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I. Introduction

The collapse of the “dot.com” stock boom and the subsequent spate of corporate scandals have provoked new skepticism toward big business, corporate law and related institutions. Thus the post-Enron moment would appear to invite new approaches to the study of corporate law. This moment of opportunity happens to coincide with an increase in the number of legal scholars of color, including scholars of corporate law who are as familiar with critical race theory as law-and-economics. As a result, the new millennium may be ushering in the birth of a new sub-field of study: “race and corporate law.”\(^1\) It is still too early to suggest that a unified methodology or school of thought has emerged. But it is worth observing that many corporate law scholars are making the long-overdue acknowledgment that race is a relevant issue in the corporate context.

Despite the post-Enron climate of skepticism about corporate law, however, a key element of 1990s thinking holds sway: the emphasis on increased shareholder value as a normative criterion for evaluating corporate behavior and related public policy. This

\(^1\) Professor, UC Davis School of Law. This paper was prepared for the Workshop on Racial Justice at the Association of American Law Schools’ (AALS) 2004 Mid-Year Meeting. I would like to thank Reynaldo Valencia and the other organizers for inviting me to participate in the Workshop. An earlier version of this paper was presented at the Section on Minority Groups session at the 2004 AALS Annual Meeting in Atlanta, Georgia. I would like to thank Lisa Fairfax for organizing that session and all participants for the helpful discussion at that event. I also thank Charles Yu for research assistance and the UC Davis School of Law for financial support.

\(^1\) This article cites several of the relevant works. More scholarship in this vein appears to be forthcoming, as a number of recent scholarly meetings have addressed the topic: the St. John’s University School of Law and the Northeast People of Color Legal Scholarship Conference jointly sponsored a 2003 symposium entitled The Intersection of Race, Corporate Law, and Economic Development (the proceedings of which were published in 77 ST. JOHN’S L. REV. 701ff. (2003)); the AALS Section on Minority Groups entitled its session at the 2004 AALS Annual Meeting “Enron, WorldCom and You: The Impact of Corporate Scandals on Communities of Color”; the Washington & Lee University School of Law held a symposium in 2004 entitled “Critical Race Theory: The Next Frontier,” featuring papers on tax, bankruptcy and corporate law (proceedings forthcoming in WASH. & LEE L. REV.); and the Washburn University School of Law held a 2004 conference on “Diversity in Corporate America.” Finally, this paper was prepared for a session on business law at the 2004 AALS Workshop on Racial Justice.
emphasis is most crudely expressed in the popular obsession with short-term stock price movements. Discussions of race in the corporate law context have lately tended to operate on corporate law terms—thus, for example, racial diversity in corporate management and workforces has been justified in terms of shareholder value. The question is the extent to which issues of racial justice can and should be addressed in shareholder value terms. Racial justice is becoming a taboo subject, which often has to be explained and justified in nominally “race-neutral” terms. In the post-Enron era, shareholder value is a particularly potent race-neutral mode of discourse.

While the rhetorical strategy of linking diversity to the bottom line is potentially powerful in the current political and cultural climate, the strategy also has limitations and costs. It is not clear that diversity and improved corporate performance always go hand in hand. Furthermore, even strong evidence of a correlation between the two would not necessarily constitute a legal basis to compel corporations to take any action to further racial justice. Finally, there is a danger that adopting the rhetoric of shareholder value will allow arguments for the intrinsic value of racial justice to atrophy. Kellye Testy has argued that a critique of corporate law “risks becoming domesticated and failing to mount a significant challenge to the status quo” if its proponents “accept the values and goals of the structures they seek to alter.” Testy directed this concern at the mere use of corporate law discourse and doctrine by “progressive” commentators, many of whom directly challenge corporate law’s normative emphasis on shareholder wealth. Her concern is doubly apt where “progressives” specifically invoke shareholder wealth to justify their policy agendas.

2 See Part III, below.
II. The Rise of “Shareholder Value” Ideology

Post-Enron America focuses on shareholder wealth with an emphasis bordering on obsession. This focus has spilled out of financial circles and corporate law and into popular discourse. What follows is a brief (and admittedly cursory) history of shareholder value ideology.

The two primary approaches to corporate governance reform can be described as the “shareholder-centered” approach and the “social responsibility” approach. Both of these now-familiar approaches retain much the same form as their famous articulations from the year 1932. That year, Adolf Berle and Gardiner Means published their immensely influential book, *The Modern Corporation and Private Property*. They argued that a fundamental characteristic of large, publicly traded corporations is the “separation of ownership and control.” That is, the professional managers who control the corporation lack accountability to the shareholders who own it. Managers are thus tempted to use their power to enrich themselves rather than their shareholders. Economists have come to refer to this phenomenon as the problem of “agency cost.” Corporate governance reform in this tradition focuses on how to make managers devote themselves to increasing corporate profitability to enrich their shareholders.

By positing the “separation of ownership and control” as a central feature of the corporation, Berle and Means assumed that shareholders are indeed the “owners” of the corporation—that the corporation *should* be run in their interest—and that their interest is to see the corporation increase in value. E. Merrick Dodd questioned the first assumption in a 1932 Harvard Law Review essay. He argued that corporate directors and officers
should not be viewed solely as agents of shareholders. A corporation must also serve the interests of other segments of society, “even if the proprietary rights of its owners are thereby curtailed.”

In contrast to the orthodox approach to corporate governance reform espoused by Berle and Means, corporate governance reform in this tradition seeks to weaken management’s accountability to shareholder interests.

Berle responded to Dodd by arguing that a broad corporate duty to serve society would not only violate shareholders’ private property rights, but would also be so vague as to put no meaningful constraint on managers’ use of corporate assets. These two views of corporate governance continue to clash today. Variations of the two basic positions echo through contemporary corporate governance law and commentary.

By the 1950s, corporate law came to reflect a Dodd-like “managerialism”: the view that, Berle’s objections notwithstanding, “increasing management power in order to balance the interests of various corporate constituency groups—shareholders, workers, suppliers, communities, etc.—is the best way to maximize social welfare from the corporate form.” As a 1953 case put it, “With the transfer of most of the wealth to corporate hands and the imposition of heavy burdens of individual taxation.... [individuals have] turned to corporations to assume the modern burdens of good citizenship in the same manner as humans do.”

Soon after that decision, even Berle conceded that Dodd’s vision had eclipsed his own. Some commentators in the 1970s argued that both managerialism and shareholder-

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4 E. Merrick Dodd, For Whom Are Corporate Managers Trustees?, 45 HARV. L. REV. 1145, 1162 (1932).
5 Adolf A. Berle, Jr., For Whom Corporate Managers Are Trustees, 45 HARV. L. REV. 1365 (1932).
centrism had failed to serve non-shareholder constituents and the environment. They called on government to impose greater substantive regulation of corporate activity.\(^9\)

The shareholder value theory returned in force in the 1970s and 80s. As American industry lost its competitive edge, many commentators blamed managerialism, which insulated directors from shareholder pressure to build corporate value. Financiers who engineered hostile takeovers in this era claimed to be “reforming” this flaw in corporate governance by reintroducing management accountability to “shareholder value.” If managers did not produce wealth for shareholders, takeover artists would buy out current shareholders at a healthy premium and install a new, more efficient management team. Because increased corporate efficiency often involved layoffs, this view was sometimes derided as serving only wealthy shareholders—and the takeover artists themselves—at the expense of jobs. The law responded with devices that protected workers and/or managerial prerogatives: statutes that permitted managers to consider non-shareholder interests (such as job preservation) in resisting takeovers, even at the expense of shareholders,\(^10\) voting rules that protected incumbent directors,\(^11\) and legislation intended to protect workers in the event of plant closings.\(^12\) Nonetheless, the shareholder value movement flowered in the 1980s, helped substantially by institutional

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\(^10\) See, e.g., PA. STAT. ANN. tit. 15, § 1715 (West 2003). As one commentator put it, “When closely examined, most of these statutes seem more managerialist than constituency-oriented, since the balancing of interests is left to non-reviewable management discretion.” Gordon, supra note 6, at 1977.
\(^11\) See Jeffrey N. Gordon, Institutions as Relational Investors: A New Look at Cumulative Voting, 94 COLUM. L. REV. 124, 148 (1994) (arguing that in the 1950s and again in the 1980s, “managerialist motives” led corporate law to disfavor cumulative voting, a device that insures minority representation on corporate boards, but threatens incumbent directors.)
investors that resented managers standing between shareholders and lucrative takeover premiums.  

Managers of the 1990s claimed to have learned the lessons of the takeover era. In contrast to the corporate managers of the 1970s and early 80s, who claimed to be protecting jobs as they resisted takeovers, incumbent managers invoked the mantra of “shareholder value” as they engaged in cost-cutting measures such as mass layoffs (a.k.a. “downsizing”). In the late 1990s, the populist arguments against shareholder value were blunted as multiple factors combined to broaden share ownership: the lure of an apparently endless bull market, the rise of low-cost trading through discount and online brokerages, and the aging of the American population as uncertainty mounted about the future of Social Security and traditional pension plans.  

During the bubble, the pervasiveness of shareholder value ideology fostered an extreme variant: some investors and managers came to view high stock price as an end in itself, regardless of its relationship to productive business activity. This inverted way of thinking contributed to the “dot.com” meltdown and the host of corporate collapses exemplified by Enron. Despite the excesses of its most extreme adherents, the shareholder value ethic has retained its popularity in the post-Enron era. The legal responses to Enron, such as the Sarbanes-Oxley Act and high-profile criminal prosecutions, have been framed in terms of making managers loyal to shareholder   

14 With respect to the increased attention to retirement saving in recent years, see James A. Fanto, We’re All Capitalists Now: The Importance, Nature, Provision and Regulation of Investor Education, 49 Case W. Res. L. Rev. 105, 112-17 (1998).  
interests, focusing on the punishment and deterrence of management fraud and self-dealing.

As noted above, the law’s response to the shareholder value “revolution” of the 1980s was largely “counter-revolutionary” and managerialist. In the aftermath of the dot.com crash and Enron, however, managers have been accused primarily of betraying shareholders, despite the carnage in terms of lost jobs. Consider, for example, that the initial news angle on the Enron collapse focused on its employees, and how the company’s misconduct had cost them both their jobs and retirement savings. Enron was accused of misleading its employees about the company’s circumstances, and then blocking them from trading company stock out of their 401(k) funds while top managers liquidated their own holdings. After filing for bankruptcy, Enron reportedly laid off roughly six thousand employees from December 2001 to January 2002.16 In another high-profile corporate failure, WorldCom reportedly laid off more than 20,000 employees between June 2001 and June 2002, reducing its workforce by ten percent.17 As we all know now, however, the plight of employees in these cases has become at best a subplot.18 The “Enron” story has instead come to represent investor losses in the bubble and resultant rage directed at managers.

18 Section 306 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7244) prohibits directors and officers from selling company stock if employees are blocked from trading in their retirement funds. But this prohibition only applies to a very specific, egregious kind of misconduct that occurred at Enron. A broader problem is that of employees’ 401(k) holdings overconcentrated in employers’ stock—this remains unaddressed. Moreover, the more immediate problem of job losses also remains unaddressed.
In the 1970s, “corporate reform” meant bringing corporate activity into line with legal and social norms, such as those regarding product safety and environmental quality. Just prior to Enron, the corporate scandals causing public concern involved not stock price manipulation, but accusations of widespread racial discrimination at companies including Texaco, Coca-Cola, and Xerox. But “corporate reform” now refers to holding management accountable for shareholder value.

Not only does the new version of “corporate reform” obscure the effect of corporate activity on non-shareholders; it also suggests that Enron and the bubble were caused entirely by management malfeasance. Both these phenomena, however, were at least partly due to shareholders’ own unrealistic expectations. Moreover, due to the separation of ownership and control in large corporations, some degree of loss due to management recklessness and self-dealing is an inherent risk assumed by all investors. Declines in stock price generally are a cyclical phenomenon that shareholders should also expect. Stockholders not only assume at least some degree of this risk, but also can hedge against it to some extent by diversifying their investments. Victims of race discrimination, environmental degradation, and other “externalized” corporate misconduct, however, have no such ability, and thus present a greater public policy concern.

III. The “Monist” Approach to Corporate Social Responsibility

21 See id.
Some commentators reject the traditional dualist choice between doing well for shareholders and doing good for society. Under this view, which Robert Clark has labeled “monism,” a corporation’s socially responsible actions will strengthen the bottom line in the long run even if they reduce profits in the short run. Corporate philanthropy, for example, may not generate immediate profits, but may yield net public relations benefits over time.

Monism is enjoying a renaissance in American popular thought and in corporate governance reform circles. As discussed above, corporate governance orthodoxy tends to define “reform” in terms of improving management fidelity to shareholder wealth concerns. In the 1980s, shareholder-centrism was often dismissed as favoring the wealthy. But in the 1990s, the shareholder class broadened and value increased without the mass layoffs of the 1980s. While the plight of the impoverished and the working poor did not improve, the benefits of the bull market seemed to reach a larger portion of the country in the 1990s than in the 1980s.

This has had a profound effect on the discourse about corporations’ relationship to the “public interest.” It became an article of faith that the rising tide of the stock market would lift all boats. At the height of the bubble, two estimable corporate scholars, Henry Hansmann and Reinier Kraakman, announced the “end of history” for corporate law. In their view, the world had come to agree that American-style shareholder-centrism had triumphed for investors and other constituents alike:

22 ROBERT C. CLARK, CORPORATE LAW 681 (1986).
All thoughtful people believe that corporate enterprise should be organized and operated to serve the interests of society as a whole, and that the interests of shareholders deserve no greater weight in this social calculus than do the interests of any other members of society. The point is simply that now, as a consequence of both logic and experience, there is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.\footnote{Henry Hansmann & Reinier Kraakman, \textit{The End of History for Corporate Law}, 89 Geo. L. J. 439, 441 (2001).}

While the bubble ushered in the latest iteration of shareholder value ideology, the bursting of the bubble did not usher it out. The Enron/dot.com era is seen as a failure because it \textit{failed} to single-mindedly serve shareholder value, not because it tried to. A number of particular managers are guilty of a raft of sins, and corporate governance is due for a period of clean-up. Underlying the current reform discourse, however, there seems to be a desire to blame these wayward managers for killing a phantom golden goose. The legal and market response to Enron seeks greater management accountability to shareholders, but has failed to look squarely at what William Bratton has called the “dark side of shareholder value”: the popular focus on higher stock price \textit{per se} encourages aggressive accounting (much of which remains legal) and other practices that increase nominal share price, rather than encouraging productive economic activity that increases real corporate value.\footnote{Bratton, \textit{supra} note 15, at 1284-85. \textit{See also} Lynn A. Stout, \textit{Stock Prices and Social Wealth}, in \textit{2 NYU SELECTED ESSAYS ON LABOR AND EMPLOYMENT LAW} 131 (David Sherwyn & Michael J. Yelnosky eds., 2003).} I hardly mean to suggest that shareholder value has no place. But the supposed reform of the post-Enron era mainly requires managers to stop lying—which the old law also required. It has done little to break the habit of putting the financial cart before the industrial horse.
At this juncture, then, shareholder value ideology retains its primacy, and arguably retains a fairly extreme form. “Progressive” scholarship, having failed to beat it, is considering joining it by adopting monist rhetoric. For example, Douglas Branson, a scholar long associated with “progressive” corporate law, argues that a “new” approach to corporate social responsibility

…results from perceptions of where enlightened self-interest points corporations and their managers. Absent are the repeated calls for governmental intervention that characterized the 1970s…. [T]he new corporate social responsibility movement is converging with…broader trends in corporate governance…. [T]he new corporate social responsibility movement is but an element of good corporate governance.26

Monist arguments have also appeared in the context of race and corporate law. A fascinating example is the amicus curiae brief filed by sixty-five large U.S. corporations in Grutter v. University of Michigan, the Supreme Court’s recent affirmative action case.27 The corporations argued that affirmative action provides them with a rich and diverse labor pool, and cited the “crucial role [diversity] plays in preparing students to be the leaders this country needs in business, law and all other pursuits that affect the public interest.”28 The brief argued that such benefits to American business give government a compelling interest in affirmative action. The Grutter Court cited the corporations’ argument (among many others) in holding that the educational benefits of diversity constitute a compelling government interest.29

26 Branson, supra note 9, at 1225.
28 Amicus Brief at 2.
29 As the court summarized the argument, “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” Grutter v. Bollinger, 539 U.S. 306, 333 (2003).
The *amicus* brief’s earnest suggestion that racial policy should be judged based on its benefits to business, without even a passing platitude about racial justice, is striking. It conveys the message that the business of America is business—and nothing else. For if diversity’s primary value lies in improving the quality of the workforce, it is worth asking why that expense is not borne by employers rather than taxpayers. I do not mean to argue that the *amici* corporations or their lawyers in fact believe only in the bottom line and have no good faith belief in racial justice. Lawyers, of course, choose arguments that will resonate. These days, economic growth is such an argument, while racial equality for its own sake is increasingly less so. But that is precisely the point: even if the deployment of the monist argument is just skillful rhetoric, the fact that top attorneys for top corporations identified it as such shows where the priorities lie (or are perceived to lie) in American public discourse about business and race.

Admittedly, as an equal protection case, *Grutter* does not directly involve “corporate law” per se. But the use of monist rhetoric by an all-star list of major corporations, including Microsoft and Nike, is a useful barometer of the *zeitgeist* with respect to corporations’ role in society. And, as we shall see, the brief’s very lack of relationship to corporate law proper is emblematic of a significant limitation of monism: it is largely irrelevant to enforceable causes of action under corporate law doctrine.

Corporate law scholars have also argued for racial diversity in monist terms lately. One recent academic study found a correlation between board diversity and firm value.30 A few years before the *Grutter* corporate *amicus* brief made the same argument, Steven Ramirez wrote that “diversity is a source of strategic strength that can enhance

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competitiveness.” Ramirez points to studies in organizational behavior finding that in certain settings, racially and ethnically diverse groups make better quality decisions than homogenous groups. A study by the Conference Board, a group of the business world’s elite leaders, argued that board diversity correlates with better business performance.

While diversity has business benefits, poor management of workplace diversity can be costly. For example, the discrimination lawsuits against Texaco and other corporations, mentioned above, damaged public relations, took a toll on market value, and ultimately led to expensive settlements. Cheryl Wade has argued that these costs indicate the confluence of antidiscrimination and shareholder wealth principles:

At least in the context of racial discrimination, I don’t see the shareholder primacy model as unduly constraining and preclusive of corporate responsibility. The best way to maximize shareholder wealth is to avoid arbitration and litigation of racial discrimination allegations that waste corporate resources in time and money paid to settle claims. Shareholder wealth is also maximized by avoiding negative publicity that may harm shareholder value…. Adherence to shareholder wealth maximization principles…may cause managers and boards to be more diligent about their duties to monitor and investigate race discrimination allegations.

IV. Limitations of the Monist Approach

1. Empirical evidence

As discussed above, some empirical evidence supports the monist position on diversity. But other evidence suggests otherwise; the picture is unclear. Moreover, empirical evidence provides an unstable foundation. Although lawyers have a tendency

31 Ramirez, supra note 19, at 85-86.
32 Ramirez, supra note 19, at 99-100.
33 Id.
34 See id. at 109-10.
to look to empirical studies for definitive “proof” of factual positions, empirical scholars disagree as often as lawyers do. It is extremely difficult to isolate the effect of any one variable on corporate performance, and devising ways to do so inevitably involve uncertainty and subjectivity. Even in those instances where empirical studies reach a consensus, it may change over time. I do not mean to argue that diversity is harmful to corporate performance, but rather that the case is far from clear, and, moreover, that building the case on empirical evidence is a potentially dangerous strategy. Such evidence can be helpful, but it must be secondary to a normative commitment to racial justice for its own sake. Otherwise, justifying diversity policies based on empirical evidence of bottom-line advantages invites rejection of those policies to the extent that other studies produce contrary evidence. Arguing that corporations should embrace diversity because it makes good business sense implies that if diversity does not increase the bottom line, it is unjustified; indeed, that it should be avoided.

As mentioned above, at least one study has found a correlation between diversity and firm value. Correlation is not causation, however, and attributing improved performance to board diversity may be a bit far-fetched. As Lynne Dallas has noted:

Studies of corporate boards of directors that seek to correlate gender and ethnicity to corporate performance are not very useful because most corporate boards, which contain twelve members on average, usually have only one female or minority member who is unlikely to be able to influence significantly board decision making.36

Some studies support the view that diversity improves decision making, as Ramirez has pointed out. But others find that heterogeneous decision-making groups can experience difficulty reaching agreement. Some studies have found that diverse groups are more effective for some purposes in some industries, but that homogeneous bodies

36 Dallas, supra note 13, at 1403 n.181.
are more effective in other contexts. One corporate commentator skeptical of “the Left’s diversity agenda” has noted such findings with considerable relish.

Scholars such as Donald Langevoort and Jill Fisch have argued that the composition of a corporation’s board should be shaped to the particular firm’s needs. Thus they question whether the current vogue for director independence is appropriate for all firms: while independent directors may perform some functions better, insider-dominated boards may be better at other functions. Similarly, although diversifying boards and workforces may improve performance in some corporations, the net effect may be neutral or even negative in others. Indeed, even if board diversity contributes to profitability in most corporations, as some evidence suggests, it is unlikely to have the same effect on all corporations. It is likely that in some businesses, racially diverse boards will yield creative decisions that improve profitability. But at other firms, diversity, whatever its undeniable benefits in terms of creative thinking, equal opportunity or racial sensitivity, may create a lack of cohesion that results in a net harm to the bottom line. Thus, in at least some situations, racial justice and shareholder wealth may conflict, and diversity cannot be justified in monist terms.

2. Doctrine and enforceability

The potential value of diversity is obviously an important insight for corporate America. Efforts to increase diversity, at least in some cases, will be a good business

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37 See id. at 1397 n.161 (citing studies).
practice; in some cases they may be prove to be invaluable. Characterizing diversity initiatives or other race-related policies as business decisions has obvious persuasive power, but it also has significant limitations due to corporate law’s treatment of business decisions. Even if there are empirically compelling bottom-line arguments for diversity, corporate law does not normally give management an enforceable duty to heed such arguments. Corporate law gives boards extremely broad discretion with respect to adopting any given business practice. It does not empower shareholders to compel the adoption of a business practice or to hold managers liable for refusing to adopt it. As the Delaware Supreme Court recently held,

Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal legal requirements of the corporation law are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and can usually help directors avoid liability. But they are not required by the corporation law and do not define standards of liability.  

As Professor Wade has argued, directors are more likely to respond to appeals to the bottom line than appeals to racial justice. Furthermore, directors who choose to pursue diversity initiatives, but encounter resistance from shareholders, can fend off such resistance by presenting the expected bottom-line benefits. However, shareholders cannot use the bottom-line benefits of diversity to compel boards to adopt any policy with respect to diversity or sanction them for failing to do so. Even if they could present evidence showing that diversity would increase the firm’s value, legal doctrine would render it irrelevant. As applied, directors’ supposed duty to “maximize” shareholder wealth is a toothless one. No courts actually require management to maximize shareholder wealth—that is, to show that they have chosen the one use of corporate

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40 Brehm v. Eisner, 746 A.2d 244 (Del. 2000).
41 See supra, text accompanying note 35.
resources that will generate more net wealth than any other. Indeed, such a showing would be all but impossible.

Despite the ubiquitous rhetoric of shareholder value, directors’ ostensibly rigorous duty to enrich shareholders is little more than a rhetorical embellishment of a much more limited duty: a “duty of care” requiring them to follow formal decision-making procedures.\footnote{See id.} That is, corporate case law takes procedural integrity as a proxy for substantive decision-making quality. Under the “business judgment rule,” a fundamental principle of state corporate law, courts are highly deferential to directors’ business decisions when shareholders allege they were made in violation of the duty of care. Courts require boards to engage in informed consideration before making business decisions, but they do not review the substance of such decisions.\footnote{See id. at 264 (“Due care in the decision making context is process due care only.”).} In some cases, it might be argued that directors were presented with a specific opportunity to address diversity to the material benefit of the corporation and its shareholders, yet dismissed it without information or consideration. These cases have the potential for success. And certainly directors violate their duties in those rare instances where they can be shown to have ignored corporate interests and acted out of personal racial animus. But if directors reject diversity-based policies in a formally proper way, or if the issue is never squarely presented to the board, a court will not entertain a shareholder’s retrospective complaint that the result was a costly one, much less that it failed to maximize returns.\footnote{Some commentators have argued that diversity issues are so inherently important that directors who fail to address them have failed their fiduciary duties. Ramirez, supra note 19, at 128-29; Leonard Baynes, Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule, 37 U. RICH. L. REV. 819, 875 (2003) (arguing that shareholders of broadcast corporations may have a cause of action against directors for failing to provide more programming aimed at minorities, on the ground that directors did not inform themselves about the value of the minority broadcast audience). Under existing doctrine, however,}
If diversity is viewed in business terms, then diversity-related corporate decisions must be subjected to a cost-benefit analysis. As Professor Ramirez has argued, diversity can benefit corporations, if managed properly.\textsuperscript{45} That is, a diverse workforce and managerial corps can improve the bottom line in some corporations, provided the corporations are willing to invest the necessary resources in implementing diversity and addressing the potential for racial conflict and discrimination. In at least some cases, and perhaps many, the present value of diversity’s benefits may not outweigh the hefty startup investment. The classic monist take on such situations is that such investment, however costly in the “short run,” will invariably pay off in the “long run.” But this is unverifiable, since the duration of the “long run” is potentially infinite. Furthermore, corporate law leaves the decision of whether to pursue short run or long run benefits entirely to managers’ discretion. Under the business judgment rule, courts will not even consider whether management performed the cost-benefit analysis correctly; it will defer to directors’ conclusions in this regard as long as minimal procedural requirements were satisfied. In the wake of Enron, courts in Delaware, the leading corporate jurisdiction, appear to be holding managers to a higher standard of care, but even so, their decisions retain the traditional focus on procedural factors and deference with respect to the substantive aspects of directors’ business decisions.\textsuperscript{46}

Under well-established legal doctrine, then, even if the benefits of diversity were to become clear, shareholders would have no legal basis to compel diversity initiatives in their corporations. Shareholders can put non-binding proposals to a shareholder vote.

\textsuperscript{45} Ramirez, supra note 19, at 109.

\textsuperscript{46} See, e.g., In re Walt Disney Company Derivative Litigation, 825 A.2d 275 (Del. Ct. Ch. 2003).
While such proposals may impose some informal pressure, management is legally entitled to ignore them whatever the outcome of the vote.\textsuperscript{47} In 2003, for example, Apple Computer shareholders proposed that the corporation count stock options paid to executives as expenses for accounting purposes.\textsuperscript{48} Although a majority of shareholders voted for the proposal, Apple management immediately stated its intention to ignore it.\textsuperscript{49}

3. A Return to Managerialism?

Corporate law provides shareholders with no sword to compel management action with respect to diversity. Rather, it gives management a shield to protect initiatives it chooses to adopt—as well as to protect the choice not to adopt them. This is much like constitutional affirmative action case law, which protects some government programs designed to foster diversity (and invalidates some others), but has never purported to require any such programs. The monist approach to diversity relies on the enlightened self-interest of managers: that bottom-line benefits will bring managers to address issues of race in corporate America. As noted above, however, the bottom-line benefits are unclear. And even assuming that diversity is good for profitability, managers would not be required to pursue it.

As Kellye Testy has argued, “unless the corporate social responsibility movement can also succeed in altering the extant power relationships of corporate law, calls for increased board attention may yield a less-than-progressive result.”\textsuperscript{50} As noted above, corporate law gives managers considerable deference with respect to their judgments

\textsuperscript{47} See Thomas Joo, A Trip Through the Maze of “Corporate Democracy”: Shareholder Voice and Management Composition, 77 St. John’s L. Rev. 735, 754 (2003).
\textsuperscript{48} This is not currently required under prevailing accounting practices, a fact that is much criticized.
\textsuperscript{49} See Joo, supra note 47, at 754-55.
\textsuperscript{50} Testy, supra note 3, at 1240.
about how to serve the bottom line. Boards are not profit-maximizing machines, but groups of fallible human individuals. They may be particularly ill suited to appreciate the value of diversity, which is only one out of a multitude of potential corporate concerns. Corporate boards and executives are overwhelmingly white and male. African Americans and Latinos make up about 30% of the U.S. population, but are estimated to fill only 4% of board seats at Fortune 500 corporations. As Cheryl Wade has argued, white male directors will have difficulty empathizing with people of color. Many of these individuals will not recognize diversity and racial justice as high priorities. In addition, even those who recognize the importance of these issues are unlikely to view them the same way that people of color do.

V. Conclusion

On one hand, monism harnesses racial justice to a powerful rhetorical and political strategy. The shareholder wealth argument has unique potential to win converts to the cause of diversity without pushing too hard on sensitive racial buttons. On the other hand, there is danger in founding a racial agenda on non-racial values. Embracing the shareholder primacy theory pushes aside, and perhaps even undermines, the argument that racial justice is a categorical good. Those who point out the instances where racial justice and corporate wealth coincide must be very careful not to concede that the bottom-line effect is determinative. In some situations, racial justice will harm corporate profitability: antidiscrimination or affirmative action regulations may impose compliance

52 Wade, supra note 35 at 1473.
costs, and lawsuits by employees or customers may result in adverse judgments or settlements. Monism cannot justify such actions; they require an explicit commitment to racial justice as an independent value—a position that is sadly out of favor today.

I do not mean to suggest that any of the authors I have cited hold extreme monist views. I take all of them to be attempting to find room in the dominant corporate discourse to make arguments for racial justice. But shareholder value discourse, whatever its value in certain contexts, has a creeping tendency to blot out concern for other human values. While it is an appropriate criterion in discussing the relative economic merits of many business decisions, it should yield when it conflicts with higher social values. Rather than focusing on reconciling with shareholder value discourse, commentators on race and corporate law should point out that it is not the only valid discourse, even in the corporate arena. The law pertaining to corporations is not limited to the shareholder wealth principle or even to internal corporate governance rules, but also includes broader “non-corporate” law, such as Title VII, that are expressly based on values other than shareholder wealth. Discussing race and corporate law should be an opportunity to apply real human values in the corporate context. The danger lies in inadvertently allowing “corporate” values to reshape our thinking about race. Scholars and teachers of corporate law must make clear that corporations are not governed solely by the profit motive, but in fact operate in the context of legal regulations and social norms. Even libertarian stalwart Milton Friedman, the most famous and ardent defender of the shareholder wealth principle, acknowledged that corporate managers’ duty is to
“make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.”

The monist analysis is somewhat reminiscent of Derrick Bell’s famous “interest convergence” theory of desegregation. Bell argued that at the height of the Cold War, American racial injustice threatened to drive African Americans toward communist ideology; thus the American political and legal establishment came to oppose segregation only as a matter of self-preservation. There is a crucial reversal in the nature of the current discourse, however. Public discourse with respect to desegregation in the post-World-War II era embraced the high-minded rhetoric of racial justice and made little mention of selfish, practical motivations. Post-bubble, post-Enron America, however, favors arguments framed in bottom-line terms, and racial justice is reduced to the role of the tacit, secret motive.

In the current political climate, there is a cost to openly embracing a racial justice agenda. And there are undeniable benefits to cloaking it in the “race-neutral” language of the marketplace. But there is also a potential cost to this strategy. There is a fine line between accommodating the prevailing bottom-line rhetoric and helping to validate that rhetoric. I do not claim to know whether the benefits of this strategy outweigh the costs, but the potential cost should at least be acknowledged and considered.