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How Much Difference Does Difference Make?**

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Diversity on Corporate Boards: How Much Difference Does Difference Make?

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Abstract:

This article seeks to evaluate the case for racial, ethnic, and gender diversity on corporate boards of directors in light of competing research findings. The analysis provides a comprehensive overview of recent studies on board diversity and explores whether diversity has been shown to improve corporate financial performance, reputation, governance, and board decision making. After exploring the strengths and limitations of various methodological approaches and survey findings, the article concludes that the relationship between diversity and financial performance has not been convincingly established. The review does, however, find some theoretical and empirical basis for believing that when diversity is well managed, it can improve decision making and can enhance a corporation's public image by conveying commitments to equal opportunity and inclusion. To achieve such benefits, however, diversity must extend beyond tokenism and corporations must be held more accountable for their progress. Discussion also focuses on the barriers to achieving diversity and suggests strategies for boards, policy makers, institutional investors, and corporate social responsibility organizations to promote more inclusive boards. The article also identifies the need for more empirical and cross-cultural research on the effectiveness of recent legal and disclosure strategies in enhancing diversity.

Keywords: Diversity, Corporate Boards, Board Diversity, Corporate Governance, Race, Gender, Women, Minorities, Directors

JEL Classification: G30, J15, J16, K22, L21

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“To serve as director on the board of a leading American corporation is to hold a position of exceptional power and influence. Indeed, the decisions made in corporate boardrooms affect the lives of hundreds of thousands of employees and consumers, as well as the performance and policies of other corporations, the ebb and flow of economic activity, the dealings of the global marketplace, and international strategies. Yet, even today, the players at the highest level of corporate governance are for the most part a homogenous group.”

- Mary C. Mattis, *Women on Corporate Boards, Two Decades of Research*¹

In recent years, increasing attention has focused on the influence of gender and racial diversity on boards of directors. A cottage industry of studies has explored this issue, as well as the role of diversity in organizational contexts more generally. This article reviews the current position of women and minorities on corporate boards and examines the rationale for increasing their representation. Analysis then turns to the barriers to achieving greater diversity and the strategies that could address them.

I. THE CURRENT STATE OF DIVERSITY ON CORPORATE BOARDS

A. Female and Minority Representation on Corporate Boards

Members of corporate boards of the largest American companies are primarily white men.² According to the most recent data, women hold only about 15 percent of the seats on Fortune 500 boards and the same percentage of key board committee chairs.³ Of all United States corporate boards, a majority (51.2 percent) have no women directors or only one.⁴ The situation in other nations is not markedly better, with the exception of Scandinavia, where legal and political pressure has forced greater gender parity.⁵

¹ Mary C. Mattis, *Women on Corporate Boards Two Decades of Research*, 3 INT’L REV. OF WOMEN & LEADERSHIP 11, 11 (1997).

² Marleen A. O’Connor, *Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power*, 65 MD. L. REV. 465, 468 (2006). Most corporate board directors are white, mid-fifties men who are predominantly Protestant and Republican. *Id.*

³ RACHEL SOARES, NANCY M. CARTER & JAN COMBOPIANO, 2009 CATALYST CENSUS: WOMEN BOARD DIRECTORS OF THE FORTUNE 500 (Dec. 10, 2009), available at http://www.catalyst.org/file/320/2009_fortune_500_census_women_board_directors.pdf. 12.3 percent of Fortune 500 boards have no women directors and almost a third (31.9 percent) have only one female director. *Id.* In 2009, women’s share of committee chairs in the Fortune 500 stood at 17 percent for nominating/governance committees, 12 percent for audit committees, and 12 percent for compensation committees. *Id.*

⁴ Lissa Lamkin Broome, *The Corporate Boardroom: Still a Male Club*, 33 J. CORP. L. 666, 667 (2008) (reviewing DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* (2007)). Even corporations whose consumer base is largely female often have few women directors on their boards. Joan MacLeod Heminway & Sarah White, *Wanted: Female Corporate Directors*, 29 PACE L. REV. 249, 254 (2007) (reviewing BRANSON, *supra*).

⁵ Norwegian corporate boards have 44 percent female members, Sweden has 27 percent, Finland has 26 percent, and Denmark, 18 percent. By contrast, women occupy fewer than 15 percent of corporate board seats in Australia, Canada, and the UK and other European countries. CATALYST, *WOMEN IN EUROPE* (April 2010), available at <http://www.catalyst.org/publication/285/women-in-europe>; GOVERNANCE METRICS INTERNATIONAL, *WOMEN ON BOARDS: A STATISTICAL REVIEW BY COUNTRY, REGION, SECTOR, AND MARKET INDEX* (March 2009); EUROPEAN PROFESSIONAL WOMEN’S NETWORK, EGON ZEHNDER INTERNATIONAL, *EUROPEAN PWN BOARDWOMEN MONITOR*

In the U.S., people of color occupy also occupy a very small percentage of board seats. Minorities hold approximately 12 percent of Fortune 500 board seats, with African-Americans in 7.4 percent of seats, Latinos in 3.1 percent of seats, and Asian-Americans in 1.5 percent of seats.⁶ Women of color fare particularly poorly in board appointments, holding only 3 percent of board seats.⁷

B. Progress or Plateau?

Although the overall percentage of women and minorities on corporate boards remains small, the number has been growing. By some measures, diversity has increased substantially over the course of the last thirty years. In 1973, only seven percent of Fortune 1000 boards had any minority directors; now 78 percent have at least one minority director.⁸ Similarly, the number of Fortune 100 boards with at least one woman increased from 11 percent in 1973 to 97 percent in 2006.⁹

Other more recent trends are also promising. In the last decade, Asian-American board representation has tripled and Latino board representation has doubled.¹⁰ Between 2001 and 2007, the number of Fortune 500 boards with three or more women tripled, rising from 25 to 76 companies, and the number of boards with two or more women rose thirty-four percent.¹¹ Women's share of *new* board appointments—which have been rising steadily since 2007—spiked in 2009 when 39 percent of the 424 new director appointments were women, surpassing the previous high of 25 percent for 2008.¹² Such trends may continue, given the growing demand

(June 2008); Siri Terjesen & Val Singh, *Female Presence on Corporate Boards: A Multi-Country Study of Environmental Context*, 83 J. BUS. ETHICS 55 (2008);

⁶ For African-American representation, see The Executive Leadership Council, *African Americans Lost Ground of Fortune 500 Boards: Blacks Remain Seriously Underrepresented*, (Press Release, July 17, 2009),

http://www.elcinfo.com/2008_Board_Census.php. For Hispanic representation, see HISPANIC ASSOCIATION ON CORPORATE RESPONSIBILITY, 2007 HACR CORPORATE GOVERNANCE STUDY 7 (2007), available at

http://www.hacr.org/docLib/20070619_2007HACRGovernanceStudy.pdf. For Asian Americans, see COMMITTEE OF 100, 2007 CORPORATE BOARD REPORT CARD: A REPORT ON DIRECTORS OF ASIAN ETHNICITY ON FORTUNE 500 BOARDS 3 (May 15, 2007), available at http://www.committee100.org/initiatives/initiative_corporate.htm. In 2003

and 2004, minorities held 10 percent of Fortune 500 board seats, with African-Americans holding 8.1 percent, Latinos 1.6 percent, and Asian Americans 1 percent. Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV 1105, 1110 (2005). Numbers are similar among Fortune 100 companies, where African-Americans held 9.8

percent of seats, Hispanics held 4.0 percent of seats, and Asians held 1.6 percent of seats. Calculations are based on data from THE ALLIANCE FOR BOARD DIVERSITY, WOMEN AND MINORITIES ON FORTUNE 100 BOARDS (2008).

⁷ SOARES, CARTER, & COMBOPIANO, 2009 CATALYST CENSUS: WOMEN BOARD DIRECTORS OF THE FORTUNE 500, *supra* note 3. Almost two-thirds of Fortune 500 companies have no women of color serving as directors. *Id.*

⁸ For 1973 numbers, see Fairfax, *supra* note 6, at 1107. For current numbers, see KORN FERRY INSTITUTE, 34TH ANNUAL BOARD OF DIRECTORS STUDY 7 (December 2008), available at www.kornferry.com/publications/9955.

⁹ THE ALLIANCE FOR BOARD DIVERSITY, WOMEN AND MINORITIES ON FORTUNE 100 BOARDS 7 (2008). In 41 percent of Fortune 100 companies, women and minorities held more than 30 percent of board seats in 2006; only three companies had no female directors and six companies had no minority directors. *Id.* at 7-8.

¹⁰ Fairfax, *supra* note 6, at 1108-09.

¹¹ Dan R. Dalton & Catherine M. Dalton, *Women Gain (Hidden) Ground in the Boardroom*, 87 HARV. BUS. REV. 23 (Jan. 1, 2009).

¹² Jim Kristie, *Boards At Their Best: Yes! There is Good News on Women Directors*, July 12, 2010, <http://www.jameskristie.blogspot.com/2010/07/yes-there-is-good-news-on-women.html> (citing the most recent numbers from Directors & Boards survey of board appointments); Erin White, *Study: More Women Named to Boards*, WALL ST. J. (May 12, 2009) (citing a study done by Directors & Boards, a quarterly journal),

for outside directors and financial experts following the passage of the 2002 Sarbanes-Oxley corporate governance legislation, as well as the increasing reluctance of active CEOs to serve on multiple outside boards.¹³

By other measures, however, progress—especially in the past decade—has stalled. For Fortune 500 companies, the share of board seats held by women has grown only from 12 to 15 percent since 2000.¹⁴ Women are also underrepresented as chairs of the compensation, audit, and nominating committees, which are among the most influential board positions.¹⁵ At current rates of change, it would take almost seventy years before women’s representation on corporate boards reached parity with men’s.¹⁶ Increases in minority representation pose still greater challenges. Total minority seats on Fortune 100 boards have barely increased since 2003, and the representation of women of color has grown less than one percent since 2003.¹⁷ Outside of the largest, most high-profile corporations, progress has been harder to achieve, in part, “because [smaller] companies do not receive as much scrutiny from those promoting gender diversity in the boardroom . . . and consequently their boards have not given the issue much thought.”¹⁸

Moreover, some of the most encouraging numbers on board diversity may conceal less promising trends. Much of the increase in women and minority directors over the last decade may reflect the same individuals sitting on more boards rather than the appointment of new individuals as directors. In addition, the Sarbanes-Oxley Act led many corporations to reduce overall board size, which means that the same number of women and minority directors may comprise a greater percentage of a now smaller board.¹⁹ Many commentators worry that these “trophy directors” are spread too thin to provide adequate oversight.²⁰ There is also concern that

<http://online.wsj.com/article/SB124208439032108595.html>. In 2006, women’s share of new director appointments was 18.5 percent. *Id.*

¹³ Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703, 704, 708-10 (2007).

¹⁴ Dalton & Dalton, *supra* note 11, at 23; SOARES, CARTER, & COMBOPIANO, *supra* note 3.

¹⁵ Annalisa Barrett, *Uneven Progress: Female Directors in the Russell 3000*, The Corporate Library, 2,4 (2010), available at <http://www.thecorporatelibrary.com>. For racial disparities in committee assignments, see Craig A. Peterson, James Philpot, & K.C. O’Shaughnessy, *African-American Diversity in the Boardrooms of the U.S. Fortune 500: Director Presence, Expertise and Committee Membership*, 15 CORP. GOVERNANCE: AN INT’L REV. 558, 568 (2007) (finding that African-American directors were more likely to sit on audit and public affairs committees and less likely to sit on executive committees). For gender disparities, see Diana Bilimoria & Sandy Kristin Piderit, *Board Committee Membership: Effects of Sex-Based Bias*, 37 ACAD. OF MGMT. J. 1453, 1469 (1994) (finding that men, after controlling for experience-based characteristics, were preferred for the compensation, executive, and finance committees, while women were preferred for public affairs committees in Fortune 300 firms).

¹⁶ Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 586 (2006).

¹⁷ Fairfax, *Some Reflections*, *supra* note 6, at 1110; text accompanying *supra* note 6; SOARES, CARTER, & COMBOPIANO, *supra* note 3. Between 2000 and 2007, the number of S&P 500 firms without any minority members actually increased from 36 percent to 41 percent, and the number of firms with only one minority member also grew from 58 percent to 81 percent. Phred Dvorak, *Some Things Don’t Change: Sarbanes-Oxley Was Expected to Increase the Number of Minority Directors. What Happened?*, WALL ST. J., Jan. 14, 2008, at R4.

¹⁸ Barrett, *supra* note 15, at 2. Although 89 percent of S&P 500 companies have at least one woman on their boards, only 60 percent of companies in the Russell 3000 have any women on their boards. *Id.* at 1.

¹⁹ Heminway & White, *supra* note 4, at 254; BRANSON, *supra* note 4, at 144. Some research also suggests that there has been recycling of the same minority individuals, particularly African-American men, among Fortune 100 board seats. See ALLIANCE FOR BOARD DIVERSITY, WOMEN AND MINORITIES ON FORTUNE 100 BOARDS 5-6 (May 17, 2005).

²⁰ BRANSON, *supra* note 4, at 100-01, 155.

the appointment of one or two token female or minority members will decrease pressure for continued diversity efforts.²¹

II. THE CASE FOR DIVERSITY ON CORPORATE BOARDS

The growing consensus within the corporate community is that diversity is an important goal. Not only does it seem “the right thing to do,” especially as corporations’ employees, customers, and clients become increasingly diverse, it is also said to pay off at the bottom line.²² The “business case” for diversity generally rests on two primary claims. The first is that it improves outcomes, particularly financial performance. The second is that it improves decision-making processes, which may in turn improve firm performance.²³

A. Diversity and Firm Performance

Despite increasing acceptance of the business case for diversity, empirical evidence on the issue is mixed.²⁴ While some studies have found positive correlations between board diversity and various measures of firm performance, others have found the opposite or no significant relationship. Discussion below reviews these findings, as well as their methodological limitations. One of the most significant constraints is the shortage of studies on racial and ethnic diversity. Most of the research focuses on gender, from which commentators often generalize without qualification.

1. Studies Finding a Positive Relationship

One of the most frequently cited studies in support of board diversity is a 2007 Catalyst study.²⁵ It ranked Fortune 500 companies according to the percentage of women on their boards and found that companies in the highest quartile outperformed companies in the lowest quartile by 53 percent on return on equity (ROE), 42 percent on return on sales (ROS), and by 66 percent on return on invested capital (ROIC).²⁶ This study was a univariate analysis, which compares the

²¹ For more on tokenism, critical mass, and complacency among companies who have appointed women and minority directors, see section II.C, *infra*.

²² For example, in a 1995 Catalyst survey of 325 CEOs, almost three-quarters (72 percent) reported that recruiting a woman director to serve on their company’s board was either a “top priority” or a “priority.” CATALYST, THE CEO VIEW: WOMEN ON CORPORATE BOARDS 13-14 (1995), available at <http://www.catalyst.org/file/218/ceo%20view-women%20on%20corporate%20boards.pdf>.

²³ See Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 589-91; Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?* 77 U. CIN. L. REV. 431, 446-47 (2008).

²⁴ There is also a growing body of literature on the relationship of diversity among corporate executives to firm performance. See e.g., Roy Adler, *Women and Profits*, 79 HARV. BUS. REV. 30 (2001) (finding a positive relationship); CATALYST, THE BOTTOM LINE: CONNECTING CORPORATE PERFORMANCE AND GENDER DIVERSITY (2004) (finding a positive relationship); Anthony F. Jurkus, Jung C. Park, & Lorraine S. Woodward, *Gender Diversity, Firm Performance, and Environment* (Working Paper Jan. 2008) (finding a positive relationship), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1085109. Researchers have also looked at gender diversity and non-profit boards. At least one study of non-profit boards finds that the equal representation of sexes enhanced social performance (i.e. an organization’s ability to fulfill its mission). Julie L. Siciliano, *The Relationship of Board Member Diversity to Organizational Performance*, 15 J. BUS. ETHICS 1313 (1996).

²⁵ Mijntje Luckerath-Rovers, *Women on Board and Firm Performance*, (April 2010 Working Paper), 11, available at <http://www.ssrn.com/abstract=1586832>. The Catalyst study acknowledges in a footnote that correlation does not imply causation. CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN’S REPRESENTATION ON BOARDS (2007).

²⁶ CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN’S REPRESENTATION ON BOARDS (2007) (using univariate tests of differences in means to compare 4-year average over 2001-2004 of ROE, ROS, and return

means of the two groups and does not include any control variables that might explain the correlation. The results of such a means comparison can also be skewed by any extreme values in the group. The study also did not specify whether the reported differences in means were statistically significant, which could also distort results.

Other studies using regression analyses have also found a positive relationship between board diversity and various measures of firm performance in samples of U.S. companies. Erhardt, Werbel, and Shrader examined five years of data for 112 large companies and found a significant positive correlation between gender and minority representation on boards and return on assets (ROA) and return on investment (ROI).²⁷ In a 2002 study, Adams and Ferreira also found a positive significant relationship between the proportion of female directors and financial performance in 1,066 publicly traded companies as measured by Tobin's Q (the ratio of the market value of a firm divided by the replacement cost of its assets), but they found no relationship or a negative relationship between board gender diversity and ROA.²⁸ Carter, D'Souza, Simkins, and Simpson's recent study of nearly over 600 Fortune 500 corporations found that greater board diversity had a significant positive effect on Tobin's Q.²⁹

Studies in other countries have also found a positive correlation between gender diversity on boards and measures of financial performance. In Australian firms, Bonn found a positive relationship between the proportion of female directors and book-to-market ratio, while Nguyen and Faff found a positive link between gender diversity and Tobin's Q.³⁰ Campbell and Minguez-Vera found a significant and positive relationship in Spanish firms between the gender composition on boards and Tobin's Q.³¹ In a study of Dutch companies, Luckerath-Rovers found a significant positive relationship between female board representation and return on equity.³²

on invested capital for top quartile of firms with highest average percentage of female directors from 2001-2003 versus firms in the lowest quartile). For an analysis of the methodological shortcomings of the Catalyst study, see Luckerath-Rovers, *supra* note 25, at 8-12.

²⁷ Niclas L. Erhardt, James D. Werbel & Charles B. Shrader, *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOVERNANCE: AN INT'L REV. 102 (2003). Return on assets measures net income divided by the total value of assets. Return on investment measures net income divided by investment capital. *Id.* at 106. The authors recognized that they could be observing reverse causation; firms with better financial performance may be more open to appointing diverse boards. *Id.* at 108.

²⁸ Renee B. Adams & Daniel Ferreira, *Diversity and Incentives in Teams: Evidence from Corporate Boards*, (working paper, Federal Reserve Bank of New York) (2002).

²⁹ David A. Carter, Frank D'Souza, Betty J. Simkins, & W. Gary Simpson, *Gender and Ethnic Diversity of U.S. Boards and Board Committees and Performance*, XX CORP. GOVERNANCE: AN INT'L REV. X, at 4 (forthcoming 2010), available online in advance of publication at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8683.2010.00809.x/abstract> (using cross-section fixed-effects and three-stage least squares to measure effect of board representation of women and minorities on Tobin's Q two years later to account for time lag of effect of diversity and to moderate effects of endogeneity), This study also looked at the effect of gender and racial/ethnic diversity on board committees and found mixed results. *Id.*

³⁰ Ingrid Bonn, *Board Structure and Firm Performance: Evidence from Australia*, 10 J. OF THE AUSTRALIAN & NEW ZEALAND ACAD. OF MGMT. 14 (2004) (finding a positive relationship between the proportion of female directors in 1999 and book-to-market ratio in 2004 for a sample of 84 Australian firms); Hoa Nguyen & Robert Faff, *Impact of Board Size and Board Diversity on Firm Value: Australian Evidence*, 4 CORP. OWNERSHIP & CONTROL 24 (2007) (finding a positive and significant relationship between board gender diversity and Tobin's Q in sample of Australian firms in 2000-2001).

³¹ Kevin Campbell & Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435 (2008) (finding through panel data analysis of 68 Spanish firms that the presence of one or more women on the board does not have a significant effect on firm value, but the ratio of women to men on the board has a significant positive effect on firm value as measured by an approximation of Tobin's Q). The authors

Of course, such correlations do not demonstrate causation. A few studies have claimed to show that board diversity leads to improved financial performance, but causal linkages are extremely difficult to prove.³³ As other studies have suggested, it could be that better firm performance leads to increased board diversity rather than the reverse.³⁴ More successful firms may also be more able to attract the female and minority candidates in high demand for board service. Larger and better-performing firms may have more resources to devote to pursuing diversity and may face more pressure from the public and large institutional investors to increase diversity on the board.³⁵ Finally, some omitted third factor could be causing both improved performance and greater board diversity.³⁶

2. Studies Finding a Negative Relationship or No Significant Relationship

Several other studies of U.S. firms have found no relationship or a negative relationship between board diversity and firm performance. Looking at a random sample of one hundred Fortune 500 corporations in the late 1980s, Zahra and Stanton found that the ratio of board member minorities, including women, was inversely related to the organization's financial performance in terms of profitability and efficiency. They found no relationship between diversity and ROE, profit margin, sales to equity, earnings per share, or dividends per share.³⁷ Another early study by Shrader et al. concluded that although the proportion of female managers was significantly and positively related to return on sales, ROA, ROE, and ROIC, the proportion of female directors was not significant.³⁸ In a study of 250 listed companies from 2000-2006,

concluded that the gender diversity was causing the increase in firm value because they did not find that firm value had a similar effect on diversity. *Id.*

³² Luckerath-Rovers, *supra* note 25 (studying 99 listed Dutch companies and finding a positive relationship between board gender diversity and return on equity, but no relationship with return on sales or return on invested capital).

³³ Carter, D'Souza, Simkins, & Simpson, *supra* note 29, at 4. After testing the proportion of women and minorities on the boards as the dependent variable and finding that Tobin's Q was not significant, the authors concluded that board diversity was driving better financial performance rather than the reverse. *Id.* Campbell and Minguez-Vera similarly concluded that gender diversity has a significant causal effect on firm value as measured by an approximation of Tobin's Q; they did not find that performance had a similar effect on diversity. Campbell & Minguez-Vera, *supra* note 31.

³⁴ Kathleen A. Farrell & Philip L. Hersch, *Additions to Corporate Boards: The Effect of Gender*, 11 J. CORP. FIN. 85 (2005). In a sample of 300 non-regulated Fortune 500 firms from 1990 to 1999, the authors found a positive relationship between ROA and the likelihood of adding a female director. But the addition of female directors showed no subsequent effect on performance, which indicates reverse causation. *Id.* Renee B. Adams & Daniel Ferreira, *Gender Diversity in the Boardroom* 16, 19 (ECGI, Finance Working Paper No. 57, 2004), available at <http://ssrn.com/abstract=594506>. The authors found a positive impact on Tobin's Q when the percentage of women directors was the dependent variable, although ROA was not significant. They also found that firms with greater variability in stock returns have fewer women directors. *Id.*

³⁵ Broome & Krawiec, *supra* note 23, at 434. See also Siri Terjesen, Ruth Sealy, & Val Singh, *Women Directors and Corporate Boards: A Review and Research Agenda*, 17 CORP. GOVERNANCE: AN INT'L REV. 320, 326 (2009); Farrell & Hersch, *supra* note 34 (hypothesizing either that women directors select high-performing or low-risk firms, or that well-functioning firms are more able to focus on adding diversity).

³⁶ See, e.g., Amy J. Hillman, Christine Shropshire, & Albert A. Cannella, Jr., *Organizational Predictors of Women on Corporate Boards*, 50 ACAD. OF MGMT. J. 941 (2007) (finding that organizational size, industry type, firm diversification strategy, and network effects (i.e. links to other boards with women directors) have significant effects on the likelihood of board gender diversity). These and other exogenous variables that many studies do not control for could account for an apparent correlation.

³⁷ Shaker A. Zahra & Wilbur W. Stanton, *The Implications of Board Directors' Composition for Corporate Strategy and Performance*, 4 INT'L J. MGMT. 229 (1988).

³⁸ Charles B. Shrader, Virginia B. Blackburn, & Paul Iles, *Women in Management and Firm Financial Performance: An Exploratory Study*, 9 J. OF MANAGERIAL ISSUES 355 (1997).

Hussein and Kiwia found no relationship between female board representation and Tobin's Q.³⁹ Miller and Triana's 2009 research found no significant relationship between board gender diversity and return on investment or return on sales.⁴⁰

In 2009, Adams and Ferreira studied a sample of firms from 1996-2003 and found a negative relationship between gender diversity and both ROA and Tobin's Q.⁴¹ The authors concluded that "the positive correlation between performance and gender diversity documented in prior literature is not robust to any method of addressing the endogeneity of gender diversity. If anything, the relationship appears to be negative."⁴² In well-governed firms, increased gender diversity on boards seemed to decrease profitability and stock prices.⁴³ A recent study of 400 leading U.S. corporations between 1997 and 2005 by Dobbin and Jung found that increases in board gender diversity had no effect on subsequent profitability but were followed by marginally significant decreases in stock value. The authors concluded that non-blockholding institutional investor bias—rather than changes in the board's behavior or capabilities—may explain the negative effects.⁴⁴

Studies of board diversity in other countries have also found no link to various measures of firm performance. In Canadian firms, Francoeur, Labelle, and Sinclair-Desgagne found a positive correlation between female officers and financial performance, but no relationship between women directors and performance.⁴⁵ Wang and Clift's 2009 study of non-financial Australian firms revealed no significant relationship between gender or racial diversity on boards and ROA, ROE, or shareholder return.⁴⁶ A 2007 study by Rose and a 2006 study by Smith,

³⁹ Kassim Hussein & Bill M. Kiwia, *Examining the Relationship Between Female Board Members and Firm Performance—A Panel Study of U.S. Firms*, AFRICAN J. OF FIN. & MGMT. (2009), available at <http://www.ssrn.com/abstract=15964698> (last revised May 3, 2010) (concluding that no relationship exists between female board representation and firm performance as measured by ROA or Tobin's Q in a study of 250 listed U.S. companies from 2000-2006).

⁴⁰ Toyah Miller & Maria del Carmen Triana, *Demographic Diversity in the Boardroom: Mediators of the Board Diversity-Firm Performance Relationship*, 46 J. MGMT. STUDIES, 755, 777 (2009).

⁴¹ Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 292 (2009), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107721. The authors used a regression with fixed firm effects to address endogeneity and possible industry effects. *Id.* at 305-07.

⁴² *Id.* at 306.

⁴³ *Id.* at 307-08.

⁴⁴ Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?* (forthcoming, N. CAROLINA L. REV. 2010), available at http://www.wjh.harvard.edu/~dobbin/cv/workingpapers/Board_Diversity_and_Performance_07_01_10.pdf. The study found that non-blockholding institutional investors significantly decrease their holdings in firms that increase women directors, though blockholding investors significantly increase their holdings. Since non-blockholders own most of the shares, their response dominates, leading to a drop in stock value. *Id.*

⁴⁵ Claude Francoeur, Real Labelle, & Bernard Sinclair-Desgagne, *Gender Diversity in Corporate Governance and Top Management*, 81 J. BUS. ETHICS 83 (2008) (examining average gross returns and ROE including the Fama and French 3-factor valuation model to account for risk and using univariate and multivariate analyses to compare financial performance for top third to bottom third firms in terms of percentage of women).

⁴⁶ Yi Wang & Bob Clift, *Is There a "Business Case" for Board Diversity?*, 21 PACIFIC ACCOUNTING REV. 88 (2009) (finding no statistically significant relationship between the percentage of female directors, the percentage of minority directors, or the percentage of female and minority directors and subsequent ROA, ROE, or shareholder return, and concluding that because higher percentages of female and minority directors do not lead to poor performance, companies can achieve greater board diversity without negatively affecting shareholder wealth).

Smith, and Verner both failed to find a significant link between female board representation and various measures of firm performance for Danish corporations.⁴⁷

3. Explanations for the Inconclusive Results

In sum, the empirical research on the effect of board diversity on firm performance is inconclusive, and the results are highly dependent on methodology. The mixed results reflect the different time periods, countries, economic environments, types of companies, and measures of diversity and financial performance selected. The relationship between board characteristics and firm performance likely varies by country because of the different regulatory and governance structures, economic climate and culture, and size of capital markets.⁴⁸ Some researchers attribute the varied findings to the methodological shortcomings of many of the studies, including small sample size, short-term observations of performance, and the difficulty of controlling for reverse causation, endogeneity, and other omitted variables that may be affecting both board diversity and firm performance.⁴⁹ Moreover, with so many different measures of firm performance from which to choose, researchers are likely to find some values that show a positive relationship with board diversity and others that show a negative relationship.⁵⁰ Scholars also question whether focusing on short-term accounting measures of financial performance is the best way to measure the impact of diversity. Research is lacking on the relationship between board diversity and long-term stock price performance, which is the “gold standard” measure of shareholder value.⁵¹

These mixed quantitative results may reflect not only differences in research methodology, but also differences in the context in which diversification occurs.⁵² For example, some studies suggest that the influence of minority directors on corporate boards is heavily

⁴⁷ Caspar Rose, *Does Female Board Representation Influence Firm Performance? The Danish Evidence*, 15 CORP. GOVERNANCE: AN INT’L REV. 404 (2007) found no significant link in a sample of 443 Danish corporations between female board representation and organizational performance as measured by Tobin’s Q. Nina Smith, Valdevar Smith, & Mette Verner, *Do Women in Top Management Affect Firm Performance? A Panel Study of 2500 Danish Firms*, 55 INT’L J. PRODUCTIVITY & PERFORMANCE MGMT. 569 (2006), employed several statistical methods and multiple measures of firm performance from 1993 to 2001, and found no significant relationship between female board representation and performance. Female directors elected by staff had a positive effect on performance but other female board members had a negative effect on performance, which could be explained by an insider relationship.

⁴⁸ Helen Kang, Mandy Cheng, & Sidney J. Gray, *Corporate Governance and Board Composition: Diversity and Independence of Australian Boards*, 15 CORP. GOVERNANCE: AN INT’L REV. 194 (2007).

⁴⁹ See Wang & Clift, *supra* note 46 (listing the various methodological shortcomings of each of the studies reviewed). Boards tend to influence strategic decisions with long-term effects, and most studies use a short time lag to examine effects on performance. Luckerath-Rovers, *supra* note 25, at 5-6.

⁵⁰ For the problem of multiple testing, see Yoav Benjamini & Yosef Hochberg, *Controlling the False Discovery Rate: A Practical and Powerful Approach to Multiple Testing*, 57 J. OF THE ROYAL STATISTICAL SOCIETY, Series B (Methodological), 289 (1995).

⁵¹ Joseph A. Grundfest, W.A. Franke Professor of Law and Business, Remarks at Stanford University conference, *Diversity on Corporate Boards: When Difference Makes a Difference*, Sept. 10, 2009, Panel 4 recording available at:

http://www.law.stanford.edu/calendar/details/2805/Diversity%20on%20Corporate%20Boards%3A%20When%20Difference%20Makes%20a%20Difference/#related_media. One recent study examined the 4-year relationship between diversity reputation and shareholder value for a sample of Fortune 500 firms designated as diversity leaders and found a significant, positive relationship but noted that there is little empirical research on the relationship between diversity and long-term stock price performance). Byron J. Hollowell, *Examining the Relationship Between Diversity and Firm Performance*, 2 J. DIVERSITY MGMT. 51 (2007).

⁵² Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 592-93.

shaped not only by the prior experience of the directors, but also the “larger social structural context in which demographic differences are imbedded.”⁵³ The failure to include a critical mass of women or minorities may in some cases prevent the potential benefits of diversity.⁵⁴ Those benefits may also be dampened by corporations’ well-documented tendency to appoint women and minorities who are least likely to challenge the status quo, or who are “trophy directors,” with too many board positions to provide adequate oversight.⁵⁵

Perhaps it should not be surprising that studies of the relationship between board diversity and financial performance are inconclusive, given that a direct relationship between various other aspects of board composition and performance has been similarly difficult to establish.⁵⁶ Empirical studies of board characteristics usually considered significant and in some cases undesirable, such as large board size, few outside directors, little or no investment by directors, and the CEO serving as board chair, “ha[ve] not yielded much evidence that these ‘usual suspects’ have any meaningful connection to board performance.”⁵⁷ The relationship between board characteristics, including diversity, and company performance may be “complex and indirect.”⁵⁸ Because boards perform multiple and varied tasks, diversity may affect different

⁵³ James D. Westphal & Laurie P. Milton, *How Experience and Network Ties Affect the Influence of Demographic Minorities on Corporate Boards*, 45 ADMIN. SCI. Q. 366 (2000).

⁵⁴ Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 592-93.

⁵⁵ See e.g. O’Connor, *supra* note 2, at 468; Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 592-93; BRANSON, *supra* note 4, at 98.

⁵⁶ Sabina Nielsen & Morten Huse, *The Contribution of Women on Boards of Directors: Going Beyond the Surface*, 18 CORP. GOVERNANCE: AN INT’L REV. 136, 137 (2010).

⁵⁷ Yang Min Kim & Albert A. Cannella, Jr., *Toward a Social Capital Theory of Director Selection*, 16 CORP. GOVERNANCE: AN INT’L REV. 282, 282 (2008). See also Dan R. Dalton, Catherine M. Daily, Jonathan L. Johnson, & Alan E. Ellstrand, *Meta-Analytic Reviews of Board Composition, Leadership Structure, and Firm Performance*, 19 STRATEGIC MGMT. J. 269 (1998) (meta-analysis of 54 studies on board composition finding no substantive relationship between board composition and firm performance). Sydney Finkelstein & Ann C. Mooney, *Not the Usual Suspects: How to Use Board Process to Make Boards Better*, 17 ACAD. OF MGMT. EXECUTIVE 1010 (2003) (finding no significant difference in terms of board size, number of outside directors, director ownership, and CEO role for high-performing versus low-performing companies); Gavin J. Nicholson & Geoffrey C. Kiel, *Can Directors Impact Performance? A Case-Based Test of Three Theories of Corporate Governance*, 15 CORP. GOVERNANCE: AN INT’L REV. 585, 585-86 (2007) (noting that researchers have so far failed to identify “a clear and demonstrable link between the board and firm performance,” as studies of board independence, leadership structure, board size, and the role of the CEO generally report no significant effect on firm performance, or small but conflicting results); Lucian Bebchuk, Alma Cohen, & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. OF FIN. STUDIES 783 (2009) (examining 24 corporate governance provisions considered significant and finding that 18 of the factors, including director indemnification, director liability, and director duties, were uncorrelated with firm valuation or abnormal returns); David Finegold, George S. Benson, & David Hecht, *Corporate Boards and Company Performance: Review of Research in Light of Recent Reforms*, 15 CORP. GOVERNANCE: AN INT’L REV. 865 (2007) (finding mixed and inconclusive results in meta-analysis of over 100 studies of CEO role, board independence, board size, and board ownership); Benjamin E. Hermalin & Michael S. Weisbach, *The Effects of Board Composition and Direct Incentives on Firm Performance*, 20 FIN. MGMT. 101 (1991) (finding no relationship between board composition in terms of inside versus outside directors and performance); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921 (1999).

⁵⁸ Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decisionmaking Groups*, 24 ACAD. MGMT. REV. 489 (1999).

functions in different ways, making it difficult to establish any consistent relationship between board diversity and firm performance.⁵⁹

Although empirical research has drawn much-needed attention to the underrepresentation of women and minorities on corporate boards, it has not convincingly established that board diversity leads to improved financial performance.⁶⁰ Given the limitations of these studies, many commentators believe that the case for diversity rests on other grounds, particularly its effects on board decision-making processes, corporate reputation, and governance capacities.⁶¹

B. *Diversity and Board Process, Corporate Reputation, and Good Governance*

A common argument by scholars, as well as board members of both sexes, is that diversity enhances board decision-making and monitoring functions.⁶² This assertion draws on social science research on small-group decision making, as well as studies of board process and members' experiences.⁶³ The basic premise is that diversity may lessen the tendency for boards to engage in groupthink—a phenomenon in which members' efforts to achieve consensus override their ability to “realistically appraise alternative courses of action.”⁶⁴

The literature on board decision making reflects three different theories about the process through which diversity enhances performance. The first is that women and men have different strengths, and that greater inclusion can ensure representation of valuable capabilities. For instance, some empirical evidence suggests that women generally are more financially risk averse than men.⁶⁵ For that reason, many commentators have speculated that women's increased participation in corporate financial decision making could have helped to curb tendencies that

⁵⁹ Nielsen & Huse, *supra* note 56, at 143. Most empirical studies examine the direct relationship between board diversity and firm performance and “fail to acknowledge that women directors may have a differential rather than uniform impact on the effectiveness in fulfilling theoretically distinct board tasks.” *Id.* at 137.

⁶⁰ See Steven Brammer, Andrew Millington, & Stephen Pavelin, *Gender and Ethnic Diversity Among UK Corporate Boards*, 15 CORP. GOVERNANCE: AN INT'L REV. 393, 394 (2007).

⁶¹ See Broome & Krawiec, *supra* note 23, at 434.

⁶² Hevig Bugge Reiersen & Beate Sjaafjell, *Report from Norway: Gender Equality in the Board Room 7* (2008), <http://ssrn.com/abstract=1139604> (citing Lynda Gratton & Lamia Walker, *Gender Equality: A Solid Business Case At Last*, FIN. TIMES, Oct. 29, 2007, at 17) (finding that corporate insiders believe that groups with gender balance deliver optimal performance in most areas that “drive innovation”).

⁶³ See e.g., Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 586; John M. Conley, Lissa L. Broome, & Kimberly D. Krawiec, *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say About Why Diversity Matters*, UNC Legal Studies Research Paper No. 1415803 (September 3, 2009), at 24, available at SSRN: <http://ssrn.com/abstract=1415803>. This qualitative interview-based study indicates that corporate insiders cite benefits to board diversity but may not have a clear picture of the precise ways in which diversity affects board processes or decision making. “[S]ubjects have mentioned their beliefs that diversity creates ‘a richer conversation,’ ‘an entirely new perspective,’ ‘different points of view,’ and ‘a very positive dynamic.’ But it is a theoretical narrative without concrete detail, a story without substance. . . . Overall, [the story amounts] to little more than ‘it seems like a good thing to do.’” *Id.* at 24.

⁶⁴ O'Connor, *supra* note 2, at 497; see also Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306-08 (2003); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption*, 77 ST. JOHN'S L. REV. 837 (2003).

⁶⁵ See Nancy Ammon Jianakoplos & Alexandra Bernasek, *Are Women More Risk Averse? Attitude Toward Financial Risk*, 36 ECONOMIC INQUIRY 620 (1998); Elsa Ermer, Leda Cosmides, & John Tooby, *Relative Status Regulates Risky Decision Making About Resources in Men: Evidence for the Co-Evolution of Motivation and Cognition*, 29 EVOLUTION & HUMAN BEHAVIOR 106 (2008).

caused the most recent financial crisis.⁶⁶ A widely discussed panel at a World Economic Forum in Davos put the question: “Would the world be in this financial mess if it had been Lehman Sisters?”⁶⁷ Many Davos participants believed that the answer was no, and cited evidence suggesting that women were “more prudent” and less “ego driven” than men in financial management contexts.⁶⁸ Other research points in similar directions, including studies from researchers at Harvard and Cambridge Universities, which find a correlation between high levels of testosterone and an appetite for risk.⁶⁹

Some commentators also cite evidence indicating that women have higher levels of trustworthiness or collaborative styles that can improve board dynamics.⁷⁰ As one female director put it, “Women are more cooperative and less competitive in tone and approach. When there’s an issue, men are ready to slash and burn, while women are ready to approach. . . . Women often provide a type of leadership that helps boards do their jobs better.”⁷¹ So too, racial and ethnic minorities’ experience of needing to relate to both dominant and subordinate groups is thought to provide a form of bicultural fluency that many enhance decision making.⁷²

A second argument is that women and minorities have different life experiences than white men do and bring different concerns and questions to the table, which allows the board to consider “a wider range of options and solutions to corporate issues.”⁷³ Diversity is productive by generating cognitive conflict: “conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretation, alternatives, and consequences.”⁷⁴ For example, Phillips, Liljenquist, and Neale’s study of group decision making

⁶⁶ See e.g., Nicholas D. Kristoff, *Mistresses of the Universe*, N.Y. TIMES, Feb. 7, 2009, at WK 12, available at <http://www.nytimes.com/2009/02/08/opinion/08kristof.html>.

⁶⁷ Katrin Bennhold, *Where Would We Be If Women Ran Wall Street?*, N.Y. TIMES, Feb. 1, 2009, <http://www.nytimes.com/2009/02/01/business/worldbusiness/01iht-gender.3-420354.htm>.

⁶⁸ *Id.*

⁶⁹ Sheelah Kolhatkar, *What If Women Ran Wall Street?*, NEW YORK MAGAZINE, March 29, 2010, at 36, available at <http://nymag.com/news/nusinessfinance/64950>.

⁷⁰ For trust, see Joan MacLeod Heminway, *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN’S L. J. 173 (2007); Rachel Croson & Nancy Buchan, *Gender and Culture: International Experimental Evidence from Trust Games*, 89 AMER. ECON. REV. 386, 389-90 (1999); Alessandro Innocenti & Maria Grazia Paziienza, *Altruism and Gender in the Trust Game*, Labsi Working Paper No. 5/2006 (2006), available at SSRN: <http://ssrn.com/abstract=884378>; Jana Vyrastekova & Sander Onderstal, *The Trust Game Behind a Veil of Ignorance: A Note on Gender Differences*, CentER Discussion Paper No. 2005-96 (Aug. 11, 2005), available at SSRN: <http://ssrn.com/abstract=807724>. For collaboration, see Vicki Kramer, Alison Konrad, & Sumru Erkut, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance*, Wellesley Centers for Women, Report No. WCW 11, at 11 (2006).

⁷¹ Kramer, Konrad, & Erkut, *supra* note 70, at 12.

⁷² Sonia Ospina & Erica Folly, *A Critical Review of Race and Ethnicity in the Leadership Literature: Surfacing Context, Power, and the Collective Dimensions of Leadership*, 20 THE LEADERSHIP Q. 876, 882 (2009).

⁷³ Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 589-90. See also Kramer, Konrad, & Erkut, *supra* note 70, at 9; Donald J. Polden, *Forty Years After Title VII: Creating An Atmosphere Conducive to Diversity in the Corporate Boardroom*, 36 U. MEMPHIS L. REV. 67 (2005) (arguing that board diversity leads to better governance because women and minority directors seem to ask different questions than white male directors, and they bring different experiences and concerns to the table); Ramirez, *supra* note 64 (arguing that diversity alters the functioning and deliberative style of boards and would lead to a new culture of scrutiny and reduce corporate corruption). But some commentators have questioned the degree to which gender and racial diversity necessarily equates with diverse perspectives. See, e.g., O’Connor, *supra* note 2, at 468.

⁷⁴ Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1393 (2002). See also Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. MGMT. REV. 402, 416 (1996) (noting that

found that when new members were “socially similar” to existing team members, subjective satisfaction was high but actual problem solving results were not. Although team members rated productivity much lower when newcomers were socially dissimilar, in fact the more heterogeneous group was much better at accomplishing the problem-solving task.⁷⁵ A diverse board can also enhance the quality of a board’s decision-making and monitoring functions because diverse groups are less likely to take extreme positions and more likely to engage in higher-quality analysis.⁷⁶

Some scholars have also suggested that diverse boards can help prevent corporate corruption because they are “bold enough to ask management the tough questions.”⁷⁷ According to one study, female directors expanded the content of board discussions and were more likely than their male counterparts to raise issues concerning multiple stakeholders.⁷⁸ Research has found that heterogeneous groups are associated with broader information networks and increased creativity and innovation.⁷⁹ One study concluded that board racial diversity increased innovation by expanding access to information and networks, and prompting more thorough evaluation.⁸⁰ Studies on the relationship between board diversity and its capacity for strategic change have reached conflicting results.⁸¹

Although research suggests that functionally or occupationally diverse groups may solve problems more quickly and effectively than homogeneous teams, demographic diversity may not

observable diversity may affect the number of alternatives considered and the quality of ideas discussed in positive ways); Erica Beecher-Monas, *Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?*, 86 OREGON L. REV. 373, 394, 412 (2007).

⁷⁵ Katherine W. Phillips, Katie A. Liljenquist & Margaret A. Neale, *Is the Pain Worth the Gain? The Advantages and Liabilities of Agreeing with Socially Distinct Newcomers*, (Working Paper, 2008).

⁷⁶ Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WISCONSIN L. REV. 795, 831-37 (2005); Susan E. Jackson, *Consequences of Group Composition for the Interpersonal Dynamics of Strategic Issue Processing*, 8 ADVANCES IN STRATEGIC MGMT. 345, 355-59 (1992); Cass R. Sunstein, *Deliberative Trouble: Why Groups Go to Extremes*, 110 YALE L.J. 71, 75 (2000); Forbes & Milliken, *supra* note 58.

⁷⁷ Ramirez, *supra* note 64, at 841.

⁷⁸ Kramer, Konrad, & Erkut, *supra* note 70, at 9.

⁷⁹ Cedric Herring, *Does Diversity Pay? Race, Gender, and the Business Case for Diversity*, 74 AM. SOCIOLOGICAL REV. 208, 208-09 (2009); Nancy DiTomaso, Corinne Post, and Rochelle Parks-Yancy, *Workforce Diversity and Inequality: Power, Status, and Numbers*, 33 ANN. REV. OF SOCIOLOGY 473, 488 (2007).

⁸⁰ Miller & Triana, *supra* note 40, at 777 (2009). This study found that board racial diversity had a positive and significant relationship with innovation and reputation and that board gender diversity had a positive and significant association with innovation but not with firm performance. Board racial diversity had a positive and significant relationship with firm performance, though board gender diversity did not have a significant effect. When control variables for innovation and reputation were included in the regression, the effect of board racial diversity on performance was reduced. *Id.* at 769, 771-73. The authors attempted to determine if causation was running in the opposite direction and concluded that the possibility of reverse causation was minimal. *Id.* at 774.

⁸¹ One study found that boards with members from diverse occupational backgrounds were less likely to initiate strategic change during periods of environmental flux. Jerry Goodstein, Kanak Gautam, & Warran Boeker, *The Effects of Board Size and Diversity on Strategic Change*, 15 STRATEGIC MGMT. J. 241 (2008). Another study found that at least under certain conditions, diversity is positively associated with strategic change. Christopher M. Treichler, *Diversity of Board Members and Organizational Performance: An Integrative Perspective*, 3 RESEARCH PAPERS 189, 191 (1995). Another study of board tasks suggested that women may positively influence qualitative tasks, such as strategic controls and corporate social responsibility, while men tend to focus on quantifiable issues to the exclusion of the human and social aspects of business. Morten Huse, Sabina Nielsen, & Inger Marie Hagen, *Women and Employee-Elected Board Members, and Their Contributions to Board Control Tasks*, 89 J. BUS. ETHICS 581, 582 (2009).

improve decision making processes and outcomes in the same ways.⁸² The educational, socioeconomic, and occupational backgrounds of women and minority directors tend to be quite similar to those of other directors.⁸³ Studies on the extent to which gender influences leadership behavior are mixed, but some suggest that men and women who occupy the same role tend to behave similarly.⁸⁴ Moreover, in some studies, demographic diversity leads to increased conflict and poor communication, which tend to counteract or dominate the benefit of broader perspectives.⁸⁵ Research also shows mixed effects of gender diversity on problem-solving abilities.⁸⁶ Diverse teams may also experience increased levels of anxiety and frustration.⁸⁷ One study found that racial (but not gender) diversity increased the risk of emotional conflict and that such interpersonal clashes characterized by anger, frustration, and other negative feelings adversely affect performance.⁸⁸ As Scott Page summarizes the evidence, demographically diverse groups tend to outperform homogeneous groups “when the task is primarily problem solving, when their identities translate into relevant tools, when they have [little or no difference in what they value], and when their members get along with one another.”⁸⁹

A third claim is that the very existence of diversity alters board dynamics in ultimately positive ways. Mannix and Neale, for example, argue that the presence of visibly diverse members enhances a group’s ability to handle conflict by signaling that differences of opinion are likely.⁹⁰ A group that lacks diversity is less likely to handle conflict well because it is not expected.⁹¹ Other scholars have drawn on signaling theory to argue that “a diverse board conveys a credible signal to relevant observers of corporate behavior.”⁹² Board diversity can convey a commitment to equal opportunity, responsiveness to diverse stakeholders, and a general message of progressive leadership, which can enhance the corporation’s public image.⁹³ Empirical evidence is limited, but some findings are consistent with this theory. Catalyst has found a relationship between the proportion of female directors and the proportion of female officers a corporation is likely to have in the future.⁹⁴ Other studies have indicated that in some sectors, the

⁸² SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 324-38 (2007); Dobbin & Jung, *supra* note 44, at 4-7.

⁸³ Fairfax, *The Bottom Line on Board Diversity*, *supra* note 76, at 834-36.

⁸⁴ Nielsen & Huse, *supra* note 56, at 138. For a review of the research, see Deborah L. Rhode & Barbara Kellerman, *Women and Leadership: The State of Play*, in *WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR REFORM* 16-20 (Barbara Kellerman & Deborah L. Rhode eds., 2007).

⁸⁵ Dobbin & Jung, *supra* note 44; Page, *supra* note 82, at 325.

⁸⁶ Susan E. Jackson & Aparna Joshi, *Diversity in Social Context: A Multi-Attribute, Multi-Level Analysis of Team Diversity and Sales Performance*, 25 *J. ORG. BEHAV.* 675, 676 (2004).

⁸⁷ Fairfax, *The Bottom Line on Board Diversity*, *supra* note 76, at 832-34.

⁸⁸ Lisa Hope Pelled, Kathleen M. Eisenhardt, & Katherine R. Xin, *Exploring the Black Box: An Analysis of Work Group Diversity, Conflict, and Performance*, 44 *ADMIN. SCI. Q.* 1, 2, 20-24 (1999) (also finding that gender diversity had no effect on emotional or task conflict, with task conflict defined as when group members disagree about goals, key decision areas, procedures, and appropriate actions).

⁸⁹ PAGE, *supra* note 82, at 328.

⁹⁰ Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 *PSYCHOLOGICAL SCI. IN THE PUB. INT.* 31 (2005).

⁹¹ *Id.*

⁹² Broome & Krawiec, *supra* note 23, at 447.

⁹³ *Id.* at 448; Fairfax, *The Bottom Line on Board Diversity*, *supra* note 76, at 852.

⁹⁴ LOIS JOY, *CATALYST, ADVANCING WOMEN LEADERS: THE CONNECTION BETWEEN WOMEN BOARD DIRECTORS AND WOMEN CORPORATE OFFICERS* 1, 6 (2008) (firms with two or more women board directors in 2001, had nearly thirty percent more female corporate officers in 2006 than firms with only one woman board director in 2001.)

presence of female or minority directors can enhance a firm's reputation with consumers.⁹⁵ In explaining these findings, researchers have suggested that board diversity may enhance firm reputation by sending signals to investors "about the robustness of the governance mechanisms in place and the quality of the firm."⁹⁶ Yet the significance of such claims should not be overstated. Employees, consumers, and the general public are typically unaware of board composition.

Scholars also have attempted to determine whether diversity might affect the likelihood and effectiveness of whistleblowing.⁹⁷ Here again, evidence is mixed. Some theorists have claimed that women's frequent outsider status and greater experience of unfairness might increase their willingness to report misconduct.⁹⁸ By contrast, other commentators have noted that whistle-blowing is correlated with high levels of self-esteem and perceived power—traits more likely to be associated with men.⁹⁹ Empirical evidence yields conflicting results. Early studies of federal workers showed that men were more likely than women to be whistle-blowers.¹⁰⁰ Subsequent studies have reached inconsistent conclusions, but one of the largest recent surveys—of nonmilitary employees on military bases—found that women were more likely to blow the whistle.¹⁰¹

Another cluster of empirical studies have identified a positive correlation between diversity and various other measures of good governance. Adams and Ferreira, for example, found that firms that have a higher representation of women hold more meetings, have higher attendance rates, experience greater participation in decision making, engage in tougher monitoring, and are more likely to replace a CEO when the stock performs poorly.¹⁰² Ibrahim and Angelidis' survey of nearly 400 corporate directors concluded that female directors exhibit a stronger commitment to corporate social responsibility.¹⁰³ A study by the Conference Board of Canada found that, on average, organizations whose boards have two or more women adopt a

⁹⁵ For gender, see Stephen J. Brammer, Andrew Millington, & Stephen Pavelin, *Corporate Reputation and Women on the Board*, 20 BRITISH J. MGMT. 17 (2009). For race, see Miller & Triana, *supra* note 40, at 777. For a description of this study's results, see text of *supra* note 80.

⁹⁶ Miller & Triana, *supra* note 40, at 762.

⁹⁷ Cindy A. Schipani, et. al., *Women and the New Corporate Governance: Pathways for Obtaining Positions of Corporate Leadership*, 65 MD. L. REV. 504, 530-33 (2006).

⁹⁸ MARCIA P. MICELI & JANET P. NEAR, *BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES* 120 (1992).

⁹⁹ *Id.* at 121.

¹⁰⁰ U.S. MERIT SYSTEMS PROTECTION BOARD, *BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS* (1984); U.S. MERIT SYSTEMS PROTECTION BOARD, *WHISTLEBLOWING AND THE FEDERAL EMPLOYEE* (1981).

¹⁰¹ Janet P. Near et al., *Beyond Enron: Is Personality Associated with Employee Reactions to Organizational Wrongdoing?* 9 (2003) (unpublished manuscript, on file with authors); Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation*, 26 WORK & OCCUPATIONS 107, 113 (1999) (suggesting that internal whistleblowers were more likely to be women). See also, e.g., Terance D. Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct*, 64 SOC. INQUIRY 322, 334 (1994); Randi L. Sims & John P. Keenan, *Predictors of External Whistleblowing: Organizational and Intrapersonal Variables*, 17 J. BUS. ETHICS 411, 418 (1998).

¹⁰² Adams & Ferreira, *Gender Diversity in the Boardroom*, *supra* note 34 (attendance); Adams & Ferreira, *Women in the Boardroom*, *supra* note 41 (attendance and monitoring).

¹⁰³ Nabil A. Ibrahim & John P. Angelidis, *Effect of Board Members' Gender on Corporate Social Responsiveness Orientation*, 10 J. APPLIED BUS. RESEARCH 35, 38 (1994) (defining social responsibility as voluntary activities that are "guided by a firm's desire to make social or philanthropic contributions not mandated by economics, law, or ethics").

greater number of accountability practices and regularly review more non-financial performance measures than organizations with all-male boards. The study further found that boards with more women paid greater attention to audit and risk oversight than all-male boards. However, as in many of the preceding studies, correlation does not indicate causation, and it could be that well-governed corporate boards are more committed to diversity and seek greater gender parity.¹⁰⁴ Moreover, in Adams and Ferreira's 2009 study, although a higher proportion of women correlated with better board monitoring, it had a negative effect on financial performance in well-governed firms.¹⁰⁵

Given the competing findings and methodological limitations of these studies, the financial benefits of board diversity should not be overclaimed. But neither should boards understate other justifications for diversity, including values such as fairness, justice, equality of opportunity, as well as the symbolic message it sends to corporate stakeholders.¹⁰⁶

III. CHALLENGES AND BARRIERS TO ACHIEVING DIVERSITY

Given the growing support for diversity on corporate boards, why has it been so difficult to achieve? One obvious explanation is that the research on performance is too mixed to make diversification a priority. Antonio Perez, CEO of Kodak, put the point bluntly: "the real barrier ... [is that many] corporations don't believe that it is a business imperative."¹⁰⁷ Other explanations involve unconscious bias and the counterproductive effects of tokenism. These factors both directly impede appointment of qualified female and minority candidates, and prevent others from gaining the leadership experience that would make them attractive choices. A third explanation is resistance to "special preferences." As with other forms of affirmative action, opponents believe that selecting members on the basis of race or gender reinforces precisely the kind of color consciousness and sex stereotyping that society should be seeking to eliminate.

A. Experience

One of the most common reasons for the underrepresentation of women and minorities on corporate boards is their underrepresentation in the traditional pipeline to board service.¹⁰⁸ The primary route has long been experience as a CEO of a public corporation. Indeed, one study found that over one-half of male Fortune 500 board directors were CEOs or former CEOs.¹⁰⁹ Given the low representation of women and minorities in top executive positions, their talents are likely to be underutilized if selection criteria are not broadened. For example, fewer than 3

¹⁰⁴ DAVID A.H. BROWN, DEBRA L. BROWN, & VANESSA ANASTASOPOULOS, THE CONFERENCE BOARD OF CANADA, *WOMEN ON BOARDS: NOT JUST THE RIGHT THING . . . BUT THE "BRIGHT" THING* 9-10 (2002).

¹⁰⁵ Adams & Ferreira, *Women in the Boardroom*, *supra* note 41.

¹⁰⁶ Fairfax, *The Bottom Line on Board Diversity*, *supra* note 76, at 850 (arguing that "advocates should use their energies to develop new modes of thinking about the moral and social imperatives for diversity"). For a discussion of ethical arguments based on equal opportunity and equal representation, see Brammer, Millington, & Pavelin, *Gender and Ethnic Diversity Among UK Corporate Boards*, *supra* note 60, at 394-95.

¹⁰⁷ Antonio Perez, Chairman and CEO of Eastman Kodak Company, Remarks at Stanford University conference, *Diversity on Corporate Boards: When Difference Makes a Difference*, Sept. 10, 2009, Panel 2 recording available at:

http://www.law.stanford.edu/calendar/details/2805/Diversity%20on%20Corporate%20Boards%3A%20When%20Difference%20Makes%20a%20Difference/#related_media.

¹⁰⁸ Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 599-601.

¹⁰⁹ Broome, *supra* note 4, at 667. *See also* Barnard, *supra* note 13, at 704.

percent of CEOs in Fortune 500 corporations are female.¹¹⁰ Minorities make up fewer than 4 percent of Fortune 500 CEOs.¹¹¹ Of senior corporate officers, only 14 percent are women, 3 percent are African American, and 1 percent are African-American women.¹¹² Even women and minorities who reach upper-level management positions often do so through routes other than profit and loss responsibility, which provides crucial experience for board positions.¹¹³ However, recent developments, including requirements of director independence and financial expertise, restrictions on current CEOs serving on outside boards, and age and tenure limits, may encourage boards to expand traditional criteria for board service and expand the pipeline for women and minorities.¹¹⁴ As more corporations have positive experience with board members of varied backgrounds, they may see the value in relying less on chief executives, whose experience may come at a cost; they are “used to running the show” and are juggling intense competing priorities.¹¹⁵

B. Bias

Another barrier to diversity in the selection of corporate boards, and in the corporate management pipeline that feeds them, is “in-group” bias—the preferences that individuals feel for those who are like them in important respects, including race, ethnicity, and gender.¹¹⁶ Such bias is particularly likely in contexts where selection criteria are highly subjective, as is often true in board appointments.¹¹⁷ Indirect evidence for the importance of such favoritism comes from research showing that when CEOs are more powerful than their boards, new board directors are likely to be similar to the CEO. Conversely, when the board is more powerful, new directors are more likely to be similar to the board.¹¹⁸

In-group favoritism also influences perceptions of competence. Members of in-groups tend to attribute accomplishments of fellow members to intrinsic characteristics, such as intelligence, drive, and commitment. By contrast, the achievements of out-group members are often ascribed to luck or special treatment.¹¹⁹ Even in experimental situations where male and

¹¹⁰ Del Jones, *Women Slowly Gaining in Corporate America*, USA TODAY, Jan 2, 2009, at 6B; CATALYST, U.S. WOMEN IN BUSINESS, August 9, 2010, http://www.catalyst.org/publication/132/US_women_in_business.

¹¹¹ Diversity, Inc., *Fortune 500 Black, Latino, Asian CEOs*, Jul. 22, 2008, <http://www.diversityinc.com/public/3895.cfm>.

¹¹² Jesse Washington, *Study: Networking Hinders Black Women Executives*, ABC NEWS, Jan. 7, 2009, <http://abcnews.go.com/US/wireStory?id=6594723>.

¹¹³ Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 600.

¹¹⁴ Barnard, *supra* note 13, at 704, 708-10.

¹¹⁵ Michelle R. Clayman, Managing Partner and Chief Investment Officer, New Amsterdam Partners, Remarks at Stanford University conference, *Diversity on Corporate Boards: When Difference Makes a Difference*, Sept. 10, 2009, Panel 2 recording available at: http://www.law.stanford.edu/calendar/details/2805/Diversity%20on%20Corporate%20Boards%3A%20When%20Difference%20Makes%20a%20Difference/#related_media.

¹¹⁶ Milliken & Martins, *supra* note 74, at 415; Marilyn B. Brewer & Rupert J. Brown, *Intergroup Relations*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 554 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 1998); Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 1998); Barbara Reskin, *Rethinking Employment Discrimination and its Remedies*, in THE NEW ECONOMIC SOCIOLOGY: DEVELOPMENTS IN AN EMERGING FIELD 218 (Mauro Guillen et al. eds., 2000).

¹¹⁷ BRANSON, *supra* note 4, at 14-15.

¹¹⁸ James D. Westphal & Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40 ADMIN. SCI. Q. 60 (1995).

¹¹⁹ Jennifer Crocker, Brenda Major & Claude Steel, *Social Stigma*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 504

female performance is objectively equal, women are held to higher standards, and their competence is rated lower.¹²⁰ As one Australian study concluded, “women’s competence has to be widely acknowledged in the public domain or through family connections before boards ... will be prepared to ‘risk’ having [them] on the board.”¹²¹ So too, in-group preferences often exclude women and minorities from the informal network of mentoring, contacts, and support that are critical for advancement. As a consequence, they are less likely to have the experience and credentials necessary for board appointments.¹²² Women of color may experience special difficulties of isolation and exclusion.¹²³

For women, traditional gender stereotypes compound the problem. Men continue to be rated higher than women on most of the qualities associated with leadership.¹²⁴ People more readily credit men with leadership ability and more readily accept men as leaders.¹²⁵ What is assertive in a man may seem abrasive in a woman, and female leaders risk seeming too feminine or not feminine enough.¹²⁶ In effect, women face tradeoffs that men do not, making it more

(Daniel T. Gilbert, Susan T. Fiske, & Gardner Lindzey eds., 1998); John F. Dovidio & Samuel L. Gaertner, *Stereotypes and Evaluative Intergroup Bias*, in AFFECT, COGNITION, AND STEREOTYPING 167 (Diane M. Mackie & David L. Hamilton eds., 1993); Martha Foschi, *Double Standards for Competence: Theory and Research*, 26 ANN. REV. OF SOCIOLOGY 21 (2000); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Cecilia L. Ridgeway, *Interaction and the Conservation of Gender Inequality: Considering Employment*, 62 CONTEMPORARY SOCIOLOGY 218 (1997).

¹²⁰ Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOCIAL PSYCHOLOGY 237 (1996); Jacqueline Landau, *The Relationship of Race and Gender to Managers’ Rating Of Promotion Potential*, 16 J. ORG. BEHAV. 391 (1995).

¹²¹ Allison Sheridan & Gina Milgate, *Assessing Board Positions: A Comparison of Female and Male Board Members’ Views*, 13 CORP. GOVERNANCE: AN INT’L REV. 6 (2005).

¹²² Rhode & Kellerman, *supra* note 84, at 1; Belle Rose Ragins, *Gender and Mentoring Relationships: A Review and Research Agenda for the Next Decade*, in HANDBOOK OF GENDER AND WORK 347, 350-62 (Gary N. Powell ed., 1998); CATALYST, WOMEN IN CORPORATE LEADERSHIP: PROGRESS AND PROSPECTS (1996); Timothy O’Brien, *Up the Down Staircase*, N. Y. TIMES, Mar. 19, 2006, at A4. Surveys of upper-level American managers find that almost half of women of color and close to a third of white women cite a lack of influential mentors as a major barrier to advancement. CATALYST, WOMEN OF COLOR IN CORPORATE MANAGEMENT: DYNAMICS OF CAREER ADVANCEMENT 15 (1999); CATALYST, WOMEN IN CORPORATE LEADERSHIP, *supra*, at 37.

¹²³ ELLA L. J. EDMONDSON BELL & STELLA M. NKOMO, OUR SEPARATE WAYS: BLACK WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY 123-32 (2001); Bernardo M. Feldman, *The Color and Culture of Gender in Organizations: Attending to Race and Ethnicity*, in HANDBOOK OF GENDER AND WORK 17, 18-26 (Gary N. Powell ed., 1998); CATALYST, WOMEN OF COLOR IN CORPORATE MANAGEMENT, *supra* note 122, at 15; David Wilkins & G. Mitu Gulati, *Why Are There So Few Black Law Firms: An Institutional Analysis*, 84 CAL. L. REV. 493 (1996).

¹²⁴ CATALYST, WOMEN TAKE CARE, MEN TAKE CHARGE: STEREOTYPING OF BUSINESS LEADERS (2005); Linda L. Carli & Alice H. Eagly, *Overcoming Resistance to Women Leaders: The Importance of Leadership Styles*, in WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE, *supra* note 84, at 127.

¹²⁵ Carli & Eagly, *supra* note 124; Laurie A. Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERSONALITY & SOC. PSYCH. BULL. 1315 (2000).

¹²⁶ Alice Eagly & Steven Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCH. REV. 574 (2002). On the one hand, they may appear too “soft”—unable or unwilling to make the tough calls required in positions of greatest influence. On the other hand, those who mimic the “male model” are often viewed as strident and overly aggressive or ambitious. *Id.*; DAWN L. BROOKS & LYNN M. BROOKS, SEVEN SECRETS OF SUCCESSFUL WOMEN 195 (1997); Alice H. Eagly, *Achieving Relational Authenticity in Leadership: Does Gender Matter*, 16 LEADERSHIP Q. 459, 470 (2005); LINDA BABCOCK & SARA LASCHEVER, WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE 87-88 (2003).

difficult for them to be both liked and respected in contexts like corporate boards, which require both.

Minorities also confront traditional stereotypes, and women of color are doubly disadvantaged.¹²⁷ The stereotypes vary somewhat across different racial and ethnic groups, but share common features. The most common is the devaluation of competence; minorities who reach positions that might qualify them for board leadership are often assumed to be the beneficiaries of “special treatment” rather than meritocratic selection. Class poses further obstacles. For example, Westphal and Stern have found that minorities from underprivileged backgrounds must engage in a higher level of ingratiating behavior toward CEOs than non-minorities and economically privileged individuals in order to obtain recommendations for board positions where the CEO is the lead director, or on boards on which the CEO is a member.¹²⁸

C. *Tokenism and Critical Mass*

Whether appointment of only one or two female or minority directors will significantly improve board decision making remains unclear.¹²⁹ Rosabeth Moss Kanter’s pathbreaking research, confirmed in multiple subsequent studies, found that token members often encounter “social isolation, heightened visibility, ... and pressure to adopt stereotyped roles. They are less likely to do well in the group, especially if the leader is a member of the dominant category.”¹³⁰ Token members are often marginalized as representing the “woman’s” or the “minority’s” point of view, as if it were a monolithic position.¹³¹ Thus, tokenism may make it more difficult for women and minorities to be heard on an equal basis with other board members.¹³² Outsiders also may have limited opportunities to influence group decisions, particularly in the context of corporate boards where much of the real discussion takes place outside of official meetings.¹³³

According to some research, a “critical mass” is necessary to realize fully the benefits of diversity on corporate boards.¹³⁴ As a report by the Wellesley Center for Women notes: “The magic seems to occur when three or more women serve on a board together. Suddenly having women in the board room becomes a normal state of affairs. ... [They] are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially.”¹³⁵

¹²⁷ Fairfax, *Some Reflections*, *supra* note 6, at 1115-16. For a study of stereotypes and barriers facing Asian-American corporate executives, see Gordon C.C. Liao & Philip Tseng, *Success-Fully Forgotten: The Asian American Executive: Dispelling the Modern Minority Myth and Why Corporate America Should Care* (2009) (paper on file with authors).

¹²⁸ James D. Westphal & Ithai Stern, *The Other Pathway to the Boardroom: Interpersonal Influence Behavior as a Substitute for Elite Credentials and Majority Status in Obtaining Board Appointments*, 51 ADMIN. SCI. Q. 169, 195 (2006).

¹²⁹ ROSABETH KANTER, CENTER FOR RESEARCH ON WOMEN IN HIGHER EDUCATION AND THE PROFESSIONS, THE PROBLEMS OF TOKENISM (1974); *see also* BRANSON, *supra* note 4, at 109-23; Heminway & White, *supra* note 4, at 257-64.

¹³⁰ KANTER, *supra* note 129, at 3; *See also* Heminway & White, *supra* note 4, at 257-64.

¹³¹ KANTER, *supra* note 129, at 3.

¹³² Terjesen, Sealy, & Singh, *supra* note 35, at 328.

¹³³ *See* William B. Stevenson & Robert F. Radin, *Social Capital and Social Influence on the Board of Directors*, 46 J. MGMT. STUDIES 16, 33 (2009) (quoting one CEO as saying: “Don’t confuse board actions with board decisions. Board decisions don’t take place in the boardroom. Board actions take place in the boardroom.”).

¹³⁴ Kramer, Konrad, & Erkut, *Critical Mass on Corporate Boards*, *supra* note 70, at 34.

¹³⁵ *Id.* at v.

However, many women and minorities who have served on boards challenge critical mass theories to the extent that they imply that anyone serving as the first or second outsider “is doomed to fail.”¹³⁶ They also fear that claims about tokenism may discourage women and minorities from accepting nominations, or that boards will treat three as “a safe harbor.”¹³⁷ Already, some companies lose their sense of urgency once they appoint even a single outsider. As one board member noted, “When you’re the only woman on the board and you talk about adding another woman, they say, ‘But we’ve got you.’”¹³⁸

The marginalization that token members experience may also impair their performance, which discourages further appointment of outsiders. For example, a director may “make herself socially invisible to avoid disrupting perceived group harmony and alleviate discomfort felt by the rest of the (all male) board.”¹³⁹ As a result, her strengths may go unrecognized, and her silence may reinforce “antiquated beliefs that a woman brings nothing new to the table.”¹⁴⁰ Alternatively some directors may fall into the role that sociologists identify as the “Queen Bee” syndrome: they “revel in the notoriety of token status, enjo[y] the perceived advantages of being the only woman in the group and excessively criticize potential women peers.”¹⁴¹

IV. STRATEGIES: WHAT WORKS AND WHAT DOESN’T

Strategies to counteract these dynamics and increase board diversity fall into three main categories. One cluster of initiatives focuses on increasing individuals’ capacity for service. A second group includes legal strategies that might expand the pool of qualified members and level the playing field for their appointment. A third set of approaches targets institutions, and attempts to increase the pressure on boards to broaden their appointments through enhanced disclosure requirements and investment strategies.

A. *Strategies for Individuals*

One obvious way to expand the number of women and minorities on corporate boards is to increase the pool of qualified applicants. Formal mentoring programs, leadership workshops,

¹³⁶ Aulana Peters, board member of 3M Corporation, Northrop Grumman, and John Deere, Remarks at Stanford University conference, *Diversity on Corporate Boards: When Difference Makes a Difference*, Sept. 10, 2009, Panel 4 recording available at: http://www.law.stanford.edu/calendar/details/2805/Diversity%20on%20Corporate%20Boards%3A%20When%20Difference%20Makes%20a%20Difference/#related_media.

¹³⁷ Mary Cranston, Senior Partner, Pillsbury Winthrop Shaw Pittman LLP, Remarks at Stanford University conference, *Diversity on Corporate Boards: When Difference Makes a Difference*, Sept. 10, 2009, Panel 3 recording available at:

http://www.law.stanford.edu/calendar/details/2805/Diversity%20on%20Corporate%20Boards%3A%20When%20Difference%20Makes%20a%20Difference/#related_media

¹³⁸ Bonnie W. Gwin & Anne Lim-O’Brien, *So Many Public Companies, So Few Women Directors*, HEIDRICK & STRUGGLES GOVERNANCE LETTER 61 (2d Quarter, 2002).

¹³⁹ Heminway & White, *supra* note 4, at 261.

¹⁴⁰ *Id.*

¹⁴¹ BRANSON, *supra* note 4, at 115. See also Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117, 170-71 (2002); Deborah L. Rhode, *The Difference “Difference” Makes*, 55 ME. L. REV. 15, 18 (2003).

diversity advisors or coaches, and related strategies can all help interested applicants shape their career paths, refine their resumes, develop networking strategies, and overcome barriers to self-promotion.¹⁴² In recent years, mentoring and networking programs targeted toward increasing women's representation on boards have become more prevalent in some countries, including the UK, Canada, and France.¹⁴³ Providing mentors who themselves have had board experience may be especially critical in bringing qualified candidates to the attention of board nominating committees.¹⁴⁴

B. *Legal Strategies*

Law could also play a greater role in reducing the obstacles to women and minorities who seek leadership positions, including both board appointments and the managerial experience that makes candidates attractive. One common proposal is to require corporations over a certain size to disclose data on recruitment, retention, and promotion of women and minorities. A number of countries mandate such disclosures, and obligating U.S. companies to supply such information would make it easier for corporations to benchmark their performance relative to other similarly situated organizations, and for stakeholders to hold poor performers accountable.¹⁴⁵ The government could also require transparency surrounding the board search process, requiring companies to disclose whether women and minority candidates were considered or interviewed for open positions.

Another strategy would be to increase enforcement resources for anti-discrimination initiatives. Although in theory individuals can sue for sex or racial discrimination in leadership positions, the difficulties of proof and the threat of blacklisting make such litigation extremely rare.¹⁴⁶ However, state and federal equal opportunity agencies could be more proactive in investigating organizations with poor performance in gender and racial equity.¹⁴⁷

Another possibility would be to follow the example of some European countries that have established quotas for board membership. Norway led the way by requiring firms to have

¹⁴² See Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 604-05. Little research is available to evaluate the cost effectiveness of such approaches. However, the most systematic large-scale study to date has found that mentoring programs are correlated with modest gains in female representation in managerial positions and that women of color benefit most. Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Diversity Management and the Remediation of Inequality*, 71 AM. SOCIOLOGICAL REV. 589 (2006). Other smaller-scale studies suggest that executives identify influential mentors as an important success strategy and that having more mentors increased the number of promotions that corporate women receive. CATALYST, WOMEN AND MEN IN U.S. CORPORATE LEADERSHIP: SAME WORKPLACE, DIFFERENT REALITIES? 16 (2004) (success strategies); CATALYST, WOMEN OF COLOR IN CORPORATE MANAGEMENT: THREE YEARS LATER 12 (2002) (promotions). For the need to combat barriers to self promotion among women, see Rhode & Kellerman, *supra* note 84, at 21; for the barriers among Asian-Americans, see Liao & Tseng, *supra* note 127; Gordon C.C. Liao, Vice President, Baird Capital Partners, Remarks at Stanford University conference, *Diversity on Corporate Boards: When Difference Makes a Difference*, Sept. 10, 2009, Panel 2 recording available at: http://www.law.stanford.edu/calendar/details/2805/Diversity%20on%20Corporate%20Boards%3A%20When%20Difference%20Makes%20a%20Difference/#related_media.

¹⁴³ Alison Maitland, *Advice that Gets Women on Board*, FIN. TIMES, Oct. 9, 2008, at Business Life 16.

¹⁴⁴ *Id.*; Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 603.

¹⁴⁵ Rhode & Kellerman, *supra* note 84, at 31. For discussion of Australian legislation, see Kate Grosser & Jeremy Moon, *Gender Mainstreaming and Corporate Social Responsibility: Reporting Workplace Issues*, 62 J. BUS. ETHICS 327, 330 (2005).

¹⁴⁶ Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 603.

¹⁴⁷ Rhode & Kellerman, *supra* note 84, at 31.

corporate boards with a minimum of 40 percent of female directors by 2008, or face dissolution.¹⁴⁸ The Norwegian government has reported full compliance with the program, which increased women's share of board seats from 7 percent in 2002 to over 40 percent.¹⁴⁹ Spain and the Netherlands have recently followed suit with legislation requiring firms to meet a 40 percent female director minimum by 2015, and France, Belgium, Germany, and Sweden are also debating similar legislation.¹⁵⁰

Critics contend that quotas do not address the problems that prevent underrepresented groups from obtaining leadership experience, and that the focus should be on eliminating those obstacles and enhancing the qualifications of women and minorities.¹⁵¹ According to some commentators, the dramatic increase in Norwegian female directors "has done little – yet – to improve either the professional caliber of the boards or to enhance corporate performance."¹⁵² The increase has also had no meaningful impact on the number of female CEOs, which remains stuck close to 5 percent.¹⁵³ Critics are also concerned that quotas will simply lead to more unqualified directors, either because of an insufficient supply of well prepared women, or because boards will fill seats with women who won't speak up.¹⁵⁴ In France, where a 40 percent quota is being debated, "[i]n private, chief executives say they will look for female board members ... who will look decorative and not rock the boat. ..."¹⁵⁵

For these reasons, some advocates of diversity prefer a "comply or explain" approach: "companies with a lower proportion [than 30 percent women on their boards] would have to explain [in their annual reports] if they proposed to fill a vacancy with a man."¹⁵⁶ Similarly, companies with no or a very small percentage of minority directors would have to explain if they intended to fill a vacancy with a non-minority. Research from other diversity contexts suggests that requiring individuals to give reasons for particular actions reduces reliance on stereotypes

¹⁴⁸ Sharon Reier, *In Europe, Women Gain on Boards*, N. Y. TIMES, Mar. 22, 2008, at C4.

¹⁴⁹ Hevig Bugge Reiersen & Beate Sjaafjell, *Report from Norway: Gender Equality in the Board Room 7* (European Company Law, No. 4, 2008), available at SSRN: <http://ssrn.com/abstract=1139604>. Nicola Clark, *Getting Women Into Boardrooms, by Law*, INT'L HERALD TRIBUNE, January 28, 2010, at 1, available at http://www.nytimes.com/2010/01/28/world/europe/28iht-quota.html?ref=the_female_factor.

¹⁵⁰ Clark, *supra* note 149. Reier, *supra* note 148, at C4. The European Union, where the percentage of board seats held by women stands at 11 percent, is also considering implementing a quota, possibly 20 percent. Euractiv, *EU Mulls Gender Quotas on Company Boards*, July 15, 2010, <http://www.euractiv.com/en/enterprise-jobs/eu-mulls-gender-quotas-on-companies-boards>.

¹⁵¹ *Room for Debate: Using Quotas to Raise the Glass Ceiling*, N.Y. TIMES, March 22, 2010, <http://roomfordebate.blogs.nytimes.com/2010/03/22/using-quotas-to-raise-the-glass-ceiling>. One Norwegian investor and corporate director stated, "When the law says you must have 40 percent women, of course you can get to 40 percent – that is not an achievement. An achievement would be to find a way to get women to rise above middle management. So far we don't have an answer for that." Clark, *supra* note 149 (quoting Ruilf Rustad).

¹⁵² Clark, *supra* note 149.

¹⁵³ *Id.*

¹⁵⁴ A recent study found that with increased number of women directors from the quota, Norwegian boards have grown younger and more inexperienced, and financial performance has declined. *Id.* Companies performed an average of 20 percent worse in terms of Tobin's Q in the year after adopting the quotas; companies requiring the most drastic changes suffered the largest negative impact. *Id.* The authors of the study point out that gender did not directly influence performance; once the study accounted for age and experience, gender was not significant. Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Value Effect of a Massive Exogenous Shock* (May 19, 2010), available at SSRN: <http://ssrn.com/abstract=1364470>.

¹⁵⁵ *Women on Company Boards: La Vie en Rose*, THE ECONOMIST, May 8, 2010, at 66, 67.

¹⁵⁶ *How to Build Diversity on Boards: A Voluntary Thirty Percent Quota for Women Would Signal Intent*, FIN. TIMES, May 19, 2009, at 12.

and helps to level the playing field for underrepresented groups.¹⁵⁷ The May 2010 revision of the UK's corporate governance code, which lays out principles with which the country's largest 350 companies' boards should comply and recommends that companies provide an explanation if they do not comply, includes the principle that companies should conduct searches for board candidates "with due regard for the benefits of diversity on the board, including gender."¹⁵⁸ Such voluntary quotas and comply or explain approaches are more politically palatable than mandatory quotas, but they still encounter criticism and their effectiveness remains uncertain, as companies may have no obligation to explain if they choose not to comply.¹⁵⁹ Future research will be needed to see if these approaches actually produce higher rates of female representation on boards.

C. *Institutional Initiatives*

Boards themselves could intensify their diversity efforts. One option is to set their own goals or requirements for new appointments.¹⁶⁰ Some advocate a "structured search" that starts with an analysis of the board's functional needs and then identifies female and minority candidates who could fill them.¹⁶¹ Whatever the process, companies need to expand their searches beyond the traditional pool of CEOs and consider other corporate executives, nonprofit directors and officers, and academic presidents and experts.¹⁶² Many commentators believe that the current pool of potential members is large enough to achieve diversity if qualifications are appropriately broadened.¹⁶³ Professional consultants, who now conduct approximately half of board searches, can help identify promising candidates outside the board's network or from less traditional backgrounds.¹⁶⁴ Companies could also institute age limits and term restrictions, which open up seats for women and minorities.¹⁶⁵ These and other efforts to demonstrate a commitment to diversity could help boards make service seem more attractive to well qualified members of underrepresented groups.¹⁶⁶

Another strategy is to reduce the influence of CEOs in the membership selection process. Some commentators argue that the interests of top corporate executives may be skewed by their desire to maintain control and high levels of compensation. Such considerations may lead them to prefer candidates who share their interests—socially similar, fellow CEOs.¹⁶⁷ Simply giving

¹⁵⁷ Stephen Benard, In Paik, & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1381 (2008).

¹⁵⁸ Rachel Sanderson & Kate Burgess, *Directors Must Be Re-Elected Annually*, FIN. TIMES, May 28, 2010, at 17.

¹⁵⁹ *Id.*

¹⁶⁰ BRANSON, *supra* note 4, at 14-15.

¹⁶¹ Clarence Otis, Chairman and CEO, Darden Restaurants, Inc., Remarks at Stanford University conference, *Diversity on Corporate Boards: When Difference Makes a Difference*, Sept. 10, 2009, Panel 3 recording available at:

http://www.law.stanford.edu/calendar/details/2805/Diversity%20on%20Corporate%20Boards%3A%20When%20Difference%20Makes%20a%20Difference/#related_media.

¹⁶² Fairfax, *Clogs in the Pipeline*, *supra* note 16, at 605-08.

¹⁶³ Kramer, Konrad, & Erkut, *supra* note 70.

¹⁶⁴ See VIRTCOM CONSULTING, BOARD DIVERSIFICATION STRATEGY: REALIZING COMPETITIVE ADVANTAGE AND SHAREOWNER VALUE 23 (2008). Barnard, *supra* note 13, at 708-09.

¹⁶⁵ Barnard, *supra* note 13, at 709-10.

¹⁶⁶ VIRTCOM CONSULTING, *supra* note 164, at 23-24.

¹⁶⁷ Steven Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1596-97 (2004).

the board more power over the appointment process could expand the pool of potential candidates.

A final cluster of strategies should focus on making board diversity (or its absence) more visible, and enlisting pressure from stakeholder groups to hold organizations accountable. Some empirical research has demonstrated a significant increase in women and minority directors when companies include pictures of the board in annual reports.¹⁶⁸ Large institutional investors could demand such disclosure.

The Securities and Exchange Commission has recently enacted two rules that may affect board diversity. The first rule requires increased transparency regarding director qualifications and the board appointment process. Companies are required to disclose “whether, and if so, how, the nominating committee (or the board) considers diversity in identifying nominees for director.”¹⁶⁹ In addition, companies whose boards have a diversity policy must explain how it is implemented and how they assess its effectiveness.¹⁷⁰ The SEC allows companies to define diversity “in ways that they consider appropriate,” and acknowledges that some may focus on racial, ethnic, and gender diversity, while others may “conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity.”¹⁷¹

An analysis of the first four months of disclosures filed under these new rules found that companies’ statements were “not very specific, thorough, or revealing.”¹⁷² Most companies’ statements express support for diversity or claim to make it a consideration in board appointments, while defining it broadly to include diversity of background, experience, and skills, as well as age, geographic location, national origin, race, gender, and ethnicity.¹⁷³ Although these disclosure requirements are a significant symbolic step in recognizing the importance of board diversity, they may not of themselves do much to increase racial, ethnic, and gender diversity.

The second rule, approved in August 2010, enables longstanding shareholders with significant holdings to nominate a certain number of directors and place them in the company’s proxy materials.¹⁷⁴ Under previous rules, shareholders had to bear the burdens of launching a proxy fight and distributing their own materials.¹⁷⁵ With these new requirements, large investors, including hedge funds, pension funds, and unions, may exercise greater influence over board

¹⁶⁸ Richard A. Bernardi, David F. Bean, & Kristen M. Weippert, *Minority Membership on Boards of Directors: The Case for Requiring Pictures of Boards in Annual Reports*, 16 CRITICAL PERSPECTIVES ON ACCOUNTING 1019 (2005).

¹⁶⁹ 17 CFR § 229.407(c)(2)(vi).

¹⁷⁰ *Id.*

¹⁷¹ Securities and Exchange Commission, SEC Final Rule: Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 16, 2009), available at <http://www.sec.gov/rules/final/2009/33-9089.pdf>.

¹⁷² KIMBERLY GLADMAN, THE CORPORATE LIBRARY, BEYOND THE BOILERPLATE: THE PERFORMANCE IMPACTS OF BOARD DIVERSITY 1, July 29, 2010, available at <http://www.thecorporatelibrary.com/reports.php?reportid=327>.

¹⁷³ *Id.* at 1-2.

¹⁷⁴ Securities and Exchange Commission, *SEC Adopts New Measures to Facilitate Director Nominations for Shareholders*, SEC Press Release 2010-155, August 25, 2010, available at <http://www.sec.gov/news/press/2010/2010-155/htm>.

¹⁷⁵ *Id.*

composition.¹⁷⁶ Because large institutional investors have been among the most vocal advocates of board diversity, their candidates are likely to be more diverse than those traditionally proposed by the company.¹⁷⁷

Investors could also act, individually and collectively, to make board diversity a higher priority in investment decisions. For example, in 2009, the Women's Leadership Fund was created to invest up to \$2 billion in publicly listed companies with a high percentage of women in senior positions, including board members, and to take activist positions in companies lacking such gender representation.¹⁷⁸ More investors should pursue such investment strategies to reward and reform companies based on their diversity records.¹⁷⁹

In addition, organizations that publish indexes for socially responsible investing and corporate social responsibility could include measures of diversity in leadership. Only a few publications now include information along these lines, despite evidence that some investors are interested in receiving it.¹⁸⁰ If diversity on boards becomes part of the standard criteria for measuring corporate social responsibility, that would increase the ability of investors, consumers, and public-interest organizations to hold corporations accountable.

CONCLUSION

As this overview makes clear, board membership remains a significant site in the struggle for more equitable and effective leadership structures. The gains in diversity that corporate America has made over the last quarter century testify to our capacity for progressive change. But the distance we remain from truly inclusive corporate boards reminds us of the progress yet to be made.

¹⁷⁶ Jessica Holzer & Dennis Berman, *Investors Gain New Clout*, WALL ST. J., Aug. 26, 2010, at A1. Investors have argued in favor of proxy access for years on the ground that "corporate boards have little incentive to be responsive to shareholder concerns because they rarely face contested elections." *Id.*

¹⁷⁷ Calpers, the largest pension fund in the U.S. by assets, is developing a diversity database of pre-screened potential board candidates that it and other investors can consult in nominating candidates. Gina Chon, *Calpers Aims Director List at Increasing Board Sway*, WALL ST. J., June 18, 2010, at C1.

¹⁷⁸ Richard Milne, *Fund to Invest in Gender Diversity*, FIN. TIMES, Oct. 26, 2009, at 21; Julia Werdigier, *Fund Plans to Invest in Companies with Women as Directors*, N.Y. TIMES, Oct. 27, 2009, at B7, available at <http://www.nytimes.com/2009/10/27/business/global/27fund.html>. Board members include Cherie Blair, wife of the former UK Prime Minister, and Jenny Shipley, former Prime Minister of New Zealand. *Id.* See also LINDA TARR-WHELAN, *WOMEN LEAD THE WAY: YOUR GUIDE TO STEPPING UP TO LEADERSHIP AND CHANGING THE WORLD* 140 (2009); www.womensleadershipfund.com.

¹⁷⁹ Corporations are often responsive to concerns of large-scale institutional investors and other influential investors. See TARR-WHELAN, *supra* note 178, at 140 (2009).

¹⁸⁰ See, e.g., Diversity Inc., *The 9th Annual 2009 DiversityInc Top 50 Companies for Diversity*, <http://www.diversityinc.com/public/department289.cfm>; Black Enterprise, *The 40 Best Companies for Diversity*, <http://www.blackenterprise.com/diversity/diversity-list-2009-companies>. An Ethical Investment Research Service survey found that a majority of women want their pension funds to favor companies with good records on equal opportunity. Grosser & Moon, *supra* note 145, at 333-35.