Corporate Leadership and the Unfinished Diversity Movement

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Abstract: This comment explores topics relating to diversity in the board room. It begins by covering the benefits a diverse board brings to firm, focusing on the business case rationales of saving firms money, strengthening core business concepts and corporate governance and increasing shareholder value. Next, the comment explores why, despite the apparent value a diverse board brings to a firm, corporations remain largely homogenized at the highest levels. Current legal, social and economic principles such as tournament theory and labor market externalities appear to shed light on what specific problems diversity advocates must contend with if they hope to increase minority involvement. Finally, the comment examines specific strategies and case studies where corporations have implemented successful plans that improved boardroom diversity, and makes suggestions on what policies and practices advocates should follow to further the unfinished diversity agenda.
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Introduction

Successful corporations today should have directors, officers and managers who come from a broad set of backgrounds. Despite substantial research indicating that diversity at the board level can benefit shareholders, employees and other constituents of a firm, efforts on the part of corporations to increase board diversity are woefully inadequate and are occurring at slow enough rates to stifle corporate growth and success. Both racial minorities and women remain
greatly underrepresented relative to the white male majority and their own numbers in society at large.

Firms conduct business in an increasingly globalized context, and therefore, a better understanding of how people from all around the globe work and think should be an adaption both corporations and their leaders need to be prepared for. In theory, integration at the highest level not only benefits the corporation by bringing in talent with different backgrounds, skill sets and experiences that will serve corporate globalization efforts, but it should send a positive message to lower levels in the corporate structure such as middle-management and laborers. In addition, increasing board room diversity should be viewed by both those within the corporation and external observers as a positive ethical and social decision.

Nevertheless, several studies, despite presenting slightly different empirical takes, offer up similar conclusions: there is a persistent trend in corporate leadership of undercutting minority recruitment at the board level, thereby perpetuating minority and gender gaps. This should be considered a problem, not only from an ethical standpoint, but from the perspective of wanting corporations to be the most efficient, successful entities they can be.

Many are unhappy with the lack of progress at increasing diversity inclusion at the board level, so why has the cycle not been broken? What is holding corporations back? What is holding diversity communities back? Corporations who integrate well at the board level can profit in a number of ways, but the reasons for the lack of diversity remain confusing, as do the remedies that could result in greater boardroom inclusion.

This comment endeavors to uncover some of the mysteries surrounding this topic. Part I presents a broad overview of the benefits that come when boards pluralize their membership by including racial minorities and women. While social, moral and ethical reasons are an important
part of the diversity movement’s history, the corporate context calls for special attention to business and economic arguments. Diversity can support core business ideas, make a firm more fiscally responsible, lead to better governance and accountability, and create more shareholder value.

Part II discusses possible reasons why corporations have been slow to diversify at the board level. First, the Sarbanes-Oxley Act has proved to be disappointing to advocates. While the independence and ethical requirements brought on by this groundbreaking legislation gave diversity advocates hope that corporations would turn to diversity as ways to maintain compliance with the new regulations, Sarbanes-Oxley did not motivate firms to drastically change policy related to diversity appointments. Second, recent developments in Title VII jurisprudence appear to shift the focus away from minority discrimination to White majority discrimination, which could have a trickle effect on board room inclusion. Third, tournament theory explains how diversity candidates for promotion are handicapped against Whites, and how the contest itself is rigged due to low levels of diversity amongst the pool of competitors. Fourth, labor market externalities influence firms to shy away from diversity policy. Three additional saboteurs of diversity are analyzed, including educational barriers, corporate colorblindness and tension within the firm’s culture over race and gender.

Part III considers two strategies that are gaining momentum and look promising for increasing board diversity. The first approach calls for a paradigm shift away from colorblindness to multiculturalism. Evidence indicates that a multicultural attitude will attract minority talent and allow firms to fully engage the strengths that are inherent with diversity sets. The second approach is called “Small Wins,” which directs firms to conduct a pinpoint examination of the cultural and policy dilemmas that result in low diversity on the board. Once
the analysis is complete, firms should implement modest changes designed to attack specific concerns without greatly disturbing the corporation as a whole.

I: The Benefits of Diversity

In order to arrive at any answers as to why boards have not integrated more, it is first important to understand what the benefits of a diverse board room could be. The Alliance for Board Diversity (ABD) offers up a compelling list to begin with.¹ Among many important attributes that a diverse board could lead a corporation to enjoy, the ABD argues that board diversity increases board confidence, in addition to sending a powerful message to stakeholders that the corporation values diverse perspectives.² The ABD’s argument is premised on the notion that as diversity transforms our nation and the global economy becomes more intertwined, the importance of recognizing a plurality of interests and taking advantage of different backgrounds is vital for the continued growth of an international corporate enterprise.

Much of the ABD’s rationale echoes historical calls for greater board diversity, specifically calling for more minorities and women on social or moral grounds. These two grounds, however, are not sufficient in and of themselves to properly encourage corporate America to increase diversity within its ranks. Had they been, advocates should expect to have seen a balance in the board by now. The moral grounds argument tended to point out a glass ceiling in American corporate culture, which was blamed on either blatant racism or

¹ The Alliance for Board Diversity [hereinafter ABD], Women and Minorities on FORTUNE 100 Boards, ABD (May 17, 2005), available at: http://theabd.org/Women%20and%20Minorities%20on%20F100%20Boards_2005.pdf. The ABD research indicates that diverse teams, when well managed, “deliver better results: they are often more innovative and more effective, while building on capabilities from broader and more diverse perspectives.”
² Id.
discrimination, or unconscious racism and stereotyping.\(^3\) Even socially positive approaches like celebrating the differences between people or believing firms had a social obligation to ensure more diversity as the number of diverse people in America rose have shown themselves to be insufficient. Despite the symbolic rhetoric, they simply do not energize the business community enough to motivate a change in policy.

Fortunately for advocates, there are many ways to show that diversity has a positive effect on core business ideas and a firm’s financial bottom line. Scholars often refer to these ideas as part of the “business case for diversity,” which has come to play a major role in the debate over why firms should seek to accelerate racial and gender integration.\(^4\) These arguments began to crystallize as a response to Justice Powell’s opinion in *Bakke*, where he and a majority of his fellow justices indicated skepticism over arguments for affirmative action based on the need to remedy past (or even present) “societal discrimination.”\(^5\) Market-based arguments became even more prominent after *Grutter*, when it became clear that they offered a way for advocates to utilize the broad “diversity” rationale that eliminated strict consideration of race.\(^6\)

A. Core Business Concepts

The Council of Institutional Investors (CII) explains a number of ways diversity can affect core business concepts. In a study published by the group, diversity is said to have a positive effect on core business concepts such as competitive advantage, organizational

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\(^3\) See Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 Wis. L. Rev. 795, 813 (discussing how corporations do not reach out to entire minority populations, miss out on a huge talent pool and even ignore such talent when they are already within the firm or when the firm has knowledge of the candidate).

\(^4\) David B. Wilkins, *From “Separate is Inherently Unequal” to “Diversity is Good for Business: ” The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 Harv. L. Rev. 1548, 1554.


performance, creativity, innovation and shareowner value. This, the group says, is the “new talking points linked to a diverse slate of board directors;” a claim that indicates that board diversification has, until recently, been more of “an exercise in corporate social responsibility, ethics, [and] morality.” Additionally, a diverse board lends itself to a solid risk management strategy.

The CII study made two sales-related conclusions that support the board diversity idea. First, the increase in ethnic minority purchasing power in the United States presents new growth and marketing opportunities that a diverse board would help the corporation take advantage of. The argument here is that diverse boards have a deeper understanding of minority purchasing priorities and a better connection to various minority communities; in contrast, non-diverse boards are more unaccustomed to viewing minority groups as important customer bases, which leads to leadership decisions that fail to maximize the minority-client opportunity.

Second, the convergence of high quality diverse management talent and fast growing diverse customers (other businesses and consumers), both in the United States and abroad, presents an opportunity for corporations to increase their global profit margins and develop their enterprise in new markets. Talented minority candidates can more easily plug themselves into markets where they have an understanding of the cultural differences of the market, relative to their white male peers. As markets such as China and Brazil continue to grow at exponential

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8 Id.
9 Id. The CII study further argues that “basic portfolio allocation theory suggests that a more diverse basket of [board members] tends to lead to lower levels of equity risk.”
10 Id.
11 Id.
rates, the ability of a board to tap into such emerging areas and satisfy the local customers in those countries could add significantly to a corporation’s bottom line.

Tellingly, many corporations recognize this point. In an amicus brief filed on behalf of a number of corporations for Grutter, the firms argue that “a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world.”\textsuperscript{12} They go on to say that diversity tends to lead to an ability “to facilitate unique and creative approaches to problem-solving” because it implicates different perspectives. Additionally, diverse groups are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those consumers.\textsuperscript{13}

Many scholars have amplified the core business argument in slightly different ways. For instance, some argue that corporations can use diverse board members, including women, to foster better relationships with various stakeholders.\textsuperscript{14} A diverse board is more likely to enable the corporation to create policies that take diversity into account both in terms of customer outreach and in employee relations, thus increasing employee satisfaction and resulting in less turnover. In other words, diversity can sensitize the corporation to the interests of employees and consumers in an increasingly diverse, global society.\textsuperscript{15} Similarly, some believe that gender diversity on boards can help a firm better assess the costs and benefits of corporate decisions.\textsuperscript{16}

\textsuperscript{13} Id. Some of the interested parties who signed the amici include Boeing, Coca-Cola, Dow Chemical, Eastman Kodak, Kellogg, Microsoft, Mitsubishi, Texaco, Procter & Gamble and Pfizer. The list is non-exhaustive.
\textsuperscript{14} Lynne L. Dallas, The Multiple Roles of Corporate Boards of Directors, 40 San Diego L. Rev. 781, 787 (2003).
\textsuperscript{15} See Fairfax, supra note 2, at 810.
Others point out that diverse boards may be able to better identify with different communities, thus enabling the firm to tap into the community for hiring purposes.\textsuperscript{17}

Similar points were brought up in a study published in the Harvard Business Review entitled Diversity as Strategy.\textsuperscript{18} Here, a diversity initiative at IBM was examined. The initiative partnered the company’s women and ethnic minorities with the Market Development unit in an attempt to penetrate businesses owned by women and ethnic minorities. The business unit went from generating approximately $10 million annually in 1998 to a total of $300 million in 2003.\textsuperscript{19} The diversity return on investment, or “Diversity ROI,” is hard to argue against given such a dramatic uptick in total sales. At the time, the study predicted that other companies would follow suit and create their own diversity initiatives, i.e. establish a diversity group within the firm, partner that group with core business units, connect to diverse customer bases, and, as said in the CII white paper, “watch the money flow in.”\textsuperscript{20}

\textbf{B. Saving Firms Money}

Diversity might also help a corporation save money. Several scholars assert that boardroom diversity can reduce social and economic costs associated with discrimination and harassment at the employee level.\textsuperscript{21} Discrimination suits are no minor issue for a corporation in terms of cost: recent cases reveal that settling racial or sexual harassment lawsuits can require

\begin{footnotesize}
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\item[\textsuperscript{17}] See Fairfax, \textit{supra} note 2, at 813. See also Marleen A. O’Connor, \textit{The Enron Board: The Perils of Groupthink}, 71 U. Cin. L. Rev. 1233, 1306-08 (2003). The study notes that some corporations are making an effort to recruit more women directors to tap into “market reciprocity.”
\item[\textsuperscript{19}] \textit{Id.}
\item[\textsuperscript{20}] \textit{Id. Accord Virtcom, \textit{supra} note 6.}
\item[\textsuperscript{21}] Steven A. Ramirez, \textit{A Flaw in the Sarbanes-Oxley Reform: Can diversity in the Boardroom Quell Corporate Corruption?} 77 St. John’s L. Rev. 837 (2003).
\end{itemize}
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firms to spend upwards of hundreds of millions of dollars before a settlement is reached.\textsuperscript{22} Two recent examples include class action suits against Coca-Cola and Texaco; both cases alleged bias in hiring and promotion, blatant racial discrimination, and corporate governance failures.\textsuperscript{23} Employees suffered personal losses, overall share value decreased, and the companies had to spend millions to fight the litigation.\textsuperscript{24}

Diversity helps to mitigate this possible hardship because women and minorities are more likely to not only empathize with members of their set, but also have a better understanding of the issues that members of their set confront while at work or trying to get hired. Diverse board members are, overall, more sensitive to the concerns that come with a diverse workforce.\textsuperscript{25} In sum, diverse board members are better equipped to respond and resolve those issues, which reduces the likelihood of there being costly lawsuits.\textsuperscript{26}

Several empirical studies back up the claim that board room diversity allows a firm to save more money. One such study, Effects of Racial Diversity on Complex Thinking in College Students, demonstrates that diversity can enhance cognitive skills in group interaction. When racial diversity is increased in a group, there is an increase in the level of intellectual complexity with the resulting group output – specifically, the groups become better able to approach complicated problems from multiple perspectives, thus being able to deliver a wider array of alternative solutions to a business problem.\textsuperscript{27} Diverse groups tend to focus more on fiscally responsible decision-making and are more apt to create strategies aimed at saving resources.

\textsuperscript{22} Cheryl L. Wade, \textit{Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination}, 76 Tul L. Rev 1461, 1468.
\textsuperscript{23} \textit{Id}. at 1469.
\textsuperscript{24} \textit{Id}. at 1470.
\textsuperscript{26} Fairfax. \textit{supra} note 2, at 811.
\textsuperscript{27} Anthony Lising, et al., \textit{Effects on Racial Diversity on Complex Thinking in College Students}, Psychological Science Vol. 15 Num. 8, American Psychological Society (2004).
C. Stronger Corporate Governance

Several scholars believe diversity can have a positive impact on corporate governance. One point that is commonly made is that boards with racial and gender diversity reduce the board’s tendency to conform, resulting in an enhanced ability for the board to closely scrutinize both its own decisions and those of middle-management. Homogeneity itself seems to be a problem, as a study in the wake of the Enron collapsed shows that the board having only one white female director may have caused it to move towards an excessive amount of conformity, which could have impeded its ability to think critically and properly assess day-to-day governance matters.

The Conference Board of Canada conducted a study examining compliance with internal conflict of interest guidelines, and found that 94% of boards with at least three women ensured compliance, compared to only 68% for all male boards. The main conclusion from this empirical is that board diversity can enhance a corporation’s culture of scrutiny. Another study conducted in the United States at Stanford Law School found that boards with greater gender diversity met more often than non-diverse boards, and were more likely to determine director pay closer in proportion to firm performance. This suggests that at least gender diversity can improve the overall accountability of the corporation in terms of correlating executive compensation to satisfactory results at the financial bottom line.

Professor Steven A. Ramirez discusses several ways diversity can be helpful to firms, including offering the idea that diverse boards can alleviate political pressure during proxy

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28 Ramirez, supra note 20, at 838.
29 O’Connor, supra note 16, at 1310.
contests or governance reform debates that otherwise could distract the board from focusing on other core business ventures.\textsuperscript{32} Another prominent diversity scholar, Janis Sarra, argues that one reason diverse boards lead to better governance practices is that they are more objective.\textsuperscript{33} Sarra’s research suggests that there is a correlation “between effective governance practice, measured by an active and independent board engaged in stewardship, monitoring and accountability, and maximizing enterprise value.” Diversity, to her, adds to a corporation’s ability to foresee and manage risk.

D. Value for Stakeholders

A study conducted by David Carter entitled \textit{Corporate Governance, Board Diversity, and Firm Value} shows another way in which the alternative perspectives afforded by diversity brings value to stakeholders. According to Carter, the variety of perspectives that emerge causes decision makers to evaluate more alternatives and more carefully explore the consequences of those alternatives, including when the firm is adopting policy relating to governance or shareholders.\textsuperscript{34} The study’s methodology centered on comparing the financial performance between firms with two or more women or minorities and boards with no diversity. When controlling for size, industry and other corporate governance measures, the study indicated a significant positive relationship between firm value and the presence of women and ethnic minorities in the board room.

Another practical benefit diversity brings to a firm relates to fiduciary duties. When carrying out their responsibilities, board members have a duty to take actions that are in the best

\textsuperscript{32} Ramirez, \textit{supra} note 20, at 838.


interests of the corporation; failing to do so constitutes a breach.\textsuperscript{35} Most view this duty as an obligation to maximize shareholder profits. Economic rationales that support diversity in the board room are consistent with this rule – if diversity leads to greater returns and more effective corporate governance, then shareholders should be interested in seeing more women and minorities in board positions.

There is also evidence to suggest that while adding one or two diversity candidates to the board could lead to improvement, even greater levels of diversity can enhance shareholder value to an even higher degree. Phyllis Keys looked at those corporations selected to Fortune magazine’s “Diversity Elite,” and found that those firms with greater diversity “exhibited a significantly higher return on equity relative to peers.”\textsuperscript{36} The study went on to note that “greater value is added when diversity promoters include individuals of various ethnic backgrounds in higher level positions… where decision-making authority and influence are greater.”\textsuperscript{37} The connection here is a compelling one: Keys is saying that particularly diverse boards are associated with particular strong shareholder gains.

The totality of these benefits, however, does not appear to be compelling corporations to change their ways. To the disappointment of diversity advocates, the overall percentage of all women and minority men in Fortune 100 corporate boards did not change substantially between September 2004 and April 2006. Minority male board positions increased only .44%, from 11.4 to 11.88.\textsuperscript{38} White females saw a similarly minor increase of .85%, from 13.04 to 13.89.\textsuperscript{39} The

\textsuperscript{35} Model Bus. Corp. Act § 8.30.
\textsuperscript{37} Id.
\textsuperscript{38} ABD, supra note 1.
\textsuperscript{39} Id.
number of minority females has actually decreased, from 4.02% of board positions to 3.01%.\textsuperscript{40} As of 2008, white men still occupy 71.53% of all Fortune 100 board positions.\textsuperscript{41} Between 2004 and 2006, Fortune 100 companies added only a total of 24 board seats – and white men gained 21 of them.\textsuperscript{42}

Low statistics have been the norm for over a decade now. For example, in 1999 women at the highest levels of business were rare, comprising only 10% of senior managers in Fortune 500 companies, and less than 4% of the uppermost ranks of CEO, president, executive vice president and COO.\textsuperscript{43} They made up less than 3% of the top corporate earners.\textsuperscript{44} Perhaps the most startling revelation during this time regarding women is that studies suggest that those women who do manage to climb to the top of the corporate ladder often leave, “frustrated or disillusioned with the business world.”\textsuperscript{45}

The story for minorities is much the same when looking at more recent snapshots in time. In 2008, 10% of board seats were occupied by Blacks.\textsuperscript{46} Asians made up only 2% of board positions, while Hispanics accounted for 4%.\textsuperscript{47} Including women, Whites occupied 84% of all positions.\textsuperscript{48} To look at it another way, Whites accounted for 1,031 of seats, Blacks account for 119, Hispanics 49, and Asians 20. The general population, in 2006, shows that Whites accounted for 66% of the population, Hispanics 15%, Blacks 14% and Asians 5%. This data leads to a

\begin{itemize}
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. at 7. The Meyerson and Fletcher study also says that statistics on women of color are “even more drastic.” Although women of color made up 24% of the U.S. women’s workforce at the time of the study, they accounted for only 14% of women in managerial roles. African-American women comprised only 6% of the women in managerial roles. How many women of color were within the top 3% of corporate earners was not shared, but it is undoubtedly a small figure.
\item \textsuperscript{44} Id.
\item ABD, supra note 1.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id.
\end{itemize}
simple conclusion: the number of minority board positions is disproportionate to the total minority population in the United States.

II: Why Boards Are Not Diverse

With so many studies that clearly show there is great utility in increasing boardroom diversity, it stands to reason that there must be overwhelming, compelling reasons as to why corporations still manage to fail at increasing their board diversity levels.

First, it is important to understand how board members are selected. Ramirez argues that the lay of the law essentially boils down to a “mutually reinforcing mechanisms by which white elites perpetuate an exclusive tradition.”\textsuperscript{49} The way Ramirez’ stance on the mechanism works is that in a publically-held company, it takes an expensive proxy contest for shareholders to elect a director. These proxy contests require difficult political maneuvering and drain shareholder resources, not to mention that both Delaware and federal law allows the sitting board to hold the lion’s share of advantage when it comes to the fight itself. The result is that the vast majority of the time, directors are selected by management and not elected by shareholders. Since there is little legal incentive for directors to stop replicating themselves, the growth of diversity in the boardroom remains sluggish. Despite the numerous positives for shareholders, the directors would be forced “to end a cycle of white leadership in which they are clearly comfortable with.”\textsuperscript{50} If Ramirez is right, then the white male elite who actually constitute the board positions would be the only group that stands to lose – and they lose because they would have to relinquish some of the power they consolidate within their group.

\textsuperscript{49} Ramirez, supra note 20, at 840.

\textsuperscript{50} Id.
This position is not surprising, and has been discussed in detail by many others. In addition to historical reasons noted above, five additional ideas may shed light on the lack of diversity in the board.

A. The Effects of Sarbanes-Oxley

In the wake of scandals surrounding Enron, MCI and Adelphi, Congress undertook a massive examination of contemporary corporate board practices. The bi-partisan effort resulted in the passage of the Sarbanes-Oxley Act (SOX). Essentially, SOX federalized core state law regarding fiduciary and due care duties of directors and officers.\textsuperscript{51} Important to the diversity question is that it also mandated greater board oversight by requiring that audit committees be composed of “independent” directors.\textsuperscript{52} In addition, SOX required that directors of public companies “promulgate codes of ethics” and maintain updated knowledge about internal matters in the corporation.\textsuperscript{53}

The focus on independence as both a value and a legal requirement means that corporations today must make serious considerations on how to compose their board. Not only must they endeavor to foster a sound relationship with shareholders and external constituencies, but also determine appropriate future candidates in light of SOX. The result of these considerations is that there is a growing awareness in the corporate community that diverse boards could help enable a firm to meet the independence threshold easier than a board dominated by insiders.

\textsuperscript{51} Fairfax, \textit{supra} note 2, at 814
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} Donald J. Polden, \textit{Forty Years after Title VII: Creating an Atmosphere Conducive to Diversity in the Corporate Boardroom}, 36 U. Mem. L. Rev. 67 (2005).
There is data to suggest that diversity could indeed result in more independent boards. A study by Carol Hymowitz\textsuperscript{54} concluded that 86\% of women directors and 82\% of minority directors are sufficiently independent in the sense that they do not have ties to the corporation’s existing management. At the time SOX was adopted, Hymowitz found that 70\% of sitting directors, as a whole, were independent under the new rule. This means that statistically speaking the odds of bringing on a new board member who satisfies SOX’s independent requirement are greater when the firm brings on diversity candidates.

The ethics concern expressed in SOX is another area where diversity may add help a corporation avoid legal trouble. According to Judy Rosener, women and minority directors seem to ask different questions than white male directors, and bring a different set of experiences and concerns with them into the board room.\textsuperscript{55} This creates a link between diversity representation and good corporate governance.\textsuperscript{56} Another study found that 94\% of boards with three or more women members insisted on conflict-of-interest guidelines while only 58\% of all male boards did so. In a 2002 report, The Conference Board of Canada also found that 72\% of diverse boards conducted formal board performance evaluations more frequently than boards with all white males.\textsuperscript{57} These points all go towards how a corporation approaches ethical dilemmas, with women and minority presence being a positive force for steering corporations in a sufficient ethical direction.

While much has been made about SOX and its possible effects, and while many argue that increasing board diversity will help corporations comply with it, advocates are still waiting

\begin{footnotes}
\item[56] Id.
\item[57] CBC, supra note 29.
\end{footnotes}
for such a result to come to fruition. The general academic mindset seems to be that SOX was a disappointment to diversity supporters in part because there is simply no mention of the word “diversity” in its language. Moreover, the legislative history of the act does not seem to indicate Congress contemplated the act to increase diversity either. This means possible legal challenges against corporations that would utilize SOX as a weapon to force plurality in corporate leadership has an incredibly difficult road. SOX is simply not the proactive legal remedy that diversity champions long for.

There could be a number of reasons for the disappointment of SOX. One thing to consider is while some CEOs might say they are interested in increasing diversity to expand their customer base, or a number of other business rationales noted above, CEOs themselves still heavily influence board selection. Even if exercising power appears informal, CEOs still wield enormous control over the nominating process. This influence does not go unrecognized by directors who have a role to play in nominating committees, as many are likely to be reluctant to voice dissent. Similarly, many would be afraid of offering alternative viewpoints that may implicate diversity expansion. In sum, it does not appear SOX’s independence requirement goes far enough at curtailing informal CEO power that ultimately relates back to the inability of minorities to penetrate the board level.

Nor does SOX do enough in regards to social connections between board members and CEOs. Even if board members are financially independent, a strong social connection between those members and the CEO can undermine active monitoring of the firm. These social

61 Bebchuck, supra note 57, at 85.
connections relate to corporate cultural norms that repress minorities from attaining the highest levels within the corporation’s ranks.

However, there may be a difference between women and racial minorities when it comes to how effective SOX and its independence and ethics orders are on changing board composition. One study shows that 23% of women directors serving on Fortune 100 boardrooms in 2006 were appointed after SOX was signed into law.62 Relating back to independence, the study also shows that only four women directors at Fortune 100 companies were insiders.63 Fairfax argues, “At the very least [this] suggests that Sarbanes-Oxley has encouraged corporations to seek out other women to serve on their boards and maintain the status quo.” It was also found that the four year period between the passage of SOX in 2002 and the polling in 2006 showed an increase in the total number of women directors.

On the other hand, the increase may not be due to SOX either in whole or in part, because all but one of the new female directors were appointed to boards which already had at least one other woman.64 Since 2002, the number of Fortune 1000 companies with at least one woman on the board has only increased three percent.65 Therefore, across the board, SOX did not lead to a critical mass of either racial minorities or females ascending to leadership roles, and it did not significantly decrease the gap between diversity in board roles and of those people in the general workforce.66

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63 Id. at 606.
64 Id. at 619.
65 Id. at 608.
66 Id. at 609.
B. The Implications of Title VII

Longstanding legal doctrines relating to the treatment of minorities would seem to do little to improve diversity efforts at the board level. First, under the current state of Title VII law, it appears to be difficult to argue that minorities face disparate treatment in the boardroom context. A disparate treatment violation is made out when an individual of a protected group is shown to have been singled out or treated less favorably than others who are similarly situated. Disparate treatment requires a showing that the employer’s actions were motivated by discriminatory intent, either via direct, indirect, or circumstantial evidence. If a minority were to bring a legal challenge and base their theory on disparate treatment, a judge would need to get acrobatic and analogize “employer” to whomever the individual in question was seeking recovery from. To that end, suing shareholders becomes problematic (shareholders being legally distinct from employers in several important ways), and suing sitting board members carries its own unique barriers.

That point distills down to another problem. The vast majority of disparate impact cases take place in a context where a low level employee is bringing a suit, not a candidate for a board position. This would suggest that for there to be success, the minority would have to already been employed, and would theoretically move up to the board in a promotional capacity. This is yet another difficulty for the practicality of the remedy, because boards often seek candidates from outside the firm.

The biggest obstacle, however, could very well lie in the discriminatory intent standard that the firm’s leaders must possess in order for a disparate treatment challenge to be successful. If a minority candidate were somehow denied the position through a shareholder vote, proving that every voting shareholder, or their proxies, possessed discriminatory intent is going to be
nearly impossible. On the other hand, if a minority were to try to sue the sitting board, that board may be able to evoke the Business Judgment Rule as a defense.

Nor does it appear that disparate impact is a plausible remedy. The current state of the law, *Ricci v. DiStefano*, makes the standard more difficult.67 Richard Primus believes that the doctrine is looking at becoming harder for prospective minority plaintiffs to use.68 Perhaps most damning to diversity advocates is the prediction made by Cheryl Harris. Essentially, Harris believes *Ricci* marks a point in Title VII jurisprudence where the focus is shifting from minority plaintiffs to white male plaintiffs.69 The point here is the remedy is becoming less available for diversity advocates and candidates, and is becoming more a tool of the majority to undermine diversity consciousness.

Those legal issues would certainly have to be tackled in any federal court, but there are state law problems that, given the lay of corporate law, would pose problems as well. Delaware law does not currently provide for compelling legal remedies for minorities, or pose serious threats to sitting boards if they fail to integrate. Diversity advocates also need to be aware of recent SEC rule changes which may have implications for their goals.

**C. Tournament Theory**

Not all board members come to a firm through outside channels. In fact, a number of board members, managers and other high-level actors in the firm’s leadership structure are promoted from within. The availability and handling of promotion opportunities for diversity candidates may explain why corporate leadership remains mostly homogenous.

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67 129 S.Ct. 2658, 2671.
Tournament theory is the idea that firm leaders use rank-order contests to provide lower level workers with incentives and promotion opportunity.\textsuperscript{70} In its simple form, tournament theory considers two workers and a single prize at the end, usually advancement in the firm hierarchy or a salary increase. When the contest is finished, the employer ranks the two workers based on easily observable criteria, and only one of the workers claims the prize. During the competition, both candidates are expected to make an effort for the promotion. The tournament is held in part to induce employees to work harder in their current positions.

Diversity concepts run into several problems when examined under tournament theory. First, contestants are usually judged on factors that are easy to observe. For example, if Candidate A’s department is more profitable than Candidate B, then Candidate A should win the tournament since profit is easily measurable and comparable (other factors aside). In theory, diversity should be easily measurable too: candidates either have diversity or they do not since it is an inherent part of a candidate’s background. The lack of diversity personnel in leadership roles suggests then that the type of objective criteria used in promotions is of the kind that relates strictly to performance.

Many of the benefits outlined in Part I are psychological, moral or ethical in nature. These types of benefits do not lend themselves well to objective measurement. While studies show that these attributes can add real financial value to a firm, weighing them between tournament contestants would require firms to consider subjective criteria. This is difficult for firms to do, which explains why objective criteria is so influential even though it is arguable that

subjective criteria can be just as important in making the ideal promotion decision. This means that what tournaments are designed to test greatly discounts what makes a diversity candidate appealing.

Another explanation could be that the tournament is rigged from the very beginning due to who gets to play. While the studies which expose the glass ceiling for women and minorities aspiring to senior management positions are well known, recent large-scale studies are finding that women and minorities also experience challenges when trying to advance to middle-ranking posts. One study found that over a five-year period between 2005 and 2010, white women were 11% less likely to be promoted than white men with similar education and experience. As of November 2002, women represented only 15.7% of corporate officers in America’s 500 largest companies. The problem extends to racial minorities as well. One study says that as of 2007, only 13% of all Blacks constitute mid-level to senior executive jobs, while Hispanics make up 9%. In the financial services industry, women and minorities account for a combined 17.4% of all types of management.

This means that diversity candidates are in short supply, and do not make up a proportional number of contestants compared to white males. If tournaments are used, it essentially handicaps diversity because diverse people do not get many chances to participate. This is an unfortunate reality for advocates, because minority and female success in corporate

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71 Subjective criteria could be a good way for firms to assess future success. For instance, how the candidates cooperate with subordinates would be an important quality for a manager to have. See Scott Baker, Stephen J. Choi & Mitu Gulati, *The Rat Race as an Information-Forcing Device*, 81 Ind. L.J. 53 at 55.
promotion tournaments could go a long way in disrupting negative stereotypes about work ethic and competence, in addition to building a management base capable of working towards the myriad of opportunities diversity provides.76

Tournament theory invites an important question: if diversity can really strengthen a firm, then why have firms failed to promote diversity candidates? The explanation may lie in how firms digest information and labor market externalities.

D. Labor Market Externalities

Diversity in the board and other levels of the corporate hierarchy faces a challenge from the realities of the market. Individual firms hesitate to buck longstanding market norms out of fear that if their decision is wrong, they will lose market capital. There is a risk component associated with implementing strong diversity initiatives geared towards placing candidates in high positions. Those risks are often thought to be too great to enact new policy.

This is a classic example of the “canary in the cave.” Firms hate risking big changes, and make decisions to avoid the uncertainties that come with being the first competitor to branch out into new territory. The canary does not get the benefit of observing previous actors who were successful. Moreover, if a new policy does prove beneficial, firms who sat on the sidelines will inevitably catch on and implement similar policy themselves. There is little value in producing new information if that information is not worth much or if it will be used to equalize the market.

Labor externalities in particular illustrate this concern. Imagine a scenario where a firm is convinced of the rationale for expanding diversity. They devote a heavy amount of resources towards creating and executing a new diversity plan which calls for the promotion of highly

competent diverse employees. Knowing this is uncharted waters for their industry, the firm is confident that its competitors will not respond with similar initiatives, so they set the level of compensation for diversity promotions low in hopes of mitigating some of the costs associated with establishing the policy in the first place. The firm hires a diversity candidate, and just to be safe in case their prediction about the competition was wrong, they include a no-compete clause in the contract with their newly-appointed manager.

Now imagine the plan works, and the diversity manager is an objective success. Their team consistently outperforms others in the firm due to the skills and traits the manager affords them. However, by now the competition has caught on and determines they need to change their practices themselves. One rival offers your manager a sizeable pay increase if they will jump ship.

At this point, the firm who created the new policy in the first instance is at a major disadvantage. The market has caught up to them, and they no longer are the only firm reaping rewards from the new source. The rival’s initiative was cheaper to implement because they knew right away what worked and what did not. As for losing the manager, depending on the state it could be that even non-compete covenants cannot save a firm from being poached of their talent.77 In this kind of scenario, the firm was always in danger of paying a price for their diversity efforts: either the candidate would not have contributed anything to justify the cost of implementing the policy, or the policy does work and now the firm has to essentially bribe the employee to stay.

Advocates are not powerless against externalities, but diversity solutions need to include some sort of mechanism that insulates the firm from external risks. One suggestion is to involve

77 For instance, California creates a significant economic constraint on contracts by stating that non-compete clauses are against public policy. See Cal. Bus. & Prof. § 1616.
Congress. If some kind of change is mandated, that at least serves to mitigate the canary in the cave dilemma because it moves firms forward together.\textsuperscript{78} Another strategy may be to formulate plans that allow for sunset scenarios; if firms want to amend their policy without the need of an onerous process like a shareholder vote, perhaps it is wise to allow them to do so. The point is that firms need to act quickly to adjust to market conditions and information they have little control over.

E. Education Barriers

Education continues to present roadblocks to diversity in the corporate world. There are two distinct problems for minorities in particular. First, thanks to \textit{Parents Involved v. Seattle School District No. 1}, race cannot be used as the primary factor in student placement for public schools.\textsuperscript{79} This means that integration at the public school level has suffered a blow. Failures to help minority students at this rudimentary level does harm to diversity in the corporate world down the road. The future of the law is also unclear, as pointed out in a study by Gerken.\textsuperscript{80} Since the constitutionality of placement programs is difficult to predict given Kennedy’s \textit{Parents Involved} concurrence, diversity advocates have to dig deeper for extralegal remedies.

Second, there are numerous problems at the higher education level that impact minorities and ultimately affect their lack of involvement in corporate boardrooms. \textit{Bakke} and its progeny such as \textit{Grutter} use “diversity” in a way that is legally malleable for admissions committees.\textsuperscript{81} While the idea is to help minorities receive spots in elite universities they may not otherwise be

\textsuperscript{78} For all its shortcomings with diversity, SOX has been said to be a success in other areas. One of the reasons for this is because firms did not have to fret over what would happen if they were the only corporation acting more ethical or appointing more independent board members.

\textsuperscript{79} 551 U.S. 701 (2007).


\textsuperscript{81} Bakke, \textit{supra} note 4, at 270; Grutter, \textit{supra} note 5, at 313.
able to attain, the opinions work to reinforce a sense of meritocracy in admission to college and graduate school that fails to account for historical discrimination.

While the impediments to higher education opportunities are a serious problem for minorities, corporations themselves have taken a stance on the debate in favor of diversity. As made clear by the Grutter amicus brief filed by Fortune 500 companies, the ability of higher education institutions to enroll minority students is important for the diversity efforts of corporations.82 The brief indicates that those corporations who co-signed valued diversity candidates, and viewed diversity as an important part of their business agenda.

F. Corporate Colorblindness

There are two important, but fundamentally different approaches that seek to reduce interracial tension that social scientists tend to discuss the most. The first approach is multiculturalism.83 This theory proposes that group differences and membership should not only be acknowledged and considered, but also celebrated. Proponents of multiculturalism argue that when ethnic group differences are ignored, the cultural heritage of non-white individuals is undermined and produces an overall detriment to the advancement of ethnic minorities. Put differently, multiculturalism “advocates considering, and sometimes emphasizing and celebrating, category membership.”84

The second approach is often referred to as colorblindness. This perspective was first given a legal voice by Supreme Court Justice John Marshall Harlan in his infamous dissenting

82 Fortune 500 Brief, supra note 11.
83 A discussion of the possible effects of the multiculturalism idea on corporate boardrooms is discussed in further detail in Part III.
opinion in *Plessy v. Ferguson*.\(^{85}\) Essentially, colorblindness proposes that racial categories do not matter and should not be considered when making decisions regarding hiring or school admissions. This approach advocates that social categories should be dismantled and disregarded, and everyone should be treated as an individual.\(^{86}\) Colorblindness aims at “reducing, eliminating, and ignoring category memberships.”\(^{87}\) Those in favor of the approach typically argue that taking cognizance of group membership in decision making is illegitimate since it is likely to lead either to discrimination against minority groups or to reverse discrimination in their favor; neither action is desirable.\(^{88}\)

The colorblind ideology has a detrimental effect on diversity in the boardroom. As suggested by a study from Evan Apfelbaum, colorblindness has two key effects in group settings that are especially pertinent in the board context.\(^{89}\) First, colorblindness is employed more as a way for whites to suit their own purposes and used in order to manage their interactions so as to appear unbiased and friendly towards people of color.\(^{90}\) Second, when colorblindness is exercised, the effect is that racial issues are avoided altogether.\(^{91}\) The implication is that white executives do not even want to have the important racial conversations needed in the corporate setting. Whether consciously or subconsciously, whites are side-stepping the issues when they take colorblind attitudes.

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\(^{85}\) 16 S.Ct. 1138, 1144 (1896). Among other infamous words from Harlan, the colorblindness rationale rings especially true when he says “In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.”


\(^{87}\) Richeson, *supra* note 83.


\(^{90}\) *Id.* at 919.

\(^{91}\) *Id.*
When placed in ambiguous or potentially threatening social interactions, many whites begin to use what Apfelbaum calls “strategic colorblindness.” Here, people are attempting to behave in ways that indicate ambivalence towards minority characteristics in order to facilitate a positive interaction and muddle race-conscious concerns. Apfelbaum’s research indicates that Whites trying to avoid talking about race is “predicated by self-presentational concerns about racial bias.” When interacting with minorities, there is a tendency to shift the conversation in order to accommodate the norms established by the other side. Empirical data further suggests that the shift is especially pronounced when the partner was Black.

Ironically, efforts on the part of Whites to make a positive impression through colorblindness usually are unsuccessful. In an interracial setting, this has been shown to be true through both verbal behavior and non-verbal behavior. The colorblind approach can make minority participants feel ill at ease, and many express that the White agent appears less friendly. These feelings indicate colorblindness actually results in greater racial prejudice.

While colorblindness is viewed by many as a form of racial bias, most agree that if it does implicate bias it does so subtly. Nevertheless, recent evidence suggests that even subtle forms of racial bias impacts behavior during interracial interactions. Schofield speaks directly on obstacles that corporate boardrooms face in their diversity efforts in this way. Some of the obstacles brought on by colorblindness mentioned here include the prevalence of taboos against mentioning race, ignoring intergroup tension, and failing to capitalize on the potential strengths that diversity may bring to a group.

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92 Id.
93 Id. at 923.
94 Id. at 929.
95 Schofield, supra note 73.
96 Id.
97 Id.
G. Firm Culture

Finally, the current state of corporate culture must not be neglected. Marqui Mapp argues that when minorities are recruited, the outgoing board members tend to be minorities themselves.\textsuperscript{98} This boils down to simply replacing what is already a low number of minorities. Dr. Ancella Livers offers a very imagistic analogy: "It's like you have one room in the house, and you're always rearranging the furniture. Depending upon if you get a couch in, you might have to throw out a chair. You're always rearranging the furniture in that same room while the rest of the house pretty much stays the same."\textsuperscript{99}

Another corporate cultural reason put forward by Livers, Mapp and others relates to the difficulty of getting a diverse candidate on the election slate. The process, they argue, practically requires knowing the right people. That is likely true for Whites as well, but it may be more difficult to know about available minority candidates since there is a general lack of them to begin with.

A study put forward by Cronqvist says that “culture is in part transmitted through the selection of managers and employees with the same benefits” and that “corporate culture affects firm policies.”\textsuperscript{100} Importantly, this means that a firm’s culture, once formed, can persist over time through the selection of “like-minded employees and/or employees’ internalizations of the firm’s organizational preferences and norms.”\textsuperscript{101} This means that the white culture remains pervasive as new leaders come in, and those new leaders in turn help keep the white majority culture firmly in control.

\textsuperscript{99} \textit{Id.}
\textsuperscript{101} \textit{Id.}
III: Improving Diversity in the Board

While there are many impediments to diversity in the board, firms are not completely in the dark as to how they should go about creating good diversity policy. Successful initiatives begin by securing the commitment of firm leaders. This depends in large part on how the firm chooses to frame “diversity.” By embracing a broad definition, firms can begin to fashion policy for promotion and board selection that accounts for many possible backgrounds.

Once the current board or a significant number of voters are sold on the concept of diversity, the next step is to conduct internal research to assess the firm’s cultural climate. Where constituents stand on diversity will influence how a firm measures its need to diversity the management and director levels. At this stage, it is also wise to empower a diversity committee made up of leaders from various departments, professional backgrounds and managerial levels. This affords the firm the ability to conduct their diversity inquiries across multiple departments, and appoint board members who will represent the interests of a broad set of the firm’s employees.

These are all general tips for how to begin the process. It requires hard work and a dedication to information gathering. Firms also need to understand that diversity can be approached in different ways.

A. The Multicultural Approach

It has been nearly sixty years since two American anthropologists, A. L. Kroeber and Clyde Kluckholn, proclaimed that multiculturalism should be considered “one of the key notions
in contemporary American thought.” 102 Culture, they describe, “consists of patterns, explicit and
implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive
achievement of human groups.” 103 Since then, the idea of multiculturalism has come to stand for
a celebration of the “distinctive achievements” of various sets, including women and racial
minorities. By acknowledging and appreciating the differences between groups, multiculturalists
argue that tensions between groups are eased, leading to a greater prospect of realizing social
equality.

The idea of culture does not imply passive acceptance of received practices, nor does it
imply the absence of debate, contestation, or dispute. Rather, multiculturalism “merely directs
our attention to those ideas about what is true, good, beautiful and efficient that are acquired by
virtue of membership in some group.” 104 For multiculturalism to be effective as an observable
practice, it is critical that those engaged in board selection take an interest in minority ideas of
what is true, good, beautiful and efficient. As Shweder says, “those ideas have a bearing on the
perpetuation of their way of life, and what they share [with others].” 105

Sociologists like Alana Fiske argue that in order to engage others as effectively as
possible in any social construct, “people must incorporate culture models, meanings, and
practices into their basic… processes.” 106 Corporations are no exception. By recognizing and
embracing cultural differences of the kind pointed out by Fiske, firms could see an increase in
minority presence on their boards.

102 A.L. KROEBER & CLYDE KLUCKHOHN, CULTURE, A CRITICAL REVIEW OF CONCEPTS AND
DEFINITIONS, 142 (Vintage Books 1952).
103 Id. at 146
104 RICHARD A. SCHWEDER, WHY DO MEN BARBECUE? RECIPES FOR CULTURAL PSYCHOLOGY, 9
(Harvard University Press 2003).
105 Id.
106 ALAN PAGE FISKE ET AL., HANDBOOK OF SOCIAL PSYCHOLOGY, 4th Ed. (Oxford University Press
Multiculturalism, when taken into account during the creation of policy, could produce a multitude of effects. For instance, a firm that adopts multiculturalism as a value shows they take an active interest in the thoughts and concerns of minority groups. Multiculturalism can validate minority interest by including them in the scheme the firm uses to retain and go after diversity talent. Embracing other cultures can help with a corporation’s effort to expand globally by helping the firm to understand which cultural differences could impact business decisions in foreign countries. By sending this message to the diversity community, a corporation can also position itself as more attractive and welcoming than its peers, thus increasingly the likelihood of landing premier diversity candidates over its competition.

It may seem simple to assume that firms are interested in what their minority customers and prospective board members think. Indeed, if multiculturalism is so obviously the right attitude for corporate America, then why has it not made a bigger impact, and why are firms so slow to adopt it as an approach? One reason may be political stigmatization. Ford argues that the uptick in diversity advocates arguing in favor of more multicultural-minded practices began in 1978 in the wake of Bakke.\footnote{RICHARD T. FORD, RACIAL CULTURE 42-57 (Princeton University Press 2004).} At the end of the case, liberals began scrambling towards a conception of diversity analogous to multiculturalism – they continued to identify and recognize racial and ethnic differences, but focus instead on the \textit{cultural} identity of people in order to continue pressing the diversity agenda forward in a way that did not rely strictly on race.\footnote{\textit{Id.} at 45.}

Corporate leaders, then, may have been slow to adopt multiculturalism out of fear of being associated with a notion that was strongly entrenched in liberal politics. Regardless of their own political leanings and affiliations, firm leaders recognize the importance of maintaining some semblance of impartiality if only to prevent alienating prospective investors or customers.
Advocates would do well to highlight that multiculturalism is really an apolitical concept not intended to support any one ideology over another.

B. The “Small Wins” Approach

One strategic method that could lead to positive changes in minority representation is known as the “Small Wins” approach. This method, which is advocated by business scholars such as Debra Meyerson and Joyce Fletcher, calls for minor systemic changes that accumulate over time. In contrast to broad shifts in recruiting policy or major alterations in candidate elections, the Small Wins approach looks to effect diversity in modest ways. 109

The method could be attractive for two key reasons. First, an approach that seeks to implement mild, incremental changes mitigates the risk of creating a backlash. One of the main tenants behind the Small Wins approach is to chip away barriers that hold women and minorities back “without sparking the kind of sound and fury that scares people into resistance.”110 With this in mind, corporations can position themselves to avoid the established players from second-guessing the efforts. Modest changes are also less likely to upset shareholder trust in the firm.

Second, Small Wins allows the firm to calibrate any changes to a very specific degree. The concept is elastic, in that there is no specific plan that each firm has to follow in order to be successful. Rather than a formulaic method, Small Wins is designed to remedy problems that are unique to the firm. Since the reasons for gender or racial inequality are not uniform across all industries, firms need to utilize an approach that best suits their own needs. The most effective methods tend to be aimed at biases so entrenched in the system that they are not even noticed

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109 Meyerson, supra note 46, at 128
110 Id. at 129
until they are gone. Since those biases vary from firm to firm, both in kind and in degree, Small Wins is able to guide the business to fulfill their own goals.

While the policy should be uniquely-tailored to suit a firm’s needs, the methodology for arriving at the policy does have a blueprint. First, once an organization determines that it has a problem, the next step is to search for its causes. This requires senior managers to probe a firm’s practices and beliefs to uncover the sources of inequity. Additionally, the firm may also benefit at this stage from soliciting shareholder interaction, gauging public opinion, speaking with diversity communities about how they view the firm, and studying peer firms who have found success in retaining or promoting minority talent. The value of gaining outside perspectives on the firm’s problems is to help the firm understand that an imbalance does exist within their structure, and should be considered something important to rectify.

Within the firm, one effective step is often one-on-one interviews with employees to uncover what they think the practices and beliefs are in the company’s culture.111 This tactic yields information mostly in regard to lower levels of the corporation’s hierarchy, but could be applied to the board room by focusing on possible candidates. Next, the firm may benefit by engaging focus groups to learn more about the effectiveness of its own practices. According to Fletcher, some firms have found great success when they conduct focus groups with men and women separately, and with racial minorities and whites separately, so long as the outcomes of the meetings are shared.112 Another important consideration to make at this stage is what questions are going to be most helpful to getting at the sources of inequity.113

111 Id.
112 Id. at 130
113 Diagnosing inequality is not always straightforward. Indeed, racial and gender biases at the board level is, as the colorblind analysis indicates, often an invisible problem to both board members and shareholders. Nonetheless, some questions have shown themselves to be more valuable than others. Some of these include “What is expected of leaders in this company,” “How and when do board members interact with one another, who participates and who
The questioning process should uncover cultural patterns and their consequences. For instance, what practices effect men differently from women, or whites differently from minorities? Which practices have unintended consequences for the business? Who in the firm is most responsible for neglecting the opportunity to increase minority involvement at the board level? By getting this information out in the open, firms are able to present what Meyerson calls a “shared narrative” and move towards implementing a Small Win that seeks to either compliment or alter the “diversity story” of the firm.

Once the problems are diagnosed and the cultural patterns are understood, it is time for the firm to design its Small Win. While tactics will vary from firm to firm, there are some ground rules that corporations should observe. First, it is critical that managers guiding the process keep the number and scope of initiatives relatively limited and strategically targeted. Second, change agents, whether they are managers, the board, or perhaps shareholders during a vote, would be wise to remind firm constituents that a single, small experimental change should not be seen as an end in itself. Small Wins that are presented as trial interventions that do not seek to overturn the system but rather slowly and surely make it better tend to garner the most support.

Firms should not be frightened to tinker with hiring or promotion policies in ways that appear like they might not have an impact, but in reality do lead to improvements. To illustrate, consider a firm who decides it is in their best interest to hire more women managers. Despite making an effort to interview females in greater numbers, the firm finds that their recruitment methods are somehow inadequate. The board examines their practices and concludes that the questions they ask candidates, their interview procedures, and even the places they looked to for

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does not,” and “How is competence identified during candidate evaluations?” For more questions, see Meyerson, supra note 46, at 135.

114 Id. at 130.

115 Id. at 131
recruiting all give white males an undesirable advantage. The firm, however, decides to make some easy recalibrations to those three things.

The firm swings into action, and a series of small initiatives are launched. They revise their interviewing protocols by making interviews fifteen minutes longer and changing the questions asked to focus more on what the candidate would contribute to the firm’s mission. The firm does not study a candidate’s deal experience or former leadership roles without first inquiring as to the candidate’s vision for the firm’s future. The result through these small changes is that the recruitment process shifts in its tone and substance: more nontraditional candidates are heard from, and the firm is presented with a slate that has diverse work styles, creative experience, managerial skills, and new energy and talent. This is not an impractical conclusion to Small Wins – it is a real example of what a corporation can do.\(^\text{116}\)

Finally, the Small Wins approach can be tied directly to the benefits of boardroom diversity to make a strong one-two punch that could go over well with both the corporation’s constituents and active members. The combination calls for changes in behavior and changes in understanding, and ties the local to the global. It helps the big picture of the firm, and fixes the firm rather than trying to fix the candidates. It allows the firm leeway to make mild alterations in the name of increased profits and shareholder returns.

**Conclusion**

Diversity refers to the variety of difference between employees of all levels in an organization. It may sound like a simple concept to some, but as more firms elect to define diversity broadly, it means that race, gender, ethnicity, age, personality, education and background are all variables to consider in a board or managerial candidate. Diversity involves

\(^{116}\) *Id.*
not only how people perceive themselves, but how they perceive others. Those perceptions affect interpersonal relationships, work product and communities outside of the firm. There is too much at stake financially and socially for firms to ignore diversity, especially amongst their leadership.

Diversity will increase significantly in the coming years. As demographics become more racially mixed, having the right approach to diversity will become a mandatory criterion of successful firms. Commitment to diversity in the workplace is already more than a matter of business sense or ethical obligation, and firms must understand that they do not exist outside of the society in which they participate in. Part of their responsibility as an institution is to be aware of and to assess how their practices can affect the world around them.

This is a crucial time. The business, ethical and cultural cases are well-developed, and firms of all sizes are recognizing the need to arm themselves with the tools to succeed in their diversity goals. As there remain serious legal, economic and social impediments to diversity in the board, the challenge for advocates is to continue to apply pressure, but towards the right measures.