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Lisa M. Fairfax

University of Maryland
School of Law

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THE BOTTOM LINE ON BOARD DIVERSITY: A COST-BENEFIT ANALYSIS OF THE BUSINESS RATIONALES FOR DIVERSITY ON CORPORATE BOARDS

LISA M. FAIRFAX*

INTRODUCTION

In recent years, a small, but growing, number of scholars have relied upon market-based or economic-based rationales to support increasing corporate board diversity—defined as the percentage of racial or ethnic members on a board.[1] Relying on these "business rationales," scholars contend that corporations should encourage board diversity because such diversity not only increases the overall effectiveness of the board and hence the corporation, but also enhances the corporation's profitability.[2] Consistent with these rationales, some scholars argue that board homogeneity, like that embodied in Enron's board, which consisted of

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* Associate Professor of Law, University of Maryland School of Law. J.D. Harvard Law School; A.B., Harvard College. I would like to thank Roger A. Fairfax, Jr., Professor Taunya Banks, Professor Richard Boldt, Dean and Marjorie Cook Professor of Law Karen Rothenberg, as well as participants and organizers of faculty workshops at the University of Maryland School of Law, the University of Pittsburgh Law School, and Case Western Reserve Law School for their comments and suggestions on earlier versions of this Article. Special thanks to Aja Claire Byrd for her research assistance on this Article. All errors, of course, are mine.

1. While this Article recognizes that there are many different forms of diversity, including racial, gender, and viewpoint diversity, this Article focuses on racial and ethnic diversity and its ability to impact corporate board behavior. While this Article draws some parallels to issues of gender diversity, this Article is limited to the impact of racial and ethnic diversity on boards, and the author looks forward to more fully exploring issues of gender diversity in later scholarly works.

2. *See, e.g.*, Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1403–05 (2002) (noting that the movement for diversity on corporate boards has the potential to counter a corporate environment focused exclusively on stock price); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306–08 (2003) (noting that "diversity may enhance board effectiveness"); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85 (2000) [hereinafter Ramirez, *Diversity in the Boardroom*] (outlining the importance of diversity to American businesses generally, and boards of directors in particular); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837 (2003) [hereinafter Ramirez, *Sarbanes-Oxley Reform*] (arguing that board diversity can improve the board's monitoring function); Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. FOR SOC. JUST. 457, 494 (2002) (noting that "[d]iversity can enhance corporate governance" in a variety of ways).

directors who were virtually all white and all male,[3] may prevent directors from considering alternative views and engaging in the critical thinking necessary to make informed decisions or serve as active monitors.[4] Board diversity may counteract this problem, thereby ensuring that directors more appropriately perform their managerial and monitoring duties. Other scholars have asserted that board diversity can have a positive impact on the corporation's bottom line by improving a corporation's ability to interact with its increasingly diverse employees, customers, and clients.[5]

While these business rationales appeared to have garnered little, if any, attention among legislators engaged in corporate governance reform,[6] they have gained better traction among both business leaders and judges who maintain that encouraging diversity at all levels of a corporation is critical to the profitability and viability of a corporation. The U.S. Supreme Court's recent *Grutter v. Bollinger*[7] decision, and the briefs on which that opinion relies,[8] reflects one of the most prominent examples of this acceptance. In that case, the Supreme Court relied, in part, on statements from business leaders regarding the importance of diversity in corporate America to uphold affirmative action within the University of Michigan Law School.[9] Indeed, sixty-five of the nation's

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3. Apparently, of the fourteen Enron directors, only one was a woman, while three were people of color—one Hispanic, one African American, and one Asian (who was also the one woman). *See* O'Connor, *supra* note 2, at 1306 n.423. Hence, eleven of the fourteen directors were white, while thirteen of the fourteen directors were men.

4. *See, e.g.*, *id.* at 1306.

5. *See, e.g.*, Dallas, *supra* note 2, at 1365–66; Ramirez, *Diversity in the Boardroom*, *supra* note 2, at 93–95.

6. Many reforms were enacted post-Enron, most notably the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), along with reforms to the listing requirements of various agencies involving corporate governance matters. *See* Troy A. Paredes, *Enron: The Board, Corporate Governance, and Some Thoughts on the Role of Congress*, *in* ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 495, 515–19 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (discussing some reforms); *see also infra* Part I.B. None of these measures require, or even recommend, increased board diversity.

7. 539 U.S. 306 (2003). On the same day the U.S. Supreme Court issued its opinion in *Grutter*, it held in another opinion that the University of Michigan College of Arts and Sciences's admission policy, which was based on a point system, violated the Equal Protection Clause of the Fourteenth Amendment because it was not narrowly tailored. *See* Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

8. *See* Brief for *Amici Curiae* 65 Leading American Businesses in Support of Respondents, *Grutter* (No. 02-241), and *Gratz* (No. 02-516) [hereinafter 65 Leading American Businesses Brief]; Brief of General Motors Corporation as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241), and *Gratz* (No. 02-516) [hereinafter GM Brief].

9. *See Grutter*, 539 U.S. at 330. In addition to relying on American businesses' assertions of the importance of diversity to corporate America to buttress its claim that a law school's desire to attain diversity was a compelling state interest, the Court relied on assertions from high ranking military officers who emphasized the importance of a

top businesses filed an amicus curiae brief urging the Court to find that diversity within America's law schools represented a compelling government interest because "the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints,"[10] and such exposure is needed at "every level of an organization."[11] General Motors Corporation, which filed a separate brief, argued that "the future of American business and, in some measure, of the American economy depend[ed]" on allowing "academic institutions to select racially and ethnically diverse student bodies."[12] In the Supreme Court's view, these kinds of assertions represented "real," "not theoretical," evidence that corporations needed a diverse student population from which they draw their workforce to perform effectively in the marketplace.[13] In accepting this evidence, the Supreme Court seemingly endorsed various business rationales for diversity—rationales which have implications for board diversity.

This Article critically examines the viability of these business rationales for diversity in an effort to determine whether such rationales can or should be used as a basis for justifying efforts to increase board diversity.[14] This examination reveals that such rationales promise more—and in some cases significantly more—than directors of color can realistically deliver. In addition, this Article concludes that while there may be practical reasons for adopting business rationales, there are also individual and societal costs associated with adopting such rationales as the dominant, if not sole, strategy for achieving diversity, which appear to have been ignored or underappreciated.

By way of background, Part I of this Article provides data on the current status of racial and ethnic diversity within corporate boards, and reveals the basic lack of diversity within the boardrooms of most major corporations. Part I also examines measures enacted in response to recent corporate governance scandals in order to assess whether those measures will lead to an increase in the number of board members of color. This Part concludes that while some measures may open the door for enhancing board diversity, others may undermine such enhancement,

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"racially diverse officer corps," noting that all selective institutions must remain both diverse and selective. *Id.* at 331.

10. 65 Leading American Businesses Brief, *supra* note 8, at 5.

11. *Id.* at 5–6.

12. GM Brief, *supra* note 8, at 2.

13. *Grutter*, 539 U.S. at 330 (stating that diversity in schools "'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals'") (quoting Brief for American Educational Research Association et al. as *Amici Curiae* at 3, *Grutter* (No. 02-241), and *Gratz* (No. 02-516)).

14. For a critical examination of the business rationales for diversity in the context of lawyers in corporate law firms, see David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

particularly measures that focus on recruiting directors with a particular financial background.

Part II critically assesses the various business rationales legal scholars and business leaders have advanced, including those who signed onto amicus curiae briefs in the Supreme Court's *Grutter* decision, in order to determine whether directors of color can achieve the claims underlying those rationales. This Part also evaluates available empirical research on the impact of diversity on the corporation's bottom line, and explores whether such research and arguments used to support corporate diversity more generally can be applied to boards and the specific obligations they undertake. In addition, Part II explores social science data on group and corporate decision-making to ascertain the applicability of that data to racial and ethnic board members. Part II concludes that directors of color may not be able to achieve many of the objectives underlying the business rationales for diversity—particularly when those objectives are viewed in the context of the roles such directors undertake and the current manner in which boards are constructed.

In light of this conclusion, Part III focuses on whether those interested in board diversity should rely upon business rationales by weighing some of the practical benefits of such rationales against their costs to individual directors of color and the communities from which they come. This Part begins by acknowledging that the adoption of business rationales represents a strategic response to the apparent rejection of more traditional moral and social justifications for diversity, and hence such rationales may be viewed as a second best alternative for achieving diversity. However, this Part warns that adopting this alternative does have individual and societal costs that have not been fully examined. In particular, this Part demonstrates that embracing rationales encouraging overextension and marginalization of directors of color may not only undermine the effectiveness of individual directors, but may also undermine future diversity efforts.

Drawing on literature regarding the effects of universal commodification, Part III also suggests that, given the historically negative treatment of racial groups within our nation, relying on rationales that encourage corporations and society to view people of color[15] as commodities is not only morally troublesome, but may also have the practical impact of encouraging the devaluation of such people. This Part also points out that shifting rationales for diversity away from moral or social justifications may be interpreted as an acknowledgement of the illegitimacy of those justifications, and argues that there are costs associated with that acknowledgement. Finally, this Part asserts that even if business rationales prove beneficial to diversity efforts in the short

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15. This Article uses the term "people of color" generally to refer to African Americans, Hispanic Americans, Asian Americans, and Native Americans as a group.

term, ceding the moral and social justification for diversity to economic or business ones could have long-term negative repercussions for maximizing diversity both inside and outside of the corporate boardroom.

This Article therefore concludes that there are considerable reasons to be cautious regarding embracing business rationales, not only because they create unrealistic expectations about the manner and extent that directors of color can impact a corporation's bottom line, but also because their costs may outweigh their practical benefits, particularly if those rationales represent the dominant or sole justification for achieving board diversity.

I. DIVERSITY AND CORPORATE BOARDROOMS: A VIEW FROM THE TOP

A. Analyzing the Empirical Evidence on Board Diversity

At first glance, the story about racial diversity within the boardroom appears to be a good one because many American corporations have at least some diversity in their boardrooms, and the number of board members of color has grown over the past decades. A 2004 Korn/Ferry International study of board membership revealed that 76% of *Fortune* 1000 companies have at least one member of an ethnic minority on their board of directors.[16] This reflects a 5% increase from two years prior, and

16. KORN/FERRY INT'L, 31ST ANNUAL BOARD OF DIRECTORS STUDY 2004, at 11 (2004) [hereinafter 2004 KORN/FERRY STUDY]. It is apparently very difficult to determine with accuracy the number of directors of color on corporate boards. Indeed, according to Catalyst, a leading research and advisory organization working to advance women in business, the racial and ethnic composition of boards is not publicly available. CATALYST, 2003 CATALYST CENSUS OF WOMEN BOARD DIRECTORS: A CALL TO ACTION IN A NEW ERA OF CORPORATE GOVERNANCE (FACTSHEET) 2 (2003), *available at* http://www.catalystwomen.org/bookstore/files/fact/WBD03factsheetfinal.pdf. Hence, researchers must rely on company responses. *See id.* This difficulty may explain why many of the studies on director diversity report conflicting numbers. Then, too, these numbers may be viewed with some skepticism because of the reporting bias—the notion that companies with the greatest amount of diversity will be most likely to respond to surveys on board diversity.

This Article relies primarily on data collected by Korn/Ferry International because that study appears to involve the greatest number of companies and responses. Its 2004 study was based on data collected from 904 proxy statements and responses from nearly 1000 directors of *Fortune* 1000 companies. 2004 KORN/FERRY STUDY, *supra*, at 4, 9. Similarly, its 2003 study was based on responses from 1362 directors of *Fortune* 1000 companies and data from over 900 companies. Korn/Ferry Int'l, Publications: 30th Annual Board of Directors Study 2003 (2003), *available at* http://www.kornferry.com/Library/Process.asp?P=Pubs_Detail&CID=960&LID=1. It is also consistent with some other studies. A 2000 study by *Fortune* magazine revealed that about 65% of *Fortune* 1000 companies had at least one member of an ethnic minority on the board. *See* Stephanie N. Mehta, *What Minority Employees Really Want*, FORTUNE, July 10, 2000, at 180, 182–83. A 2000 study by the Investor Responsibility Research Center found that 67% of Standard & Poor's (S&P) 500 companies had at least one person of color on their board. Press Release, Investor Responsibility Research Center, IRRC

a 32% increase from ten years ago.[17] According to the Korn/Ferry study, African Americans account for 47% of such seats, as compared to 31% in 1994; Latinos hold 18%, as compared to 9% in 1994; and Asian Americans hold 11%, as compared to 4% in 1994.[18] Moreover, in 1973, only 7% of *Fortune* 1000 companies had boards containing at least one ethnic minority.[19] Hence, the last thirty years has seen a considerable increase in the number of people of color serving as directors of major corporations.

A closer inspection reveals a different tale because such people only hold a small percentage of overall board seats. Of course, if 76% of companies have at least one person of color on their boards, then the Korn/Ferry study demonstrates that nearly a quarter of *Fortune* 1000 companies do not have any people of color on their boards.[20] Moreover, studies reveal that people of color hold only 6.9% of the more than 11,500 board seats available within *Fortune* 1000 companies.[21] More

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Releases 2000 Board Practices Report (Dec. 1, 2000), *available at* http://www.irrc.org/company/12012000boardprac.html. That study provided data from 418 S&P 500 companies. *Id.*

17. 2004 KORN/FERRY STUDY, *supra* note 16, at 11–12 (noting that in 2002, 71% of *Fortune* 1000 companies had at least one or more ethnic minorities on their board, and in 1994, only 44% of *Fortune* 1000 companies had at least one or more ethnic minorities on their boards). According to the 2004 Korn/Ferry study, 75% of companies had one or more ethnic minorities on their boards in 2003, as compared to 71% in 2002, 68% in 2001, 65% in 2000, 65% in 1999, and 47% in 1995. *Id.* at 12. The 2004 Korn/Ferry study also found that 82% of *Fortune* 1000 companies had at least one woman on their boards in 2004, compared to 63% in 1994. *Id.* at 11.

18. *Id.* at 11. According to the study, African Americans held 34% of minority-held board seats in 1995, 41% in 1999, 41% in 2000, 42% in 2001, 44% in 2002, 47% in 2003, and 47% in 2004. *Id.* at 12. Latinos held 9% in 1995, 14% in 1999, 14% in 2000, 16% in 2001, 17% in 2002, 19% in 2003, and 18% in 2004. *Id.* Asian Americans held 4% in 1995, 10% in 1999, 11% in 2000, 10% in 2001, 10% in 2002, and 10% in 2003, and 11% in 2004. *Id.*

19. Bus. for Soc. Responsibility, Issue Brief: Board Diversity, *available at* http://www.bsr.org/CSRResources/IssueBriefDetail.fcm?DocumentID=443 (last visited July 23, 2005).

20. *See* 2004 KORN/FERRY STUDY, *supra* note 16, at 11.

21. *See* Gary Strauss, *Microquest Study Finds: Good Old Boys' Network Still Rules Corporate Boards*, USA TODAY, Nov. 1, 2002, *available at* http://www.mqc.com/USAtoday.html. According to the study, 492 people of color hold 798 of 11,500 board seats. *Id. Fortune* magazine reports that people of color comprised 21% of boards in 2003, 19% in 2002, and 11% in 2001. Cora Daniels, *50 Best Companies for Minorities*, FORTUNE, June 28, 2004, at 136, 138. However, the data may cover more than *Fortune* 1000 companies because *Fortune* contacted *Fortune* 1000 companies and 200 of the largest privately held U.S. companies. *Id.* at 140. That report did not indicate the number of responses on which it was based. However, an earlier report stated that people of color made up 19% of boardrooms in 2003, 18% in 2002, and 11% in 2001. Jonathan Hickman et al., *50 Best Companies for Minorities*, FORTUNE, July 7, 2003, at 103, 103. That study was based on 141 responses from *Fortune* 1000 companies and the 200 largest privately held U.S. companies. *Id.*; *see also* Jeremy Kahn, *Diversity Trumps The Downturn*, FORTUNE, July 9, 2001, at 114, 115 (commenting on data). Interestingly, the two studies appear to report inconsistent data. Then too, there may be an even greater

specifically, African Americans hold roughly 3.3%, Asian Americans hold nearly 1.9%, and Latinos hold approximately 1.6% of the board seats of *Fortune* 1000 companies.[22] Similarly, people of color account for only 8.8% of the board seats at Standard & Poor's (S&P) 1500 companies.[23] These numbers reveal that people of color occupy only a small portion of corporate board seats.

The empirical evidence on board seats also reveals that people of color hold a smaller percentage of board seats relative to their percentage of the population and the workforce. A recent report conducted by the U.S. Census Bureau found that racial and ethnic minority groups made up about 29% of the nation's population.[24] The most recent U.S. census report in 2000 found that people of color represent a majority of the population in almost half of the nation's 100 largest cities.[25] Moreover, one researcher estimates that by 2050, people of color will constitute almost half of the nation's population.[26] Another study estimates that during this decade, minorities, immigrants, and women will occupy 85% of all new jobs.[27] When viewed against their percentage in the population and workforce, therefore, racial and ethnic minorities appear to be underrepresented in corporate boardrooms.

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reporting bias in the context of the *Fortune* survey because it is designed to determine the top companies for people of color. One may expect, therefore, that companies with policies favorable towards people of color, including policies that ensure a high percentage of such people in their upper ranks, would be more likely to respond to the survey than those without such policies. In this sense, the study may be skewed to producing more positive results. It is also worth noting that the sample size in at least one of the studies is only 141 responses out of a possible 1200. Such a small sample size not only calls the data into question, but also the relatively large number of nonresponses could be interpreted to reflect a lack of concern for diversity within the nation's top corporations.

22. *See* Strauss, *supra* note 21. According to the study, 186 African Americans hold 388 seats, 176 Asian Americans hold 223 seats, while 129 Latinos hold 186 seats. *Id.*

23. *See* Carol Hymowitz, *Corporate Boards Lack Gender, Racial Equality*, WSJ.COM (July 9, 2003), *at* http://www.careerjournal.com/columnists/inthelead/20030709-inthelead.html. The Investor Responsibility Research Center found that 7.4% of board seats were held by people of color in 2000. *See* Press Release, *supra* note 16.

24. *See* POPULATION ESTIMATES PROGRAM, U.S. CENSUS BUREAU, POPULATION ESTIMATES FOR STATES BY RACE AND HISPANIC ORIGIN: JULY 1, 1999, *available at* http://www.census.gov/population/estimates/state/srh/srh99.txt.

25. Brookings Inst. Ctr. on Urban & Metro. Policy, *Census 2000 Matters: Racial Change in the Nation's Largest Cities: Evidence from the 2000 Census* (Apr. 2001), *available at* http://www.brookings.edu/es/urban/census/citygrowth.htm. In 1990, whites represented more than 50% of the population in seventy of the 100 largest cities. By 2000, whites were a majority in only fifty-two of those cities. *Id.*

26. *See* Jon Meacham, *The New Face of Race*, NEWSWEEK, Sept. 18, 2000, at 38, 40 (estimating that 47% of Americans will be African American, Latino, Asian American, or Native American).

27. *See* DIVERSITY BEST PRACTICES & BUSINESS WOMEN'S NETWORK, BEST OF THE BEST: CORPORATE AWARDS FOR DIVERSITY & WOMEN 2003–2004, at 11 (2004), *available at* http://www.diversitybestpractices.com/pdf/taste_bob04.pdf.

Further dissection of the empirical data on board diversity reveals an even more troubling story because racial minorities tend to hold multiple directorships, a phenomenon unique to racial minorities, and African Americans in particular. Thus, a 2002 study revealed that of the approximately 4300 people who serve on boards of S&P 500 companies, only twenty-seven sit on five boards or more.[28] Seven of these twenty-seven board members are African American.[29] Moreover, of the 4300 S&P 500 board members, only five sit on six boards or more, and four out of these five board members are African American.[30] Thus, while relatively few whites hold multiple board positions, most of the board positions held by African Americans tend to be held by a subset of that group. This has led one commentator to note, "there is no real diversity in the diversity of corporate boards."[31] In other words, the raw number of people of color serving on boards is lower than the data suggests because it reflects the multiple directorships held by racial minorities.

Taken together, and regardless of the yardstick one utilizes, the view from the top reveals that corporate boards lack diversity. Certainly, there has been some historical increase within the last thirty years, ensuring that corporations have at least a minimum amount of diversity among their directors. However, as a group, these corporations have not moved beyond the minimum. This is reflected not only by comparing the percentage of people of color on boards to their percentage in the workforce and population more generally, but also from the realization that the relatively high number of directors of color serving on multiple boards means that the actual number of people of color who serve on boards is lower than the empirical data indicates.[32] The empirical data therefore suggests that our corporate structure continues to be a

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28. Dan Ackman, *Black Directors: Diversity Without Diversity*, FORBES.COM (Aug. 8, 2002), *at* http://www.forbes.com/2002/08/08/0808blackdirectors.html.

29. *Id.* Those seven are Shirley A. Jackson, president of Rensselaer Polytechnic Institute; William H. Gray III, president of the United Negro College Fund; Franklin Thomas, former president and chief executive officer (CEO) of the Ford Foundation; Vernon Jordan, lawyer and investment banker; James A. Johnson, vice chairman of Perseus; Louis Sullivan, former U.S. Secretary of Health and Human Services and president emeritus of the Morehouse School of Medicine; and James Cash, Jr., professor at Harvard Business School. *Id.* Moreover, Ann Jordan, Vernon Jordan's wife, sits on three boards, meaning that she and her husband together hold nine board seats. Lynn Norment, *Black Women on Corporate Boards*, EBONY, Mar. 2002, at 42, 42, 46.

30. Ackman, *supra* note 28.

31. *Id.*

32. It is difficult to have a discourse regarding board diversity without an empirical context that serves to outline the contours of the issue. The fact that the empirical data on board diversity appears relatively unreliable, therefore, should represent cause for concern, and suggests that diversity advocates should push for public disclosure of such information.

demographic pyramid with the bulk of our diversity reserved for the bottom portions of that pyramid.[33]

B. Diversity and Board Reforms: A Silver Lining to Corporate Scandals?

Arguably the positive by-product of corporate governance scandals has been the increased attention to, and reforms aimed at, addressing shortcomings in America's corporate governance system.[34] Indeed, Enron caused business and government leaders to assess more critically the effectiveness of corporate governance mechanisms and ultimately to alter those mechanisms.[35] While no reform measure specifically requires, or even strongly encourages, increased diversity on corporate boards, some measures offer the potential for such an increase to occur. However, if corporations focus on recruiting directors with traditional financial backgrounds, then this potential may not be realized.

In general, reform efforts aimed at corporate boards increase the likelihood that corporations must recruit new board members, thus expanding opportunities for all new board members, including racial and ethnic minority members. Indeed, given the increased liability associated

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33. This does not appear to be a phenomenon unique to people of color. Indeed, research by Catalyst suggests a similar pattern for women. Thus, while in 2002 women comprised approximately 47% of the labor force, they only accounted for 12.4% of *Fortune* 1000 board seats. *See* CATALYST, 2003 CATALYST CENSUS OF WOMEN BOARD DIRECTORS: A CALL TO ACTION IN A NEW ERA OF CORPORATE GOVERNANCE 2, 5 (2003) (on file with author). Then too, women tend to hold multiple board seats in higher percentages than their male counterparts. *See id.* at 8. The fact that women appear to be fairing only slightly better than people of color suggests a general resistance to all forms of diversification at the board level.

34. *See* Charles M. Elson & Christopher J. Gyves, *The Enron Failure and Corporate Governance Reform*, 38 WAKE FOREST L. REV. 855, 856 (2003) (noting that corporate scandals have "resulted in a significant and broad scale re-examination of the American system of corporate governance"); *see also* 2004 KORN/FERRY STUDY, *supra* note 16, at 5–6 (noting changes in corporate governance as a result of corporate governance scandals, such as boards holding sessions without the CEO and formalizing the lead director role). *But see* Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 3 (2002) (criticizing and questioning the need for reforms). The Korn/Ferry study found that companies had begun devoting sections of their proxies to discussions of the corporation's corporate governance philosophy, and providing a more detailed description of corporate governance matters. 2004 KORN/FERRY STUDY, *supra* note 16, at 9. According to the study, as a result of recent problems, 80% of corporations had formalized the role of the lead director—appointing a director to preside over sessions and evaluate the CEO—as compared to only 32% in 2002. *Id.* at 27. Such a role was seen as "controversial and divisive" prior to Sarbanes-Oxley. *Id.* Then too, 90% of corporations reported having a corporate governance committee, representing an increase from 62% in 2002 prior to Sarbanes-Oxley. *Id.* at 32.

35. *See* Elson & Gyves, *supra* note 34, at 856.

with being a director of a major public company,[36] many directors have resigned or refused renomination, while others have declined board positions.[37] Alternatively, directors faced with rising exposure to liability have begun to limit the number of board positions they are willing to hold.[38] Directors may also be compelled to limit their number of directorships based on the greater attention that role now requires. In fact, a recent survey of mid-sized public companies found that the hours directors devote to their job have nearly doubled as a result of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").[39] People who cannot devote such increased attention to their position as directors may be forced to resign. At the very least, such increased attention cuts against

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36. In January of 2005, directors at WorldCom agreed to a settlement in which they would personally pay eighteen million dollars of a fifty-four million dollar settlement with shareholders, while directors at Enron agreed to personally pay thirteen million dollars of a $168 million settlement with shareholders. Lucian Bebchuk, *What's $13 Million Among Friends?*, N.Y. TIMES, Jan. 17, 2005, at A17 (discussing Enron's director settlement); Ben White, *Former Directors Agree To Settle Class Actions*, WASH. POST, Jan. 8, 2005, at E1 (discussing the Enron and WorldCom settlements).

37. *See* 2004 KORN/FERRY STUDY, *supra* note 16, at 10 (noting directors resigning); BERNARD BLACK ET AL., OUTSIDE DIRECTOR LIABILITY 1 n.4 (Stanford Law School John M. Olin Program in Econ., Working Paper No. 250, 2003) (citing studies that found people were declining board positions based on fear of increased liability), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=382422; Paredes, *supra* note 6, at 521 (noting that "aggressive" reform efforts may narrow the pool of potential candidates for directors); Kemba J. Dunham, *Reforms Turn Search for Directors into a Long, Tedious Task*, WALL ST. J., Aug. 29, 2002, at B1 (noting people turning down director positions as a result of increased liability exposure). Korn/Ferry also found an increase in the percentage of Americans declining board invitations because of the risk. The amount has more than doubled since Sarbanes-Oxley came into law, going from 13% in 2002 to 29% in 2004. 2004 KORN/FERRY STUDY, *supra* note 16, at 7.

38. *See* Dunham, *supra* note 37, at B1. Indeed, even directors internationally have declined board positions due to the perceived risk associated with them. Thus, 51% of directors in the United Kingdom as compared to 46% in the prior year reported declining board positions, while 31% of German directors indicated that they had declined positions, an increase from 11% in 2003. 2004 KORN/FERRY STUDY, *supra* note 16, at 42.

39. Pub. L. No. 107-204, 116 Stat. 745 (to be codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C.); Tamara Loomis, *For Public Companies, a High Price for Compliance*, NAT'L L.J., May 12, 2003, at 18 (citing a study conducted by the law firm of Foley & Lardner of thirty-two companies and a review of 328 proxy statements). The study represents the first to capture the costs associated with the regulations imposed by Sarbanes-Oxley. Loomis, *supra*, at 18. The study found that directors expected the annual number of hours they devoted to the board would go from 125 hours to more than 200 hours. *Id.* The study found that since the passage of Sarbanes-Oxley, the average price of being public had gone from $1.3 million to almost $2.5 million. *Id.* Almost two-thirds of the increased costs associated with being public stemmed from a rise in directors' and officers' liability insurance, which went from an average of $329,000 a year to $639,000 a year. *Id.* Rising accounting and legal fees also explain the increased costs involved with being public. *Id.* Similarly, the Korn/Ferry study found that boards devoted increased attention to their duties as a result of Sarbanes-Oxley. *See* 2004 KORN/FERRY STUDY, *supra* note 16, at 14–15. Thus, both audit committees and full boards reported meeting more frequently. *Id.*

directors serving on multiple boards.[40] Either result forces companies to search for new directors.[41] Such a search may represent an opportunity for corporations to reach out to people of color and make their boardrooms more diverse.[42]

More specifically, reform measures that require corporations to have more independent directors can have a positive impact on the number of directors of color.[43] One of the principle reform efforts post-Enron was to ensure that corporations have a majority of outside and independent directors on their boards.[44] Thus, based on the notion that increasing the number of independent directors in a corporation would enhance the quality of corporate board oversight, the New York Stock Exchange (NYSE) altered its corporate governance rules after Enron to require its listed companies to have a majority of independent directors on their boards.[45] The American Stock Exchange (AMEX) and the NASDAQ Stock Market (NASDAQ) also impose such requirements on their listed

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40. The Korn/Ferry study found that directors sitting on a large number of boards were resigning. 2004 KORN/FERRY STUDY, *supra* note 16, at 10. Similarly, the Korn/Ferry study found that most international directors who declined positions were those who held multiple directorships. *Id.* at 42. Then too, corporations have begun to limit the number of external directorships the CEO may take—generally to two. *See id.* at 24. Hence, while only 23% of corporations imposed such limits in 2001, now 51% of corporations have such a requirement. *Id.*

41. *See* Loomis, *supra* note 39, at A18.

42. The Korn/Ferry study reported that 12% of companies reported needing to add new directors as a result of new reforms, as opposed to 3% in 2003. 2004 KORN/FERRY STUDY, *supra* note 16, at 37. However, that study also reports that when directors resign, the vacancies are not being filled. *See id.* at 10. The study suggests that this may be the result of corporations creating smaller boards or the fact that recruiting directors is more difficult. *See id.*

43. This Article uses the term independent director to refer both to those directors who do not hold any employment position within a corporation (and therefore may be considered "outside" directors), and to those directors who do not have any material business or personal relationship with the corporation.

44. Reforms pressuring corporations to increase the number of outside and independent directors pre-date Enron, and in fact have been advocated for many years. *See, e.g.*, Victor Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597 (1982) (describing reforms related to increasing independent board directors); Lynne L. Dallas, *The Multiple Roles of Corporate Boards of Directors*, 40 SAN DIEGO L. REV. 781, 787 (2003) (noting that "[p]robably the most significant trend in board governance in the United States in the last twenty years has been the increase in the number and proportion of outside directors on corporate boards of directors"); Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 270–72 (1997) (describing efforts aimed at ensuring greater independence of board directors).

45. N.Y. STOCK EXCH., LISTED COMPANY MANUAL § 303A.01 (2005) [hereinafter NYSE LISTED COMPANY MANUAL], *available at* http://www.nyse.com/Frameset.html?displayPage=/listed/1022221393251.html; *see also id.* § 303A.02(a) (defining an independent director, in part, as a director who does not have any "material relationship" with the company).

companies.[46] Moreover, the AMEX, NASDAQ, and NYSE require listed companies to have both a nominating or corporate governance committee (responsible for identifying qualified directors) and a compensation committee (responsible for reviewing executive compensation), and each member of those committees must be independent.[47] Finally, Sarbanes-Oxley, the AMEX, NASDAQ, and NYSE all require each member of a board's audit committee to be independent.[48] These reforms collectively require corporations to increase the number of independent directors serving on their boards.[49]

Such an increase has positive repercussions for the number of board members of color. Indeed, one study found that corporations with a greater percentage of inside directors were less likely to have directors of color, suggesting that women and people of color tend to be outside, independent directors.[50] Other studies similarly revealed that corporations tend to find their directors of color outside of the company.[51] Hence,

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46. *See* AM. STOCK EXCH., AMEX COMPANY GUIDE §§ 121(A), 802(a) (2005) [hereinafter AMEX COMPANY GUIDE], *available at* http://wallstreet.cch.com/AmericanStockExchangeAMEX/AmexCompanyGuide/default.asp; NASDAQ STOCK MARKET, INC., MARKETPLACE RULES §§ 4200(a)(15), 4350(c)(1) (2004) [hereinafter NASDAQ MARKETPLACE RULES], *available at* http://www.nasdaq.com/about/MarketplaceRules.pdf.

47. *See* AMEX COMPANY GUIDE, *supra* note 46, §§ 804(a), 805(a) (requiring all nominating and compensation committee members to be independent); NASDAQ MARKETPLACE RULES, *supra* note 46, § 4350(c)(3)(A)(ii), (c)(3)(B)(ii), (c)(4)(A)(ii) (requiring that all compensation committee members and all nominating committee members be independent); NYSE LISTED COMPANY MANUAL, *supra* note 45, §§ 303A.04(a), 303A.05(a) (listing the committees' minimal responsibilities, and requiring that all nominating and compensation committee members be independent).

48. *See* § 301, 116 Stat. at 776 (defining independent as meaning that a board member cannot be an insider of the corporation, and cannot receive any compensation from the corporation other than in relation to her fees as a director); AMEX COMPANY GUIDE, *supra* note 46, § 803(a); NASDAQ MARKETPLACE RULES, *supra* note 46, § 4350(d)(2); NYSE LISTED COMPANY MANUAL, *supra* note 45, § 303A.07(b).

49. The Korn/Ferry study reports that new regulations have not impacted the balance between inside and outside directors. 2004 KORN/FERRY STUDY, *supra* note 16, at 11. Instead, the average number of outside directors is nine, the same average reported since 1990. *Id.* This suggests that many of the corporate reform measures had already been implemented prior to Enron and Sarbanes-Oxley. Hence, it is the increased liability and attention associated with holding directorships that appear to account for the need for more directors, and when this need arises, corporations recognize that they must seek outside directors to fulfill it.

50. DAVID A. CARTER ET AL., CORPORATE GOVERNANCE, BOARD DIVERSITY, AND FIRM VALUE 16 (Okla. State Univ., Working Paper, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304499. The study also found a very strong correlation between the percentages of women and minorities on corporate boards: companies with a high percentage of female directors also tended to have a high percentage of minority directors, and vice versa, suggesting a concerted effort by these corporations to have greater overall diversity on their boards. *Id.* at 19.

51. Thus, 82% of directors of color at S&P 1500 corporations were outside directors as compared to 66% of directors generally. Press Release, Investor Responsibility Research Center, IRCC Study Pinpoints Trends in Director Composition

reform efforts aimed at increasing the number of independent directors on boards may serve a dual purpose of ensuring an increase in the number of directors of color on boards.[52]

Of course, the general focus on reducing the number of multiple directorships may prove a double-edged sword for directors of color. On one hand, because such directors tend to have the highest number of multiple directorships, that focus may have a greater impact on them, triggering a reduction in their numbers. On the other hand, corporations may feel obligated, for example, to fill their "Latino" director seat with another Latino director. Such an obligation means that, while the raw number of people of color serving on boards may increase because different people will hold board seats, the total number of board members of color may remain static. In this way, the impact of these reforms on directors of color appears more nuanced.

Also, the emphasis, both in specific requirements and in general reform rhetoric, on recruiting directors with some financial background and experience may make it more difficult to increase the number of directors of color. More generally, Securities and Exchange Commission (SEC) and congressional investigations suggested that some directors failed to adequately probe financial transactions, while others failed to comprehend sufficiently financial information regarding company transactions and financial data within their companies' annual reports.[53] This suggestion sparked concern about the financial literacy of corporate directors, and a general desire for improvement. In response, some

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and Compensation (Nov. 15, 2001), *available at* www.irrc.com/company/11142001_BdPrac01.html.

52. Given that women also tend to be outside directors, such reforms could have a similar positive impact on increasing the number of women who serve as board members.

53. *See* Larry Catá Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327, 420–22 (citing a Securities and Exchange Commission (SEC) finding that a director ignored clear warning signs of financial impropriety and thus did not fulfill his directorial duties); Elson & Gyves, *supra* note 34, *passim* (citing to the U.S. Senate Permanent Subcommittee on Investigations' report); Lisa M. Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1, 12–13 & nn.48–54 (2002) (citing reports in which directors claimed to be unaware of company financial reports, as well as reports that board members "fail[ed] to curb fraudulent accounting practices"); Lisa M. Fairfax, *The Sarbanes-Oxley Act as Confirmation of Recent Trends in Director and Officer Fiduciary Obligations*, 76 ST. JOHN'S L. REV. 953, 956–59 (2002) (noting that directors made decisions without sufficient awareness or understanding of company financial information); Paredes, *supra* note 6, at 505–08 & 506 n.39 (summarizing the U.S. Senate Permanent Subcommittee on Investigations's assessment of the role of Enron's board in Enron's collapse, and noting the board's failure to prevent the company from engaging in high risk accounting practices). *But see* A. Mechele Dickerson, *A Behavioral Approach to Analyzing Corporate Failures*, 38 WAKE FOREST L. REV. 1, 25 (2003) (noting that "even financially sophisticated directors often fail to understand . . . financial risks facing their firms").

reforms require particular directors to have some financial background and experience. Thus, the AMEX, NASDAQ, and NYSE, all require each member of the audit committee of a listed company to be "financially literate."[54] Sarbanes-Oxley requires public corporations to disclose whether their audit committees include a financial expert, and if they do not, to explain why such an expert is not a member of the committee.[55] Such disclosure essentially ensures that public corporations appoint a financial expert to the audit committee of their board.

It may be difficult for some directors of color to meet the financial background and expertise requirement. Indeed, there appear to be very few people of color (and, for that matter, very few people)[56] who qualify as a financial expert based upon traditional criteria. For example, under both SEC and AMEX guidelines, one method for assessing whether a director can qualify as a financial expert examines whether the director has education and experience as a chief financial officer (CFO) or in a position with similar functions.[57] However, a 2000 survey of *Fortune* 500 companies revealed that people of color account for only fourteen of the chief financial officers of such companies, ten of the treasurers, and five of the controllers.[58] Hence, few people of color can meet this standard of financial expertise based on serving in these kinds of positions.

Another method pursuant to which a person can be deemed a financial expert is by "actively supervising" someone who is a CFO or in an equivalent position.[59] Presumably, this means that directors must be a chief executive or in some other high-level position to qualify as a financial expert based on this criterion. However, the fact that there are only three black chief executive officers (CEO) of *Fortune* 500 companies reveals the difficulties people of color may have in meeting

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54. *See* AMEX COMPANY GUIDE, *supra* note 46, § 121(B)(2)(a)(ii); NASDAQ MARKETPLACE RULES, *supra* note 46, § 4350(d)(2)(A); NYSE LISTED COMPANY MANUAL, *supra* note 45, § 303A.07(a) cmt.

55. Section 407 of Sarbanes-Oxley required the SEC to issue rules that require issuers "to disclose whether or not, and if not, the reasons therefor, the audit committee of that issuer is comprised of at least 1 member who is a financial expert." § 407(a), 116 Stat. at 790. This requirement is now embodied in Item 401(h) of Regulation S-K of the Securities Exchange Act of 1934 ("Exchange Act"). Regulation S-K, 17 C.F.R. § 229.401(h) (2004).

56. The Korn/Ferry study reported that Sarbanes-Oxley's definition of financial expert makes it very difficult to find directors to serve in that capacity. *See* 2004 KORN/FERRY STUDY, *supra* note 16, at 37. The study reported that 29% of corporations found it "difficult" or "very difficult" to find people with the financial expertise necessary to serve on boards. *See id.* at 35.

57. *See* 17 C.F.R. § 229.401(h)(3)(i); AMEX COMPANY GUIDE, *supra* note 46, § 121(B)(2)(a)(ii).

58. Roy Harris, *The Illusion of Inclusion: Why Most Corporate Diversity Efforts Fail*, CFO, May 2001, at 42, 44 (citing a study undertaken by *CFO* magazine).

59. 17 C.F.R. § 229.401(h)(3)(ii). That provision also requires that a financial expert be able to understand and assess the application of generally accepted accounting principles (GAAP). *Id.* § 229.401(h)(2)(i)–(ii).

this criteria.[60] Then too, financial experts must have experience preparing and evaluating financial statements of the "breadth and level of complexity" that they can reasonably expect to be raised by the issuer's financial statement.[61] Such experience does not typify the profile of many directors of color.

The fact that only a few people of color hold the kinds of positions within *Fortune* 500 companies that confer financial expertise is indicative of the relative lack of experience such people may have in this area. Consistent with this indication, studies reveal that directors of color tend to have more varied backgrounds than their white counterparts. Such directors typically have experience in government, law, or academia, while white directors are more likely to have business and financial experience from having served as a CEO.[62] All of this data reveals that directors of color may have less financial and business experience than white directors. Thus, corporations that focus on recruiting directors with financial expertise may experience a "pool" problem in relation to people of color.[63] Such a problem, in turn, may represent a stumbling block for increasing the number of directors of color.

Hence, while some reform measures may facilitate the increase of diversity within corporate boards, others may cut against that increase. The reality appears to be that more corporate board seats may open up as a result of reform measures. However, because there is no specific requirement for board diversity, whether corporations choose to fill these openings with people of color remains an option. The next Parts will address whether rationales for board diversity based on economic or business concerns can serve as the impetus for ensuring that corporations will exercise that option.

II. A CRITICAL ANALYSIS OF THE BUSINESS CASE FOR DIVERSITY AND ITS IMPLICATIONS FOR CORPORATE BOARDS

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60. The three current black CEOs of *Fortune* 500 companies are Ken Chenault of American Express Company, Stan O'Neal of Merrill Lynch & Company, and Richard Parsons of Time Warner Incorporated. *See* Latif Lewis, *Black Execs Calling the Shots*, BLACKENTERPRISE.COM (Oct. 20, 2004), *at* http://www.blackenterprise.com/printarticle.asp?id=905. Franklin Raines, the first black CEO of a *Fortune* 500 company, announced in December of 2004 that he was leaving Fannie Mae. Bethany McLean, *The Fall of Fannie Mae*, FORTUNE, Jan. 24, 2005, at 122, 130, 138. There have been only six African American CEOs of *Fortune* 500 companies, but two more have been hired, bringing the total number to eight. *See* Lewis, *supra*. Indeed, Kmart has hired its first African American CEO, Aylwin Lewis, and Darden Restaurants has hired Clarence Otis, an African American, to serve as CEO. *Id.*

61. 17 C.F.R. § 229.401(h)(2)(iii).

62. For example, in assessing the phenomenon of multiple directors, Dan Ackman notes that his analysis revealed that white directors tend to be CEOs or former CEOs while directors of color have more varied backgrounds. *See* Ackman, *supra* note 28.

63. See Part II.A for a discussion of the relative legitimacy of the pool problem.

The business rationales for diversity have several distinct, but intertwining layers. All of the rationales suggest that diversity can have a positive impact on the corporation, ultimately enhancing its profitability. In fact, at least one study analyzing *Fortune* 1000 companies found a positive correlation (although not causation) between the number of women and people of color on a board and firm value.[64] For ease of understanding, this Article divides the business rationales into five arguments. The first rationale argues that, given the diverse nature of the population and its labor pool, corporations will need to attract diverse individuals in order to continue growing and to remain competitive. Second, by allowing corporations to respond better to an increasingly diverse client and customer base, diversity may improve a corporation's position in the marketplace. Third, corporations with diversity on their boards may be more sensitive to differences in the workforce, and hence may be better equipped to prevent conflicts based on those differences, which could lead to costly discrimination and harassment lawsuits. Fourth, increasing diversity, particularly at the upper ranks, can have a positive impact on employment relationships within the corporation, reducing turnover and its associated costs while increasing productivity and profitability. Fifth, increasing the number of directors of color may enhance the quality of a board's decision-making and monitoring function. This Part critically examines each of these arguments.[65]

A. The Talent Rationale

According to the talent rationale, given the diversity of the labor pool, corporations should recognize that they must reach out to the entire population, including its racial and ethnic members, in order to ensure access to all talents and the corporation's continued growth. Such a rationale has two components. First, it recognizes that corporations will not have access to an adequate pool of talented employees if they continue to ignore large segments of the workforce. Indeed, people of color comprise 29% of the population, and are expected to comprise almost half of the population by 2050.[66] In almost half of the nation's largest cities, people of color comprise a majority of the population.[67]

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64. CARTER ET AL., *supra* note 50, at 4. The study focuses on publicly traded *Fortune* 1000 companies and on board characteristics for 1997. *Id.* at 9. The sample size was 637 firms, and after controlling for size, industry, and other corporate governance measures, the study found a statistically significant positive relationship between the number of women or people of color on a corporation's board and firm value—measured by Tobin's q. *See id.* at 4, 10.

65. This Article acknowledges that evaluating the rationales individually may discount the strength of those rationales when viewed collectively.

66. *See supra* note 24 and accompanying text.

67. *See supra* note 25 and accompanying text.

Moreover, while there are roughly five white people for every person of color among Americans ages seventy and up, that ratio is two-to-one for Americans forty and below, and 1.5 to 1 for Americans under ten years of age.[68] These figures reveal that the future population, and thus the future workforce, will be more racially and ethnically diverse. In light of these statistics, corporations unwilling to recruit employees from all backgrounds may not be able to meet their future employment demands, ultimately hampering their ability to expand.

Second, this argument recognizes that talent is not race specific. Not only do people of color comprise a significant portion of the labor pool, particularly in many of the nation's largest cities, but the student population at the undergraduate and graduate levels reflects increasing levels of diversity. According to U.S. Department of Education statistics, people of color accounted for 28% of the total enrollment at colleges and universities in 2000.[69] If these enrollment patterns remain consistent with more general demographic trends, then people of color should account for nearly half of the total college population by 2050.[70] People of color receive nearly 22% of all bachelor's degrees and nearly 18% of all master's degrees.[71]

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68. *See* THE BUSINESS CASE FOR DIVERSITY: THE PROOF, THE STRATEGIES, AND THE INDUSTRIES IN THE FRONT LINE 4 (DiversityInc.com ed., 3d ed. 2002) [hereinafter BUSINESS CASE].

69. *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF BLACKS 92–93 (2003) [hereinafter TRENDS IN BLACK EDUCATION], *available at* http://nces.ed.gov/pubs2003/2003034.pdf. This study found that in 2000, blacks accounted for 11% of the total enrollment at colleges and universities, Hispanics accounted for 10%, Asians accounted for 6%, while Native Americans accounted for 1%. *See id.* By contrast, in 1980, blacks accounted for 9% of total enrollment at colleges and universities, Hispanics accounted for 4%, Asians accounted for 2%, and Native Americans accounted for 1%. *See id.* As these statistics reveal, every ethnic group other than Native Americans experienced some increase in their college enrollment. *See id.* The statistics also revealed a decrease in the percentage of white students that comprised the total percentage of all students attending colleges and universities, going from 81% in 1980 to 68% in 2000. *Id.* These percentages drive home the point that the nation's school population is becoming increasingly more diverse. Interestingly, within all racial and ethnic groups (except nonresident aliens), women account for more than half of the total percentage of people enrolled in colleges and universities. *Id.* at 94. Thus, 56% of white students, 57% of Hispanic students, 52% of Asian students, 63% of black students, and 59% of Native American students enrolled in colleges and universities in 2000 were women. *See id.* at 95. These statistics also reveal that black women account for a higher proportion of the total black student population than any other group. *Id*. at 94.

70. *See id.* at 6–7. Indeed, the percentage of people of color enrolled in colleges and universities is roughly the same as their percentage in the population more generally. *Compare id.* at 7, *with id.* at 93. Studies suggest that by 2050, such people will represent nearly half of the population. *See id.* at 7. If student population patterns mirror general population patterns, then by 2050, students of color may also represent nearly half of the student population.

71. *Id.* at 97. In the 1999 to 2000 academic school year, blacks earned 8.7% of all bachelor's degrees, Hispanics earned 6.1%, Asians earned 6.3%, and Native Americans

Moreover, over the last twenty years, the greatest growth in bachelor's degrees among people of color occurred in business, increasing by 182%,[72] while the number of master's degrees in business rose by 230%.[73] A recent study revealed that degrees in business were by far the most popular degree earned by people of color.[74] These statistics suggest that corporations that do not reach out to the entire population, including its diverse segments, miss out on a huge talent pool. Ignoring such talent has financial implications because doing so may prevent companies from being as innovative as they could.[75] Then too, corporations that overlook portions of the nation's talent pool may be at a competitive disadvantage with those that do take advantage of such talent.[76] Thus, increasing diversity within corporations will not only enable corporations to tap new sources of talent so that they can remain innovative and competitive with other companies, but will also ensure that corporations maximize their ability to hire new employees, thereby enabling these corporations to continue to exist and expand.

The first component of the talent rationale appears to have implications for all levels of the corporation, including its board. Indeed, this rationale appears compelling because corporations depend upon talented employees for their growth and success. Because the number of board members is smaller than the number of corporate employees, corporations may not ordinarily experience as many difficulties with recruiting and retaining qualified individuals for board service as they will

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earned 0.7%. *Id.* With respect to master's degrees, blacks earned 7.8%, Hispanics earned 4.2%, Asians earned 5.0%, and Native Americans earned 0.5%. *Id.* The portion of white women who finish is less than that of white men, while the opposite is true for black women. *See id.* at 96, 165 supp. tbl.7.2.

72. Press Release, Minority College Enrollment Surges Over the Past Two Decades; Students of Color Still Lag Behind Whites in College Participation, *available at* www.acenet.edu/AM/Template.cfm?Section+20032&Template+/CM/ContentDisplaycfm&ContentID+3719.

73. *Id.*

74. While more master's in education were earned than master's in business, the total number of degrees (both master's and bachelor's) in business represented the highest category. *See id.* at 99, 101. Twenty-two percent of the bachelor's degrees and 24% of the master's degrees earned by blacks were in business. *Id.* By contrast, degrees in social studies and history, the next most popular bachelor's degree, accounted for only 11% of the total degrees conferred. *Id.* at 99.

75. *See* CARTER ET AL., *supra* note 50, at 5 (noting that diversity sparks innovation and creativity); Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium*, 65 TENN. L. REV. 925, 981 (1998) (noting that worker diversity fosters creativity and innovation); Ramirez, *Diversity and the Boardroom*, *supra* note 2, at 98 (noting leading business leaders' belief that diversity leads to profitability because it helps companies generate innovative ideas).

76. *See* Ramirez, *Diversity and the Boardroom*, *supra* note 2, at 94 (noting that diversity provides a competitive advantage in the escalating "'war for talent'") (quoting Geoffrey Colvin, *The 50 Best Companies for Asians, Blacks, and Hispanics*, FORTUNE, July 19, 1999, at 52, 52–57).

encounter for employment. However, changes brought by reform measures have made securing qualified directors, particularly outside directors, more challenging for corporations.[77] This challenge may require corporations to recruit from a more diverse pool of directors than they have traditionally. Moreover, the fact that people of color tend to be outside independent directors strengthens the possibility that reforms will lead to increases in the number of directors of color.[78] In this regard, the first component of the talent rationale appears to have applicability to board diversity.

The second component of this rationale, however, while encouraging corporations to diversify, may not have an impact on the overall number of people of color who serve as directors. That is because the second component presumes that corporations can gain a competitive advantage by recruiting and retaining talented people of color who other corporations will not be able to recruit and retain simultaneously. However, unlike most other jobs, directors can, and routinely do, hold multiple directorships.[79] Because there is always the opportunity to convince a director to serve on additional boards, corporations can share whatever talent such directors bring. The empirical evidence on the high percentages of people of color serving in multiple directorships underscores this point.[80] Moreover, the ability to share directors may not only obviate the need to actively pursue additional candidates of color, but also suggests that no one corporation obtains a competitive advantage over another corporation. In this regard, the talent rationale may pressure boards to diversify, but does not pressure them to move beyond the same pool of board candidates—potentially undermining its net impact.

Reforms, particularly those disfavoring multiple directorships, should have made sharing directors of color more difficult—thereby reinvigorating the notion that some corporations can gain a competitive advantage when they secure such directors. However, this difficulty has not occurred. Instead, while post-Enron reforms and fear of liability have prompted most people to reduce the number of boards on which they serve,[81] people of color apparently have retained the same number of

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77. *See supra* notes 42, 56 and accompanying text.

78. It is possible that as more people of color enter higher ranks within corporations, corporations may be able to recruit directors of color from inside their corporate ranks, making the emphasis on outside directors less critical. However, given the small number of people of color at the highest ranks within corporate America, this possibility appears a long way off.

79. *See supra* note 28 and accompanying text.

80. *See supra* notes 29–32 and accompanying text (explaining the phenomenon of multiple directorships unique to directors of color).

81. *See* 2004 KORN/FERRY STUDY, *supra* note 16, at 7; BLACK ET AL., *supra* note 37, at 1 & n.4.

board memberships.[82] For example, a 2003 *Forbes* magazine study of S&P 500 companies revealed that, during the same time period that the total number of directors holding five or more board seats dropped by half,[83] two black directors were also the only directors who served on more than six boards.[84] This suggests that reforms have not prevented corporations from drawing on the same directors of color. This continuing phenomenon reveals that the talent rationale may ensure that the percentage of corporations with directors of color continues to rise, without triggering a corresponding increase in the raw number of directors who are called to serve.

More significantly, the second component of the talent rationale may prove ineffective because it fails to address adequately whether a sufficient number of people of color satisfy the criteria for being a board member (at least as measured by the currently—admittedly limited—criteria for board membership). Indeed, merely citing statistics—even those suggesting that people of color comprise large segments of graduates from colleges, universities, and business schools—may prove insufficient in convincing corporations that ignoring diverse individuals will impede their profitability. Instead, proponents must convince corporate America that people of color satisfy the qualifications of the specific jobs at issue. In other contexts, this "pool problem" represents a significant hurdle because entities often claim that people of color do not have the necessary qualifications to fulfill employment positions.[85] This claim enables corporations to argue that despite their desire to employ a

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82. *See* Virginia Citrano, *Still Overworked, but Not As Much*, FORBES.COM (July 11, 2003) (finding that only three individuals hold six or more directorships and two of them are black), *at* http://www.forbes.com/2003/07/11/cx_vc_0711directors.html.

83. *Id.* (finding that the number of directors serving on five or more boards dropped from eighteen to nine).

84. *Id.* (finding that Gray and Shirley each remain on eight boards).

85. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501–02 (1989) ("[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."); *see also* Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 547 (1988) (discussing the pool problem in legal academia); Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1362–64 (1992) (reviewing DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991)); Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 918–24 (1994) (discussing the pool problem in education and employment); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1813–14 (1989) (discussing the pool problem in legal academia); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis,* 84 CAL. L. REV. 493, 503–06 (1996) (discussing the pool problem, particularly for blacks, in corporate law firms).

diverse workforce, there are no qualified candidates of color to fulfill that desire.[86]

In the context of corporate boards, the pool problem may represent an even greater obstacle because very few people of color (and, for that matter, relatively few white people) appear to meet the qualifications of a traditional board member. Model statutes, for example, allow corporations to prescribe the qualifications of their directors.[87] Most corporations give the nominating committee of the board the discretion to nominate the candidates for directors.[88] Changes in SEC and listing requirements now limit that discretion, at least with regard to certain committees.[89] As Part I.B reveals, these changes require that directors who serve on the audit committee have some financial background and expertise.[90] The Korn/Ferry study reported that corporations have experienced difficulties in finding directors to meet these new requirements.[91] This difficulty may be particularly acute with regard to directors of color. Indeed, as Part I.B demonstrates, studies show that a very small portion of people of color hold the kinds of jobs traditionally believed to provide expertise in financial matters.[92] Because the number of people of color serving in such positions may be limited, companies

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86. *See J.A. Croson*, 488 U.S. at 501–02 ("[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."); *see also* Chused, *supra* note 85, at 547 (discussing the pool problem in legal academia); Delgado, *supra* note 85, at 1362–64; Farber, *supra* note 85, at 918–24 (discussing the pool problem in education and employment); Kennedy, *supra* note 85, at 1813–14 (discussing the pool problem in legal academia); Wilkins & Gulati, *supra* note 85, at 503–06 (discussing the pool problem in corporate law firms).

87. *See* MODEL BUS. CORP. ACT § 8.02 (2002) (allowing corporations to identify requirements for directors in their articles of incorporation or their bylaws).

88. *See* SECTION OF BUS. LAW, AM. BAR ASS'N, *Corporate Director's Guidebook*, *in* 56 BUS. LAW. 1571, 1608 (3d ed. 2001) (describing nominating committee functions). The New York Stock Exchange requires that each listed company have a nominating committee that considers director candidates. *See* FINAL NYSE CORPORATE GOVERNANCE RULES 7–8 (2003), *available at* http://www.nyse.com/pdfs/finalcorpgovrules.pdf. By contrast, the SEC requires companies to disclose whether they have a nominating committee, and if not, why they believe it appropriate not to have one, as well as the names of directors who participate in nominating candidates. *See* 17 C.F.R. § 240.14a-101(7)(d)(1), (7)(d)(2)(i). Since Sarbanes-Oxley, the percentage of corporations with formal nominating committees has increased from 87% in 2003 to 96% in 2004. 2004 KORN/FERRY STUDY, *supra* note 16, at 12. This represents an increase from 73% in 1995. *Id.* at 13.

89. *See supra* Part I.B (noting new changes requiring that the majority of the board be independent and that directors of the nominating and audit committees be independent as well).

90. *See supra* Part I.B.

91. *See* 2004 KORN/FERRY STUDY, *supra* note 16, at 35–37.

92. *See, e.g.*, Harris, *supra* note 58, at 44 (revealing a small number of people of color holding financial offices in *Fortune* 500 companies); *see also supra* Part I.B.

seeking such individuals to qualify as financially literate may find the pool of available candidates to be relatively small.

The pool also may be deemed small with respect to other traditional criteria. Outside of the requirements for audit committees, the nominating committee continues to have discretion in determining the type of people who they nominate for a directorship. Traditionally, however, such committees have drawn from a very elite pool—tending to select people who are CEOs or former CEOs of major corporations. Indeed, retired executives represent the most prevalent type of director: 95% of corporations have such a director.[93] Not many people of color fit this profile. In fact, there are only three black people serving as a CEO of a *Fortune* 500 company, and there have been only eight in total.[94] Then too, a 2002 U.S. Equal Employment Opportunity Commission report revealed that minorities hold only 15.2% of the total management positions in the private sector.[95]

Moreover, a 2004 study revealed that black women hold just 5.1% of the nation's total professional, managerial, and related jobs, and only 1.6% of corporate officer positions at *Fortune* 500 companies.[96] It is worth noting that these percentages, while small, do suggest that the available talent pool of people of color is greater than the current representation within corporate boards suggests, and hence that corporations should do a better job of reaching out to them. That being said, these statistics do create difficulties for the validity of the talent rationale. In 2004, 37% of corporations claimed to have experienced difficulty finding any directors with the requisite management experience.[97] This difficulty may be augmented with regard to directors of color. From this perspective, the pool of diverse candidates appears significantly smaller than the statistics regarding demographics suggest.

Of course, corporations and their boards may appear disingenuous when they argue that the pool problem represents a legitimate hurdle to increasing board diversity. This is because while there may be specific

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93. 2004 KORN/FERRY STUDY, *supra* note 16, at 11.

94. *See* Lewis, *supra* note 60.

95. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, OCCUPATIONAL EMPLOYMENT IN PRIVATE INDUSTRY BY RACE/ETHNIC GROUP/SEX, AND BY INDUSTRY, UNITED STATES, 2002 (2002), *available at* http://www.eeoc.gov/stats/jobpat/2002/us.html.

96. CATALYST, ADVANCING AFRICAN-AMERICAN WOMEN IN THE WORKPLACE: CATALYST'S NEW GUIDE FOR MANAGERS 1 (2004), *available at* http://www.catalystwomen.org/bookstore/perspective/04may.pdf; CATALYST, STATISTICAL OVERVIEW OF WOMEN AND DIVERSITY IN THE WORKPLACE, *available at* http://www.catalystwomen.org/services/ic/files/Quick%20Takes%20-%20Statistical%20 Overview.pdf [hereinafter CATALYST, STATISTICAL OVERVIEW]. This is compared to women generally who hold 15.7% of corporate officer positions at *Fortune* 500 companies. CATALYST, STATISTICAL OVERVIEW, *supra*.

97. 2004 KORN/FERRY STUDY, *supra* note 16, at 35.

criteria for jobs that people of color cannot meet in other contexts,[98] corporate statutes do not impose definitive criteria in the context of board members other than those related to audit committee members.[99] Hence, corporations are not bound by any specific criteria when selecting board members; they are free to select members who have different experiences and backgrounds. This suggests that the pool for board candidates is narrow only because corporations have chosen to confine their search to a relatively narrow base. It may also suggest a need for ensuring that people of color serve on nominating committees to encourage corporations to take a broader view of the talent pool.

However, as a practical matter, corporations do not extend their board search beyond a very elite base. Hence, when corporations do not select chief executives, they gravitate toward former government officials or academics. Consistently, 58% of corporations have former government officials on their boards, and 58% of corporations have academics on their boards.[100] Then too, of the top ten *Fortune* 500 companies,[101] generally only one or two members of the entire board—which range from ten to sixteen members—are *not* current or former top executives or officers of major companies.[102] In fact, one company's

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98. *See* Farber, *supra* note 85, at 920 (discussing the small percentage of recipients (less than 2%) of scientific Ph.D.s that are black); *see also* Kennedy, *supra* note 85, at 1814 (discussing the pool problem in legal academia).

99. *See supra* note 87 and accompanying text; *see also* 17 C.F.R. § 240.14a-101(7)(d)(2)(H) (allowing corporations and nominating committees to proscribe criteria for director candidates); MODEL BUS. CORP. ACT § 8.02.

100. 2004 KORN/FERRY STUDY, *supra* note 16, at 12.

101. *See* Fortune *500 Largest U.S. Corporations*, FORTUNE, Apr. 5, 2004, at B1 (listing the top ten *Fortune* 500 companies as: (1) Wal-Mart Stores, (2) Exxon Mobil, (3) General Motors, (4) Ford Motor, (5) General Electric, (6) ChevronTexaco, (7) ConocoPhillips, (8) Citigroup, (9) International Business Machines, and (10) American International Group).

102. *See* AM. INT'L GROUP, INC., SCHEDULE 14A INFORMATION: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 2–5 (SEC File No. 001-08787, Apr. 5, 2004) (listing one attorney, one former government official, one academic, and one head of a charitable organization out of fifteen directors), *available at* http://www.sec.gov/edgar.shtml; CHEVRONTEXACO CORP., SCHEDULE 14A: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 6–9 (SEC File No. 001-00368, Mar. 26, 2004) (listing one attorney, one academic, and one head of a charitable organization out of twelve board members), *available at* http://www.sec.gov/edgar.shtml; CITIGROUP INC., SCHEDULE 14A INFORMATION: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 13–21 (SEC File No. 001-09924, Mar. 16, 2004) [hereinafter CITIGROUP PROXY STATEMENT] (listing one academic-consultant, one academic-former government official, and two other former government officials out of sixteen directors), *available at* http://www.sec.gov/edgar.shtml; CONOCOPHILLIPS, SCHEDULE 14A: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 7–9 (SEC File No. 000-49987, Mar. 31, 2004) (listing one academic and three former government officials out of sixteen board members), *available at* http://www.sec.gov/edgar.shtml; EXXON MOBIL CORP., SCHEDULE 14A INFORMATION: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF

entire eleven-member board consisted of people who were heads or former heads of major entities.[103] Within the remaining nine companies, eight companies had one or more academics, four companies had one law firm partner, and three companies had one or more former federal government officials, including one former U.S. president.[104] Like CEOs, there are not significant numbers of people of color within these categories.[105] Thus, while the fact that corporations have flexibility in determining board characteristics may weaken the legitimacy of the pool

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1934, at 7–10 (SEC File No. 001-02256, Apr. 14, 2004) (listing two academics out of eleven board members), *available at* http://www.sec.gov/edgar.shtml; FORD MOTOR CO., SCHEDULE 14A: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 5–9 (SEC File No. 001-03950, Apr. 8, 2004) (listing two academics out of sixteen board members), *available at* http://www.sec.gov/edgar.shtml; GEN. ELEC. CO., SCHEDULE 14A: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 6–11 (SEC File No. 001-00035, Mar. 2, 2004) (listing two academics and one attorney out of fifteen board members), *available at* http://www.sec.gov/edgar.shtml; GEN. MOTORS CORP., SCHEDULE 14A INFORMATION: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 8–10 (SEC File No. 001-00043, Apr. 21, 2004) [hereinafter GM PROXY STATEMENT] (noting that all eleven board members head or did head major corporations), *available at* http://www.sec.gov/edgar.shtml; INT'L BUS. MACHS. CORP., SCHEDULE 14A: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 5–7 (SEC File No. 001-02360, Mar. 8, 2004) (listing two academics and one head of a charitable organization out of twelve directors), *available at* http://www.sec.gov/edgar.shtml; WAL-MART STORES, INC., SCHEDULE 14A: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 2–4 (SEC File No. 001-06991, Apr. 15, 2004) (listing one attorney out of fourteen board members), *available at* http://www.sec.gov/edgar.shtml.

103. *See* GM PROXY STATEMENT, *supra* note 102, at 8–10 (noting that all eleven board members head major corporations).

104. *See supra* note 102. Former President Gerald Ford, in addition to a former director of the Central Intelligence Agency, sits on the board of Citigroup, Incorporated. *See* CITIGROUP PROXY STATEMENT, *supra* note 102, at 21.

105. *See* DAVID A. BOSITIS, JOINT CTR. FOR POL. & ECON. STUD., BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY (2001) (noting that from 2001 to 2002, only thirty-nine federal office holders were black), *available at* http://www.jointcenter.org; Chused, *supra* note 85, at 538 (noting a 1986 to 1987 study finding that blacks accounted for 3.7% of faculty members at majority operated law schools); Wilkins & Gulati, *supra* note 85 (demonstrating the lack of black lawyers at corporate law firms); Ann Davis, *Big Jump in Minority Associates, But . . .*, NAT'L L.J., Apr. 29, 1996, at A1, A21 (noting a 1996 survey showing that blacks accounted for 2.4% of lawyers in majority white law firms and 1.2% of the partners); Wendy Killeen, *For Colleges, Faculty Diversity Becomes Single-Minded Goal*, BOSTON GLOBE, Mar. 3, 2005, at 1 (discussing the lack of faculty diversity at colleges); Susan Page, *Bush Is Opening Doors with a Diverse Cabinet*, USA TODAY, Dec. 10, 2004, at 17A (noting that before President Clinton, cabinet positions were almost exclusively the province of white males, and that prior to President Bush, "no person of color had been named to any of the four most prestigious Cabinet jobs"); *cf.* Terry M. Neal, *Diversity and the Bush Cabinet*, WASHINGTONPOST.COM (Dec. 23, 2004), http://www.findarticles.com/p/articles/mi_m0NTQ/is_2004_Dec_23/ai_n9510490 (noting that out of twenty-four appointments, President George W. Bush named four blacks, three Latinos, and two Asians to his cabinet; and out of twenty-nine cabinet appointments, President William Clinton named seven blacks, three Latinos, and one Asian).

problem as a criticism of the talent rationale, as a practical matter, the kind of candidates that boards select encourages corporations to view the number of available candidates of color as relatively narrow.

This Section reveals that the talent rationale may foster diversity, but only in a limited manner. The diversity of the nation's population appears to lend validity to that aspect of the talent rationale recognizing that corporations will need to recruit and retain more diverse individuals if they want to maintain and grow their employment base, including their directorships. However, because corporations may have a greater ability to share board members, rationales that rely upon notions of competitive advantages may not lead to an increase in the overall number of directors of color.

Moreover, the apparent lack of qualified candidates may undermine the legitimacy of the talent rationale. From this perspective, whether the talent rationale can compel corporations to actively recruit directors of color depends upon both corporations' perception of the pool problem and their willingness to expand their criteria in a manner that encompasses a broader segment of the population. Given the current data on board members of color, and the continued trend of multiple directorships related to such members, as long as only a few people of color continue to meet the traditional characteristics of board members, then the general demographics of the labor pool may have only a limited impact on corporations' desire to reach out to a more diverse candidate pool.

B. The Market Rationale

According to the market rationale, corporations that employ diverse individuals will reach a broader range of customers and clients, thereby increasing their sales performance and ultimate profitability. Indeed, this appears to be one of the key contentions of *Grutter*, and the briefs that underlie it.[106] These arguments suggest that such market outreach can be achieved in at least two ways. First, corporations with people of color in management and on the board will more effectively market existing products and services in a manner that attracts diverse populations.[107] Second, those corporations will be better equipped to identify and develop new products and services aimed at the particular needs or interests of

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106. *See, e.g.*, 65 Leading American Businesses Brief, *supra* note 8, at 7 (noting that a diverse group of individuals "are better able . . . to market offerings in ways that appeal to [a variety of] consumers").

107. *See* Dallas, *supra* note 2, at 1385 (stating that many directors believe diverse boards will "'better reflect the changing marketplace and the growth in minority market segments'") (quoting KORN/FERRY INT'L, 26TH ANNUAL BOARD OF DIRECTORS STUDY 1999, at 13 (1999)).

diverse communities.[108] Because corporations with diverse individuals can employ these strategies, they will be able to increase their financial position in the marketplace.

Certainly, there is some reason to believe that a corporation's ability to market its products to, and develop new products for, diverse customers and clients, and thereby increase its profitability, may depend on its ability to understand and appreciate a diverse client and customer base. One recent study revealed that people of color comprise 18% of U.S. buying power, and the growth in the spending of African American consumers has outpaced that of white consumers.[109] Other, albeit limited, research revealed that market strategies aimed specifically at particular communities are more effective than marketing efforts aimed at a general audience.[110]

For example, that research demonstrates that advertising in Spanish or on Spanish language television serves to attract more Latino customers than English language advertisements.[111] Similarly, some companies found that marketing directed at communities of color increases sales from people within those communities. Car companies such as Ford Motor Company ("Ford") and Volvo Group ("Volvo") have worked

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108. *See* 65 Leading American Businesses Brief, *supra* note 8, at 7 (noting that a diverse group of individuals "are better able to develop products and services that appeal to a variety of consumers").

109. *See* Jordan T. Pine, *Buying Power of African Americans to Reach $682 Billion by 2006* (Nov. 27, 2001), *reprinted in* BUSINESS CASE, *supra* note 68, at 75, 75 (noting that U.S. buying power is expected to reach $7.1 trillion in 2001, and that African Americans comprise $572.1 billion of buying power). The fact that blacks represent a significant portion of the buying power may ensure that corporations pay heed to communities of color irrespective of the diversity within their corporate ranks. Moreover, those communities can exert pressure on corporations to diversify through the giving or withholding of their market power. In a similar strategy, some corporations have refused to do business with law firms that are not diverse. *See, e.g.*, Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 ST. JOHN'S L. REV. 785, 794 & n.71 (2003); J. Cunyon Gordon, *Painting by Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table"*, 71 FORDHAM L. REV. 1257, 1259 (2003); David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 856 (1998). This strategy appears to be based less on economic justifications than on moral rationales about the importance of working with a diverse team.

110. *See* ROSLOW RESEARCH GROUP, SPANISH VS. ENGLISH ADVERTISING EFFECTIVENESS AMONG HISPANIC TEENS 2 (2000) [hereinafter ROSLOW, SPANISH VS. ENGLISH] (noting the effectiveness of advertising to Hispanics in Spanish), *available at* http://www.roslowresearch.com/home.htm; Roslow Research Group, Case Histories, *at* http://www.roslowresearch.com/home.htm (detailing successful marketing strategies aimed at the Hispanic community) (last visited July 29, 2005) [hereinafter Roslow, Case Histories]. In addition, 70% of Korean and Chinese Americans prefer advertising in their own languages. *See* Jordan T. Pine, *How To Reach a Third of Your Future Customers* (Nov. 6, 2001), *reprinted in* BUSINESS CASE, *supra* note 68, at 71, 72.

111. *See generally* ROSLOW, SPANISH VS. ENGLISH, *supra* note 110; Roslow, Case Histories, *supra* note 110.

closely with companies that specialize in developing advertisement campaigns and products aimed at blacks and Latinos.[112] Apparently, as a result, the total dollars spent on cars within the black community has nearly doubled since 1996,[113] and Ford is the number one car company in the Latino market in terms of car sales.[114] This anecdotal evidence suggests that identifying appropriate advertising strategies and products that will attract an increasingly diverse customer base requires an awareness of diversity issues.

Then too, a corporation's ability to take advantage of the buying power within communities of color may require them to actively combat stereotypes regarding those communities. Directors of color may be helpful in this endeavor. Indeed, a 1996 study prepared for the Federal Communications Commission (FCC) found several instances of discriminatory practices in the advertising industry.[115] These practices stemmed, in part, from incorrect stereotypes regarding consumers of color.[116] Having people of color in management and on the board who can counteract these stereotypes may prove useful for ensuring that such practices do not continue.[117] This, in turn, may ensure that those stereotypes do not impede corporations' ability to benefit from the buying power of people of color.

First, this rationale may be flawed because corporations do not necessarily need to have directors of color on their board in order to take advantage of the economic opportunities embedded in the market rationale. Instead, corporations can hire marketing firms, specifically marketing firms with people of color in them, which can assist them in developing strategies for reaching diverse communities. Indeed, this is precisely what Ford and Volvo did when they launched their campaign to

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112. *See* Yoji Cole, *Faltering PC Makers Could Learn Marketing Lesson from Mature Auto Industry* (Jan. 11, 2002), *reprinted in* BUSINESS CASE, *supra* note 68, at 82, 82; Eric L. Hinton, *The Black Middle Class: When Will Growing Economic Clout Bring Respect?*, *reprinted in* BUSINESS CASE, *supra* note 68, at 37, 37–38.

113. *See* Hinton, *supra* note 112, at 38 (explaining that the total dollars spent on new and used cars by blacks has risen from $22 million to $43.2 million); Pine, *supra* note 109, at 76.

114. *See* Cole, *supra* note 112, at 83.

115. *See* KOFI ASIEDU OFORI, CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY, WHEN BEING NO. 1 IS NOT ENOUGH: THE IMPACT OF ADVERTISING PRACTICES ON MINORITY-OWNED & MINORITY-FORMATTED BROADCAST STATIONS 11–13, 25–31 (2002) (noting the prevalence of "no Urban/Spanish dictates," whereby an advertiser or agency does not allow commercials to be aired on stations that program primarily to black or Latino communities, regardless of ratings or consumption patterns), *available at* http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/.

116. *See id.* at 12. Some examples include perceptions that black people do not buy linens. *See id.* at 26. Others include perceptions that Latinos do not bathe as frequently as non-Latinos. *Id.* at 37.

117. *Cf. id.* at 38 (noting that advertising agencies tend to be all white and hence do not understand people of color).

target specific ethnic communities.[118] The fact that this resource is available to corporations may obviate the need for corporations to seek out directors of color for the purpose of tapping diverse markets. Moreover, given that directors may not have marketing background or experience and marketing firms do have such expertise, utilizing those firms may be more effective than reliance on directors of color. From this perspective, while the market rationale underscores the economic importance of accessing diverse markets, that rationale may prove insufficient in demonstrating that corporations need to recruit directors of color in order for that access to occur.

Second, even assuming that directors of color can play a role in marketing, that role may be much more limited than the market rationale suggests. Certainly, corporate directors engage in strategic planning, and in this capacity they may play a role in ensuring that the corporation targets particular communities or develops policies for doing so.[119] This role should not be minimized because the FCC study revealed that some companies often fail to market their products in a manner designed to reach diverse audiences—even when the qualitative data indicates that people of color spend amounts of money similar to whites on such products.[120] If directors of color can be instrumental in prompting corporations to adopt targeted marketing strategies, this rationale has some legitimacy.

However, the role of directors in the corporation may prevent them from significantly contributing to the marketing of products and services or otherwise being involved with the development of their company's marketing or production strategies. Indeed, the market rationale appears more appropriate in the context of employees and executives who interact with clients and customers, or who are responsible for defining the marketing and production strategies of the corporation. Yet, many board members do not have such interaction or responsibility.[121] Instead, in many corporations, directors serve primarily as monitors who do not get involved with product development or sales campaigns, and hence their primary role encompasses accepting or rejecting policies already established by management and their employees.[122] For board members

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118. *See* Cole, *supra* note 112, at 82; Hinton, *supra* note 112, at 38.

119. Thus, it is reported that when Jill Kerr Conway was the sole female director at Nike, she told her fellow directors that the company should launch a female sports-apparel division, which now accounts for a significant segment of Nike's overall revenue. Hymowitz, *supra* note 23.

120. *See* OFORI, *supra* note 115, at 11–13 (noting the refusal of certain luxury car companies to consider placing ads on urban formatted radio stations); *id.* at 25–31; *see also id.* at 33 (noting that certain "upscale" products and services such as insurance, banks, financial services, and tourism destinations are not advertised to black people).

121. *See* Fisch, *supra* note 44, at 284–86 (noting that the extent to which corporations require their boards to engage in decision-making varies from firm to firm).

122. *See* Fisch, *supra* note 44, at 284–86.

who serve on these monitoring boards, their limited role may not enable them to shape corporate policies regarding marketing strategies, undermining their ability to contribute to a corporation's marketing efforts. In this way, the market rationale may be too simplistic because it fails to appreciate the role of board members.

The market rationale may also rest on illegitimate stereotypes regarding communities of color, which detracts from its validity. To the extent the market rationale recognizes the buying power of people of color and, based on that recognition, highlights the importance of ensuring that corporations include communities of color in their advertising campaigns to achieve maximum profitability, this argument seems sound.

However, the argument becomes more suspect to the extent that it implies that people of color need advertising or products distinctly different from white Americans. Certainly, some of the admittedly limited studies suggest that communities of color respond to targeted advertising.[123] Yet, these studies can be interpreted in different ways. Because these studies suggest that targeted advertising can be effective when aimed at people whose first or primary language is not English, such accounts may be interpreted to mean that advertising is more effective when it is given in a language customers can more readily understand.[124] Such an interpretation seems both reasonable and obvious. Then too, the apparent effectiveness of targeted campaigns may simply suggest that people of color are more likely to purchase products where advertisements include people who look like them. The broader interpretation that corporations must alter the content of their advertisements or the nature of their products and services in order to appeal to an "ethnic" audience, while applicable for some products like hair products, may not be applicable for others such as cars or clothing. Products or services that stem from this belief play into stereotypes about people of color, and, because they are based on those stereotypes, they may ultimately prove ineffective. In fact, this belief ignores class differences among people of color, which may constitute a stronger influence on their consumer needs than their racial or ethnic identity.

Thus, the market rationale has both strengths and weaknesses, suggesting that proponents may have exaggerated the extent to which directors could achieve the claims underlying the rationale. For example, it is possible that securing directors of color may allow corporations to reach different markets and ultimately enhance their profitability. It is also possible that such directors can counteract discriminatory marketing practices that inhibit profit-making.

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123. *See supra* notes 112–14 (defining studies with Ford and Volvo).

124. *See* OFORI, *supra* note 115, at 12 (noting that language barriers may be one reason for decreased advertising on stations with Latino audiences).

Unfortunately, there are some stumbling blocks to realizing these possibilities.[125] First, this rationale may not provide a compelling reason for corporations to diversify their boards because corporations have other, possibly more effective, means of securing the economic benefits of marketing to people of color. Second, the market rationale may be inapplicable to board members who engage mainly in monitoring officers and overseeing corporate policies because it inaccurately presumes that those members actively engage in marketing and product development. Third, this rationale may rely on illegitimate stereotypes that ultimately undermine its saliency.

C. The Litigation Rationale

There is tremendous appeal in the notion that enhancing board diversity will prevent the number, or decrease the severity, of costly discrimination suits. High profile cases regarding racial discrimination in the workforce such as those involving Texaco, Incorporated ("Texaco") and the Coca-Cola Company ("Coca-Cola"), which resulted in settlements of $176.1 million and $192.5 million respectively, certainly demonstrate the economic impact that such discrimination can have on a corporation.[126]

If board diversity could serve to prevent such costs, it would provide a strong incentive to anyone concerned with the corporation's bottom line. Some shareholders appear to believe that board diversity has this

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125. There is another presumption embedded in the market rationale that arguably could undermine its viability. The crux of the market rationale appears to be that corporations need an awareness of diversity in order to take advantage of the spending power within diverse communities. Indeed, the U.S. Supreme Court's *Grutter* opinion appears to rest on the notion that a diverse school population is important precisely because it fosters a recognition and understanding of diversity by everyone within that population. 539 U.S. at 330. In other words, such diversity ensures that whites appreciate differences, and as a consequence enables them to navigate more effectively diverse communities both within and outside of the business world. From this perspective, if someone is educated or trained to appreciate diversity, this appreciation should make her as effective as a person of color in reaching out to other communities. The logical progression of such a rationale suggests that people of color—and subsequently corporations' need to recruit or retain people of color—may lose their utility when and if this appreciation does occur. In this way, the presumption that people of all races can gain an appreciation and understanding of diversity through education and exposure may obviate the need for corporations to hire people of color in order to obtain the benefits of diversity. At present, this argument against the marketing rationale is not that powerful because we do not appear to have reached this level of appreciation, and in fact may be moving backwards. Moreover, this argument may presume that appreciation is static and fixed, whereas it is more likely derived from ongoing life experiences as a member of a particular group.

126. *See* Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1468–69 (2002) (discussing these and other racial discrimination lawsuits against large corporations).

preventative value. As an example, after its settlement, Texaco's proxy statement included a shareholder proposal calling for greater diversity on the board, suggesting that such diversity might have been able to alleviate the discrimination that took place at Texaco.[127] As the proposal stated, "[t]he loss of $170 million in discrimination settlements . . . strongly underscores Texaco's need for expanded diversity on [its] Board."[128] These shareholders appear to agree with the notion that diverse boards can help to prevent or decrease employment conflicts and the subsequent costs related to those conflicts. Even the signers of one of the *Grutter* briefs appear to support the litigation rationale, noting that individuals educated in a diverse environment "are likely to contribute to a positive work environment, by decreasing incidents of discrimination and stereotyping."[129]

However, neither the empirical nor the anecdotal evidence appears to support the presumption that enhanced board diversity correlates with reduced incidents of discrimination among employees and their corresponding lawsuits. In the cases of Texaco and Coca-Cola, both corporations had an African American board member during the time that the allegations related to racial harassment surfaced.[130] Moreover, those members were present when what many described as inappropriate responses took place.[131] This suggests that there are limits to such individuals' effectiveness. As Part II.E discusses in greater detail, these limits may relate to the fact that many boards do not have a critical mass of people of color, and this mass is important to ensure that such directors feel comfortable voicing (especially controversial) opinions about race or diversity.[132] Then too, it appears that even while diversity within management and boards has grown, the number and level of severity of

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127. *See* TEXACO, INC., SCHEDULE 14A INFORMATION: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 26 (SEC File No. 001-00027, Mar. 27, 1997) [hereinafter TEXACO PROXY STATEMENT], *available at* http://www.sec.gov/edgar.shtml.

128. *Id.* at 26. The proposal further noted that "[w]hile Texaco has one woman and one African American on its Board, we believe the recent scandal and legal settlement highlight the need for additional Board members." *Id.*

129. *See* 65 Leading American Businesses Brief, *supra* note 8, at 7.

130. *See* COCA-COLA CO., SCHEDULE 14A: PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934, at 9 (SEC File No. 001-02217, Mar. 4, 2004) [hereinafter COCA-COLA PROXY STATEMENT] (noting that Donald F. McHenry, an African American, has been a director of Coca-Cola since 1981), *available at* http://www.sec.gov/edgar.shtml; TEXACO PROXY STATEMENT, *supra* note 127, at 10 (noting that Franklyn G. Jenifer, an African American, had served on the board since 1993).

131. *See* COCA-COLA PROXY STATEMENT, *supra* note 130, at 9 (showing that McHenry was on the board through at least 2004); TEXACO PROXY STATEMENT, *supra* note 127, at 10 (showing that Jenifer was on the board through at least 1997); *see also* Wade, *supra* note 126, at 1465.

132. *See infra* notes 201–02.

discrimination and harassment suits within the workforce have gone up.[133] This suggests that board diversity has had no appreciable impact on employee conflict, undermining the validity of the litigation rationale.

Indeed, that rationale may be flawed because it fails to realistically address and acknowledge the conflicts created by diversity within the workforce, instead suggesting that directors of color can manage those conflicts on their own. Studies of increased racial conflict merely reflect the practical reality that when entities bring together people of different racial groups, there is bound to be conflict based on lack of understanding.[134] In this regard, such studies reveal that corporations have not done a sufficient job of managing diversity. Managing diversity refers to the idea that in order for diversity to prove effective, corporations must provide "proactive attention" to diversity issues and create a climate in which all members of the corporation can work effectively.[135]

A University of Michigan study funded by the U.S. Department of Labor's Glass Ceiling Commission concluded that while the presence of diversity offered opportunities, "[u]nless the effects of diversity are well managed, turnover, miscommunication, and interpersonal conflict may increase leading to lower productivity and ultimately lower performance on profit, market share or other strategic goals."[136] According to the study, corporations must be willing to alter their culture to embrace differing perspectives and must be able to respond to those perspectives.[137] Certainly, directors of color can play a role in helping to develop that response. However, they cannot be the sole source of such response. Indeed, the Michigan study makes clear that in order to manage diversity, corporations must alter their culture, rather than just add diverse people—even board members—to that culture.[138]

This study suggests that the litigation rationale is flawed because it deemphasizes the role the entire corporation—as opposed to individual directors of color—must play in managing diversity. Then too, the

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133. Thus, charges of racial harassment filed with the U.S. Equal Employment Opportunity Commission (EEOC) have increased fivefold in the past decade. According to EEOC statistics, the total number of harassment charges filed based on race went from 9757 in the fiscal years from 1980 to 1989, to 47,175 in the fiscal years from 1990 to 1999. *See* U.S. Equal Employment Opportunity Comm'n, Trends in Harassment Charges Filed with the EEOC, *available at* http://www.eeoc.gov/stats/harassment.html (last modified July 22, 2004).

134. *See id.*; *see also* TAYLOR COX, JR. & CAROL SMOLINSKI, MANAGING DIVERSITY AND GLASS CEILING INITIATIVES AS NATIONAL ECONOMIC IMPERATIVES 14 (Univ. of Mich., Working Paper No. 9410-01, 1994) (discussing enhanced conflicts), *available at* http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/GlassCeilingBackground5ManagingDiversity.pdf.

135. *See* COX & SMOLINSKI, *supra* note 134, at 6.

136. *See id.* at 14.

137. *See id.* at 6–7.

138. *See id.* at 1, 6–7.

litigation rationale fails to appreciate the significant time and resources associated with managing diversity. Professors Devon Carbado and Mitu Gulati have emphasized the importance of acknowledging the "transaction costs" associated with managing diversity.[139] These costs include the expenses of implementing diversity training and programs as well as the possibility that the results—to the extent they can be reached—may only be realized over the long term.[140] As Carbado and Gulati note, these costs strengthen employers' incentives to pursue homogeneity.[141] Hence, the litigation rationale may be flawed because it ignores the importance of managing diversity (and the expense associated with such management), suggesting that directors of color can provide a "quick fix" to a corporation's diversity conflicts.

Given its defects, the litigation rationale appears ill-suited as a justification for enhancing board diversity. At best, increased board diversity may represent an important first step toward implementing a system designed to manage diversity as well as an important signal of a corporation's commitment to diversity, particularly when that corporation has been embroiled in litigation that casts doubt on such a commitment. At worst, however, it may be a symbolic tool, enabling corporations to provide the illusion of diversity without grappling with the difficult transaction costs associated with making that illusion a reality.

D. The Employee Relations Rationale

Almost as a corollary to the litigation rationale, some contend that diversity may serve to enhance a corporation's ability to work with its diverse employment population.[142] Indeed, the corporations that signed onto one of the *Grutter* briefs put forth this rationale.[143] Under this view, because managers of color can understand their employees of color, those managers will more likely adopt, or facilitate the adoption of, policies and

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139. *See* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1798–1802 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)). Professors Devon Carbado and Mitu Gulati emphasize the importance of recognizing the transaction costs associated with managing diversity within the workplace to critical race theorists because it gives employers strong incentives not to diversify their workforce—that incentives are not motivated by racial animus. *See id.* at 1802.

140. *See id.* at 1800, 1802.

141. *See id.* at 1802.

142. The notion that directors will be able to prevent conflicts resulting from their diverse workforce can also be considered an aspect of the employee relations rationale, but for ease of discussion, this Article treats them as two separate (although clearly overlapping) rationales.

143. 65 Leading American Businesses Brief, *supra* note 8, at 7 ("[A] racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world.").

practices that increase employee satisfaction.[144] Such enhanced satisfaction has an economic benefit because it ultimately leads to greater productivity and profitability for corporations.[145]

Because this rationale rests on the ability of people in the upper ranks of the corporation to set policies reflecting the concerns of all employees, this rationale appears to have importance for directors. Indeed, Professor Lynne Dallas notes that boards have a relational role and that diversity enhances this role by enabling board members and thus the corporation to better relate to its employees, shareholders, and other corporate constituents.[146] Some studies, which focus on both gender and racial-ethnic diversity, confirm that such diversity at the upper levels may facilitate better understanding of diverse employees, generating policies that enhance their performance and overall productivity. These studies reveal that corporations with high percentages of women in senior management and on the board are more likely to have policies related to part-time work, maternity and paternity leave, and other "family friendly" measures.[147] Such policies have a financial impact. Indeed, several studies showed that employees with supportive workplaces are the most satisfied with their jobs and the most loyal, which leads to reduced turnover among workers as well as a reduction in the costs related to such turnover.[148]

However, like the market rationale, this argument may be inapplicable to the majority of directors who do not interact with employees in ways that make their diversity relevant. Many directors do not have a significant voice in the creation and implementation of employment policies. Hence, while this argument may seem particularly relevant for people in management positions, it may be inapplicable for directors.

Of course, there may be a symbolic importance to having people of color in positions of authority. For example, having people of color as managers may reveal the attainability of such positions to people of color who comprise the rank and file—negating the existence of a "glass ceiling" for employees.[149] If employees believe in the attainability of

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144. *See id.*

145. *See infra* note 148.

146. Dallas, *supra* note 44, at 800; Dallas, *supra* note 2, at 1384–85 ("The movement to have diversity on corporate boards is intended to sensitize the corporation to the interests of employees and consumers in an increasingly diverse, global society.").

147. *See* Bus. for Soc. Responsibility, Work-Life Quality, *available at* http://www.bsr.org/CSRResources/IssueBriefDetail.Cfm?DocumentID=50965 (last visited May 30, 2005) (citing various studies).

148. *See id.*; *see also* James K. Harter et al., *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement and Business Outcomes: A Meta-Analysis*, 87 J. APPLIED PSYCHOL. 268, 273–74 (2002).

149. *See* Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1666–

higher-level positions, corporations may experience less turnover and have a better ability to recruit and retain their workforce, which in turn may positively impact the corporation's bottom line.[150] However, even if valid, this argument applies with less force to corporate boards. Because board members do not normally interact with company employees, employees may be unaware of the composition of their company's board. Thus, their symbolic importance to those employees appears to be diminished.

With regard to recruitment and retention, having people of color in executive positions undoubtedly sends a powerful statement to those people of color in the corporation assessing their potential for advancement.[151] This statement not only influences their decision to join the corporation, but may also influence their decision to remain with the corporation.[152] However, because corporations select—and, in fact, are now required to select—the majority of their board members from outside of the corporation, having people of color on the board may not serve as a symbol that employees can ascend to such a position in the same way that having diversity at the executive level does. In this regard, board membership may not even have symbolic value for employees.

Then too, this rationale may inappropriately presume that directors of color will be able to understand the concerns of employees of color. Currently, directors of color are drawn from a socioeconomic class and background similar to their white counterparts, and different from the majority of American employees including employees of color.[153] The employee relations rationale presumes that despite this difference, directors of color will be able to understand the concerns of such employees. Part II.E addresses in more detail the flaws with this kind of presumption.

The employee rationale appears particularly problematic when viewed in the context of board functions. In essence, because many board members have limited roles in shaping policies as well as limited interactions with employees, their ability to meaningfully contribute to employee policies—even in a symbolic way—may also be limited.

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68 (2004) (noting that people of color in management positions allow others in the rank in file to imagine themselves in such positions).

150. *See id.*

151. *See id.*

152. *See id.* ("[T]he presence of people of color at the top of the corporation sends a positive message to people of color at the bottom that they, too, can ascend the corporate hierarchy.").

153. *See* Victor Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, 612 (1982); James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 675 n.291 (1985); *see also* Sarra, *supra* note 2, at 487 (discussing a similar occurrence among female directors).

E. The Governance Rationale

Some have argued that having directors of color enhances the quality of a board's decision-making and monitoring functions. By statute, all corporate powers must be managed by, or be under the direction of, the board of directors.[154] This management responsibility essentially involves two functions, a decision-making function and an oversight function.[155] The decision-making role requires that directors act in good faith and make decisions that they "reasonably believ[e] to be in the best interests of the corporation."[156] In order to satisfy this requirement, directors must make decisions only after they have gained sufficient familiarity with contemplated transactions by considering all relevant information or data pertaining to those transactions.[157]

Most social and psychological data on group dynamics suggest that having a diverse group of directors will facilitate a board's decision-making function because that data reveals that heterogeneous groups tend to make higher quality decisions.[158] Social and psychological research studies on group dynamics reveal that in making decisions, individuals are restricted by their own perspective, which is a product of their background characteristics.[159] When in groups, these combined perspectives determine the kind and quality of the decisions the groups ultimately make.[160] When group members all have the same perspective, it limits the range of information they have and the issues they consider.[161] Homogenous groups also suffer from polarization, which

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154. *See* MODEL BUS. CORP. ACT, *supra* note 87, § 8.01 (requiring, subject to certain limitations, that each corporation have a board of directors, and that all corporate powers be managed or directed by the board).

155. *See id.* § 8.31 cmt. f.

156. *See id.* § 8.30(a).

157. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985) (noting that directors breach their duty when they make decisions without informing themselves of all relevant information); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (noting that directors must inform themselves "of all material information reasonably available to them" prior to making a decision); Francis v. United Jersey Bank, 432 A.2d 814, 820 (N.J. 1981) (stating that directors must pay attention to financial and business information when discharging their duty).

158. *See* CARTER ET AL., *supra* note 50, at 5; Taylor H. Cox et al., *Effects of Ethnic Group Cultural Differences on Cooperative and Competitive Behavior on a Group Task*, 34 ACAD. MGMT. J. 827, 839 (1991); Donald C. Hambrick & Phyllis A. Mason, *Upper Echelons: The Organization as a Reflection of Its Top Managers*, 9 ACAD. MGMT. REV. 193 (1984); Susan E. Jackson, *Consequences of Group Composition for the Interpersonal Dynamics of Strategic Issue Processing*, 8 ADVANCES STRATEGIC MGMT. 345, 355–59 (1992).

159. Dallas, *supra* note 2, at 1389–90 (explaining the upper echelon theory); Hambrick & Mason, *supra* note 158, at 194–98 (same).

160. *See* Dallas, *supra* note 2, at 1391, 1396.

161. *Id.* at 1396.

means that such groups tend to stake out extreme positions.[162] By contrast, a heterogeneous group is likely to contain a number of persons with conflicting opinions, knowledge, and perspectives, which results in a wider and more thorough consideration of alternatives and consequences.[163]

Because groups of varied people will have different approaches to analyzing and assessing information, they will produce a broader, even more nuanced set of solutions.[164] In this regard, both the quality of their analysis and the quality of their ultimate decision are likely to be superior to those of homogeneous groups. If we consider racially diverse boards as more heterogeneous, then these studies suggest that such boards are better able to fulfill their decision-making role because their diversity enables them to consider more fully all relevant information when making a decision. Their diversity also appears to ensure the high quality of their ultimate solution because it will reflect a richer decision-making process.

Social science data also suggests that diversity can improve the monitoring role of the board. As part of their management responsibilities, board members have an oversight function which entails ongoing monitoring of the corporation and its operations.[165] Enron and other corporate debacles suggest that boards failed in this monitoring function. Scholars have advanced many reasons for this failure, one of which is that the Enron board lacked true independence,[166] which led them to rubber-stamp the decisions of managers, or to not critically examine those decisions.[167] In applying social science data on group dynamics to Enron and other corporate governance failures, some have asserted that Enron board members exhibited "groupthink," which refers to a kind of mindless adherence to group norms and a failure to challenge decisions because of that adherence.[168] The groupthink theory was initially developed by Irving Janus in the 1970s, and has gained

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162. *Id.* at 1401; O'Connor, *supra* note 2, at 1255–56; Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 75 (2000).

163. *See* CARTER ET AL., *supra* note 50, at 5. Indeed, signers of an amicus brief in *Grutter* also note the ability of diverse groups "to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives." *See* 65 Leading American Businesses Brief, *supra* note 8, at 7.

164. *See* Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489 (1999).

165. *See, e.g.*, *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del Ch. 1996) (noting that boards have an obligation to monitor the legal compliance efforts of the corporation); *Francis*, 432 A.2d at 822 (noting that directors have a general monitoring responsibility).

166. O'Connor, *supra* note 2, at 1267.

167. *See* Ramirez, *Sarbanes-Oxley Reform*, *supra* note 2, at 840–41 (noting that problems of "groupthink" contributed to problems at Enron and other companies).

168. O'Connor, *supra* note 2, at 1238–39.

popularity in the field of social psychology.[169] According to the literature, groupthink is a symptom unique to cohesive homogenous groups.[170] Under this rationale, the Enron board's homogeneity—it was almost all white and all male[171]—led to a groupthink mentality that prevented it from adequately assessing the actions of management.[172] Racially diverse boards avoid this problem by undermining the homogeneity that leads to groupthink and its negative by-products.[173]

Certainly, the business community has embraced this rationale. As an example, the business leaders who signed an amicus brief in *Grutter* asserted that "the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints,"[174] and that such exposure is needed "at every level of an organization."[175] These leaders emphasize that individuals of different racial backgrounds may bring an awareness of different issues, and hence provide a broader perspective to the boardroom and corporate discussions.[176] This perspective is in turn vital to corporations seeking to serve a diverse and global customer and client base.[177]

However, the diversity mandated by the governance rationale may undermine a board's effectiveness by decreasing the level of trust and comfort among directors. Professors Lynn Stout and Margaret Blair emphasize the importance of trust on corporate boards to ensuring that boards operate effectively.[178] Certainly, when boards include people with different backgrounds, the level of trust within the board setting may decline because of their unfamiliarity with one another.[179] To the extent that trust expedites the decision-making process,[180] such a decline could have a negative impact on that process. Lack of comfort may also have

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169. *Id.* at 1238, 1257, 1259 (noting the popularity of the groupthink model, but also that there are mixed results as to the validity of the groupthink model); *see also* IRVING L. JANUS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 9 (2d ed. 1982); IRVING L JANUS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES 8–9 (1972) [hereinafter JANUS, VICTIMS OF GROUPTHINK].

170. *See* JANUS, VICTIMS OF GROUPTHINK, *supra* note 169, at 197 ("The prime condition repeatedly encountered in the case studies of fiascoes is group cohesiveness."); O'Connor, *supra* note 2, at 1261–62, 1306 ("One of the main lessons of the groupthink theory is that social homogeneity on corporate boards harms critical deliberation.").

171. *See supra* note 3 and accompanying text.

172. *See* Ramirez, *Sarbanes-Oxley Reform*, *supra* note 2, at 839–41.

173. *See id.*

174. 65 Leading American Businesses Brief, *supra* note 8, at 5.

175. *Id.*

176. *See id.* at 7.

177. *See id.* at 3, 7.

178. Margaret M. Blair & Lynn A. Stout, *Trust, Trust Worthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1796–99 (2001) (discussing the importance of trust in corporate decision-making).

179. *See infra* notes 181–82.

180. Blair & Stout, *supra* note 178, at 1796.

an impact on the ability of boards to work together—and diversity breeds lack of comfort. Thus, while studies suggest that people feel more comfortable and satisfied within groups of members who are like themselves,[181] others reveal that diverse groups not only experience more communication problems, but also tend to report higher levels of anxiety and frustration with their workgroup.[182]

At the very least, this suggests that corporations must manage diversity at the board level to ensure that board members feel comfortable with one another. The increased discomfort and lack of trust generated by diversity also suggest that the governance rationale may overestimate the ability of diverse groups to reach high quality decisions. Then too, people of color may feel pressured to reduce this discomfort and lack of trust by reducing their differences, making themselves more "racially palatable" to their fellow board members.[183] If this occurs, there will be greater comfort, but less genuine diversity, undermining the ability of board diversity to meet the objectives of the governance rationale.

The governance rationale may be flawed as well because it appears to be based on a presumption that people of color will provide heterogeneity or different perspectives simply by virtue of their race or ethnicity. That presumption is vulnerable to an attack made by many opponents of affirmative action that such a rationale presumes that race can be used as a proxy for viewpoint and perspective. Professor Lani Guinier argues that people of the same racial groups do have shared experiences and perspectives.[184] Others, such as Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit, note that race may not be a tight proxy for viewpoint or experience.[185] While this Article does not seek to further that debate, it is worth noting that the observation about the inappropriateness of using race as a proxy for viewpoint or experience may be particularly salient in the context of corporate boards. Indeed, when measuring the heterogeneity of a group, group theory looks at a variety of factors including race, gender, educational background, and financial status.[186]

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181. Dallas, *supra* note 2, at 1393; Jackson, *supra* note 158, at 361–62.

182. *See* Karen A. Jehn, *Managing Workteam Diversity, Conflict, and Productivity: A New Form of Organizing in the Twenty-First Century Workplace*, 1 U. Pa. J. Lab. & Emp. L. 473, 477–79 (1998) (discussing the tension and hostility caused by diversity in groups)

183. *See* Carbado & Gulati, *supra* note 149, at 1657–58.

184. *See* Lani Guinier, *The Pigment Perplex: The Complexity of Race Reveals the Inefficacy of Conventional Admissions Criteria and Demonstrates the Vital Importance of Diversity*, AM. LAW, Aug. 2002, at 61.

185. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 690 (6th ed. 2003); Richard A. Posner, *The* Bakke *Case and the Future of "Affirmative Action"*, 67 CAL. L. REV. 171, 181 (1979).

186. *See* Hambrick & Mason, *supra* note 158, at 197–98.

Typically, the only significant difference between directors of color and white directors is their race or ethnicity. Indeed, only 3% of board members are women of color, so most of the people of color on boards are men.[187] Viewing directors of color in light of the factors used to determine heterogeneity suggests that their presence may not be sufficient to create a heterogeneous board. From this perspective, we need to be careful when trying to use race as a proxy for the type of heterogeneity needed to combat groupthink and to promote more effective monitoring and decision-making.

With regard to this issue, there is both good and bad news. The good news is that some studies suggest that even among people with shared social and economic backgrounds, people of color are more likely to identify along racial lines when the issues they confront relate to race.[188] The bad news is that these studies do not indicate how such people will behave with regard to issues that do not involve race or some racial subtext. Social science theory suggests that they may not identify along racial lines. Indeed, group theory reveals that when people come together, they look for commonality or shared characteristics, and make decisions based on their common ground rather than their differences.[189] The more common ground there is, the more likely their similarities, and not their differences, will dictate their behavior.[190]

With so much common ground to choose from, one wonders how different perspectives among directors of color will arise. The possibility for differing perspectives to arise is further diminished by the manner in which directors are selected. Indeed, directors nominate other directors, and in this nomination process, they tend to nominate people who are like themselves,[191] or people who they believe will most likely "fit in."[192]

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187. *See* CATALYST, *supra* note 16, at 2 (noting that there has recently been a slight increase from 2.5% to 3%).

188. Studies regarding African Americans and public opinion reveal that there is a strong racial divide on matters related to race and matters with a racial subtext—"matters of public policy that individuals perceive to disproportionately affect one race more than others, such as the death penalty, welfare programs, and food stamps." Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1236–37 (2003); *see also* MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 55, 182 (1994); PATRICIA GURIN ET AL., HOPE AND INDEPENDENCE: BLACKS' RESPONSE TO ELECTORAL AND PARTY POLITICS 75–81 (1989); DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 27–33 (1996). Racial identity is a strong predictor of how different racial groups view these matters. *See* DAWSON, *supra*, at 115–17; GURIN ET AL., *supra*, at 109. This result remains basically static even when one controls for other factors such as class or status. DAWSON, *supra*, at 117; GURIN ET AL., *supra*, at 109.

189. *See* Dallas, *supra* note 2, at 1396.

190. *See id.* (noting that the more diverse a group's preferences, the less reliance is placed on similarities when the group makes decisions).

191. Recently, the SEC proposed changes that would allow shareholders, under certain circumstances, to include their nominees for directors in the company's proxy

This means nominating people of color who are not viewed as divisive.[193] Thus, there is a strong possibility that the people of color selected as board members will be selected for their similarities to other board members, undermining the effectiveness of the governance rationale by decreasing the possibility that the perspectives of people of color will be different from that of other directors.

Indeed, Carbado and Gulati explain this problem in the context of corporate promotions more generally.[194] In their recent work, they conclude that the type of people of color most likely to be promoted within corporations are not likely to promote the interests of other people of color.[195] This is because corporate officials often only seek to promote those people of color who are racially palatable and demonstrate a willingness to subordinate their group identity for the good of the firm.[196] These characteristics are particularly important for managers of color because they must be perceived to have the capacity to manage whites without making them uncomfortable.[197] In this way, the corporation's promotion system screens out those people of color who exhibit racial differences.[198] The same can be expected from the director nomination process. Moreover, given that directors are drawn from the same pool of corporate managers who already have been prescreened through the corporation promotion process, the director nomination process may act

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statement. U.S. Sec. & Exch. Comm'n, Proposed Rule: Security Holder Director Nominations, Release Nos. 34-48626, IC-26206 (Oct. 14, 2003) (to be codified at 17 C.F.R. §§ 240, 249, 274), *available at* http://www.sec.gov/rules/proposed/34-48626.htm. For a discussion of the proposed rules, see Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43 (2003); and Lewis J. Sundquist III, *Comment: Proposal To Allow Shareholder Nomination of Corporate Directors: Overreaction in Times of Corporate Scandal*, 30 WM. MITCHELL L. REV. 1471 (2004). However, it appears that these proposed changes will not take effect.

In November of 2003, the SEC did adopt a rule requiring corporations to disclose how shareholders may propose candidates to a company's nominating committee, as well as additional disclosure regarding the nominating committees procedure. *See* U.S. Securities & Exch. Comm'n, Final Rule: Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors, Exchange Act Release Nos. 33-8340, 34-48825, IC-26262 (Nov. 24, 2003) (to be codified at 17 C.F.R. §§ 228–229, 240, 249, 270, 274) [hereinafter SEC Final Rule], *available at* http://www.sec.gov/rules/final/33-8340.htm; *see also* Stewart M. Landefeld & Danielle Benderly, *New SEC Rules Require Expanded Nominating Committee Disclosure in Proxy Statements*, 18 INSIGHTS 2 (2004); Sundquist, *supra*, at 1477–78. The rules took effect January 1, 2004. *See* SEC Final Rule, *supra*.

192. *See* Carbado & Gulati, *supra* note 139, at 1804 (noting a bias within the selection mechanism).

193. *See id.* at 1790 (noting a commitment to sameness and a rejection of difference).

194. *See* Carbado & Gulati, *supra* note 149, at 1654–59.

195. *See id.* at 1672–73.

196. *See id.* at 1657–58, 1675–76.

197. *See id.* at 1672–77.

198. *See id.* at 1654–59.

as a second screen, ensuring that directors of color may be the least likely people to advance and promote the interests of nonwhites.

Even assuming that board members of color have perspectives different from other board members, the governance rationale may deemphasize the importance of critical mass to ensure that people of color will feel comfortable voicing their perspective. Most boards do not have a critical mass of people of color. While 76% of corporations have at least one person of color,[199] very few boards have more than one. In 1997, when just over half of *Fortune* 1000 firms had at least one person of color, only 11.5% had two, while only three firms had four or more directors that were people of color—and this is for boards that have an average size of eleven directors.[200] This study reveals that there is no critical mass of directors of color. The literature on critical mass suggests that people of color may feel marginalized and thus fail to speak out unless they have others in the group who share their views and perspectives.[201] The *Grutter* court adopted the conclusions of this literature, noting the importance of critical mass in the classroom setting to ensure that people of color feel comfortable voicing their diverse viewpoints.[202] According to the Court, critical mass promotes cross-racial understanding and diminishes stereotyping by allowing diverse individuals to espouse different views.[203] Without this critical mass, directors may internalize the need to build cohesion, or feel uncomfortable voicing views or positions different from the majority. Thus, corporations that do not seek to build a critical mass may not be able to take advantage of the governance rationale.

F. Concluding Assessments

As this Part reveals, there are both merits and limitations to the business rationales. With regard to the talent rationale, there is certainly merit in the assertion that corporations need to take advantage of the talents of all people within our country or they may miss out on new innovations and, given the demographics, they may find difficulties meeting their future employment needs. However, corporations' narrow view of board qualifications and candidates may undermine the ability of

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199. *See supra* note 16.

200. *See* CARTER ET AL., *supra* note 50, at 9–12, 27 tbl.3.

201. *See, e.g.*, Emily Calhoun, *An Essay on the Professional Responsibility of Affirmative Action in Higher Education*, 12 TEMP. POL. & CIV. RTS. L. REV. 1, 14–15 (2002); Kathryn R.L. Rand & Steven Andrew Light, *Teaching Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale*, 54 J. LEGAL EDUC. 316, 317–18 (2004); *see also Grutter*, 539 U.S. at 318–19 (noting that critical mass prevents isolation and allows students to feel comfortable expressing their views).

202. 539 U.S. at 333, 335 (endorsing the law school goal of ensuring critical mass in its student population).

203. *See id.* at 330.

the talent rationale to encourage diversity except in a limited manner. As the market rationale suggests, people of color may do a better job of ensuring that corporations appreciate and respond to the concerns of others within their community, particularly when those concerns relate to matters of race or ethnicity. However, in light of the fact that corporations can use both managers and marketing firms to reach this goal, it is not clear that such corporations also need to use directors who may not have any additional expertise. Then too, there is some legitimacy to the assertion within both the governance and employee relations' rationales that directors of color may bring different perspectives and ideas to the board, which may facilitate the adoption of policies aimed at enhancing worker satisfaction and decreasing conflict and costly discrimination suits.

However, these rationales deemphasize the importance of critical mass and a more comprehensive strategy for managing diversity, suggesting that directors of color can handle that task on their own. They also deemphasize the possibility that people of color will be selected for their sameness, rather than their ability to bring different perspectives to the board. In the end, these business rationales appear to promise more than directors of color can realistically deliver, and this false promise stems, in part, from the failure to appreciate the more limited role directors (as opposed to managers) have in creating and implementing corporate practices as well as an overblown expectation regarding the ability of directors of color to manage the conflicts and issues presented by a diverse workforce.

III. THE COSTS AND BENEFITS OF BUSINESS RATIONALES AS A JUSTIFICATION FOR BOARD DIVERSITY

Given that there are merits to at least some aspects of the business rationales, the fact that they may be flawed as well may not be a sufficient reason to reject them if such rationales have the ability to compel corporations to increase diversity. Instead, the more relevant inquiry may be one that seeks to assess the relative costs and benefits of relying on business rationales to advance diversity on corporate boards. This Part asserts that while there may be practical benefits to relying on such rationales, there are also both individual and societal costs associated with that reliance.

A. The Benefits

1. PROFIT AND PRACTICALITY

Undoubtedly, there are important practical reasons for choosing to rely on business rationales to promote diversity. Historically, calls for

increased diversity have rested on social or moral grounds. The growth of the business rationales for diversity stems from a concern that moral or social appeals have proven insufficient to encourage corporate America to increase diversity within its ranks.[204] In fact, in some ways, rationales for diversity have undergone an evolution.[205] The first stage of rationales was grounded in concepts of discrimination. Thus, proponents argued that corporations needed to actively increase diversity in order to redress prior discrimination against people of color by society in general and corporate America in particular.[206]

Proponents also argued that the lack of diversity within the upper ranks of corporate America reflected a glass ceiling, which resulted either from blatant racism or discrimination, or from unconscious racism or stereotyping.[207] Corporate America had a moral obligation to penetrate the glass ceiling by actively pursuing diversity. Thus, even if we accept that corporate executives are not racist, at best, the fact that boards continue to be primarily all white and all male suggests that corporations and their nominating committees have failed to properly appreciate the talent of persons of other races and ethnicities. At worst, corporations' refusal to move beyond the "good old boy" network when searching for directors may reflect a more deep-seated problem, an unconscious stereotyping about the ability of nonwhites to serve as directors. Proponents of diversity insisted that corporations have a moral obligation to reject these presumptions by actively seeking out diversity.

The second stage of rationales adopted a more positive approach, rooted in concepts about our ideal society. Proponents argued that we should celebrate our diversity.[208] More specifically, proponents claimed

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204. *See* Wilkins, *supra* note 14, at 1548–55.

205. This Article does not mean to assert that there has not been overlap in the evolution or stages of rationales for diversity. Hence today, proponents continue to assert both moral and economic justifications for increased diversity. However, the stages do reflect an evolution whereby particular rationales have been relatively dominant.

206. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305–06 (1978); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 858–59 (1995); Richard Delgado, *Why Universities Are Morally Obligated To Strive for Diversity: Restoring the Remedial Rationale for Affirmative Action*, 68 U. COLO. L. REV. 1165, 1166 (1997); Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 677 (2004).

207. *See* Metro Broad., Inc. v. Fed. Communications Comm'n, 497 U.S. 547, 554–57 (1990); *J.A. Croson*, 488 U.S. at 498; U.S. Glass Ceiling Comm., Good for Business: Making Full Use of the Nation's Human Capital: Fact-Finding Report of the Federal Glass Ceiling Commission, Daily Lab. Rep. No. 52 (BNA), at S-2 to S-4 (Supp. Mar. 16, 1995); M. Neil Browne & Andra Giampetro-Meyer, *Many Paths to Justice: The Glass Ceiling, the Looking Glass, and Strategies for Getting to the Other Side*, 21 HOFSTRA LAB. & EMP. L.J. 61, 67–75 (2003) (discussing the causes and effects of the glass ceiling).

208. *See* Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 577–78 (2000) (discussing how "'[c]elebrating the value of . . . diversity has become routine'") (quoting

that as the population and the workforce becomes more diverse, corporations have a moral or social obligation to ensure that their executive and board ranks also include diverse individuals.[209]

While the arguments developed within the first and second stages had strong symbolic and even rhetorical appeal, they apparently failed to energize the business community. Thus, while surveys suggest that directors and corporate executives believe board diversity to be an important goal,[210] they also indicate their belief that rationales must go beyond moral or social appeals. Indeed, participants at a forum sponsored by the Conference Board, including representatives from such corporations as Bank of America, PepsiCo, and TIAA-CREF, "immediately rejected the notion that board diversity for its own sake, without a business case, was sufficient reason to act."[211] Thus, the very fact that scholars and business leaders alike feel compelled to advance business justifications for board diversity indicates that moral rationales may not be enough to encourage voluntary measures for increasing diversity. For these reasons, a third stage of diversity rationales has evolved that relies upon business or market considerations. This stage represents a clear response to the business community's rejection of moral or social appeals for diversity.[212] From this perspective, even if flawed, many perceive business rationales as the only method available to convince corporations to enhance diversity.

2. BUSINESS RATIONALES AND BOARD FIDUCIARY DUTY

One may even assert that economic rationales are more consistent with a board's fiduciary responsibilities. When carrying out their responsibilities, board members have a fiduciary duty to take actions that are in the best interests of the corporation,[213] and their failure to do so

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PROMISE AND DILEMMA: PERSPECTIVES ON RACIAL DIVERSITY AND HIGHER EDUCATION 3 (Eugene Y. Lowe, Jr. ed., 1999)) (alteration in original); Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1933, 1937 (2001) (discussing how the celebration of diversity enjoys great acceptance and is endorsed as a policy goal).

209. *See, e.g.*, Wilkins, *supra* note 14, at 1565–67 (noting the growing moral consensus that diversity is the "'right ting to do'") (quoting HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 75–76 tbl.3.1 (1985)).

210. *See* KORN/FERRY INT'L & CORP. BD. MAGAZINE STUDY, WHAT DIRECTORS THINK 2 (2002) (indicating that 58.9% of board members would like increased minority representation on their board).

211. CAROLYN KAY BRANCATO & D. JEANNE PATTERSON, CONFERENCE BD., BOARD DIVERSITY IN U.S. CORPORATIONS: BEST PRACTICES FOR BROADENING THE PROFILE OF CORPORATE BOARDS 7 (Research Report No. 1230-99-RR, (1999)).

212. *See* Wilkins, *supra* note 14, at 1556 ("Corporate America has fully signed on to the business case for diversity . . . .").

213. *See* MODEL BUS. CORP. ACT, *supra* note 87, § 8.30(a).

represents a breach of that duty.[214] Many interpret this duty as an obligation to maximize shareholder profit. On one hand, economic rationales appear consistent with that kind of obligation because they suggest that increasing diversity on the board will result in enhanced profitability and corporate effectiveness. On the other hand, requiring boards to adopt measures aimed at increasing diversity without any economic or business rationale for those measures may reflect a breach of that duty.[215] From this perspective, such a rationale may be necessary to comport with directors' fiduciary commitments.

3. ECONOMIC EMPOWERMENT

Business rationales also have some benefit for individual directors and even communities of color more generally. Indeed, such rationales appear to recognize both the value and the economic viability of people of color. For example, the governance rationale suggests that people of color add value to an organization. Then too, the market rationale stresses the economic power of people of color and hence may be empowering for the individual directors appointed to court and represent those communities, and for the communities being courted, finally providing them with not only a voice, but also leverage within corporate America. As one scholar notes, "power in the market is power, and that is liberating."[216] Given the legacy of disenfranchisement and disempowerment experienced by people of color, this benefit should not be undervalued.

B. The Costs[217]

1. THE COSTS OF BEING SET UP FOR FAILURE

If a director of color's existence on a board is measured in terms of her ability to deliver on the claims underlying the business rationales, then

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214. *See id.* § 8.31.

215. *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (finding that a decision to withhold dividends from shareholders, which was based on social concerns and a desire to benefit the general public, violated directors' fiduciary duty to generate profit for shareholders).

216. *See* Margaret Jane Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341, 350 (1991) (discussing feminist arguments in support of surrogacy based on market-based liberation).

217. One cost which should not be overlooked, but does not stem specifically from business rationales, is the cost of encouraging directors of color to increase their board membership during a time of corporate uncertainty and enhanced risks of liability. Indeed, post-Enron and Sarbanes-Oxley studies suggest that most people are leery of becoming directors. *See supra* note 37 and accompanying text. Moreover, for apparently the first time ever, outside directors have agreed to pay out of their own pockets in order to settle a federal securities law action. *See supra* note 36.

such rationales create standards that such directors may inevitably fail to meet. Part II reveals some of the individual difficulties with directors of color's ability to fulfill the claims posited by business rationales. For example, the market rationale appears to rely on board members' ability to interact more actively with clients and customers than many board members traditionally do.[218] It also appears to assume that directors of color can relate to customers and clients of color, an assumption that may be inaccurate given the class differences between such directors and the corporation's client and customer base.[219] Moreover, even if some directors could fulfill some of the claims of the business rationale, it seems virtually impossible for directors to achieve all of them. Thus, the rationales in aggregation may make their failure a virtual certainty.

There is both an individual and a societal cost associated with these potential failures. With regard to the individual, she may experience frustration and anxiety in seeking to meet what may be unattainable objectives. Then too, her position as a director may be jeopardized if she cannot fulfill these objectives, causing damage to her personal and professional reputation. In addition to these individual costs, the failure to meet these objectives may undermine the firm's ability to retain directors of color in the future. On one hand, those led to expect that people of color could achieve many, if not all, of these claims may be disappointed in the outcome. This disappointment may translate into a reluctance to actively pursue people of color in the future. On the other hand, for those already reluctant to value the importance of diversity, such failure can serve as validation of their assumptions regarding people of color. That failure certainly provides them with ample reason to reject diversity as a whole. In this way, business rationales may be costly because they foster unrealistic expectations that not only negatively impact an individual's position, but may also undermine future efforts to achieve diversity.

2. THE COSTS OF OVEREXTENSION

Business rationales may also cause directors of color to become overextended. As the empirical data suggests, directors of color already tend to be overextended because they tend to sit on too many boards.[220] The business rationales may contribute to this overextension. As some note, "[c]orporate America's push to achieve diversity in the boardroom has resulted in the same names called over and over again."[221] The

218. *See supra* notes 121–22 and accompanying text.

219. *See supra* note 153.

220. *See supra* notes 28–30.

221. Lisa DiCarlo, *America's Most Overworked Company Directors*, FORBES.COM (Aug. 8, 2002), *at* http://www.forbes.com/2002/08/08/0808overworkedpackage_print.html.

pressure to increase board diversity, coupled with a corporation's perception of the pool problem, may explain why people of color tend to serve on multiple boards at a higher rate than their white counterparts. In this regard, business rationales that fail to properly address the pool problem exacerbate the relative overextension of directors of color. The fact that directors hold multiple directorships only reveals part of their overextension. This is because even if directors of color serve on only a few boards, they may feel obligated to attempt to meet the objectives of the various business rationales. Such an obligation may lead these board members to take on many more tasks than their white counterparts. In this regard, the business rationales augment the commitment directors of color must undertake.

Such an augmentation comes at a price to the individual and society. The current consensus regarding good corporate governance practices is that this kind of overcommitment is detrimental to directors' ability to perform their functions with proper vigor.[222] Indeed, one study notes that based on the number of companies in which they serve as directors, directors who serve on six or more boards probably had more than 200 hours of board and committee meetings per person in 2001.[223] This is in addition to their full-time jobs, which often include serving as chief executive of a large company.[224] As the study concludes, these directors "are simply stretched too thin."[225] The result of being stretched too thin may be that directors fail to pay appropriate attention to their responsibilities, undermining their effectiveness and perhaps leading to costly mistakes. Then too, if directors of color are perceived as performing their duties in a less than rigorous manner, that perception could damage diversity efforts by generating or confirming negative perceptions regarding people of color's performance abilities. From this perspective, these rationales are costly because they encourage overextension, placing directors of color in a position that may compromise their ability to perform effectively.

This overextension also has negative repercussions for the boards on which these directors serve. Boards which continue to have directors of color who hold multiple directorships have received bad corporate governance marks for that fact alone. Indeed, two corporations were given "F" grades from a shareholder activist group as a result of having directors on their board serve on multiple boards.[226] Those directors were

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222. *See* 2004 KORN/FERRY STUDY, *supra* note 16, at 24 (noting that many corporations now limit the number of outside boards on which their CEOs can serve).

223. *See* DiCarlo, *supra* note 221.

224. *See id.* (noting that, of the five directors sitting on six or more boards of S&P companies, Jackson is the president of Rensselear Polytechnic Institute, Gray is the chief executive of the United Negro College Fund, and Jordan is the senior managing partner of the investment bank Lazard Freres).

225. *Id.*

226. *See* Citrano, *supra* note 82.

black.[227] Because such a practice may undermine a director's ability to perform her duties, it may also jeopardize the overall effectiveness of the corporation.

3. THE COSTS OF MARGINALIZATION

Many of the business rationales may cause corporations to marginalize directors or communities of color in ways that may have negative repercussions. First, corporations may marginalize the role such directors undertake. For example, the market rationale may encourage marginalization by suggesting that directors' roles should be limited to interacting with their particular community. For example, that rationale suggests that corporations should utilize black directors to help manage or develop black clients and customers. Along these same lines, by suggesting that directors of color have the unique ability to appreciate the concerns of their particular communities or employees of their own racial group, the employee relations and market rationales may encourage corporations to place such directors on only those committees aimed at addressing such groups. As an example, both Texaco and Coca-Cola have established "public responsibility" committees aimed at responding to diversity and social issues, and their black board members were either on that committee or the chair of the committee.[228] In fact, that committee is the only one on which the black director at Coca-Cola serves.[229]

This pigeon-holing of directors of color is problematic. Business rationales that encourage such pigeon-holing create limits on directors' ability to be full participants on the board. In that regard, such rationales may not lead to empowering either the director or the community she is supposed to represent. In fact, business rationales that encourage marginalization may conflict with others that not only insist that people of color should be used for their full range of talents, but also insist that people of color's differing perspective is critical to all decisions made by the corporation.

In addition, these rationales may cause corporations to marginalize directors as individuals. Indeed, the governance rationale appears to force directors into the role of an outsider. The notion that directors of color should or must bring differing viewpoints into the boardroom means that

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227. *See id.*; DiCarlo, *supra* note 221.

228. *See* COCA-COLA PROXY STATEMENT, *supra* note 130, at 17 (noting that McHenry chairs the "Public Issues and Diversity Review Committee"). The committee "aids the Board in discharging its responsibilities relating to public issues and diversity." *See id.* at 21; *see also* TEXACO PROXY STATEMENT, *supra* note 127, at 5 (noting that Jenifer sits on the "Public Responsibility Committee").

229. *See* COCA-COLA PROXY STATEMENT, *supra* note 130, at 17. Jenifer also serves on Texaco's audit committee. *See* TEXACO PROXY STATEMENT, *supra* note 127, at 5.

they may become the "devil's advocate" for the board. While this may be productive for the board as a whole,[230] it makes it difficult for the individual directors forced to assume that role to establish cohesion with other board members who may view them as antagonistic. This kind of marginalization could ultimately lead to decreased communication and understanding among directors, exacerbating as opposed to alleviating tension between various racial groups. Enabling corporations to use directors of color in this way also shifts the burden away from others in the corporation to educate themselves regarding the concerns and issues of communities different from their own.

Finally, business rationales may encourage corporations to marginalize communities of color in a manner that may prove destructive. The market rationale encourages corporations to target their advertising and products in a manner that appeals to specified communities.[231] At first blush, this appears to be a positive development, ensuring that corporations meet the particularized needs of those communities. However, there may be negative repercussions. Given the negative perceptions and stereotypes that continue to be attributed to various groups, if corporations create or target specific products or services for such groups, there exists the potential that such products or services may be inferior, or at least construed as inferior. The FCC's study confirms that such potential can, in fact, be realized. That study illustrates the widespread belief of many corporate officials and advertisers that once a product or service becomes associated with particular racial groups, it will be viewed as less valuable.[232]

Consequently, officials and advertisers pay less for advertising those "ethnic" products or services,[233] even when qualitative data reveals that communities of color spend as much or more on such products or services.[234] Then too, the study reveals that companies do not want to be perceived as making ethnically targeted products for fear of driving away

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230. *See* O'Connor, *supra* note 2, at 1304–06 (suggesting the positive impact a permanent "devil's advocate" could have on boards).

231. *See supra* Part II.B.

232. *See* OFORI, *supra* note 115, at 35–36 (noting luxury car manufacturers concerns that being identified with ethnic customers would stigmatize or "diminish the value" of their cars, and noting that J.C. Penney's abandoned a successful product campaign out of fear that white America would think it had become a black store).

233. *See id.* at 13 (noting the belief that the black consumer is less valued, and hence companies pay less to market products for black consumers); *id.* at 32–35 (noting the widespread existence of "minority" discounts, whereby companies offer discounted rates for advertising products on stations aimed at people of color). Minority broadcasters indicated that these discounts reduced their revenues by 63%, while the Federal Communications Commission (FCC) concluded that they represented a significant barrier to competition. *Id.* at 13, 28.

234. *See id.* at 41–42.

their white customers.[235] Hence, when corporations do engage in such targeting, they target categories that are less upscale and of a lesser quality.[236] An example, albeit problematic, is liquor, where even when advertisers spend significant dollars targeting the black community, they rarely target them with expensive brands.[237] These rationales may contribute to these practices. By encouraging corporations to develop different strategies and products for distinct communities, some business rationales may have the opposite effect than intended, encouraging, or at least facilitating, the development of second-class products or services.

4. THE COSTS OF COMMODIFICATION

Grounding the need for diversity within market-based rationales appears to embrace racial commodification. Such commodification refers to the notion that race or racial identity can or should be used as a commodity to be bought and sold in the marketplace.[238] At their crux, arguments for diversity based on business rationales reflect commodification because those arguments promote diversity for the value such diversity can bring to a corporation. Most notably, the market rationale rests on the notion that communities of color represent buying power and that corporations can utilize directors of color to attract that power. Other rationales are less obvious, but nonetheless embrace commodification because they justify diversity based on its economic value to the corporation. For example, the litigation rationale suggests that corporations can utilize directors of color to decrease their incidence of racial tension and the corresponding costs associated with the lawsuits that arise from that tension.[239] In this regard, such arguments embrace notions of racial commodification.

First, such commodification is objectionable on moral grounds. Recently, several scholars have discussed the impact of commodification, particularly as it relates to women. Most notably, Professor Margaret Jane Radin objects to universal commodification, which is the idea that all things and people can be commodified or viewed in terms of their market value.[240] Relying in part on Immanuel Kant, she argues that such

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235. *See id.* at 35 (noting that companies do not advertise tourism upscale locations to blacks for fear that it will "turn off" the white traveler).

236. *See id.* at 33 (noting that companies do not target blacks for upscale or luxury products because they are not seen as suitable customers).

237. *See id.* at 35.

238. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 1–2 (1996) (describing the concept of commodification and noting that personal attributes can be commodities).

239. *See supra* Part II.C.

240. RADIN, *supra* note 238, at 56; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1859–63 (1987). For a critique of Professor Margaret Jane Radin's work, see John A. Robertson, *Human Flourishing and Limits on Markets*, 95

commodification can be rejected on purely moral grounds.[241] Under Kant's perception of personhood, persons have value in and of themselves.[242] They also have attributes that can be valued, controlled, or manipulated.[243] Kant argues that the moral distinction between people and objects is that people must be treated as ends in themselves, not means—and not for their particular attributes.[244] Hence, Kant's moral law would reject commodification to the extent it requires that people be treated as means and not ends in themselves, failing to value people for their intrinsic worth.[245] As an extension, Kant's moral law would reject arguments for diversity resting on business rationales because they rely on the economic value people of color can bring to corporations, treating them as a means to enhance profit and not as valuable ends in themselves.

Second, because commodification encourages society to view people of color as commodities and not as valuable persons,[246] it may encourage society to view such people as less valuable than their white counterparts. Commodification encourages corporate constituents to value directors of color in terms of their ability to reach particular economic objectives, and when they fail to reach those objectives, they may be seen as less valuable. In fact, Radin argues that commodification can also lead to self-devaluation because individuals come to internalize market rhetoric and see themselves as mere commodities as opposed to intrinsically valuable beings.[247] Of course, in a certain sense, everyone who encounters the corporate enterprise is being commodified in order to benefit the corporation and its shareholders. This includes directors whose role—particularly post-Enron and post-Sarbanes-Oxley—will be judged against their ability to meet the corporations' financial objectives.[248] In this respect, rationales that embody commodification appear to treat directors of color in the same manner as other directors.

MICH. L. REV. 2139, 2148–50 (1997) (reviewing RADIN, *supra* note 238); and Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 404–05 (1993). *See also* Martha M. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 3–4 (2003) (discussing Radin's and Judge Richard Posner's theories with respect to commodification). For a discussion of commodification in the context of mass restitution and slavery, see Anthony J. Sebok, *Two Concepts of Injustice in Restitution for Slavery*, 84 B.U. L. REV. 1405, 1423, 1426 (2004).

241. *See* Radin, *supra* note 240, at 1881.

242. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (1785), *reprinted in* THE MORAL LAW 53, 95–96 (H.J. Paton trans., 1967) (1948).

243. Radin, *supra* note 216, at 345 (citing IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 52–53, 64–65 (John Ladd trans., 1965) (1797)).

244. *See id.* at 345 & n.4 (citing KANT, *supra* note 242).

245. *See id.*

246. *See id.* at 345–46.

247. *See id.*

248. *See supra* note 36 (discussing recent shareholder suits against directors).

Indeed, even Radin notes that not all commodification is objectionable.[249] Instead, she argues for partial commodification, pointing out that some attributes may be treated as commodities without destroying personhood.[250] A categorical rejection of commodification fails to appreciate that it may be empowering for individuals of color because it assigns them some positive value within the marketplace. In this regard, commodification may treat directors of color like all other directors, enhancing their personhood.

However, as Radin notes, commodification can have a different and more damaging impact when applied to particular groups.[251] First, while it is true that all directors may be viewed as commodities in the sense that they are judged by their ability to meet corporate objectives, unlike other directors, directors of color will also be evaluated on their ability to meet the objectives advanced by the various business rationales. As this Article reveals, it may be difficult, if not impossible, for directors to meet those objectives. When that occurs, we may expect their value to deteriorate in a manner distinct from their white counterparts. Second, the historical and social understanding of race and racial groups makes commodification of such groups more troubling than commodification of whites.

On one hand, a complete rejection of commodification fails to recognize that people can distinguish between personhood and attributes that comprise personhood. On the other hand, the ability to make distinctions between personhood and the economic value of their attributes may apply with less force in the context of people of color. Indeed, Radin notes that market discourse does not exist in a vacuum; rather, it exists within a culture that not only includes a history of racial and sexual subordination, but also includes lingering racism and patriarchy.[252] Historically, people of color have been viewed as commodities.[253] The obvious example is slavery, when society did not distinguish between black people and their attributes, but instead

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249. *See* RADIN, *supra* note 238, at 102–03, 134–36; Radin, *supra* note 240, at 1921–25.

250. *See* RADIN, *supra* note 238, at 102–03, 134–36; Radin, *supra* note 240, at 1921–25.

251. Radin, *supra* note 216, at 347–49 (noting that commodification is especially problematic for people of color because they have historically been devalued and viewed only in terms of their economic value).

252. *See id.*

253. For some examples of interesting discussions of slavery and commodity, see Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999); and Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309 (1996).

dismissed their value as humans and treated them as commodities to be purchased and sold.[254]

It is this historical context that continues to taint our perceptions of race today. Because of this history, commodification, as applied to women and people of color, is more likely to lead to suppression and devaluation.[255] Consistent with Radin's assessment, this social and historical context suggests why it may be more problematic to view directors of color as commodities as opposed to other directors whose market value will not be assessed against this historical backdrop. In this way, economic-based justifications for diversity appear problematic because they encourage corporations to view people of color in terms of their market value, which could lead to a devaluation of such people.

5. COSTS OF CEDING MORAL AUTHORITY

There is also a cost involved in ceding the legitimacy of moral and social rationales for diversity. This is because business rationales shift the discussion about diversity away from moral and social issues and toward economic-based and market-based justifications. That shift may represent a subtle acknowledgement of the invalidity of the former issues. To be fair, it is possible that diversity advocates can seek to advance both moral and economic rationales for diversity simultaneously, negating this shift and its connotations. However, given that business rationales were adopted in response to the apparent ineffectiveness of moral claims,[256] this possibility does not appear to be a realistic one. From this perspective, these business rationales do not appear to be designed to supplement moral ones, but rather to replace them. Diversity advocates must ask themselves if that replacement, and the implicit acknowledgement that it may represent is appropriate, particularly in light of the empirical data which lends credence to these moral or social rationales and suggests that the glass ceiling for people of color is not being overcome.

Then too, by placing rationales for diversity squarely in market terms, diversity advocates may allow corporations to ignore confronting the legacy of discrimination and its lingering effects. Such allowance comes at a price. It is possible that corporations and society cannot effectively manage diversity without acknowledging the moral and social

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254. *See* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999); and Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309 (1996).

255. *See* Radin, *supra* note 216, at 347–49.

256. *See supra* notes 211–12.

issues that underlie conflicts associated with diversity. Also, in the face of subtle and not so subtle attacks on affirmative action, ceding the moral space, rather than confronting those who would challenge the moral and social legitimacy of diversity claims, may allow others to claim that space. This is particularly dangerous if it turns out that these business rationales are also illegitimate because then diversity advocates may be left with no justification for their efforts. In this respect, such advocates should use their energies to develop new modes of thinking about the moral and social imperatives for diversity, as opposed to developing strategies that shift the focus away from such imperatives.

When thinking about that shift, diversity advocates might actually find support in recent corporate scholarship that supports a broader understanding of a corporation's obligations. Indeed, historically there have always been two modes of thought with respect to the corporation and its obligations.[257] Certainly, there are many corporate scholars who contend that the corporation's primary, if not only, concern should be the maximization of profit.[258] These scholars support the "shareholder primacy" model of the corporation.[259] Business rationales seem perfectly suited to this shareholder primacy conception of the corporation. However, there are other scholars who take a broader view of the corporation, insisting that corporate actors should maximize the interests of all of the relevant actors who interact with the corporate enterprise.[260] Based on this conception of the corporation, advancing initiatives that take into account social concerns and the interests of employees and other constituents may be well within the framework of corporations' obligations.

Consistent with this conception, scholars have historically insisted that corporations have a social responsibility to adopt measures beyond those specifically tied to financial benefits.[261] In fact, recently, business leaders at the forefront of corporate governance reform have advocated these principles. In commenting on directors' role, Ira Millstein, who drafted one of the first *OECD Principles of Corporate Governance*, recently stated that directors must be "people whom shareholders,

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257. *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–65 (1992) (noting that society has alternated between two views of the corporation, one contending that corporate actors should maximize shareholder wealth, and another contending that corporate actors should make decisions that account for the interests of all corporate constituents).

258. *See, e.g.*, A.A. Berle, Jr., *For Whom Corporate Managers* Are *Trustees: A Note*, 45 HARV. L. REV. 1365, 1367–69 (1932).

259. *See* Allen, *supra* note 257, at 265.

260. *See supra* note 257.

261. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147–48 (1932).

employees, suppliers, customers and communities trust to 'do the right thing.'"[262]

Most significantly, Professors Henry Hansmann and Reinier Kraakman, who only a few years ago claimed that all of society had accepted the shareholder primacy model,[263] note that today's corporate form "enhances the probability that [board members] will respond in a principled fashion to the interests of all corporate constituencies simply through moral principles and social pressure."[264] This broader notion of the corporation means that corporate actors do not have to justify their actions in terms of market returns, but can pursue actions that have a valuable impact on the corporation and the community it serves.

Along these lines, courts have sanctioned corporate actions that appear to stem from this broader understanding of corporate responsibilities. Hence, even when they do not advance short-term profits, courts will not overturn director actions so long as they can be tied to the long-term health of the corporation.[265] For example, courts have upheld charitable giving by boards based on the notion that such giving enhances the community image of the corporation, which benefits the corporation, if only intangibly.[266] Like charitable giving, promoting board diversity for its own sake may serve to enhance the public image of a corporation. Also, courts have allowed corporations to forgo profits in order to preserve the integrity of the community in which it serves.[267] Similarly, courts have enabled corporations to prevent shareholders from taking advantage of the lucrative returns available in connection with a takeover, so that corporations can protect their employees and society.[268]

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262. *See* Ira M. Millstein, *A Perspective on Corporate Governance (Rules, Principles, or Both)*, *in* THE ACCOUNTABLE CORPORATION (forthcoming Sept. 2005) (manuscript at 7, on file with author).

263. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) ("[T]here is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.").

264. *See* Henry Hansmann & Reinier Kraakman, *What Is Corporate Law?*, *in* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 12 (2004).

265. *See, e.g.*, Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (allowing directors to forego profits to advance the long-term concerns of the corporation).

266. *See, e.g.*, Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969) (noting that the overall benefits of charitable giving outweighed the loss of income to shareholders).

267. *See, e.g.*, *Shlensky*, 237 N.E.2d at 780 (allowing corporations to forego profit to prevent the neighborhood's deterioration).

268. *See, e.g.*, Moran v. Household Int'l, Inc., 500 A.2d 1346, 1349, 1357 (Del. 1985) (allowing directors to adopt antitakeover strategies in order to protect employees); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (noting that when defending against a takeover, corporations could consider the interests of customers, employees, and even the community).

Courts sanction these actions based on a corporate governance paradigm that contends that corporations have an obligation beyond maximizing shareholder profits and returns.[269]

Certainly, diversity efforts justified on moral or social grounds would fit into this paradigm. Thus, rather than fitting their arguments into the shareholder primacy framework, diversity advocates should seek to push this broader concept of the corporation. This effort not only appears more consistent with the modern understanding of corporations' role within society, but also encourages people to view the corporation in terms other than its market viability. Such a view makes it easier to justify efforts on social appeals, a justification for diversity that may be more honest and valid than business ones.

This Part reveals that there are benefits, but also important drawbacks, to business rationales for diversity. The practical benefits of these rationales cannot be overlooked, not only because many believe that they are the only way in which advocates can advance diversity initiatives in the current climate, but also because they—perhaps for the first time—recognize the power and value of people of color. Yet, the drawbacks caution against adopting these rationales without reservation. Indeed, in the long term, such gains may be problematic because they are based on concepts that encourage the devaluation of people of color, the by-product of which is negative treatment. In other words, in order to be viewed as full participants in the corporate structure, people of color cannot begin from a premise that they only have limited worth.

IV. CONCLUSION

Given the diversity of the nations' population and workforce, corporate boards are not as diverse as one would expect. Indeed, nearly 25% of *Fortune* 1000 companies do not have any people of color on their board.[270] Then too, more than 90% of the available board seats within those companies are held by whites.[271] Reforms do not appear to have altered this environment.

The issue, therefore, is what strategy *can* be employed to enhance board diversity. The problem with relying on economic-centered or business-centered rationales to encourage such diversity is that while they clearly have some merit, those rationales have been oversold, creating expectations that directors of color cannot realistically fulfill. Indeed, those rationales suggest that directors of color will be able to single-

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269. *See* Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 406, 408 (2001) (noting that the case law allows directors to allocate resources to all relevant corporate constituents).

270. *See* 2004 KORN/FERRY STUDY, *supra* note 16, at 11–12.

271. *See* Strauss, *supra* note 21.

handedly solve the complex problems associated with workforce diversity, while boosting a corporation's ability to profit in a diverse market and enhancing the board's ability to make higher quality decisions.

And, given the many boards on which people of color tend to serve, such people apparently will be able to accomplish this feat for several different corporations at once. Then too, they apparently will be able to accomplish this feat while juggling the additional responsibilities imposed upon them by Sarbanes-Oxley and other reforms, as well as the responsibilities they must satisfy in their actual full-time jobs. Viewed in this light, the business rationales appear unrealistic, and as such may prove unconvincing to corporations. In this regard, adoption of these business rationales, particularly as the sole or dominant strategy for diversity, appears flawed at best.

Moreover, this strategy may do more harm than good for diversity efforts. Given corporate America's apparent unwillingness to accept moral or social justifications for diversity, there are some practical benefits to utilizing business rationales. However, it is important to assess the costs of grounding diversity considerations in arguments about economics or the market. These costs include the possibility that business rationales may lead to the overextension, the marginalization, and even the devaluation of people of color. Then too, challenging those unwilling to accept the moral and social imperative of diversity may be more important and beneficial than shifting the conversation to one that embraces rationales that are more palatable, but less valid. Diversity is an important goal in and of itself, and it may be costly to hide behind market rhetoric in order to achieve it. In this regard, evaluating the merits of business rationales includes ensuring that directors' quest to win the "race to the top" proves beneficial to them and the communities from which they come. In light of the flaws within the business rationales and the costs associated with their adoption, winning the race based on those rationales may prove to be a hollow victory.