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Transforming the Future of Work by Embracing Corporate Social Justice

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Transforming the Future of Work by Embracing Corporate Social Justice

Andrea Giampetro-Meyer*

Abstract

Professionals from Generations Y (millennials) and Z (Gen Z or zoomers) expect their employers to embrace diversity, equity and inclusion (DEI).¹ They want to work for companies that support individuals of various races, ethnicities, religions, abilities, genders, and sexual orientations. Professionals from these generations are seeking employers that have created a diverse workforce, clear promotion track, and a commitment to dismantling systemic racism.² Companies that want to attract top talent are making DEI a priority. They are also implementing action plans to demonstrate their serious commitment to DEI

* Professor of Law & Social Responsibility, Loyola University Maryland. Thank you to the participants in the Academy of Legal Studies in Business (ALSB) “Business Ethics and the Future of Work” Symposium for helpful comments. Thank you also for the support from The Center for Ethics, Diversity, and Workplace Culture at Temple University and the Center for Legal Studies and Business Ethics at Oklahoma State University for supporting this work.

1. See Jennifer Miller, *For Younger Job Seekers, Diversity and Inclusion in the Workplace Aren't a Preference. They're a Requirement*, WASH. POST (Feb. 18, 2021, 7:00 AM) [hereinafter *Diversity and Inclusion is a Requirement*] (describing the increased importance of DEI programs and policies to young professionals) [perma.cc/NF94-SBYZ]. The Pew Research Center establishes the age ranges that define generational groups. ‘Millennial’ includes individuals who were born between 1981 and 1996, who are currently between twenty-eight and forty three years old. Generation Z includes individuals who were born between 1997 and 2012, who are currently between twelve and twenty-seven years old. Michele Debczak, *These Revised Guidelines Redefine Birth Years and Classifications for Millennials, Gen Z, and Generation Alpha*, MENTAL FLOSS (Dec. 6, 2019) (last updated March 10, 2023, 5:27 PM) [perma.cc/U6H6-PMWD].

2. See *Diversity and Inclusion Is a Requirement*, *supra* note 1

Millennials . . . and Generation Z job seekers are setting a higher bar; they want employers to be equally committed to changing themselves. This includes hiring a more diverse workforce, helping employees of color advance through the ranks, giving them more decision-making power and facilitating uncomfortable conversations about systemic racism.

because millennials and zoomers are quick to recognize and criticize performative approaches.³ Companies that excel in the DEI space are likely to reap significant rewards, especially the time, energy, and talent of young job seekers.

This Article explores and enriches DEI strategist Lily Zheng's definition of corporate social justice (CSJ), which is "an approach to societal change centered on the measurable, lived experiences of groups disadvantaged by society regulated by trust between a company and its employees, customers, and the broader community it touches, and realized through deep integration with every aspect of a business."⁴ The Article starts by describing DEI approaches and programs. It then presents legal background, including analysis of the upcoming U.S. Supreme Court affirmative action decisions and their likely impact on DEI practice. This article then relates Zheng's definition of corporate social justice to: (1) traditional ethical guidelines, (2) original debates about corporate social responsibility, and (3) contemporary support for environmental social governance (ESG). Integrating past theories with present-day ideas allows us to envision a fair future of work. Corporate and organizational DEI approaches and programs must challenge the status quo to realize the dream of a just workplace. This Article ultimately offers concrete recommendations for working toward corporate social justice.

3. When DEI work is performative that means the work is superficial. See LILY ZHENG, *DEI DECONSTRUCTED: YOUR NO-NONSENSE GUIDE TO DOING THE WORK AND DOING IT RIGHT* 86 (2023) (critiquing the DEI industry and showing readers the data-driven, outcome-oriented approaches that create structural change).

4. The 3% Conference, *Entering the Age of Corporate Social Justice*, YOUTUBE (April 15, 2020) [hereinafter *3% Conference*]; see also Lily Zheng, *We're Entering the Age of Corporate Social Justice*, HARV. BUS. REV. (June 15, 2020) [hereinafter *Corporate Social Justice*] (explaining the author's theory of corporate social justice) [perma.cc/CQQ3-HB55]. Zheng points out that companies with effective Corporate Social Responsibility (CSR) programs are more profitable. In the past, CSR programs have included diversity and inclusion work. *Id.* Zhen offers the idea of Corporate Social Justice (CSJ) as "a new paradigm that imagines a healthier and mutually beneficial relationship between companies and the communities they interact with. It is driven by the growing desire of socially-aware consumers and employees for companies, especially for socially-conscious and forward-thinking companies, to do better." *Id.* Zheng believes that companies can "leverage their influence to build a better world for all—including themselves." *Id.*

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I. Introduction

In recent years, liberal groups have demanded societal change to promote diversity, equity, and inclusion⁵ in the workplace. Through social movements, including #MeToo,⁶ #BlackLivesMatter,⁷ #StopAAIPHate,⁸ and #StopAntisemitism,⁹ underrepresented employees and their allies have made it clear that they envision a fair workplace, a workplace in which no one is held back by employers' discriminatory views and/or actions. In this context, diversity, equity & inclusion (DEI) practitioners perform work within corporations and organizations to advance a true meritocracy¹⁰ in the American workplace. At the same time, conservative groups have expressed concerns that DEI is political.¹¹ Conservative groups believe that education or training

5. See ZHENG, *supra* note 3, at Part I (“Diversity is the workforce composition that all stakeholders, especially underserved and marginalized populations, trust to be representative and accountable.”); *id.* at 46. (“Equity is the measured experience of individual, interpersonal, and organizational success and well-being across all stakeholder populations and the *absence* of discrimination, mistreatment, and abuse for all.”); *id.* at 39. (“Inclusion is the achievement of an environment that all stakeholders, especially underserved and marginalized populations, trust to be respectful and accountable.”); *id.* at 52.; see also Danielle Beavers, *Diversity, Equity and Inclusion Framework: Reclaiming Diversity, Equity and Inclusion for Racial Justice*, THE GREENLINING INST. (March 2018) [hereinafter *Diversity, Equity and Inclusion Framework*] (“Diversity refers to a difference or variety of a particular identity.”); *id.* at 3. (“Equity refers to the resources and the need to provide additional or alternate resources so that all groups can reach comparable, favorable outcomes.”); *id.* (“Inclusion refers to internal practices, policies, and processes that shape an organization’s culture.”).

6. ME TOO MOVEMENT [perma.cc/Z272-NVCJ].

7. BLACK LIVES MATTER [perma.cc/6QPX-67DN].

8. STOP AAPI HATE [perma.cc/D98T-JWKT].

9. ANTI-DEFAMATION LEAGUE [perma.cc/DA9B-VE8W].

10. STEPHEN J. MCNAMEE, *THE MERITOCRACY MYTH* 2 (4th ed. 2018) (“Meritocracy refers to a social system as a whole in which individuals get ahead and earn rewards in direct proportion to their individual efforts and abilities.”); see generally Akshaya Kamainath, *Social Movements, Diversity, and Corporate Short-Termism*, 23 *GEO. J. GENDER & L.* 449 (2022) (proposing that corporate decisions and actions should be geared toward the long term, and they should help all stakeholders, and criticizing corporate responses aimed at appeasement of the online crowd rather than initiation of real change).

11. See generally VIVEK RAMASWAMY, *WOKE, INC.: INSIDE CORPORATE AMERICA’S SOCIAL JUSTICE SCAM* (2021) (criticizing politically motivated underpinnings in the DEI, specifically critiquing “corporate wokeness,” “stakeholder capitalism,” and more) [hereinafter *WOKE, INC.*].

that makes individuals more aware of historic injustice triggers guilt, especially among White people.¹² Conservative DEI critics believe this guilt is problematic because it is harmful to individuals who did not contribute directly to past injustices.¹³

Conservative views have come to the forefront as legislatures have passed laws aimed at putting the brakes on the most impactful DEI work.¹⁴ Additionally, the conservative majority of the United States Supreme Court is poised to rule against any program that uses race as a factor in college admissions decisions.¹⁵ This decision is likely to outlaw affirmative action¹⁶

12. See John R. Vile, *Stop W.O.K.E Act (Florida) (2022)*, THE FIRST AMEND. ENCYCLOPEDIA [hereinafter *Stop W.O.K.E Act*] (“The law prohibited teaching or instruction that ‘espouses, promotes, advances, inculcates, or compels’ students or employees to believe any of eight concepts.”) [perma.cc/RLF5-TPRD].

13. See *id.* (explaining that politicians have begun to worry that political correctness may have “created a false sense of guilt among those who were not responsible for them”).

14. For example, the Florida state legislature in 2022 passed the Stop W.O.K.E. Act. This law prohibits teaching certain concepts related to race in the classroom and employment settings. Among several prohibited items, the law forbids teaching that

[a] person, by virtue of his or her race, color, sex, or national origin, bears responsibility for and must feel guilt, anguish or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.

See *Stop W.O.K.E Act*, *supra* note 12 (finding The Stop W.O.K.E. Act also aims to protect students and employees against a hostile school/work environment due to “critical race theory” training); see also Kayla M. Scarpone & Mackenzie D. Hayes, *Shots Fired at the “Stop Woke” Act’s Expansion of Florida Civil Rights Law*, 41 No. 3 TRIAL ADVOC. (FDLA) 40 (2022) (explaining that a judge has enjoined parts of this law as violative of the First Amendment and impermissibly vague).

15. See *Students for Fair Admission, Inc. v. President & Fellows of Harvard College*, SCOTUSBLOG (considering whether Harvard College is violating Title VII of the Civil Rights Act as their admissions policies apply to Asian American applicants) [perma.cc/SY46-PVJA]; *Students for Fair Admissions, Inc. v. University of North Carolina*, SCOTUSBLOG (considering whether colleges and universities can use race as a factor in admissions) [perma.cc/HBT4-9Y7M]. In essence, both cases are about the practice of considering race and/or ethnicity in college admissions. A decision on these cases is likely in June 2023.

16. See generally Stacy Hawkins, *What the Supreme Court’s Diversity Doctrine Means for Workplace Diversity Efforts*, 33 ABA J. LAB. & EMP. L. 139 (2018) [hereinafter *Diversity Doctrine and Workplace Diversity Efforts*] (explaining how decisions in higher education differ from decisions in employment; also offering an expert opinion on which DEI practices are less legally risky than others); Stacy Hawkins, *How Diversity Can Redeem the*

and bolster conservative efforts to halt some DEI initiatives in schools and workplaces. Zheng's definition of CSJ is consistent with traditional ethical guidelines and corporate social responsibility (CSR) principles.¹⁷ CSJ also fits with environmental social governance (ESG) frameworks.¹⁸

This Article reinforces the concept of CSJ by integrating CSJ with traditional ethical guidelines,¹⁹ original debates about corporate social responsibility,²⁰ and contemporary support for environmental social governance (ESG).²¹ Corporate and organizational DEI work must challenge the status quo; working toward CSJ is one way to achieve this goal. This Article ultimately offers concrete recommendations for promoting CSJ as a wave of opposition²² threatens DEI work. Section I describes DEI programs and approaches that strive to change both individuals and systems. This section also summarizes DEI critiques from both progressive and conservative perspectives. Section II of the Article presents a summary of the legal background that inspired DEI work initially and continues to support it. Section II also explores the relationship between affirmative action and DEI practice in light of the U.S. Supreme Court's likely decision to outlaw race as a factor in higher education admissions decisions. Section III

McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession, 83 *FORDHAM L. REV.* 2457 (2015) [hereinafter *Defense of the Commitment to Diversity*] (showing which workplace diversity programs are legally defensible); Stacy Hawkins, *A Deliberative Defense of Diversity: Moving beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 *COLUM. J. RACE & L.* 75 (2012) [hereinafter *A Deliberative Defense of Diversity*] (arguing that viewing the diversity interest through the lens of modern diversity can help evolve equal protection jurisprudence).

17. See *3% Conference*, *supra* note 4 (“Corporate Social Justice is a reframing of CSR that centers the focus of any initiative on the measurable, lived experiences of groups harmed and disadvantaged by society.”).

18. See *Using ESG Tools*, *infra* note 214 (describing how the tools and metrics of environmental social justice apply to broader social justice initiatives).

19. See *infra* subpart III.A.

20. See *infra* sections III.B.1; III.B.2.

21. See *infra* Part III.B.3.

22. See *Vile*, *supra* note 12 (outlining the Florida legislation which prevents “faculty from presenting certain viewpoints related [to] race and sex”); see generally RAMASWAMY, *supra* note 11 (recounting the author's negative views of incorporating morality and politics into business).

integrates CSJ with traditional ethical guidelines, CSR principles, and ESG frameworks. Integrating CSJ with philosophical ideas and established theories grounds and enriches CSJ. Finally, Section IV offers concrete recommendations for moving CSJ forward to improve workplace cultures and “lift up the world.”²³

II. DEI Initiatives

Employers that decide to engage in DEI work have motivations and goals that vary by company and industry. If we were to ask an employer *why* the company or organization is pursuing a set of DEI initiatives, their answer might depend on *when* the employer decided to embrace DEI. Diversity initiatives from the 1960s to today have evolved from programs to promote tolerance,²⁴ then embrace multiculturalism,²⁵ and more recently strive for diversity.²⁶ The idea that DEI efforts should go beyond diversity to also strive for equity, inclusion, belonging, and justice is relatively new.²⁷

In light of the intensifying battle between progressive and regressive²⁸ actions related to DEI, DEI practitioners must double

23. See GEORGE SERAFEIM, *PURPOSE + PROFIT: HOW BUSINESS CAN LIFT UP THE WORLD* xvii (2022) (“There is a path for us all to lift up the world through business. It comes down to the power of combining purpose and profit.”).

24. See Beavers, *supra* note 5, at 4 (stating that “restrained acceptance” of workplace integration was a defining principle of the “Tolerance” period of DEI which lasted from the 1960s to the mid-1970s).

25. See *id.* (explaining that the “Multiculturalism” period was from the mid-1970s through the 1990s and was defined by “recognition, and sometimes respect or celebration, of racial minorities and their accomplishments”).

26. See *id.* (noting that the diversity period started in the 1990s and continues today and is defined by the “[e]xpectation that corporations and government reflect the nation”).

27. See *What is Diversity, Equity, and Inclusion?*, MCKINSEY & CO. (Aug. 17, 2022) [hereinafter MCKINSEY] (defining diversity as “who is represented in the workplace” in terms of gender, age, ethnicity, physical ability, neurodiversity, and more) [perma.cc/YEA7-S4FG]; see *id.* (defining equity as “fair treatment for all people, so that the norms, practices, and policies in place ensure that identity is not predictive of opportunities or workplace outcomes”); see *id.* (defining inclusion as “how the workforce experiences the workplace and the degree to which organizations embrace all employees and enable them to make meaningful contributions”).

28. See Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723, 723 (2022) (describing how

down on the highest quality work,²⁹ work that dismantles structural disadvantage in the workplace. Companies that make DEI a priority have much to gain by excelling in the DEI space. By making DEI a priority and creating/implementing high quality DEI strategies, they can attract young professionals who want to use their time, energy, and talent in diverse workplaces that offer clear promotion tracks and commitment to dismantling systemic racism.³⁰ One beacon for imagining the future of work is DEI strategist Lily Zheng's push for corporate social justice (CSJ). Zheng defines corporate social justice as "an approach to societal change centered on the measurable, lived experiences of groups disadvantaged by society regulated by trust between a company and its employees, customers, and the broader community it touches, and realized through deep integration with every aspect

right-wing forces have targeted Critical Race Theory (CRT) and deployed anti-CRT rhetoric to justify "backlash bills," which are "designed to chill conversations about race and racism in the classroom").

29. See Harvard Business School, *John F. Dovidio speaks at "Gender and Work: Challenging Conventional Wisdom"*, YOUTUBE (May 21, 2013) (Dr. Dovidio talks about the problem of superficial inclusion. He points out that: (1) superficial inclusion cloaks injustice, (2) social change occurs when people are unhappy, (3) the irony of harmony is that when people feel good, they perpetuate inequality at a structural level, and (4) we can't rely on good intentions. From this content, we can make some inferences about DEI work. Work that makes participants feel good, and work that strives for harmony probably will not change much. DEI work is probably more successful when practitioners make participants feel unhappy) [perma.cc/6B6D-FUTE]; see also Jesse Singal, *What if Diversity Training is Doing More Harm Than Good?*, N.Y. TIMES (Jan. 17, 2023) (explaining "[t]here's little evidence that many of these [DEI] initiatives work." Moreover, "[s]ome diversity initiatives might actually worsen the D.E.I. climates of organization . . .") [perma.cc/KB6G-XWZC]. Singal highlights backlash from some programs. What works? Refrain from attempting to change attitudes of individual employees. Instead, diagnose an organization's specific problems and develop strategies for solving the precise problems. Also, organizations need to realize there are no quick fixes and solving problems might be tedious).

30. See *Diversity and Inclusion is a Requirement*, *supra* note 1. Moreover, DEI can counter the effects of discrimination in the workplace. U.S. workers indicate that workplace discrimination affects "employees' perceptions of an organization's culture, their opportunities, and their coworkers' intentions. Workplace discrimination can also affect . . . feelings of psychological safety and belonging and their ability to do their best work." For more information see Ellyn Maese & Camille Lloyd, *Understanding the Effects of Discrimination in the Workplace*, GALLUP (May 26, 2021) (explaining that DEI can counter the effects of discrimination in the workplace) [perma.cc/VZ9F-X5J6].

of a business.”³¹ This Article argues that CSJ should guide DEI practitioners as they play a significant role in shaping the future of work.³² Additionally, the ESG movement has brought transparency and accountability to the forefront of DEI work.³³ This movement will also shape future workplaces.

The field of diversity management started in the 1960s when employers needed to educate their managers about new civil rights laws and their requirements.³⁴ Employers wanted to avoid liability for engaging in discrimination.³⁵ Employer motivations often went beyond risk management and extended to creating cultures to retain employees. Once companies and organizations welcomed previously marginalized or excluded groups into their workplaces, they needed to offer training to support newly integrated offices.³⁶ Diversity initiatives vary widely in terms of design quality. No matter which era of diversity management, some initiatives have inspired backlash, especially when employer approaches have blamed and shamed managers.³⁷ In spite of decades of diversity

31. See 3% Conference, *supra* note 4; see also *Corporate Social Justice*, *supra* note 4, at 2 (explaining why corporate social justice is emerging post-George Floyd).

32. See IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 17 (2019) (defining racism as “a marriage of racist policies and racist ideas that produces and normalizes racial inequities”); *id.* at 17–18 (explaining the term non-racist is a term of denial); When someone expresses a racist idea or supports racist policies, they often use the defense, “I am not racist.” *Id.* at 9, 22. Antiracists, by contrast, do more than defend themselves while supporting racist ideas or policies. Antiracists take actions that assume and work toward racial equality. *Id.* at 22. Antiracists challenge the norm [of racial inequity] by using their skill to change or eliminate racist policies. *Id.* at 209. CSJ is consistent with antiracism because it embraces action at a structural level.

33. See Sarah Dong, *The History and Growth of the Diversity, Equity, and Inclusion Profession*, GLOB. RSCH. & CONSULTING GRP. INSIGHTS (June 2, 2021) (analyzing the rise of DEI programs in the workplace and whether they are built to last) [perma.cc/PS9N-7U4L].

34. *Id.*

35. See *id.* (explaining how workplace diversity trainings first emerged after the introduction of equal employment and affirmative action laws).

36. See *id.* (stating that it was not until the introduction of equal employment and affirmative action laws that many companies had an integrated and diverse workforce).

37. See Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail and What Works Better*, HARV. BUS. REV. 2, 9 (2016) (analyzing diversity initiatives in 829 U.S. firms, and highlighting successful programs including voluntary trainings, enhanced recruitment efforts, mentoring, and diversity managers, and

work, employment discrimination continues to thrive across companies and industries. After Derek Chauvin murdered George Floyd in May 2020, employees demanded more.³⁸ Many employers consequently stepped up their DEI work.³⁹ Many employers adopted individualistic initiatives, programs to change individual managers and employees as they interact one-on-one, in teams, and in larger groups.⁴⁰ Some employers adopted approaches to change systems such as performance evaluation systems.⁴¹ Finally, some employers adopted approaches to change both people and systems.⁴² Today, no matter which initiatives an employer pursues, the employer typically expects DEI work to help the company or organization attract and retain employees, connect with their customer base, improve decision making, and spark innovation.⁴³

A. DEI Initiatives that Target Individuals

DEI work is trending right now. The authenticity of employer commitment to DEI work varies. Some employers seek quick fixes such as one-time speaking events to raise awareness of inequity.⁴⁴

less successful programs including mandatory trainings and grievance systems); *see also id.* at 4 (“You don’t get managers on board by blaming and shaming them with rules and reeducation.”).

38. *See* Roy Maurer, *New DE&I Roles Spike After Racial Justice Protests*, SOC’Y HUM. RES. MGMT. (Aug. 6, 2020) (reporting the increase in job openings in the DEI field since the murder of George Floyd) [perma.cc/566H-2GA4].

39. *Id.*; *see also* MCKINSEY, *supra* note 27 (“Companies that are diverse, equitable, and inclusive are better able to respond to challenges, win top talent, and meet the needs of different customer bases.”).

40. *See* *15 Ways to Improve Diversity and Inclusion in the Workplace*, FIRSTUP (July 14, 2021) (proposing ways to improve DEI in a work environment) [perma.cc/NRZ6-24YN].

41. *Id.*

42. *Id.*

43. *Id.*

44. Bridget Read, *What Are Companies Desperate for Diversity Consultants Actually Buying? Inside the Diversity-Equity-and-Inclusion Industrial Complex*, THE CUT (May 26, 2021) [perma.cc/5T7S-QFZS]; *see also* Lily Zheng, *The Failure of the DEI-Industrial Complex*, HARV. BUS. REV. (Dec. 01, 2022) (defining the DEI-Industrial complex as “an exploitative relationship that purports to end inequity but instead sustains it at great cost to marginalized populations”) [perma.cc/6298-6UDZ]. She criticizes organizations that favor one-time, “inspirational” events to

Other employers offer talks or workshops on how to identify and put an end to unconscious bias, among other one-day talks.⁴⁵ Another common program is bystander intervention training, which encourages employees to speak out when they witness microaggressions⁴⁶ in their organizations. Additional initiatives include sessions to learn how to build diverse teams⁴⁷ or become a better allies.⁴⁸ Mentoring programs⁴⁹ and Employee Resource Groups (ERGs)⁵⁰ are common. Companies and organizations are hiring Chief Diversity Officers (CDOs) to join their executive teams.⁵¹ These CDOs are responsible for designing and executing

“raise awareness” of inequity. As a DEI strategist and practitioner, Zheng prefers “interventions that change incentive structures, shift the balance of power and resources, or reimagine personnel processes like evaluation, promotion, and conflict resolution.” *Id.*

45. See, e.g., PAMELA FULLER, MARK MURPHY & ANNE CHOW, *THE LEADER’S GUIDE TO UNCONSCIOUS BIAS: HOW TO REFRAME BIAS, CULTIVATE CONNECTIONS, AND CREATE HIGH-PERFORMING TEAMS* 34 (2020) (explaining that bias is natural because we all take mental shortcuts; offers guidance on how to overcome unconscious bias).

46. A microaggression is a statement or action that demonstrates subtle, unintentional discrimination against someone from a marginalized group. Another phrase that captures the same concept is subtle acts of exclusion (SAEs). TIFFANY JANA & MICHAEL BARAN, *SUBTLE ACTS OF EXCLUSION: HOW TO UNDERSTAND, IDENTIFY, AND STOP MICROAGGRESSIONS* 19–26 (2020) (explaining that SAEs include exaggerated stereotypes, backhanded compliments, unfounded assumptions, or objectification).

47. See, e.g., JOANN WORTHAM, *EDI IS THE NEW BLACK: LEAD THE MARKET WITH DIVERSE TEAMS* 3–6 (2022) (explaining not only how to build diverse teams, but also how to move toward a welcoming, diverse, innovative workforce).

48. See, e.g., KAREN CATLIN & SALLY MCGRAW, *BETTER ALLIES: EVERYDAY ACTIONS TO CREATE INCLUSIVE, ENGAGING WORKPLACES* 18–19 (2021) (highlighting ways to cultivate an environment where coworkers feel welcomed, respected, and supported; when employees improve ally skills, they create a culture that allows everyone to thrive).

49. See, e.g., LISA Z. FAIN & LOIS J. ZACHARY, *BRIDGING DIFFERENCES FOR BETTER MENTORING* 1–2 (2020) (offering an evidence-based guide to help mentors develop the cultural competence they need to serve as effective mentors).

50. See, e.g., FARZANA NAVANI, *THE POWER OF EMPLOYEE RESOURCE GROUPS: HOW PEOPLE CREATE AUTHENTIC CHANGE* (2022) (explaining how employee resource groups create a more inclusive work environment for marginalized employees; ERGs come together voluntarily based upon a common background such as race).

51. See Dong, *supra* note 33 (“The addition of the ‘Chief Diversity Officer’ position to many executive boards has further cemented the value that diversity brings to a business’ performance and reputation.”).

programs to create more diverse, equitable workplaces. All of the initiatives listed so far assume that a key to creating more diverse, equitable, and inclusive workplaces is changing individuals and how they interact with one another. These initiatives are important and can be successful if an employer truly embraces change and individuals are willing to follow company leadership.⁵²

At times during the evolution of DEI work, employers offered mandatory training in response to specific legal risks. For example, in the late 1980s and early 1990s many employers required employees to undergo mandatory sexual harassment training.⁵³ The goal was to educate employees about what they could and could not do and say in the workplace. Employer initiatives in the training space were inspired by directives from the Equal Employment Opportunity Commission (EEOC) and the U.S. Supreme Court stating that training is necessary and important.⁵⁴ In some cases, employers can show an affirmative defense to sexual harassment liability if they show they used “reasonable care” to prevent harassing behavior. Employers can establish reasonable care by offering training.⁵⁵ Employees often resent mandatory training, especially when it is poorly designed and implemented. Employee negativity from the early days of mandatory training influences DEI work today.

In the 1980s, companies and organizations developed the business case for diversity, which companies and organizations have updated and continued to use to justify their DEI work.⁵⁶ The

52. Critics of DEI work come from both the left and right. *See, e.g.*, Anthony Conwright, *The Trouble with White Fragility Discourse: Why HR Divisions Can't Be On The Vanguard of Racial Reform*, THE AFR. AM. POL'Y F. (May 12, 2022) (criticizing from the left, especially corporate-managerial programs that center white people and have no real roots in Black traditions or Black communities) [perma.cc/5TBU-VNHA]; *see also* WOKE, INC., *supra* note 12 (criticizing from the right, especially corporate wokeness).

53. *See What Training Must Employers Provide to Employees?*, SHRM (describing different states' approaches to mandatory sexual harassment training) [perma.cc/ETZ3-PUZG].

54. *See id.* (explaining the influence of certain EEOC guidelines on employers' sexual harassment trainings).

55. *See id.* (discussing a potential employer defense to sexual harassment liability).

56. *See* Hawkins, *supra* note 16, at 79 (“Modern diversity practice is supported by three dominant theories: (1) the business case (improved business competence”).

business case emphasizes that more diversity yields more success, including financial success. In other words, increased diversity and profits go hand-in-hand. In recent years, as ESG has become more popular, organizations have added an additional rationale for DEI work. In particular, engaging in DEI work is consistent with corporate citizenship.⁵⁷

B. DEI Initiatives that Target Systems

Employers that target systems realize that changing individuals is not enough. When employers agree to look at systems, they realize they need to look at policies, processes, and practices. Specifically, they evaluate the hiring and promotion processes, performance evaluations, and the way opportunities are distributed.⁵⁸ They rely on data and metrics.⁵⁹ Employers that take DEI work seriously are steadfast in their commitment to creating change.⁶⁰ Some employers change incentive structures,⁶¹ including linking executive pay to results.⁶² Other employers engage in racial

57. See *id.* at 84–85 (providing statistics to demonstrate the positive impact diversity can have on the financials of a business).

58. See JOAN C. WILLIAMS, *BIAS INTERRUPTED: CREATING INCLUSION FOR REAL AND FOR GOOD 2* (2021) (showing readers how to use standard business tools to interrupt bias that affects both formal and informal systems, from performance appraisals to access to opportunities).

59. See *id.* at 215 (explaining that business tools used to interrupt bias use data to conduct the necessary measurements).

60. See *id.* (considering those employers that value DEI measures to be committed to change).

61. See Joan C. Williams & James D. White, *Update Your DE&I Playbook*, HARV. BUS. REV. (July 15, 2020) (White and Williams propose a four-component DE&I model: (1) “Make sure the DE&I leader has the authority to make systemic change;” (2) “Change the way glamour work is assigned” (3) “Change the incentives and enhance the capacity of middle management;” and (4) “Debias HR systems”) [perma.cc/692W-GVA3].

62. See Peter Eavis, *Want More Diversity? Some Experts Say Reward C.E.O.s for It*, N.Y. TIMES (July 14, 2020) [hereinafter *Reward C.E.O.s*] [perma.cc/LM56-HRLM].

[Arguing that making diversity targets part of compensation and disclosing them would not just give top executives a financial incentive to hire and promote more Black and Latino people, but also provide a public scorecard that employees and shareholders could use to determine whether companies were following through on their commitment.]

equity assessments.⁶³ Employers that strive for structural change offer messaging that appeals to fairness because fairness benefits everyone.⁶⁴ Overall, employers that devote resources to creating structural change want to inspire deep, lasting success for the company and employees.⁶⁵

III. Legal Background

The Diversity, Equity and Inclusion (DEI) movement in the United States emerged alongside the civil rights movement in the 1960s.⁶⁶ As Congress passed new laws and the Equal Employment Opportunity Commission (EEOC)⁶⁷ offered guidance on how to implement these laws, practitioners served as professionals in the trenches working to promote change, or at least legal compliance.⁶⁸

A. Anti-Discrimination Law—an Overview of Legislation

Laws that strive to eliminate discrimination in employment date back to the U.S. Constitution's Equal Protection Clause.⁶⁹ In terms of federal legislation,⁷⁰ notable laws include the Equal Pay

63. See Pamela Coukos & Ahmmad Brown, *Racial Equity Assessment Can Change Your Company for the Better—If You Get It Right*, WORKING IDEAL (Aug. 6, 2021) [hereinafter *Racial Equality Assessment*] (explaining that racial equity assessment relies on practices that build trust and ensure credibility, e.g., an external independent assessment team, transparency to stakeholders, and more.) [perma.cc/W3BP-2VU3].

64. See ZHENG, *supra* note 3 (noting the benefits of fairness in the workplace).

65. See Coukos & Brown, *supra* note 63 (demonstrating that successful change must be adequately supported by a company).

66. See Margo Edmunds & Dorcas Lind, Glossary of Definitions and Core Concepts for Diversity, Equity, and Inclusion, ACADEMYHEALTH (last updated Aug. 9, 2021) (stating that the DEI movement has roots in the Civil Rights Movement of the 1960s) [perma.cc/5CPC-PWZR].

67. See 42 U.S. C. §§ 2000e-2000e-17 (giving the EEOC the power to bring its own cases).

68. See Dong, *supra* note 33 (explaining the history of DEI in the workplace).

69. The Equal Protection Clause is part of the Fourteenth Amendment. U.S. CONST. amend. XIV § 1.

70. States have also enacted anti-discrimination laws. For example, several states have enacted their own versions of the federal Equal Pay Act. Some states have expanded protections under this law. For example, nine states have enacted

Act,⁷¹ Title VII of the Civil Rights Act of 1964,⁷² the Age Discrimination in Employment Act of 1967,⁷³ the Pregnancy Discrimination Act of 1978,⁷⁴ and the Americans with Disabilities Act of 1990.⁷⁵

The Equal Pay Act prohibits unequal pay based upon sex.⁷⁶ Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment practices against employees on the basis of race, color, national origin, and religion.⁷⁷ Congress and judges have amended or interpreted this law to prohibit discrimination based upon pregnancy,⁷⁸ sexual orientation,⁷⁹ and gender identity.⁸⁰ The Age Discrimination in Employment Act prohibits employment discrimination against individuals who are 40 years of age or older.⁸¹ The Americans with Disabilities Act of 1990 prohibits discrimination against individuals with disabilities⁸² and requires employers to provide reasonable accommodations for disabled employees.⁸³

state equal pay law that extend protections to race, or race combined with sex. See Stephanie Bornstein, *Confronting the Racial Pay Gap*, 75 VAND. L. REV. 1401, 1439–40 (2022) (arguing in favor of legal changes to address the racial pay gap, including changing equal pay laws to add protections against race-based pay inequity).

71. 29 U.S.C. § 206(d).

72. 42 U.S.C. § 2000e-2(a)(1).

73. 29 U.S.C. §§ 621-34.

74. 42 U.S.C. § 2000e(k).

75. 42 U.S.C. §§ 12101-03.

76. 29 U.S.C. § 206(d).

77. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (prohibiting employers from discriminating against individuals because of their race, color, religion, sex, or national origin).

78. See 42 U.S.C. § 2000e(k) (defining the terms “because of sex” or “on the basis of sex” to include pregnancy and childbirth).

79. See *Bostock v. Clayton Cnty.* 140 S. Ct. 1731, 1747 (2020) (“[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”).

80. *Id.*

81. See Age Discrimination in Act, 29 U.S.C. §§ 621–34 (prohibiting employment discrimination against persons over the age of 40).

82. See Americans with Disabilities Act 42 U.S.C. §§ 12101–03 (prohibiting discrimination and prejudice against people with disabilities allowing disabled individuals the opportunity to compete on an equal basis).

83. *Id.*

B. Anti-Discrimination Law and the Broken Promise of Structural Change

In the late 1990s and early 2000s, plaintiffs were successful in suing major corporations for across-the-board race and gender discrimination.⁸⁴ In 1996, Texaco settled a class action lawsuit with Black employees for \$176.1 million, which was the largest race discrimination lawsuit ever when plaintiffs and the defendant reached a settlement.⁸⁵ The lawsuit alleged that Texaco discriminated against Black employees regarding pay, performance evaluations, and promotions.⁸⁶ In 2000, Coca-Cola settled a class action lawsuit with Black employees for \$192.5 million.⁸⁷ This lawsuit's allegations were similar to the allegations in the Texaco case.

The Texaco and Coca-Cola cases were two significant cases that aimed for structural reform.⁸⁸ Plaintiffs and defendants settled the two cases in the context of the Civil Rights Act of 1991, which had expanded compensatory and punitive damages.⁸⁹ This law also granted the right to a jury trial.⁹⁰ Given this context, employers had increased incentives to prevent lawsuits. They watched as Texaco and Coca-Cola complied with consent decrees with specific plans for how to undo systematic race discrimination in employment. Consent decrees in this era provided financial support for “oversight groups, task forces, the creation of training programs, or revision of personnel procedures.”⁹¹ These larger

84. See Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 367 (2008) (reviewing structural reform litigation and articulating which features of consent decrees were effective at creating change).

85. *Id.* at 368.

86. *Id.*

87. *Id.*

88. See *id.* at 367 (listing the Texaco and Coca-Cola cases among those seeking to create systemic change through structural reform litigation).

89. See *id.* at 367–68 (explaining that the Civil Rights Act of 1991 expanded compensatory and punitive damages and that Texaco and Coca-Cola settled race discrimination cases in the wake of this act).

90. See *id.* at 367 (“[T]he Civil Rights act of 1991 . . . expanded compensatory and punitive damages, and made jury trials a matter of right.”).

91. *Id.* at 370.

consent decrees included extensive judicial monitoring, which made structural change likely.⁹²

In 2008, law professor and legal scholar Nancy Levit examined the traits of successful consent decrees. She determined that consent decrees with features that promoted accountability were most likely to create change.⁹³ Levit highlighted: (1) the tenacity and creativity of courts charged with monitoring, (2) courts' willingness to delegate responsibility by appointing decree monitors or task forces, (3) the transparency of whatever process the court approved, (4) awareness of the time and resources it takes to create change, (5) clear assessment approaches, especially use of benchmarks and goals, and, finally, (6) the company's commitment to change.⁹⁴

The Texaco case inspired today's DEI work.⁹⁵ Many of the practices that are commonplace today started after the Texaco case, including increased diversity recruiting and hiring, affinity groups, and supplier diversity initiatives.⁹⁶ Additionally, companies added CDOs and elevated these positions to the executive team.⁹⁷ Companies developed statements announcing their commitments to diversity.⁹⁸ For the first time, companies

92. *See id.* at 371 (“The uncertainty of this legal foundation for class claims also pushes plaintiffs toward settlement and the request for structural changes in employment practices.”).

93. *See id.* at 372 (“Those employment discrimination consent decrees that have led to

measurable results in hiring and promotion changes have had key provisions commanding corporate and managerial accountability.”).

94. *See id.* (describing the six features of promising settlement agreements, and noting that diversity training alone is ineffective).

95. *See* Hawkins, *supra* note 16, at 81–82 (“Texaco became not only a model for future employment discrimination settlements (such as the subsequent record-breaking \$192 million Coca-Cola settlement in 1999), but also a model for the emergence of a new corporate diversity paradigm.”).

96. *See id.* at 82 (noting that in the aftermath of Texaco, corporations were awash in diversity programming).

97. *See id.* (“The Chief Diversity Officer became the newest member of the corporate executive team, and corporate profiles touted their commitment to, investments in, and results around diversity for both internal and external audiences.”).

98. *Id.*

went beyond compliance with EEO requirements⁹⁹ and voluntarily embraced diversity, even if a primary motivation was to avoid the consent decrees that changed both Texaco and Coca Cola.

The promise of class actions to promote structural change hit a major stumbling block in 2011 when the U.S. Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*.¹⁰⁰ In this case, the Court “rejected a proposed class of 1.5 million employees” who alleged “widespread sex discrimination at Wal-Mart stores.”¹⁰¹ In particular, the Court rejected the class because it was “too unwieldy to satisfy the [Federal Rules of Civil Procedure] Rule 23(a)(2) requirement of ‘commonality.’”¹⁰²

Dukes was an expansive class action.¹⁰³ Betty Dukes and six additional plaintiffs aimed to represent current and former Wal-Mart employees who worked at stores across the United States.¹⁰⁴ Plaintiffs objected to Wal-Mart’s practice of relying on local store managers to make pay and promotion decisions.¹⁰⁵ The plaintiffs believed, with data to support their beliefs, that when local managers used their discretion, they favored men.¹⁰⁶ Plaintiffs alleged that women were regularly paid less and denied promotions, even with higher performance evaluations and greater

99. See *id.* (explaining that the scope of diversity efforts exceeded compliance because of a focus on demographic aspects outside of the historically protected categories).

100. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (blocking class certification for pay issues because the claims were individual in nature); see also John M. Husband & Bradford J. Williams, *Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action*, 40 COLO. LAW. 53, 53 (2011) (claiming that the decision “arguably halted the advance of nationwide employment class actions”).

101. Husband & Williams, *supra* note 100, 100 at 53.

102. *Id.*

103. See *Wal-Mart Stores*, 564 U.S. at 342 (referring to the case as “one of the most expansive class actions ever”).

104. See Husband & Williams, *supra* note 100, 100 at 53 (explaining that Wal-Mart is the country’s largest private employer with thousands of stores including Discount Stores, Supercenters, Neighborhood Markets, and Sam’s Clubs).

105. See *id.* (describing the broad discretion that Wal-Mart grants its store managers).

106. See *id.* at 54 (noting that the plaintiffs made their argument using a disparate treatment theory of employment discrimination under Title VII of the Civil Rights Act of 1964).

tenure.¹⁰⁷ The class action lawsuit promised to prove it.¹⁰⁸ The plaintiffs did *not* allege that Wal-Mart endorsed any *policy* favoring men or disfavoring women in pay and promotion decisions.¹⁰⁹

In making its decision to disallow a class action, the Court outlined rigorous guidelines for when plaintiffs can use the class action tool.¹¹⁰ In particular, the Court strengthened the requirement that all class action plaintiffs show questions of law or fact common to the class.¹¹¹ The Court held that “[b]ecause [plaintiffs] provide no convincing proof of a company-wide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common questions.”¹¹² The majority concluded that class members’ “claims must depend upon a common contention of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”¹¹³ In other words, class action plaintiffs must identify policies or decision makers that affect each class member identically.¹¹⁴ Lawsuits must focus on individual stores or departments unless they can find “express discriminatory policies applying across an entire company.”¹¹⁵ The majority believed that Wal-Mart’s policy of *forbidding* sex

107. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 344 (2011) (presenting the experiences of the three named plaintiffs in the case).

108. See *Husband & Williams*, *supra* note 100, 100 at 54 (seeking to prove their case using statistical evidence, anecdotal reports, and analysis of the Wal-Mart culture).

109. See *Wal-Mart Stores*, 564 U.S. at 344 (emphasizing that there is no official company policy of discrimination, but that the discretion granted to managers is used disproportionately against women).

110. See *id.* (outlining the *Dukes* decision in which the Supreme Court reaffirmed the “rigorous analysis” requirement and introduced a new rule requiring class action plaintiffs to prove all elements necessary for class action certification).

111. See *id.* at 350 (explaining that a plaintiff seeking class action certification “must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc”).

112. *Id.* at 359.

113. *Id.* at 350.

114. *Husband & Williams*, *supra* note 100, at 57.

115. *Id.*

discrimination was sufficient to establish that the company could not have “operated under a general policy of discrimination.”¹¹⁶ *Dukes* made it difficult for individuals to come together using the class action tool, especially because plaintiffs’ attorneys now have to look through the class to the merits of the case. This new approach requires an immense amount of discovery,¹¹⁷ an investment most law firms are unable to make.

C. DEI and the Law

Affirmative action and DEI initiatives are different.¹¹⁸ The most significant difference between the two is the theories that underlie them.¹¹⁹ Professor Stacy Hawkins a leading expert in the affirmative action and DEI space. She has explained that the theory that supports affirmative action is “solely remedial.”¹²⁰ Affirmative action programs started in the 1960s and aimed to redress past employer and university discrimination against women and racial minorities.¹²¹ Affirmative action includes conscious decisions to consider race, ethnicity and gender to

116. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353–54 (2011).

117. See Gerson H. Smoger & David M. Arbogast, *The Post-Dukes “Rigorous Analysis” and Pre-Certification*, 82 GEO. WASH. L. REV. ARGUENDO 104, 105 (2014) (explaining that the “rigorous analysis” *Dukes* called for asks parties and the courts to devote more time and resources to gathering and reviewing evidence).

118. See Hawkins, *supra* note 16, at 152.

[T]he key difference between higher education and employment is that admissions decisions in education are largely made in the aggregate on the basis of limited, objective criteria. By contrast, employers typically select employees on an individualized and subjective basis. . . . Both pursue diversity . . . admissions more often involve explicitly consideration of race or ethnicity in ways far less common in the workplace.

119. See *id.* at 79 (comparing the three theories of modern diversity practice to the sole remedial theory of affirmative action).

120. See *id.* (noting that a remedial theory has also governed equal protection jurisprudence by providing a framework for equal protection analysis).

121. See *id.* at 83 (looking to cases arising under affirmative action, specifically under Executive Order 11246 and Title VII, as proof of this remedial purpose).

achieve a specific numerical representation.¹²² Since 1991, when Congress amended Title VII,¹²³ employers are liable when they consider any protected trait, even when their decisions consider legitimate factors, too.¹²⁴ In essence, affirmative action is obsolete in the employment space.

By contrast, DEI initiatives in employment are trending. The theories that underlie DEI initiatives are the business case,¹²⁵ functional theory,¹²⁶ and corporate social responsibility.¹²⁷ DEI initiatives use race, ethnicity and gender to achieve the diversity that “enrich[es] the work environment with people from a variety of backgrounds.”¹²⁸ DEI initiatives are likely legally valid because they are not race/ethnicity or gender-conscious in ways that are linked to numerical representation.

DEI advocates have highlighted the importance of affirmative action and diversity in higher education because colleges and universities “feed the employment market.”¹²⁹ Not surprisingly,

122. See Hawkins, *Defense of the Commitment to Diversity*, *supra* note 16, at 2474 (categorizing practices which aim to achieve some numerical representation as requiring the very high *Weber/Johnson* burden of proof).

123. See Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (amending the Civil Rights Act of 1964 “to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes”).

124. See Nancy L. Zisk, *The Road Map to Attaining Diversity in the Workplace: How Race-Conscious Admissions Programs in Education Can Lead the Way*, 59 SAN DIEGO L. REV. 325, 332, 339 (2022) (arguing that, similar to the educational setting, employment decisions should allow the use of race as a factor in decision-making and reiterating that Title VII applies to hiring, discharge, compensation, terms, conditions, and privileges of employment).

125. See *A Deliberative Defense of Diversity*, *supra* note 16, at 79 (defining the business case as “improved business competence”).

126. See *id.* (defining functional theory as “increased operational performance”).

127. See *id.* (defining corporate social responsibility as “good corporate citizenship”).

128. *A Deliberative Defense of Diversity*, *supra* note 16, at 83; see also Stephen M. Rich, *Whose Diversity: The Contest for Control Over the Law and Culture of Work*, 39 BERKELEY J. EMP. & LAB. L. 177, 185 (2018) (presenting a theory of equal opportunity as “a duty to invest equally in the growth and advancement of all persons regardless of their social status” that may be achieved through diversity management).

129. Patrick Shin et al., *The Diversity Feedback Look*, 2014 U. CHI. LEGAL F. 345, 346 (2014).

employers are primary advocates for diversity in higher education because they want to ensure a pipeline of qualified future workers and leaders.¹³⁰ Today, employers are generally on the side of Harvard University and the University of North Carolina in the recent lawsuits, *SFFA v. Harvard*¹³¹ and *SFFA v. UNC*.¹³² Appellants and appellees are currently awaiting United States Supreme Court decisions in these two cases.¹³³ In these cases, an anti-affirmative action group led by conservative legal activist Edward Blum called Students for Fair Admissions¹³⁴ seeks to end holistic admissions programs that permit colleges and universities to consider race as one factor to achieve educational diversity.¹³⁵

130. See, e.g., Bloomberg News, *Google, Apple Back Affirmative Action in Harvard Case*, DATACENTER KNOWLEDGE (April 5, 2022) (arguing that corporate DEI efforts “depend on university admissions programs that lead to graduates educated in racially and ethnically diverse environments”) [perma.cc/LB6K-32NN].

131. See *SSFA v. Harvard*, No. 20-1199 (U.S. argued Oct. 31, 2022) (deciding “whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives”).

132. See SCOTUS Blog, *supra* note 15 (explaining the North Carolina case that involves a public university that is subject to both Title VI and the Equal Protection Clause in which plaintiffs accuse the University of discriminating against white and Asian applicants by giving preference to Black, Hispanic, and Native American applicants); see also Adam Liptak, *Supreme Court Seems Ready to Throw Out Race-Based College Admissions*, N.Y. TIMES (last updated Nov. 1, 2022) (summarizing the legal challenge to Harvard’s race-conscious admissions program) [perma.cc/B8S8-UVRU].

133. See *id.* (surmising that the *Harvard* decision will likely be issued in June 2023).

134. See *Help Us Eliminate Race and Ethnicity from College Admissions*, STUDENTS FAIR ADMISSIONS (stating that SFFA’s mission is “to support and participate in litigation that will restore the original principles of our nation’s civil rights movement: A student’s race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university”) [perma.cc/Y6HR-R9BG].

135. See Adam Liptak, *Supreme Court Seems Ready to Throw Out Race-Based College Admissions*, N.Y. TIMES (last updated Nov. 1, 2022) (providing that this decision would likely overturn precedent) [perma.cc/6D9M-DF7V]; see also *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 388 (2016) (ruling that the University of Texas’s use of race in their admissions policy passes constitutional muster and affirming *Grutter v. Bollinger*); see also *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (ruling that race can be used as a factor in college admissions decisions to achieve student body diversity). Eight states have already ended the use of race as a factor in college admissions decisions: Arizona, California, Florida, Idaho, Michigan, Nebraska, Oklahoma, and Washington.

At oral arguments on October 31, 2022, the Court's conservative majority signaled a likely decision to outlaw plans at Harvard and the University of North Carolina that take account of race to foster educational diversity.¹³⁶ The Court is poised to end affirmative action in higher education.¹³⁷ The Court is likely to say that colleges and universities may not consider race or ethnicity in admissions, even when doing so is necessary to achieve diversity.¹³⁸ The likely consequence of this decision is that it will boost admissions for White and Asian students and undermine admissions for Black and Latinx students, especially at elite institutions.¹³⁹ From justices' comments at oral arguments, we can expect the conservative justices to highlight the theme that it is time for colleges and universities to stop considering race in admissions decisions.¹⁴⁰ We can expect the liberal judges to highlight the theme that "[w]hen students of all races and backgrounds come to college and live together and learn together, they become better colleagues, better citizens and better leaders."¹⁴¹ What we do not know is what the conservative majority will say about race-neutral approaches to achieving diversity, such as consideration of socioeconomic factors, recruiting from certain high schools, and increased support for low-income students.¹⁴² We also do not know what the Court will say about legacy preferences for (White) relatives of alumni.¹⁴³ Finally, we do not know what the Court will say about the extent to which colleges and universities can pursue diversity at all.¹⁴⁴

136. *See id.* (describing the five hours of oral arguments and the receptiveness of the Court).

137. *See id.* (making an educated prediction about the future of affirmative action based on the political makeup of the Court).

138. *See id.* (predicting that concerns about the impact on diversity will not stop the Court from outlawing affirmative action).

139. *See id.* (outlining possible consequences of affirmative action being terminated for applicants of different races).

140. *See id.* (positing what the conservative justices' reasoning for choosing to overturn affirmative action will be).

141. *Id.*

142. *See id.* (highlighting that it is still an open question as to whether the conservative justices are supportive of race-neutral admissions policies).

143. *Id.*

144. *Id.*

Professor Hawkins has predicted that some workplace DEI initiatives will continue to be legally valid, including offering statements to express commitment to equal opportunity,¹⁴⁵ expanding outreach¹⁴⁶ and candidate pools,¹⁴⁷ offering employee resource groups that “foster[] mutual support among employees,”¹⁴⁸ and training opportunities that are open to everyone.¹⁴⁹ DEI initiatives that are likely to be legally invalid are employment decisions that “consciously consider race, ethnicity, [or] gender . . . in an effort to achieve some identified numerical representation.”¹⁵⁰ A DEI initiative that is legally risky is tying executive performance evaluations and/or compensation to diversity goals.¹⁵¹

IV. Reinforcing Corporate Social Justice

Today, consumers and employees expect more from corporations and organizations.¹⁵² They expect companies to center their work on “the measurable, lived experiences of groups harmed and disadvantaged by society.”¹⁵³ DEI strategist Lily Zheng’s idea of corporate social justice (CSJ) captures new expectations, including the idea that CSJ “is a framework regulated by the trust between a company and its employees, customers, shareholders, and the broader community it touches.”¹⁵⁴ CSJ aims to benefit all stakeholders.¹⁵⁵ CSJ requires “deep integration with every aspect

145. See *Defense of the Commitment to Diversity*, *supra* note 16, at 2478 (explaining that not all DEI initiatives will face legal challenges).

146. *Id.* at 2474.

147. *Id.* at 2471, 2479–80.

148. *Id.* at 2476.

149. *Id.*

150. *Id.* at 2474.

151. *Id.* at 2475; see Eavis, *supra* note 62 (stating that people cannot be rewarded unequally in pursuit of diversity goals).

152. See *Corporate Social Justice*, *supra* note 4, at 1 (“Consumers and employees are now looking for more than Corporate Social Responsibility—they’re looking for what I call Corporate Social Justice.”).

153. *Id.* at 2.

154. *Id.*

155. See *id.* (“Corporate Social Justice is a new paradigm that imagines a healthier and mutually beneficial relationship between companies and the communities they interact with.”).

of the way a company functions.”¹⁵⁶ CSJ is consistent with ethical guidelines and ESG.

A. Traditional Ethical Guidelines

Long ago, philosophers introduced ethical theories to guide actors as they decide how to behave or what kind of person they wish to become. Three theories are utilitarianism (the ethics of consequences), deontology (the ethics of duty), and virtue theory (the ethics of character). This section explores three traditional ethical guidelines and integrates them with the idea of corporate social justice. Note that when we explore the first two theories we will focus on action. When we explore the third theory, we will focus on character. The extent to which actors in businesses and organizations embrace ethical principles affects workplace culture.¹⁵⁷

1. Utilitarianism

Jeremy Bentham and John Stuart Mill proposed utilitarianism, a theory that argues that we should decide what actions are ethical based solely on an action’s consequences.¹⁵⁸ Utilitarian ethical theory centers consequences;¹⁵⁹ it holds that the moral correctness of an action relates directly to the good the action produces.¹⁶⁰ Jeremy Bentham, the first philosopher to

156. *Id.*

157. *See generally* TRACY DATHEET ET AL., CORPORATE SOCIAL RESPONSIBILITY (CSR), SUSTAINABILITY AND ENVIRONMENTAL SOCIAL GOVERNANCE (ESG): APPROACHES TO ETHICAL MANAGEMENT (2022) (providing a comprehensive overview of Corporate Social Responsibility (CSR), Environmental Social Governance (ESG); also includes a summary of ethical theories).

158. *See* M. NEIL BROWNE ET AL., PRACTICAL BUSINESS ETHICS FOR THE BUSY MANAGER 73 (2003) [hereinafter PRACTICAL BUSINESS ETHICS]; *See generally* LAURA P. HARTMAN ET AL., BUSINESS ETHICS: DECISION MAKING FOR PERSONAL INTEGRITY & SOCIAL RESPONSIBILITY 65–85 (2018) [hereinafter BUSINESS ETHICS] (discussing utilitarianism).

159. PRACTICAL BUSINESS ETHICS, *supra* note 158, at 74.

160. *See* Corey A. Ciocchetti, *Tricky Business: A Decision-Making Framework for Legally Sound, Ethically Suspect Business Tactics*, 12 CARDOZO PUB. L. POL’Y

propose utilitarianism, focused on consequences that maximize pleasure over pain.¹⁶¹ John Stuart Mill, Bentham’s predecessor, focused on something slightly different—maximizing happiness in the world for the greatest number of people.¹⁶² In the context of business, the greatest number of people means a wide range of stakeholders.¹⁶³ CSJ is consistent with the concept of maximizing happiness in the world because CSJ asks companies to truly understand the experiences of marginalized groups and to take deeply embedded actions to benefit marginalized groups and all stakeholders. CSJ insists that “the greatest number of people” includes marginalized groups.

Utilitarianism seems intuitively correct to many people.¹⁶⁴ However, this ethical decision-making theory is often difficult to apply. Specifically, critics of the theory point out that it is difficult to measure the benefits and consequences of actions.¹⁶⁵ Moreover, people who work in business often face ethical dilemmas that will cause harm no matter what decision the person makes.¹⁶⁶ In this situation, utilitarianism asks the actor to choose the action that will lead to the least harm. However, it is often difficult to calculate harm.¹⁶⁷

2. Deontology

Immanuel Kant proposed deontological ethical theory, a theory that argues that we should decide what actions are ethical

& ETHICS J. 1, 9 (2013) [hereinafter *Tricky Business*] (“[T]he moral correctness of an action is directly correlated to the good produced by its goal or purpose.”).

161. See PRACTICAL BUSINESS ETHICS, *supra* note 158, at 74. This is hedonistic utilitarianism.

162. See *id.* This is eudaimonistic utilitarianism.

163. See *Tricky Business*, *supra* note 160, at 11 (“In the business context, the greatest number of people involves many stakeholders - employees, customers, shareholders, the families of the three groups just mentioned, community members living nearby corporate property, and potentially society at large.”).

164. PRACTICAL BUSINESS ETHICS, *supra* note 158, at 74.

165. See *id.* at 74–75 (noting the difficulties when actually applying utilitarianism).

166. See *id.* at 75.

167. See *id.*

by focusing on a person's duty.¹⁶⁸ A duty is a moral or legal obligation that lets people know how to act in a specific situation. According to Kant, what makes an action right is that it was done for the sake of duty to an ethical law.¹⁶⁹ In other words, Kant's focus is on ethical motivation, e.g., he wants a person to act for the sake of duty.¹⁷⁰ Kant offers guidance on our duties. He argues that we must "act in accordance with principles that can be willed into universal laws."¹⁷¹ He also argues that it is our duty "to treat people as ends in themselves and never as mere means."¹⁷² We must respect people as human beings, and not use them as tools or conveniences.¹⁷³ CSJ is consistent with deontology because both theories show fundamental respect for all people, including those society has marginalized. Both theories are duty-based and innate.¹⁷⁴

One challenging aspect of deontology is that it is sometimes difficult to determine which duties a person is obligated to follow.¹⁷⁵ Another challenging aspect of this theory is that the theory yields absolutes when the most challenging business ethics situations usually involve grey areas.¹⁷⁶ Finally, critics question whether duties recognized in the past still apply in a drastically changing world.¹⁷⁷

168. *See id.* at 73.

169. *See id.* at 75.

170. *See id.*

171. *See id.* at 76.

172. *See id.*

173. *See id.*

174. *See* Corporate Social Justice, *supra* note 4, at 3–5 (recommending a process through which companies should integrate Corporate Social Justice practices). The depth of CSJ is clear when Zheng outlines how companies can pursue social good. She suggests these steps: (1) "[b]egin with a goal or vision for a more just society," (2) "[t]houghtfully situate your company within the broader ecosystem surrounding that goal," (3) "[b]uild robust and representative working groups that connect the company and its stakeholders," (4) "[t]ake a stance," and (5) "[r]egularly evaluate progress." She lists goals such as closing the race-based wealth gap, addressing systemic racism in policing, and eliminating anti-Black racism. Her appeal is to forward-thinking companies.

175. *See* BROWNE ET. AL., *supra* note 158.

176. *See* *Tricky Business*, *supra* note 160, at 10–11 (describing a key objection to Deontology).

177. *See id.* at 11 ("[D]o the duties that applied to generations past still bind actors in the twenty-first century?").

3. *The Theory of Virtue*

Aristotle proposed the theory of virtue ethics, which asks: “What sort of person must I become to do the right thing?;” this theory focuses on the character development.¹⁷⁸ Aristotle focused on moral virtues, especially courage, discipline, wisdom and fairness.¹⁷⁹ He pointed out that virtues are habits and defined in terms of a middle ground.¹⁸⁰ For example, a person should practice courage as a middle ground habit and be neither cowardly nor foolhardy.¹⁸¹ Aristotle believed that individuals must develop “a firm and settled disposition to choose the good.”¹⁸² CSJ is consistent with the theory of virtue because a person with strong moral character insists on fairness, which means “the habit of giving to others what they are due.”¹⁸³ A person with strong moral character acts on a firm, settled disposition to choose good, which means working toward eliminating structural inequality, as CSJ demands.

One challenging aspect of virtue theory is that, unlike utilitarianism and deontology, it does not directly guide action.¹⁸⁴ This theory also assumes that individuals have had the good

178. See Robert G. Kennedy, *Virtue and Corporate Culture: The Ethical Formation of Baby Wolverines*, 17 REV. BUS. 10, 12 (1995) (explaining that virtue theory repairs “flaws on the personal level and culture on the organizational level”).

179. See *id.* (updating to instead call the cardinal virtues (fortitude, temperance, prudence, and justice) courage, discipline, wisdom, and fairness; defining courage as “the habit moderating the emotions of fear or boldness to achieve a rational goal”; defining discipline as “the habit of moderating the emotions of enjoyment and denial to achieve a well-ordered personal or professional life”; defining wisdom as “the habit of recognizing good ends and choosing effective and efficient means of achieving them;” and finally, defining fairness as “the habit of giving to others what they are due”).

180. See *id.* at 11–15 (defining virtues in terms of a middle ground between the extremes of too much and too little).

181. See *id.* at 13 (“Courage is a good example of a moral virtue. The courageous person should be contrasted with both the cowardly and the foolhardy.”).

182. *Id.*

183. See *id.* at 14 (“[Fairness] comes into play in business in many ways, not least of which concerns attending to the rights and interests of the stakeholders of a firm.”).

184. See *Tricky Business*, *supra* note 160, at 11 (“Unlike the teachings of Utilitarianism and Deontology, Virtue Ethics is not an action-guiding theory.”).

fortune to be around virtuous people. Virtuous people can influence others. They can identify virtues and encourage those around them to develop good habits and, ultimately, virtue.¹⁸⁵

B. Corporate Social Responsibility and ESG

Corporate social responsibility (CSR) describes the responsibilities businesses and organizations have to the societies in which they operate.¹⁸⁶ CSR is dynamic; alternative perspectives on what CSR means have evolved over time. Generally, however, the rationale for CSR is rooted in history.¹⁸⁷ Governments give permission for corporations to exist. In return, citizens can expect corporations to work toward social objectives.¹⁸⁸ CSR can mean “business responsibility *to* society (accountability),”¹⁸⁹ “business responsibility *for* society (compensating for negative impacts),”¹⁹⁰ and/or “responsible behavior (a business needs to be operated ethically, responsibly, and sustainably).”¹⁹¹

1. The Shareholder View

One theory of social responsibility argues that a company’s social responsibility is limited to the economic responsibility of

185. *See id.* (pointing out that if you associate with people who are honest, kind and compassionate, then you are more likely to act that way).

186. *See* JEREMY MOON, CORPORATE SOCIAL RESPONSIBILITY: A VERY SHORT INTRODUCTION 3 (2014) [hereinafter CORPORATE SOCIAL RESPONSIBILITY] (defining corporate social responsibility).

187. *See id.* at 6–7 (stating the emergence and necessity of CSR was historically due to special licenses corporations required to pursue public projects, but later CSR remained because of corporation’s limited liability status, which meant society required assurance of their sociability).

188. *See* CARLOS A. BALL, THE QUEERING OF CORPORATE AMERICA: HOW BIG BUSINESS WENT FROM LGBTQ ADVERSARY TO ALLY 9 (Beacon Press 2019) (explaining how, over time, LGBTQ activism turned large corporations into queer equality allies, thereby showing what is possible through progressive activism within companies).

189. CORPORATE SOCIAL RESPONSIBILITY, *supra* note 186, at 4.

190. *Id.*

191. *See id.* (noting that CSR overlaps with principles of ethics, sustainability, and citizenship).

producing goods and services and maximizing profits within the law.¹⁹² This theory, the shareholder theory, makes managers responsible to shareholders only.¹⁹³ Economist Milton Friedman articulated the shareholder view of social responsibility in 1970.¹⁹⁴ Dr. Friedman argued that the primary purpose of business is to maximize profits for shareholders.¹⁹⁵ Managers must act as agents of the company's owners/investors.¹⁹⁶ Their "one and only one responsibility . . . is to use [the corporation's] resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."¹⁹⁷

Journalist David Gelles has argued effectively that the shareholder view of CSR has damaged companies and society.¹⁹⁸ Gelles describes Jack Welch's devotion to the shareholder view and

192. See Branco Manuel Castelo, *Shareholder Theory*, in *ENCYCLOPEDIA OF CORPORATE SOCIAL RESPONSIBILITY*—SPRINGER 2136–41 (2013) ("According to this theory, such behavior, done within the constraints of law and without deception or fraud, would be beneficial for society as a whole. Within this theory corporate social responsibility is defined in purely economic profit making terms.")

193. See *id.* at 2136 ("Shareholder theory equates to an influential view on the role of business in society which pushes the idea that the only responsibility of managers is to serve in the best possible way the interests of shareholders, using the resources of the corporation to increase the wealth of the latter by seeking profits.")

194. See Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG. 17 (Sep. 13, 1970) (identifying struggles of shareholder elected executives who have to act in the interest of social responsibility, which may be against what is best for shareholders' profit interests and almost breaks the agent serving principal narrative of these relationships) [perma.cc/BX8F-RDRS].

195. See *id.* ("The whole justification for permitting the corporate executive to be selected by the stockholders is that the executive is an agent serving the interests of his principal. This justification disappears when the corporate executive imposes taxes and spends the proceeds for "social" purposes.")

196. See *id.* (defining acting as an agent to the shareholders, who are principals, as maximizing profits, which can be challenged with additional requirements such as social responsibility where now managers are to balance their roles within the corporation and within society as both corporation and individuals).

197. *Id.*

198. See generally DAVID GELLES, *THE MAN WHO BROKE CAPITALISM: HOW JACK WELCH GUTTED THE HEARTLAND AND CRUSHED THE SOUL OF CORPORATE AMERICA—AND HOW TO UNDO HIS LEGACY* (2022).

the tools he used to apply Friedman's view, downsizing,¹⁹⁹ dealmaking,²⁰⁰ and financialization,²⁰¹ all with the goal of enriching investors.²⁰² Gelles explains that many companies have adopted Welchism, including Amazon and Boeing.²⁰³ Gelles highlights how negative externalities impact communities. He uses General Electric (GE) as an example, especially the environmental harm GE caused communities by dumping cancer-causing chemicals into the Hudson River.²⁰⁴ Gelles explains that the advent of the B Corporation movement started a transition to a different CSR view,²⁰⁵ the stakeholder view.²⁰⁶

2. The Stakeholder View

Another theory of social responsibility, the stakeholder theory, views a company's social responsibility as one that applies to a range of stakeholders, including investors, employees, customers, communities, and the natural environment.²⁰⁷ Today, many companies prefer this CSR view and are using it to treat workers better, including offering them better pay and benefits, plus profit-

199. *See id.* at 4 (explaining how mass layoffs destabilized the working class).

200. *See id.* at 5 (highlighting dealmaking tactics in mergers and acquisitions).

201. *See id.* at 6 (describing how GE founded GE capital, essentially an unregulated bank).

202. *See id.* (emphasizing Welch's endless quest to enrich his investors, including through cutting hundreds of thousands of jobs).

203. *See id.* at 203 ("Welch's influence was so pervasive that the GE way of doing business became the norm in corporate America, from Amazon to Boeing to Kraft Heinz, and beyond.").

204. *See id.* at 168 (considering the broader, negative effects that Welchism has had on communities).

205. *See id.* at 93 (observing a shift in balancing corporate responsibilities in favor of satisfying stakeholders).

206. *See id.* at 214 (noting that by 2019, the Business Roundtable, an influential policy group consisting of CEOs from leading U.S. companies, embraced the stakeholder view).

207. *See generally* Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 1 (Jan. 1995) (explaining another theory that affects the social responsibility of a company and the reach it has on its members and people involved with the company).

sharing.²⁰⁸ These same companies offer a more long-term view,²⁰⁹ rather than maximizing short-term profits for investors.

Philosopher-turned-management expert R. Edward Freeman articulated the stakeholder theory of social responsibility in 1984.²¹⁰ Dr. Freeman argued that customers, employees, lenders, suppliers, and neighboring communities, plus stockholders, are essential for a firm's success.²¹¹ A stakeholder view allows managers who work amidst complexity to act in ways that will yield success.²¹² The stakeholder view of CSR is an internal framework that aligns with a company's values, plays a role in shaping an organization's culture, and signals to outsiders the company's beliefs.²¹³

3. ESG Assumes the Stakeholder View

Institutional investors, asset owners and managers, private equity fund limited partners and investor groups are reviewing their portfolios and tracking companies' progress on stated goals.²¹⁴ Environmental social governance, or ESG metrics,

208. See Gelles, *supra* note 198, at 23 (noting how companies prefer the new CSR plan to boost morale and inspire employees).

209. See *id.* (considering how companies' strategies have shifted to prioritize long-term success).

210. R.E. Freeman, *Strategic Management: A Stakeholder Perspective* (1984). For a modern interpretation of stakeholder theory, see Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 444 (2019) (describing the promise of corporate law to support companies that want to be forces for social change; emphasizing moral authority and leadership); see generally Thomas M. Jones, Andrew C. Wicks & R. Edward Freeman, *Stakeholder Theory: The State of the Art*, in THE BLACKWELL GUIDE TO BUSINESS ETHICS 19 (Norman E. Bowie ed., 2002).

211. See Freeman, *supra* note 210, at 6 ("In order to be successful, the top managers of the firm had to simultaneously satisfy the owners, the employees and their unions, suppliers and customers.").

212. *Id.* at 19 (identifying benefits of adopting stakeholder view).

213. *Id.* at 240 (noting the role that stakeholders have in internal and external views of an organization).

214. See Adam O. Emmerich, David M. Silk, & Sabastian V. Niles, *Using ESG Tools to Help Combat Systemic Racism and Injustice*, *Harvard Law School Forum on Corporate Governance*, HARV. L. SCH. F. CORP. GOVERNANCE (June 17, 2020) [hereinafter *Using ESG Tools*] (identifying the trend of individuals and groups evaluating their portfolios) [perma.cc/TZN8-BCHH].

provide tools and frameworks that help stakeholders understand how companies are doing with regard to DEI, ethical behavior, human capital, and more.²¹⁵

ESG assumes a stakeholder view;²¹⁶ it assumes that a range of stakeholders matter. ESG evolved with the rising significance of data-informed decision-making. Internally, companies create ESG strategies to help them act on and measure what is mutually good for the planet, people, and profits.²¹⁷ Externally, ESG is a criterion investors use to determine a company's worth and potential.²¹⁸ ESG is an approach to investing that considers the environmental and social impacts of a company's actions and the effectiveness of corporate governance in managing those actions.²¹⁹ Companies that apply ESG criteria are "performing better and safer for all stakeholders, investors, employees, customers, and the community."²²⁰

In 2006, the United Nation's Principles for Responsible Investment (PRI) first mentioned ESG and offered language "requiring financial evaluations of companies to include ESG criteria."²²¹ Since 2006, major institutional investors have expected companies to commit to ESG; institutional investors will weigh a company's commitment to ESG when they make

215. *See id.* ("ESG metrics . . . provide valuable tools and models to help both public and private companies and their investors and other stakeholders . . . understanding their progress on these issues.").

216. *See* Betsy Atkins, *Demystifying ESG: Its History & Current Status*, FORBES (June 8, 2020) [hereinafter *Demystifying ESG*] (describing the transition of companies towards stakeholder vs. shareholder interactions) [perma.cc/H6FQ-ATR].

217. *See id.* (explaining 120 large multinational firms in the IBC expressed a commitment to demonstrate to stakeholders their forward looking approach in establishing long-term value).

218. *See id.* (same).

219. *See id.* ("A company's ability to manage environmental, social and governance matters demonstrates the leadership and good governance that is so essential to sustainable growth.").

220. *Id.* *Using ESG Tools*, *supra* note 214 (noting that investors use ESG to screen investments based on factors, including greenhouse gas emissions and diversity and that investors aim to decrease financial risk).

221. *Demystifying ESG*, *supra* note 216.

investment decisions.²²² Institutional investors look at specific ESG measures and, consequently, have expected companies to diversify their boards, reduce their carbon footprints, and more.

Currently, companies use different frameworks and metrics to measure ESG performance. For example, the Global Reporting Initiative (GRI) created a stakeholder-based accountability framework in 1997 and started using the acronym ESG in 2009;²²³ some companies rely on the GRI framework. Two organizations that have set reporting standards are the Sustainability Accounting Standards Board (SASB) and the Taskforce on Climate-related Financial Disclosures (TCFD).²²⁴ Moreover, rating agencies have created their own ESG frameworks. One popular tool is Sustainalytics.²²⁵ Increasingly, when employees look for jobs, they consider potential employers' ESG ratings as determined by different frameworks and metrics.²²⁶

In 2020, the US Securities and Exchange Commission (SEC) created an ESG disclosure framework, hoping to perfect a standard framework at some point.²²⁷ Although the SEC amended a rule to encourage companies to report on the attraction, retention and development of their workforce, including DEI information, companies have been unenthusiastic about reporting data they

222. *See id.* (“The emphasis on ESG is increasingly growing as major institutional investors are making it clear they expect the companies they hold to commit strongly to ESG criteria.”).

223. *See id.* (noting that a number of investors, businesses, and governments still use GRI’s ESG framework today).

224. *Id.*

225. *See id.* (highlighting that the program is a combination of several international rating systems that incorporate sector and industry based comparisons).

226. *See id.* (“ESG is continually becoming a greater factor in a company’s success in attracting, engaging and retaining employees correlating to the demographics of the current workforce.”).

227. *See id.* (describing the SEC’s decision to create the ESG disclosure framework without the use of a third party rating agency); *see generally* Alicia E. Plerhoples, *ESG & Anti-Black Racism*, 24 U. PA. J. BUS. L. 909 (2022) (arguing that the U.S. Securities and Exchange Commission should regulate ESG accounting and auditing firms, especially with regard to racial equity audits); *see also* Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 52 (2022) (showing how corporate law offers tools corporations can use to take DEI seriously and achieve goals including a summary of SEC board diversity disclosure rules).

have compiled.²²⁸ Companies also need to make their goals clear.²²⁹ In the coming months, the SEC is likely to offer details about what human capital disclosures it expects in the years ahead.²³⁰

Republican-leaning states have recently engaged in actions that demonstrate backlash against ESG.²³¹ As of August 2022, sixteen states outlawed ESG investing for state funds.²³² Florida stated that investments in state pension funds can consider only “pecuniary factors” and not “the furtherance of social, political, or ideological interests.”²³³ The backlash extends to the stakeholder view of CSR. If CSJ gains traction, backlash is sure to follow.

V. Corporate Social Justice and The Future of Work

As conservatives double down on denial about workplace inequity, DEI advocates must deploy deeply integrated best practices to promote diversity, equity, and inclusion. They must also emphasize the experiences of marginalized groups, employer-employee trust, and transparency about objectives and metrics. Citizens must hold companies accountable for pursuing CSJ by seeking improvements in law (changing SEC reporting

228. See Henry Kronk, *Companies Say They're Serious About DEI. So Why Are This Year's 10-Ks So Short on Detail?*, CORP. COMPLIANCE INSIGHTS (May 7, 2021) [hereinafter *10-Ks are Short on Detail*] (noting that public companies report the details of their workforce to the public and to the government in a number of ways and explaining that private sector companies with 100 employees or more must also report numerous details of their workforce to the EEOC via form EEO-1. EEO-1 reports are not public) [perma.cc/GB5K-SNJP].

229. See *id.* (describing the unclear messaging of major companies).

230. See *id.* (noting that without this guidance that “wide leeway remains for companies when it comes to human capital disclosures”); see generally George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639 (2021) (describing the rise of the human capital management movement and suggesting new measures that protect human capital).

231. See Catrina Crittenden, *ESG Backlash*, AM. U. BUS. L. REV. (Oct. 2022) (arguing that anti-ESG legislation in Republican leaning states is increasing) [perma.cc/TBC3-3KQZ].

232. See *id.* (describing the majority of these bills as preventing state investment funds from going to companies which boycott industries such as fossil fuels).

233. See *id.* (showing that states like Florida and Texas go beyond the majority approach to impose restrictions that are a broader referendum on ESG considerations).

requirements), ethics (exploring what it means to “regulate by trust”), and ESG (changing ESG to EESG to highlight employees).

A. Recommendation One: Clarify SEC Reporting Requirements

CSJ strives for regulation by trust. Traditional regulators, including the Securities and Exchange Commission (SEC) could promote trust by clarifying and increasing its reporting requirements.²³⁴ In essence, the SEC could rely on shareholder power to make sure publicly-traded companies follow through on their DEI commitments.²³⁵ Although the SEC has asked companies to make human capital disclosures, the request has to date lacked specificity and standardization.²³⁶

In particular, in 2020, the SEC amended Item 101 of Regulation S-K to require companies to describe their human capital resources, including human-capital measures or objectives that are material.²³⁷ The SEC applied a principles-based (rather

234. See Pam Coukos & Cyrus Mehri, *How the SEC Can Harness Shareholder Power to Support Racial and Gender Equity Through a DEI Index*, WORKING IDEAL (Feb. 3, 2021) [hereinafter *DEI Index*] (recommending that all large publicly traded companies should disclose standardized information on DEI such as board representation, data on leadership diversity, workforce diversity and pay equity metrics, and any progress on inclusive workplace practices) [perma.cc/SEQ5-8YQT]; see also *10-Ks are Short on Detail*, *supra* note 228 (reminding readers that 10-K reports are public and certified by c-suite executives after an audit process).

235. See Coukos & Mehri, *supra* note 234 (“A standard set of disclosures about hiring, representation, leadership and pay would empower customers and investors to make informed choices about where to spend their money.”).

236. See *10-Ks are Short on Detail*, *supra* note 228 (finding the SEC gave companies broad leeway in determining which details about the workforce could be considered “material” for Item S-K Item 101(C) on 10-K filings).

237. See John D. Frey, *Striving for Simplicity: Updates to Regulation S-K Items 101 and 105*, 81 LA. L. REV. 999, 1020 (2021) (“Human capital disclosures have become a particular area of interest to investors over the years because investors realize how important human capital is to the success of a business, and, consequently, the proposed Item 101(c) directly mentions human capital.”); see generally Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 309 (2022) (presenting a roadmap for the SEC for modernizing ESG disclosure; also presenting more ambitious proposals for sustainable finance reform).

than prescriptive) approach to disclosure.²³⁸ The regulatory agency gave examples of human-capital measures, including development, attraction, and retention of employees.²³⁹ At this point, what companies choose to disclose through public filings can vary significantly.²⁴⁰

Civil rights attorneys Pam Coukos and Cyrus Mehri have suggested that human capital disclosures should include information about hiring, representation, leadership, and pay.²⁴¹ Additionally, companies could make clear what the Board of Directors is doing in the DEI space, including information about Board diversity, the extent and nature of Board oversight over DEI practices, data on leadership diversity, and information about the most highly compensated individuals a company employs.²⁴² Ideally, the information provided will demonstrate transparency on whether a company is meeting its DEI goals.²⁴³ When employees, consumers, and investors have additional information, they can decide where to work, what to buy, and which companies' stocks will enhance portfolios. In addition to offering more information on SEC reports, companies could include information in annual reports and on their websites. Improved human capital disclosures are consistent with CSJ.

238. See Frey, *supra* note 237, at 1023 (describing how a principles-based approach grants registrants discretion when reporting material balance which the SEC intends to balance with other controls such as accounting and antifraud laws).

239. See *id.* at 1020 (requiring human capital metrics such as total number of employees).

240. See *id.* at 1028 (noting that while the SEC provided a non-exhaustive list which registrants can use as a guideline, that what each chooses to disclose is ultimately flexible).

241. See Coukos & Mehri, *supra* note 234 (recommending that the SEC impose standard DEI disclosures, and additionally proposing that indexes, institutional investors, agencies, and companies could take the initiative to require these types of disclosures as well).

242. See *id.* (suggesting reports include information such as how the top 200 highest compensated individuals identify, e.g., by gender, race, ethnicity).

243. See *id.* ("Through increased transparency of key measures of leadership and workforce DEI, we can use the market to move stalled progress on glass ceilings and wage gaps for people of color as well as for women.").

B. Recommendation Two: Explore What it Means to “Regulate by Trust”

Recommendation Two, which is that scholars and DEI experts should explore what it means to “regulate by trust,” must consider the work of Dr. Joanne Ciulla. Dr. Ciulla’s work sits at the intersection of leadership and traditional ethical guidelines. Moreover, her work considers the important role of trust in leadership. CSJ relies on the idea of regulating by trust.

Dr. Joanne Ciulla has written that “[l]eadership is not a person or a position. It is a complex moral relationship between people, based on trust, obligation, commitment, emotion, and a shared vision of the good.”²⁴⁴ Dr. Ciulla describes relationships between leaders, followers, and trust. She makes several insightful points. First, she writes that followers have a choice—they must decide whether to give leaders trust.²⁴⁵ She explains that people follow leaders whom they trust and respect.²⁴⁶ Second, Dr. Ciulla points out that leaders earn trust by their actions and the way they treat all stakeholders;²⁴⁷ actions based upon ethical principles generate trust.²⁴⁸ Third, Dr. Ciulla points out that trust is difficult for leaders to obtain, but it is the “most powerful currency of the leader/follower relationship.”²⁴⁹ Trust is important because it is a

244. See Joanne B. Ciulla, *Trust and the Future of Leadership*, in THE BLACKWELL GUIDE TO BUSINESS ETHICS 334, 345 (Norman E. Bowie ed., 2002) [hereinafter *Trust and the Future of Leadership*] (relying on the work of Robert C. Solomon).

245. See *id.* at 346 (“Giving trust is a difficult and dynamic set of emotions. It is the burden of followers to decide whether to trust or not to trust their leaders. This is the decision that makes or breaks a leader in today’s world.”).

246. See *id.* (describing the difficulty to establish trust and respect).

247. See *id.* (declaring that earning trust and respect is imperative and occurs through business actions as well as treatment of shareholders).

248. See Joanne B. Ciulla, *Verizon Lecture: Why Is It So Difficult to Be an Ethical Leader?* 123 BUS. & SOC’Y REV. 369, 373 (2018) (“Ethical leaders can be more effective because people trust them.”).

249. See *id.* (building on the argument that unethical leaders fail to build relationships with their followers).

component of competitive advantage,²⁵⁰ supports teamwork,²⁵¹ and fosters innovation.²⁵²

C. Recommendation Three: Move from ESG to EESG

The “S” in ESG stands for social dimensions of a company’s work, including community and employee well-being.²⁵³ In particular, social metrics include social factors that “pose a risk to a company’s financial performance,”²⁵⁴ such as DEI, labor standards, data protection and security, and supply chain management.²⁵⁵ S&P Global Ratings, a leading ESG rating agency, says that the through-line for a range of social issues is “relations between a company and people or institutions outside of it.”²⁵⁶ Given this broad through-line, some experts believe that ESG should move to EESG, with “employees” deserving a committed focus;²⁵⁷ employment issues should not be “bur[ied] in the S.”²⁵⁸ Investors, consumers, employees, and other stakeholders expect

250. See *Trust and the Future of Leadership*, *supra* note 244, at 347 (“Yet, even if the latter were

the future, the leaders who were able to form alliances and gain the trust of others, might still have the competitive advantage.”).

251. See *id.* at 348 (arguing that when leaders gain trust, they are able to bring their followers together despite diversity).

252. See *id.* at 346 (“Organizations that have high levels of trust are potentially more innovative because employees aren’t afraid to take risks.”).

253. See *Strategically Social*, CORPORATE CITIZEN MAGAZINE, Feb. 26, 2021, at 39–43 (suggesting strong performance in the “S” category can help a company’s performance).

254. Jason Saul, *Fixing the S in ESG*, STAN. SOC. INNOVAT. REV. (Feb. 22, 2022) [perma.cc/8LDH-89X7].

255. See Josh Palmer, *15 Key ESG Metrics to Monitor*, ONBOARD (Aug. 30, 2022) (listing factors for social metrics) [perma.cc/QJB7-JYA3].

256. See Saul, *supra* note 254 (explaining what S&P calls “[t]he purported through-line”).

257. See *Using ESG Tools*, *supra* note 214 (“The heightened focus and appreciation for ‘EESG’ imperatives generally (i.e., employees warranting their own dedicated focus, rather than being encompassed generally in other buckets) in the context of the COVID-19 pandemic also holds promise with respect to these areas.”).

258. Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885, 1903 (2021).

employers to address many issues under the (E)ESG umbrella, including health and safety, working conditions, employee benefits, diversity and inclusion, and human rights.²⁵⁹

The most prominent corporate law expert in favor of moving ESG to EESG is law professor Leo E. Strine, Jr.²⁶⁰ Professor Strine has spoken publicly about his belief that “[w]orkers should not be forgotten in the move towards sustainability.”²⁶¹ Emphasizing the investor-oriented nature of ESG, Professor Strine has stated that workers are primarily responsible for companies’ success, so companies concerned with performance must treat employees well.²⁶² Professor Strine has added substance to these general statements by writing about how the Delaware Chancery Court’s decision in *In re Caremark* supports EESG.²⁶³ Specifically, Strine argues that “EESG is best understood as an extension of the board’s duty to implement and monitor a compliance program under *Caremark*.”²⁶⁴ In *Caremark*, the court stated that the board has an affirmative obligation to assure itself in good faith that the corporation has a system of internal reporting and compliance controls to monitor for illegal activities.²⁶⁵ In essence, Strine “situate[es] EESG within the board’s existing fiduciary duties.”²⁶⁶ Strine’s analysis uses EESG rather than ESG. He notes that “[t]he extra ‘E’ is for employees—a crucial but oftentimes missing

259. See *What is ESG*, ESG.ORG (“ESG covers a wide range of issues that may have a direct or indirect impact on financial relevance. Some of these issues that come under the purview of ESG reporting include resource management, supply chain management, organizational health, safety policies, and building trust through transparency.”) [perma.cc/8X6A-X9UW].

260. See Strine, Smith, & Steel, *supra* note 258, at 1885 (describing Professor Strine’s background as the Michael L. Wachter Distinguished Fellow in Law and Policy at the University of Pennsylvania Carey Law School and the former Chief Justice and Chancellor of the State of Delaware).

261. See, e.g., Laura Joffre, *Workers Being Forgotten in ESG—US Corporate Law Expert*, PIONEERS POST (March 10, 2021) (quoting Strine on this belief) [perma.cc/R24Y-NK23].

262. See *id.* (“[N]o company could do good unless it treated ‘the people most responsible for its success, and most responsible for the success of a market-based system, with respect—and that’s the workers.’”).

263. See generally Strine, Smith & Steel, *supra* note 258.

264. *Id.* at 1885.

265. See *id.* (stating that *Caremark* made it a duty for a board to implement and monitor a compliance program).

266. *Id.* at 1886.

component in the ESG discussion.”²⁶⁷ Strine is correct; ESG should move to EESG. Recommendation Three, in support of making this move, is consistent with the employee focus of CSJ.

VI. Conclusion

Recently, the Florida Department of Education decided that an Advanced Placement course on African American studies could not be offered in the state’s high schools.²⁶⁸ This decision is consistent with the state’s ban on teaching aspects of race and gender that assume structural inequality still exists in the United States. Florida’s recent decision is one act of many across the country that aim to restrain today’s civil rights movement.²⁶⁹ Advocates for workplace justice must continue to do their part in the justice relay race.²⁷⁰ Each advocate must each do their part. By centering work around corporate social justice, advocates can move toward a true meritocracy. In a meritocracy, employers give *all* employees their due. The CSJ relay requires participants to understand the day-to-day injustices disadvantaged groups experience in the workplace. They must strive for employer-employee relationships that are regulated by trust, which reduces reliance on oversight. Employers must embrace transparency and

267. *Id.* at 1887 n.3.

268. See Patricia Mazzei & Anemona Hartocollis, *Florida Rejects A.P. African American Studies Class*, N.Y. TIMES (Jan. 19, 2023) (“Florida will not allow a new Advanced Placement course on African American studies . . . stating that the course is not ‘historically accurate’ and violates state law.”) [perma.cc/7ZP7-LZE7].

269. See Janai Nelson, *Ron DeSantis Wants to Erase Black History. Why?*, N.Y. TIMES (Jan. 31, 2023) (“[P]ointing out that throughout the country, but most notably in Florida, Ron DeSantis and those will similar views want to censor the “histories and experiences of historically marginalized groups, especially Black and L.G.B.T.Q. communities. . . .”) [perma.cc/4NAN-DBQP].

270. See Abigail Ng, *Finding Hope in the Relay for Racial Justice*, MEDIUM (Feb. 27, 2017) (explaining that Reverend Bryan Massingale uses the metaphor of the relay race when he thinks about today’s civil rights movement stating:

I may not get to the finish line, but I run my leg of the race so that the person coming after me can do what they have to do. When we see ourselves as part of a rely, then we don’t get upset when we suffer defeats. We know that our job is to do our part, but we don’t have to do everything. We just have to do something.

[perma.cc/7US3-75WE].

accountability to show their efforts to promote diversity, equity, and inclusion. DEI work must be deeply integrated into all aspects of a business or organization. Now more than ever, the case for corporate social justice is compelling and necessary, especially to the young professionals who will lead us all into a more equitable future.