SFFA Cases*

In *SFFA v. Harvard* and *SFFA v. the University of North Carolina at Chapel Hill* (“UNC”) the Court held that the admissions processes at Harvard University and UNC violated Title VI of the Civil Rights Act of 1964.¹⁰² The Court further held that UNC also violated the Equal Protection Clause of the Fourteenth Amendment since it is subject to Constitutional review as a public university.¹⁰³ The issue before the Court focused on both schools’ admissions policies which provided for race-conscious considerations as a factor in deciding who to admit.¹⁰⁴ The schools argued that it was necessary to consider race in admissions in order to accomplish meaningful diversity.¹⁰⁵ They advanced that the aim of diversity enhanced the training of future leaders by helping them to appreciate a diverse outlook as well as promoting a robust marketplace of ideas.¹⁰⁶ While noting that the goal of remedying societal discrimination through diversity was commendable, the Court nonetheless held that the policies, as applied in both admissions processes, were too amorphous to withstand strict scrutiny.¹⁰⁷ In reliance on *Regents of University of California v. Bakke*,¹⁰⁸ the Court reasoned that remedying societal, racial discrimination is an amorphous concept of injury that unreasonably threatens to “open the door to competing claims for ‘remedial relief’ for every disadvantaged group” based on “inherently unmeasurable claims of past wrongs” that “cannot ‘justify a [racial] classification that imposes disadvantages upon persons... who bear no responsibility for whatever harm the beneficiaries of the [race-based] admissions program are thought to have suffered.’”¹⁰⁹

Because Harvard’s and UNC’s admissions programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points, those

<https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/>.

101. *Id.*

102. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2175 (2023).

103. *Id.* at 2175. *See also* *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 141 S. Ct. 2753 (2021).

104. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2154-56.

105. *Id.* at 2166.

106. *Id.*

107. *Id.*

108. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

109. *Id.* at 2173-74.

admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. At the same time, nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university. Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice.¹¹⁰

These cases have the capacity to have a "reverse *Brown*," effect. *Brown* overturned the evils of *Plessy* and held that separate but equal is inherently unequal.¹¹¹ The Court's holding specifically ended legal segregation in public schools, but its ultimate impact was far greater. More specifically, *Brown* "brought issues of racial equality to the forefront of the nation's attention. Beyond its repercussions for the educational system, the decision also heralded broad changes to concepts of justice and national identity."¹¹² Similarly, while the holdings in the *SFFA* cases apply to university admissions, their impact will be equally as impactful in undermining *Brown*'s efforts. Using the essence of the Court's holding, Missouri's Attorney General, the University of Kentucky's President, and lawmakers in Wisconsin, immediately began targeting minority scholarships.¹¹³ The cases have also impacted diversity efforts outside of the academic setting.¹¹⁴ In fact, shortly after the *SFFA* cases were decided, Attorney Generals from thirteen states issued a warning letter to Fortune 100 CEOs threatening serious legal consequences in connection with DEI initiatives.¹¹⁵

[T]he Supreme Court's recent decision should place every employer and contractor on notice of the illegality of racial quotas and race-based preferences in employment and contracting practices. As Attorneys General, it is incumbent upon us to remind *all* entities operating within our respective jurisdictions of the binding nature of

110. *Id.* at 2153.

111. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495-96 (1954).

112. *The Cultural Aftermath of Brown v. Board*, LSU OFF. COMM'NS & UNIV. RELS. (DEC. 11, 2015), <https://www.lsu.edu/mediacenter/news/2015/12/11brownvboard.eb.php>.

113. Rayna Reid Rayford, *Republicans Now Targeting Scholarships for Black Students After Supreme Court's Affirmative Action Decision*, ESSENCE (July 6, 2023), <https://www.essence.com/news/republicans-attack-minority-scholarships> (providing that "Missouri's attorney general, Andrew Bailey, dispatched a letter to colleges and universities across the state, stating that 'Missouri institutions must identify all policies that give preference to individuals on the basis of race and immediately halt the implementation of such policies.' The exact same day of the landmark ruling, Eli Capilouto, President of the University of Kentucky said, 'We are still reviewing the details of the ruling, but, based on our initial understanding, it appears that the court has restricted the consideration of race with respect to admissions and scholarships.'" Finally, "Robin Vos, Wisconsin's Speaker of the House tweeted that 'Lawmakers will introduce legislation to correct the discriminatory laws on the books and pass repeals in the fall.'").

114. See Julian Mark, *Edward Blum Group Drops Suit After Perkins Coie Expands Diversity Program*, WASH. POST (Oct. 11, 2023, 9:37 PM), <https://www.washingtonpost.com/business/2023/10/11/perkins-coie-dei-fellowship/>.

115. Letter from Collective of 13 Attorney Generals to Fortune 100 CEOs (July 13, 2023), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf>.

American anti-discrimination laws. If your company previously resorted to racial preferences or naked quotas to offset its bigotry, that discriminatory path is now definitively closed. Your company must overcome its underlying bias and treat *all* employees, *all* applicants, and *all* contractors equally, without regard for race.¹¹⁶

Senator Tom Cotton (R-AR) issued a similar letter to fifty-one law firms advising that the firms and their clients may be in violation of federal law by promoting DEI programs.¹¹⁷ In relevant part, Senator Cotton noted:

The Supreme Court recently struck down racial discrimination in college admissions. Though that case focused on colleges, the same principles and indeed the plain text of federal law also cover private employers....To the extent that your firm continues to advise clients regarding DEI programs or operate one of your own, both you and those clients should take care to preserve relevant documents in anticipation of investigations and litigation.¹¹⁸

The Court's holdings in the *SFFA* cases have also spurred litigation outside of the academic setting as a means of attacking DEI efforts more globally.¹¹⁹ For example, the American Alliance for Equal Rights ("AAER") filed two federal lawsuits against Perkins Coie and Morrison & Foerster alleging that their diversity fellowship programs were contracts in violation of §1981.¹²⁰ Specifically, AAER argued that the fellowships intentionally discriminate because only "students of color," "students who identify as LGBTQ+," and/or "students with disabilities" can apply.¹²¹ Relying upon the *SFFA* cases, AAER, in both complaints stated:

SFFA reaffirms that "[e]liminating racial discrimination means eliminating all of it." No racial discrimination is benign: It always "demeans the dignity and worth" of every American "to be judged" by his or her race "instead of by his or her own merit and essential qualities." That principle is true under the Constitution, true under Title VI, and true under 42 U.S.C. §1981—the federal statute that bars private employers... from discriminating based on race when making contracts.¹²²

AAER's litigation strategy proved to be successful as both firms ultimately revised their programs to expand them to all students.¹²³

116. *Id.*

117. Letter from Tom Cotton to 51 Law Firms (July 17, 2023), <https://www.cotton.senate.gov/imo/media/doc/Senator%20Cotton%20Letters%20to%20Law%20Firms%20re%20DEI.pdf>.

118. *Id.*

119. See Shay Dvoretzky et al., *Potential Private Sector Implications of the Supreme Court's Affirmative Action Ruling*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (July 6, 2023), <https://www.skadden.com/insights/publications/2023/07/potential-private-sector-implications>.

120. Am. All. for Equal Rts. v. Morrison & Foerster LLP, No. 1:23-cv-23189 (S.D. Fla. 2023); Am. All. for Equal Rts. v. Perkins Coie LLP, No. 3:23-cv-01877 (N.D. Tex. 2023).

121. *Id.*

122. Complaint at 2, Am. All. for Equal Rts. v. Morrison & Foerster LLP, No. 1:23-cv-23189 (S.D. Fla. 2023) (citations omitted).

123. Mark, *supra* note 114.

AAER also sued the Fearless Fund, a venture capital firm focusing on awarding grants and other resources to businesses owned by women of color.¹²⁴ AAER challenged Fearless Fund's Strivers Grant Contest which awarded \$20,000 grants to small businesses whose ownership was controlled by at least 51% black women.¹²⁵ AAER requested injunctive and declaratory relief to bar the program.¹²⁶ AAER argued the grant program violated §1981 since it excluded everyone other than black women.¹²⁷ U.S. District Judge Thomas Thrash Jr. denied AAER's request arguing that the Fearless Fund's grant program was a form of protected speech under the First Amendment.¹²⁸ On appeal, the Eleventh Circuit, overturned the district court's decision, and granted AAER's injunction, holding that the First Amendment does not allow the Fearless Fund to "exclude persons from a contractual regime based on their race."¹²⁹ This decision is extremely troubling given that women-founded Black and Latina companies, combined, account for less than 1% of all venture capital funds in the U.S.¹³⁰ Based on data from 2018 to 2019, Black women-founded companies raised about \$700 million in funding, 0.27% of the \$276.7 billion in venture capital investment, while Latina women-founded companies raised \$1.03 billion, accounting for 0.37% of total venture capital investment.¹³¹

The conservative push against DEI has been successful.¹³² According to a report from LinkedIn, in 2020 and 2021, based on the ten C-Suite positions that experienced the largest growth in Corporate America, the top C-suite title was that of Chief Diversity and Inclusion Officer at an increase of 168.9%.¹³³ However, in 2022, growth in this position substantially declined 4.5%.¹³⁴ The promises that many corporations made to hire more black, brown, and members of the LGBTQ+

124. Am. All. for Equal Rts. v. Fearless Fund Mgmt., No. 23-CV-3424, 2023 WL 6295121, at *1 (N.D. Ga. Sept. 27, 2023).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at *6, *8.

129. Am. All. for Equal Rts. v. Fearless Fund Mgmt., No. 23-13138, 2023 WL 6520763, at *1 (11th Cir. Sept. 30, 2023).

130. *Project Diane 2022: Latina and Black Women Entrepreneurs in the Tech & Innovation Ecosystem*, DIGITALUNDIVIDED, <https://www.digitalundivided.com/projectdiane> (last visited Dec. 30, 2023).

131. Jessica Guynn, *Black Women and Latina Entrepreneurs Get Less Than 1% of Venture Capital*, CHI. SUN TIMES (Dec. 8, 2020, 9:00 AM), <https://chicago.suntimes.com/business/2020/12/8/22160178/black-women-latina-entrepreneurs-venture-capital-inequities-projectdiane-digitalundivided-maillian>.

132. *See The War on DEI*, INSIGHT INTO DIVERSITY (2023), <https://www.insightintodiversity.com/the-war-on-dei/>.

133. George Anders, *Who's Vaulting Into the C-suite? Trends Changed Fast in 2022*, LINKEDIN (Feb. 1, 2023), <https://www.linkedin.com/pulse/whos-vaulting-c-suite-trends-changed-fast-2022-george-anders>.

134. *Id.*

communities, to increase DEI efforts, and to support the Black Lives Matter Movement, in response to George Floyd's death, have subsided.¹³⁵

Two and a half years later, those promises have primarily fallen flat. A 2022 study showed minimal increase in the percentage of Black employees since 2020. For Daniel Oppong, a corporate diversity expert and founder of DEIB consultancy, The Courage Collective, the message is clear. "It signals that companies are more interested in managing public perception than they are interested and invested in and driving real change," he said.¹³⁶

These changes suggest two realities. First, increases by Corporate America regarding improved DEI efforts were reactive to the political climate at the time and not indicative of a true commitment to DEI.¹³⁷ Second, that the conservative attack on DEI has caused companies with an illusory commitment to DEI to abandon it. Because of movements against DEI in the form of Anti-Woke policies, legislation against CRT, and the *SFFA* cases, there is a need for new and creative mechanisms to support DEI. These attacks on DEI have substantially limited its continued impact. While this is our present reality, there is hope as discussed in the next section.

IV. SOLUTIONS

While DEI efforts are under a serious attack, there is a toolbox of strategies that can operate to stave off the retrenchment.

First, recent Delaware corporate law jurisprudence offers a glimmer of hope about how to defend against the attack on DEI. Specifically, Vice Chancellor Lassiter's decision in *In re McDonald's Corporation Stockholder Derivative Litigation*¹³⁸ provides a critical strategy. This case, focused on an evaluation of the *Caremark*¹³⁹ duty and its scope.¹⁴⁰ *Caremark* duties require that corporate leaders monitor corporate risks.¹⁴¹ To establish that corporate leaders have violated this

135. Ebony Flake, *Tech Companies Are Quietly Defunding Diversity Pledges and Industry Layoffs Are Hitting Black and Brown Workers Hardest-Experts Say the Message is Clear*, ESSENCE (Dec. 8, 2022), <https://www.essence.com/news/money-career/tech-companies-quietly-defunding-diversity-pledges/>.

136. *Id.*

137. Matt Gonzales, *Why Are DEI Roles Disappearing?*, SHRM (Mar. 15, 2023), <https://www.shrm.org/topics-tools/news/inclusion-equity-diversity/dei-roles-disappearing> (stating that "Amy Hull, director and head of DE&I at Paycor, a global leader in human capital management, said the LinkedIn and Revelio data shows that the pledge to impact change was not followed by genuine effort... Jamie Adasi, head of inclusion, diversity, equity and allyship for software company Greenhouse in New York City, said many companies were engaging in 'diversity theater'—a term used to describe an attempt by employers to make others think they care about DE&I issues despite not investing resources into them.").

138. *In re McDonald's Corp. Stockholder Derivative Litig.*, 291 A.3d 652 (Del. Ch. 2023).

139. *In re Caremark Int'l Inc.*, 698 A.2d 959 (Del. Ch. 1996).

140. *McDonald's*, 291 A.3d at 674.

141. Nicholas V. Perricone, *Delaware Court of Chancery Extends the Fiduciary Duty of Oversight (i.e., Caremark Claims) to Corporate Officers*, MINTZ, <https://www.mintz.com/insights->

duty, a plaintiff must plead particularized facts to support a reasonable inference that either “(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.”¹⁴² It is widely known and appreciated that establishing breach of the *Caremark* duty is “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.”¹⁴³ In *McDonald’s*, shareholders brought a shareholder derivative suit against the board alleging that it disregarded “red flags” that condoned sexual harassment and misconduct.¹⁴⁴ As a result, the corporation was harmed due to employee lawsuits, a loss of employee trust, and a tarnished reputation.¹⁴⁵ Chancellor Lassiter’s opinion in the case was extremely informative in that it expanded the *Caremark* duty to cover central compliance risk.¹⁴⁶ Prior to *McDonald’s*, many courts interpreted *Caremark* to only require a duty to monitor “essential and mission critical risks.”¹⁴⁷ To illustrate the distinction between mission critical and central compliance functions, consider McDonald’s current operations. For example, McDonald’s clearly has a duty to monitor mission critical functions like food quality as that is the essence of their business. However, there is also a duty to monitor central compliance related issues like Title VII. As the court noted,

Compliance with labor and employment law is an essential corporate obligation. Sexual harassment and misconduct render the workplace unsafe. Acts of sexual harassment and misconduct can result in serious injury to the corporation. The acts obviously harm the affected employees. At the same time, the acts jeopardize the corporation’s relationship with other employees, create a risk that customers and clients will defect to competitors, and subject the corporation to potential liability under state and federal law.¹⁴⁸

Chancellor Lassiter’s focus on a *Caremark* obligation to monitor central compliance related risks, like discrimination, opens the door for a shareholder

center/viewpoints/2023-02-15-delaware-court-chancery-extends-fiduciary-duty-oversight-ie (last visited Feb. 2, 2024) Until *In Re McDonalds*, *Caremark* duties only applied to board members but this court found that officers also have a duty to monitor. More accurately, officers must make a good faith effort to establish compliance systems within the area of the company under their authority. However, they may also have a responsibility to report red flags outside of their area of responsibility if the underlying misconduct is “particularly egregious” or “sufficiently prominent,” such as where an officer “receives credible information indicating that the corporation is violating the law.

142. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

143. *Caremark*, 698 A.2d at 967.

144. *McDonald’s*, 291 A.3d at 661.

145. *Id.*

146. *Id.* at 678 (“That does not mean that *Caremark* only applies to ‘essential and mission critical risks.’ Although it is fair to infer that all ‘essential and mission critical risks’ qualify as ‘central compliance risks,’ it is also possible that some ‘central compliance risks’ may not reach the level of ‘essential and mission critical.’”).

147. *Id.*

148. *Id.* at 680.

derivative suit based on a board's failure to monitor other Title VII claims including situations where a particular policy or practice results in a lack of diversity. While *Caremark* claims are difficult to win, the possibility of suit based on a lack of diversity due to a violation of Title VII provides shareholders with another basis to encourage corporate leaders to ensure that diversity is an important organizational consideration.

Second, shareholder proposals are another mechanism that can help to ensure meaningful corporate diversity and it is likely that such proposals will assume increased importance.¹⁴⁹ Shareholder proposals allow shareholders to highlight issues of concern to the corporation and its leadership.¹⁵⁰ A shareholder proposal contains 500 words or less detailing a request for the board, or the corporation, to take specific action.¹⁵¹ If successful, the proposal will be included in the corporation's proxy statement for consideration by the voting shareholders at the next shareholder meeting.¹⁵² The corporation may decline to include the proposal in its proxy statement for a number of reasons,¹⁵³ however, even if the corporation declines to include it, the request alone is perceived as a useful tool at bringing important issues to the corporation's attention.¹⁵⁴ As a result of the current discussion regarding DEI, this tool will see increased importance.

"First, the Supreme Court's decision will likely serve as a catalyst for proposals relating to DEI. And second, the shareholders who submit these proposals are often not concerned about the proposals passing but aiming to make a broader political point."¹⁵⁵ Part of the reason that shareholder proposals will continue to have increased importance is based on the reality that institutional investors continue to place high value on companies that prioritize DEI.¹⁵⁶ For example, State Street Global Advisors,¹⁵⁷ the fourth largest asset manager in the world, referenced in its 2023 Proxy Voting and Engagement Guidelines, that it

149. *Preparing for Shareholder Proposals on Diversity in 2024*, CONF. BD. (Sept. 7, 2023), <https://www.conference-board.org/publications/What-Boards-Should-Know-About-Racial-Equity-Civil-Rights-Audits> ("Shareholder proposals on racial equity and civil rights audits gained immediate traction in 2021, with nine proposals receiving average support of 32 percent. In the 2022 proxy season, 31 proposals received an average of 33 percent support, and six were approved by shareholders. This year, the tide turned: in the first half of 2023, 25 proposals were submitted to a vote, and support fell 19 percentage points to 14 percent.").

150. 17 C.F.R. § 240.14a-8(a) (2023).

151. *Id.* at (d).

152. *Id.* at (a).

153. *Id.* at (i).

154. *See id.* at (a).

155. *Preparing for Shareholder Proposals*, *supra* note 149.

156. Bonnie Chiu, *Investors Are Waking Up to Market Potential of Diversity, Equity and Inclusion*, FORBES (Mar. 1, 2022, 4:32 AM), <https://www.forbes.com/sites/bonniechiu/2022/03/01/investors-are-waking-up-to-market-potential-of-diversity-equity-and-inclusion/?sh=c7b0bd75597f>.

157. Yie-Hsin Hung, *Investment Management: Leading with Diversified Investment Strategies*, STATE STREET, <https://annualreport.statestreet.com/Y2022/Details/2022/investment-management/default.aspx> (last visited Dec. 30, 2023) ("State Street Global Advisors is the fourth-largest asset manager in the world, with total assets under management (AUM) of \$3.5 trillion as of December 31, 2022.").

“may vote against the nominating committee chair of boards in the Russell 3000¹⁵⁸ that are not at least 30 percent gender diverse.”¹⁵⁹ It may also vote against boards “in the Russell 1000¹⁶⁰ where the company does not disclose the gender, racial, and ethnic composition of its board.”¹⁶¹ Moreover, it will also consider voting against “the compensation committee chair at companies in the S&P 500 that do not disclose their EEO-1 reports.”¹⁶²

Third, embracing the concept of “Corporate Justice” can serve as a valid solution for supporting DEI efforts. In our book entitled “Corporate Justice,” Dean Andre Douglas Pond Cummings and I, state the following about Corporate Justice:

Corporate Justice is an elusive term—easily stated, but not easily defined. At its core, Corporate Justice refers to a responsibility, even a moral obligation, which businesses and corporations have to engage fairly, civilly and responsibly in the world and community that they do business and from which they derive profits. More than that, the concept of Corporate Justice also focuses on the roles that shareholders, policy makers, other stakeholders and the community at large have in fostering a more just and responsible business community.... Corporate Justice requires that corporations do no harm in their pursuit of profits.¹⁶³

Our definition of Corporate Justice is more comprehensive than the frequently used, and often misapplied, concept of Corporate Social Responsibility (“CSR”). The primary focus of CSR is only on that of the corporate insiders to recognize a self-awareness that the corporate entity must engage responsibly with the community.¹⁶⁴ This recognition is often difficult to manifest since corporate insiders are primarily concerned with profit maximization. Corporate Justice, however, recognizes that stakeholders, in and outside of the corporation, have a duty to ensure that corporations justly operate in the business world.¹⁶⁵

Corporate Justice encompasses much more than CSR. While Corporate Justice embraces the ethos and goals of CSR, it requires much more than good citizenship by

158. Emily Guy Birken, *The Russell 3000 Index*, FORBES (June 27, 2022, 10:11 AM), <https://www.forbes.com/advisor/investing/russell-3000-index/> (“The Russell 3000 is a market index that measures the performance of the top 3,000 U.S. publicly traded companies as ranked by market capitalization. The index’s broad reach means that the Russell 3000 tracks approximately 98% of all U.S. stocks.”).

159. *Preparing for Shareholder Proposals*, *supra* note 149.

160. Emily Guy Birken, *The Russell 1000 Index*, FORBES (June 27, 2022, 9:42 AM), <https://www.forbes.com/advisor/investing/russell-1000-index/> (“The Russell 1000 is a stock market index measuring the performance of the largest 1,000 public companies in the U.S. by market capitalization.”).

161. *Preparing for Shareholder Proposals*, *supra* note 149.

162. *Id.*

163. TODD J. CLARK & ANDRE DOUGLAS POND CUMMINGS, *CORPORATE JUSTICE* 367 (2016).

164. Tim Stobierski, *What is Corporate Social Responsibility? 4 Types*, BUS. INSIGHTS BLOG (Apr. 8, 2021), <https://online.hbs.edu/blog/post/types-of-corporate-social-responsibility> (“Corporate social responsibility (CSR) is the idea that a business has a responsibility to the society that exists around it.”).

165. CLARK & CUMMINGS, *supra* note 163, at xvi-xvii.

a corporation. Corporate Justice seeks to hold corporate leaders, shareholders, politicians and the community at large responsible for ensuring that financial markets operate in a manner... that promotes the financial well-being of more than a corporation's own shareholders or the corporation's own decision makers. While Corporate Justice does not reject the idea of generating profit, it does mandate that profit maximization cannot be a corporation's only objective. Unlike CSR, Corporate Justice recognizes that a corporation's obligation to promote this responsibility is a responsibility that is shared by groups in and outside of the corporation.¹⁶⁶

Embracing the concept of Corporate Justice will expand the duty of who is responsible for promoting corporate accountability. When there are parties, in and outside of the corporation, operating to promote fairness, the entire financial marketplace operates more effectively.

Corporate Justice in our current environment where DEI is under attack would mandate that external stakeholders, like consumers as well as the government, operate to promote DEI as a valid corporate ideal. For example, consumers through the "power of the purse," can decide which corporations to patronage by evaluating a corporation's commitment to diversity. This same strategy was highly effective during the Civil Rights Movement when Black bus riders in Montgomery, Alabama stopped riding the city buses after Rosa Parks was arrested for failing to sit at the back of the bus.¹⁶⁷ The boycott proved to be extremely successful at gaining the city's attention.¹⁶⁸ "The Montgomery Bus Boycott was a successful enterprise that put on full display the influence of the African American dollar. It has been suggested that the boycott cost the city of Montgomery \$3,000 per day."¹⁶⁹ In addition, local businesses also suffered because the boycotters began prioritizing other expenditures for their money.¹⁷⁰ Utilizing a similar approach against corporations that fail to embrace meaningful diversity would have an enormous impact on ensuring a legitimate corporate commitment to DEI.¹⁷¹ According to a 2018 Nielsen report entitled, "Black Dollars Matter: The Sales Impact of Black Consumers," Black consumers have a collective and important power over the marketplace. While Blacks account for only 14% of the population, they are responsible for approximately \$1.2 trillion in purchases.¹⁷²

166. *Id.* at xviii.

167. *Montgomery Bus Boycott*, STAN. UNIV. MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., <https://kinginstitute.stanford.edu/montgomery-bus-boycott> (last visited Dec. 30, 2023).

168. Curtis O. Robinson, Sr., *The Montgomery Bus Boycott, \$1.2 Trillion and Reparations*, POST NEWS GRP. (Aug. 2, 2019), <https://www.postnewsgroup.com/the-montgomery-bus-boycott-1-2-trillion-and-reparations/>.

169. *Id.*

170. *Id.*

171. See Ellen McGirt, *RaceAhead: A New Nielsen Report Puts Black Buying Power at \$1.2 Trillion*, FORTUNE (Feb. 28, 2018, 1:57 PM), <https://fortune.com/2018/02/28/raceahead-nielsen-report-black-buying-power/>.

172. *Black Impact: Consumer Categories Where African Americans Move Markets*, NIELSEN (Feb. 2018), <https://www.nielsen.com/insights/2018/black-impact-consumer-categories-where-african-americans-move-markets/>.

Through this purchasing power, Black's have an enormous capacity to successfully demand greater diversity.

The California Legislature's enactment of Assembly Bill No. 979 ("AB 979") provides an excellent example of the role that the government can play in promoting DEI through Corporate Justice.¹⁷³ AB 979, also known as California's Board Diversity Statute, required California public companies headquartered in the state to include a minimum number of directors from "underrepresented communities"¹⁷⁴ or be subject to fines for violating the statute.¹⁷⁵ Although the United States District Court for the Eastern District of California ultimately found the statute unconstitutional, it was nonetheless a great example of how a government can engage in Corporate Justice as an external stakeholder.¹⁷⁶

Fourth, consistent with the concept noted in the previous section regarding collective economic activism of minority concerns, it is important to increase educational and informational outreach to marginalized communities. More accurately, it is imperative that these communities embrace an ownership mentality rather than a consumer mentality. Instead of buying products, it is critical to focus on the value of buying stocks and accumulating ownership. Through that process, shareholders have the capacity to utilize their voting power to influence the corporate agenda.

Former Civil Rights activist, and Pennsylvania politician, Cynthia Delores Tucker, exemplified this idea. Ms. Tucker, infuriated with the misogynistic and violent lyrics found in rap music, waged war against the genre in the mid-1990s.¹⁷⁷ In fact, she took her fight all the way to Time Warner's corporate boardroom.¹⁷⁸

To effect her campaign, [Ms.] Tucker purchased ten shares of stock in Time Warner, the entertainment conglomerate that co-owned Interscope Records, the distributor of Death Row Records owned by Suge Knight containing a roster of artists that included Tupac Shakur, Dr. Dre and other renowned hip hop artists. At the May 1995 Time Warner annual shareholders' meeting in New York City, Ms. Tucker was able to gain

173. Assemb. B. 979, 2019-2020 Reg. Sess. (Cal. 2020). *See also AB-979 Corporations: Boards of Directors: Underrepresented Communities.*, CAL. LEGIS. INFO., https://leginfo.ca.gov/aces/billTextClient.xhtml?bill_id=201920200AB979 (last visited Dec. 30, 2023).

174. *Id.* (defining a "director from an underrepresented community" as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.").

175. *Id.*

176. *All. for Fair Bd. Recruitment v. Weber*, No. 21-cv-01951, 2023 WL 3481146, at * 2 (E.D. Cal. May 15, 2023) (finding that the statute was facially invalid because it amounted to a quota since it operated as "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" Moreover, the court held that "AB 979 requires corporate boards to have, at minimum, one or three board members who self-identify with select racial and ethnic groups. Despite Defendant's attempt to semantically cast this requirement as flexible, the Court finds that it is a racial quota as it requires a certain fixed number of board positions to be reserved exclusively for certain minority groups.... In the absence of a genuine issue of material fact, the Court finds that AB 979 is unconstitutional on its face and Plaintiff is entitled to summary judgment in its favor as a matter of law.").

177. CLARK & CUMMINGS, *supra* note 163, at 367.

178. *Id.*

a speaking opportunity and delivered a blistering seventeen-minute attack on the genre and the company calling Time Warner a “conspirator in the denigration and destruction of the black community.”¹⁷⁹

Ms. Tucker’s efforts proved to be somewhat successful as Time Warner ultimately sold its interest in Interscope.¹⁸⁰ Her story highlights the value of educating marginalized communities about the importance of stock ownership rather than merely participating as a consumer.

Fifth, it is important to continue to highlight that the *SFFA* cases only apply to admissions.¹⁸¹ While there is concerted effort from DEI opponents to expand the holding, the case was narrowly decided in the admissions context. As such, efforts to apply *SFFA* to diversity initiatives in the corporate context are premature. As a result, corporations that truly value diversity must resist the urge to acquiesce to the conservative threat of litigation. As part of this process, advocates for DEI must create a superfund to defend DEI-based programs and initiatives much like Edward Blum has created to dismantle them.¹⁸² In addition, it is critical to appreciate that *SFFA* does not prohibit diversity as a valuable consideration. Instead, Justice Roberts opinion highlights a pathway to incorporate DEI as long as the DEI-based initiative does not operate to exclude groups based on racial classifications. As Justice Roberts reasoned, it is acceptable to provide opportunities to individuals based on an analysis of how that person’s “race affected his or her life...,” as long as it is tied to “that student’s courage and determination” or “that student’s unique ability to contribute to the university.”¹⁸³ The central concern is that “the student must be treated based on his or her experiences as an individual—not on the basis of race.”¹⁸⁴

179. CLARK & CUMMINGS, *supra* note 163, at 367.

180. *Id.*

181. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2175 (2023).

182. For more information about the fund that Blum created to attack DEI initiatives, see THE AM. ALL. FOR EQUAL RTS., <https://americanallianceforequalrights.org/> (last visited Mar. 28, 2024).

183. *Id.* at 2176.

184. *Id.*