DIVERSITY ON CORPORATE BOARDS: HOW MUCH DIFFERENCE DOES DIFFERENCE MAKE?

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ABSTRACT

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

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I. INTRODUCTION

In recent years, increasing attention has focused on the influence of gender and racial diversity on boards of directors.[1] Sixteen countries now require quotas to increase women's representation on boards, and many more have voluntary quotas in corporate governance codes.[2] In the United States, support for diversity has grown in principle, but progress has lagged in practice, and controversy has centered on whether and why diversity matters.[3] The stakes in this debate are substantial. Corporate boards affect the lives of millions of employees and consumers, and the policies and practices of the global marketplace. As recent scandals demonstrate, failures in board governance can carry an enormous cost; Enron is a notorious example.[4] Who gains access to these boards is therefore an issue of broad social importance.

This article argues that increasing diversity should be a social priority, but not for the reasons often assumed. Part II begins the discussion by reviewing the underrepresentation of women and minorities on corporate boards.[5] Part III provides a comprehensive

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[1]*See* Susan Franceschet & Jennifer M. Piscopo, *Equality, Democracy, and the Broadening and Deepening of Gender Quotas*, 9 POL. & GENDER 310, 310 (2013).

[2]*Id.* at 311.

[3]*See* Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 867 (2011).

[4]*See generally* Troy A. Paredes, *Enron: The Board, Corporate Governance, and Some Thoughts on the Role of Congress*, *in* NANCY B. RAPOPORT ET AL., ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER 495, 495-538 (2d. ed. 2009).

[5]*See infra* Part II.

review of the research on board diversity, financial performance, and good governance and concludes that the "business case for diversity" is less compelling than other reasons rooted in social justice, equal opportunity, and corporate reputation.[6] Part IV turns to the barriers to achieving greater diversity,[7] and Part V explores strategies that could address them.[8]

II. THE CURRENT STATE OF DIVERSITY ON CORPORATE BOARDS

A. *Female and Minority Representation on Corporate Boards*

Close to three-quarters of members of corporate boards of the largest American companies are white men.[9] According to the most recent data, women hold only 16.9% of the seats on Fortune 500 boards.[10] Women occupy 14.8% of Fortune 501-1000 board seats[11] and only 11.9% of board seats in Russell 3000 companies.[12] The situation in other nations is not markedly better, with the exception of those countries that have mandated quotas.[13]

In the U.S., people of color also occupy a very small percentage of board seats. Among the Standard and Poor's (S&P) 200, 13% of the

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[6] *See infra* Part III.

[7] *See infra* Part IV.

[8] *See infra* Part V.

[9] THE ALLIANCE FOR BOARD DIVERSITY, MISSING PIECES: WOMEN AND MINORITIES ON FORTUNE 500 BOARDS – FACT SHEET, at 2 (2013), *archived at* http://perma.cc/M786-RDX9 (reporting that white males accounted for 73.3% of Fortune 500 company board seats).

[10] *Women on Boards: Quick Take*, CATALYST (Mar. 3, 2014), *archived at* http://perma.cc/LGC5-U7JR; RACHEL SOARES ET AL., 2013 CATALYST CENSUS: *FORTUNE* 500 WOMEN BOARD DIRECTORS 1 (2013), *archived at* http://perma.cc/QE4D-QDKB.

[11] 2020 WOMEN ON BOARDS, 2020 WOMEN ON BOARDS GENDER DIVERSITY INDEX 4 (2013), *archived at* http://perma.cc/6GNR-XH8F.

[12] GMI RATINGS, GMI RATINGS' 2013 WOMEN ON BOARDS SURVEY 17 (2013), *archived at* http://perma.cc/7AB2-B49K.

[13] *See generally* DELOITTE, WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE (3d ed. 2013), *archived at* http://perma.cc/P4LE-W975 (discussing Asian, American, European, African, and Middle-Eastern countries). Norway, which had the first quota law, has the greatest percentage, having 42% women. *Id*. at 15. France, which also has mandatory quotas, has 22.5% of women serving on the boards of SBF120 listed companies. *Id*. at 20. The average for European Union countries is less than 14%. HOUSE OF LORDS [H.L.], EUR. UNION COMM., WOMEN ON BOARDS: REPORT 7 (Nov. 9, 2012) (U.K.); James Kanter, *Europe to Study Quotas for Women on Boards*, N.Y. TIMES, Mar. 5, 2012, at B3 (noting only 13.7% of board seats of large companies in the European Union are occupied by women).

companies have no minorities on their boards,[14] and more than two thirds of the Fortune 500 have no women of color.[15] Only 3.2% of directors are women of color.[16] Within the S&P 100 companies, only 37% have minority women on their boards.[17]

B. *Progress or Plateau?*

Although the overall percentage of women and minorities on corporate boards remains small, the actual number has been growing.[18] By some measures, diversity has increased substantially over the last three decades.[19] In 1973, only 7% of Fortune 1000 boards had any minority directors;[20] thirty-five years later, 76% had at least one minority director.[21] Over the same period, the number of Fortune 100 boards with at least one woman increased from 11%[22] to 97% in 2006.[23] In 2004, the majority of Fortune 100 companies had 0-30% board diversity; by 2012, the majority had 31% or more board diversity.[24] For certain minority groups, the progress has been particularly striking. In the last decade, Asian-American board representation has tripled and Latino board representation has doubled.[25] Among S&P 100 companies, 71% "have achieved [a] critical mass of three or more diverse directors[—]a 4% increase since 2010[;]" only 2% lack any diversity on their boards.[26]

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[14] *See* SPENCER STUART, SPENCER STUART BOARD INDEX 2013, at 19 (2013), *archived at* http://perma.cc/4FJG-5R8U.

[15] *Women Progress on Corporate Boards, but Going Is Slow*, 34 CORP. BOARD 25, 25 (2013).

[16] RACHEL SOARES ET AL., *supra* note 10, at 2.

[17] CALVERT INVS., EXAMINING THE CRACKS IN THE CEILING: A SURVEY OF CORPORATE DIVERSITY PRACTICES OF THE S&P 100, at 19 (2013), *archived at* http://perma.cc/X2MF-YVDQ.

[18] *See id.*

[19] *See* Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV. 1105, 1107 (2005).

[20] *See id.* at 1108.

[21] *See* KORN/FERRY INTERNATIONAL, 33RD ANNUAL BOARD OF DIRECTORS STUDY 11 (2006), *archived at* http://perma.cc/82HK-GVEQ.

[22] *See* Fairfax, *supra* note 19, at 1107-08.

[23] THE ALLIANCE FOR BOARD DIVERSITY, WOMEN AND MINORITIES ON FORTUNE 100 BOARDS 7 (2008), *archived at* http://perma.cc/VC99-A4VG. In more than 40% of Fortune 100 companies, women and minorities held more than 30% of board seats in 2006. *Id.* at 5. Only three companies had no female directors and six companies had no minority directors. *Id*. at 7.

[24] THE ALLIANCE FOR BOARD DIVERSITY, *supra* note 9, at 1.

[25] Fairfax, *supra* note 19, at 1108-09.

[26] CALVERT INVS., *supra* note 17, at 18.

By other measures, however, progress—especially in the past decade—has stalled. For S&P 1500 companies, the share of board seats held by women has only grown from 11% in 2006 to 14% in 2012.[27] Women are also underrepresented as chairs of compensation, audit, and nominating committees, which are among the most influential board positions.[28] At current rates of change, it would take almost seventy years before women's representation on corporate boards reached parity with that of men.[29]

Increases in minority representation pose still greater challenges. Total minority seats on Fortune 100 boards have barely increased since 2003, and the representation of women of color has grown less than 1% since 2003.[30] African-American representation declined from 2010 to 2012.[31] Outside of the largest, most high-profile corporations, progress has been harder to achieve, in part, "because [smaller] companies do not

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[27] *More Women Join Corporate Boards*, INVESTORS' BUS. DAILY (L.A.), Dec. 31, 2012, at A08.

[28] *See* Charles A. O'Reilly, III & Brian G.M. Main, *Women in the Boardroom: Symbols or Substance* 5 (STAN. GRAD. SCH. BUS., Res. Paper No. 2098, 2012) (citing studies regarding gender disparities); *Women Progress on Corporate Boards, but Going Is Slow*, *supra* note 15, at 25 (finding women account for 6% of board leadership roles and 26% of positions on key committees); *see also* Diana Bilimoria & Sandy Kristin Piderit, *Board Committee Membership: Effects of Sex-Based Bias*, 37 ACAD. OF MGMT. J. 1453, 1469 (1994) (finding men, after controlling for experience-based characteristics, were preferred for the compensation, executive, and finance committees, while women were preferred for public affairs committees in Fortune 500 firms). The problem is not limited to the United States. *See generally* Colette Fagan & Maria C. Gonzalez Menendez, *Conclusions*, *in* WOMEN ON CORPORATE BOARDS AND IN TOP MANAGEMENT: EUROPEAN TRENDS AND POLICY 245, 245-58 (Colette Fagan et al. eds., 2012) (describing the situation in Europe); ANNALISA BARRETT, UNEVEN PROGRESS: FEMALE DIRECTORS IN THE RUSSELL 3000, CORP. LIBR. (2010). *Cf.* Craig A. Peterson, James Philpot & K.C. O'Shaughnessy, *African-American Diversity in the Boardrooms of the U.S. Fortune 500: Director Presence, Expertise and Committee Membership*, 15 CORP. GOVERNANCE: AN INT'L REV. 558, 568 (2007) (finding that African-American directors were more likely to sit on audit and public affairs committees and less likely to sit on executive committees).

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

[30] *See* Fairfax, *supra* note 19, at 1110; RACHEL SOARES, NANCY M. CARTER & JAN COMBOPIANO, 2009 CATALYST CENSUS: *FORTUNE* 500 WOMEN BOARD DIRECTORS (Dec. 10, 2009), *archived at* http://perma.cc/3DJ9-CY6S; *supra* Part II.A. Between 2000 and 2007, the number of S&P 500 firms without any minority members actually increased from 36% to 41%, and the number of firms with only one minority member also grew from 58% to 81%. Phred Dvorak, *Some Things Don't Change: Sarbanes-Oxley Was Expected to Increase the Number of Minority Directors; What Happened?*, WALL ST. J., Jan. 14, 2008, at R4.

[31] In Fortune 500 companies, African-American males' representation "[dropped] from 5.7% to 5.5%[], and the representation remained stagnant for [African American] women at 1.9%." THE ALLIANCE FOR BOARD DIVERSITY, *supra* note 9, at 2.

receive as much scrutiny from those promoting gender diversity in the boardroom . . . ."[32]

Moreover, some of the most encouraging numbers on board diversity may conceal less promising trends. The Sarbanes-Oxley Act led many corporations to reduce overall board size, meaning that the same number of women and minority directors may comprise a greater percentage of a now smaller board.[33] In addition, much of the increase in women and minority directors over the last decade may reflect the same individuals sitting on more boards rather than the appointment of new individuals as directors.[34] Many commentators worry that these "trophy directors," who may serve on as many as seven boards, are spread too thin to provide adequate oversight.[35] Another concern is that the appointment of one or two token female or minority members will decrease pressure for continued diversity efforts.[36]

III. THE CASE FOR DIVERSITY ON CORPORATE BOARDS

The growing consensus within the corporate community is that diversity is an important goal.[37] The case for diversity rests on two primary claims. The first is that diversity provides equal opportunity to groups historically excluded from positions of power. The public has a "strong [] interest in ensuring that opportunities are available to all, . . . that women [and minorities] entering the labour market are able to fulfil their potential, and that we make full use of the wealth of talented women . . ." and minorities available for board service.[38] The second

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[32]BARRETT, *supra* note 28. Although 89% of S&P 500 companies have at least one woman director, only 60% of companies in the Russell 3000 have any women. *Id*.

[33]*See* Joan MacLeod Heminway & Sarah White, *Wanted: Female Corporate Directors,* 29 PACE L. REV. 249, 254 (2009) (reviewing DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 144 (2007)). Some research also suggests that there has been recycling of the same minority individuals, particularly African-American men, among Fortune 100 board seats. *See* THE ALLIANCE FOR BOARD DIVERSITY, WOMEN AND MINORITIES ON *FORTUNE* 100 BOARDS 6 (2005), *archived at* http://perma.cc/V4NP-KYS5.

[34]*See* Douglas M. Branson, *Initiatives to Place Women on Corporate Boards of Directors—A Global Snapshot*, 37 J. CORP. L. 793, 800 (2012) ("[W]omen may be serving on four, five, six, or seven boards of directors.").

[35]*See id.*; BRANSON, *supra* note 33, at 98-101, 155.

[36]*See infra* Section IV.C.

[37]For example, in a Catalyst survey of 325 CEOs, almost three-quarters (72%) reported that recruiting a woman director to serve on their company's board was either a "top priority" or a "priority." CATALYST, THE CEO VIEW: WOMEN ON CORPORATE BOARDS 13-14 (1995).

[38]HOUSE OF LORDS [H.L.], EUR. UNION COMM., WOMEN ON BOARDS: REPORT 13-14 (Nov. 9, 2012) (U.K.).

claim is that diversity will improve organizational processes and performance. This "business case for diversity" tends to dominate debates in part because it appeals to a culture steeped in shareholder value as the metric for corporate decision making.[39] This is also the claim on which controversy centers, so it is the focus of the discussion below.

A. *Diversity and Firm Performance*

Despite increasing references to acceptance of the business case for diversity, empirical evidence on the issue is mixed. While some studies have found positive correlations between board diversity and various measures of firm performance,[40] others have found the opposite[41] or no significant relationship.[42] The discussion below reviews these findings, as well as their methodological limitations. One of the most significant constraints is the shortage of studies on racial and ethnic diversity. Most of the modern research focuses on gender, from which commentators often generalize without qualification.

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[39] *See* James A. Fanto, et al., *Justifying Board Diversity*, 89 N.C. L. REV. 901, 932 (2011); Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. 449, 452 (2012) (noting that the moral case is insufficient to drive diversity initiatives); Fairfax, *supra* note 3, at 864 (noting the business community's embrace of the business case); *see also* Fairfax, *supra* note 29, at 589-92 (showing support for the business case); Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 446-47 (2008).

[40] *See* POLICY AND IMPACT COMM. OF THE COMM. FOR ECON. DEV., FULFILLING THE PROMISE: HOW MORE WOMEN ON CORPORATE BOARDS WOULD MAKE AMERICA AND AMERICAN COMPANIES MORE COMPETITIVE 11, 13-14 (2012), *archived at* http://perma.cc/A57Y-8JWA (concluding that women directors help deliver "measurable economic gains" and that the presence of women directors may be the key differentiator in future global success); *Women and Profits*, 79 HARV. BUS. REV. 30, 30 (2001) (reporting Roy Adler's study found a positive relationship); CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2007), *archived at* http://perma.cc/ZP5N-PA3E (finding a positive relationship); Anthony F. Jurkus et al., *Women in Top Management and Agency Costs* 11 (Working Paper Mar. 2011), *archived at* http://perma.cc/PV38-UM6W (finding a positive relationship). Researchers have also looked at gender diversity and non-profit boards. At least one study of non-profit boards finds that the equal representation of sexes enhanced social performance (*i.e.*, an organization's ability to fulfill its mission). Julie I. Siciliano, *The Relationship of Board Member Diversity to Organizational Performance*, 15 J. BUS. ETHICS 1313, 1317 (1996).

[41] *See infra* Part III.A.2.

[42] *See infra* Part III.A.2.

1. Studies Finding a Positive Relationship

One of the most frequently cited studies in support of board diversity is a 2007 Catalyst study.[43] It ranked Fortune 500 companies according to the percentage of women on their boards and found that, from 2001 to 2004, companies in the highest quartile outperformed companies in the lowest quartile by 53% in return on equity (ROE), 42% in return on sales (ROS), and 66% in return on invested capital (ROIC).[44] This study was a univariate analysis, which compares the means of two groups but does not include any control variables that might explain a correlation.[45] The results of such a means comparison can also be skewed by any extreme values in the group.[46] Further, the study did not specify whether the reported differences in means were statistically significant, which could also distort results.[47] In addition, the strength of these relationships did not hold up in Catalyst's follow-up study covering 2004 to 2008, which found no significant difference in ROE.[48]

More recently, advocates of increasing the representation of women on corporate boards have cited a Credit Suisse Research Institute study as evidence that the presence of women leads to better performance.[49] This analysis of 2,360 companies from around the world

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[43] *See* Mijntje Luckerath-Rovers, *Women on Board and Firm Performance*, 17 J. MGMT. & GOV'T 491, 491 (2013). The Catalyst study acknowledges in a footnote that correlation does not imply causation. CATALYST, *supra* note 40, at n.2.

[44] *See* CATALYST, *supra* note 40, at 1 (using univariate tests of differences in means to compare a 4-year average over 2001-2004 of ROE, ROS, and ROIC for top quartile of firms with the highest average percentage of female directors from 2001-2003 versus firms in the lowest quartile). *But see* Luckerath-Rovers, *supra* note 43, at 497-98 (analyzing the shortcomings of the Catalyst study).

[45] *See* Luckerath-Rovers, *supra* note 43, at 500.

[46] *Id.* at 498.

[47] *Id.*

[48] NANCY M. CARTER & HARVEY M. WAGNER, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2004-2008) 1, CATALYST (2011), *archived at* http://perma.cc/BEE2-ZJMU (finding an outperformance by the highest quartile companies over the lowest quartile companies of 16% in ROS, and 26% in ROIC). This study did find, however, that for companies with three or more women board directors in at least four of the five years outperformed those with zero women directors in at least four of the last five years. *Id*. (finding outperformance of 84% on ROS, 60% on ROIC, and 46% on ROE).

[49] CREDIT SUISSE RES. INST., GENDER DIVERSITY AND CORPORATE PERFORMANCE 12-16 (Aug. 2012), *archived at* http://perma.cc/TC6U-FAH2. Another recent study by Thomson Reuters reported that, on average, companies with mixed-gender boards performed similar to or marginally better than a benchmark index, and that companies with no women on their boards underperformed relative to gender-diverse boards. ANDRE CHANAVAT & KATHARINE RAMSDEN, MINING THE METRICS OF BOARD DIVERSITY (2013), *archived at*

found that companies with at least one female director had higher net income growth during a six-year period than companies with no women directors (14% versus 10%); companies with a market capitalization of more than $10 billion that have women on their boards had share price performance 26% higher than comparable businesses with all-male boards.[50] This study also used a means comparison of groups of companies and thus is subject to many of the same criticisms as the Catalyst study.[51]

Other studies, using regression analyses, have also found a positive relationship between board diversity and various measures of firm performance in samples of U.S. companies. Erhardt, Werbel, and Shrader examined five years of data for 112 large companies and found a significant positive correlation between gender and minority representation on boards and return on assets (ROA) and return on investment (ROI).[52] Adams and Ferreira also found a positive significant relationship between the proportion of female directors and financial performance in 1,066 publicly traded companies as measured by Tobin's Q (the ratio of the market value of a firm divided by the replacement cost of its assets), but they found no relationship or a negative relationship between board gender diversity and ROA.[53] Carter, D'Souza, Simkins, and Simpson's study of major U.S. corporations listed in the S&P 500 index, found that gender and ethnic diversity on the board had a significant positive effect on ROA, although it found no effect on Tobin's Q.[54] Another study by Carter et al. found a significant relationship

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http://perma.cc/7SBF-762R ("Companies with no women on their boards . . . had slightly higher tracking errors, indicating potentially more volatility.").

[50]CREDIT SUISSE RES. INST., *supra* note 49, at 12-13.

[51]*Id.*

[52]Niclas L. Erhardt, James D. Werbel & Charles B. Shrader, *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOVERNANCE: AN INT'L REV. 102, 106-07 (2003). ROA measures net income divided by the total value of assets, while ROI measures net income divided by investment capital. *Id*. at 106. The authors recognized that they could be observing reverse causation: firms with better financial performance may be more open to appointing diverse boards. *Id*. at 108.

[53]Renee B. Adams & Daniel Ferreira, *Diversity and Incentives in Teams: Evidence from Corporate Boards* (July 21, 2002) (second chapter of unpublished Ph. D. dissertation, University of Chicago) (on file with author).

[54]David A. Carter, Frank D'Souza, Betty J. Simkins & W. Gary Simpson, *The Gender and Ethnic Diversity of U.S. Boards and Board Committees and Performance*, 18 CORP. GOVERNANCE: AN INT'L REV. 396, 400 (2010) (using ordinary least squares regression with firm and time fixed effects and three-stage least squares with firm and time fixed effects on a sample of S&P 500 firms for the period 1998-2002 to measure the effect of women and minorities board representation on Tobin's Q and ROA). This study also found a positive and significant relationship between the number of women on important board committees and ROA, but it found no relationship to gender or ethnic diversity on boards or committees when

between the percentages of women and minorities on the board and return on assets and equity.[55]

Studies in other countries have also found a positive correlation between gender diversity on boards and measures of financial performance. In Australian firms, Bonn found a positive relationship between the proportion of female directors and book-to-market ratio, while Nguyen and Faff found a positive link between gender diversity and Tobin's Q.[56] Campbell and Minguez-Vera found a significant and positive relationship in Spanish firms between the gender composition on boards and Tobin's Q.[57] In a study of Dutch companies, Luckerath-Rovers found a significant positive relationship between female board representation and return on equity.[58] In a study of Israeli companies in which the government owned a substantial equity interest and required relative gender balance on boards, Schwartz-Ziv found that the ROE and net profit margin were significantly higher in companies with at least three women on their boards.[59]

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measuring financial performance with Tobin's Q, and no relationship between the number of minority directors on the board or on committees and ROA. *Id*. at 410-11.

[55] *See* David A. Carter et al., *Corporate Governance, Board Diversity and Firm Value*, 38 FIN. REV. 33, 51 (2003).

[56] Ingrid Bonn, *Board Structure and Firm Performance: Evidence from Australia*, 10 J. AUSTL. & N.Z. ACAD. OF MGMT. 14, 14 (2004) (finding a positive relationship between the proportion of female directors in 1999 and market-to-book ratio in 2004 for a sample of eighty-four Australian firms); Hoa Nguyen & Robert Faff, *Impact of Board Size and Board Diversity on Firm Value: Australian Evidence*, 4 CORP. OWNERSHIP & CONTROL 24, 28-29 (2007) (finding a positive and significant relationship between board gender diversity and Tobin's Q in a sample of Australian firms in 2000-2001). In another study of top 500 listed Australian firms, Hutchison, Mack, and Plastow explored whether gender diversity affects performance indirectly by moderating the association between firm risk (as measured by volatility of earnings) and financial performance. Marion Hutchison, Janet Mack & Kevin Plastow, *Who Selects the 'Right' Directors? An Examination of the Association Between Board Selection, Gender Diversity, and Outcomes*, ACCOUNTING & FINANCE 1, 23-24 (2014) (concluding that gender diversity moderates the association between risk and performance using ROA as the measure of performance, but not when Tobin's Q is used as the measure of performance).

[57] Kevin Campbell & Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435, 447 (2008) (finding through panel data analysis of sixty-eight Spanish firms that the presence of one or more women on the board does not have a significant effect on firm value, but the ratio of women to men on the board has a significant positive effect on firm value as measured by an approximation of Tobin's Q). The authors concluded that the gender diversity was causing the increase in firm value because they did not find that firm value had a similar effect on diversity. *Id*.

[58] Luckerath-Rovers, *supra* note 43, at 499-503 (studying ninety-nine listed Dutch companies and finding a positive relationship between board gender diversity and return on equity but no relationship with return on sales or return on invested capital).

[59] Miriam Schwartz-Ziv, *Does the Gender of Directors Matter?*, 3-5 (Dec. 2, 2013) (unpublished manuscript), *archived at* http://perma.cc/6NLH-EZZB.

Of course, such correlations do not demonstrate causation. A few studies have claimed to show that board diversity leads to improved financial performance, but causal linkages are extremely difficult to prove.[60] As other studies have suggested, it could be that better firm performance leads to increased board diversity rather than the reverse.[61] More successful firms may be better positioned to attract the female and minority candidates in high demand for board service.[62] Larger and better-performing organizations may have more resources to devote to pursuing diversity and may face more pressure from the public and large institutional investors to increase diversity on the board.[63] Finally, some third factor could be causing both improved performance and greater board diversity.[64]

2. Studies Finding a Negative Relationship or No Significant Relationship

Several other studies of U.S. firms found no relationship or a negative relationship between board diversity and firm performance. Looking at a random sample of one hundred Fortune 500 corporations, Zahra and Stanton found the ratio of board member minorities, including

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[60] *See, e.g.*, Campbell & Minguez-Vera, *supra* note 57, at 446-48 (concluding that gender diversity had a significant causal effect on firm value as measured by an approximation of Tobin's Q, but performance did not have a similar effect on diversity).

[61] *See* Fairfax, *supra* note 3, at 862; Kathleen A. Farrell & Philip L. Hersch, *Additions to Corporate Boards: The Effect of Gender*, 11 J. CORP. FIN. 85, 101 (2005); O'Reilly & Main, *supra* note 28, at 10; CREDIT SUISSE RES. INST., *supra* note 49, at 17. In a sample of 300 non-regulated Fortune 1000 firms from 1990 to 1999, the authors found a positive relationship between ROA and the likelihood of adding a female director. Farrell & Hersch, *supra*, at 86. But the addition of female directors showed no subsequent effect on performance, which indicates reverse causation. *Id*. at 89, 101-02; *see also* Renee B. Adams & Daniel Ferreira, *Gender Diversity in the Boardroom*, 16, 19 (ECGI, Working Paper No. 57/2004, 2004) (finding a positive impact on Tobin's Q when the percentage of women directors was the dependent variable, although ROA was not significant and, that firms with greater variability in stock returns had fewer women directors).

[62] *See* Broome & Krawiec, *supra* note 39, at 434.

[63] *See id.*; *see also* Siri Terjesen et al., *Women Directors on Corporate Boards: A Review and Research Agenda*, 17 CORP. GOVERNANCE: AN INT'L REV. 320, 327-28 (2009); Farrell & Hersch, *supra* note 61, at 102 (hypothesizing either that women directors select high-performing or low-risk firms, or that well-functioning firms are more able to focus on adding diversity).

[64] *See, e.g.*, Amy J. Hillman et al., *Organizational Predictors of Women on Corporate Boards*, 50 ACAD. OF MGMT. J. 941, 944-45 (2007) (finding that organizational size, industry type, firm diversification strategy, and network effects, *i.e.*, links to other boards with women directors, have significant effects on the likelihood of board gender diversity). These and other exogenous variables for which many studies do not control could account for an apparent correlation.

women, was inversely related to the organization's financial performance in terms of profitability and efficiency.[65] They found no relationship between diversity and ROE, profit margin, sales to equity, earnings per share, or dividends per share.[66] Another early study by Shrader et al. concluded that although the proportion of female managers was significantly and positively related to return on sales, ROA, ROE, and ROIC, the proportion of female directors was not significant.[67] Carter et al. found no significant relationship between financial performance, as measured by Tobin's Q, and the number of women or minority directors on the board or on certain board committees.[68] In a study of 250 listed companies from 2000-2006, Hussein and Kiwia found no relationship between female board representation and Tobin's Q.[69] Miller and Triana's 2009 research found no significant relationship between board gender diversity and return on investment or return on sales.[70] O'Reilly and Main's analysis of 2000 firms found no positive association "between either the number of women outside directors on the board or the addition of a woman to the board on [return on assets]."[71] In addition, a meta-analysis of 85 studies of board composition found little evidence that it has any effect on firm performance.[72]

In 2009, Adams and Ferreira studied a sample of firms from 1996-2003 and found a negative relationship between gender diversity and

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[65]Shaker A. Zahra & Wilbur W. Stanton, *The Implications of Board of Directors' Composition for Corporate Strategy and Performance*, 5 INT'L J. MGMT. 229, 231-33 (1988).

[66]*Id.* at 232-35.

[67]Charles B. Shrader et al., *Women in Management and Firm Financial Performance: An Exploratory Study*, 9 J. OF MANAGERIAL ISSUES 355, 365 (1997).

[68]Carter et al., *supra* note 54, at 408. This study did find a positive and significant relationship between both the number of women on the board and the number of ethnic minorities on the board and ROA. *Id.* at 410. But it found no relationship to gender or ethnic diversity on boards or committees when measuring financial performance with Tobin's Q, and no relationship between the number of minority directors on the board or on committees and ROA. *Id*. at 410-11.

[69]Kassim Hussein & Bill Kiwia, *Examining the Relationship Between Female Board Members and Firm Performance—A Panel Study of U.S. Firms* 14 (June 27, 2009), *archived at* http://perma.cc/9AGC-UTVQ (concluding that no relationship exists between female board representation and firm performance as measured by ROA or Tobin's Q in a study of 250 listed U.S. companies from 2000-2006).

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

[71]O'Reilly & Main, *supra* note 28, at 16.

[72]Dan R. Dalton et al., *Meta-analytic Reviews of Board Composition, Leadership Structure, and Financial Performance*, 19 STRATEGIC MGM'T J. 269, 282 (1998).

both ROA and Tobin's Q.[73] The authors concluded "the positive correlation between performance and gender diversity shown in prior literature is not robust to any method of addressing the endogeneity of gender diversity. If anything, the relation appears to be negative."[74] In well-governed firms, increased gender diversity on boards seemed to decrease profitability and stock prices.[75] A study of 400 leading U.S. corporations between 1997 and 2005, by Dobbin and Jung, found that increases in board gender diversity had no effect on subsequent profitability but were followed by marginally significant decreases in stock value.[76] The authors concluded that non-blockholding institutional investor bias—rather than changes in the board's behavior or capabilities—may explain the negative effects.[77]

Studies of board diversity in other countries have also found no link to various measures of firm performance. For Canadian firms, Francoeur et al. found a positive correlation between female officers and financial performance, but no relationship between women directors and performance.[78] In a recent study of UK listed companies, Gregory-Smith, Main, and O'Reilly found no significant relationship between the proportion of women directors and ROA, ROE, total shareholder return, or the price to book ratio.[79] Wang and Clift's 2009 study of non-financial Australian firms revealed no significant relationship between gender or racial diversity on boards and ROA, ROE, or shareholder return.[80] A

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[73] Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 292, 305-07 (2009) (using a regression with fixed firm effects to address endogeneity and possible industry effects).

[74] *Id*. at 306.

[75] *See id*. at 307-08.

[76] Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 833-36 (2010).

[77] The study found that non-blockholding institutional investors significantly decrease their holdings in firms that increase women directors, though blockholding investors significantly increase their holdings. *Id*. at 834. Since non-blockholders own most of the shares, their response dominates, leading to a drop in stock value. *Id*. at 835-37.

[78] *See* Claude Francoeur et al., *Gender Diversity in Corporate Governance and Top Management*, 81 J. BUS. ETHICS 83, 84 (2008) (examining average gross returns and ROE including the Fama and French 3-factor valuation model to account for risk and using univariate and multivariate analyses to compare financial performance for top third to bottom third firms in terms of percentage of women).

[79] Ian Gregory-Smith, Brian G.M. Main & Charles A. O'Reilly III, *Appointments, Pay and Performance in UK Boardrooms by Gender*, 124 THE ECON. J. F109, F122-23 (2014) ("The overall conclusion is . . . that there is no evidence here of any boardroom gender diversity effect showing through to overall company performance.").

[80] Yi Wang & Bob Clift, *Is There a "Business Case" for Board Diversity?*, 21 PAC. ACCT. REV. 88, 95-98 (2009) (finding no statistically significant relationship between the percentage of female directors, the percentage of minority directors, or the percentage of

study by Rose and a study by Smith et al. both failed to find a significant link between female board representation and various measures of firm performance for Danish corporations.[81] A study of Norwegian firms found a negative effect of quotas on performance.[82] Other research on Scandinavian firms has found no relationship between board diversity and organizational performance.[83]

3. Explanations for the Inconclusive Results

In sum, the empirical research on the effect of board diversity on firm performance is inconclusive, and the results are highly dependent on methodology. The mixed results reflect the different time periods, countries, economic environments, types of companies, and measures of diversity and financial performance. The relationship between board characteristics and firm performance likely varies by country because of the different regulatory and governance structures, economic climate and culture, and size of capital markets.[84] Some researchers attribute the varied findings to the methodological shortcomings in many of the studies, including small sample size, short-term observations of performance, and the difficulty of controlling for reverse causation,

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female and minority directors and subsequent ROA, ROE, or shareholder return, and concluding that because higher percentages of female and minority directors do not lead to poor performance, companies can achieve greater board diversity without negatively affecting shareholder wealth).

[81] *See* Caspar Rose, *Does Female Board Representation Influence Firm Performance? The Danish Evidence*, 15 CORP. GOVERNANCE: AN INT'L REV. 404, 408-10 (2007) (finding no significant link in a sample of 443 Danish corporations between female board representation and organizational performance as measured by Tobin's Q); Nina Smith et al., *Do Women in Top Management Affect Firm Performance? A Panel Study of 2,500 Danish Firms*, 55 INT'L J. PRODUCTIVITY & PERFORMANCE MGMT. 569, 588 (2006) (using several statistical methods and multiple measures of firm performance from 1993 to 2001 and finding no significant positive relationship between female board representation and performance, except when elected by staff).

[82] *See* Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation,* 127 Q. J. ECON. 137, 179 (2012). Ahern and Dittmar found significant changes in board composition not only in higher proportions of women, but also in decreased average age and experience, and the authors attributed the decrease in firm value to the law's unintended consequence of younger and less experienced boards. *Id.* at 188.

[83] *See* Rose, *supra* note 81, at 411; *see also* TROND RANDOY ET AL., A NORDIC PERSPECTIVE ON CORPORATE BOARD DIVERSITY (Nordic Innovation Centre 2006) (analyzing board diversity in Norway, Denmark, and Sweden); O'Reilly & Main, *supra* note 28, at 8 (discussing Randoy et al. study).

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

endogeneity, and other omitted variables that may be affecting both board diversity and firm performance.[85] Moreover, with so many different measures of firm performance from which to choose, researchers are likely to find some values that show a positive relationship with board diversity and others that show a negative relationship.[86] Scholars also question whether focusing on short-term accounting measures of financial performance is the best way to measure the impact of diversity. Research is lacking on the relationship between board diversity and long-term stock price performance, which is the "gold standard" measure of shareholder value.[87]

These mixed quantitative results may reflect not only differences in research methodology, but also differences in the context in which diversification occurs.[88] For example, some studies suggest that the influence of minority directors on corporate boards is heavily shaped not only by the prior experience of the directors, but also by the "larger social structural context in which demographic differences are imbedded."[89] The failure to include a critical mass of women or minorities may in some cases prevent the potential benefits of diversity.[90] Those benefits may also be dampened by corporations' well-documented tendency to appoint women and minorities who are least likely to challenge the status quo, or who are "trophy directors," with too many board positions to provide adequate oversight.[91]

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[85] *See* Wang & Clift, *supra* note 80, at 91 (listing the various methodological shortcomings of each of the studies reviewed); *see also* Luckerath-Rovers, *supra* note 43, at 6-7 (noting that boards tend to influence strategic decisions with long-term effects, and most studies use a short time lag to examine effects on performance).

[86] *See generally* Yoav Benjamini & Yosef Hochberg, *Controlling the False Discovery Rate: A Practical and Powerful Approach to Multiple Testing*, 57 J. ROYAL STAT. SOC'Y, Series B (Methodological) 289 (1995) (discussing the problem of multiple testing).

[87] *See* Joseph A. Grundfest, W. A. Franke Professor of Law and Business, Stanford University, Diversity on Corporate Boards: When Difference Makes a Difference (Sept. 10, 2009), *archived at* http://perma.cc/9K4Q-Z8MG; *see also* Byron J. Hollowell, *Examining the Relationship between Diversity and Firm Performance*, 2 J. DIVERSITY MGMT. 51, 51-52 (2007) (examining the 4-year relationship between diversity reputation and shareholder value for a sample of Fortune 500 firms designated as diversity leaders and finding a significant positive relationship, but noted that there is little empirical research on the relationship between diversity and long-term stock price performance).

[88] *See* Fairfax, *supra* note 29, at 592-93.

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

[90] *See* Fairfax, *supra* note 29, at 593.

[91] *See, e.g.*, Marleen A. O'Connor, *Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power*, 65 MD. L. REV. 465, 468 (2006); Fairfax, *supra* note 29, at 592-93.

Perhaps it should not be surprising that studies of the relationship between board diversity and financial performance are inconclusive, given that a direct relationship between various other aspects of board composition and performance has been similarly difficult to establish.[92] Empirical studies of board characteristics usually considered significant and in some cases undesirable, such as large board size, few outside directors, little or no investment by directors, and the CEO serving as board chair, "ha[ve] not yielded much evidence that these 'usual suspects' have any meaningful connection to firm performance."[93] The relationship between board characteristics, including diversity, and company performance may be "complex and indirect."[94] Because boards perform multiple and varied tasks, diversity may affect different

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

[93] Yang Min Kim & Albert A. Cannella, Jr., *Toward a Social Capital Theory of Director Selection*, 16 CORP. GOVERNANCE: AN INT'L REV. 282, 282 (2008); *see also* Dalton et al., *supra* note 72, at 280 (meta-analysis of 54 studies on board composition finding no substantive relationship between board composition and firm performance); Sydney Finkelstein & Ann C. Mooney, *Not the Usual Suspects: How to Use Board Process to Make Boards Better*, 17 ACAD. OF MGMT. EXEC. 101, 101-02 (2003) (finding no significant difference in terms of board size, number of outside directors, director ownership, and CEO role for high-performing versus low-performing companies); Gavin J. Nicholson & Geoffrey C. Kiel, *Can Directors Impact Performance? A Case-Based Test of Three Theories of Corporate Governance*, 15 CORP. GOVERNANCE: AN INT'L REV. 585, 585-86 (2007) (noting that researchers have so far failed to identify "a clear and demonstrable link" between board composition and firm performance, as studies of board independence, leadership structure, board size, and the role of the CEO generally report no significant effect on firm performance, or small but conflicting results); Lucian Bebchuk et al., *What Matters in Corporate Governance?*, 22 REV. OF FIN. STUDIES 783, 823 (2009) (examining twenty-four corporate governance provisions considered significant and finding that 18 of the factors, including director indemnification, director liability, and director duties, were uncorrelated with firm valuation or abnormal returns); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship between Board Composition and Firm Performance*, 54 BUS. LAW. 921 (1999) (finding firms with majority-independent boards do not perform better than firms with insider directors, while supermajority-independent boards may lead to worse performance); David Finegold, George S. Benson & David Hecht, *Corporate Boards and Company Performance: Review of Research in Light of Recent Reforms*, 15 CORP. GOVERNANCE: AN INT'L REV. 865, 871-72 (2007) (finding mixed and inconclusive results in a meta-analysis of over 100 studies of CEO roles, board independence, board size, and board ownership); Benjamin E. Hermalin & Michael S. Weisbach, *The Effects of Board Composition and Direct Incentives on Firm Performance*, 20 FIN. MGMT. 101, 111 (1991) (finding no relationship between board composition in terms of inside versus outside directors and performance).

[94] Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 490 (1999).

functions in different ways, making it difficult to establish any consistent relationship between board diversity and firm performance.[95]

Although empirical research has drawn much-needed attention to the underrepresentation of women and minorities on corporate boards, it has not convincingly established that board diversity leads to improved financial performance.[96] Given the limitations of these studies, many commentators believe that the "business case for diversity" rests on other grounds, particularly its effects on board decision-making processes, corporate reputation, and governance capacities.[97]

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

A common argument by scholars, as well as board members of both sexes, is that diversity enhances board decision-making and monitoring functions.[98] This assertion draws on social science research on small-group decision making, as well as studies of board process and members' experiences.[99] The basic premise is that diversity may lessen the tendency for boards to engage in groupthink—a phenomenon in

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[95] *See* Nielsen & Huse, *supra* note 92, at 137-43 ("[M]ost empirical studies make no distinction between different board tasks and fail to acknowledge that women directors may have a differential rather than uniform impact on the effectiveness in fulfilling theoretically distinct board tasks.").

[96] *See* Steven Brammer et al., *Gender and Ethnic Diversity Among UK Corporate Boards*, 15 CORP. GOVERNANCE: AN INT'L REV. 393, 394-96 (2007).

[97] *See* Broome & Krawiec, *supra* note 39, at 434.

[98] Hedvig Bugge Reiersen & Beate Sjafjell, *Report from Norway: Gender Equality in the Board Room*, 7 & n.23 (2008), *archived at* http://perma.cc/X6NL-783Q (quoting Lynda Gratton & Lamia Walker, *Gender Equality: A Solid Business Case At Last*, FIN. TIMES, Oct. 28, 2007, *archived at* http://perma.cc/B6VL-NTRY) (finding corporate insiders believe that groups with gender balance deliver optimal performance in most areas that "drive innovation").

[99] *See* Fairfax, *supra* note 29, at 586; *see also* John M. Conley et al., *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say about why Diversity Matters* 24 (N.C. Sch. L., Legal Studies Research Paper No. 1415803, 2009), *archived at* http://perma.cc/4Q95-SVHT (finding their qualitative interview-based study indicates that corporate insiders cite benefits to board diversity but may not have a clear picture of the precise ways in which diversity affects board processes or decision making). The John M. Conley et al. study concluded:

> [S]ubjects have mentioned their beliefs that diversity creates a "richer conversation," "an entirely new perspective," "different points of view," and "a very positive dynamic." But it is a theoretical narrative without concrete detail, a story without substance. . . . Overall, our subjects tell a story that amounts to little more than "it seems like a good thing to do."

John M. Conley, *supra*.

which members' efforts to achieve consensus override their ability to "realistically appraise alternative courses of action."[100]

The literature on board decision making reflects three different theories about the process through which diversity enhances performance. The first theory is that women and men have different strengths, and that greater inclusion can ensure representation of valuable capabilities.[101] For instance, some empirical evidence suggests that women generally are more financially risk averse than men.[102] For that reason, many commentators have speculated that women's increased participation in corporate financial decision making could have helped to curb tendencies that caused the most recent financial crisis.[103] A widely discussed panel at a World Economic Forum in Davos put the question: "Would the world be in this financial mess if it had been Lehman Sisters?"[104] Many Davos participants believed that the answer was no, and cited evidence suggesting that women were "more prudent" and less "ego driven" than men in financial management contexts.[105] One study found presence of at least one woman on a company's board was associated with a reduction of almost 40% in the likelihood of a financial restatement.[106] Other research pointed in similar directions, including

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[100] *See* IRVING L. JANIS, VICTIMS OF GROUPTHINK 3 (1972) (the original analysis of "group think"); *see also* Branson, *supra* note 35, at 795 (describing the role of diversity in preventing this dynamic on corporate boards; Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61, 76 (2012); CREDIT SUISSE RES. INST., *supra* note 49, at 20; Fanto et al., *supra* note 39, at 928; Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306-08 (2003); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837, 839 (2003).

[101] *See* O'Connor, *supra* note 100, at 1311-13 (discussing the qualities of women managers).

[102] *See* Nancy Ammon Jianakoplos & Alexandra Bernasek, *Are Women More Risk Averse?*, 36 ECON. INQUIRY 620, 629 (1998); Elsa Ermer et al., *Relative Status Regulates Risky Decision-Making about Resources in Men: Evidence for the Co-Evolution of Motivation and Cognition*, 29 EVOLUTION & HUM. BEHAV. 106, 116 (2008) (showing that men are more prone to risky decision-making).

[103] *See* Nicholas D. Kristof, *Mistresses of the Universe,* N.Y. TIMES, Feb. 8, 2009, at WK. 12; Branson, *supra* note 34, at 795-97. Norway's Minister of Trade similarly claimed that women board members reduce excessive risk taking. Kate Sweetman, *How Women Have Changed Norway's Boardrooms*, HBR BLOG NETWORK (July 27, 2009, 4:07 PM), *archived at* http://perma.cc/57JX-9GKZ.

[104] Katrin Bennhold, *Where Would We Be If Women Ran Wall Street?*, N.Y. TIMES, Feb. 1, 2009, *archived at* http://perma.cc/G3PR-3H7C.

[105] *Id*.

[106] *See* Michael Cohn, *Women on Corporate Boards Encourage Better Financial Reporting*, ACCT. TODAY, Nov. 14, 2012 (citing a study by Lawrence J. Abbott, Susan Parker, and Theresa Presley, published in Accounting Horizons, that suggested the effect resulted from the measure of independence diversity conferred on corporate boards through more

studies from researchers at Harvard and Cambridge Universities, which found a correlation between high levels of testosterone and an appetite for risk.[107]

Some commentators also cite evidence indicating women have higher levels of trustworthiness[108] or collaborative styles[109] that can improve board dynamics.[110] As one female director put it, "[w]omen are more cooperative and less competitive in tone and approach. When there's an issue, men are ready to slash and burn, while women are ready to approach. . . . Women often provide a type of leadership that helps boards do their jobs better."[111] Women's experience with uncomfortable situations may give them particular capabilities in championing difficult issues.[112] Similarly, racial and ethnic minorities' experience of needing to relate to both dominant and subordinate groups provides a form of bicultural fluency that may enhance decision-making.[113]

A second theory of how diversity enhances performance is that women and minorities have different life experiences than white men, and bringing different concerns and questions to the table allows the board to consider "a wider range of options and solutions to corporate issues."[114] Diversity is productive by generating cognitive conflict:

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questioning, greater consideration of alternative viewpoints, and a more deliberative and collaborative decision-making process that counters groupthink).

[107]Sheelah Kolhatkar, *What If Women Ran Wall Street?*, N.Y. MAG. (Mar. 21, 2010), *archived at* http://perma.cc/6P5K-VCD7.

[108]*See* Joan MacLeod Heminway, *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN'S L. J. 173, 181 (2007); Rachel Croson & Nancy Buchan, *Gender and Culture: International Experimental Evidence from Trust Games*, 89 AM. ECON. REV. 386, 389-90 (1999); Alessandro Innocenti & Maria Grazia Pazienza, *Altruism and Gender in the Trust Game* 13-14 (U. Siena Labsi Experimental Econ. Lab. Grp., Working Paper No. 5/2006, 2006), *archived at* http://perma.cc/S4CS-XN75; Jana Vyrastekova & Sander Onderstal, *The Trust Game Behind the Veil of Ignorance: A Note on Gender Differences* 11 (CentER Discussion Paper No. 2005-96, 2005), *archived at* http://perma.cc/7MYY-8TZD.

[109]*See* VICKI W. KRAMER ET AL., CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE 11 (Wellesley Ctrs. for Women, 2006)

[110]*See* CREDIT SUISSE RES. INST., *supra* note 49, at 18 (discussing mentoring and concern with the needs of others).

[111]KRAMER ET AL., *supra* note 109, at 12.

[112]*See* Nancy McInerney-Lacombe et al., *Championing the Discussion of Tough Issues: How Women Corporate Directors Contribute to Board Deliberations*, *in* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL RESEARCH AND PRACTICE 123, 136 (Susan Vinnicombe, Val Singh, Ronald J. Burke, Diane Bilimoirea & Morten Huse, eds. 2008).

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

[114]Fairfax, *supra* note 29, at 590; *see also* KRAMER ET AL., *supra* note 109, at 9; Donald J. Polden, *Forty Years After Title VII: Creating an Atmosphere Conducive to Diversity in the Corporate Boardroom*, 36 U. MEM. L. REV. 67, 85 (2005) (arguing board diversity leads

"conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences."[115] For example, Phillips et al.'s study of group decision making found that when new members were "socially similar" to existing team members, subjective satisfaction was high but actual problem solving results were not.[116] Although team members rated productivity much lower when newcomers were socially dissimilar, the more heterogeneous group was much better at accomplishing the problem-solving task.[117] A diverse board can also enhance the quality of a board's decision-making and monitoring functions because diverse groups are less likely to take extreme positions and more likely to engage in higher-quality analysis.[118]

Some scholars have also suggested that diverse boards can help prevent corporate corruption because they are "bold enough to ask management the tough questions."[119] According to one study, female directors expanded the content of board discussions and were more likely than their male counterparts to raise issues concerning multiple stakeholders.[120] Research has found that heterogeneous groups are

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to better governance because women and minority directors seem to ask different questions than white male directors, and that they bring different experiences and concerns to the table); Ramirez, *supra* note 100, at 840-41 (arguing diversity alters the functioning and deliberative style of boards and would lead to a new culture of scrutiny and reduce corporate corruption). But some commentators have questioned the degree to which gender and racial diversity necessarily equates with diverse perspectives. *See, e.g.,* O'Connor, *supra* note 91, at 468 (noting women executives cannot be too masculine or feminine).

[115]Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1391 (2002); *see also* Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. MGMT. REV. 402, 416 (1996) (noting that observable diversity may affect the number of alternatives considered and the quality of ideas discussed in positive ways); Erica Beecher-Monas, *Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?*, 86 OR. L. REV. 373, 394 (2007).

[116]*See* Katherine W. Phillips et al., *Is the Pain Worth the Gain? The Advantages and Liabilities of Agreeing with Socially Distinct Newcomers*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 336, 337, 346 (2009).

[117]*Id*. at 346.

[118]*See* Dobbin & Jung, *supra* note 76, at 814-15; 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, 831-34 (2005); Forbes & Milliken, *supra* note 94, at 493; Susan E. Jackson, *Consequences of Group Composition for the Interpersonal Dynamics of Strategic Issue Processing*, 8 ADVANCES IN STRATEGIC MGMT. 345, 355-59 (1992); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 75 (2000).

[119]Ramirez, *supra* note 100, at 841.

[120]*See* KRAMER ET AL., *supra* note 109, at 9. In a study of Israeli companies in which the government holds a substantial equity interest and has required relative gender balance for 20 years, Schwartz-Ziv found that boards with at least three directors of each gender in

associated with broader information networks as well as increased creativity and innovation.[121] One study concluded that board racial diversity increased innovation by expanding access to information and networks, and prompting more thorough evaluation.[122] Overall, studies on the relationship between board diversity and its capacity for strategic change have reached conflicting results.[123]

Although research suggests that functionally or occupationally diverse groups may solve problems more quickly and effectively than homogeneous teams, demographic diversity may not improve decision-making processes and outcomes in the same ways.[124] The educational, socioeconomic, and occupational backgrounds of women and minority directors tend to be quite similar to those of other directors.[125] Accordingly, some commentators have questioned the extent to which demographic diversity brings relevant diversity in perspectives.[126] Even when women and minorities have a different view, if they are

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attendance were twice as likely to both request further information and to take an initiative, compared to boards without such "critical masses," boards with at least three female directors were more likely to experience CEO turnover when performance was weak, and individual male and female directors were more active when at least three women directors were present at board meetings. *See* Schwartz-Ziv, *supra* note 59, at 22.

[121] *See* Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 208-09 (2009); Nancy DiTomaso et al., *Workforce Diversity and Inequality: Power, Status, and Numbers*, 33 ANN. REV. SOC. 473, 488 (2007).

[122] *See* Miller & del Carmen Triana, *supra* note 70, at 777 (2009). This study found that board racial diversity had a positive and significant relationship with innovation and reputation and that board gender diversity had a positive and significant association with innovation but not with firm performance. *Id.* at 755. Board racial diversity had a positive and significant relationship with firm performance, though board gender diversity did not have a significant effect. *See id.* When control variables for innovation and reputation were included in the regression, the effect of board racial diversity on performance was reduced. *Id*. at 769, 771-73. The authors attempted to determine if causation was running in the opposite direction and concluded that the possibility of reverse causality was minimal. *Id*. at 774.

[123] *Compare* Jerry Goodstein et al., *The Effects of Board Size and Diversity on Strategic Change*, 15 STRATEGIC MGMT. J. 241, 246 (1994) (finding that boards with members from diverse occupational backgrounds were less likely to initiate strategic change during periods of environmental flux), *with* Christopher M. Treichler, *Diversity of Board Members and Organizational Performance: An Integrative Perspective*, 3 CORP. GOVERNANCE: AN INT'L REV 189 (1995) (finding that at least under certain conditions, diversity is positively associated with strategic change), *and* Morten Huse et al., *Women and Employee-Elected Board Members, and Their Contributions to Board Control Tasks*, 89 J. BUS. ETHICS 581, 583 (2009) (suggesting that women may positively influence qualitative tasks, such as strategic controls and corporate social responsibility, while men tend to focus on quantifiable issues to the exclusion of the human and social aspects of business).

[124] SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 324-35 (2007); Dobbin & Jung, *supra* note 76, at 814-15.

[125] Fairfax, *supra* note 118, at 832-36.

[126] O'Reilly & Main, *supra* note 28, at 23; O'Connor, *supra* note 91, at 468.

represented at only token levels, they may lack sufficient leverage to influence the discussion. Studies on the influence of gender on leadership behavior are mixed, but some suggest that men and women who occupy the same role tend to behave similarly.[127] Moreover, in some studies, demographic diversity leads to increased conflict and poor communication, which tend to counteract or dominate the benefit of broader perspectives.[128] Research also shows mixed effects of gender diversity on problem-solving abilities.[129] Diverse teams may also experience increased levels of anxiety and frustration.[130] One study found that racial (but not gender) diversity increased the risk of emotional conflict and that such interpersonal clashes characterized by anger, frustration, and other negative feelings adversely affect performance.[131] As Scott Page summarizes the evidence, demographically diverse groups tend to outperform homogeneous groups "when the task is primarily problem solving, when their identities translate into relevant tools, when they have little or no [difference in what they value], and when their members get along with one another."[132]

A third theory on how diversity enhances performance is that the very existence of diversity alters board dynamics in ultimately positive ways. Mannix and Neale, for example, argue that the presence of visibly diverse members enhances a group's ability to handle conflict by signaling that differences of opinion are likely.[133] A group that lacks

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[127]Nielsen & Huse, *supra* note 92, at 138. For a review of the research, see Deborah L. Rhode & Barbara Kellerman, *Women and Leadership: The State of Play*, *in* WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 1, 16-20 (Barbara Kellerman & Deborah L. Rhode eds., 2007).

[128]*See* Dobbin & Jung, *supra* note 76, at 817; PAGE, *supra* note 124, at 325; O'Reilly & Main, *supra* note 28, at 24; *see also* Karen A. Jehn et al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, 44 AD. SCI. Q. 741, 756 (1999) (unless carefully managed, diversity can lead to negative outcomes).

[129]*See* Susan E. Jackson & Aparna Joshi, *Diversity in Social Context: A Multi-Attribute, Multilevel Analysis of Team Diversity and Sales Performance*, 25 J. ORG. BEHAV. 675, 676 (2004). One meta-analytic review of research showed no consistent link between diversity and group performance. *See* Sheila Simsarian Webber & Lisa M. Donahue, *Impact of Highly and Less Job-Related Diversity on Work Group Cohesion and Performance: A Meta-Analysis*, 27 J. MGMT. 141, 142 (2001).

[130]Fairfax, *supra* note 118, at 834.

[131]*See* Lisa Hope Pelled et al., *Exploring the Black Box: An Analysis of Work Group Diversity, Conflict, and Performance*, 44 ADMIN. SCI. Q. 1, 2, 20-24 (1999) (finding that gender diversity had no effect on emotional or task conflict, with task conflict defined as when group members disagree about goals, key decision areas, procedures, and appropriate actions).

[132]PAGE, *supra* note 124, at 328.

[133]*See* Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. IN THE PUB. INT. 31, 35-38 (2005).

diversity is less likely to handle conflict well because it is not expected.[134] Other scholars have drawn on this signaling theory to argue "that a diverse board conveys a credible signal to relevant observers of corporate behavior . . . ."[135] Board diversity can convey a commitment to equal opportunity, responsiveness to diverse stakeholders, and a general message of progressive leadership, which can enhance the corporation's public image.[136]

Empirical evidence is limited, but some findings are consistent with this theory. Catalyst has found a relationship between the proportion of female directors and the proportion of female officers a corporation is likely to have in the future.[137] Other studies have indicated that in some sectors, the presence of female or minority directors can enhance a firm's reputation with consumers.[138] In explaining these findings, researchers have suggested that board diversity may enhance firm reputation by sending signals to investors "about the robustness of the governance mechanisms in place and the quality of the firm."[139] Yet the significance of such claims should not be overstated. It is unclear how aware employees, consumers, and the general public are concerning board composition.

Scholars also have attempted to determine whether diversity might affect the likelihood and effectiveness of whistleblowing.[140] Some theorists have claimed that women's frequent outsider status and greater experience of unfairness might increase their willingness to report misconduct.[141] By contrast, other commentators have noted that

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[134] *See id*. at 33 (discussing the value of diversity).

[135] Broome & Krawiec, *supra* note 39, at 447.

[136] *See id*. at 448; CATALYST, ADVANCING WOMEN LEADERS: THE CONNECTION BETWEEN WOMEN BOARD DIRECTORS AND WOMEN CORPORATE OFFICERS 9 (2008), *archived at* http://perma.cc/37BC-FR65; Fairfax, *supra* note 118, at 852; Fanto et al., *supra* note 39, at 931.

[137] CATALYST, *supra* note 136, at 6 (noting firms with two or more women board directors in 2001 had nearly 30% more female corporate officers in 2006 than firms with only one woman board director in 2001).

[138] *See* Stephen Brammer et al., *Corporate Reputation and Women on the Board*, 20 BRIT. J. MGMT. 17, 19-21 (2009) (discussing the positive effects of gender diversity on a firm's reputation); Miller & del Carmen Triana, *supra* note 70, at 775 (discussing the positive effects of racial diversity on firm reputation); *see also supra* note 70 and accompanying text.

[139] Miller & del Carmen Triana, *supra* note 70, at 762.

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

[141] MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES 120 (1992); MARCIA P. MICELI, JANET P. NEAR & TERRY MOREHEAD DWORKIN, WHISTLE-BLOWING IN ORGANIZATIONS 60-61 (2008).

whistleblowing is correlated with high levels of self-esteem and perceived power—traits more likely to be associated with men.[142] Empirical evidence yields conflicting results. Early studies of federal workers showed that men were more likely than women to be whistle-blowers.[143] Subsequent studies have reached inconsistent conclusions, and more recent studies have found no gender differences in the likelihood of whistle-blowing.[144]

Additional empirical studies have identified a positive correlation between diversity and other measures of good governance. Adams and Ferreira, for example, found firms that have a higher representation of women hold more meetings, have higher attendance rates, experience greater participation in decision making, engage in tougher monitoring, and are more likely to replace a CEO when the stock performs poorly.[145] Ibrahim and Angelidis' survey of nearly 400 corporate directors concluded that female directors exhibit a stronger commitment to corporate social responsibility.[146] A study by the Conference Board of Canada found that, on average, organizations whose boards have two or more women adopt a greater number of accountability practices and regularly review more non-financial performance measures than

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[142]MICELI & NEAR, *supra* note 141, at 121; MICELI, NEAR & DWORKIN, *supra* note 141, at 62 (noting that "theory suggests that men will be somewhat more likely to report wrongdoing than will women" because men occupy a greater proportion of high-status positions with opportunities to observe wrongdoing and a greater proportion of professions with ethical codes that encourage whistleblowing, and women may experience greater harm from whistleblowing because it is seen as a nonconforming behavior).

[143]*See* U.S. MERIT SYSTEMS PROTECTION BOARD, BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS 26 (1984). *But see* WHISTLEBLOWING AND THE FEDERAL EMPLOYEE app. B, at 8 (1981) (using an anonymous questionnaire that didn't ask for gender attribution).

[144]*See* MICELI, NEAR & DWORKIN, *supra* note 141, at 61; Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation*, 26 WORK & OCCUPATIONS 107, 113 (1999) (suggesting that internal whistleblowers were more likely to be women). *See generally* Terance D. Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct*, 64 SOC. INQUIRY 322, 334 (1994) (hypothesizing about reasons behind women and men's whistleblowing); Randi L. Sims & John P. Keenan, *Predictors of External Whistleblowing: Organizational and Intrapersonal Variables*, 17 J. BUS. ETHICS 411, 418 (1998).

[145]*See* Adams & Ferreira, *supra* note 61, at 2 (attendance); Adams & Ferreira, *supra* note 73, at 298-301 (attendance and monitoring).

[146]*See* Nabil A. Ibrahim & John P. Angelidis, *Effect of Board Members' Gender on Corporate Social Responsiveness Orientation,* 10 J. APPLIED BUS. RES. 35, 36 (1994) ("[D]iscretionary activities are purely voluntary and guided by a firm's desire to make social or philanthropic contributions not mandated by economics, law, or ethics.").

organizations with all-male boards.[147] The study further found that boards with more women paid greater attention to audit and risk oversight than all-male boards.[148] However, as in many of the preceding studies, correlation does not demonstrate causation, and it could be that well-governed corporate boards are more committed to diversity and seek greater gender parity.[149] Moreover, in Adams and Ferreira's 2009 study, although a higher proportion of women correlated with better board monitoring, it had a negative effect on financial performance in well-governed firms.[150]

Given the competing findings and methodological limitations of these studies, the financial benefits of board diversity should not be overstated.[151] But neither should boards understate other justifications for diversity, including values such as fairness, justice, and equal opportunity, as well as the symbolic message it sends to corporate stakeholders.[152] A diverse board signals that women's perspectives are important to the organization, and that the organization is committed to gender equity not only in principle but also in practice.[153] Further, corporations with a commitment to diversity have access to a wider pool of talent and a broader mix of leadership skills than corporations that lack such a commitment.[154] For example, the adverse publicity that Twitter received when it went public with a board of all white men is a case study in the reputational costs of a leadership structure that fails to reflect the diversity of the user community it serves.[155]

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[147] DAVID A.H. BROWN ET AL., THE CONFERENCE BOARD OF CANADA, WOMEN ON BOARDS: NOT JUST THE RIGHT THING . . . BUT THE "BRIGHT" THING 11 (2002), *archived at* http://perma.cc/57FC-8YU5.

[148] *Id*.

[149] *See* Broome & Krawiec, *supra* note 39, at 434.

[150] Adams & Ferreira, *supra* note 73, at 308.

[151] Fairfax, *supra* note 118, at 853.

[152] *Id*. at 850 ("[A]dvocates should use their energies to develop new modes of thinking about the moral and social imperatives for diversity . . . ."); *see also* Fanto et al., *supra* note 39, at 934 (noting the symbolic value of diverse boards in reaffirming anti-discrimination norms); Rushworth M. Kidder, *Diversity on Corporate Boards—Why it Matters*, MINORITY BUS. ROUNDTABLE, *archived at* http://perma.cc/46ZX-PBDA (last visited Apr. 27, 2014); *see also* Brammer et al., *supra* note 96, at 393-94 (discussing ethical arguments based on equal opportunity and equal representation).

[153] Brammer et al., *supra* note 96, at 394-95.

[154] CREDIT SUISSE RES. INST., *supra* note 49, at 18.

[155] Claire Cain Miller, *Curtain is Rising on a Tech Premier with (as Usual) a Mostly Male Cast*, N.Y. TIMES, Oct. 4, 2013, *archived at http://perma.cc/K2L2-NJDS*. Men and women use Twitter almost equally. *Id*. Twitter has since appointed a woman, Marjorie Scardino, to its board of directors. Vindu Goel, *Twitter Appoints Marjorie Scardino as First Female Board Member*, N.Y. TIMES, Dec. 5, 2013, *archived at* http://perma.cc/DPS3-MY6Z.

IV. BARRIERS TO ACHIEVING DIVERSITY

Given the growing support for diversity on corporate boards, why has it been so difficult to achieve? One obvious explanation is that the research on performance is too mixed to make diversification a priority. Antonio Perez, CEO of Kodak, put the point bluntly: "the real barrier . . . [is that many] corporations don't believe that it is a business imperative."[156] Other explanations involve unconscious bias and the counterproductive effects of tokenism.[157] These factors both directly impede appointment of qualified female and minority candidates, and prevent others from gaining the leadership experience that would make them attractive choices.[158] A third explanation is resistance to "special preferences."[159] As with other forms of affirmative action, opponents believe that selecting members on the basis of race or gender reinforces precisely the kind of color consciousness and sex stereotyping that society should be seeking to eliminate.[160]

A. *Lack of Leadership Experience*

One of the most common reasons for the underrepresentation of women and minorities on corporate boards is their underrepresentation in the traditional pipeline to board service.[161] The primary route to board directorship has long been through experience as a CEO of a public corporation. Indeed, one study found over one-half of male Fortune 500 directors were CEOs or former CEOs.[162] A National Association of Corporate Directors survey found CEO-level experience the most

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[156] *See* Antonio Perez, Chariman and Chief Executive Officer, Eastman Kodak Company, Diversity on Corporate Boards: When Difference Makes a Difference (Sept. 10, 2009), *archived at* http://perma.cc/V2XJ-WFEV.

[157] *See* Fairfax, *supra* note 29, at 595-96.

[158] *See id.* at 600-02.

[159] *See* Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity* Policies, 71 AM. SOC. REV. 589, 595 (2006).

[160] *Id.*

[161] *See* Fairfax, *supra* note 29, at 599-600 (finding a "dearth" of women among the executive ranks); Fairfax, *supra* note 3, at 880 (stating that executive experience is the most common characteristic of Fortune 1000 directors).

[162] *See* Lissa Lamkin Broome, *The Corporate Boardroom: Still a Male Club*, 33 J. CORP. L. 665, 665-67 (2008) (reviewing BRANSON, *supra* note 33); *see also* Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703, 707 (2007) ("[T]he primary source of board members traditionally has been CEOs and former CEOS . . . ."); ERNST & YOUNG, GETTING ON BOARD: WOMEN JOIN BOARDS AT HIGHER RATES, THOUGH PROGRESS COMES SLOWLY 4 (2012) (reporting that 80% of female directors have executive experience).

important functional background in the search for a new director, with 97% of respondents considering professional experience "critical" or "important" for board candidates.[163] Given the low representation of women and minorities in top executive positions, their talents are likely to be underutilized if selection criteria are not broadened. Women constitute only 3.5% of Fortune 1000 CEOs and 14.6% of Fortune 500 executive officer positions.[164] Minorities make up 4.6% of Fortune 500 CEOs.[165]

Even women and minorities who reach upper-level management positions often do so through routes other than profit and loss responsibility, which provides crucial experience for board positions.[166] From male directors' perspective, lack of executive experience is the primary reason why the percentage of women on boards is not increasing.[167]

However, recent developments—including requirements of director independence and financial expertise, restrictions on current CEOs serving on outside boards, and increased attention on age and tenure limits—may encourage boards to revisit traditional criteria for board service and expand the pipeline for women and minorities.[168] The number of active CEOs who serve on the boards of other public companies, and the proportion of newly elected independent directors who are CEOs, has decreased significantly during the last decade.[169]

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[163] NAT'L ASS'N OF CORP. DIRS. & CTR. FOR BD. LEADERSHIP, 2009 NACD PUBLIC COMPANY GOVERNANCE SURVEY 21 (2009).

[164] Joann S. Lublin & Kelly Eggers, *More Women Are Primed to Land CEO Roles*, WALL ST. J. ONLINE (Apr. 30, 2012, 2:53 PM ET), *archived at* http://perma.cc/ZV3U-R2K9; RACHEL SOARES ET AL., 2013 CATALYST CENSUS: *FORTUNE* 500 WOMEN EXECUTIVE OFFICERS AND TOP EARNERS 1 (2013), *archived at* http://perma.cc/W56A-XEZU.

[165] *Where's the Diversity In Fortune 500 CEOs?*, DIVERSITYINC, *archived at* http://perma.cc/JX57-T2FY (last visited Apr. 1, 2014).

[166] Fairfax, *supra* note 29, at 600-01.

[167] BORIS GROYSBERG & DEBORAH BELL, 2012 BOARD OF DIRECTORS SURVEY 3 (2012), *archived at* http://perma.cc/QWC3-LXLY(survey facilitated by Heidrick & Struggles and WomenCorporateDirectors (WCD)); *see also* Carmen Nobel, *Few Women on Boards: Is There A Fix?* (2013), HARV. BUS. SCH., *archived at* http://perma.cc/82AG-QP66. In contrast, women directors cited the fact that "traditional networks tend to be male-oriented" as the primary reason for the stagnation in women's representation on corporate boards over the last ten years. Nobel, *supra*. For an interesting profile of the first woman to serve on the board of large publicly traded corporations, see David F. Larcker & Brian Tayan, *Pioneering Women on Boards: Pathways of the First Female Directors* 1-2 (2013), STAN. CLOSER LOOK SERIES, *archived at* http://perma.cc/R383-V75P.

[168] *See* Barnard, *supra* note 162, at 708-10.

[169] DAVID LARCKER & BRIAN TAYAN, A REAL LOOK AT REAL WORLD CORPORATE GOVERNANCE 28 (2013). However, the percentage of Fortune 500 board seats held by active CEOs increased by 6.5% in 2013, the first increase in that number in 23 years. *See* Amanda

There is "no widely accepted" research demonstrating that active CEOs make better board members or lead to improved advice or monitoring by the board.[170] In fact, one survey found that 79% of corporate directors do not believe that "active-CEO directors [are] better than average directors."[171] As more corporations have positive experiences with board members of varied backgrounds, they may see the value in relying less on chief executives, whose experience may come at a cost because they are "used to running the show" and juggle intense competing priorities.[172]

B. *Bias*

Another barrier to diversity in the selection of corporate boards, and in the corporate management pipeline that feeds them, is "in-group" bias—the preferences that individuals feel for those who are like them in important respects, including race, ethnicity, and gender.[173] Such bias is particularly likely in contexts where selection criteria are highly subjective, as is often true in board appointments.[174] Indirect evidence for the importance of such favoritism comes from research showing that when CEOs are more powerful than their boards, new directors are likely

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Gerut, *CEOs Returning to Outside Directorships*, AGENDA WEEK (Dec. 23, 2013), http://www.agendaweek.com (subscription required).

[170] LARCKER & TAYAN, *supra* note 169, at 30.

[171] HEIDRICK & STRUGGLES & STAN. ROCK CTR. FOR CORP. GOVERNANCE, 2011 CORPORATE BOARD OF DIRECTORS SURVEY 2, 11 (2011); *see also* LARCKER & TAYAN, *supra* note 169, at 30-31.

[172] *See* Michelle R. Clayman, Founder, Managing Partner, and Chief Investment Officer, New Amsterdam Partners LLC, Diversity on Corporate Boards: When Difference Makes a Difference (Sept. 10, 2009), *archived at* http://perma.cc/5D4S-RE23; *see also* LARCKER & TAYAN, *supra* note 169, at 30 ("Although respondents value the strategic and operating experience of CEO directors, when asked about their undesirable attributes, a full 87% believe that active CEOs are too busy with their own companies to be effective."); HEIDRICK & STRUGGLES & STAN. ROCK CTR. FOR CORP. GOVERNANCE, *supra* note 171, at 11 (reporting that responding directors felt active CEOs were: "[t]oo busy with their company to be effective directors" (87%); "[t]oo interested in networking/promoting their own company to be effective directors" (21%); "[t]oo bossy/used to having their own way" (33%); and "[n]ot good collaborators" (28%)) (emphasis omitted).

[173] *See* Milliken & Martins, *supra* note 115, at 420-21; Barbara F. Reskin, *Rethinking Employment Discrimination and its Remedies, in* THE NEW ECONOMIC SOCIOLOGY: DEVELOPMENTS IN AN EMERGING FIELD 218, 221-22 (Mauro F. Guillen et al. eds., 2002). *See generally* Marilyn B. Brewer & Rupert J. Brown, *Intergroup Relations*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 554 (4th ed.) (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 1998) (reviewing frameworks of intergroup relations studies); Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY *supra*, at 357 (review of social stereotyping studies).

[174] BRANSON, *supra* note 33, at 14-15.

to be similar to the CEO.[175] Conversely, when the board is more powerful, new directors are more likely to be similar to existing board members.[176] In-group bias keeps women out of the informal networks of advice and support from which appointments are often made.[177] Female directors see exclusion from such networks as the most important reason for women's underrepresentation on corporate boards.[178]

In-group favoritism also influences perceptions of competence.[179] Members of in-groups tend to attribute accomplishments of fellow members to intrinsic characteristics, such as intelligence, drive, and commitment.[180] By contrast, the achievements of out-group members are often ascribed to luck or special treatment.[181] Even in experimental situations where male and female performance is objectively equal, women are held to higher standards, and their competence is rated lower.[182] As one Australian study concluded, "women's competence has to be widely acknowledged in the public domain or through family connections before boards . . . will be prepared to 'risk' having a woman on the board."[183] Many women directors report they have to be "twice as good as men" to get board appointments.[184] In-group preferences often

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[175] James D. Westphal & Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40 ADMIN. SCI. Q. 60, 61-65 (1995).

[176] *Id.*

[177] *See* Belle Rose Ragins, *Gender and Mentoring Relationships: A Review and Research Agenda for the Next Decade*, *in* HANDBOOK OF GENDER & WORK, 347, 350-65 (Gary N. Powell ed. 1999); CATALYST, WOMEN IN CORPORATE LEADERSHIP: PROGRESS AND PROSPECTS 39-40 (1996); Timothy L. O'Brien, *Up the Down Staircase*, N.Y. TIMES, Mar. 19, 2006, *archived at* http://perma.cc/B7JV-BN96.

[178] GROYSBERG & BELL, *supra* note 167, at 3.

[179] *See* John F. Dovidio & Samuel L. Gaertner, *Stereotypes and Evaluative Intergroup Bias, in* AFFECT, COGNITION, AND STEREOTYPING 167, 170-71 (Diane M. Mackie & David L. Hamilton eds., 1993); Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOC. PSYCHOL. Q. 237, 237-38 (1996).

[180] Dovidio & Gaertner, *supra* note 179, at 170-71; Foschi, *supra* 179, at 237-39.

[181] *See* Jennifer Crocker et al., *Social Stigma, in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 504, 508-09 (4th ed.) (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 1998); Dovidio & Gaertner, *supra* note 179, at 170-71; Martha Foschi, *Double Standards for Competence: Theory and Research*, 26 ANN. REV. SOCIOL. 21, 31-32 (2000); Linda Hamilton Krieger, *The Content of Our Categories*: *A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187-88, 1204-05 (1995); Cecilia L. Ridgeway, *Interaction and the Conservation of Gender Inequality: Considering Employment*, 62 AM. SOC. REV. 218, 221 (1997).

[182] Foschi, *supra* note 179, at 240-246; Jacqueline Landau, *The Relationship of Race and Gender to Managers' Ratings of Promotion Potential*, 16 J. ORG. BEHAV. 391, 392 (1995).

[183] Allison Sheridan & Gina Milgate, *Accessing Board Positions: A Comparison of Female and Male Board Members' Views*, 13 CORP. GOVERNANCE: AN INT'L REV. 6 (2005).

[184] Maria C. Gonzalez Menendez et al., *Introduction*, *in* WOMEN ON CORPORATE BOARDS AND IN TOP MANAGEMENT: EUROPEAN TRENDS AND POLICY 1, 3 (Colette Fagan et al. eds., 2012).

exclude women and minorities from the informal network of mentoring, contacts, and sponsorship support, all of which are critical for advancement. It follows that women and minorities are less likely to have the experience and credentials thought necessary for board appointments.[185] Lack of mentoring of minority and women directors also keeps them from obtaining additional board appointments.[186] Women of color in particular experience difficulties of isolation and exclusion.[187]

Stereotypes about competence compound the problem. Despite recent progress, women and minorities often lack the presumption of competence enjoyed by white men, and need to work harder to achieve the same results.[188] Male achievements are more likely to be attributed to individual capabilities such as intelligence, drive, and commitment, and female achievements are more often attributed to external factors such as chance or special treatment—a pattern that social scientists label "he's skilled, she's lucky."[189] The more subjective the standard for assessing

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[185] *See* Rhode & Kellerman, *supra* note 127, at 6-15; SYLVIA ANN HEWLETT ET AL., THE SPONSOR EFFECT: BREAKING THROUGH THE LAST GLASS CEILING 22 (2010). A survey of upper-level American managers found that almost half of women of color and close to a third of white women cite a lack of influential mentors as a major barrier to advancement. CATALYST, WOMEN OF COLOR IN CORPORATE MANAGEMENT 10-15 (1999).

[186] *See* Michael L. McDonald & James D. Westphal, *Access Denied: Low Mentoring of Women and Minority First-Time Directors and Its Negative Effects on Appointments to Additional Boards*, 56 ACAD. MGMT. J. 1169, 1175-84 (2013).

[187] *See* Ella L.J. Edmondson Bell & Stella M. Nkomo, OUR SEPARATE WAYS: BLACK AND WHITE WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY 122-32 (2001); Bernardo M. Ferdman, *The Color and Culture of Gender in Organizations: Attending to Race and Ethnicity*, *in* Handbook of Gender & Work 17, 23 (Gary N. Powell ed. 1999); CATALYST, *supra* note 185, at 15; Fairfax, *supra* note 19, at 1113; David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 557-58, 568, 570, 579 (1996).

[188] *See* Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2256 (2010); Cecilia L. Ridgeway & Paula England, *Sociological Approaches to Sex Discrimination in Employment*, *in* SEX DISCRIMINATION IN THE WORKPLACE, 189, 195-96 (Faye J. Crosby et al. eds., 2007). Even in experimental situations where male and female performance is objectively equal, women are held to higher standards, and their competence is rated lower. Foschi, *supra* note 179, at 240, 246; *see also* Fairfax, *supra* note 3, at 883 (citing several studies based on bias research).

[189] Janet K. Swim & Lawrence J. Sanna, *He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures,* 22 PERSONALITY & SOC. PSYCHOL. BULL. 507, 507 (1996); *see also* Jeffrey H. Greenhaus & Saroj Parasuraman, *Job Performance Attributions and Career Advancement Prospects: An Examination of Gender and Race Effects,* 55 ORG. BEHAV. & HUM. DECISION PROCESSES 273, 276, 290 (1993). *See generally* Crocker et al., *supra* note 181, at 504-53 (social stigma); Dovidio & Gaertner, *supra* note 179, at 167-193 (social stigma and cognition); Foschi, *supra* note 181, at 21-42 (double standards); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias*

qualifications, the harder it is to detect such biases.[190] Because subjective criteria are particularly significant in upper-level positions, women and minorities are particularly likely to be underrepresented in the pool from which directors are chosen.[191] In one Harvard Business School experiment, MBAs were given two case studies, identical except in one the CEO was named John and in the other was named Jane.[192] Students rated Jane more negatively.[193]

Other gender stereotypes create further problems. Men continue to be rated higher than women on most of the qualities associated with leadership.[194] People more readily credit men with leadership ability and more readily accept men as leaders.[195] What is assertive in a man may seem abrasive in a woman, and female leaders risk seeming too feminine or not feminine enough.[196] Women who come across strongly may be seen as "ice queens" or "iron maidens," while women who adopt less assertive styles may seem weak or indecisive.[197] In effect, women face tradeoffs that men do not, making it more difficult for them to be both liked and respected in corporate board contexts, which require both. A telling recent experiment by Stanford Business School professor Francis Flynn gave participants a case study about a leading venture capitalist with outstanding networking skills.[198] Some of the participants were told

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Approach to Discrimination and Equal Employment Opportunity, 47 STAN L. REV. 1161 (1995) (social stigma and Title VII jurisprudence); Ridgeway, *supra* note 181, at 227-30.

[190] *See* Fairfax, *supra* note 29, at 602.

[191] *Id.* at 599-600.

[192] *See* CREDIT SUISSE RES. INST., *supra* note 49, at 28.

[193] *Id.*

[194] *See* CATALYST, WOMEN "TAKE CARE," MEN "TAKE CHARGE:" STEREOTYPING OF U.S. BUSINESS LEADERS EXPOSED 6 (2005), *archived at* http://perma.cc/6Q3-K47D; Linda L. Carli & Alice H. Eagly, *Overcoming Resistance to Women Leaders: The Importance of Leadership Styles, in* WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 127, 127-129 (Barbara Kellerman & Deborah L. Rhode eds., 2007).

[195] Carli & Eagly, *supra* note 194, at 128; Laurie A. Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1315, 1315, 1325 (2000).

[196] Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 578 (2002). On the one hand, women leaders may appear too "soft," *i.e.*, unable or unwilling to make the tough calls required in positions of greatest influence. *Id.* On the other hand, women that mimic the "male model" are often viewed as strident and overly aggressive or ambitious. *Id.*; *see also* DONNA L. BROOKS & LYNN M. BROOKS, SEVEN SECRETS OF SUCCESSFUL WOMEN 195 (1997); LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 87-89 (2003); Alice H. Eagly, *Achieving Relational Authenticity in Leadership: Does Gender Matter?*, 16 LEADERSHIP Q. 459, 470 (2005).

[197] BRANSON, *supra* note 33, at 66-68.

[198] Joyce Routson, *Networking is More than Lots of Names, Says Heidi Roizen*, STAN. GRAD. SCH. BUS. NEWS, Nov. 1, 2009, *archived at* http://perma.cc/6LAA-9WVF.

that the individual was Howard Roizen; the others were told that she was Heidi Roizen.[199] The participants found working with Howard more enjoyable than working with Heidi, and they found Heidi less humble and more self-promoting and power hungry.[200]

Minorities also confront traditional stereotypes, and women of color are doubly disadvantaged.[201] The stereotypes vary somewhat across different racial and ethnic groups, but share common features. The most common is the devaluation of competence; minorities who reach positions that might qualify them for board leadership are often assumed to be the beneficiaries of "special treatment" rather than meritocratic selection.[202] Class poses further obstacles. For example, Westphal and Stern have found that minorities from underprivileged "backgrounds must engage in a higher level of ingratiatory behavior toward [] CEO[s] . . ." than non-minorities and economically privileged individuals in order to obtain recommendations for board positions where the CEO is the lead director, or on boards on which the CEO is a member.[203]

C. *Tokenism and Critical Mass*

Whether appointment of only one or two female or minority directors will significantly improve board decision making remains unclear.[204] Rosabeth Moss Kanter's path-breaking research, confirmed in multiple subsequent studies, found that token members often encounter "social isolation, heightened visibility, . . . and pressure to adopt stereotyped roles. They are likely to do less well in the group, especially if the leader is a member of the dominant category."[205] Token members are often marginalized as representing the "woman's" or the "minority's"

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[199] *Id.*

[200] *Id.*

[201] *See* Fairfax, *supra* note 19, at 1115-16; *see also* Gordon C.C. Liao & Philip Tseng, *Success-Fully Forgotten: The Asian American Executive: Dispelling the Modern Minority Myth and Why Corporate America Should Care* (2009) (on file with authors) (discussing stereotypes and barriers facing Asian-American executives).

[202] Rhode & Kellerman, *supra* note 127, at 9-11 (noting that this phenomenon occurs as part of "in-group favoritism").

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

[204] *See* ROSABETH MOSS KANTER, THE PROBLEMS OF TOKENISM 39 (1974) (monograph prepared for the Center for Research on Women in Higher Education and the Professions); *see also* BRANSON, *supra* note 33, at 109-23; Heminway & White, *supra* note 33, at 257-64 (exploring behavior of token women directors on all-male boards).

[205] KANTER, *supra* note 204, at 2; *see also* Heminway & White, *supra* note 33, at 257-64.

point of view, as if it were a monolithic position.[206] Thus, tokenism may make it more difficult for women and minorities to be heard on an equal basis with other board members.[207] Outsiders also may have limited opportunities to influence group decisions, particularly in the context of corporate boards where much of the real decision making takes place outside of official meetings and token members are excluded from informal socializing.[208]

According to some research, a "critical mass" is necessary to realize fully the benefits of diversity on corporate boards.[209] As a report by the Wellesley Center for Women notes, "The magic seems to occur when three or more women serve on a board together. Suddenly having women in the room becomes a normal state of affairs. . . . [They] are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially."[210] However, many women and minorities who have served on boards challenge critical mass theories to the extent that they imply that anyone serving as the first or second outsider "is doomed to fail."[211] They also fear that claims of tokenism may discourage women and minorities from accepting nominations, or that boards will treat three as "a safe harbor."[212] Already, some companies lose their sense of urgency once they appoint even a single outsider. As one board member noted, "When you're the only woman on the board and you talk about adding another woman, they say, 'But we've got you . . . .'"[213]

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[206] *See* KANTER, *supra* note 204, at 3.

[207] Terjesen et al., *supra* note 63, at 328. One study "found that directors who were the sole woman on a board had to struggle to be heard in board discussions, while being one of two or three women on the board dramatically changed the situation." Beate Elstad & Gro Ladegard, *Women on Corporate Boards: Key Influencers or Tokens?*, 16 J. MGMT. & GOVERNANCE 595, 598 (2012).

[208] *See* William B. Stevenson & Robert F. Radin, *Social Capital and Social Influence on the Board of Directors*, 46 J. MGMT. STUD. 16, 33 (2009) ("As one CEO said []: 'Don't confuse board actions with board decisions. Board decisions don't take place in the boardroom. Board actions take place in the boardroom.'"); Menendez et al., *supra* note 184, at 5 (discussing women's exclusion from informal socializing).

[209] KRAMER ET AL., *supra* note 109, at 34.

[210] *Id*. at v.

[211] *See* The Honorable Aulana L. Peters, Retired Partner, Gibson, Dunn & Crutcher LLP, Former SEC Commissioner, Diversity on Corporate Boards: When Difference Makes a Difference (Sept. 10, 2009), *archived at* http://perma.cc/TEH4-VJ86.

[212] *See* Mary Cranston, Senior Partner, Pillsbury Winthrop Shaw Pittman LLP, Diversity on Corporate Boards: When Difference Makes a Difference (Sept. 10, 2009), *archived at* http://perma.cc/F9M4-KGMT.

[213] Bonnie W. Gwin & Anne Lim-O'Brien, *So Many Public Companies, So Few Women Directors*, 30 DIRS. & BDS. 61 (2006), *available at* 2006 WLNR 24254193.

The marginalization that token members experience may also impair their performance, which discourages further appointment of outsiders. For example, a director may "make herself socially invisible to avoid disrupting perceived group harmony and alleviate discomfort felt by the rest of the (all male) board."[214] As one woman put it, "[I]f you emphasize how different you are, you are considered a troublemaker."[215] The result is that women's strengths may go unrecognized, and their silence may reinforce "antiquated beliefs that a woman brings nothing new to the table."[216] Alternatively, some directors may fall into the role that sociologists identify as the "Queen Bee" syndrome, meaning that they "'revel in the notoriety of token status,' enjoy[] the perceived advantages of being the only woman in the group and 'excessively criticiz[e] potential women peers.'"[217]

V. STRATEGIES FOR CHANGE

Strategies to counteract these dynamics and increase board diversity fall into three main categories. The first category focuses on increasing individuals' capacity for service.[218] The second category includes legal strategies that might expand the pool of qualified members and level the playing field for their appointment.[219] The third category targets institutions, and attempts to motivate corporations to take voluntary steps to enhance diversity.[220] In recent years, countries throughout the world have taken significant steps through legislation, regulation, and encouragement of voluntary efforts to increase the representation of women on boards.[221] These efforts have led to some measurable progress, but their most significant contribution may be the increased focus on gender diversity on corporate boards and in other leadership positions.

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[214] Heminway & White, *supra* note 33, at 261.

[215] Menendez, Fagan & Anson, *supra* note 184, at 5.

[216] Hemingway & White, *supra* note 33, at 261.

[217] *Id*. at 259 (quoting BRANSON, *supra* note 33, at 115); *see also* Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117, 170-71 (2002) (defining the "queen bee" syndrome); Deborah L. Rhode, *Keynote Address: The Difference "Difference" Makes*, 55 ME. L. REV. 15, 18 (2003).

[218] *See infra* Part V.A.

[219] *See infra* Part V.B.

[220] *See infra* Part V.C.

[221] *See* Knowledge Center, *Increasing Gender Diversity on Corporate Boards: Current Index of Formal Approaches*, CATALYST (Aug. 21, 2013), *archived at* http://perma.cc/8J2Z-DLP8 (providing a comprehensive list of formal legislative, regulatory, and voluntary approaches in countries around the globe).

A. *Strategies for Individuals*

One obvious way to expand the number of women and minorities on corporate boards is to increase the pool of qualified applicants. Formal mentoring programs, leadership workshops, diversity advisors or coaches, and related strategies can all help interested applicants shape their career paths, refine their resumes, develop networking strategies, and overcome barriers to self-promotion.[222] In recent years, mentoring and networking programs targeted toward increasing women's representation on boards have become more prevalent in some countries, including the UK, Canada, France, and Australia.[223] Providing mentors who themselves have had board experience may be especially critical in bringing qualified candidates to the attention of board nominating committees.[224] Australia has had success in educating potential female directors and then pairing them with mentors who pledge to assist them for a year and at the close of the relationship to help place them on a corporate board.[225] In the United States, many private groups, in association with advocacy groups and universities, have pursued a strategy of establishing and expanding female director networks and providing mentors to aspiring board members.[226]

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[222] *See* Fairfax, *supra* note 29, at 603-05. Little research is available to evaluate the cost effectiveness of such approaches. However, the most systematic large-scale study to date has found that mentoring programs are correlated with modest gains in female representation in managerial positions and that women of color benefit most. *See* Kalev et al., *supra* note 159, at 611. Other smaller-scale studies suggest that executives identify influential mentors as an important success strategy and that having more mentors increased the number of promotions that corporate women receive. *See* CATALYST, WOMEN AND MEN IN U.S. CORPORATE LEADERSHIP: SAME WORKPLACE, DIFFERENT REALITIES? 11-13 (2004), *archived at* http://perma.cc/BL93-L3TQ (discussing success strategies); CATALYST, WOMEN OF COLOR IN CORPORATE MANAGEMENT: THREE YEARS LATER 12-15 (2002), *archived at* http://perma.cc/VA5Z-5C2Y (discussing promotions); *see also* Rhode & Kellerman, *supra* note 127, at 21 (discussing the need to combat barriers to self-promotion among women); Liao & Tseng, *supra* note 201 (discussing the barriers among Asian-Americans); Gordon C.C. Liao, Vice President, Baird Capital Partners, Diversity on Corporate Boards: When Difference Makes a Difference (Sept. 10, 2009), *archived at* http://perma.cc/6UJN-7CTZ.

[223] *See* Alison Maitland, *Advice that Gets Women on Board*, FIN. TIMES, Oct. 9, 2008, *archived at* http://perma.cc/C329-HU9X.

[224] *See id*.; Fairfax, *supra* note 29, at 603-04.

[225] Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure,* 37 U. DAYTON L. REV. 39, 42-43 (2011).

[226] *See, e.g.*, Alison Damast, *Program Aims to Prepare Women for Board Service*, BUS. WK., July 16, 2012, *archived at* http://perma.cc/TP9M-ZFHZ (describing a mentoring program through George Washington University's Business School, and citing initiatives at Stanford, Harvard, and Northwestern).

B. *Legal Strategies*

Law can also play a greater role in reducing the obstacles to women and minorities who seek leadership positions, including both board appointments and the managerial experience that makes candidates attractive.

One common proposal is to require corporations "over a certain size to disclose data concerning recruitment, retention, and promotion[]" of women and minorities.[227] A number of countries mandate such disclosures,[228] and obligating U.S. companies to supply such information would make it easier for corporations to benchmark their performance relative to other similarly situated organizations, and for stakeholders to hold poor performers accountable.[229] The government could also require transparency surrounding the board search process by requiring companies to disclose whether women and minority candidates were considered or interviewed for open positions. An even stronger approach would be to encourage corporations to adopt a version of the "Rooney Rule," applicable to professional football. The National Football League (NFL) requires teams to pledge to include a minority candidate among the finalists for each coaching and general manager position and to conduct an on-site interview with that finalist.[230] In the seven years after "the rule was adopted in 2003, the number of black head coaches in the NFL increased from 6% to 22%."[231] Securities and Exchange Commissioner Luis Aguilar has suggested that "many corporate boards may need their own Rooney [R]ule . . . ."[232]

A second legal strategy would be to increase enforcement resources for anti-discrimination initiatives. Although in theory individuals can sue for sex or racial discrimination in leadership positions, the difficulties of proof and the threat of blacklisting make

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[227] Rhode & Kellerman, *supra* note 127, at 31.

[228] *Id.*; *see also* Kate Grosser & Jeremy Moon, *Gender Mainstreaming and Corporate Social Responsibility: Reporting Workplace Issues*, 62 J. BUS. ETHICS 327, 330-31 (2005) (discussing Australian legislation).

[229] *See* Rhode & Kellerman, *supra* note 127, at 31.

[230] *See* Damon Hack, *Pro Football; The NFL Spells out New Hiring Guidelines*, N.Y. TIMES, Dec. 9, 2003, *archived at* http://perma.cc/ET5L-URVB; Mark Maske, *Diversity of NFL's Coaching Searches Praised This Time Around*, WASH. POST, Jan. 15 2014, *archived at* http://perma.cc/LUA5-T974.

[231] Branson, *supra* note 34, at 806.

[232] Luis A. Aguilar, Commissioner, Sec. & Exch. Comm'n, Board Diversity: Why It Matters and How to Improve It, at the Agenda Luncheon Program (Nov. 4, 2010) (transcript archived at http://perma.cc/7YCY-HLQC).

such litigation extremely rare.[233] However, state and federal equal opportunity agencies could be more proactive in investigating organizations with a poor performance on gender and racial equity.[234]

A third possibility would be to follow the example of sixteen countries that have established quotas for board membership for at least some companies.[235] Some commentators argue that quotas for women directors are necessary in the United States to overcome structural impediments and to help female directors reach or exceed a critical mass.[236] Norway led the way by requiring publicly listed firms with corporate boards of nine or more members to have a minimum of 40% of female directors by 2008, or face dissolution.[237] The Norwegian government has reported full compliance with the program, which increased women's share of board seats from 7% in 2002 to over 40%.[238] Spain and the Netherlands have recently followed suit with legislation requiring firms to meet a 40% female director minimum by 2015.[239] Belgium requires a third of directors to be female; Italy requires one-

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[233] *See* Fairfax, *supra* note 29, at 603.

[234] *See* Rhode & Kellerman, *supra* note 127, at 31 (discussing the current limitations of federal and state agencies in enforcing antidiscrimination laws).

[235] The countries are Austria, Belgium, Denmark, Finland, France, Greece, Iceland, Ireland, Israel, Italy, Malaysia, the Netherlands, Norway, Spain, Switzerland, and South Africa. Franceschet & Piscopo, *supra* note 1, at 311.

[236] See Bruce Kogut, Jordi Colomer & Mariano Belinky, *Structural Equality at the Top of the Corporation: Mandated Quotas for Women Directors*, 35 STRAT. MGMT. J. 891 (2014).

[237] Norwegian Public Limited Liability Companies Act, § 6-11 (2009) (Nor.), *archived at* http://perma.cc/VB38-8DFB:

> 1. If the board of directors has two or three members, both sexes shall be represented.
> 2. If the board of directors has four or five members, each sex shall be represented by at least two members.
> 3. If the board of directors has six to eight members, each sex shall be represented by at least three members.
> 4. If the board of directors has nine members, each sex shall be represented by at least four members, and if the board of directors has more members, each sex shall represent at least 40 percent of the members of the board.

See also Sharon Reier, *In Europe, Women Finding More Seats at the Table*, N. Y. TIMES, Mar. 22, 2008, *archived at* http://perma.cc/S8MS-8DQK (noting that Norway filled 40% of corporate board seats with women since 2008).

[238] Nicola Clark, *Getting Women Into Boardrooms, by Law*, N.Y. TIMES, Jan. 27, 2010, at 1, *archived at* http://perma.cc/KM6V-Y4R4. *See generally* Hevig Bugge Reiersen & Beate Sjafjell, *Report from Norway: Gender Equality in the Board Room*, 5 EUR. CO. L. 191 (2008) (discussing practical significance of this law). Note, however, that more than two-thirds of the publicly traded companies that were subject to the Norwegian quota opted to delist rather than comply with the law. Claire Cain Miller, *Women on Board: Quotas Have Limited Success*, The Upshot, N.Y. TIMES, June 20, 2014, *archived at* http://perma.cc/7UW9-83A9.

[239] Clark, *supra* note 238, at 1.

fifth; and Finland requires government bodies and state-owned enterprises to have equal representation of men and women absent "special reasons to the contrary."[240] Effective in 2017, France will impose a 40% quota.[241] UK, Germany, Belgium, and Sweden are also debating similar legislation.[242] In other parts of the world, the United Arab Emirates and India now require certain companies to have women on their boards.[243]

Critics contend quotas do not address the problems that prevent underrepresented groups from obtaining leadership experience, and that the focus should be on eliminating those obstacles and enhancing the qualifications of women and minorities.[244] According to some commentators, the dramatic increase in Norwegian female directors "has done little—yet—to improve either the professional caliber of the boards or to enhance corporate performance."[245] Quotas have not changed women's underrepresentation in top management, nor have they stimulated changes in the gender composition of small private companies not subject to quotas.[246] The shortage of women with executive

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[240] DELOITTE, *supra* note 13, at 17, 19, 23.

[241] *Id*. at 20.

[242] *See* Clark, *supra* note 238, at 1. *But see* James Kanter, *Britain Objects to Quota For Women on Boards*, N.Y. TIMES, Nov. 14, 2012, *archived at* http://perma.cc/4LB3-T34E. The European Union, where the percentage of board seats held by women stands at 11%, is also considering implementing a quota, possibly 20%. *See EU Mulls Gender Quotas on Company Boards*, EURACTIV (July 15, 2010), *archived at* http://perma.cc/LW69-W8SZ.

[243] *See* Sara Hamdan, *U.A.E. Promotes Women in the Boardroom*, N.Y. TIMES, Dec.19, 2012, *archived at* http://perma.cc/4VD7-H9JR (reporting that the U.A.E. has made it mandatory for every company and government agency in the country to have female board members); David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Developments Regarding Gender Diversity on Public Boards*, at 4, AMERICANBAR.ORG (2013), *archived at* http://perma.cc/P6K2-D4QQ ("[India's] August 2013 Companies Act now requires every listed company to have at least one female director within one to three years of its listing, depending on the size of the company.").

[244] *See* Amy Ditmar et al., *Using Quotas to Raise the Glass Ceiling*, N.Y. TIMES, March 22, 2010, *archived at* http://perma.cc/WLS5-LMJB. One Norwegian investor and corporate director stated, "'When the law says you must have 40 percent women, of course you can get to 40 percent—that is not an achievement[.] An achievement would be to find a way to get women to rise above middle management. So far we don't have an answer for that.'" Clark, *supra* note 238, at 2 (quoting Ruilf Rustad).

[245] Clark, *supra* note 238, at 1.

[246] Fagan & Menendez, *supra* note 28, at 249; Mari Teigen, *Gender Quotas for Corporate Boards in Norway: Innovative Gender Equality Policy*, *in* WOMEN ON CORPORATE BOARDS AND IN TOP MANAGEMENT: EUROPEAN TRENDS AND POLICY 70, 83 (Colette Fagan et al. eds., 2012); *see also* Miller, *supra* note 238 ("In Norway, the quotas have not led to an increase in the overall number of female executives, or to a decrease in the gender pay gap, a boom in the number of young women pursuing careers in business, or to more family-friendly workplace policies.") (reporting the results of Marianne Bertrand, Sandra E. Black, Sissel

experience has led to trophy directors, or "golden skirts" as they are called in Norway.[247] Some worry that the phenomenon has become self-perpetuating because "young female executives [] faced with the choice of pushing on to reach top positions or taking several board roles" have opted for the latter course.[248] Partly for that reason, women lack the experience that would give them board leverage and are underrepresented in the most powerful board positions: they account for 40% of board members but only 7% of board chairs.[249] Critics further argue quotas will simply lead to more unqualified directors, either because of an insufficient supply of well prepared women, or because boards will fill seats with women who won't speak up.[250] For example, in France, "[i]n private, chief executives say they will look for female board members . . . who will look decorative and not rock the boat."[251]

Evidence on the impact of quotas on financial performance and governance is mixed. Some research suggests that the increased presence of women correlates with slight losses in companies' bottom lines, which has been linked to women's lower levels of top management experience.[252] However, the presence of more women on boards has also reportedly led to more focused and strategic decision making and decreased conflict.[253]

Jensen & Adriana Lleras-Muney, *Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labor Market Outcomes in Norway*, NBER Working Paper, June 2014).

[247] Richard Milne, *Deja-vu in Norway over EU's Women Quotas*, FIN. TIMES, Oct. 23, 2012, *archived at* http://perma.cc/5K4V-E8LZ; *see also* Anne Sweigart, *Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada,* 32 NW. J. INT'L L. & BUS. 81A, 83A (2012); Teigen, *supra* note 246, at 87.

[248] Milne, *supra* note 247.

[249] *See* Teigen, *supra* note 246, at 87.

[250] A 2010 study found that with increased number of women directors from the quota, Norwegian boards have grown younger and more inexperienced, and financial performance has declined. *Id*. at 85. Companies performed an average of 20% worse in terms of Tobin's Q in the year after adopting the quotas; companies requiring the most drastic changes suffered the largest negative impact. *See* Ahern & Dittmar, *supra* note 82, at 167-68. The authors of the study point out that gender did not directly influence performance; once the study accounted for age and experience, gender was not significant. *Id.* at 173-74.

[251] *Women on Company Boards: La Vie en Rose*, ECONOMIST, May 6, 2010, *archived at* http://perma.cc/AJP3-YENC.

[252] *See* Amy Ditmar et al., *supra* note 244 (discussing the Norway numbers).

[253] *See* Nielsen & Huse, *supra* note 92, at 143-45. Another study, however, found that most corporate decisions were unaffected by the increased representation of women on the board, but that firms affected by the quota conducted fewer employee layoffs after female board representation increased, leading to higher relative labor costs and reduced short-term profits). David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence from Quotas*, 5 AMER. ECON. J.: APPLIED ECON. 136, 137-38 (2013) (comparing Norwegian firms affected by the quota to other public and private Nordic firms unaffected by the legislation).

In the United States, resistance to quotas builds on longstanding concerns about any departure from meritocratic principles.[254] Facebook CEO Mark Zuckerberg typifies this view. When asked in 2011 why his five-member board had no women, he responded, "I'm going to find people who are helpful, and I don't particularly care what gender they are . . . . I'm not filling the board with check boxes."[255] Many individuals worry that preferential treatment will stigmatize beneficiaries and diminish their credibility.[256] That may be part of the reason why a majority of American female directors oppose quotas, even though they believe the strategy would be effective in increasing board diversity.[257]

Some of the resistance to quotas in the U.S. may also be based on skepticism that increasing the number of women on boards is an important goal, as evidenced by the fact that the discussion often still focuses on why it matters to have more women on corporate boards.[258] Other countries, particularly in Europe, have moved past that stage and are debating the appropriate mechanism by which to achieve that objective.[259] So far in the U.S., the only legislative action related to

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[254] *See Civil Rights Act Veto—Bush Turns His Back On American Workers*, SEATTLE TIMES, October 25, 1990, *archived at* http://perma.cc/GKV5-F9ND (vetoing the Civil Rights Act of 1990 on the grounds that it would impose quotas on employers); Anthony Lewis, *The Case of Lani Guinier*, N.Y. REV. OF BOOKS, Aug. 13, 1998, *archived at* http://perma.cc/6GZ9-AJJ5 (withdrawing the nomination of Lani Guinier to head the Justice Department Civil Rights Division after she was labeled a "quota queen").

[255] Ken Auletta, *A Woman's Place: Can Sheryl Sandberg Upend Silicon Valley's Male-Dominated Culture?*, NEW YORKER, July 11, 2011, *archived at* http://perma.cc/3W73-WLEX (quoting Mark Zuckerberg). Facebook has since added Sheryl Sandberg to its board. *See* Brian Womack, *Facebook Adds COO Sandberg to Board as First Female Director*, BLOOMBERG NEWS, June 26, 2012, *archived at* http://perma.cc/MSS8-T3NR.

[256] *See* HOUSE OF LORDS [H.L.], EUR. UNION COMM., WOMEN ON BOARDS: REPORT 27 (Nov. 9, 2012) (U.K.) (noting that quotas would be unpopular among many potential beneficiaries and would risk fostering the perception that women appointed were not there on their merit).

[257] One study shows that 39% of women directors opposed quotas, although 51% believed that they are an effective tool for increasing board diversity. GROYSBERG & BELL, *supra* note 167, at 4 (noting also that 25% of men believe quotas to be an effective tool and that 18% of men support the use of quotas).

[258] *See generally* Kelly Wallace, *No Movement for Women at the Top in Corporate America,* CNN, Dec. 11, 2013, *archived at* http://perma.cc/44JF-GXAF (discussing lack of diversity agenda).

[259] *See* Katz & McIntosh, *supra* note 243, at 6:

> [I]n the United States, there is still a sense that an emphasis on gender diversity needs to be justified rather than pursued as a matter of course. In Europe and elsewhere, the discussion surrounding legislative initiatives tends to be focused on the best way to achieve greater gender diversity rather than whether or not it is a worthwhile goal.

See also Karyn L. Twaronite, *Women on Boards: Moving from "Why" to "How*," FORBES, Jan. 8, 2013, *archived at* http://perma.cc/BR9D-WP6S.

increasing gender diversity on boards has taken a voluntary approach. For example, in August 2013, the California State Senate passed a resolution formally urging companies to increase gender diversity on their boards.[260]

Given the resistance to quotas, some advocates of diversity recommend a "comply-or-explain" approach.[261] This approach can take several forms. A common proposal is "companies with a lower proportion [than 30% women on their boards] would have to explain [in their annual reports] if they proposed to fill a vacancy with a man."[262] Similarly, companies with no minorities or a small percentage of minorities on their boards would have to explain if they intended to fill a vacancy with a non-minority.[263] Social science research suggests that requiring individuals to give reasons for particular actions improves decision-making quality, reduces reliance on stereotypes, and helps to level the playing field for underrepresented groups.[264] The UK has a different version of comply-or-explain.[265] The 2010 revision of the country's corporate governance code (with which the country's largest 350 companies' boards should comply) included the principle that companies should conduct searches for board candidates "with due regard for the benefits of diversity on the board, including gender."[266] Companies must comply with the principle espoused in the revision or explain their non-compliance.[267] Similarly, Australian public

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[260] The California State Senate passed the following resolution:

> [W]ithin a three-year period from January 2014 to December 2016, inclusive, every publicly held corporation in California with nine or more director seats [should] have a minimum of three women on its board, every publicly held corporation in California with five to eight director seats [should] have a minimum of two women on its board, and every publicly held corporation in California with fewer than five director seats [should] have a minimum of one woman on its board . . . .

S. Con. Res. 62 (Cal. 2013) (enacted) (introduced July 11, 2013 and passed August 26, 2013), *archived at* http://perma.cc/7NJV-AH4D.

[261] *See* Rachel Sanderson & Kate Burgess, *Directors Must Be Re-Elected Annually*, FIN. TIMES, May 28, 2010, *archived at* http://perma.cc/49MJ-TA85.

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

[263] *See id.*

[264] *See* Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 263 (1999); Martha Foschi, *Double Standards in the Evaluation of Men and Women,* 59 SOC. PSYCHOL. Q. 237, 251 (1996); Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1381 (2008).

[265] *See* Sanderson & Burgess, *supra* note 261.

[266] *Id.*

[267] *See id.*

corporations are subject to a comply-or-explain mandate.[268] "Companies should establish a policy concerning diversity and disclose the policy or a summary of that policy. The policy should include requirements for the board to establish measurable objectives for achieving gender diversity for the board to assess annually both the objectives and progress in achieving them."[269] Seventeen other nations have similar comply-or-explain provisions,[270] and the European Council is considering a directive that would require large, publicly traded firms to describe their policy on board diversity and the outcomes that have flowed from it.[271] If companies do not have such a policy, they must provide a "clear and reasoned explanation as to why this is the case."[272]

The United States has adopted a comply-or-explain approach in other corporate governance contexts. For example, under the Sarbanes-Oxley Act of 2002, companies must disclose whether they have adopted a code of ethics for senior financial managers and whether their boards' audit committees have at least one financial expert.[273] If they have not adopted such a code or appointed an expert, the companies must explain why.[274] Also, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, firms must disclose whether they have separated the role of the board chair and chief executive officer, and if they have not done so, explain why not.[275]

The Securities and Exchange Commission (SEC) enacted a rule, which went into effect in 2010, pushing companies in the direction of

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[268] ASX CORP. GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS WITH 2010 AMENDMENTS at 11 (2d ed. 2010).

[269] *Id.*; *see also* E. MERVYN DAVIES, WOMEN ON BOARDS 19-20 (2011), *archived at* http://perma.cc/LM7U-YXJU (discussing the need to measure board attrition rates, establish diversity policies, and explain board appointments); Branson, *supra* note 34, at 807-08 (same); Hazen & Broome, *supra* note 225, at 43 (same). *But see* BLACKROCK INV. MGMT. (AUSTL.) LTD., GLACIAL CHANGE IN DIVERSITY AT ASX 200 COMPANIES – CAN CORPORATE AUSTRALIA ESCAPE THE IMPOSITION OF DIVERSITY QUOTAS? 3, 5 (2012) (reporting on the negative effects of the provision).

[270] *See* AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE & DIVERSITY (forthcoming 2013, Cambridge University Press) (providing a summary of other countries' comply-or-explain provisions).

[271] *Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC as Regards Disclosure of Non-financial and Diversity Information by Certain Large Companies and Groups*, at 3, COM (2013) 207 final (Apr. 16, 2013), *archived at* http://perma.cc/FT5A-HEEQ.

[272] *Id.* at 12.

[273] *See* Sarbanes-Oxley Act of 2002, Publ. L. No. 107-204, §§ 406 and 407, 116 Stat. 745 (2002).

[274] *Id.*

[275] Dodd-Frank Wall Street Reform and Consumer Protection Act, Publ. L. No. 111-203, § 972, 124 Stat. 1376 (2010).

comply-or-explain on diversity issues.[276] The rule requires companies to disclose "whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director."[277] In addition, companies whose boards have a diversity policy must explain how the policy is implemented and how the company assesses its effectiveness.[278] The SEC allows companies to define diversity "in ways that they consider appropriate," and acknowledges that some may focus on racial, ethnic, and gender diversity, while others may "conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity . . . ."[279]

Aaron Dhir's forthcoming analysis of the first two years of experience under this rule finds that almost all companies (98%) claim to consider diversity in making board appointments.[280] Only 8%, however, reported having a formal diversity policy.[281] According to Dhir, his study's "most salient" finding is that when interpreting diversity, the "dominant corporate discourse is experiential . . . rather than identity-based. In other words, most frequently firms define diversity in reference to a director's prior experience, or other generic factors, rather than his or her socio-demographic characteristics."[282] The rule would be stronger if the SEC made clear that consideration of diversity constitutes a policy triggering additional disclosure requirements, and if the Commission defined diversity to include race, gender, and other demographic characteristics.[283] As Dhir notes, identity-related characteristics were what commentators on the rule wanted to see disclosed.[284] An even more effective approach in securing transparency and accountability would be to require companies to adopt policies with measurable objectives for achieving diversity and assess progress in achieving them, or to explain why they have not adopted such policies.[285]

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[276] 17 C.F.R. § 229.407(c)(2)(vi) (2012).

[277] *Id.*

[278] *Id.*

[279] Proxy Disclosure Enhancements, Release No. 33-9089, SEC Docket S7-23-09, at 39 (Dec. 16, 2009).

[280] *See* DHIR, *supra* note 270.

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] DHIR, *supra* note 270.

[285] *Id.*

Comply-or-explain approaches are more politically palatable than mandatory quotas, but their effectiveness remains uncertain.[286] Future research will be necessary to see if these approaches actually produce higher rates of female and minority representation on boards.

C. *Institutional Initiatives*

Corporations can intensify their diversity efforts, both at the board level and in their internal policies, to help build the pipeline of women and minorities qualified for future appointments.[287] One option is to set their own goals or requirements for new appointments to ensure a critical mass of women and minorities.[288] Some commentators advocate a "structured search" that starts with an analysis of the board's functional needs and then identifies female and minority candidates who could fill them.[289] Whatever the process, companies need to establish an inclusive nominating committee that is sensitive to the value of diversity.[290] They also need to expand their searches beyond the traditional pool of CEOs and consider other corporate executives, nonprofit directors and officers, and academic presidents and experts.[291] Many commentators believe the current pool of potential members is large enough to achieve diversity if qualifications are appropriately broadened.[292] Professional consultants, who now conduct approximately half of board searches, can help identify promising candidates outside the board's network or from less traditional

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[286] *See* David Seidl, Paul Sanderson, & John Roberts, *Applying the "Comply-or-Explain" Principle: Discoursive Legitimacy Tactics with Regard to Codes of Corporate Governance,* 17 J. MGMT & GOVERNANCE 791, 797-804 (2013) (finding substantial rates of noncompliance); *see also* DHIR, *supra* note 270 (finding similar limitations in the comply-or-explain approach in other studies).

[287] *See* Rhode & Kellerman, *supra* note 127, at 27-30 (discussing strategies to ensure equal opportunity in leadership positions, such as well-designed mentoring programs and accountability structures); *see also* Frank Dobbin et al., *Diversity Management in Corporate America,* 6 CONTEXTS 21, 25 (2007) (discussing the positive effects of mentoring programs for women and minorities); Kalev et al., *supra* note 159, at 590 (finding accountability structures enhance the various programs′ effectiveness).

[288] *See* BRANSON, *supra* note 33, at 144 (noting the relative ease and flexibility of board structures).

[289] *See* Clarence Otis, Jr., Chairman and CEO, Darden Restaurants, Inc., Diversity on Corporate Boards: When Difference Makes a Difference (Sept. 10, 2009), *archived at* http://perma.cc/M4GK-5ZX9.

[290] *See* Butler, *supra* note 100, at 85-86.

[291] *See* Fairfax, *supra* note 29, at 605-07.

[292] *See generally* KRAMER ET AL., *supra* note 109 (discussing why having one woman on a board may lead to more female directors).

backgrounds.[293] These and other efforts to demonstrate a commitment to diversity could help boards make service seem more attractive to well-qualified members of underrepresented groups.[294]

Companies could also institute age limits and term restrictions, which open up seats for women and minorities.[295] As one commentator put it, "What's holding women back isn't bias. It's the fact that no one ever leaves the boards."[296] Board members are often reluctant to give up positions that provide prestige and a significant salary, especially at the end of their careers.[297] Despite the thousands of board seats within large public companies, relatively few seats turn over on a yearly basis.[298] The number of available positions has been decreasing in recent years,[299] although in 2013 S&P 500 boards added the most new independent directors since 2008.[300] The reduced turnover among public company directors is in large part due to the increasing average age of directors. Forty percent of public company directors are age 68 or older.[301] Even if women were to receive the majority of new board appointments, the progress in increasing women's representation on corporate boards will continue to be slow unless the number of seats becoming available significantly increases.[302]

Another institutional initiative for increasing the pace of progress is to reduce the influence of CEOs in the membership selection process. Some commentators argue that the interests of top corporate executives

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[293] *See* Barnard, *supra* note 162, at 708-09; VIRTCOM CONSULTING, BOARD DIVERSIFICATION STRATEGY: REALIZING COMPETITIVE ADVANTAGE AND SHAREOWNER VALUE 23 (2008) (discussing practices that help board diversification).

[294] *See* VIRTCOM CONSULTING, *supra* note 293, at 23-24.

[295] *See* Barnard, *supra* note 162, at 709-10.

[296] Diane Brady, *To Get Women on Company Boards, Make Men Leave*, BUS. WK., Sept. 20, 2012, *archived at* http://perma.cc/LWX3-M6K2.

[297] *See* NAT'L ASS'N OF CORP. DIRS., THE DIVERSE BOARD: MOVING FROM INTEREST TO ACTION 11-14 (2012) (discussing structural factors creating barriers to improving representation of women on boards, including absence of tenure-limiting mechanisms, small sizes of boards, directors' reluctance to lose prestige associated with board seats, and inadequate use of director evaluations as a tool for board turnover).

[298] *See* SPENCER STUART, SPENCER STUART BOARD INDEX 2012, at 7, 10 (2012), *archived at* http://perma.cc/B7E4-X5C7.

[299] *Id.* (reporting that the S&P 500 added only 291 new independent directors in 2012, down from 401 directors in 2002, and the smallest number of new directors in a decade).

[300] SPENCER STUART, *supra* note 14, at 8.

[301] *See* Holly J. Gregory, *Board Composition, Diversity and Refreshment,* PRACTICAL LAW, June 2013, *archived at* http://perma.cc/W5VL-X7HY. As more directors near retirement age, a higher percentage of companies (88%) have retirement ages set at 72 years or older as compared to a decade ago, when the majority of companies with a mandatory retirement age set it at 70 or younger. SPENCER STUART, *supra* note 14, at 16.

[302] *Id.*

may be skewed by their desire to maintain control and high levels of compensation.[303] Such considerations may lead them to prefer candidates who share their interests—socially similar, fellow CEOs.[304] Simply giving the board more power over the appointment process could expand the pool of potential candidates.

A fourth institutional initiative should focus on making board diversity (or its absence) more visible and enlisting pressure from stakeholder groups to hold organizations accountable. Some empirical research has demonstrated a significant increase in women and minority directors when companies include pictures of the board in annual reports.[305] Several companies in Silicon Valley, including Hewlett-Packard, Intel, Google, Yahoo, Facebook, and LinkedIn, have released information about the diversity of their employees and leaders.[306] The breakdowns by gender and race and ethnicity are very similar for many of these technology companies, whose workforces tend to be 60-70% male and approximately 90% white and Asian, with only 3 to 4% Hispanic employees and 2% African-American employees.[307] Many of the companies released the numbers through official blog posts pledging their commitments to increasing diversity and transparency.[308] Voluntary

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[303] *See* NAT'L ASS'N OF CORP. DIRS., *supra* note 297, at 13.

[304] *See* Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1598-99 (2004). However, one recent study suggests that women directors may be more generous than their male counterparts in setting compensation policy. *See* O'Reilly & Main, *supra* note 28, at 5. If that pattern is confirmed in further research, CEOs might find women to be more attractive candidates.

[305] Richard A. Bernardi et al., *Minority Membership on Boards of Directors: The Case for Requiring Pictures of Boards in Annual Reports*, 16 CRITICAL PERSPECTIVES ON ACCT. 1019, 1029 (2005).

[306] Jeff Elder, *What Silicon Valley's Diversity Reports Say About the Tech Workforce*, WALL ST. J. ONLINE, June 19, 2014, *archived at* http://perma.cc/D4RY-2QJU.

[307] Alison Griswold, *When It Comes to Diversity In Tech, Companies Find Safety in Numbers*, SLATE, June 27, 2014, *archived at* http://perma.cc/439G-FJPL.

[308] *See, e.g.*, Maxine Williams, *Building a More Diverse Facebook*, FACEBOOK NEWSROOM, June 25, 2014, *archived at* http://perma.cc/E6Z3-79S3 ("We have a long way to go, but we're absolutely committed to achieving greater diversity at Facebook and across the industry."); Laszlo Block, *Getting to Work on Diversity at Google*, GOOGLE OFFICIAL BLOG, May 28, 2014, *archived at* http://perma.cc/M5AR-F7MW ("Put simply, Google is not where we want to be when it comes to diversity, and it's hard to address these kinds of challenges if you're not prepared to discuss them openly, and with the facts."); Jacqueline Reses, *Workforce Diversity at Yahoo*, YAHOO, June 17, 2014, archived at http://perma.cc/3UWC-8488 ("Here at Yahoo we are committed to attracting, developing, and retaining a diverse workforce."); Pat Waldors, *LinkedIn's Workforce Diversity*, LINKEDIN OFFICIAL BLOG, June 12, 2014, *archived at* http://perma.cc/H5ZX-LSPJ ("[T]here is a cycle of responsibility associated with transparency. This is why we though it important to publish our own numbers regarding diversity at LinkedIn – to better ensure accountability.").

disclosure efforts such as these can help bring more attention to the issue and may increase pressure on companies to make more diverse board appointments.

Large institutional investors could also demand such disclosure and use their leverage as shareholders to advance gender diversity among companies in which they hold significant stakes.[309] The Thirty Percent Coalition is a group—composed of leading women's organizations, institutional investors, executives, elected officials, and concerned individuals—that joined together in 2011 to achieve 30% representation of women on public company boards in the United States by 2015.[310] The Coalition has reported some success using letter-writing campaigns and shareholder resolutions to target companies with no women serving on their boards.[311] Organizations can bring more attention to the performance of particular companies by publishing report cards evaluating companies on board diversity. One organization, 2020 Women on Boards, publishes an annual Gender Diversity Index of Fortune 1000 Companies.[312] U.S. Stock exchanges, such as NASDAQ and NYSE, could follow the example of exchanges in Australia[313] and New Zealand[314] that require listing companies to provide greater

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[309] *See* NAT'L ASS'N OF CORP. DIRS., *supra* note 297, at 16 (noting that large public pension funds such as CalPERS and CalSTRS have used shareholder proposals and the threat of those proposals to negotiate with companies whose stock they own regarding board diversity); *see also* Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. DAYTON L. REV. 7, 10 (2011) (noting that CalPERS and CalSTRS are working with a panel of leading corporate governance experts to create a digital database aimed at increasing board diversity).

[310] *About*, THIRTY PERCENT COAL., *archived at* http://perma.cc/97NG-BSCL (last visited Mar. 24, 2014).

[311] *Institutional Investors Note Progress as Eight Companies Appoint Women to their Boards*, THIRTY PERCENT COAL. (Sept. 18, 2013), *archived at* http://perma.cc/6ZY8-593Q. As of September 2013, 8 of the targeted companies had appointed women to their boards. *Id.* After participating in the filing of 25 shareholder resolutions during the 2013 proxy season, the Coalition reported that it withdrew 18 of the proposals when companies agreed to include diversity considerations in their corporate governance guidelines on the nominating process. *Id.* Three of the shareholder resolutions went to a vote in 2013, and one received support of 50.7%, "mark[ing] the first time a board diversity resolution has received majority support from shareholders." *Id*.

[312] *2020 Gender Diversity Index: 2013 Key Findings*, 2020 WOMEN ON BOARDS, *archived at* http://perma.cc/Q7KF-AGHS (last visited May 16, 2014).

[313] *See* ASX LTD., ASX Listing R. 4.10.3, *archived at* http://perma.cc/VDH5-UNDM (requiring listed companies to disclose their diversity policies, including measurable objectives and progress, or to explain why they do not disclose the information).

[314] *See* NZX LTD., NZSX/NZDX Listing R. 10.5.5(j), *archived at* http://perma.cc/JB9K-MTWG (requiring a "quantitative breakdown" of officers and directors as well as a comparison from the year before).

disclosure regarding board composition and search processes, or even adopt a comply-or-explain approach as a best practice.[315]

Investors can also act, individually and collectively, to make board diversity a higher priority in investment decisions. For example, in 2009, the Women's Leadership Fund was created to invest up to $2 billion in publicly listed companies with a high percentage of women in senior positions, including board members, and to take activist positions in companies lacking such gender representation.[316] As a general matter, however, diversity-related proxy proposals submitted to American corporations have not been frequent.[317] Nor have investors initiated significant informal contact with companies concerning issues of gender and racial inclusion.[318] More investors should pursue such strategies to reward and reform companies based on their diversity records.[319]

A final institutional strategy is for organizations that publish indexes for socially responsible investing and corporate social responsibility to include measures of diversity in leadership.[320] Only a few publications now compile information along these lines, despite evidence that some investors are interested in receiving it.[321] If diversity on boards becomes part of the standard criteria for measuring corporate social responsibility, then the ability of investors, consumers, and public-interest organizations to hold corporations accountable would increase.

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[315] *See* Black, *supra* note 309, at 17-18; Katz & McIntosh, *supra* note 243, at 5.

[316] Richard Milne, *Fund to Invest in Gender Diversity*, FIN. TIMES, Oct. 26, 2009, *archived at* http://perma.cc/L85P-4URH; *see also* Julia Werdigier, *Fund Plans to Invest in Companies with Women as Directors*, N.Y. TIMES, Oct. 26, 2009, *archived at* http://perma.cc/92R2-7Y5Z (noting the organization's board inlcudes Cherie Blair, wife of the former UK Prime Minister, and Jenny Shipley, a former Prime Minister of New Zealand); LINDA TARR-WHELAN, WOMEN LEAD THE WAY: YOUR GUIDE TO STEPPING UP TO LEADERSHIP AND CHANGING THE WORLD 140 (2011) (urging investors to invest in companies that support gender diversity).

[317] *See* DELOITTE, *supra* note 13, at 1; DHIR, *supra* note 270.

[318] *See* SPENCER STUART, 2012 BOARDROOM DIVERSITY SURVEY: SUMMARY REPORT (2012), *archived at* http://perma.cc/A6VH-E9V8 (reporting only 11.3% of surveyed firms received contact from investors within the previous three years on issues of racial or gender diversity on the board).

[319] *See* TARR-WHELAN, *supra* note 316, at 140 (finding corporations responded positively when an investment firm made the proposal).

[320] *See About the DiversityInc Top 50*, DIVERSITYINC, *archived at* http://perma.cc/3A72-8SRL (last visited Mar. 24, 2014).

[321] *Id.*; *see also 2012 Best Companies for Diversity*, BLACK ENTER. (July 11, 2012), *archived at* http://perma.cc/G57V-BRA2. An Ethical Investment Research Service survey found the majority of women want their pension funds to favor companies with good records on equal opportunity. Grosser & Moon, *supra* note 228, at 333-35.

VI. CONCLUSION

As recent initiatives make clear, board membership remains a significant issue in the struggle for more equitable leadership structures. In this context, it matters to get the arguments right, and to make the case for diversity on the basis of strong equitable and reputational arguments rather than more contested links between board membership and financial performance. The gains in diversity that corporate America has made over the last quarter century testify to our capacity for progressive change. But the distance we remain from truly inclusive corporate boards reminds us of the progress yet to be made.