

# DIVERSITY, EQUITY, AND INCLUSION (DEI) IN THE ERA OF HOSTILITY: A PLEA FOR ACTION AND A ROADMAP FOR MOVING FORWARD

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## INTRODUCTION

In 2020, America experienced an awakening with the death of George Floyd by the hands of police that, I argue, was a long time coming. In the wake of George Floyd's murder and the awareness of the persistent social inequities that permeated American culture, many institutions within American society, including institutions of higher education (IHEs), focused with intentionality on equity, inclusivity, and racism.<sup>1</sup> However, by 2023 multiple states led by Republican legislators proposed an onslaught of laws and regulations that impeded diversity, equity, and inclusion (DEI) efforts in higher education. In fact, Texas and Florida enacted laws that all but eliminated DEI offices in public IHEs.<sup>2</sup> Consequently, while laws proposed to eliminate DEI efforts in IHEs failed in many other states,<sup>3</sup> the hostility towards DEI efforts slowed down the momentum that was created after the death of George Floyd. This essay explores the importance of DEI in higher education, some of the legal frameworks against DEI, and the impact of counter legislation on DEI efforts in higher education. Finally, this essay offers a roadmap for future consideration so that DEI progress is not totally dismantled.

## I. IMPORTANCE OF DIVERSITY, EQUITY, AND INCLUSION IN THE MISSION OF HIGHER EDUCATION

During one of the numerous diversity trainings that I participated in, I heard the following statement, "Diversity is being invited to the dance and inclusion is being asked to dance."<sup>4</sup> This statement is a cute metaphor designed to give insight

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1. *George Floyd Is Killed By A Police Officer, Igniting Historic Protests*, HISTORY (May 24, 2021), <https://history.com/this-day-in-history/george-floyd-killed-by-police-officer>.

2. S.B. 17, 88th Leg., Reg. Sess. § 1 (Tex. 2023); S.B. 266, 2023 Leg., 125th Sess. § 4 (Fla. 2023). Texas Senate Bill 17 bans public colleges from having DEI offices or staff, requiring diversity statements, and requiring diversity training. Laws took effect January 1, 2024.

3. *DEI Legislation Tracker*, CHRON. OF HIGHER EDUC., <https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts> (last visited Feb. 16, 2024) (showing at least seventy-one bills introduced with twenty-five failing to pass).

4. Verna Myers, *Diversity is Being Invited to the Party: Inclusion is Being Asked to Dance*, YOUTUBE (Dec. 10, 2015), <https://www.youtube.com/watch?v=9gS2VPukB3M>.

to folks who simply cannot understand what diversity and inclusion mean. While I think the metaphor is limited, as it does not give much insight into who should be invited to the dance, I do think it is a point of reference for basic understanding of how the concepts of diversity and inclusion actually manifest in IHEs. Thus, receiving the invitation is the first barrier to overcome and it is where we find ourselves even after over fifty years of fighting for access. The Supreme Court laid out, over several cases, that diversity is a compelling interest for IHEs and therefore “inviting folks” to the dance was something that IHEs should be doing. The Civil Rights Act of 1964 made it illegal to discriminate against students and college applicants based on race, color, religion, or national origin.<sup>5</sup> Initially, IHEs that received federal funds were required to document their affirmative action practices and metrics.<sup>6</sup> Thus, the use of race-conscious criteria as one metric for admission was not only permitted but required.<sup>7</sup>

The Court first addressed the challenge of race-conscious admission policies in 1978 in *Regents of the University of California v. Bakke*,<sup>8</sup> where the Court allowed race-conscious policies that focused on race as a factor, but not a racial quota. The Court articulated that the goal of a diverse student body by an IHE is constitutionally permissible, albeit the method used must be narrowly tailored to meet that goal.<sup>9</sup> Moving forward the Court continued to articulate that diversity was a compelling interest to IHEs by its ruling in the landmark case of *Grutter v. Bollinger*<sup>10</sup> where Justice O’Connor promoted the virtues of diversity on university campuses.<sup>11</sup> Consistently throughout the Court’s rulings, including its most recent decision, recognition of diversity in the student body was accepted as a compelling interest of IHEs.<sup>12</sup> Specifically, the Court found that nothing prohibits universities from considering an applicant’s discussion of how race has affected their life whether through character development or a unique ability that can contribute to the university.<sup>13</sup> Therefore, the Court has continued to acknowledge that the invitation to the dance should be for everyone.

While there remains a strong focus on race-conscious efforts in higher education, an awareness of sex and gender in higher education has also been front and center with the renewed changes under Title IX of the Education Amendments Act of 1972.<sup>14</sup> Needless to say, college campuses look differently today than they did prior to the 1960s when the doors of IHEs were pried open and access was

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5. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of Titles 28 and 42 of the U.S.C.).

6. *Affirmative Action*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/affirmative\\_action](https://www.law.cornell.edu/wex/affirmative_action) (last visited Feb. 26, 2024).

7. See Mitchell F. Crusto, *A Plea for Affirmative Action*, 136 HARV. L. REV. F. 205, 211 (Jan. 2023) (discussing legal challenges to affirmative action).

8. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 267 (1978).

9. *Id.* at 312.

10. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

11. See Crusto, *supra* note 7, at 212.

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

13. *Id.* at 2176.

14. See Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 (2018).

provided to diverse students and faculty. The increased diversity of the American population has pressed IHEs to recruit and provide access to those students that reflect the communities in which they serve. However, race and gender diversity are only the surface. IHEs are filled with students from different regions offering different dialects, cultural expressions, and histories. In addition, students with visible and invisible disabilities are expanding their presence on college and university campuses, thus, making IHEs important places for people from all walks of life to converge. Another way to put it, IHEs are making the dance interesting because so many people from so many different places and backgrounds are attending.

While I think all types of diversity are important for IHEs, race is a category of diversity that is important to recognize because our country has intentionally discriminated against people because of their race. There is a need to remedy not only the past discriminatory behavior but the present-day outcomes of that past discrimination. The impact of racial discrimination is still being felt in communities that are under resourced, public schools that are unequal, and wealth that has not been accumulated over generations.<sup>15</sup> The truth is that education, while not a panacea, is the one place where ideas can be shared, lessons can be learned, and minds can grow in furtherance of expanding the democracy of America. Frankly, education makes our communities better places to live. Unfortunately, with the passage of recent laws in several states, this is changing and likely not for the better.

## II. LAWS AND POLICIES IMPACTING DEI

Recently, the Chronicle of Higher Education set out a series of articles focused on DEI efforts in colleges and universities and the hostile responses that states initiated against these efforts.<sup>16</sup> Let's just say that the responses were swift and clearly not favorable to increased efforts to focus on DEI. I should note that my promotion came because of the effort to be intentional to DEI on my campus. I will talk more about my experience later in the essay. However, there was a significant growth in job openings and opportunities in the DEI space that came about because of the intentionality of colleges and universities. Unfortunately, only a few years later those opportunities have shrunk and are all but gone.<sup>17</sup>

While many states put forth laws that were hostile to a wide range of DEI efforts, including banning of health care to trans-youth, banning or removing books that focused on DEI topics, and restructuring how DEI offices operate on college campuses, many state legislatures did not implement sweeping changes.<sup>18</sup> The

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15. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

16. *The Assault on DEI*, CHRON. OF HIGHER EDUC., <https://www.chronicle.com/package/the-assault-on-dei> (last visited Dec. 22, 2023).

17. Andrea Hsu, *Amid A Slowing Economy, Some Companies Have Been Dropping DEI Jobs*, NPR (Aug. 21, 2023, 5:04 AM), <https://www.npr.org/2023/08/21/1194972785/amid-a-slowing-economy-some-companies-have-been-dropping-dei-jobs>.

18. See generally *DEI Legislation Tracker*, *supra* note 3 (tracking where Anti-DEI legislation has been proposed).

states that did pass laws made their intentions very clear.<sup>19</sup> The two most visible and vocal anti-DEI states were Texas and Florida and they passed regulations to ensure that the cultures on their college campuses were definitely changed. It should be noted that both Texas and Florida have high numbers of minorities with a specific focus on the Latinx population (I know that this term is not preferred by many, but it is the term I can use to capture such a diverse group of people). Thus, the growing population of a more diverse population in these states only made the responses more hostile.

A. *Florida Senate Bill 266*

Florida's Governor, Ron DeSantis, has been hostile to all efforts to discuss race, sex, gender, and diversity in education. He has vehemently spoken out against Critical Race Theory being taught in schools (although it is a graduate-level theory and not taught in K-12) and has set in place an environment that prohibits that accurate teaching of history.<sup>20</sup> The culmination of his hostile efforts was the passage of Senate Bill 266.<sup>21</sup> The bill prohibits public colleges from spending money on DEI programs, and bans offering of general education courses that "distort significant historical events, teach 'identity politics' or are based on theories that systemic racism, sexism, oppression, or privilege is inherent in the institutions of the United States."<sup>22</sup> This law has effectively closed DEI offices, removed diversity statements as a part of the application package, and left IHEs in Florida struggling to figure out how to support all the students that walk through their doors. Recently, a coalition of professors and students from New College of Florida sued the institution's trustees arguing the law is vague, overly broad, and effectively deters and chills free speech.<sup>23</sup> The same can be said for Texas's passage of Senate Bill 17.

B. *Texas Senate Bill 17*

In the same vein, Texas's legislature passed stringent anti-DEI legislation in 2023. This legislation expressly prohibits establishing and maintaining a DEI office. In addition, the law prohibits the use of a DEI statement in hiring and retention and, most importantly, the law prohibits any requirement of DEI training

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19. See generally *DEI Legislation Tracker*, *supra* note 3 (tracking where Anti-DEI legislation has been proposed).

20. Hannah Natanson, *All the Ways Ron DeSantis is Trying to Rewrite Black History*, WASH. POST (July 24, 2023), <https://www.washingtonpost.com/education/2023/07/24/desantis-florida-black-history/>.

21. S.B. 266, 2023 Leg., 125th Sess. (Fla. 2023); Adrienne Lu, *Here's What Florida's Proposed Anti-DEI Regulations Would Ban*, CHRON. OF HIGHER EDUC. (Oct. 12, 2023), <https://www.chronicle.com/article/heres-what-floridas-proposed-anti-dei-regulations-would-ban> (explaining that Senate Bill 266 was signed into law May 2023 and took effect July 1, 2023).

22. S.B. 266, 2023 Leg., 125th Sess. § 9 (Fla. 2023).

23. Laura Spitalniak, *New College Group Sues Florida Over Law Restricting Instruction*, HIGHER ED DIVE (Aug. 16, 2023), <https://www.highereddive.com/news/new-college-group-sues-florida-over-restrictive-higher-ed-law/690952/>.

except where required by the federal government (Ex. Title IX).<sup>24</sup> Additionally, the legislation allows for any student or employee required to take DEI training to have standing to sue for declaratory or injunctive relief.<sup>25</sup>

These two laws create environments that are not only hostile to DEI efforts, they all but exclude any intentional DEI efforts as they relate to race and LGBTQ+ identities. Both laws provide exceptions for other forms of DEI outreach such as for first-generation students, veterans, and low-income students.<sup>26</sup> However, the overall effect is to chill any efforts related to DEI by causing mistrust, chaos, and hostility. Anyone working in this area can attest that this type of environment effectively ends DEI work in Texas and Florida, and burdens DEI efforts around the country as more state legislators become emboldened to challenge the premise of DEI efforts.

While Louisiana was able to thwart off most of the anti-DEI legislation, with a new conservative governor and a conservative legislature, many are fearful that sweeping changes to DEI efforts are forthcoming. Even in states that have not passed such sweeping legislation, hostility is on the rise against diversity statements,<sup>27</sup> required trainings,<sup>28</sup> and the overall support for DEI offices.<sup>29</sup> Let me be clear, after 2020, while there was momentum behind DEI and it felt as if substantive change was happening in terms of how our society addressed ongoing issues of race, gender, LGBTQIA+ lives and other forms of identity, there was a clear halt to any progress by 2023. In three short years, DEI went from the top of the hill to a source of contention. There is no IHE that is left untouched including those in blue states such as California.<sup>30</sup> The question is where this situation leaves IHEs as they continue to serve an ever-growing diverse student population.

### III. A PATH FORWARD

Articulating a path forward is not easy with more barriers put in the way, but it is also not a path that can stop moving forward. The population of the country is

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24. S.B. 17, 88th Leg., Reg. Sess. § 1 (Tex. 2023).

25. *Id.*

26. S.B. 266, 2023 Leg., 125th Sess. § 4 (Fla. 2023); S.B. 17, 88th Leg., Reg. Sess. § 1 (Tex. 2023).

27. Zachary Schemele, *Diversity Statements Get the Ax at Arizona's Public Universities*, CHRON. OF HIGHER EDUC. (Aug. 9, 2023), <https://www.chronicle.com/article/diversity-statements-get-the-ax-at-arizonas-public-universities> (highlighting that amid conservative criticism, public universities in Arizona have scrapped the use of diversity statements in the hiring process).

28. S.B. 364, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023); S.B. 2247, 68th Leg. Assemb. (N.D. 2023); S.B. 102, 113th Gen. Assemb., First Reg. Sess. (Tenn. 2023); H.B. 158, 113th Gen. Assemb., First Reg. Sess. (Tenn. 2023).

29. Maggie Hicks, *Diversity Chief at U. of South Carolina Has "Diversity" Stripped from His Title*, CHRON. OF HIGHER EDUC. (Aug. 22, 2023), <https://www.chronicle.com/article/diversity-chief-at-u-of-south-carolina-has-diversity-stripped-from-his-title> (highlighting that some institutions have renamed or dissolved DEI offices or fired or repositioned DEI officers).

30. Adrienne Lu, *Diversity Statements Violate First Amendment, Professor Says in Suing U. of California*, CHRON. OF HIGHER EDUC. (May 19, 2023), <https://www.chronicle.com/article/diversity-statements-violate-first-amendment-professor-says-in-suing-u-of-california> (exploring lawsuits against the use of diversity statements in hiring practices).

more diverse than ever, and the students projected to enter higher education in the future are majority non-white.<sup>31</sup> In our society, we have an increase in people with visible and invisible disabilities, including mental health needs, and we have an ever-growing population of people who identify as LGBTQIA+.<sup>32</sup> Thus, IHEs must find a path forward in order to meet the population of students they will see on their campuses. My experience working at the Southern University Law Center (SULC), a historically Black college and university (HBCU) in Louisiana, provides me insight and confirmation that this work can be done even with headwinds against DEI.

A. *HBCUs and MSIs as a Roadmap*

Historically Black colleges and universities (HBCUs) are those institutions that were established prior to 1964<sup>33</sup> with the mission of educating students who were not allowed education at traditional institutions. Since their founding, HBCUs have succeeded in moving many Black students into the middle class.<sup>34</sup> However, HBCUs do not exclude admissions of other students and, in fact, have intentionally expanded recruitment of non-Black students. HBCUs value diversity for its educational and societal benefits and believe exposing students to different sociocultural identities is necessary to prepare them to succeed in an increasingly multicultural world.<sup>35</sup> HBCUs have admissions strategies that are focused on the holistic view of a potential student and hiring practices that recruit faculty that are qualified and can teach students from a variety of backgrounds and experiences. HBCUs are not monolithic by any means but have shown themselves to be true to educating a wide range of students thereby holding true to what education should be: an opportunity for success.

In the same vein, minority serving institutions (MSIs) are a broader designation for IHEs that enroll a significant portion of minority students including, Hispanic, Asian American, Pacific Islander, and Native American students.<sup>36</sup> In addition, MSIs (including HBCUs) enroll a disproportionate amount of low-income and first-generation students.<sup>37</sup> These institutions focus on a framework that brings DEI into action. For example, student success is a central

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31. Janie Boschma, *Census Release Shows America is More Diverse and More Multiracial Than Ever*, CNN (Aug. 12, 2021, 8:36 AM), <https://www.cnn.com/2021/08/12/politics/us-census-2020-data/index.html>.

32. Scottie Andrew, *More US Adults Identify as LGBTQ now Than at any Time in the Past Decade, a New Poll Says*, CNN (Feb. 17, 2022, 2:36 AM), <https://www.cnn.com/2022/02/17/us/lgbtq-population-increase-gallup-cec/index.html>.

33. LORELLE L. ESPINOSA ET AL., *MINORITY SERVING INSTITUTIONS AS ENGINES OF UPWARD MOBILITY* 3 (2018).

34. *HBCUs Fuel the American Middle Class*, UNCF (Nov. 18, 2021), <https://uncf.org/news/hbcus-fuel-the-american-middle-class>.

35. Mariah Stewart, *HBCUs Are Becoming More Diverse, But Not Everyone Considers That a Good Thing*, INSIGHT INTO DIVERSITY (Feb. 10, 2021), <https://www.insightintodiversity.com/hbcus-are-becoming-more-diverse>.

36. *Minority Serving Institutions Program*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/pmb/eo/doi-minority-serving-institutions-program> (last visited Feb. 26, 2024).

37. ESPINOSA ET AL., *supra* note 33, at 10.

focus of MSIs. They take underserved students from a multitude of backgrounds and provide them with access to higher education. There are numerous reports of these institutions doing this work and producing great results despite their limited resources.<sup>38</sup> In addition, MSIs have created pipelines for diverse talent whereby you find large numbers of underrepresented minorities in tenured positions and administrative positions.

I should note that HBCUs such as SULC have some of the most diverse faculty in IHEs.<sup>39</sup> While diversity in students and faculty are important factors, community impact is the most significant key in diversity. The importance of diversity does not lie in diversity for diversity's sake nor in the numbers (although representation is important). The force behind diversity is the positive change that can come from it. Therefore, how we educate students and send them out into communities to make changes necessary to establish and maintain a strong democracy is key. MSIs are doing that every day. Let me be clear that the anti-DEI movement is placing a weight around the necks of institutions and those focused on DEI work, but this does not mean that the work stops, nor does it mean that there are no options. In fact, it can be argued that institutions became lazy in their efforts and now, with the narrowing of affirmative action and a slew of anti-DEI laws, there is a jolt to the system. This is where the rubber meets the road and if IHEs are serious about meeting the needs of a diverse population, they must continue to find avenues to meet those needs. I strongly encourage IHEs to not give up but, in fact, work smarter on efforts to make campuses a welcoming place for all.

### B. *Institutional Framework*

As I think through the path forward for DEI principles, I continue to advocate for a more systemic framework for the *actual* principles of DEI. Frankly, I advocate for the principles of DEI to be more action oriented and less programmatic. When I received my promotion to Associate Vice Chancellor for Equity, Inclusion & Title IX in July 2021, there was momentum for change. I believed this new role would allow me to make some of the substantive changes that I thought were needed to meet the needs of 21st Century students and to update the workplace to have more engaged and productive workers. The environment was ripe with energy and there was not only institutional support for discussions on implicit bias, racism, equity, and cultural competency, but there was a regulatory framework in place specifically for law schools. For example, the American Bar Association passed new rules for accreditation requiring law schools to provide education to law students on bias, cross-competency, and racism.<sup>40</sup>

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38. Ayesha Rascoe, *HBCUs Have Been Underfunded for Decades. A History of Higher Education Tells Us Why*, NPR (Feb. 12, 2023, 8:01 AM), <https://www.npr.org/2023/02/12/1156391898/hbcus-have-been-underfunded-for-decades-a-history-of-higher-education-tells-us-why>.

39. *Most Diverse Faculty*, PRINCETON REV., <https://www.princetonreview.com/law-school-rankings?rankings=most-diverse-faculty> (last visited Dec. 23, 2023).

40. ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 2023-2024, Standard 303(c) (AM. BAR ASS'N 2023).

However, there was little in the way of substantive structure or, as I like to say, “meat on the bones” for this type of change.

Most schools and their new DEI teams began with programming or “training”, but there was really no way to gauge the efficacy of the “training” or programming. Furthermore, the data showed that DEI trainings were not effective in moving the ball forward on the stated goals of helping to create a positive and welcoming institutional environment by changing behavior.<sup>41</sup> From my viewpoint the priority was to establish what my institution’s goals were and then create the framework to help reach those goals. I had no issue with my new office using programming and panel discussions as the starting point of the framework that I used to meet institutional goals. After the first year, I knew that I wanted to establish an institutional framework for implementing DEI initiatives. For example, instead of only offering programming on women in leadership, I proposed initiatives that would make flex work an option for employees because I knew that those in caregiving roles needed those options. Furthermore, I knew from our employee data that our large employee group of Black women would greatly benefit from this type of option. Thereby, making a substantive change in the lives of Black, female workers.

For anyone who works in higher public education, we know that there are layers of bureaucracy that must be crossed before any changes can be made but that should not stop the process from moving forward with the needed changes. With the steady trickle of disdain for anything DEI in colleges, businesses, and state legislatures, it is a necessity to move from a programmatic framework to an institutional framework where it does not matter if you use the language of DEI, but instead what matters is if you do the work of DEI. For example, law professors do not need to state that they are covering equity when they cover *Brown v. Board of Education*<sup>42</sup> because they can cover the case exactly as it was written and navigate through the legal reasoning, the multiple follow-up cases, and even discuss the state of current public education. No student can leave that class discussion without recognizing inequality; even those students that hate any forced DEI efforts.

Thus, institutional frameworks give IHEs the ability to not have DEI as a separate office or tangential part of learning but to incorporate DEI into everyday workings of the institution. Training on DEI is not the same thing as doing DEI work. I do believe that the growing hostility towards DEI is now forcing institutions to no longer rely on low-impact initiatives but to thoughtfully consider how to really diversify their faculty and administration, broaden recruitment and admissions policies and procedures, and create environments that are accessible to all that attend the institution. In my book, this is not the end but simply a new beginning.

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41. Musa al-Gharbi, *Diversity is Important. Diversity-Related Training is Terrible*, HETERODOX ACAD. (Sept. 16, 2020), <https://www.musaalgharbi.com/2020/09/16/diversity-important-related-training-terrible> (highlighting the ineffectiveness of DEI training on changing behavior).

42. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).