AMERICAN JOURNAL
of LAW *and* EQUALITY

THE IRRESISTIBLE FORCE AND THE IMMOVABLE OBJECT
Students for Fair Admissions and Workplace DEI

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INTRODUCTION

What happens when an irresistible force meets an immovable object? This famous riddle seems unanswerable. No object can resist an irresistible force, which suggests that the object must move. Yet no force can move an immovable object, which suggests that the object must remain still.

This irresistible-force paradox aptly frames the impact of the U.S. Supreme Court decision in *Students for Fair Admissions v. President and Fellows of Harvard College* ("*SFFA*") on workplace diversity, equity, and inclusion ("DEI") initiatives.[1] A Supreme Court opinion on a matter of constitutional law is a seemingly irresistible force. Yet diversity, which Justice Sotomayor described in her *SFFA* dissent as a "fundamental American value,"[2] is an apparently immovable object. While the *SFFA* decision did not directly address the legality of workplace DEI programs, the irresistible force is now meeting the immovable object. Anti-DEI activists have used the logic of *SFFA* to wage a multipronged attack against DEI in lawsuits challenging corporate representation targets,[3] law firm diversity fellowships,[4]

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

2 *Id.* at 2263.

3 Taylor Telford, *A Newspaper Giant Tried to Diversify Its Staff. White Workers Sued*, WASH. POST (Nov. 4, 2023), https://www.washingtonpost.com/business/2023/10/29/gannett-diversity-lawsuit-reverse-discrimination-white-workers/.

4 Nate Raymond, *Anti-Affirmative Action Activist Targets 3 More Law Firms' Diversity Fellowships*, REUTERS (Oct. 12, 2023), https://www.reuters.com/legal/legalindustry/anti-affirmative-action-activist-targets-3-more-law-firms-diversity-fellowships-2023-10-12/.

https://doi.org/10.1162/ajle_a_00067

and even a grant program for Black women entrepreneurs.[5] They are also stoking a broader culture war, blaming DEI for everything from Claudine Gay's tenure as Harvard President to Boeing's aircraft safety failures.[6]

Some commentators have emphasized the immovability of workplace DEI, suggesting that it can continue more or less as it did under a pre-*SFFA* legal landscape. A coalition of thirteen Democratic state attorneys general published a letter in July 2023 arguing that *SFFA* did not impose any "new limits" on private-sector DEI initiatives and that companies remained free to continue their DEI work "subject to the same limitations" under federal antidiscrimination law "that have applied to them for over half a century."[7]

Others, by contrast, have argued that the irresistible force of the Court's opinion will destroy DEI. Stephen Miller, a former advisor to President Trump and president of the conservative legal organization America First Legal, has declared that "all DEI programs" are now "illegal."[8] Legal scholar Noah Feldman predicted before the *SFFA* decision that "every chief diversity officer in the country will need a new job title—and perhaps a new job."[9] After the release of the decision, he wondered: "If your whole job description has been to press for diversity, especially racial diversity, what are you supposed to do when pursuing that objective has been rendered effectively illegal?"[10]

5 Erin Mulvaney, *Minority Business Grants: A New Front in the Legal Battle Over Racial Preferences*, Wall St. J. (Jan. 31, 2024), https://www.wsj.com/politics/policy/minority-business-grants-a-new-front-in-the-legal-battle-over-racial-preferences-71625502. *See also* Theo Francis & Lauren Weber, *The Legal Assault on Corporate Diversity Efforts Has Begun*, Wall St. J. (Aug. 8, 2023), https://www.wsj.com/articles/diversity-equity-dei-companies-blum-2040b173; Andrea Hsu, *Corporate DEI Initiatives Are Facing Cutbacks and Legal Attacks*, NPR (Aug. 19, 2023), https://www.npr.org/2023/08/19/1194595310/dei-affirmative-action-supreme-court-layoffs-diversity-equity-inclusion.

6 Jay P. Greene, *Claudine Gay Is Gone, But Diversity Ideology Still Plagues Harvard*, Fox News (Jan. 4, 2024), https://www.foxnews.com/opinion/claudine-gay-gone-but-diversity-ideology-still-plagues-harvard; Fabiola Cineas, *No, DEI Isn't Making Airplanes Fall Apart*, Vox (Jan. 25, 2024), https://www.vox.com/politics/24049675/dei-boeing-airline-accidents-republicans-blame-diversity.

7 Letter from Aaron D. Ford, Attorney General, State of Nevada et al. to Fortune 100 CEOs (July 19, 2023), https://illinoisattorneygeneral.gov/News-Room/Current-News/Fortune%20100%20Letter%20-%20FINAL.pdf.

8 *America First Legal Puts Woke Corporations, Law Firms, and Hospitals on Notice: All DEI Programs and Workplace "Balancing" Based on Race, National Origin, and Sex Violate the Law*, Am. First Legal (June 29, 2023), https://aflegal.org/america-first-legal-puts-woke-corporations-law-firms-and-hospitals-on-notice-all-dei-programs-and-workplace-balancing-based-on-race-national-origin-and-sex-violate-the-law.

9 Noah Feldman, *The Supreme Court Will Make It Harder to Hire a Diverse Team*, Bloomberg (Oct. 31, 2022), https://www.bloomberg.com/opinion/articles/2022-10-31/what-the-supreme-court-s-diversity-ruling-means-for-employers.

10 Noah Feldman, *Which Corporate Diversity Efforts Are Now Illegal?*, Bloomberg (July 6, 2023), https://www.bloomberg.com/opinion/articles/2023-07-06/yes-the-supreme-court-s-affirmative-action-ruling-really-does-affect-employers.

We argue that the answer lies between these extremes. When the irresistible force of the law meets the immovable object of workplace DEI, the legal standards will be absorbed into the practice of DEI, causing it to morph as an enterprise. This outcome answers the irresistible force paradox. The force will not be resisted; it will be absorbed. And the object will not be moved; it will be transformed. In part I, we explain why the optimists about DEI are wrong to treat *SFFA* as essentially irrelevant to workplace initiatives, given that the Court's conservative supermajority has clearly signaled that it will look askance at some forms of DEI. In part II, we explain why the pessimists are wrong to predict that workplace DEI will effectively end, since even in a worst-case scenario, organizations will have ample legal room to continue this work. In part III, we argue that organizations should make several shifts to their DEI practices to put them on a firm legal footing, moving away from practices that confer "preferences" on members of legally protected groups with respect to palpable employment benefits. In part IV, we offer an affirmative vision of DEI in the new legal environment centered on the concepts of "debiasing" and "inclusive leadership."

I. WHAT THE OPTIMISTS GET WRONG

In *SFFA*, the Supreme Court ruled that the race-conscious admissions policies at Harvard University and the University of North Carolina violated the Equal Protection Clause of the U.S. Constitution and Title VI of the Civil Rights Act of 1964 ("Title VI").[11] The Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[12] Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[13]

In invalidating the universities' admissions policies, the Court definitively embraced an "anti-classification" view of racial discrimination rather than an "anti-subordination" view.[14] An anti-subordination view supports racial classifications when they advance substantive equality by helping marginalized groups overcome racial barriers or biases. On this view, affirmative action programs can be distinguished from Jim Crow laws because they redress historical subordination rather than reinforcing it. An anti-classification view

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

12 U.S. Const. amend. XIV, § 1.

13 Civil Rights Act of 1964, 42 U.S.C. § 2000d.

14 Reva. B. Siegel, *Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470 (2004). The remedial view has long been constrained in the Court's jurisprudence. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

treats a racial categorization as presumptively wrong, even where it advances the interests of a marginalized racial group. On this view, affirmative action should be viewed with the same skepticism as Jim Crow laws because they both employ racial classifications.

The six Justices in the *SFFA* majority clearly endorsed the latter view. In an echo of Chief Justice Roberts's line from the 2007 *Parents Involved* decision—"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[15]—the *SFFA* Court observed that "[e]liminating racial discrimination means eliminating all of it."[16] The Court also described "the inherent folly" of "trying to derive equality from inequality," suggesting that it finds the notion of benign racial classifications to be inherently misguided.[17]

Importantly, the *SFFA* Court did not rule on the main federal laws governing employment discrimination: Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S. Code § 1981 ("section 1981"). Title VII bars discrimination in employment by providing that it is an "unlawful employment practice" for an employer:[18]

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 1981 bars race discrimination in contracting (including in employment contracts) by providing that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[19] In essence, Title VII regulates the relationship between employers and their employees or prospective employees. Section 1981 is both wider and narrower. It is wider in that it applies to both employment contracts and other contractual relationships, such as between businesses and their suppliers. It is narrower in that it applies

15 *Parents Involved in Cmty. Schs.*, 551 U.S. at 748.

16 *Students for Fair Admissions*, 143 S. Ct. at 2161.

17 *Id.* at 2160.

18 Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

19 42 U.S.C. § 1981.

only to race discrimination and not to discrimination on the basis of sex, religion, or other nonracial classifications.

The *SFFA* decision does not bear directly on Title VII or section 1981 because the case concerned university admissions policies rather than employment practices. Nevertheless, we consider it likely that a future Supreme Court ruling will apply similar reasoning in the employment context. As Justice Gorsuch noted in a concurrence joined by Justice Thomas, the prohibition on discrimination under Title VII is "essentially identical" to the one in Title VI, meaning that the Court should presume that the terms in both statutes "have the same meaning"—namely that they "codify a categorical rule of 'individual equality, without regard to race.'"[20] More broadly, the *SFFA* Court gave the public a clear window into how it reasons about race discrimination in tightly embracing the anti-classification view.

To be sure, an anti-classification approach to employment discrimination would need to overturn two decades-old precedents that approved workplace affirmative action under Title VII. In the 1979 case of *United Steelworkers v. Weber*, the Court approved a set-aside program that reserved 50% of openings in an on-the-job craft worker training program for Black employees until the percentage of Black skilled craft workers at the plant approximated the percentage of Black individuals in the local labor force.[21] Similarly, in the 1987 case of *Johnson v. Transportation Agency*, the Court approved a plan in which the employer considered the sex of qualified applicants when promoting into "positions within a traditionally segregated job classification in which women have been significantly underrepresented."[22]

Both *Weber* and *Johnson* were grounded in an anti-subordination principle. The Court in both cases emphasized that the plans were designed to break down old patterns of hierarchy and segregation and did not "unnecessarily trammel" the interests of the dominant group.[23] In *Weber*, the Court explicitly rejected a "literal" reading of Title VII—which would prohibit race-based decision-making—in favor of one that considered the legislative history of Title VII "and the historical context from which the Act arose."[24] "It would be ironic," Justice Brennan stated for the majority, "if a law triggered by a Nation's concern over centuries of racial injustice" were to prohibit "all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."[25]

20 *Students for Fair Admissions*, 143 S. Ct. at 2209.

21 United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

22 Johnson v. Transp. Agency, Santa Clara Cnty., 480 U.S. 616, 620–21 (1987).

23 *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 637–38.

24 *Weber*, 443 U.S. at 201.

25 *Id.* at 204.

Given the anti-classification ethos in *SFFA* and the vastly different judicial philosophies of the Justices then and now, it is highly improbable that the current Supreme Court would uphold *Weber* and *Johnson*. In *SFFA* itself, the Court effectively overruled a decades-old precedent—*Grutter v. Bollinger*—that had approved holistic race-conscious admissions programs, even though it did not acknowledge doing so.[26] In a similar vein, the Court would likely either overrule *Weber* and *Johnson* explicitly or eviscerate them in substance by making it nearly impossible for employers to meet the standard of a "traditionally segregated job classification" or by making it easy for challengers to show that their interests were "unnecessarily trammeled."

The upshot of overturning *Weber* and *Johnson* would be to require strictly identity-neutral decision-making in employment practices covered by Title VII, just as the Court in *SFFA* required identity-neutral decision-making in college admissions. That is, when hiring, firing, compensating, or setting terms and conditions of employment in general, employers would not be permitted to take the characteristics protected by Title VII (race, color, religion, sex, and national origin) into account at all. It would be no defense for employers to say that they did so to advance the interests of subordinated groups in a traditionally segregated job category or to advance diversity, equity, and inclusion.

Such a ruling would imperil the most aggressive forms of DEI, such as

- Hiring quotas or set-asides (ensuring that a certain percentage of hires or promotions are reserved for women or people of color);
- Tiebreaker decision-making (considering characteristics such as race or sex when choosing among similarly strong candidates);
- Group-specific internships and fellowships (offering programs that limit eligibility to particular demographics); and
- The tying of manager compensation to diversity goals (providing bonuses or bumps in performance evaluation processes to leaders who improve diversity numbers on their teams).

26 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2175, 2207 (2023) (Thomas, J., concurring) ("The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled."); *id.* at 2239 (Sotomayor, J., dissenting) ("The Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education. The majority opinion does so by turning a blind eye to these truths and overruling decades of precedents, 'content for now to disguise' its ruling as an application of 'established law and move on.'" (quoting Kennedy v. Bremerton Sch. Dist., 597 U.S. ____ (2022) (Sotomayor, J., dissenting)).

Many such practices were already legally dubious before the *SFFA* decision. Nonetheless, progressive employers have historically been able to push the envelope due to the protections afforded by *Weber* and *Johnson* and the relative lack of activist energy directed toward challenging corporate DEI activities.[27] Now that the conservative legal movement is energized against DEI,[28] the Supreme Court may well usher in a new era in which any DEI program that appears to favor some groups (such as women, people of color, or LGBTQ+ people) over others (such as men, white people, or straight and cisgender people) will be newly scrutinized and regulated.

II. WHAT THE PESSIMISTS GET WRONG

Critically, however, a ruling that outlaws affirmative action in employment would not come close to ending DEI in the workplace. DEI and affirmative action are simply not coextensive. As legal scholar Stacy Hawkins has pointed out, traditional affirmative action involves "explicit racial and gender preferences" of the kind approved in *Weber* and *Johnson*, while workplace DEI often involves "inexplicit race- and gender-consciousness."[29] This distinction may seem a fine one, but it explains why workplace DEI will survive even a concerted legal assault. In fact, as we will explain, the distinctions between affirmative action and workplace DEI go even deeper.

A. The Current Landscape of Workplace DEI

Workplace DEI programs include a variety of practices that go well beyond those examined in *Weber* and *Johnson*. As the acronym "DEI" suggests, these programs encompass at least three different categories. Some programs focus on the "D" by aiming to diversify personnel within the organization. Some programs focus on the "E" by aiming to achieve greater equity and fairness in the organization's policies and procedures. Some programs focus on the "I" by aiming to build a more inclusive culture in which the organization's employees feel a greater sense of belonging. In addition, some organizations go beyond internal initiatives to advance the values of DEI in the broader community.

27 *See* Deborah Malamud, *The Strange Persistence of Affirmative Action Under Title VII*, 118 W. Va. L. Rev. 1 (2015) ("Unlike the case of affirmative action in higher education, there is no conservative public interest group making Title VII affirmative action its cause célèbre.").

28 Jessica Guynn, *DEI Under Siege: Why More Businesses Are Being Accused of 'Reverse Discrimination,'* USA Today (Dec. 20, 2023), https://www.usatoday.com/story/money/careers/2023/12/20/dei-reverse-discrimination-lawsuits-increase-woke/71923487007/.

29 Stacy L. Hawkins, *The Long Arc of Diversity Bends Towards Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 Univ. Md. L.J. of Race, Religion, Gender, & Class 61, 66 (2017).

To illustrate how wide-ranging such programs can be, we share this non-exhaustive table of practices that fit under the DEI umbrella:

Diversifying the organization ("D")	Achieving greater equity and fairness ("E")	Building an inclusive culture ("I")	Advancing DEI externally
Build pipeline programs to diversify the talent pool (e.g., programs at high schools, colleges, or graduate schools to give scholarship, internship, and fellowship opportunities to students from underrepresented groups)	Establish committees and task forces to address workplace inequities on issues such as race and gender (e.g., DEI committee, racial equity task force)	Create employee resource groups based on identity (e.g., Black, Asian, Hispanic, LGBTQ+, women, disabled, etc.) and fund programs for members of those groups, such as networking events, forums, and dinners	Advocate for policy reform on DEI issues, e.g., release statements in support of marriage equality or in opposition to anti-trans legislation, sign amicus briefs in court cases that implicate DEI issues
Conduct targeted outreach at colleges with diverse student populations (e.g., historically Black colleges and universities)	Audit recruitment and promotion processes to identify biases, then work to remove them (e.g., remove biased or stereotypical language from job advertisements, ensure that hiring and promotion criteria are merit based, conduct structuring interviews, etc.)	Conduct training on topics such as unconscious bias, inclusive recruitment, intergroup dialogue, or allyship to create awareness and encourage people to treat one another with greater respect and inclusivity	Diversify vendor relationships: build connections with minority-owned businesses to broaden base of suppliers

(Continued)

Diversifying the organization ("D")	Achieving greater equity and fairness ("E")	Building an inclusive culture ("I")	Advancing DEI externally
Build relationships with diverse professional groups (e.g., National Association of Black Accountants, Society of Hispanic Professional Engineers)	Establish processes for inclusive meetings and events, such as procedures for conversational turn taking and policies around inclusive scheduling in light of religious holidays and employee family commitments	Host events on DEI topics, such as a speaker series, expert-in-residence program, or DEI book club	Support community organizations focused on DEI issues through pro bono work and philanthropy, e.g., donate money to organizations that work on civil rights
Establish mentorship and sponsorship programs specifically for members of underrepresented groups	Create flexible work policies	Sponsor DEI-related celebrations such as Pride and other heritage months	
Conduct leadership development and training targeted at underrepresented groups such as women's leadership programs or talent networks for people of color	Review employee benefits policies to ensure they are equitable, e.g., ensure that parental leave policies are gender-neutral and that same-sex couples can access the same partner benefits as heterosexual couples	Create a more physically inclusive office environment, such as through all-gender bathrooms, nursing rooms, greater accessibility for disabled workers, childcare facilities, and menstrual care products in bathrooms	
Set representation targets (e.g., *X*% Black managers by *X* date)	Conduct a pay equity audit to identify and correct pay disparities	Diversify symbols and spaces, such as through diverse artwork and portraits in office settings	

(Continued)

Diversifying the organization ("D")	Achieving greater equity and fairness ("E")	Building an inclusive culture ("I")	Advancing DEI externally
Incentivize managers to hire and promote underrepresented candidates through financial bonuses or bumps in performance evaluation processes	Address inequities in allocation of work opportunities, such as mentorship, sponsorship, and stretch assignments	Conduct engagement surveys to assess employee perceptions of workplace culture	
Adopt diverse slate requirements such as the "Rooney Rule" or the "Mansfield Rule" to ensure that candidate pools are diverse			
Adopt a quota or set-aside to reserve hiring or promotion slots for members of underrepresented groups			
Use tiebreaker decision-making by considering race or sex when choosing between similarly strong candidates			

B. Distinguishing Lawful from Unlawful DEI

Even as interpreted by the current conservative Supreme Court supermajority, Title VII and section 1981 will not prohibit all DEI programs. Such interpretations will prohibit only activities that meet three criteria, which we call the "three Ps." First, the program must confer a *preference*, meaning that some individuals are treated more favorably than others. Second, the preference must be given to members of a legally *protected group*, meaning those defined by race, color, religion, national origin, sex, sexual orientation, and gender identity. Third, the preference must relate to a *palpable benefit*, such as a contract (under section 1981) or a benefit that affects an individual's employment opportunities (under Title VII). A plethora of DEI programs lack at least one of these elements.

Many DEI programs do not confer a preference. For example, an organization might require members of a promotions committee to undergo implicit bias training before making promotion decisions to mitigate bias against any group. Such a program treats all employees the same way and is perfectly consistent with an anti-classification reading of employment discrimination statutes.

To be clear, we acknowledge that many proponents of DEI do not regard *any* DEI program as conferring a "preference" in the sense of giving an unfair advantage to members of marginalized social groups. Rather, all DEI programs aim to counteract preferences in the other direction that have favored men, white people, and other dominant groups in the allocation of employment opportunities. Yet the Supreme Court has made clear in *SFFA* that it rejects this remedial view and considers programs that favor nondominant groups to be as invidious as programs that favor dominant ones.

In addition to programs that do not confer a preference, some DEI programs do not treat people differently based on whether they belong to a protected group. For instance, an organization might host an inclusion summit with opportunities to engage in networking, mentorship, and professional development training, opening the summit to any employee with an interest in DEI issues who passes a competitive selection process. Such a summit confers a preference on some employees over others by allowing only some people to attend. It also confers the preference with respect to palpable benefits by offering mentorship and training. Yet it does not allocate the preference based on protected group status.

Finally, some DEI programs do not offer palpable benefits to the recipients. For example, an organization might offer a suite of events, volunteer opportunities, and book clubs to celebrate heritage months. While these programs may improve an organization's climate of inclusion broadly speaking, or offer intangible benefits like social connections, they do not affect any individual's terms and conditions of employment or deprive anyone of an employment opportunity such as a job, a pay increase, or a promotion.

Accordingly, a wide array of DEI programs will remain lawful, even under a worst-case scenario in which the Supreme Court overturns *Weber* and *Johnson* and insists on a strict anti-classification interpretation of Title VII and section 1981.

III. WHAT ORGANIZATIONS SHOULD DO

Given our view that the field of DEI will become freshly regulated in the months and years ahead, it is imperative that organizations identify potential risks in their existing DEI programs and make adjustments to conform to the new legal landscape.

To start, organizations should work with their legal counsel to conduct a risk assessment that uses traffic-light coding to divide DEI programs into red, yellow, and green zones of legal risk based on the post-*SFFA* landscape. The red zone would include any program that confers a preference on a protected group with respect to palpable benefits, such as a diversity internship program restricted to members of historically underrepresented demographic groups. The green zone would include programs that do not satisfy at least one of the three Ps, such as a diversity and inclusion speaker series. The yellow zone would include programs with murkier legal risk. Diversity targets, for example, could be defended as purely aspirational or attacked as evidence that the employer considers race and sex in hiring and promotion decisions.[30]

Next, organizations need to consider legal risks of abandoning DEI programs. Suppose a DEI program is effective at diversifying an organization's leadership and removing the program causes the leadership to become more homogeneous. The organization might then increase its risk of being sued for disparate-impact discrimination for applying an identity-neutral promotions policy that disproportionately screens out women or people of color.[31] To take another example, suppose a DEI program has led to an improvement in inclusive leadership behaviors at the organization such that women, people of color, and LGBTQ+ people feel they are generally treated with fairness and respect. If the organization abandons the initiative and it leads to an increase in incidents of bias, the firm might increase its risk of ordinary disparate-treatment lawsuits.[32]

After examining the legal risks on both sides, a DEI risk assessment also considers social risks from both sides. One side consists of conservative stakeholders who attack DEI programs as "woke." The other side consists of progressive stakeholders who expect organizations to offer robust DEI programming. Organizations should take account of the

30 *See*, *e.g.*, Denney v. City of Albany, 247 F.3d 1172 (11th Cir. 2001); Andersen v. Mack Trucks, Inc., 118 F. Supp. 3d 723 (E.D. Pa. 2015); Powers v. Broken Hill Proprietary U.S. Inc., 2022 U.S. Dist. LEXIS 210259 (S.D. Tex. 2022).

31 Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k). Disparate-impact discrimination under Title VII is where a facially neutral policy or practice has a discriminatory effect and the challenged practice is not job-related or consistent with business necessity.

32 A disparate-treatment lawsuit under Title VII is a standard intentional discrimination claim in which a plaintiff claims to have been treated adversely on the basis of their race, color, religion, sex, or national origin.

reputational risk that it could incur from employees, prospective hires, clients, the media, and others for its decisions with respect to DEI initiatives.

Finally, after considering all legal and social risks, an organization should weigh those risks against the program's impact. An organization may be more willing to tolerate a moderate or even high legal and social risk if it determines that a particular program is extremely effective at advancing its DEI goals. Conversely, an organization might be willing to discard an ineffective DEI program even if the risks are relatively low.

For the purposes of this article, we focus only on the legal risks newly created by the *SFFA* case. Once an organization has determined that certain of its DEI programs involve unacceptable legal risk and need to be amended, we recommend several adjustments in line with the following table:

Most risky DEI	How to mitigate risk
Conferring preferences	Avoid preferences • From **lifting to leveling**
On protected groups	Avoid protected groups • From **cohorts to content** (up-switching) • From **cohorts to character** (down-switching) • From **cohorts to cohorts** (side-switching)
With respect to palpable benefits	Avoid palpable benefits • From **adverse to ambient**

Organizations can avoid "preferences" by moving from lifting to leveling. Instead of adopting DEI programs that lift some groups above others, organizations can embrace DEI actions that are identity-neutral but help level the playing field. Suppose an organization is designing a recruitment process. A "lifting" approach would provide a bump to some groups over others, such as by instructing interviewers to give priority to applicants who belong to an underrepresented cohort at the organization. A "leveling" approach would seek to remove bias from the recruitment process so that all candidates can be assessed on identity-neutral criteria of merit.

A classic example of a "leveling" approach is the use of screens for orchestra auditions. In 1970, less than 5% of musicians in the top five orchestras in the United States were women. By the mid-1990s, the percentage had increased to 25%.[33] Researchers attribute this dramatic increase in part to a simple design fix: the orchestras obscured the gender of musicians by having them audition behind a screen.[34] This reform made it harder for gender bias to influence the assessments of musical directors, enabling performers to be evaluated on their musical abilities alone.

While using a physical screen to improve the hiring process is impractical in most workplaces, behavioral economist Iris Bohnet describes how organizations can adopt similar leveling approaches.[35] Bohnet observes that open-ended interviews—where interviewers ask broad questions about a candidate's background and interests to assess their "cultural fit"—allow a variety of implicit biases to creep into the process. Interviewers favor candidates who remind them of themselves, replicating demographic disparities in the organization. To mitigate this tendency, Bohnet suggests that organizations develop merit-based criteria for assessing candidates and adopt a fixed set of questions that are asked of all candidates with a consistent scoring system. She also suggests scoring answers in real time and avoiding interviews in front of a panel where decision-makers can influence each other's assessments. Organizations that adopt such "structured" interviews do not treat any candidates more favorably than others and thus avoid any preferences that could fall short of evolving legal standards. Instead, they identify bias that is currently in the system and design a neutral process that mitigates the bias while treating all candidates equally. Any analogous DEI program that takes bias *out* of a system rather than putting bias *in* is legally safe in the same way.

33 Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians* (Nat'l Bureau of Econ. Rsch., Working Paper No. 5903, 1997), https://www.nber.org/system/files/working_papers/w5903/w5903.pdf.

34 Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 Am. Econ. Rev. 715 (2000).

35 Iris Bohnet, What Works: Gender Equality by Design 128–44 (2016).

Aside from avoiding preferences, organizations can also avoid "protected groups." There are three ways to do so—shifting from cohorts to content (up-switching), cohorts to character (down-switching), or cohorts to cohorts (side-switching).

A shift from cohorts to content means that instead of limiting access to DEI programs to members of a particular demographic cohort, an organization opens access to anyone with a demonstrated commitment to the content of the program. In the months after the *SFFA* decision, conservative legal strategist Edward Blum filed lawsuits against the law firms of Morrison & Foerster, Perkins Coie, and Winston & Strawn. He claimed that the diversity fellowships of these three prominent firms violated section 1981.[36] At the time of the lawsuits, the firms limited the programs' eligibility to students from historically underrepresented groups in the legal industry. During the litigation, however, they opened eligibility to students of any demographic background.[37] The Morrison & Foerster fellowship criteria now include whether an applicant has a "demonstrated commitment to promoting diversity, inclusion, and accessibility" and an "ability to bring a diverse perspective to the firm as a result of [their] adaptability, cultural fluency, resilience, and life experiences."[38] The Perkins Coie and Winston & Strawn fellowships have similar criteria.[39] Satisfied by these changes, Blum dropped all the lawsuits.[40]

Such a shift from cohorts to content is available to any organization that currently offers programs exclusively to particular groups, whether those programs are internships, fellowships, mentorship programs, leadership development training, retreats and conferences, or any other employment opportunity. Instead of assessing whether a candidate for the program belongs to an underrepresented cohort, an organization would instead assess whether the candidate shows a sufficient commitment to the issues animating the

36 Tatyana Monnay, *Winston & Strawn Is Third Firm Hit With Blum Group's DEI Suit*, Bloomberg Law (Oct. 30, 2023), https://news.bloomberglaw.com/business-and-practice/winston-strawn-is-third-firm-hit-with-blum-groups-dei-suit.

37 Erin Mulvaney, *Law Firms Alter Diversity Programs Amid Legal Challenges*, Wall st. J. (Oct. 9, 2023), https://www.wsj.com/us-news/law/law-firms-alter-diversity-programs-amid-legal-challenges-5608eab4.

38 *Keith Wetmore 1L Fellowship for Excellence, Diversity, and Inclusion*, Morrison Foerster, https://assets.contentstack.io/v3/assets/blt5775cc69c999c255/bltdde785224dcf46cc/6554ef52a8c641e0f7e80c21/231115-wetmore-fellowship.pdf.

39 *1L Opportunities*, Perkins Coie, https://www.perkinscoie.com/en/about-us/careers/law-students/1l-opportunities.html; *1L LCLD Scholars Program*, Winston & Strawn, https://www.winston.com/en/careers/law-students#tab-section-6.

40 Julian Mark, *Edward Blum Group Drops Suit After Perkins Coie Expands Diversity Program*, Wash. Post (Oct. 11, 2023), https://www.washingtonpost.com/business/2023/10/11/perkins-coie-dei-fellowship/; Nate Raymond, *Affirmative Action Opponent Drops Case over Winston & Strawn's Diversity Fellowship*, Reuters (Dec. 6, 2023), https://www.reuters.com/legal/legalindustry/affirmative-action-opponent-drops-case-over-winston-strawns-diversity-fellowship-2023-12-06/.

program. A "women's leadership retreat" could become a "gender equity retreat" open to employees of any gender who have shown a dedication to the advancement of women through their work experience, study, or extracurricular activities. While such a shift would ensure that no one is excluded from the retreat, the content of the program could remain the same, focused on barriers facing women in professional workplaces and strategies for overcoming gender bias.

We acknowledge the costs of such a shift. Many group-targeted DEI initiatives provide a rare opportunity for members of marginalized groups to speak openly about the challenges they experience without risking judgment from dominant-group members. Adding allies to these conversations may reduce the psychological safety in the room.[41] At the same time, such shifts have benefits beyond legal risk management. Research indicates that allies are often more effective than members of marginalized groups at advocating for diversity without incurring penalties.[42] Allowing them to participate in more DEI programs may enable them to sharpen their allyship capabilities and enhance the organization's DEI efforts overall.

The second way to avoid protected groups is to shift from cohorts to character (down-switching). Whereas up-switching zooms out from one group to all groups, down-switching zooms in from a group-level analysis to an individual one. This shift draws on an important exception in *SFFA*. The Court noted that while universities cannot use race to provide a categorical bump to some applicants over others, they can still consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[43] This exception does not allow universities to consider race by stealth, but it does allow them to tie an applicant's racial experiences to their individual qualities, such as courage, determination, or leadership skills.

As a matter of logic, the Court should allow a similar move under an analogous ruling relating to Title VII or section 1981. Employers could, therefore, invite candidates for a job, promotion, or other employment opportunity to describe how their race—or other aspects of identity—have affected their life. The selection criteria could then include a

41 Amy C. Edmondson & Kathryn S. Roloff, *Overcoming Barriers to Collaboration: Psychological Safety and Learning in Diverse Teams, in* Team Effectiveness in Complex Organizations: Cross-Disciplinary Perspectives and Approaches 186–88 (Eduardo Salas et al. eds., 2009) (defining "psychological safety" in part as "a team climate characterized by interpersonal trust and mutual respect in which people are comfortable being themselves").

42 Heather M. Rasinski & Alexander M. Czopp, *The Effect of Target Status on Witnesses' Reactions to Confrontations of Bias*, 32 Basic & Applied Soc. Psychol. 8 (2010); Jill E. Gulker et al., *Confronting Prejudice: The Who, What, and Why of Confrontation Effectiveness*, 8 Soc. Influence 280 (2013); David R. Hekman et al., *Does Diversity-Valuing Behavior Result in Diminished Performance Ratings for Non-White and Female Leaders?*, 60 Acad. Mgmt. J. 771 (2016).

43 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023).

range of identity-neutral attributes (such as resilience, grit, cross-cultural competency, or maturity) that can be gleaned from such descriptions. Even pre-*SFFA*, proponents of DEI often touted the "business case for diversity," noting that diversity can improve creativity and innovation due to the different life experiences that diverse team members bring to an organization.[44] Shifting from cohorts to character allows organizations to tap into those different life experiences directly without relying on demographics as a proxy.

The final way to avoid protected groups is to shift from cohorts to cohorts (side-switching). This approach takes the focus of a DEI program away from the classifications protected under Title VII and section 1981 (namely race, color, national origin, religion, sex, sexual orientation, and gender identity) and toward other classifications, such as age, disability, or socioeconomic status. In 2004, the Court held that the Age Discrimination in Employment Act (ADEA) did not prevent an employer from discriminating in favor of the old over the young—only in favor of the young over the old.[45] Similarly, the Americans with Disabilities Act (ADA) only prohibits discrimination against a "qualified individual on the basis of disability," and explicitly states: "Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability."[46] Accordingly, employers may still engage in explicit age-based and disability-based affirmative action in favor of older or disabled workers.

Other classifications such as socioeconomic status or "first-generation" status lie beyond the reach of legislation—we know of no law that prohibits or protects distinctions specifically on this basis.[47] As such, organizations may explicitly prefer candidates who grew up in a low-income family or were the first in their family to attend college. As such classifications are race-adjacent, we do caution here that the Court in *SFFA* warned against attempts to establish through "other means the regime we hold unlawful today," noting that "what cannot be done directly cannot be done indirectly."[48] Courts under Title VII analysis already inquire whether an employer's proffered reason for making a decision was a "pretext" for unlawful discrimination.[49] Organizations cannot, therefore, simply use

44 *See*, *e.g.*, Katherine W. Phillips, *How Diversity Makes Us Smarter*, Sci. Am. (Oct. 1, 2014), https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/; *Why Diversity and Inclusion Matter (Quick Take)*, Catalyst (June 24, 2020), https://www.catalyst.org/research/why-diversity-and-inclusion-matter/.

45 Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581 (2004).

46 Americans with Disabilities Act, 42 U.S.C. §§ 12112, 12201.

47 Some laws, however, prohibit discrimination on the basis of homelessness or public assistance status. *See* Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 Va. L. Rev. 1283, 1357–58 (2018).

48 *Students for Fair Admissions*, 143 S. Ct. at 2176.

49 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

socioeconomic status as a proxy for race. Rather, any attempt at increasing socioeconomic diversity at the organization must genuinely and consistently be aimed at socioeconomic status itself.

The final way that organizations can mitigate legal risk is to avoid palpable benefits by shifting from the "adverse" to the "ambient." The term "adverse" draws on the requirement for a plaintiff to have suffered an "adverse employment action" to bring a claim under Title VII.[50] The term "adverse employment action" is a judicial invention based on section 703 of Title VII, which lays out certain employment practices that are unlawful if they are based on race, color, religion, sex, or national origin. They include failing or refusing to hire, discharging, or otherwise discriminating against an individual "with respect to his compensation, terms, conditions, or privileges of employment."[51] They also include depriving someone of "employment opportunities" or otherwise adversely affecting their "status as an employee."[52] This discrete list of unlawful employment practices suggests there may be other employment practices that involve such *de minimis* harm that they do not give rise to liability, even when such practices are based on prohibited classifications. For instance, if an employer subsidizes a happy hour for LGBTQ+ employees to socialize with each other during Pride month, it is hard to see how a non-LGBTQ+ employee excluded from the happy hour has suffered a deprivation of "employment opportunities" or otherwise experienced discrimination relating to the terms and conditions of their employment.

In the April 2024 decision of *Muldrow v. City of St. Louis*, the Supreme Court clarified the level of harm required to establish an adverse employment action under Title VII. The Court held that while a plaintiff needs to have experienced "some harm respecting an identifiable term or condition of employment," the harm does not need to be "significant," "serious," "substantial," or "any similar adjective suggesting . . . a heightened bar.[53]

Accordingly, employees cannot sue in relation to a DEI policy simply because they find the policy objectionable on ideological grounds. The policy must have caused them "some harm." Employers can, therefore, mitigate risk by shifting away from programs that directly affect the employment opportunities of individual workers toward programs that are more "ambient" in nature. Many common DEI programs improve the overall culture of the organization without depriving any employees of job opportunities or otherwise affecting their status within the organization. Employee training on subjects such as implicit bias, allyship, and anti-racism is now a staple of DEI programming. Other examples

50 *See*, *e.g.*, Minor v. Centocor, Inc., 457 F.3d 632, 634 (7th Cir. 2006).

51 Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

52 *Id.*

53 Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024).

include efforts to create a more physically inclusive office environment, such as through all-gender bathrooms, nursing rooms, and childcare facilities; building relationships with diverse professional associations, such as the Hispanic National Bar Association or Leadership Council for Legal Diversity; and supporting community organizations focused on DEI issues, such as through pro bono work or philanthropy.

IV. A NEW ERA OF DEI

As we have discussed, these shifts provide an answer to the irresistible force paradox: DEI will not be destroyed, but instead transformed.

Now is not the first time that DEI has undergone transformation. As sociologist Frank Dobbin explains in his book *Inventing Equal Opportunity*,[54] the field of DEI is an outgrowth of the "affirmative action" and "equal opportunity" departments that proliferated in the decades following the passage of the Civil Rights Act of 1964. Dobbin argues that in response to President Ronald Reagan's attacks on affirmative action in the 1980s, organizations pivoted: "Equal opportunity policies were rewritten as diversity mission statements. Race relations workshops became diversity training seminars. Equal opportunity committees became diversity task forces."[55]

DEI might undergo a similar rebrand in response to *SFFA* and its aftermath. Political science scholar and diversity consultant Alvin Tillery, for instance, has recommended that companies stop using the acronym "DEI" or the term "diversity" to describe their work: "So the chief diversity officer is going to become the Title VII compliance officer. Inclusion training is going to be Title VII compliance training."[56] Other organizations may lean into terms like "well-being" or "employee experience."[57]

The changes we have recommended to DEI, however, go much deeper than the rhetorical. To ensure that DEI in the new era is not merely a dilution of the old approach but an effective method of achieving more just institutions, organizations need a fresh vision that remains true to the underlying ideals of DEI while complying with emerging legal standards. We argue that the most promising frameworks to achieve that end are those centered on "debiasing" and "inclusive leadership."

54 Frank Dobbin, Inventing Equal Opportunity (2009).

55 *Id.* at 136–58.

56 Julian Mark & Eli Tan, *Affirmative Action Ruling Puts Target on Corporate Diversity Programs*, Wash. Post (June 29, 2023), https://www.washingtonpost.com/business/2023/06/29/affirmative-action-business-diversity/.

57 Emily Peck, *Companies Are Backing Away from "DEI,"* Axios (Jan. 4, 2024), https://www.axios.com/2024/01/04/dei-jobs-diversity-corporate.

A debiasing approach to DEI means taking seriously the Court's pronouncement in *SFFA* that "[e]liminating racial discrimination means eliminating all of it." We know from extensive research that discrimination is pervasive and often subtle. An individual's race—or perceived race—affects their likelihood of receiving a callback for a job interview,[58] evaluations of their leadership,[59] and even response rates to their emails.[60] "Whitening" a Black or Asian person's résumé (such as by changing their name or omitting activities that would reveal their racial identity) increases their likelihood of receiving a callback.[61] Asking decision-makers to imagine an "ideal" job candidate causes them to imagine white candidates more often than Black candidates.[62] It is no wonder, then, that senior leadership ranks remain overwhelmingly white: in 2023, 86% of Fortune 50 CEOs and 90% of law firm equity partners were white.[63]

Given the context of *SFFA*, the Court's pronouncement was about eliminating racial discrimination specifically. Yet in an employment context, Title VII also prohibits discrimination on other bases: color, national origin, religion, sex, sexual orientation, and gender identity.[64] If the Court were to apply consistent reasoning in both contexts, it would endorse eliminating "all" such forms of discrimination as well. Research suggests, for example, that women are more likely than men to be interrupted,[65] to receive vague feedback,[66] to be assigned "office housework" such as scheduling meetings and organizing

58 Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991 (2004); Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Socio. 937 (2003); Lincoln Quillian et al., *Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years*, Harv. Bus. Rev. (Oct. 11, 2017), https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years.

59 Ashleigh Shelby Rosette et al., *The White Standard: Racial Bias in Leader Categorization*, 93 J. Applied Psychol. 758 (2008).

60 Katherine L. Milkman et al., *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations*, 100 J. Applied Psychol. 1678 (2015).

61 Sonia K. Kang et al., *Whitened Résumés: Race and Self-Presentation in the Labor Market*, 61 Admin. Sci. Q. 469 (2016).

62 Jazmin L. Brown-Iannuzzi et al., *Narrow Imaginations: How Imagining Ideal Employees Can Increase Racial Bias*, 16 Grp. Processes & Intergroup Rels. 661 (2013).

63 *The Diversity of the Top 50 Fortune 500 CEOs over Time*, Qualtrics (Aug. 4, 2023), https://www.qualtrics.com/blog/fortune-500-ceo-diversity/; Nat'l Ass'n for L. Placement, 2023 Report on Diversity in U.S. Law Firms (Jan. 2024), https://www.nalp.org/uploads/Research/2023NALPReportonDiversityFinal.pdf.

64 In *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), the Supreme Court held that the prohibition on sex discrimination encompassed discrimination on the basis of sexual orientation or gender identity.

65 Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 Va. L. Rev. 1379 (2017).

66 Shelley J. Correll & Caroline Simard, *Research: Vague Feedback Is Holding Women Back*, Harv. Bus. Rev. (Apr. 29, 2016), https://hbr.org/2016/04/research-vague-feedback-is-holding-women-back.

social events,[67] and to receive a lower salary when they have children.[68] They are also less likely to persuade investors to fund their business ventures, even when they make the same pitches as men.[69] Given the scope and scale of discrimination, a commitment to eliminate "all of it" would require a sweeping DEI agenda to identify and root out all forms of explicit, implicit, and systemic bias across the whole employment life cycle, from recruitment to retention to promotion.

Of course, the Court would not approve all methods of achieving that goal. For instance, as we have argued, creating an internship program that limits eligibility to certain racial groups would likely violate the anti-classification ethos in *SFFA*. Yet many debiasing techniques are not so restrictive. If bias is narrowing the applicant pool, employers can invest in pipeline programs, expand outreach, adopt pay transparency, and purge stereotypical language from job advertisements and other communications to attract a more diverse candidate slate. If bias is favoring members of dominant groups in the recruitment process, employers can set clear and merit-based hiring criteria and implement structured interviews.[70] If bias is causing some groups to experience higher rates of attrition or lower promotion rates, employers can adopt formal mentorship and sponsorship programs that are open to all but likely to benefit underrepresented groups the most.[71] They can also expand flexible work arrangements, parental leave, and childcare support;[72] reward contributions that fall disproportionately to women such as office housework;[73] and require decision-makers to undergo rigorous antibias training before making employment decisions.[74] All these approaches would remain legal even if they had the effect of helping underrepresented groups more than others. After all, a rising tide will lift all boats but will perforce have a greater effect on the boats that began at a lower starting point.

These are just a few examples of a wide array of debiasing techniques that employers can adopt in the new legal landscape. "Eliminating all" employment discrimination is a daunting task that will require a deep investment of time and resources—both to identify forms of bias in the workplace and to experiment with solutions to mitigate such bias. Yet it is also a task that has the apparent blessing of the current Supreme Court.

67 Joan C. Williams & Marina Multhaup, *For Women and Minorities to Get Ahead, Managers Must Assign Work Fairly*, Harv. Bus. Rev. (Mar. 5, 2018), https://hbr.org/2018/03/for-women-and-minorities-to-get-ahead-managers-must-assign-work-fairly.

68 Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. Socio 1297 (2007).

69 Alison Wood Brooks, *Investors Prefer Entrepreneurial Ventures Pitched by Attractive Men*, 111 PNAS 4427 (2014).

70 Bohnet, *supra* note 35, at 123–45.

71 Frank Dobbin & Alexandra Kalev, Getting to Diversity: What Works and What Doesn't 92 (2022).

72 *Id.* at 130–53.

73 Bohnet, *supra* note 35, at 195–98.

74 Edward Chang et al., *Incorporating DEI into Decision-Making*, Harv. Bus. Rev. (Sep. 1, 2023), https://hbr.org/2023/09/incorporating-dei-into-decision-making.

The second framework for a new era of DEI is one centered on the concept of "inclusive leadership." Demographic diversity is a fact of contemporary American life. More than half of Americans under the age of 18 are people of color.[75] More than a quarter of adults in Gen Z identify as part of the LGBTQ+ community.[76] Women outnumber men in the college-educated workforce.[77] Racial and ethnic diversity is increasing over time, leading some demographers to predict a "majority-minority" nation in the 2040s.[78]

The political scientist Danielle Allen has argued that under such conditions of demographic diversity, individuals need the "capacities, skills, and knowledge" to develop the "art of bridging," by which she means the "art of forming productive social relationships across boundaries of difference."[79] Allen observed that certain professionals, such as "translators, interpreters, mediators, patient advocates, community organizers engaged with diverse populations, and members of global business teams," routinely employ the art of bridging.[80] She has recommended tapping into the "tacit body of knowledge" used by such professionals "to flesh out the content of the art of bridging."[81]

DEI professionals are well situated to do the work recommended by Allen and to teach the art of bridging in workplace settings. Under the umbrella of "inclusive leadership," they can teach workers about common challenges experienced by members of particular social groups, such as the "motherhood penalty" that deprives working mothers of equal pay and the "bamboo ceiling" that impedes the advancement of Asian Americans into leadership positions.[82] They can also teach skills such as how to be an effective ally, how to communicate across cultures, and how to manage diverse teams, as well as teaching traits like resilience, curiosity, and empathy.

To make an inclusive leadership curriculum robust, organizations could embed it into performance evaluation and compensation reviews at all levels. For example, to receive

75 William H. Frey, *New 2020 Census Results Show Increased Diversity Countering Decade-Long Declines in America's White and Youth Populations*, Brookings (Aug. 13, 2021), https://www.brookings.edu/articles/new-2020-census-results-show-increased-diversity-countering-decade-long-declines-in-americas-white-and-youth-populations/.

76 Matt Lavietes, *Nearly 30% of Gen Z Adults Identify As LGBTQ, National Survey Finds*, NBC News (Jan. 24, 2024), https://www.nbcnews.com/nbc-out/out-news/nearly-30-gen-z-adults-identify-lgbtq-national-survey-finds-rcna135510.

77 Richard Fry, *Women Now Outnumber Men in the U.S. College-Educated Labor Force*, Pew Rsch. Ctr. (Sep. 26, 2022), https://www.pewresearch.org/short-reads/2022/09/26/women-now-outnumber-men-in-the-u-s-college-educated-labor-force/.

78 William H. Frey, *The U.S. Will Become "Minority White" in 2045, Census Projects*, Brookings (Mar. 14, 2018), https://www.brookings.edu/articles/the-us-will-become-minority-white-in-2045-census-projects/.

79 Danielle Allen, *Toward a Connected Society, in* Our Compelling Interests 101 (Earl Lewis & Nancy Cantor eds., 2016).

80 *Id.*

81 *Id.*

82 Correll et al., *supra* note 68; Jane Hyun, Breaking the Bamboo Ceiling: Career Strategies for Asians (2006).

bonuses or be eligible for promotion, employees could be expected to display effective allyship in addition to displaying competency on topics such as problem solving, teamwork, and critical thinking.

Many DEI professionals already impart the "capacities, skills, and knowledge" of "the art of bridging" within their organizations. This type of DEI work will become even more central to the field as other approaches to DEI involve heightened legal risk. Teaching inclusive leadership does not confer any preference on protected groups with respect to palpable benefits. To the contrary, inclusive leadership is a critical professional skill that employees of all backgrounds require to be effective in twenty-first-century American workplaces.

CONCLUSION

We opened with the irresistible-force paradox, noting that the force of the Supreme Court opinion in *SFFA* was colliding with the immovable object of workplace DEI. As we have explained, the Court's opinion will necessitate significant changes to the practice of DEI by requiring organizations to move away from approaches that confer preferences on protected groups with respect to palpable benefits (the three Ps). Yet the era of DEI is far from over.

As organizations work through the implications of *SFFA* and redesign their DEI initiatives to adapt to the new legal landscape, we argue that a focus on debiasing and inclusive leadership competencies offers a promising way forward. Everyone can be brought into the DEI tent, including members of dominant groups. Yet in return for such access, everyone should be expected to contribute to a diverse, equitable, and inclusive culture by developing a set of inclusive leadership competencies. They should also be expected to contribute to the elimination of "all" discrimination, as the Supreme Court has urged.

While the *SFFA* decision is an unequivocal setback for supporters of DEI, it will not end the work of striving for more just institutions. That value is too deeply entrenched in the minds of organizational leaders and the younger generations they are recruiting. As Justice Sotomayor noted in her dissent in *SFFA*, "[n]otwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. . . . The pursuit of racial diversity will go on."[83] The question is not whether DEI will continue but what new paths it will take going forward. We have tried here to begin to chart that course.

83 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2263 (2023).