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JUSTIFYING BOARD DIVERSITY*

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In this Article, we point out that advocates for board diversity in public companies feel pressure to justify it in terms of its contribution to shareholder value. This pressure is not surprising, insofar as the dominant social identity of boards, which itself is partly a creation of the discipline of finance, views shareholder value as the ultimate criterion for any company action, including eligibility for the board. We observe, however, that accepting this criterion poses a problem for diversity advocates, because the empirical evidence for a diverse board's contribution to shareholder value is not strong or definitive, and the chain of causation from a diverse board to increased shareholder value is a long and tenuous one. We similarly note that there is no conclusive evidence that a diverse board addresses well-known pathologies of boards as decision-making groups and thus improves board functioning. We draw parallels between this quandary of diversity advocates in satisfying the shareholder value mandate and recent antidiscrimination law jurisprudence, which, in discriminatory impact settings, makes business necessity determinative of the outcome of cases. We believe, however, that the lack of strong empirical support for board diversity with respect to shareholder value or board performance does not necessarily doom the cause of diversity advocates. We argue that diversity advocates should endorse justifications and normative frameworks other than shareholder value to support diverse boards. Corporate law allows boards to base their decisions with respect to many matters, including board composition, on business-related grounds that are only loosely connected to shareholder value. In our view, diversity advocates should take advantage of this freedom, although we acknowledge the resistance to, and risks associated with, any questioning of shareholder value. We contend that if diversity advocates, as well as nondiverse board members and others, justify board diversity on other grounds and norms, they could promote a transformation in the social identity of boards. This transformed identity might improve board functioning,

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but it is enough for us that it reflects and promotes antidiscriminatory norms.

INTRODUCTION

The basic test for many advocates of board diversity is to show that gender, racial, ethnic, or other diversity improves the performance of boards of public companies. Today's standard (and almost exclusive) measure for the performance of firms, and thus of boards, is shareholder value, which refers to the market value of a firm's common shares and which originates from the discipline of finance.[1] Thus, when proponents of board diversity feel compelled to make their case within the standard framework (as many of them do), they have to show, as an empirical matter, that boards with diverse members outperform less diverse boards in enhancing the shareholder value of their firms.

To our knowledge, the empirical studies to date have not supported the case for board diversity on shareholder value grounds.[2] This result may be due to shortcomings in the design of empirical studies; further refinement may in time produce better evidence for the diversity case. However, proponents of board diversity may not want to pin all of their hopes on empirical results, for it has been notoriously difficult to show that the design or composition of a

1. *See, e.g.*, GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA 5–6, 45–46 (2009); MICHAEL C. JENSEN, FOUNDATIONS OF ORGANIZATIONAL STRATEGY 51–102 (1998).

2. *See infra* note 72 and accompanying text.

corporate board improves or harms the firm's performance.[3] We believe that this is because any causal chain between board composition and shareholder value is an impossibly long one. It must be remembered that the board of a public company in the United States is generally a collection of busy executives from other firms who (except in a crisis) gather together once a month to review and approve the broad strategic direction of a firm.[4] The chief executive officer ("CEO") and her team actually operate the firm; the board merely ratifies their decisions and strategies. Much of the relevant literature on boards, therefore, suggests that a board's contribution to firm value is likely to be minimal at best and hard to establish empirically.[5]

Even if a board has limited influence on firm value, it still has some impact, and one could justifiably inquire as to methods of improving its functioning. Organizational and social psychological literature identifies characteristics of well-performing decision-making groups, like boards, as well as the pathologies of such groups.[6] To cite only one well-known—and sometimes controversial—example, cohesive groups have been found to engage in "groupthink," a social phenomenon whereby group members adopt a group identity that excludes other, different perspectives.[7] The

3. *See generally* Renee B. Adams et al., *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey*, 48 J. ECON. LITERATURE 58 (2010) (surveying primarily the empirical literature on boards of directors, especially with respect to the determinants of their make-up and their actions).

4. *See infra* Part I.B.

5. Adams et al. survey the empirical literature on specific contributions of boards to issues related to firm value, such as dismissing a poorly performing CEO, hiring a new CEO, and setting firm strategy. *See* Adams et al., *supra* note 3, at 64–80. This literature shows the difficulties of drawing causal relationships between boards and firm performance. *Id.*

6. *See infra* Part I.C.

7. *See generally* IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES (rev. 2d ed. 1983) (the classic work identifying "groupthink" in political decision-making groups). Social psychology and organizational scholars do not accept all aspects of groupthink. Despite the need for refinement and testing, however, it is clearly viewed as a useful perspective. *See generally* James K. Esser, *Alive and Well After 25 Years: A Review of Groupthink Research*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 116 (1998) (reviewing empirical research attempting to support the groupthink phenomenon and further theoretical developments of the groupthink approach); Paul B. Paulus, *Developing Consensus About Groupthink After All These Years*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 362 (1998) (discussing similarities between the groupthink approach and other studies of groups). *But see* Sally Riggs Fuller & Ramon J. Aldag, *Organizational Tonypandy: Lessons from a Quarter Century of the Groupthink Phenomenon*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 163, 167–69 (1998) (criticizing the theory as erroneous, without empirical support, and oversimplified).

cognitive and even emotional blinders produced by groupthink can result in disasters for the group and the organization that it advises and supervises.[8] By contrast, a group that defines its social identity by openness to other perspectives and to internal debate may avoid these pathologies and perform well in novel situations—situations that public company boards often face.[9] The organizational and social psychological literature also suggests, however, that having diverse members in decision-making groups, without more, does not remedy group decision-making problems or transform the social identity of a group.[10]

We believe, however, that the lack of strong empirical support for board diversity with respect to shareholder value, as well as the lack of similar evidence for improvements in group decision making, does not necessarily doom the cause of diversity advocates. Indeed, we think that part of the problem lies with the framing of the issue, which reaffirms the shareholder value rubric in the evaluation of anything (like board composition) associated with a public firm. Accepting this perspective means that diversity advocates must justify board diversity on similar cost/benefit terms, such as value improvement resulting from diverse boards attracting customers or incentivizing employees. Moreover, the advocates may feel compelled to make their arguments within this perspective of shareholder value because they understand it to be shared by public company board members, including members who are women and ethnic and racial minorities. This acceptance is not surprising, for it has been inculcated in the board members in their business school training and professional experience.[11]

We argue that diversity advocates should embrace justifications and normative frameworks other than shareholder value to support diverse boards. As we discuss below, the law allows boards to base their decisions with respect to many matters, including board

8. *See* JANIS, *supra* note 7, at 174–77.

9. *See id.* at 263–71. On the basics of social identity theory, see Michael A. Hogg, *A Social Identity Theory of Leadership*, 5 PERSONALITY & SOC. PSYCHOL. REV. 184, 186–87 (2001).

10. *See generally* Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223 (2004) (discussing the difficulty in producing ethical conduct—individuals often convince themselves that they are acting ethically, when in fact they are acting in a self-interested way).

11. *See* RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION 317–26 (2007) (recounting the growth of agency theory, with its shareholder value perspective, in U.S. business schools).

composition, on business-related grounds that are only loosely connected to shareholder value.[12] Moreover, we feel that it is important as a social and political matter to counter the dominance of finance, with its shareholder value perspective, as the undisputed source of norms for public firms. We believe that recognizing alternative justifications for board composition provides scholars of boards (including diversity advocates) with the opportunity to think innovatively about board composition, such as from organizational and social psychological perspectives. Although we believe that, in certain circumstances, having diverse individuals on boards could improve board decision making, or at least prevent group pathologies, we do not argue that board diversity must be justified on these functionalist grounds either.

The Article proceeds as follows. Part I briefly reviews the basic legal structure and obligations of the public company board and the dominance of the finance perspective. It also briefly surveys several basic conclusions on board purpose and function drawn from the organizational and social psychological literature (particularly social identity theory). Part I then highlights, from the perspective of this literature, problems associated with decision-making groups. In Part II, we discuss our understanding that board diversity has not been conclusively shown to increase shareholder value as an empirical matter, which has put diversity advocates on the defensive. We draw parallels between this situation and recent antidiscrimination law jurisprudence, which, in discriminatory impact settings, makes business necessity determinative of the outcome. Here we observe that the application of this law to corporate boards would not increase board diversity. In this Part, we also refer to findings in the organizational and social psychological literature suggesting that the addition of a few "outsiders," especially if they share the same

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12. *See infra* Part II.A. Professor Kang points out in his commentary to this Article that we appear to accuse diversity advocates of a kind of bad faith, or obtuseness, in justifying diversity on the basis of shareholder value. *See* Jerry Kang, *The Mismatch Critique: Comment on Fanto, Solan, and Darley*, 89 N.C. L. REV. 937, 939–40 (2011). In this vein, he contends that we are not sufficiently sympathetic to the constraints that the diversity advocates operate under. *Id.* at 940. These are fair criticisms, which he also made to us at the conference. We acknowledge that, for many diversity advocates, the use of a shareholder value justification for board diversity must be often just a strategy. We also try to suggest below that the advocates should not have to shoulder alone the burden of making a case for diverse boards. We do feel, however, that the power of the shareholder value concept and its accompanying ideology should not be underestimated and that its tactical use can have undesired consequences (e.g., the promotion of a few individuals from diverse backgrounds into the corporate elite accompanied by the maintenance, and indeed worsening, of wealth disparities in the United States).

perspectives and background (i.e., the same social identity) with pre-existing group members, does not ameliorate problems in group decision making. In Part III, we argue that diversity advocates should continue to offer normative frameworks other than finance-based shareholder value to justify board diversity and should take advantage of the flexibility of corporate law for this advocacy. We also recognize the difficulties of this advocacy and explain that the burden for it must not rest solely on diversity advocates. Instead, recognition of other normative perspectives in firms allows for the transformation of board social identity that may improve board functioning, but board diversity does not depend upon this functional outcome. We conclude with a call for use of these perspectives.

I. THE BOARD AND ITS PROBLEMS

A. *Legal Structure and Obligations of Boards*

Before beginning our discussion of board diversity, a brief overview of the legal structure and foundation of the public company board is in order. The corporate law of the firm's state of incorporation and the jurisprudence of the courts of that state primarily determine the board's structure and the obligations of board members.[13] Thus, the law establishes the board as the primary supervisory body for the corporation, the manner of nomination and election of board members, and the minimum qualifications for directors. It also lays out in broad terms the duties of the board and those of individual board members. Jurisprudence, primarily in equity, further elaborates upon the duties of the board and its members in many different circumstances.[14] For example, as is well known, a detailed jurisprudence dictates the board's conduct when it faces a change of control transaction.[15] The discipline of finance, however, with its focus on shareholder value, has influenced corporate law jurisprudence, particularly in the influential state of Delaware. Thus, while boards are entitled to make decisions based on

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13. *See* JAMES A. FANTO, DIRECTORS' AND OFFICERS' LIABILITY § 1:3, at 1-11 to -12 (2d ed., release no. 4, 2009).

14. *See, e.g.*, Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (discussing the board's basic duty of good faith); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (discussing basic duty of care of directors), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

15. For the classic case on these duties, known by every business organization student, see generally Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985).

what they perceive to be in the best interests of the firm and its constituencies (e.g., employees and the communities in which the firm operates), the message of the jurisprudence is often that boards should ultimately base their decisions on the financial benefits to shareholders.[16]

In the complicated legal world in which public companies operate, other laws impose obligations on directors. Since public companies are regulated participants in the securities markets, federal securities laws and related stock exchange rules also affect the structure, composition, and duties of a public company board.[17] For example, as a result of these laws and rules, public company boards are composed primarily of independent directors and have audit, compensation, and nominations committees composed only of such directors with defined tasks and procedures.[18] Among other things, federal law requires board members to oversee any public offering of the firm's securities,[19] to avoid trading on inside information,[20] and to follow guidelines about disclosing nonpublic material information either publicly or privately.[21] As scholars have noted, directors must also be concerned about not violating the myriad criminal laws

16. For example, this is the ultimate message of *Revlon*. *See id.* at 185; *see also* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989) (interpreting *Revlon*).

17. The basic duties of public companies are found in the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78nn (2006), and the Act's accompanying SEC rules, which regulate the public securities markets. In general, companies whose securities are traded in these markets are participants therein and are thus subject to regulation under that Act. A public company has multiple disclosure obligations, including the filing of an annual report on Form 10-K, 17 C.F.R. § 240.15d-1 (2010); the filing of quarterly reports on Form 10-Q, § 240.15d-13; the filing of "special" reports on Form 8-K whenever one of the events enumerated in the Form occurs, § 240.15d-11; and the filing of a proxy statement for the annual shareholders' meeting (as well as for special meetings), 17 C.F.R. § 240.14a-3 (2010).

18. From a broad perspective, stock exchange rules require listed firms to have a majority of independent directors. *See* N.Y. STOCK EXCH., NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 303A.01 (2002). Independent directors are "outside" directors (i.e., nonemployee directors) who have no material financial or other relationship with the firm or its executives. Federal securities laws require that the key board committees be composed of such independent directors. *See, e.g.*, 15 U.S.C. § 78j-1(m)(3) (outlining requirements for audit committee members).

19. This comes from their liability through the registration statement for public offerings. *See* 15 U.S.C. § 77k(a)(2) (2006).

20. This prohibition comes from section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and implementing Rule 10b-5, 17 C.F.R. § 240.10b-5 (2010).

21. One such guideline is Regulation FD ("Fair Disclosure"), which mandates that directors (among others) should not reveal nonpublic material information about their company privately unless they simultaneously reveal it publicly. *See* 17 C.F.R. §§ 243.100–.103 (2010).

applicable to their conduct as board members.[22] This list of legal obligations could frighten anyone from becoming a board member unless he realized that, apart from the criminal context and cases of self-dealing, the law limits board members' liability.[23] In addition, firms purchase comprehensive directors' and officers' insurance policies that pay for defense costs and any damages assessed against them in all but the most egregious cases.[24]

Boards and firms do not exist in a vacuum and are also subject to, or at least feel the pressure of, social norms relating to their conduct. There are many codes of conduct and "best practices" for board member behavior promulgated by interested associations, such as the National Association of Corporate Directors,[25] and by institutional shareholders and their advisors.[26] These codes no doubt influence board conduct, but they are of no legal significance.[27] In addition, there are director codes or practices designed and pushed by groups attempting to establish their norms in the boardroom; this may well occur in the environmental, labor, or diversity areas.[28] As in

22. *See, e.g.*, FANTO, *supra* note 13, §§ 7:1–7:4, at 7-2 to -39, § 7:6, at 7-45 to -60.

23. Corporate law permits a firm in its certificate of incorporation to eliminate damages against directors for violations of their duty of care. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

24. On this insurance, see FANTO, *supra* note 13, § 8:4, at 8-24 to -37. For a recent study, see generally Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market*, 74 U. CHI. L. REV. 487 (2007) (concluding that corporate governance is a significant factor in determining a firm's premium for directors' and officers' insurance).

25. *See, e.g.*, *NACD Bookstore*, NAT'L ASS'N OF CORP. DIRECTORS, http://www.nacdonline.org/Store (last visited Feb. 11, 2011) (providing resources for corporate directors on topics ranging from board composition to ethics and compliance). The Business Roundtable also provides codes and best practices for directors. *See Principles of Corporate Governance 2010*, BUS. ROUNDTABLE, 1 (Apr. 2010), http://businessroundtable.org/uploads/studiesreports/downloads/2010_Principles_of_Corporate_Governance_1.pdf.

26. The most well known of the advisors to institutional investors is the firm RiskMetrics (formerly Institutional Shareholder Services), which was recently acquired by MSCI, Inc. *See* MSCI, http://www.msci.com (last visited Feb. 11, 2011). Again, as is also well known, institutional investors adopt general policies on firm issues, including board matters, since part of their investment strategy involves "indexing" (i.e., investing in the entire stock market). *See* CAROLYN K. BRANCATO, INSTITUTIONAL INVESTORS AND CORPORATE GOVERNANCE: BEST PRACTICES FOR INCREASING CORPORATE VALUE 27–28 (1997).

27. *See In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 697, 745 (Del. Ch. 2005) (stating the limited effect of such best practices in corporate law), *aff'd*, 906 A.2d 27 (Del. 2006).

28. For a list of such groups with respect to diversity on boards of directors, see Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 432 n.1 (2008).

the case of antidiscrimination laws, these norms may be enshrined in the law and applicable to public firms.[29]

B. The Functions of Boards

Corporate boards are also the subject of organizational research because the law identifies only part of what boards do. Under the law, as discussed above, boards are the supervisors and monitors of the firm. Their function essentially involves approving major strategies and actions proposed by the CEO and his executive team and ensuring that the overall control systems of the firm, again as instituted by the executives, are adequate for the firm's business.[30] From an organizational studies perspective, the board acts as a monitor of executives and the firm.[31]

As discussed in the organizational literature, the board has other nonlegal functions, including advising, networking, and signaling. They are significant in the selection of board members and can thus affect the number of qualified, diverse candidates for board positions. Board members serve as advisors to the CEO and other major executives on significant, often strategic, issues related to the firm.[32] This function could limit the range of those who appear eligible for board membership. Individuals who could offer advice on such issues based upon their experience must generally be those who are current or former CEOs, or who have had other significant executive responsibilities (e.g., president of a nonprofit). Too much should not be made of this experience, because it is conceivable that individuals without executive experience, such as a management scholar, might also be qualified to give good advice. What appears to matter for board selection on this point is that CEOs are believed to take seriously the advice only of those who have had this executive experience and whom they consider to be their peers.[33] Executive

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29. As we discuss below, however, the laws may not apply to a typical director if he is not an employee. *See infra* Part II.B.

30. On this latter duty to ensure that adequate control systems are in place, see Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

31. *See* COLIN B. CARTER & JAY W. LORSCH, BACK TO THE DRAWING BOARD 67–68 (2004) (discussing three key functions of a board: monitoring performance, making key decisions, and giving advice); Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 492 (1999) (discussing activities that a board may participate in that increase the effectiveness of both the board and the company).

32. *See* Adams et al., *supra* note 3, at 64; Jonathan L. Johnson et al., *Boards of Directors: A Review and Research Agenda*, 22 J. MGMT. 409, 424–25 (1996).

33. *See, e.g.*, CARTER & LORSCH, *supra* note 31, at 115–16.

background also gives a director credibility with his fellow board members, for board members also advise the board on issues within their areas of expertise. Indeed, a possible reason for the smaller representation of women and racial and ethnic minorities on public company boards is that members of these groups have not had the necessary executive experience to qualify them for the advisory function.[34] Firms go lower in the executive ranks to find diversity candidates, but they risk undermining a director's advisory role or relegating the director to an insignificant board function.[35]

As its name suggests, networking means that board members provide the board and executives with useful connections to other industries and activities.[36] A board member with numerous connections can be a valuable resource to a firm. A typical director, it must be remembered, may be the CEO of another firm, a director of several other firms, and a director of nonprofit organizations.[37] These connections can be useful to the firm, for a director with them brings along knowledge of practices and strategies at other firms and can identify acquisition targets and financing options.[38] A particularly important networking characteristic today comes from a director's government "connections," which can arise from government service, generally in the executive branch. These connections can be particularly significant for firms in highly regulated industries or for those doing considerable business with the government. For example, a director within a network of existing and former government

34. *Cf.* Nancy M. Carter & Christine Silva, *Women in Management: Delusions of Progress*, HARV. BUS. REV., Mar. 2010, at 19, 19–21 (discussing the difficulties of women in advancing in management ranks); Herminia Ibarra et al., *Why Men Still Get More Promotions than Women*, HARV. BUS. REV., Sept. 2010, at 80, 82–85 (discussing the lack of appropriate mentoring for women that will take them into top management).

35. *See* JULIE HEMBROCK DAUM ET AL., SPENCER STUART, 2006 BOARD DIVERSITY REPORT 11–12 (2006), *available at* http://content.spencerstuart.com/sswebsite/pdf/lib/Board_Diversity_Report_2006.pdf (discussing how women and ethnic and racial minority directors have been drawn from other senior executive positions and from executive positions in nonprofits).

36. *See* Amy J. Hillman et al., *Organizational Predictors of Women on Corporate Boards*, 50 ACAD. MGMT. J. 941, 942 (2007).

37. To take one example, among many, William C. Weldon is Chairman/CEO of Johnson & Johnson, a director of JPMorgan Chase, and a trustee for Quinnipiac University (among other nonprofit positions). *See* JPMORGAN CHASE, PROXY STATEMENT 5 (2010), *available at* http://investor.shareholder.com/jpmorganchase/annual.cfm.

38. *See* Johnson et al., *supra* note 32, at 427–29. *See generally* Christine Shropshire, *The Role of the Interlocking Director and Board Receptivity in the Diffusion of Practices*, 35 ACAD. MGMT. REV. 246, 246–47 (2010) (discussing, from a theoretical perspective, the characteristics of directors that promote diffusion of practices among firms as a result of interlocking directors).

officials can assist executives with regulatory issues and advise them and the board on relevant legislative and regulatory changes, and she may even act as an indirect lobbyist for a firm.[39] This function can be an avenue to the board for women and ethnic and racial minorities who have not had the typical experience as a CEO to qualify them for board service.[40]

The networking function is related to the signaling function, which arises from the "symbolic capital" of a director.[41] Signaling means that a board member enhances the firm in the eyes of employees, customers, and the general public simply by his membership on the board.[42] How this enhancement occurs, of course, depends upon the observer and is difficult to measure.[43] A high-profile, female, former government regulator who becomes a director may, for example, raise a firm's reputation among current regulators, as well as among women customers and employees who appreciate female representation on the board. If, to take another example, Warren Buffett were to join a board, he would bring to it his prestige of being the "master" investor and would signal to the investment community his belief that the firm is valuable.[44] Since symbolic capital is a broad concept and since a person's presence on a board can send all kinds of signals, including a firm's commitment to gender, racial,

39. Recently, a U.S. firm, Amerilink Telecom Corporation, decided to market telecommunications equipment made by a Chinese manufacturer. *See* Spencer E. Ante & Shayndi Raice, *Dignitaries Come on Board to Ease Huawei into U.S.*, WALL ST. J., Sept. 21, 2010, at B1. Amerilink brought on its board of directors former House majority leader Richard Gephardt and former World Bank head James Wolfensohn to help the firm overcome security concerns by U.S. government officials over the use of Chinese telecommunications equipment in the United States. *Id.* Amerilink's founder and CEO is a former vice chairman of the Joint Chiefs of Staff. *Id.*

40. Examples come to mind, such as Vernon Jordan, who began as a civil rights lawyer, served as a senior advisor to former President Bill Clinton, and is now the ultimate corporate insider with numerous director positions. *See Vernon E. Jordan Jr.*, AKIN GUMP STRAUSS HAUER & FELD LLP, http://www.akingump.com/vjordan/ (last visited Feb. 12, 2011). For a brief biography of Mr. Jordan, see the website of Akin Gump Strauss Hauer & Feld, *id.*, where he is a senior counsel. *Id.*

41. *See, e.g.*, PIERRE BOURDIEU, LA NOBLESSE D'ÉTAT: GRANDES ÉCOLES ET ESPRIT DE CORPS 110–111 (1989) (discussing the creation of symbolic capital through schooling). Bourdieu's notion of symbolic capital is that it can be amassed and exchanged in a way not unlike "hard" capital or assets. *See* PIERRE BOURDIEU, LE SENS PRATIQUE 202–04 (1980).

42. *See* Johnson et al., *supra* note 32, at 411 (referring to this function as a resource dependence one).

43. *See* Broome & Krawiec, *supra* note 28, at 447–52.

44. Arguably, he did as much when he invested in Goldman Sachs during the financial crisis. *See* ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES 485–87 (2009).

and ethnic diversity, it is not always easy to trace how this symbolic capital translates into economic capital (i.e., shareholder value).[45] However, to the extent that women and ethnic minorities have not advanced in appropriate numbers to senior positions in corporate and nonprofit hierarchies, which produce symbolic capital, the signaling function of the board may contribute to keeping them off corporate boards.

C. *Board Socialization*

A major complaint about public company boards is that they go along with value-destroying strategies pushed by the CEO and the executive team and that they are not active enough in detecting fraud or overreaching. Examples come readily to mind: boards approve mergers that prove to be ultimately destructive,[46] rubber-stamp outsized compensation packages,[47] or do not question suspicious transactions.[48] After a firm disaster or scandal, there are always questions about why the board did not see and then prevent the problem and why the board passively approved of a destructive business strategy.

There is considerable jurisprudence on the legal responsibility of directors in different circumstances as well as a voluminous legal literature on improving board performance.[49] This jurisprudence and literature understandably focuses on the board's monitoring or supervisory function. As the literature recognizes, many problems arise from the somewhat unique position of board members, who are the ultimate supervisors of a public firm, but who generally have full-time, high-level positions elsewhere and thus only limited time to

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45. *See generally* Luigi Guiso et al., *Civic Capital as the Missing Link* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 15,845, 2010), *available at* http://faculty.chicagobooth.edu/luigi.zingales/research/papers/civic_cap.pdf (criticizing the vagueness and use of the concept of symbolic capital).

46. For a discussion of the literature on this topic, see generally James A. Fanto, *Braking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers*, 49 BUFF. L. REV. 249 (2001).

47. A classic case is *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27 (Del. 2006), which also shows how, in the absence of a conflict of interest, directors are rarely found liable for highly questionable business decisions. *Id.* at 66–68.

48. The textbook case involves the directors of Enron, who passively approved the accounting irregularities designed by the firm's senior executives. *See In re* Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 613–37 (S.D. Tex. 2002).

49. Jurisprudence on legal obligations of directors is reviewed in FANTO, *supra* note 13, § 1:3, at 1-11; some of the scholarly jurisprudence is discussed in Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governace*, 97 NW. U. L. REV. 547, 561–73 (2003). Representative citations to the economic and finance literature on this subject appear in Adams et al., *supra* note 3, at 102–07.

devote to their board work.[50] Since they are outsiders, moreover, they are highly dependent for information upon executives, who can manage the information flow to a board. As is well known, board reform through corporate and securities law, as well as through board best practices, encourages board members to spend more time with the firm and provides them with their own sources of information about the firm, independent of executives.[51] To take only one example, as a result of the Sarbanes-Oxley reforms, the board audit committee has a direct relationship with a firm's outside auditors, who report to it.[52]

Boards are decision-making and advisory groups, even if their decisions are more akin to an approval or disapproval of executive proposals. Accordingly, they are prone to many of the group pathologies that social psychologists and organizational theorists have detected in decision-making groups.[53] One well-known group pathology is "groupthink." In its classic description, groupthink appears when group members embrace a group viewpoint (generally one adopted by a strong leader), enforce conformity with that viewpoint among fellow group members, react hostilely to anyone (whether insider or outsider) challenging it, and maintain the perspective even in the face of conflicting evidence.[54] Groups in the thrall of groupthink can make disastrous decisions, often because they ignore conflicting viewpoints and evidence.[55]

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50. *See* CARTER & LORSCH, *supra* note 31, at 22; *see also* SPENCER STUART, SPENCER STUART BOARD INDEX 24 (2009), *available at* http://content.spencerstuart.com/sswebsite/pdf/lib/SSBI2009.pdf (noting that annual board meetings have increased to an average of nine meetings per year).

51. *See* SPENCER STUART, *supra* note 50, at 11–12 (discussing the increasing practice of public companies to restrict the number of other directorships any board member may have).

52. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775–77 (2002) (codified as amended at 15 U.S.C. § 78j-1(m) (2006)).

53. *See generally* John M. Darley, *How Organizations Socialize Individuals into Evildoing*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13 (David M. Messick & Ann E. Tenbrunsel eds., 1996) (discussing organizational, rather than individual, thinking by members of the board).

54. The classic work on groupthink is JANIS, *supra* note 7. For representative discussions of this phenomenon, see, for example, Randall S. Peterson et al., *Group Dynamics in Top Management Teams: Groupthink, Vigilance, and Alternative Models of Organizational Failure and Success*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 272, 273 (1998); Marlene E. Turner & Anthony R. Pratkanis, *A Social Identity Maintenance Model of Groupthink*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 210, 220–22 (1998).

55. In his book Janis provides examples of the phenomenon in government decision making. *See, e.g.*, JANIS, *supra* note 7, at 198–241 (discussing groupthink in the Watergate scandal). For other examples, see generally Emily Pronin, *How We See Ourselves and*

For the most part, one can only speculate as to what exactly occurs in boardrooms, since boards are an elite, closed environment accessible to few persons (and few academics).[56] Yet social identity research has shown that in various contexts the individual self takes on identities in accordance with the groups with whom it associates.[57] Thus, the social identity associated with board membership is likely to influence board functioning and may be a source of pathology. From the perspective of social identity theory, directors assume a particular identity when they become board members, leaving other identities at the door of the boardroom.[58] Each board, of course, has its own particular version of this identity, for boards are all idiosyncratic groups to some extent.[59] However, one could posit that the social identities of all boards share certain (one might call them "institutional") features, which include a belief structure and a code of conduct. Under the belief structure, directors accept that the firm exists primarily for shareholder value and thus that board members should promote this goal.[60] This structure would also include an awareness of and a pride in the elevated social position that goes along with board membership, which carries with it a concept of infallibility in decisions.[61] The code of conduct would include deference to the CEO and the executive team, as well as to long-standing board members, and a collegiality that requires conflict

How We See Others, 320 SCIENCE 1177 (2008) (discussing the introspection fallacy, whereby people look into their own prior thinking and find nothing wrong, but look at the actions of others and discover bias).

56. *See* Adams et al., *supra* note 3, at 59.

57. *See* S. ALEXANDER HASLAM, PSYCHOLOGY IN ORGANIZATIONS: THE SOCIAL IDENTITY APPROACH 17, 30 (2d ed. 2004).

58. *Id.* at 17.

59. *See* CARTER & LORSCH, *supra* note 31, at 8–9 (discussing how boards have their own individual needs and structures).

60. *See* Sumantra Ghoshal, *Bad Management Theories Are Destroying Good Management Practices*, 4 ACAD. MGMT. LEARNING & EDUC. 75, 75–77 (2005); Dennis A. Gioia, *Business Education's Role in the Crisis of Corporate Confidence*, ACAD. MGMT. EXECUTIVE, Aug. 2002, at 142, 143. The shareholder value perspective has become part of board members' identity, since they have been taught this perspective in business school, and it has been reinforced throughout their professional experience. Of course, part of the social identity of boards and of business more generally, which is also reinforced in business school education, is that diversity is irrelevant for job performance and that success in business is gender neutral. *See* Elisabeth K. Kelan & Rachel Dunkley Jones, *Gender and the MBA*, 9 ACAD. MGMT. LEARNING & EDUC. 26, 38–39 (2010).

61. *See* KARL E. WEICK, MAKING SENSE OF THE ORGANIZATION 370–71 (2001); David M. Messick & Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, SLOAN MGMT. REV., Winter 1996, at 9, 17–18.

avoidance.[62] In addition, this board social identity is constantly reinforced, for board members come from contexts where the identity reigns. Indeed, a person known for being "different" (i.e., not adequately embracing this social identity) would not be selected for (or renominated to) a board, under the euphemism that he would not be the right "fit." Social psychological research suggests that groups with this kind of social identity, if it becomes extreme, are prone to decision-making errors, since the social identity does not allow for cognitive conflict and encourages self-censorship on the part of its members.[63]

Another way of characterizing this socialization of a board member is that the standard process of recruiting a director is generally one that involves intensive and complex selection components.[64] Moreover, once a candidate is tentatively selected, often indirect but always well-understood patterns of communication take place between the candidate and the members of the nominating committee and/or the CEO to ensure that all parties understand what the firm expects of the board member.[65] It is in the final stages of this "vetting process" that the candidate has the chance to make clear the matters that are of importance to her, the ways in which she will advocate on those matters, and perhaps most important, her understanding of the limits that exist on the conduct of her advocacy.[66]

We would hypothesize that, in the case of a "diversity" candidate, there is usually information available and understandings shared that make the conduct of this implicit negotiation process go quite smoothly. First, those performing the corporate side of the encounter will have decided that, on balance, the corporation will

62. *See* JAY W. LORSCH WITH ELIZABETH MACIVER, PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS 91–96 (1989).

63. For representative discussions of this phenomenon, see Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, ACAD. MGMT. EXECUTIVE, Nov. 2005, at 9, 11; Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RES. ORGANIZATIONAL BEHAV. 1, 10 (2003).

64. *See* LORSCH WITH MACIVER, *supra* note 62, at 20.

65. The above describes the standard board candidate selection process as conducted by a management team that strategizes carefully. This is not to deny that some companies, perhaps led by confident entrepreneurs, conduct the process in a more impulsive way, perhaps leading to the dreaded outcome of a "runaway" board member.

66. *See* Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 777–78 (2011) (discussing a CEO's investigation to discover if a sought-after female director had "three heads or something").

gain from appointing "diversity" board members. Second, since the diversity candidates typically will have been on other corporate boards or, failing that, will have functioned in other organizational settings, their conduct in those settings can be investigated, generally through informal channels. What they will advocate for is likely to have been revealed by their actions in these previous settings. One aspect of their conduct that will be particularly investigated concerns whether they can stay within the bounds of "tactful advocacy" that is normative in board meetings, especially when the new member is, as is expected, promoting diversity policies.[67]

Our sense is that there will often be informal "go-betweens," third parties who are acquainted with the officers and board members of the corporation and with the board candidate, who "casually encounter" the candidate and raise the needed questions about the candidate's understanding of the implicit belief structure and codes of conduct of boards.[68] The board candidate can use the occasion to set forth his advocacy position (e.g., the kinds of hiring practices and perhaps flex-time working hours for which he would advocate). The "go-between" can probe for a sense of how far the prospective board member would push his points. By these conversations, which take place between socially adroit persons, reasonably clear understandings about advocacy and its limits can be negotiated.[69] In addition, it is likely that the CEO has already decided in advance of these conversations that some movement in these directions is

67. "Tactful advocacy" here means advocacy that does not ultimately challenge the shareholder value goal of the firm and may often result in no advocacy at all (in other words, silence). *Cf.* Frances J. Milliken & Elizabeth Wolfe Morrison, *Shades of Silence: Emerging Themes and Future Directions for Research on Silence in Organizations*, 40 J. MGMT. STUD. 1563, 1563–67 (2003) (discussing the problems raised by organizational silence and organizational research in this domain). Sometimes the new board member's advocacy is not expected to be typically "tactful," but it is nonetheless accepted. In the last quarter of the twentieth century, if one invited the Reverend Leon Sullivan to join a corporate board, it was completely understood that the firm would adopt his "Sullivan Principles," which pledged the corporation to pressure South African corporations to integrate their work force and adopt other principles of social responsibility. *See A Principled Man: Rev. Leon Sullivan*, MARSHALL UNIV., http://muweb.marshall.edu/revleonsullivan/indexf.htm (last visited Feb. 12, 2011).

68. *See* Roderick M. Kramer, *Trust and Distrust in Organizations*, 50 ANN. REV. PSYCHOL. 569, 577 (1999) (discussing the role of "go-betweens" in developing trust in new relationships).

69. One technique used by experienced "go-betweens" is the "admonitory tale." This is a story about a specific other person (often created for admonitory purposes) who "went too far"—who advocated too strongly for his position or somehow otherwise violated some subtle rule of conduct—and lost effectiveness forever. These stories are very powerful, in that they vividly and concretely shine a bright light on the otherwise invisible line that a person must not cross.

desirable and so is willing to support, to a limited extent, the diverse board member's suggestions.[70]

At any point in the vetting process, the diversity candidate is free to terminate his consideration of the position. A principled candidate will do this when he judges that the corporation cannot move far enough in the diversity direction. Putting this in terms of his own reputation, to accept a board position for only modest diversity gains would send a false signal to those for whom the candidate is a representative.[71] There are ways of withdrawing from consideration gracefully, which enable the corporation not to lose face. The corporate leaders might even decide to re-approach the diversity candidate in the future, when they are able to consider making a stronger set of adaptations.

Having set forth the legal and functional background on boards, as well as our understanding of boards as decision-making groups, we turn to explore how board diversity has been justified.

II. THE FAILED EMPIRICAL CASE FOR BOARD DIVERSITY

A. *Shareholder Value Perspective*

We find that proponents of board diversity often feel obligated to justify it on the basis of shareholder value. That is, they wish to show that an increase in board diversity correlates with an increase in shareholder value. A central problem of this approach is that, so far at least, the proponents have been unable to provide firm empirical support for board diversity. Existing studies provide inconclusive evidence of the benefit, from a shareholder value perspective, of increasing the number of women and ethnic and racial minorities on

70. Any CEO who contemplates having a diverse person on the board will realize that the diverse person must be able to make some claims that her community benefits from her presence on the board. The obvious "good" is to have the company publically put energy in diversity hiring. The smart CEO and the smart board candidate will have implicitly negotiated some package of hiring efforts in advance of the diverse person joining the board. A smart CEO is (mildly) happy about this, given the various legal pressures not to discriminate in hiring. So, from this "realist" perspective, we should not expect much more from the board selecting a diverse person than some (pre-negotiated) increased efforts on diversity hiring. *See, e.g.*, *supra* note 67.

71. In symbolic capital terms, the director will have made a bad exchange for the symbolic capital he conveys to the firm through his membership on the board. *See, e.g.*, PIERRE BOURDIEU, LA DISTINCTION: CRITIQUE SOCIALE DU JUGEMENT 158 (1979) (discussing how, in the educational context, it is important for one to understand the careers that carry the promise of the most symbolic capital and thus the most economic capital).

public company boards.[72] Of course, as more women and minorities become directors, there will be further data for the studies, which may ultimately show more positive connections between diversity and increased shareholder value.

This lack of strong empirical evidence is not surprising, for empirical studies with respect to the effect of most features of board structure and composition on shareholder value have generally had inconclusive results. For example, although the predominance of independent board members on public company boards has become a legal and practical reality for U.S. companies, the conclusion that independent board members increase shareholder value is subject to debate as an empirical matter.[73] Similar debates have occurred as to empirical evidence for other aspects of board structure, such as having an independent chair in the board position who is not the CEO.[74] Again, these results, including those on board diversity, are understandable because board members are responsible for a relatively insignificant part of a firm's affairs, even if they have an important place in corporate governance.[75]

As a legal matter, since boards are paramount in the governance of public firms, any board could decide to propose to shareholders to increase its diversity.[76] A board could justify this decision on general

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72. *See* Broome & Krawiec, *supra* note 28, at 432–33 (reviewing the studies); Aaron A. Dhir, *Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*, 35 QUEEN'S L.J. 569, 591–99 (2010) (reviewing studies); Sabina Nielsen et al., *Board Diversity and Firm Performance: An Empirical Investigation of the Mediating Effects of Board Processes and Task Performance* (Acad. of Mgmt. Proceedings, No. 14,474, 2008), *available at* http://www.ebscohost.com/academic.business-source-premier (accessible through fee-based membership).

73. *See* Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 231–34 (2002) (discussing the lack of evidence for the benefit of independent board members).

74. *See* Adams et al., *supra* note 3, at 80–86 (discussing this and other empirical matters). *See generally* Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921 (1999) (providing econometric evidence dealing with the composition of the board between independent and nonindependent directors and its effect on various measurements of board and firm performance).

75. On the other hand, studies have shown that a diverse board may be negatively related to firm performance as a result of the implicit bias of certain institutional investors, who may find that a too diverse board suggests that the board has lost its focus on shareholder value. *See, e.g.*, Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 833–34 (2011).

76. Spencer Stuart reports that the representation of women and ethnic minorities on boards of large public companies has plateaued over the last five years, at sixteen and fifteen percent respectively, although board members say that they would like to have greater representation. *See* SPENCER STUART, *supra* note 50, at 15, 18.

business-related grounds (e.g., improvement in customer and employee relations or demonstration of compliance with social norms that will create a favorable media view of the company) even if it has no hard empirical evidence for the decision. Under established law, this kind of decision would be sustained by the courts as an appropriate "business judgment" by the board, for, as is well known, courts accord considerable deference to boards on "business" matters.[77] In sum, diversity advocates do not need a failsafe empirical case for the benefits of board diversity in order to promote their cause; they just need to make persuasive, business-related arguments and have them adopted in board circles.[78]

Why, then, cannot diversity advocates be content with winning the diversity war without winning the empirical battle? Certainly, one answer is that, if the advocates are scholars, they would like to base their advocacy on solid empirical grounds.[79] More significantly, they no doubt realize that there are probably limits to how far generalized business justifications, which have no unassailable empirical support in shareholder value, will take them in financial and investment circles. That is, shareholder value is the bottom-line focus of members of these circles on any significant matter with respect to a firm.[80] To take an extreme example, suppose that a firm adopted a significant board diversity policy, such as suggesting to shareholders that board membership reflect gender, ethnic, and racial percentages in the United States, and justified this policy on general business grounds. The board realistically has to fear that investors might be suspicious of this policy because its adoption shows that the board is not adequately focusing on shareholder value.[81] This board is likely to be punished gradually, as share price falls and investor pressure builds

77. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

78. Indeed, if anything, SEC regulation encourages boards to include diverse members, for it requires companies to disclose in their annual proxy statements "whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director." 17 C.F.R. § 229.407(c)(2)(vi) (2010).

79. This seems to be especially true if the advocates subscribe to a shareholder value perspective. Moreover, there is a general trend toward empirical work in legal scholarship. *See, e.g.*, *Conference on Empirical Legal Studies 2010*, YALE LAW SCH., http://www.law.yale.edu/news/CELS.htm (last visited Feb. 12, 2011).

80. Of course, in certain circumstances, the shareholder value norm may be trumped by law, such as statutes forbidding discrimination, as we discuss further below. *See infra* Part II.B.

81. There may also be a discriminatory animus involved in this reaction by investors, even if it happens at the subconscious level. *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1064 (2006).

for the board to get its eyes back on the appropriate focus.[82] Given that, in our view, diversity advocates probably fear that this punishment is the likely outcome for boards proposing significant board diversity initiatives, we think that they accept the status quo at least until they can bring forward stronger empirical support of the benefits of diversity, or until the investment and board community accepts diversity without such support. And the status quo appears to mean a slow-moving, incremental diversification.[83]

B. *The Inadequacy of Civil Rights Law to Motivate Board Diversity*

The Civil Rights Act of 1964 makes it illegal to discriminate in employment practices. The statute prohibits not only the disparate treatment of those whom the firm employs or those who seek employment at the firm, it also prohibits practices that have a disparate impact on protected groups, unless these practices can be justified by a legitimate business reason.[84] Yet there is a peculiar island in the business world—the island of corporate boards—that this Act does not directly affect. It does not apply to corporate board membership because board members, with the exception of the few executives on the board,[85] are usually not employees.[86] In fact, courts

82. Again, the contribution of Dobbin and Jung to this conference issue provides empirical support for this scenario. Their research shows that the increase of women directors on boards results in a drop in share value of the companies involved, and that this decline in value is due to sales by institutional investors, other than public pension funds, which overwhelms any buying pressure by the funds. Dobbin & Jung, *supra* note 75, at 834–35. They suggest that there is no reason for the sales other than explicit or implicit bias, as the presence of women on boards has not been shown to decrease firm performance. *Id.* at 837.

83. Statistics on the incremental increases of women on boards are available at CATALYST, http://www.catalyst.org (last visited Feb. 12, 2011). *See also* SPENCER STUART, *supra* note 50, at 8, 15, 18 (reporting on the percentage of women and minorities on boards). In this paragraph, we acknowledge that diversity advocates are using the shareholder value justification as a strategic move under the constraints within which they must work—an acknowledgement in response to Professor Kang's criticism. *See* Kang, *supra* note 12, at 942.

84. *See* 42 U.S.C. § 2000e-2 (2006).

85. *See* Equal Emp't Opportunity Comm'n v. Johnson & Higgins, Inc., 91 F.3d 1529, 1537–40 (2d Cir. 1996).

86. The Supreme Court has set forth guidelines for determining when a board member should be considered an employee. *See* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 449–51 (2003). A typical board member will not be considered an employee. *See* Stephanie Greene & Christine Neylon O'Brien, *Who Counts?: The United States Supreme Court Cites "Control" as the Key to Distinguishing Employers from Employees Under Federal Employment Antidiscrimination Laws*, 2003 COLUM. BUS. L. REV. 761, 787 ("The language in the EEOC guidance indicates that principals must overcome a presumption that they are employers.").

routinely hold that the statute does not apply to corporate directors.[87] As the Seventh Circuit has put it: "Directors are traditionally employer rather than employee positions."[88]

We believe that the advocates' concern about board diversity is primarily motivated by the perception of, and unhappiness with, this gap in the law because it runs counter to the social values that undergird the Civil Rights Act. This motivation would seemingly render the arguments about the business advantage of diverse boards irrelevant. For if those who support diversifying corporate boards do so because they believe diversity to be a worthy value in its own right, then the arguments about whether diversification enriches shareholders would seem to be a necessary intellectual justification, but not one of significant concern.

However, ironically and as discussed below, the United States Supreme Court has emphasized the "business" limitations argument in the interpretation of the civil rights laws. This pushes the intent of these laws into the background and validates the business purpose, which actually reinforces the shareholder value perspective. Moreover, many, including a majority of the Justices currently sitting on the Supreme Court, draw a distinction between a ban on racist or sexist practices, on the one hand, and an affirmative effort to create a diverse, elite culture, on the other. If the civil rights laws are construed to encourage only the former, then those who are motivated by norms established by the Civil Rights Act will find themselves having to break new ground. And it may well be that the domain of the corporate board of directors is a particularly difficult arena in which to do that. We think that it is useful to explain this outcome in more detail.

There is no doubt that nondiscrimination has become a social norm in its own right, just as discrimination was itself formerly an acceptable social norm.[89] The law, moreover, has played a significant role in the transformation of these norms. In nationwide polls of whites taken before the enactment of the Civil Rights Act of 1964, fifty-five percent of respondents said that white people should have the first opportunity at any job.[90] By the 1970s, that number shrank to

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87. *See* De Jesús v. LTT Card Servs., Inc., 474 F.3d 16, 24 (1st Cir. 2007) (applying the *Clackamas* standard to a closely held corporation).

88. Chavero v. Local 241, Div. of the Amalgamated Transit Union, 787 F.2d 1154, 1157 (7th Cir. 1986).

89. *See* ERIC POSNER, LAW AND SOCIAL NORMS 133–43 (2000).

90. HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 104 (2d ed. 1997).

three percent.[91] By the same token, the percentage of people who favor segregation in transportation shrank from fifty-four percent to twelve percent.[92] One may be surprised that one of eight people continued to hold this view as late as the 1970s, but the change in social norms is abundantly clear. There can be no doubt that decades of the everyday experience of not permitting such practices has led to people adopting the view that nondiscrimination is simply right as a social value.

Cass Sunstein observes:

> If a discriminatory act is consistent with prevailing norms, there will be more in the way of discriminatory behavior. If discriminators are ashamed of themselves, there is likely to be less discrimination. The social meaning of an act of sexual harassment will have a great deal to do with the amount of sexual harassment in that particular environment. A large point of law may be to shift social norms and social meaning. Consider in this connection the fact that many restaurant owners and inn-keepers actually supported the Civil Rights Act of 1964, which would have prevented them from discriminating. Why would people want the state to act against them? The answer lies in the fact that the law helped shift social norms and the social meaning of nondiscrimination. Whereas nondiscrimination would formerly signal a willingness to act on a race-neutral basis—and hence would trigger social norms that call for discrimination against blacks—it would henceforth signal a willingness to obey the law, and hence fail to trigger adverse social norms.[93]

Nonetheless, when it comes to diversity as a social value to be affirmatively sought, neither the law nor the opinion polls show uniform support. A New York Times/CBS News poll taken in 2010 showed that twenty-eight percent of all respondents and fifty-two percent of those identifying themselves with the Tea Party movement believed that "in recent years too much has been made of the problems facing black people."[94] As for the courts, the Supreme Court has on several occasions attempted to distinguish between race-neutral decision making, on the one hand, and affirmative efforts

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91. *Id.* at 105.

92. *Id.* at 104–05.

93. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2043–44 (1996).

94. *See* Kate Zernike & Megan Thee-Brenan, *Discontent's Demography: Who Backs the Tea Party*, N.Y. TIMES, Apr. 15, 2010, at A1.

to diversify, on the other, approving only of the former except in limited circumstances.

The Civil Rights Act states:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[95]

This covers cases of disparate treatment and disparate impact.[96] Not only may an employer not discriminate in its employment practices because of a person's "race, color, religion, sex, or national origin," it must justify practices that result in prima facie discriminatory effects even when the employer did not intentionally discriminate.[97] Were the statute to apply to corporate boards, it would disallow intentional efforts to deny board membership to the various protected groups, and it would impose more scrutiny on practices that result in a lack of diversity as a side effect.

The situation is complicated by the relationship between the disparate treatment and disparate impact prongs of the law. Efforts to remedy past discrimination resulting from disparate impact risk disadvantaging white males in a manner that might be considered disparate treatment of them. The Supreme Court began balancing these concerns in 1978 with *Regents of the University of California v. Bakke*[98] and has deemphasized diversity as a legitimate ground for making admissions decisions in education and employment decisions since then.[99] In *Bakke*, the Court held that a white medical school applicant had been unconstitutionally denied admission to a state medical school that had set aside a certain number of seats for minority applicants.[100] Justice Powell's plurality opinion permitted race to be considered as one factor in assessing applicants, but not as the only consideration:

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95. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2006).

96. *See infra* notes 107–19 and accompanying text (discussing the relationship between disparate impact and disparate treatment in the context of Ricci v. DeStefano, 129 S. Ct. 2658 (2009)).

97. § 2000e-2(k)(1)(A).

98. 438 U.S. 265 (1978).

99. *See infra* notes 102–19 and accompanying text (discussing Grutter v. Bollinger, 539 U.S. 306 (2003), which tolerates diversity as a value in higher education, and Ricci v. DeStefano, 129 S. Ct. 2658 (2009), which refuses to tolerate diversity as a value in employment decisions).

100. *Bakke*, 438 U.S. at 320.

> It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.[101]

Some twenty-five years later, the Court reaffirmed this approach in *Grutter v. Bollinger*[102] by upholding the University of Michigan Law School's admissions policy, which included race as one factor of many.[103] Both *Bakke* and *Grutter* involved heavily divided courts. In *Bakke*, four Justices would have struck down the California scheme as violative of the civil rights laws, and four would have upheld the scheme as a legitimate effort to combat past discrimination.[104] Justice Powell was the lone vote for disallowing the plan as it was designed, but allowing some room for diversity in admissions decisions.[105] *Grutter* was a five-to-four decision, with Justice O'Connor writing the opinion of the Court.[106]

Both Powell and O'Connor have left the Court, and its latest decision, this time in the context of public employment, displays a more aggressive rejection of diversity as a value when it can be achieved only at the expense of the disparate treatment of white employees. *Ricci v. DeStefano*,[107] a 2009 case, involved the New Haven (Connecticut) Fire Department's use of a test to certify

101. *Id.* at 315.
102. 539 U.S. 306 (2003).
103. *Id.* at 341.
104. *Bakke*, 438 U.S. at 267.
105. *Id.*
106. *Grutter*, 539 U.S. at 310.
107. 129 S. Ct. 2658 (2009).

employees for promotion.[108] The result of the test given in 2003 was that the eight available lieutenant positions would all go to white candidates, and the seven vacant captain positions would go to members of a group consisting of seven whites and two Hispanics.[109] No black person would be promoted.[110] While a number of black firefighters had passed the test, promotions were scheduled to be offered in order of the test scores, and the available positions would be taken before any African American would be eligible.[111]

As a result of the apparent racially disparate consequences, or "impact," of the test results, New Haven's Civil Service Board held hearings, which included discussion of whether testing methods used by other cities should have been employed since they might have resulted in less racial disparity.[112] The board ultimately decided not to certify the results of the test.[113] As a consequence, certain white firefighters who would have been promoted based on their test scores brought an antidiscrimination lawsuit.[114] At the same time, African American firefighters who had passed the test with lower scores than the white firefighters threatened to bring a disparate impact claim if they were not promoted.[115] This litigation made its way to the Supreme Court, which ruled in a five-to-four decision that the disparate treatment claim brought by the white firefighters trumped the threatened disparate impact claim of the black firefighters.[116]

In its opinion, the Court first held that the threat of a disparate impact lawsuit can justify disparate treatment of white candidates only when there is a "strong basis in evidence" that a disparate impact case would prevail.[117] In this case, the Court held that such a standard could not possibly be met. Although the black firefighters had easily demonstrated that the test resulted in disparate impact, this prima facie case was not enough under antidiscrimination law.[118] As the Court explained:

> The problem for respondents is that a prima facie case of disparate-impact liability—essentially, a threshold showing of a

108. *Id.* at 2665–66.
109. *Id.* at 2666.
110. *Id.*
111. *See id.*
112. *Id.* at 2667–70.
113. *Id.* at 2671.
114. *Id.*
115. *Id.* at 2664.
116. *Id.* at 2681.
117. *Id.* at 2676.
118. *Id.* at 2677–78.

> significant statistical disparity, and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results. That is because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt. We conclude there is no strong basis in evidence to establish that the test was deficient in either of these respects.[119]

Thus, whether a disparate impact claim will prevail depends upon questions of business necessity, and, in this case, strong evidence that such a claim would prevail was a prerequisite for overcoming a countervailing claim of disparate treatment.

How would current jurisprudence impact serious efforts to diversify corporate boards? In all likelihood, it makes little difference that the civil rights laws do not apply to them (because board members are not employees). Even if the laws applied, a firm would only have to prove that it based its current policy of choosing directors on various business-related reasons (particularly to increase shareholder value). This would likely be good enough to rebut a disparate impact claim. We suspect that the present diversity policy of most firms (stated as follows) would survive any challenge: a board is open to nominate eligible minority board members, provided that the "right" (i.e., those who will help the firm perform better) candidates can be identified. A more aggressive approach to diversification, however, may well constitute disparate treatment under current doctrine, lending legal support to those firms that wish to maintain the status quo of having a small sampling of women and members of minority groups present on a mostly white male board.

How much a firm will want to identify such candidates absent strong evidence that doing so will affect the bottom line for shareholder value depends in large part on how deeply embedded diversity has become as a social norm. Diversity has become enough of a social norm in the area of higher education that the Supreme Court has twice intervened to set limits. Some Justices have found it a legally impermissible value to pursue, while others have found it totally acceptable; the bottom line is that the Court permits diversity to be taken into account in a limited way, as we saw above.[120] The

119. *Id.* at 2678 (citations omitted).

120. For a discussion of the history of the "diversity debate" and an analysis of the competing arguments as to whether diversity is a value whose attainment should be sought

very fact that these cases have made their way to the Supreme Court suggests that at least certain parties in higher education have adopted the view that diversity is a value worth pursuing.

Nonetheless, as *Ricci* illustrates, the current trend in American law is to favor race-neutral policies. Sumi Cho describes this trend as "post-racialism,"[121] which she defines as follows:

> [P]ost-racialism in its current iteration is a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action.[122]

Others write similarly about this phenomenon.[123] To the extent that the financial community has internalized this race-neutral approach, it will become increasingly difficult for boards themselves to take the lead in bringing about greater diversity, notwithstanding that the law is not likely to stop them from doing so.

As we noted earlier, it is not clear what signals will be received when a firm decides to diversify beyond the social norm of demonstrating that the firm is not racist or sexist in that its board has women and minority group members. The law has stopped taking the lead in the antidiscrimination norms, as it formerly did when desegregating inns and lunch counters. Now firms themselves must take the risk of giving the wrong signal to the financial community, unless greater diversification becomes a more universally accepted norm.[124]

There are other reasons for the civil rights laws not to apply to board selection, the most practical of which is that membership is highly restricted and is generally administered by nomination followed by shareholder election. This makes it unlikely that there will be many plaintiffs who could bring such suits. Our point, though, is that a review of the civil rights laws, whose values we believe

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in the education context, see generally Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861 (2000).

121. *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009).

122. *Id.*

123. *See generally* Mario L. Barnes et al., *A Post-race Equal Protection?*, 98 GEO. L.J. 967 (2010) (criticizing current constitutional and statutory doctrine concerning civil rights as wrongly assuming that racism has ceased to be an issue in the United States).

124. *See* Dobbin & Jung, *supra* note 75, at 828 (observing that these risks are not negligible, as empirical evidence indicates that investors discount the share price of firms that increase board gender diversity).

underlie much of the effort to diversify boards, takes us right back to shareholder value. The interpretation of the civil rights laws emphasizing business necessity supports the position that diversifying boards depends upon empirical research strongly demonstrating that a diverse board will help firms perform better. Once again, this contributes to maintaining the status quo of incremental diversification.

C. *Diversity as a Way to Address Board Pathologies*

One argument for board diversity is that it could help address the group pathologies, discussed earlier, that arise from the typical social identity of boards. A diverse board member could introduce "cognitive conflict" within the boardroom and thus reshape a social identity typified by deference, conformity, and stylized conflict. That is, as social psychologists have explained, group pathologies like groupthink, where decision-making parties uniformly pursue one path or strategy, could be undermined if a group member brings forward other perspectives that are in direct conflict with the group's inclinations.[125] This resistance could in turn spark more discussion, the consideration of alternative strategies, and/or inquiry into problematic transactions and compensation arrangements. A diverse board member could be seen as an ideal candidate for this role of catalyst for social identity transformation of the board, if one assumes that the diverse board member's experiences provide her with different perspectives than those of the typical board member.

There are several obvious problems with this scenario, however. The social psychological literature suggests that it is difficult for one person to alter group dynamics, particularly with respect to cohesive groups.[126] Rather, an internal critic of a cohesive group is generally marginalized by the group and ignored or placed into the innocuous role of being the "house" critic, and thus he cannot effect any significant change to the decision-making process or the group's identity.[127] Moreover, since women and ethnic and racial minority board members may already face a significant risk of being

125. On the general issue of cognitive conflict, see Donald Lange, *A Multidimensional Conceptualization of Organizational Corruption Control*, 33 ACAD. MGMT. REV. 710, 718–19 (2008); Ann E. Tenbrunsel et al., *Building Houses on Rocks: The Role of the Ethical Infrastructure in Organizations*, 16 SOC. JUST. RES. 285, 295 (2003).

126. *See* WEICK, *supra* note 61, at 114 (stating that efforts by individuals are "compromised" when they act with "little social support").

127. *See* JANIS, *supra* note 7, at 114–17. Indeed, having a house critic may make the group all the more cohesive about its strategies because it can say that it has considered alternatives and accepted criticism.

marginalized on boards (i.e., because of conscious and implicit biases), they could risk being made wholly irrelevant by taking on this oppositional role. Indeed, they may often be inclined to engage in self-censorship with respect to any alternative perspective that they could offer.[128] Furthermore, it also seems unfair to force women and other minorities, who have only entered the boardroom relatively recently, into this risky confrontational role.

In addition, the women and ethnic and racial minorities who have arduously climbed up the business hierarchy and who are thus eligible to be nominated as board candidates are like their white male counterparts. They, too, have been trained, through their education and professional careers, to find "natural" the social identity of boards.[129] From the social identity perspective, when acting as board members, they run the risk of bringing nothing new to the table, certainly not their other identities, especially when they feel pressure (and have been instructed in the "vetting" process) to conform. Thus, board diversity is not likely to address group pathologies on boards. To be blunt, it serves only to expand the gender and racial makeup of the corporate elite.

There is some evidence that group (and thus board) pathologies can be addressed by the formation of a significant subgroup within a group that resists, and changes, the dominant social identity.[130] In other words, a coalition of resistance may be formed where coalition members support each other in their creation of an alternative subgroup and subgroup identity that, in time, replaces the current social identity of the group. In corporate boards, this phenomenon appears to surface within a board in a crisis, when a dominant CEO is overthrown because of a scandal or firm problem.[131] In a related vein,

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128. This self-censorship occasionally surfaces in the useful interviews recorded in the database collected by Professors Broome, Conley, and Krawiec. *See* Broome et al., *supra* note 66, at 784–85.

129. *See* Kelan & Jones, *supra* note 60, at 38 (interpreting a study to show that female MBA students do not "reflect critically on gender discrimination").

130. *Cf.* Linda K. Treviño et al., *Behavioral Ethics in Organizations: A Review*, 32 J. MGMT. 951, 962 (2006) (discussing "the ease with which situationally defined identities become entrenched within organizations" and how social identities may "compete with organizationally defined identities").

131. We rely here on anecdotal evidence. The changes to WorldCom, Inc. following its massive accounting scandal and the removal of corrupt management are one example. *See generally* Restoring Trust: Report to Hon. Jed S. Rakoff, U.S. Dist. Court for the S. Dist. of N.Y., on Corporate Governance for the Future of MCI, Inc., SEC v. WorldCom, Inc., No. 02 Civ. 4963 (S.D.N.Y. Aug. 26, 2003), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/worldcom/corpgov82603rpt.pdf (reporting on the transformation of corporate governance and firm attitudes within the former WorldCom after a trustee took control of the oversight of the firm).

literature on diversity in business settings suggests that diverse individuals are more likely to offer their alternative perspectives only in certain circumstances in the workplace. The individuals must feel that their input will be respected and that they have a critical mass of cohorts.[132] Therefore, board diversity may turn out to be important in changing board social identity, but it is likely to be dependent upon having adequate numbers of diverse board members and transforming the functioning of boards—both difficult to achieve.

III. OTHER JUSTIFICATIONS FOR DIVERSE BOARDS

A. *Countering Finance*

In our view, diversity advocates should not restrict themselves to, or even emphasize, justifying board diversity in terms of shareholder value. As we have suggested above, showing that diverse boards increase shareholder value is difficult as an empirical matter, and it makes advocates dependent upon a lengthy causal chain (i.e., from board composition to shareholder value) for changing the status quo. More significantly, since we believe that the shareholder value paradigm is problematic as a normative and policy matter, we prefer that diversity advocates (and others) not reinforce this normative perspective on the firm. In addition, it is clear that the case for board diversity, as for diversity in other contexts, is based upon normative frameworks other than shareholder value (e.g., to redress past discrimination).[133] As some diversity advocates have explained, it belittles or cheapens the case for board diversity to base it upon the shareholder value paradigm.[134] In our view, diversity advocates in the corporate context should base their advocacy upon these frameworks, just as the frameworks inspire antidiscrimination laws.[135]

132. *See* Erica Gabrielle Foldy et al., *Power, Safety and Learning in Radically Diverse Groups*, 8 ACAD. MGMT. LEARNING & EDUC. 25, 26 (2009); *see also* Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715, 728–30 (2011) (discussing the importance of employees feeling as though management values their opinions and takes them into account when decisions are made).

133. *See* Kang & Banaji, *supra* note 81, at 1075 (discussing the use of diversity to counter implicit biases).

134. *See, e.g.*, Dhir, *supra* note 72, at 600–01.

135. We provide an example of possible justifications for diversity in the discussion below. Since we are not scholars who specialize in diversity studies, we leave to others (particularly the contributors to this issue) an exposition of possible frameworks. For example, at the end of his commentary, Professor Kang insightfully lays out a justification for board diversity that does not depend upon shareholder value. Kang, *supra* note 12, at 943–44. Once again, moreover, we acknowledge his point that diversity advocates are

One often used example is the signaling effect of a diverse board.[136] As is well known, the argument could be made that a diverse board, as a signal, may increase a firm's profits. The argument rests on the premise that customers prefer to give their business to, and employees are motivated to work harder for, a firm that values diversity (as shown by its board composition). We do not believe that a diverse board has to be justified as this kind of a signal, which is again based upon shareholder value (and hard to establish as an empirical matter). However, board diversity also signals to employees, customers, and the community that the firm is inclusive (and thus not exclusive) with respect to all of its participants and associates (from the lowest-ranking employees to the most senior who are the board members). Moreover, this diversity would signal the firm's compliance with the norms embodied in antidiscrimination laws. Thus, a diverse board could be justified on the grounds that a firm should demonstrate acceptance of social values enshrined in the law, with less emphasis upon the shareholder value perspective. Such arguments are intended to enhance a firm's prestige in the community by virtue of the social values that it espouses.

As noted earlier, the law allows corporate boards, when deciding firm issues such as board composition, to make a "loose" connection to shareholder value.[137] Certainly, such a case could be made for a diverse board, and, in our view, there is no reason for diversity advocates not to take advantage of the law's flexibility on this point. That is, diversity advocates should offer lip service to finance, but also introduce other normative frameworks into the discussion. Unless there is convincing empirical evidence that the introduction of such values is damaging to shareholder value—which we doubt can be offered—then the law provides enough flexibility to permit such arguments to be advanced.

Nonetheless, we understand that diversity advocates are walking a fine line here. As discussed above, considerable resistance to diversity may surface from existing executives and board members, and particularly from institutional investors and money managers,

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likely using the shareholder value justification as one of the few discourse strategies available to them. *See id.* at 940, 942. We, too, understand that the power of a dominant ideology is that it controls discourse and thus dictates the kinds of arguments that can even be articulated on a given subject. As we have suggested and discuss further below, however, there is more space in current discourse about boards for justifications for diversity that do not depend upon shareholder value.

136. *See* Broome & Krawiec, *supra* note 28, at 447–48.

137. *See supra* Part II.B.

steeped as they are in finance and suspicious of anything that suggests less than true devotion to shareholder value.[138]

Making the challenge even more difficult is the narrow way in which the Supreme Court has construed the civil rights laws. As discussed above, attempts to remedy the disparate impact of employment practices on women and ethnic and racial minorities are rebutted by business necessity or have even been construed as themselves a violation of the disparate treatment prong of the civil rights statutes. This interpretation is by no means necessary, and it is in fact a departure from prior precedent, as Justice Ginsburg points out in her dissent in *Ricci*.[139] To the extent that board diversification is an outgrowth of a culture that values racial and gender equality stemming from a half century of employment discrimination legislation, such decisions are likely to place even more burden on those firms that wish to diversify their boards.[140] Yet the fact that the courts have not embraced diversity as an appropriate goal in the enforcement of these laws need not deter a firm from diversifying its board if significant segments of society are out in front of the law and accept diversification as a legitimate and praiseworthy goal.

Diversity advocates may argue that it is inappropriate, and even unfair, to place upon them the burden of challenging, either directly or indirectly, the shareholder value paradigm, which might hinder the achievement of the other goals of board diversity and, as we noted earlier, put current diverse board members in the uncomfortable position of being seen as only diversity advocates. While this is a concern, we feel that there is also a risk of reducing board diversity to including on a board a few diverse directors who share the shareholder value perspective and who thus expand somewhat the corporate and financial elite. One compromise that would recognize the precarious position of diverse board members and would not just reinforce the shareholder value paradigm would be to place the main obligation for board diversity upon current board members, who are

138. Again, Dobbin and Jung's evidence with respect to the conduct of smaller money managers is telling. *See* Dobbin & Jung, *supra* note 75, at 828–29.

139. *See* Ricci v. DeStefano, 129 S.Ct. 2658, 2701–02 (2009) (Ginsburg, J., dissenting).

140. Of course, legislating a minimum percentage of diverse board members—an approach taken by Norway—would solve this problem in that no firm would have to risk being an unappreciated pioneer in this regard, but such legislation is not likely to be enacted and might even be considered unconstitutional if it were. *See generally* Kate Sweetman, *How Women Have Changed Norway's Boardrooms*, HARV. BUS. REV. BLOGS: HBR NOW (July 27, 2009, 4:07 AM), http://blogs.hbr.org/hbr/hbr-now/2009/07/how-women-have-changed-norways.html (discussing the impact of the Norwegian diversity legislation on their boards).

primarily not women or members of racial or ethnic minorities. They would then have to nominate diverse directors in meaningful numbers and face the immediate resistance of institutional investors focused upon shareholder value.[141]

B. Improvements to Board and Firm Functioning

We also hope that a more diverse board, with members offering perspectives other than shareholder value, could improve board functioning as to its supervisory and advisory roles and could reduce the harmful consequences of the shareholder value perspective. As one commentator has put it, the hope is that diversity "can act to create a culture of scrutiny instead of a culture of greed" on corporate boards.[142] Although, as we have emphasized throughout the Article, the case for board diversity does not depend upon the practical or functional outcomes, these outcomes may be a welcomed positive externality of diversity. To take just one prominent example, much conduct in public firms that is detrimental both to firms and society arises from executive compensation practices and related issues (i.e., "rents" more generally). Compensation practices, which center on stock options and which have resulted in extreme pay disparities within firms, are creatures of finance's agency model.[143] Moreover, many prominent abuses in public firms involve compensation and related rent-seeking. Stock option backdating comes to mind,[144] as do the compensation arrangements in financial firms like Merrill Lynch that continued despite massive losses.[145] There is little evidence that board members consciously approve of fraud and other abuses in compensation. However, the social identity shared by the typical board member makes him deferential to finance-based compensation

141. Our remarks in this paragraph thus represent one response to Professor Kang's criticism that we do not adequately sympathize with the precarious position of diversity advocates. *See* Kang, *supra* note 12, at 938–39.

142. 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, 846 (2003).

143. *See* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 159–73 (2004) (examining option compensation practices which provide pay without performance and increase windfalls).

144. *See generally* JAMES M. BICKLEY & GARY SHORTER, CONG. RESEARCH SERV., RL 33926, STOCK OPTIONS: THE BACKDATING ISSUE (2008) (surveying this issue and related research).

145. *See, e.g.*, ANDREW M. CUOMO, N.Y. STATE OFFICE OF THE ATT'Y GEN., NO RHYME OR REASON: THE 'HEADS I WIN, TAILS YOU LOSE' BANK BONUS CULTURE 1–2 (2009), *available at* http://www.ag.ny.gov/media_center/2009/july/pdfs/Bonus%20Report%20Final%207.30.09.pdf.

arrangements and inclined to approve (and to think as natural) high compensation for top executives.[146] This same social identity prevents directors from focusing on the consequences of their decisions, such that the compensation arrangements result in extraordinary wealth creation for the corporate elite.[147]

The hope is that a diverse board (with suitable numbers of diverse members who would express perspectives other than that of shareholder value) could help alter the dominant, finance-based social identity that now characterizes public company boards. As in all social situations, this would mean the formation of a new social identity for a particular board that is influenced by the perspectives of its diverse members and that would not simply reflect the shareholder value standard. Again to take an example from compensation, a board with a different social identity might question many compensation assumptions and practices, such as the sheer size of compensation packages, the disparity between executive compensation and that of other employees, the form of the compensation (i.e., primarily stock-based), and the beliefs with respect to current practices (i.e., one cannot attract competent executives without it).

A firm with diverse board members could also have a salutary effect on corporate culture by reaffirming social norms with respect to antidiscrimination. It is our belief that firms with significant numbers of women and ethnic and racial minorities on their boards will be less likely to tolerate discriminatory conduct in the firms themselves, and be less ready to offer shareholder value justifications for the discriminatory impact of their employment practices. Even if such effects are difficult to measure, the benefit of having diverse board members as role models in high positions and the symbolic value of their presence for the affirmation of other normative frameworks than finance are undeniable.

CONCLUSION

Gender, ethnic, and racial diversity on boards of public companies remains an elusive goal for diversity advocates. Moreover, these advocates feel the pressure to justify board diversity in terms of its contribution to shareholder value. This pressure is not surprising, insofar as the dominant social identity of boards views shareholder

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146. *See* DAVIS, *supra* note 1, at 85–99.

147. *See id.* at 250. On the strength and pervasiveness of the ideology of finance, see SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 104–18 (2010).

value as the ultimate criterion for any action, including eligibility for the board. However, accepting this criterion poses a problem for diversity advocates, for they are called upon to justify increased board representation of women and ethnic and racial minorities with empirical evidence regarding its contribution to shareholder value. Such evidence is not strong or definitive, and the chain of causation from a diverse board to increased shareholder value is a long and tenuous one. As we have shown, this pressure that makes diversity secondary to shareholder value finds its counterpart in antidiscrimination law jurisprudence. Moreover, having diverse board members, without more, does not appear to improve board decision making, at least by addressing some well-known board pathologies.[148]

Diversity advocates should not limit themselves to the shareholder value paradigm, for it obscures the other perspectives and values that they offer to justify board diversity and reinforces that paradigm. As it turns out, corporate law provides directors considerable freedom for their business decisions, which could be used to accommodate board diversity. We understand that there will be resistance to, and risks associated with, any questioning of shareholder value, and we do not intend to ask diversity advocates or diverse board members alone to carry this burden. Yet we feel that, if diversity advocates justify board diversity on other grounds and norms, they could promote a transformation in the social identity of boards. Although this transformed identity might have a subsidiary benefit of improving board functioning, it is enough for us that it reflects and promotes antidiscriminatory norms.

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148. However, while board diversity might not help the bottom line in the regular course of business, the social psychological research discussed earlier does suggest that, in times of crisis, if a board has diverse enough perspectives, groupthink may be avoided and better decisions made. *See supra* note 131 and accompanying text. Since neither the occurrence of a crisis nor the nature of any crisis that a board may confront is predictable, such benefits are hard to measure and not likely to affect share prices. Nonetheless, they may be a positive consequence of an effort to diversify more aggressively.