Worldview Diversity in the Boardroom: A Law and Social Equity Rationale

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I. INTRODUCTION

Recently, gender and racial diversity in politics—and, consequently, gender and racial prejudice in society—has reemerged as a hot topic in the popular media.[1] The heightened interest began in 2008 with the appointment of Nancy Pelosi as the first woman to serve as Speaker of the U.S. House of Representatives and picked up steam with the presidential bids of democratic party candidates then-Senator Hillary Clinton—a white woman—and then-Senator Barack Obama—a black man.[2] The historic election of President Barack Hussein Obama as the forty-fourth President of the United States fueled pundits' speculation that the United States had entered a "post-racial" society.[3] Secretary of State Hillary Clinton's presidential bid and Associate Justices Sonia Sotomayor's and Elena Kagan's appointments by President Obama to

1. *See, e.g.*, Nancy Cook, *Race, Ideology Shaped Super Tuesday Vote*, NPR (Feb. 6, 2008), http://www.npr.org/templates/story/story.php?storyId=18738766 ("Super Tuesday's results . . . prov[ed] that race, class, gender and political ideology do matter in this presidential race."); Rick Klein, *Pelosi: Clinton Camp Played Gender Card*, ABC NEWS (Nov. 5, 2007), http://www.abcnews.go.com/Politics/Vote2008/story?id=3821689&page=1 ("[Hillary Clinton's] campaign appears to be exploiting perceptions of Clinton facing down a field of aggressive male challengers."). Numerous discussions on Internet blogs and television shows referenced race, gender, and politics. The television show *Saturday Night Live* lampooned Senator Clinton the weekend before the West Virginia primary with respect to reports that many in the state would support her candidacy because she is white, while Senator Obama is black. Identity politics—"political activity and theorizing founded in the shared experiences of injustice of members of certain social groups"—truly has entered mainstream consciousness. Cressida Heyes, *Identity Politics*, STAN. ENCYCLOPEDIA PHILOSOPHY (July 16, 2002), http://plato.stanford.edu/entries/identity-politics/. On May 7, 2008, a brief search for the terms "race," "gender," "politics," and "Washington Post" or "Associated Press" revealed over 207,000 hits for web pages referencing all of those terms.

2. *See* Dan Balz, *Race and Gender Make Democrats' Field Historic*, WASH. POST, Jan. 17, 2007, at A01 (discussing the nominations of Clinton and Obama); Andrea Stone, *Pelosi Soon to Make History as First Female Speaker of the House*, USA TODAY (Nov. 8, 2006, 3:46 AM), http://www.usatoday.com/news/politicselections/vote2006/CA/2006-11-08-pelosi-profile_x.htm (discussing Pelosi's election as Speaker of the House).

3. *See* Joel Anderson, *Burying "Post-Racial": We're So Far from Achieving a Post-Racial Society that Even Using the Term is Harmful*, AM. PROSPECT (July 28, 2010), http://www.prospect.org/cs/articles?article=burying_post_racial ("[I]t's time we retire the notion that we are 'post-racial.'"); Tom Burrell, *A Post-Racial U.S.? Are You Kidding? Obama's Election Brought Some Kinds of Bigotry to the Surface*, NYDAILYNEWS.COM (June 18, 2010, 4:00 AM), http://www.nydailynews.com/opinions/2010/06/18/2010-06-18_a_postracial_us_are_you_kidding_obamas_election_brought_some_kinds_of_bigotry_to.html ("Obama's election less than two years ago sparked a momentary illusion that we had gotten past race. It turns out, far from ushering in a post-racial era, the election of Obama has in fact unleashed the rabid dog of fear, bigotry, hate and ignorance."); Ron Todt, *Andrew Breitbart: Obama Is Not "Post-Racial,"* GRIO (July 31, 2010, 8:30 PM), http://www.thegrio.com/politics/andrew-breitbart-obama-is-not-post-racial.php (discussing Obama's tacit promise to be a post-racial candidate).

the U.S. Supreme Court have fueled media coverage about whether the United States has become a "post-gender"[4] or "post-racial" society.[5]

Commentators tend to agree that race and gender still matter, although they disagree about what to do about it.[6] Examples of gender and race subordination abound. For instance, with regard to gender, many women are forced to be full-time stay-at-home mothers due to a public policy design that lacks childcare subsidies and because low-

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4. *See, e.g.*, Talk of the Nation, *Hillary's Big Moment: Are We Post-Gender?*, NPR (Aug. 27, 2008, 1:57 PM), http://www.npr.org/blogs/talk/2008/08/last_night_senator_hillary_cli.html (debating whether the United States is now a post-gender society).

5. *See* Hilary Hurd Anyaso, *Post-Racial Society?*, NW. U. NEWS CENTER (Aug. 11, 2010), http://www.northwestern.edu/newscenter/stories/2010/08/postracial-diversity-obama.html (citing HARVEY YOUNG, EMBODYING BLACK EXPERIENCE: STILLNESS, CRITICAL MEMORY AND THE BLACK BODY (2010)) ("President Obama is the most visible representation of the way race functions in America today . . . ."); Lois Danks, *The Myth of Post-racial Society*, DISSIDENT VOICE (June 26, 2010), http://dissidentvoice.org/2010/06/the-myth-of-a-post-racial-society/ (discussing a Black History Month forum's conclusion that "racism is still rampant in the United States"); Nat Hentoff, *National View: Are Americans Ready for a Post-racial Society?*, METROWEST DAILY NEWS (July 10, 2009, 8:57 AM), http://www.metrowestdailynews.com/opinion/x968676954/National-View-Are-Americans-ready-for-a-post-racial-society (discussing the U.S. Supreme Court's decision in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), and deeming it evidence that America has yet to achieve post-racial status).

6. *See, e.g.*, Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian* 82 (Suffolk Univ. Law Sch. Research Paper No. 10-16, 2010) (arguing for the development of "a scholarly program revealing . . . that post racialism, while explicitly progressive, hides implicit bias from view"); Jeffrey J. Rachlinski & George Scott Parks, Implicit Bias, Election '08, and the Myth of a Post-Racial America 1 (2009) (working paper), *available at* http://ssrn.com/abstract=1456509 ("Although President Obama's election means that explicit, open anti-Black racism has largely faded, an analysis of the campaign's rhetoric and themes suggests that unconscious racism is alive and well."); Cheryl Harris, *Are We Post-Racial Yet? Can We Be? Do We Want to Be?*, NEGOTIATION LAW BLOG (May 1, 2009), http://www.negotiationlawblog.com/2009/05/articles/truth-justice-and-the-american/are-we-postracial-yet-can-we-be-do-we-want-to-be/ ("Post-racialism maybe one can think of is the destination that color-blindness is supposed to get us to . . . . [I]f we really want to interrogate the possibilities of racial justice or racial reconciliation, we're not going to get very far if the starting point is that we have already gotten beyond the problem."); Devona Walker, *Maureen Dowd Misdiagnosed Obama's Race Problem*, ALTERNET (July 28, 2010, 9:41 AM), http://blogs.alternet.org/speakeasy/2010/07/28/maureen-dowd-misdiagnosed-obamas-race-problem/ ("[W]hen the President was elected, many Americans somehow thought he single-handedly ushered in a new post-racial era in America. Some conservative journalists even speculated that because a black man had been elected to the highest office in the land, we could finally put to bed affirmative action policies and that blacks would suddenly realize that racism was something of the past."); *cf. Are We Living in a Post-Racial America?*, NPR (Feb. 11, 2009), http://www.npr.org/templates/story/story.php?storyId=100557180 ("President Barack Obama is the country's first African American president. For some, his victory has ushered in a post racial era in which there is less need for Americans to talk about race. But not everyone agrees."); John McWhorter, *It's Official: America is "Post-Racial" in the Age of Obama*, GRIO (Jan. 14, 2010, 10:20 AM), http://www.thegrio.com/opinion/its-official-america-is-postracial-in-the-age-of-obama.php (arguing that Obama's election demonstrates that "race does not matter in America the way it used to" and that the United States has almost achieved post-racial status).

wage employers frown upon keeping pregnant workers.[7] Twenty-three percent of predominantly professional mothers quit their jobs because of the "lack of affordable, high-quality paid childcare."[8]

Like examples of gender subordination, examples of race subordination also abound. Church burnings in Alabama were aimed at the communities of color in rural areas that even today lack basic infrastructure such as schools, libraries, roads, and housing.[9] Noose displays and similar intimidation tactics followed President Obama's election.[10] In July 2010, the Agriculture Secretary asked Shirley Sherrod, an African American female ex-employee of the U.S. Department of Agriculture, to resign her position after officials misconstrued her remarks regarding how she had overcome her racial bias due to an experience helping a white farmer.[11] She had told a National Association for the Advancement of Colored People group in 1986, "I was struggling with the fact that so many black people had lost their farm land, and here I was faced with having to help a [w]hite person save their land. So I didn't give him the full force of what I

7. *See* JOAN C. WILLIAMS & HEATHER BOUSEY, CTR. FOR AM. PROGRESS, CTR. FOR WORKLIFE LAW, THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 7, 30 (2010), a*vailable at* http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf ("Calls to the Center for WorkLife Law's hotline for family caregivers reveal the lengths low-wage employers will go to 'get rid of' pregnant workers. One caller reported being forced to undergo monthly 'drug tests' that, upon further investigation, appear to have been pregnancy tests, because only women were required to take them."). Other examples from callers include a woman who was fired when she became pregnant and was offered her job back upon the condition of her having an abortion. *Id.* at 30. Reported lawsuits cite the following reasons for women being fired because of their pregnancy: a hotel kitchen is "no place for a pregnant woman to be"; where pregnant women worked at a front desk "it didn't look good"; and a bartender "could not keep up." *Id.* Middle-income women are more likely to face discrimination after they give birth and return to work, where they are warned not to get pregnant again and ridiculed for having to take their child to medical appointments. *Id.* at 45.

8. *Id.* at 57. The authors note, "One attorney, despite excellent evaluations, was passed over repeatedly for promotions that were offered to less qualified men with children and to a woman without children." *Id.* at 58.

9. *See, e.g.*, Rusty Dornin et al., *Suspect: Church Fires Started as "Joke": Three Birmingham College Students Arrested, Charged*, CNN.COM L. CENTER (Mar. 9, 2006, 4:32 AM), http://www.cnn.com/2006/LAW/03/08/alabama.churches/ (discussing the burning of nine Alabama churches, five of which had primarily black congregations).

10. *See, e.g.*, *Obama Election Spurs Race Threats, Crimes*, ASSOCIATED PRESS, Nov. 15, 2008, *available at* http://www.msnbc.msn.com/id/27738018/ ("Cross burnings. Schoolchildren chanting 'Assassinate Obama.' Black figures hung from nooses. Racial epithets scrawled on homes and cars. Incidents around the country referring to President-elect Barack Obama are dampening the postelection glow of racial progress and harmony, highlighting the stubborn racism that remains in America.").

11. AFRO Staff, *Top USDA Employee Resigns After Remarks are Considered Racist*, AFRO (July 21, 2010), http://www.afro.com/sections/news/afro_briefs/story.htm?storyid=1975.

could do. I did enough."[12] Ms. Sherrod later explained that she told the story because "working with him helped me to see that it wasn't a [b]lack and [w]hite issue."[13] Ultimately, Sherrod overcame her prejudice and worked with the farmer for two years to save the family farm.[14]

These anecdotes demonstrate that gender and racial bias are heated issues. "[M]any of the prejudices and racial issues that have haunted the U.S. for centuries continue today . . . ."[15] In a society that has not yet reached post-gender or post-racial status, it is far from clear that simply labeling it "post-gender" and "post-racial" and shutting down the dialogue about race will transform the society into a "post-gender," "post-racial" one. Of course, women and people of color are not monolithic groups. Individuals' experiences differ. However, "[w]e also need to appreciate how issues such as racial profiling target [black] bodies regardless of age, gender, sexuality and class."[16] Similarly, issues such as workforce sexual harassment target women due to their gender and impact women as a group.[17] This is not to say that men do not face sexual harassment or that white people are never the target of discrimination. However, it is to say that racial and gender subordination targets individuals based on observable personal characteristics. Although women and people of color are achieving ever more prominent positions of power, gender and race still matter in the United States.

In addition to race and gender, class also still matters. Incomes declined across all wage groups due to the 2008 financial crisis.[18] However, the crisis served to create a less equal society in terms of economic power.[19] Although the severe stock market declines in 2008 caused income from securities trading to drop for the affluent, "[o]n every other income front, the affluent more than held their own. In 2008, excluding income from stock trades and other capital gains, America's top 10 percent actually slightly increased their share of the nation's wealth."[20] The redistribution of wealth from the lower and

12. *Id.*

13. *Id.*

14. *Id.*

15. Anyaso, *supra* note 5.

16. *Id.* (quoting YOUNG, *supra* note 5) (internal quotation marks omitted).

17. *See id.*

18. *See generally* Sam Pizzigati, *America's Top Incomes: Down but Certainly Not Out*, WORKING GROUP ON EXTREME INEQUALITY (July 24, 2010), http://extremeinequality.org/?p=237 (analyzing the U.S. income gap).

19. *Id.*

20. *Id.*

middle income levels to the United States' most wealthy citizens reveals that the Great Recession served to widen the gap between the wealthy and everyone else. The recovery from the Great Recession has benefited mainly the top 1 percent.[21]

As another example, the unemployment rate at the end of July 2010 was approximately 9.5 percent.[22] Breaking this statistic down further, the unemployment rate at the top of the economic ladder—bachelor's degree or higher—was 4.5 percent.[23] For the middle class, including high school graduates and those with some college education or an associate's degree, it was 9.2 percent;[24] and for those at the bottom of the economic ladder—less than a high school diploma—it was 13.8 percent.[25] The unemployment rate among adult men was 9.7 percent, and among adult women was 7.9 percent.[26] The unemployment rate was 15.6 percent among African Americans and 12.1 percent among Hispanics.[27] Employment statistics fail to account for the underemployed and for those who have ceased to look for employment because none is available.[28] The United States has become an increasingly class-based society.[29] As more women and minorities find themselves in the lower economic classes, class disadvantages only exacerbate the gender and racial subordination mentioned earlier.

There are calls to overcome gender and racial subordination through efforts to diversify in many areas, but especially for diversity among the members of the political, corporate, and academic elite in American society.[30] In particular, commentators call for greater gender and racial

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21. *Id.*

22. U.S. Dep't of Labor, *Economic News Release: Employment Situation Summary*, BUREAU LABOR STAT. (Aug. 6, 2010, 8:30 AM), http://www.bls.gov/news.release/archives/empsit_08062010.htm.

23. *Id.*

24. This percentage was obtained by averaging the unemployment rates for high school graduates and individuals with some college education or an associate's degree.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See generally* Jas Writer, *Class-Based Society in America*, SOCYBERTY (Dec. 8, 2008), http://socyberty.com/society/class-based-society-in-america/ ("[C]lass-based society has become the usual norm within all modern and postmodern realities of social organization, as applied . . . to almost all contemporary nations.").

30. *See, e.g.*, Tracy Anbinder Baron, *Keeping Women Out of the Executive Suite: The Court's Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 283–306 (1994) (discussing judicial failure to deal with employment discrimination); Timothy A. Canova, *Monologue or Dialogue in Management Decisions: A Comparison of Mandatory Bargaining Duties in the United States and Sweden*, 12 COMP. LAB. L.J. 257, 295–96 (comparing the U.S. and Swedish legal regimes governing collective bargaining, and proposing that boards should

diversity on corporate boards.[31] Literature in the areas of corporate social responsibility and law and socioeconomics, as well as a growing number of studies at the intersection of corporate law and critical race theory, argue: (1) gender and racial diversity on corporate boards is essential to better governance and decision making and may lead to greater corporate profitability;[32] and (2) boards should seek racial and gender diversity out of fairness and equity concerns.[33] In fact, commentators have emphasized that boards should strive for viewpoint diversity, not simply gender and racial diversity, because independent thinking—which may lead to better governance—is one goal of

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include labor representatives); 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, 1106–38 (2005) (comparing and contrasting "the experiences of women and people of color on corporate boards and discuss[ing] how the differences in those experiences might impact their ultimate success in achieving greater representation on corporate boards"); Theresa A. Gabaldon, *Like a Fish Needs a Bicycle: Public Corporations and Their Shareholders*, 65 MD. L. REV. 538, 539 (2006) ("[S]hareholder primacy doctrine prevents examination of the interests of those not adequately represented in prior corporate law colloquy."); 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, 1600–12 (2004) (arguing that convergence theory is the key to true race reform in the corporate board selection process); Janis Sarra, *Class Act: Considering Race and Gender in the Corporate Boardroom*, 79 ST. JOHN'S L. REV. 1121, 1121–25 (2005) (arguing that lack of diversity of corporate boards exacerbates race and gender discrimination issues); Cheryl L. Wade, *Transforming Discriminatory Corporate Culture: This is Not Just Women's Work* 7–9 (St. John's Legal Studies Research Paper No. 06-0041, 2006) (arguing that CEOs may influence corporate culture in order to achieve racial and gender equality).

31. *See* Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1365–66 (2002) (arguing that the corporate social responsibility movement may provide a solution to race, gender, and ethnic inequality on corporate boards of directors); 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, 797 (2005) (analyzing "business rationales for diversity . . . to determine whether such rationales can or should be used as a basis for justifying efforts to increase board diversity"); Fairfax, *supra* note 30, at 1110–14 (arguing that there are "miles to go" in increasing racial and gender diversity on corporate boards).

32. *See* Dallas, *supra* note 31, at 1365–66 (arguing that the corporate social responsibility movement may provide a solution to race, gender, and ethnic inequality on corporate boards of directors); Fairfax, *supra* note 31, at 795–97 (describing the business rationales that have been used for advocating greater diversity in corporate settings).

33. *See, e.g.*, Douglas Branson, *No Seat at the Table: How Corporate Governance and Law Keep Women Out of the Boardroom* 92–94 (Univ. of Pittsburgh Legal Studies Research Paper No. 2007-11, 2007) (arguing that the number of women directors is still static and growing slowly and that "the glass ceiling still seems firmly in place"); Wade, *supra* note 30, at 353–54 ("A CEO's sincere commitment to workplace race and gender equity is a prerequisite to achieving fairness for women and minority employees."). For further consideration of this literature, see *infra* Parts III.A. and IV.A (describing the cultural cognition theory and the changing role of risk in corporate law, respectively).

diversity, and that goal is best served by having a variety of different viewpoints on corporate boards.[34]

Recommendations for greater board diversity may overlook a growing body of empirical research on cultural cognition.[35] Whereas corporate social responsibility and corporate law scholarship use the results of empirical research on gender and racial composition of corporate boards on governance and corporate profitability, legal scholarship mostly disregards the research on cultural cognition and worldview diversity.[36] The evidence suggests that worldview bias may create misperception of risks on corporate boards and lead to biased corporate decision making.[37]

Cultural cognition studies suggest that individuals conform their assessment of risk to their vision of an ideal society—their cultural

34. *See* Erica Beecher-Monas, *Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?*, 86 OR. L. REV. 373, 376–77, 391–95 (2007) (discussing how diversity broadly may generate independent thinking); Regina F. Burch, *The Myth of the Unbiased Director*, 41 AKRON L. REV. 509, 552–56 (2009) (arguing that worldview diversity may mitigate a lack of independent thinking on corporate boards).

35. *See* Burch, *supra* note 34, at 537–44 (discussing the Yale Law School Cultural Cognition Project's study on cultural bias and the white male effect).

36. *Id.*

37. A majority of the directors of large, publicly held corporations are white males who are affluent and highly educated and who hold executive positions or are retired from executive positions. Demonstrated ability to lead in a hierarchical organizational structure, to act quickly and decisively, and to commit to a decision are some of the attributes of individuals who achieve top management positions. These behavioral characteristics are consistent with hierarchical and individualistic norms. A recent study of Fortune 1000 companies demonstrated that women were represented on 82 percent of corporate boards; 76 percent of Fortune 1000 boards included at least one ethnic minority. Fairfax, *supra* note 30, at 1107. The number of companies with ethnic and gender diversity generally has increased over the last ten years. *See* ALLEN L. WHITE, BUS. FOR SOC. RESPONSIBILITY, THE STAKEHOLDER FIDUCIARY: CSR, GOVERNANCE AND THE FUTURE OF BOARDS 3–17 (2006), http://www.bsr.org/reports/BSR_AW_Corporate-Boards.pdf (arguing a corporate board should be a stakeholder rather than a shareholder and fiduciary, which would thus make corporate boards adaptable to "the changing nature of the social contract between business and society"). The percentage of minority men on Fortune 100 corporate boards declined slightly between 2004 and 2006 from 11.88 percent to 11.40 percent. ALLIANCE FOR BD. DIVERSITY, WOMEN AND MINORITIES ON FORTUNE 100 BOARDS 6 (2008), http://www.proutgroup.com/Resources/abdreportfinal2008.pdf. Furthermore, the number of women and minorities as a percentage of the total number of board seats remains small. Seventy-one percent of directorships at these Fortune 100 companies were held by white males and "[a]ll women and all minority men held less than one-third of board director seats." *Id.* at 9. For example, as of 2006, 1,219 board seats existed on Fortune 100 companies; 17.06 percent of those were held by women and 15.42 percent by minorities. *Id.* at 6. Moreover, minorities held an average of 1.18 board seats. *Id.* African American directors held an average of 1.31 board seats. *Id.* While three corporations had no women on their boards, up from only one in 2004, it was not uncommon to find a board with no minorities, particularly no Asian Americans or Hispanic Americans. *Id.* at 7.

viewpoint or worldview.[38] Cultural cognition theorists assert that cultural cognition is distinct from other decision-making processes, such as "loss aversion,"[39] "status quo bias,"[40] and "group polarization."[41] Instead,

> [p]erhaps because of upbringing, perhaps because of genetic disposition, or perhaps because of some combination of the two, people form hierarchic, egalitarian, individualistic, or communitarian cultural commitments. These commitments, in turn, supply the values to which individuals conform their beliefs and define the relevant groups within which social influences on belief operate.[42]

Cultural cognition is not the same as a predisposition to hold certain values or beliefs due to race and gender. Individuals' views of the "ideal society" more strongly influence risk perception than do race and gender.[43]

The theory of cultural cognition lends support to recommendations for greater board diversity. First, the theory has descriptive power in that it may apply particularly to explain one important factor operating in board decision making—the way that corporate boards weigh the costs and benefits of certain activities. Second, even if worldviews are outweighed by other factors in board decision making, such as group dynamics, diversity of viewpoint is still important given that boards

38. *See* Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465, 466 (2007) [hereinafter Kahan et al., *Culture and Identity*] ("[T]he white-male effect might derive from a congeniality between hierarchical and individualistic worldviews . . . and a posture of extreme risk skepticism."); Dan M. Kahan et al., *The Second National Risk and Culture Study: Making Sense of—and Making Progress In—The American Culture War of Fact* 2 (Yale Law Sch., Pub. Law Working Paper No. 154, 2007) [hereinafter Kahan et al., *Second National Risk*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017189 ("The 'cultural cognition thesis' asserts that people's beliefs about risk are shaped by their core values.").

39. Loss aversion is defined as "the tendency for people to strongly prefer avoiding losses than acquiring gains. Some studies suggest that losses are as much as twice as psychologically powerful than gains. This leads to risk aversion when people evaluate a possible gain; since people prefer avoiding losses to making gains." *Loss Aversion—Definition*, WORDIQ.COM, http://www.wordiq.com/definition/Loss_aversion (last visited Mar. 23, 2011).

40. Status quo bias is defined as "cognitive bias for the status quo; in other words, people like things to stay relatively the same." *Status Quo Bias—Definition*, WORDIQ.COM, http://www.wordiq.com/definition/Status_quo_bias (last visited Mar. 23, 2011).

41. Group polarization is defined as "the tendency of people to make decisions that are more extreme when they are in a group, as opposed to a decision made alone or independently." *Group Polarization*, WIKIPEDIA, http://en.wikipedia.org/wiki/Group_polarization (last modfied Jan. 6, 2011).

42. Dan M. Kahan & Paul Slovic, *Cultural Evaluations of Risk: "Values" or "Blunders"?*, 119 HARV. L. REV. F. 166, 170 (2006).

43. Kahan et al., *Culture and Identity*, *supra* note 38, at 466; Kahan et al., *Second National Risk*, *supra* note 38, at 2.

have become more active in considering corporate decisions. Third, worldviews may be tested empirically—viewpoint diversity is easier to create if it can be quantified.

In addition to lending support to requests for greater board diversity, the theory has normative and prescriptive value. Normatively, the theory suggests that one should ask whether diversity of directors' views of the ideal society is wanted, because such diversity may impede decision making. The theory's prescriptive aspects may be used to devise or assess solutions to increasing board diversity; e.g., board training, director pipeline programs, such as the DirectWomen Board Institute, demographics disclosure mandates under federal law, and mandated diversity requirements.[44]

This Article proposes that greater worldview diversity on corporate boards may lead to better governance and mitigate bias and unfairness in corporate decision making. Also, it recommends greater gender and racial diversity as a way to achieve greater worldview diversity.

Part II of this Article summarizes the empirical research on the gender and racial composition of corporate boards. It discusses corporate board demographics for publicly traded corporations. Also, it reviews research on the effect of board diversity on corporate profitability, including monitoring and decision making. In general, the empirical evidence suggests that gender and racial diversity may correlate positively with corporate profitability; i.e., as gender and racial

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44. *See, e.g.*, Proxy Disclosure Enhancements, Securities Act Release Nos. 33-9089, 34-61175, 47 Fed. Reg. 68,834 (Dec. 23, 2009) [hereinafter Proxy Disclosure Enhancements], *available at* http://www.sec.gov/rules/final/2009/33-9089.pdf (discussing the SEC's new disclosure rules, requiring disclosure of "compensation policies and practices[,] . . . director and nominee qualifications[,] . . . [and] board leadership structure"); Douglas M. Branson, *Still Square Pegs in Round Holes? A Look at ANCSA Corporations, Corporate Governance, and Indeterminate Form or Operation of Legal Entities*, 24 ALASKA L. REV. 203, 215–17 (2007) ("Precepts of modern corporate governance speak to the following: board size, elimination of trophy directors, board and boardroom decorum, director training, director performance reviews, and standards of the corporation. . . . Post-SOX, a number of law and business schools now offer week long courses for directors . . . ."); Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 56–57 (2009) (noting countries like Norway have enacted a Corporate Board Quota law ("CBQ") that mandates "that all publicly-listed corporations in Norway repopulate their boards to include at least forty percent women by January 1, 2008. . . . Noncompliance [] result[s] in dissolution of the corporation."); Marina v.N. Whitman, *Keynote Address: Corporate Governance and Sustainable Peace: An Insider's View*, 36 VAND. J. TRANSNAT'L L. 723, 726–27 (2003) ("Now, not only do most of these companies set up internal training programs for new directors, but there is a whole industry of consulting firms and universities, particularly law schools and business schools, that run programs for corporate directors."); *About DirectWomen: Overview*, DIRECT WOMEN, http://directwomen.org/about/ (last visited Mar. 23, 2011) (discussing DirectWomen, which promotes independence and diversity in corporate governance).

diversity increases, so may share price.[45] However, further evidence may point to the opposite.[46]

Part III discusses the theory of cultural cognition and the empirical projects at the Yale Cultural Cognition Center. It suggests that cultural cognition affects board members' perceptions of risk taking.[47] The findings on worldview bias may be consistent with the findings on whether board diversity leads to increased corporate profitability or greater shareholder value. For example, it may be that the addition of one or two "diverse" board members, in and of itself, does little to mitigate structural worldview bias and the skewed risk perceptions that exist among most corporate boards. This could be due to a number of factors, including group dynamics. However, another factor could be that chief executive officers and board members seek board nominees who replicate the worldviews of the board majority.[48] This part concludes by explaining why board racial and gender diversity alone may not mitigate skewed risk perceptions on boards and suggests that greater worldview diversity may be in a corporation's best interests from an equity and fairness viewpoint.

Part IV elaborates on the position that worldview diversity, as well as gender and racial diversity, is an important corporate goal from an equity and fairness viewpoint.[49] Part IV.A discusses the role of risk in corporate law before and after the 2008 financial crisis and the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").[50] It argues that corporate fiduciary duty law is sparse with respect to holding directors liable for taking unreasonable risks. Further, the Dodd-Frank Act contains risk management provisions, but does not go far enough.[51] Part IV.B

45. *See infra* notes 97–101 and accompanying text (discussing these empirical findings in greater detail).

46. *See infra* Part II.B (discussing evidence indicating that increases in diversity have been only gradual and that corporate boards still fail to reflect U.S. demographics).

47. *See infra* notes 126–31 and accompanying text (examining the correlation between gender, race, and risk taking).

48. *See, e.g.*, Ramirez, *supra* note 30, at 1587 ("CEOs will naturally seek boards that are as similar as possible to themselves in all socially relevant characteristics.").

49. *See infra* Part IV.A.

50. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *infra* Part IV.A.

51. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. I, § 165, 124 Stat. 1376, 1423 (requiring that certain large, interconnected financial institutions establish risk committees to oversee enterprise risk management practices); *id.*, tit. IX, § 956 (requiring that certain financial institutions disclose incentive compensation management and that corporate governance practices appropriately balance risks and rewards); *infra* Part IV.A (discussing Dodd-Frank provisions related to managing company-specific and economy-wide

discusses the corporate social responsibility literature and the idea that stakeholders' interests may be as important a driver of corporate decision making as shareholder value.[52] Also, it discusses the notion in the literature on board diversity that diversity is good because it satisfies stakeholders' interests in addition to possibly satisfying shareholders' interests in increased share value. Board diversity is consistent with corporate social responsibility theories and strategies. Part IV also introduces critical race theory literature as one method to evaluate whether worldview diversity would prove effective at helping boards mitigate the risks of biased decision making.[53]

Part V discusses three practical roadblocks to increased worldview diversity on corporate boards.[54] In addition, it uses the insights from research on board dynamics, and from cultural cognition and critical race theory, to present possible strategies to overcoming those roadblocks.[55] Part V concludes that increased worldview diversity on corporate boards is achievable, and Part VI summarizes the Article.[56]

President Obama stated, when signing the Dodd-Frank Act, that "[n]o law can force anyone to be responsible."[57] However, a combination of law and changes in business norms may improve board decision making. The focus of this Article is on creating incentives to encourage directors to change business norms. Board decision making is a function of the "competencies and [behavioral] characteristics of . . . directors."[58] Competencies—what one can do—grow from education, skills training, and experience. Behavioral characteristics derive from a combination of personality—who one is—and upbringing—the influence of external factors, including family, friends, and society. Worldview—how one views one's role and the role of others in society—shapes behavioral norms.

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risks).

52. *See infra* Part IV.B.

53. *See infra* Part IV.

54. *See infra* Part V.

55. *See infra* Part V.

56. *See infra* Parts V and VI.

57. *Whiteboard Archives of Politico 44: A Living Diary of the Obama Presidency*, POLITICO (July 21, 2010, 11:34 AM), http://www.politico.com/politico44/wbarchive/whiteboard07212010.html.

58. RICHARD LEBLANC & JAMES GILLIES, INSIDE THE BOARDROOM: HOW BOARDS *REALLY* WORK AND THE COMING REVOLUTION IN CORPORATE GOVERNANCE 8 (2005).

II. Empirical Research on Corporate Boards

Empirical evidence suggests that an association exists between gender and racial diversity on corporate boards and better shareholder value. Also, diverse corporate boards' decisions are viewed with greater legitimacy. However, empirical research also paints a different picture: gender and racial diversity is but a small factor in value-enhancing board decisions.

A. Empirical Research on the Gender and Racial Composition of Corporate Boards

Recent statistics on board composition indicate that although gender and racial diversity have increased on public company boards, increases have been gradual, and corporate boards still reflect neither the demographics of the U.S. population nor the demographics of the labor force.[59] Moreover, boards do not reflect the percentage of the general population holding professional degrees and qualifying for executive or management positions. For example, according to a 2009 Catalyst Census report of women in board positions:

> In 2008, women . . . held 15.2 percent of board seats.
>
> Women's share of nominating/governance committee chairs is the only board leadership position in which women are keeping pace with their share of overall board seats.
>
> In both 2008 and 2009, almost 90 percent of companies had at least one woman director,[60] but less than 20 percent had three or more women serving together.
>
> In 2008, women of color held 3.2 percent of all board seats, and white women held 11.8 percent.
>
> In 2008, women of color directors comprised about two-thirds Black women, almost one-quarter Latinas, and about one-tenth Asian women.
>
> In 2008 and 2009, more than one-fourth of companies had one woman of color director, but no company had three or more women of color directors serving together.[61]

The Catalyst Census report further notes that 11.4 percent of board seats in 2006 were held by minority males: 7.14 percent African American; 1.23 percent Asian American; and 3.04 percent Hispanic.[62]

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59. *See infra* notes 60–62 and accompanying text.

60. Rachel Soares et al., Catalyst, 2009 Catalyst Census: *Fortune* 500 Women Board of Directors 1 (2009).

61. *Id.* at 2.

62. Alliance for Board Diversity, *supra* note 37, at 6.

Gathering accurate board diversity statistics has proven difficult. First, some double-counting may exist when a woman or a person of color serves on more than one board.[63] Second, prior to 2010, the Securities and Exchange Commission ("SEC") did not require publicly traded companies to collect or to report information regarding board diversity.[64]

Effective February 28, 2010, the SEC required corporate boards of publicly held corporations to disclose in their proxy materials more information about how diversity factors into board member nominations.[65] According to the SEC, the purpose of the rule was to "provide investors with information on corporate culture and governance practices that would enable investors to make more informed voting and investment decisions."[66]

Although the SEC often defines important disclosure concepts, in this case the SEC allowed corporations to define the term "diversity" because

> companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin.[67]

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63. *See* Fairfax, *supra* note 31, at 802 (analyzing empirical data revealing that racial minorities tend to hold multiple directorships, while "relatively few whites hold multiple board positions"); *see also* Fairfax, *supra* note 30, at 1116–17 ("[W]omen of color directors may hold more multiple board seats than other directors.").

64. *See* Proxy Disclosure Enhancements, *supra* note 44 (amending Item 407(c)(2)(vi) of Regulation S-K to require "disclosure of whether, and if so how, a nominating committee considers diversity in identifying nominees for director").

65. *See id.* (requiring disclosure of how diversity is considered in identifying director nominees). The final rule states:

> Describe the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder, and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.

17 C.F.R. § 229.407(c)(2)(vi) (2010).

66. Proxy Disclosure Enhancements, *supra* note 44. The commenters included institutional investors Boston Club, Boston Common Asset Management, CalPERS, Pax World Management Corporation, Trillium Asset Management Corporation, and Social Investment Forum.

67. *Id.*

The new rule does not require boards to disclose board diversity by race, gender, etc., or to report those statistics along with the number of other boards on which a director may serve. A recent Corporate Library study entitled "The Value of Board Diversity: What Companies Don't Know, But Investors Should," examined the "diversity" disclosures from 388 of the Standard & Poor's 500 companies and found that "companies' definitions of diversity typically lump together all kinds of personal and professional characteristics."[68] Diversity most often was defined in the aggregate according to gender, race, ethnicity, geography, age, and/or professional experiences.[69] Sexual orientation, physical disability, and socioeconomic diversity were not mentioned in any of the disclosures.[70] In light of these varied and all-inclusive definitions, the rule has not resolved the data collection problem described above.

However, the rule has another purpose at least as important as improving transparency regarding diversity statistics, if not more important. During the notice and comment period after the SEC proposed the rule, institutional investors commented that board diversity improves financial performance and "that diverse boards can help companies more effectively recruit talent and retain staff."[71] The disclosures could reveal whether companies also believe that board diversity increases shareholder value, improves recruiting and retention of talented staff, or has some other positive impact on corporate operations, finance, or governance. One may infer whether a corporation believes that diversity has a positive value by examining the corporation's proxy statement, which discusses institutionalized processes "through which [corporate managers] will be able to survey the social issues facing the corporation, evaluate the corporation's current practices, reflect on alternatives, and implement action."[72]

In the Corporate Library report, Kimberly Gladman noted that companies' disclosures were vague, fairly "boilerplate," and "notable for what's not there."[73] Specifically, the disclosures did not address

68. Kimberly Gladman, *The Value of Board Diversity: What Companies Don't Know, but Investors Should*, CORP. LIBR. BLOG (July 29, 2010, 11:46 AM), http://blog.thecorporatelibrary.com/blog/2010/07/the-value-of-board-diversity-what-companies-dont-know-but-investors-should.html.

69. *Id.*

70. *Id.*

71. Proxy Disclosure Enhancements, *supra* note 44.

72. Cyrus Mehri, Andrea Giampetro-Meyer & Michael B. Runnels, *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability, and Workplace Fairness*, 9 FORDHAM J. CORP. & FIN. L. 395, 409 (2005).

73. Robert Kropp, *Corporate Disclosures Ignore Financial Benefits of Board Diversity*, SOCIALFUNDS (Aug. 5, 2010), http://www.socialfunds.com/news/article.cgi?sfArticleId=3007.

issues such as efforts to recruit a diverse board and the connection between board diversity, corporate governance, and corporate performance.

For example, two reasons are often given for the predominance of white males on corporate boards: lack of qualified senior executives in the pipeline, and lack of corporate governance training of potential diversity candidates who are female or people of color.[74] Corporate boards strive for, and in some cases are mandated to achieve, board independence.[75] An independent director often comes from the ranks of senior executives outside of the company who, due to his or her interactions with corporate boards, may have corporate governance awareness if not actual corporate governance training.[76] In addition, boards increasingly look for executives with experience in industries that are or will be important to the corporations' future, not just to the corporations' current business. Finally, due to the requirement of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") that audit committees have at least one member who is a financial expert, corporations look for board members with financial expertise.[77] The Sarbanes-Oxley requirements seem to have created more opportunities to serve on corporate boards. As senior executives have resigned from board positions because of the increased time commitment commensurate with increased monitoring obligations due to Sarbanes-Oxley, board positions open up. However, this benefits qualified women and people of color who seek to become directors only if they are considered as directors. Do these numerous qualifications—financial expertise, industry experience, knowledge regarding corporate governance, and independence—overly narrow the pool for board members who can increase board gender and racial diversity?

Less diversity among senior executives means less diversity among potential board candidates. The purported lack of female senior

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74. *See* Beverly Behan, *Time for Diversity in the Boardroom*, BLOOMBERG BUSINESSWEEK (Jan. 20, 2009, 2:24 PM), http://www.businessweek.com/managing/content/jan2009/ca20090120_589700.htm (discussing the factors constraining corporate board invitations to minorities).

75. *See* Self-Regulatory Organizations, Exchange Act Release No. 34-47516, 68 Fed. Reg. 14,451 (Mar. 25, 2003), *available at* http://www.sec.gov/rules/sro/34-47516.htm (noting the filing of a proposed SEC rule change regarding board independence).

76. *See* LEBLANC & GILLIES, *supra* note 58, at 51–52, 67–75.

77. *See* Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Exchange Act Release Nos. 33-8177, 34-47235, 68 Fed. Reg. 5110 (Jan. 31, 2003), *available at* http://www.sec.gov/rules/final/33-8177.htm. Section 407 required publicly traded companies to disclose whether the audit committee has at least one financial expert on the committee. *See* 15 U.S.C. § 7265(a) (2002) (delegating authority to the SEC under Sarbanes-Oxley relating to financial experts on audit committees).

executives and senior executives of color who are board-ready begs the question: why is there a lack of diversity among senior executives? However, some question whether a dearth of qualified, diverse senior executives even exists.[78] For example, the Executive Leadership Council ("ELC") is comprised of more than 500 African American senior-level executives from a wide variety of industries.[79] The executives either report directly to the Chief Executive Officer ("CEO") or are within three levels below the CEO in the corporate hierarchy.[80] According to the ELC and others, the issue is not a dearth of board-ready diversity candidates, but that board candidates are often within the nominating committee's or CEO's "circle of acquaintance";[81] those committees and acquaintanceships just do not include many qualified women or people of color. These are issues that could be addressed in the proxy disclosures and should inform the disclosures.[82]

B. Diversity, Governance, Fairness, and Profitability

According to a post by Kimberly Gladman on the Corporate Library blog, "Company after company claims [in proxy disclosures and in other published material] to value diversity and says [diversity] makes board discussions more robust and better informed. However, exactly

78. *See, e.g.*, *New Survey of Corporate Hiring: Black and Latino Executives Falling Further Behind*, PR NEWSWIRE (Mar. 25, 2010), http://www.prnewswire.com/news-releases/new-survey-of-corporate-hiring-black-and-latino-executives-falling-further-behind-89105902.html (noting that the poor economy in 2008–2009 cultivated this attitude among the executive search industry). A survey examining employment rates of minority executives conducted by Wesley, Brown & Bartle ("WB&B"), a national executive search firm, shows that "when an equally credentialed Black or Latino executive is one of three finalists for an open position, their respective chance of getting the job offer is not one in three but one in 33." *Id.* Wesley Portiotis, chairman of WB&B, discussed his assignment experience from Fortune 500 companies where WB&B presented over 300 highly qualified minority candidates, whom he referred to as "the hidden talent pool of high performers." *Id.* The results were "less than two percent were hired in line and operations roles that affect the company's bottom-line." *Id.*

79. *See Vision and Mission*, EXECUTIVE LEADERSHIP COUNCIL, http://www.elcinfo.com/mission.php (last visited Mar. 23, 2011) ("The mission of The Executive Leadership Council is to build an inclusive business leadership pipeline, and to develop African-American corporate leaders—one student and one executive at a time.").

80. *Id.*

81. *Id.*

82. Another potential issue is the incentive to disclose vague statements regarding diversity, or viewed another way, the lack of incentive to disclose more than the bare minimum regarding board diversity. Disclosures could lead to litigation. If the corporation were to disclose the "lack of candidates" argument, then shareholders could claim the statement is evidence that the corporation did not do its homework to locate candidates. Further, if other corporations make vague statements about diversity, then the business norm leans towards vague statements and the corporation cannot be faulted for failure to have processes in place that are not up to standard business practices.

how this happens is not explained."[83] Moreover, the companies do not describe "what difference . . . it make[s], performance-wise, to have women and members of racial and ethnic minority groups serve on corporate boards."[84] The disclosures do not specify the connection between diversity and improved corporate governance or firm performance, even though academics from law, business, and economics investigate such a connection.[85]

The disclosures mirror the results of a qualitative study conducted by John Conley, Lissa Broome, and Kimberly Krawiec.[86] The purpose of the study was to crystallize directors' and their advisers' rationales for board diversity. In sum, the participants identified a variety of rationales: firms seeking board diversity are accessing an untapped talent pool;[87] a diverse board gets to a better answer;[88] diverse boards are more likely to engage in constructive dissent;[89] a diverse board conveys a credible signal to relevant observers of corporate behavior;[90] and board diversity is accepted without much introspection.[91] In the

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83. Gladman, *supra* note 68.

84. *Id.*

85. *See* David A. Carter et al., *Board Diversity and Firm Performance*, *in* 17 RESEARCH IN INTERNATIONAL BUSINESS & FINANCE 49, 51–55 (Jonathan A. Batten et al. eds., 2003) (examining the relationship between board diversity and firm value for Fortune 1000 firms); David A. Carter et al., *Corporate Governance, Board Diversity and Firm Value*, 38 FIN. REV. 33, 37 (2003) (discussing the link between diversity and firm value); David Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18 CORP. GOV.: AN INT'L REV. 396, 398–400 (2010) [hereinafter Carter et al., *Gender and Ethnic Diversity*] (discussing the benefits of including women and ethnic minorities on boards of directors); CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS 1 (2007) (discussing the success of financial measures when women serve on boards); CORPORATE LIBRARY, BEYOND THE BOILERPLATE: THE PERFORMANCE IMPACTS OF BOARD DIVERSITY 6 (2010), *available at* http://www.thecorporatelibrary.com/product_documents/327boarddiversitydisclosures.pdf (discussing potential consequences of women board directors). *See generally* Deborah Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?* 4–9 (Rock Ctr. for Corp. Governance at Stanford Univ., Working Paper No. 89, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685615 (summarizing the recent empirical literature on the relationship between board diversity and corporate performance).

86. John M. Conley, Lissa L. Broome & Kimberly D. Krawiece, *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say About Why Diversity Matters* 10–23 (Univ. of N.C. Law Sch., Legal Studies Research Paper Series No. 1415803, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415803#%23.

87. *See id.* at 12 (discussing diversity in relation to board succession planning).

88. *See id.* at 11 (noting that a diverse board will better appreciate differing viewpoints based on race, economic status, or industry background).

89. *See id.* at 3 (discussing the rationale for board diversity).

90. *See id.* at 19 (stating that test subjects indicated that board composition sends "positive signals about the company to particular groups").

91. *See id.* at 24 (relating the viewpoint of one test subject that "you're never going to have a board that will honestly question whether or not there is a value associated with [diversity]").

study, the interviewees told a story that "amount[ed] to little more than '[diversity] seems like a good thing to do.'"[92] In sum, none identified the benefits of diversity with concrete details.[93]

Calls for greater diversity often are motivated by two concerns.[94] First, greater diversity may lead to improved shareholder value.[95] Second, greater diversity is better from a fairness point of view—that is, diversity would lead to more role models who serve as examples of what historically disempowered people may achieve; to corporations that play a bigger role in the society at large; to corporations that have a better sense of the markets they serve; or to a more egalitarian workforce.[96]

Empirical evidence suggests that gender and racial diversity may go towards achieving both of these goals.[97] First, "a survey conducted in 1997 identified fifty-one studies that had tested for a correlation between a corporation's social performance and the [corporation's] financial performance."[98] "Although the results of these studies are mixed, the authors of the review report 'good news', observing that 'the largest number of researchers has found a positive relationship.'"[99] Studies that are more recent have indicated either a positive or a neutral relationship between gender and racial diversity and firm performance.[100] For example, a recent study conducted by Carter et al.

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92. *Id.*

93. *See id.* (concluding that research showed little evidence of a "master narrative" of board diversity).

94. *See, e.g.*, Fairfax, *supra* note 31, at 798–800 (discussing risks inherent in shifting diversity justifications from moral and social rationales to economics-based rationales).

95. *See id.*

96. *See* Melissa Murray & Darren Rosenblum, *On Equity in Economic Stimulus: Should Job Creation Favor Men?*, S.F. CHRON. (May 19, 2009), http://articles.sfgate.com/2009-05-19/opinion/17202600_1_gi-higher-education-jobs (arguing that policymakers must develop solutions "to protect both men and women from future economic uncertainty").

97. Several methodological issues exist with respect to empirical studies that seek to determine whether diversity is good for a company. First, the number of female directors and directors of color is relatively small. Second, researchers take care to distinguish between a connection between diversity and shareholder value versus diversity as the source of the effect on corporate performance. In other words, diversity causes better performance. Third, even if a causal link between diversity and performance were established, it would not be certain that diversity caused better performance, as opposed to the other way around—better performing boards also seek diverse candidates.

98. Mehri et al., *supra* note 72, at 411.

99. *Id.* (quoting Jennifer J. Griffen & John F. Mahon, *The Corporate Social Performance and Corporate Financial Performance Debate: Twenty-Five Years of Incomparable Research*, 36 BUS. & SOC'Y 5, 6–7 (1997)).

100. *See* Carter et al., *Gender and Ethnic Diversity*, *supra* note 85, at 399 (summarizing the empirical studies linking board diversity and firm financial performance). Many of these studies use Tobin's Q as a measure of corporate performance. *See, e.g.*, Larry H. P. Lang & René M.

"suggests that the interaction of gender diversity and ethnic minority diversity do not impact financial performance."[101]

However, the picture of the interaction between diversity and corporate performance is more complex than suggested above. Other studies have found that gender diversity improves corporate monitoring as measured by board member attendance records.[102] For example, a 2008 study by Renee Adams and Daniel Ferreira found that "female directors have better attendance records than male directors, male directors have fewer attendance problems the more gender-diverse the board is, and women are more likely to join monitoring committees."[103] Adams and Ferreira suggested that "gender-diverse boards allocate more effort to monitoring."[104] In addition, among the companies studied, "[CEO] turnover is more sensitive to stock performance and directors receive more equity-based compensation in firms with more gender-diverse boards." This suggested closer board monitoring of management performance. Moreover, the authors concluded that gender diversity led to negative financial performance in firms with fewer takeover defenses, and that "mandating gender quotas for directors can reduce firm value for well-governed firms."[105] Gender-diverse boards may lead to lower takeover premiums for shareholders of target companies with weaker takeover defenses.[106]

However, other studies have revealed different factors at play that contribute to demonstrated negative effects of board diversity. A 2003 study by Gompers, Ishii, and Metrick found that "firms with stronger shareholder rights had higher firm value, higher profit, higher sales growth, lower capital expenditures, and made fewer corporate

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Stulz, *Tobin's Q, Corporate Diversifications, and Firm Performance*, 102 J. POL. ECON. 1248 (1994) (describing that Tobin's Q is a measure of market value versus the replacement cost of the company's assets).

101. Carter et al., *Gender and Ethnic Diversity*, *supra* note 85, at 396.

102. *See* Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 291 (2009) (discussing attendance records and board diversity); Kevin Campbell & Antonio Minquez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435, 440 (2008) (discussing how the gender composition of the board can affect the quality of a director's monitoring role); Luis Rodríguez-Domínguez, Isabel-María García-Sánchez & Isabel Gallego-Alvarez, *Explanatory Factors of the Relationship Between Gender Diversity and Corporate Performance*, EUR. J. L. & ECON., March 2010 (discussing how women achieve better performance in sectors traditionally dominated by men when working conditions and academic background are similar).

103. Adams & Ferreira, *supra* note 102, at 291.

104. *Id.*

105. *Id.*

106. *Id.*

acquisitions."[107] In other words, weak takeover defenses translated into higher shareholder value. Two explanations are suggested. First, companies with stronger takeover defenses are not as likely to be acquired; a takeover premium is less likely, and thus in the aggregate, companies with stronger takeover defenses have lower market values.[108] By contrast, buyers typically pay more for companies with fewer takeover defenses (i.e., strong shareholder rights) than the market value of the company right before the takeover bid.[109]

Second, weaker takeover defenses indicate that management is disciplined either by the external market for takeovers or by internal governance structures, such as strong shareholder rights or monitoring boards of directors.[110] Thus, companies with weak takeover defenses would have stronger shareholder rights, more effective board monitoring, or be acquired.[111]

Although board gender diversity may lead to over-monitoring (and thus lower takeover premiums) at companies with weaker takeover defenses, it may be "the stronger monitoring practices of diverse boards that lead to more efficient value discovery,"[112] i.e., lower takeover premiums. Or, it may be that women on gender-diverse boards have "a more realistic sense of corporate value."[113] While gender-diverse boards may

> have a detrimental effect on the short-term returns to shareholders of target companies[,] . . . they would have a positive effect on the potential acquirers, the shareholders of the surviving entity, and any portfolios that hold all of the stocks concerned. Diversity, then, may be a tool that helps focus companies on the creation of economic

107. Paul Gompers, Joy Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q. J. ECONOMICS 107, 134–35 (2003).

108. *See* CORPORATE LIBRARY, *supra* note 85, at 6. Shareholders of a company with fewer takeover defenses are likely to receive a takeover premium more often than shareholders of a company with stronger takeover defenses. *Id.* A greater likelihood of a takeover premium may translate into higher stock prices.

109. *See id.* (suggesting the strength of shareholder rights in companies with weak takeover defenses has a disciplining effect on managers as those managers are "less likely to subordinate shareholder rights to their own").

110. *See id.* (highlighting that market forces driven by high "takeover premiums," i.e., the difference between pre- and post-acquisition stock values, attract shareholders to companies with weak takeover defenses).

111. *See id.* (noting the conflict between the positives of weak takeover defenses and strong shareholder rights, and the lack of diversity on the boards of these companies).

112. *Id.*

113. *Id.*

> value, not the realization of short-term gains that come at others' expense, in a zero-sum game.[114]

Board diversity may have an impact on communities as well as on markets. A diversity candidate may view decisions with an eye towards the potential impact on stakeholders as well as on shareholders.[115] As one bank director stated:

> [Bank boards are] social institutions of cities and towns of various sizes and there are strengths to that and there are weaknesses. The strengths are that you have cohesion and a certain sense of reflecting broadly held values of the community. The weakness is that you don't—boards can become . . . hidebound, inbred, and can fail to take into account changes that are going on in their communities. Plus, in the case of women, I have tried to point out to banks that more than half the people in their markets are women . . . . It's sensible to me that you would want to have someone who is a working woman on a board, at least one, to point out to the rest of the board what it's like—what the life of . . . many of their employees is like.[116]

The empirical research on factors affecting corporate boards such as decision making, group dynamics, organizational culture, and communications styles is evolving. Also, the research on board diversity's business case is becoming more sophisticated. One point is apparent from the recent proxy disclosures and from qualitative interviews with directors: it is not too late for the research to further inform directors' thinking regarding diversity in the boardroom.

III. RESEARCH ON THE THEORY OF CULTURAL COGNITION

It may be that a board reflective of a variety of worldviews is the difference between those boards that appear diverse in terms of race and gender but do not achieve the expected gains in terms of shareholder value or in corporate governance, and those that do. Many factors could be at play. This section discusses the research on cultural cognition, risk perception, and decision making, which all may indicate whether that variety in worldview exists.

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114. *Id.*

115. *See* Conley et al., *supra* note 86, at 19–20 (noting that some of the research subjects saw diverse boards that were representative of various groups, such as shareholders, employees, and customers, as a way to send positive signals about the company to those groups—a concept also known as the "signaling theory").

116. *Id.* at 20.

A. Cultural Cognition Theory and Empirical Research

Social science researchers have investigated why the public holds certain opinions about the risks posed by socially-charged activities, such as gun ownership, climate change, marijuana use, nuclear power, nanotechnology, and abortion, in order to better understand how factors such as personal characteristics (e.g., race, gender, and age), cultural influences, and values impact public discourse about hotly debated social issues.[117] Another goal of the research is to arrive at public policy methods of achieving democratic and creative resolutions to these issues.[118] Individuals' perception of the riskiness of these

117. *See generally*, *e.g.*, MARY DOUGLAS, RISK AND BLAME: ESSAYS IN CULTURAL THEORY (1994) (discussing the advent of an anthropological theory that explains the human need to transfer blame for disaster onto unpopular groups or classes); MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNOLOGICAL AND ENVIRONMENTAL DANGERS (1983) (discussing the influence of perceived societal risks on the political debate to determine which risks are "acceptable"); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) (explaining the statistical relationship between discrete lethal events and the socially perceived risk that follows); CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005) (highlighting the manner in which feelings of fear and paranoia accompanying disaster and crime spread through society like "wildfire" following a particular event); Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1 (2000) (explaining the relationship between cognitive stress and risk perception); Hélène Joffe, *Risk: From Perception to Social Representation*, 42 BRIT. J. SOC. PSYCHOL. 55 (2003) (discussing the problems with assumptions made by risk perception approaches); Kahan et al., *Culture and Identity*, *supra* note 38, at 466 (suggesting the "white male effect" leads white males to fear risk less than women and minorities because of "a congeniality between hierarchical and individualistic worldviews, on the one hand, and a posture of extreme risk skepticism, on the other"); Dan M. Kahan et al., *Whose Eyes are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838, 849 (2009) (detailing a study that displayed marked differences in perceptions among different demographics who viewed a high-speed police chase video from the criminal case *Scott v. Harris*); R.W. Rogers, *Protection Motivation Theory of Fear Appeals and Attitude Change*, 91 J. PSYCHOLOGY 93 (1975) (proposing a protection motivation theory suggesting that components of fear can create an attitude change); Irwin M. Rosenstock, *Historical Origins of the Health Belief Model*, 2 HEALTH EDUC. MONOGRAPHS 328 (1974) (describing the Health Belief Model, which predicts the likelihood of a person undertaking a recommended health action by evaluation demographic variables, various perceptions, and modifying factors); R. Schwarzer, *Self-Efficacy in the Adoption and Maintenance of Health Behaviors: Theoretical Approaches and a New Model*, *in* SELF-EFFICACY: THOUGHT CONTROL OF ACTION 217 (R. Schwarzer ed., 1992); Paul Slovic et al., *Rating the Risks*, *in* PERCEPTION OF RISK 1101 (Paul Slovic ed., 2000) (discussing the role of heuristics in risk perception in the public arena); Kahan et al., *Second National Risk*, *supra* note 38, at 2 (describing a series of reports and surveys designed to test the "'cultural cognition thesis' which asserts that people's beliefs about risk are shaped by their core values").

118. *See* Joffe, *supra* note 117, at 55 (challenging the "perception approaches" that dominate the psychology of risk by suggesting that the "social representation theory" is more accurate); Kahan et al., *supra* note 117, at 903–04 (concluding that the *Scott v. Harris* study depicts a cultural division in society that affects not only jury verdicts but also public sentiment for a range of social policy issues, such as vaccination, gun control, and climate change); Kahan et al., *Second National Risk*, *supra* note 38, at 15 (suggesting that political breakdowns in American

activities is skewed—risk perception is biased. Conflict can interfere with finding resolutions to social problems that most people would agree need to be resolved, but that evoke significant disagreement over the means to achieve resolution.

Researchers have tested various hypotheses to determine the mechanisms operating to create risk misperception. A variety of empirical and survey-based attitudinal research at the Yale Cultural Cognition Project ("Cultural Cognition Project") tests the "cultural cognition hypothesis" and investigates the mechanisms that underlie the operation of cultural cognition in risk perception.[119] The cultural cognition hypothesis seeks to explain the variance in individuals' risk sensitivity. The cultural cognition hypothesis states that "values are prior to fact in disputed issues of risk . . .—not just in the moral sense—but in the cognitive sense, in that our values shape our understandings of what risks are real and significant as opposed to contrived and overblown."[120] Individuals tend to conform their beliefs to their values.[121] Thus, risk perception would be most strongly correlated with worldviews and not with personal characteristics.

Using a typology credited to Mary Douglas, an anthropologist, and Aaron Wildavsky, a cultural theorist who studied group cultures, the Yale researchers have conducted a number of studies to test the hypothesis that cultural worldviews, i.e., individuals' views of the "ideal society," explain the variance among individuals' perceptions of risk, despite the availability of facts regarding those risks.[122] In the Douglas and Wildavsky typology, four worldviews exist: communitarian, individualist, egalitarian, and hierarchist.[123] For example, people who hold relatively individualistic and hierarchical values are inclined to disbelieve the seriousness of environmental risks and disfavor environmental regulation because such regulation threatens their beliefs

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democratic society play a role in the perception of risk).

119. *See generally* WALTER INST.: THE CULTURAL COGNITION PROJECT AT YALE L. SCH., http://www.culturalcognition.net/ (last visited Mar. 23, 2011) (describing research studies and projects, including studies of perception of risks inherent in nanotechnology, gun ownership, HPV vaccines, environmental pollution, and how cultural cognition operates).

120. Dan Kahan, *The Cultural Cognition of Risk: Theory, Evidence and Implications*, WALTER INST.: THE CULTURAL COGNITION PROJECT AT YALE L. SCH. (Oct. 8, 2009), http://mediasite.video.ufl.edu/mediasite/Viewer/?peid=e16374d0980344fa911266bf40b60 314.

121. *Id.*

122. Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1072 (2006).

123. *See* Mary Douglas, A History of Grid and Group Cultural Theory, *available at* http:// projects.chass.utoronto.ca/semiotics/cyber/douglas1.pdf (discussing the contributions of Wildavsky and other theoreticians to the group and grid cultural theory).

about enterprise and commerce.[124] On the other hand, individuals who subscribe to egalitarian beliefs may be more ready to credit the seriousness of environmental risks and favor environmental regulation because commerce represents values inconsistent and threatening to their own beliefs.[125]

A number of studies have shown that an individual's values, as represented by that individual's worldview, "strongly predict that person's attitudes towards a wide range of societal risks."[126] One Cultural Cognition Project study investigated whether worldviews, or personal characteristics, were more predictive of whether an individual would favor or oppose gun control.[127] The researchers hypothesized:

> [T]he association of guns with traditional gender roles and with state authority should make gun control anathema to individuals of a relatively hierarchical orientation. Those of an egalitarian orientation, in contrast, should support gun control as a means of affirming gender and racial equality. Persons of a relatively individualist orientation should oppose gun control, which they are likely to see as denigrating the ideal of individual self-reliance. By the same token, individuals who are less inclined toward individualism should favor gun control in order to express trust in, solidarity with, and collective responsibility for the well-being of, their fellow citizens.[128]

The research results were consistent with the four research hypotheses:

> [T]he more egalitarian and solidaristic [i.e., communitarian] an individual's worldview, the more likely that person was to support gun control; likewise, the more hierarchical and individualistic the respondent's worldview, the more likely he or she was to oppose gun control.
>
> Indeed, among individuals of divergent orientations, the contrast in attitudes toward gun control was stark. Thus, individuals who were relatively hierarchical in their outlooks were nearly twice as likely as those who were relatively egalitarian, and individuals who were relatively individualistic over four times as likely as individuals who

124. *See* Donald Braman & Dan M. Kahan, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1298 (2003) (noting that while individualists and hierarchists tend to perceive environmental risks from commerce as low, they perceive different risks as high, namely "the dangers of social deviance, the risks of foreign invasion, and the fragility of economic institutions").

125. *See id.* ("[I]ndividuals of an egalitarian orientation are predictably sensitive to environmental and industrial risks, the minimization of which licenses the regulation of commercial activities productive of disparities in wealth and status.").

126. *Id.*

127. *See id.* at 1302–05 (describing the researchers' study of the perceptions of different social groups on gun control).

128. *Id.* at 1302.

> were relatively solidaristic [i.e., communitarian], to oppose gun control.[129]

Moreover, the researchers found that worldviews—as opposed to any other characteristic—were more predictive of attitudes towards gun control.[130] However, women, regardless of their cultural orientation, were more likely to favor gun control than men. This finding regarding gender was consistent with common assertions "that women are *more* concerned with risks of all types."[131]

A subsequent survey delved further into the combined influence of gender, race, and worldviews on risk perception.[132] This study investigated an observed phenomenon known as the "white male effect," which has drawn researchers' attention.[133] The phrase refers to empirical evidence showing that the risk perceptions of a certain group of white males were more skewed than the risk perceptions of females and persons of color.[134] The researchers proposed that "variance in risk perceptions—across people generally, and across race and gender in particular—reflects a form of *motivated cognition* through which people seek to deflect threats to identities they hold, and roles they occupy, by virtue of contested cultural norms."[135] The term "cultural-identity-protective cognition" describes this cognitive process.[136]

The researchers formed two hypotheses to investigate whether cultural-identity-protective cognition might motivate differences in risk perception across gender and race:

> First, individuals holding differing worldviews should disagree with one another when their respective norms clash on the value of a putatively dangerous activity. And second, individuals sharing a cultural worldview should diverge along gender or race lines when

129. *Id.* at 1306–07.

130. *Id.* at 1307.

131. *Id.* at 1309.

132. *See* Kahan et al., *Culture and Identity*, *supra* note 38, at 466 (stating the study was designed to test the hypothesis that "the white-male effect might derive from a congeniality between hierarchical and individualistic worldviews, on the one hand, and a posture of extreme risk skepticism, on the other").

133. *See id.* at 465–67.

134. *See id.* at 465 (noting the white male effect, which is the theory that "white men fear various risks less than women and minorities," is "well documented, but poorly understood").

135. *Id.* at 467.

136. *Id.* at 472 (stating that instead of individuals wanting to belong to a group, e.g., 4-H or a church community, individuals want to belong to the group in society that holds the same values that the individual holds); *see also* Burch, *supra* note 34, at 514 (describing how cultural-identity-protective cognition might impact board decision making).

> their shared norms feature gender or race differentiation with respect to social roles involving such an activity.[137]

For example, "the social roles that guns enable and the virtues they symbolize are stereotypically *male* roles and virtues" and gun ownership historically was a white prerogative and a "symbol of white male status."[138] Thus, "it is individualistic and hierarchical white males whose identities are threatened most by regulation of guns and who should therefore form the most skeptical attitude about asserted gun risks."[139] Individualistic and hierarchical females and people of color should have less skepticism about gun risks "because they have less of an identity investment in guns being freely available."[140] Finally, "[b]ecause egalitarianism and communitarianism don't tie antipathy to guns to race and gender roles, those worldviews should uniformly incline whites and minorities, men and women, toward gun-risk sensitivity."[141]

The results of the study strongly suggested that the "white male effect" was due not simply to the influence of worldviews, but to how cultural artifacts related to race and gender may operate to amplify risk sensitivity and "risk skepticism."[142] Of course, women and people of color also displayed risk misperceptions, as well as egalitarians and communitarians.[143]

What are the mechanisms connecting worldviews to risk perceptions? The Yale researchers investigated three mechanisms: culturally-biased assimilation/polarization, the cultural credibility heuristic, and identity-protective cognition.[144]

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137. Kahan et al., *Culture and Identity*, *supra* note 38, at 473.

138. Richard Hofstadter, *America as a Gun Culture*, 21 AM. HERITAGE 4 (1970), *quoted in* Kahan et al., *Culture and Identity*, *supra* note 38, at 475.

139. Kahan et al., *Culture and Identity*, *supra* note 38, at 475.

140. *Id.*

141. *Id.*

142. *Id.* at 465.

143. *See id.* at 498 (explaining that the dynamics that contribute to skewed risk perceptions within the four specific worldviews are similar to the dynamics that contribute to risk perception in women and minorities).

144. Kahan, *supra* note 120. *See generally Mechanisms of Cultural Cognition Project*, WALTER INST.: THE CULTURAL COGNITION PROJECT AT YALE L. SCH. (June 25, 2009, 3:16 PM), http://www.culturalcognition.net/projects/mechanisms-of-cultural-cognition.html (describing the focus of the project as identifying the social and cognitive processes through which values shape risk perceptions and other factual beliefs); Dan M. Kahan et al., *Who Fears the HPV Vaccine, Who Doesn't, and Why? An Experimental Study of the Mechanisms of Cultural Cognition*, 34 LAW & HUM. BEHAV. 501, 514 (2010) (noting that a study confirmed that discrepancies in risk perception associated with HPV vaccination varied greatly between those who held hierarchist and individualist worldviews, and those who held egalitarian and communitarian worldviews).

Culturally-biased assimilation/polarization refers to the fact that individuals process information in a biased way that reinforces their prior predisposition.[145] Exposure to information has no uniform effect on people's perceptions on risk.[146] Information causes people to become more polarized in their views.[147] Also, cultural disposition may cause people to seek information (prior knowledge) and then construe it in a way that conforms to their cultural disposition.[148]

Second, the cultural credibility heuristic states that people determine their views based on the views of others who have similar cultural dispositions.[149] Trust in experts is conditioned on whether the experts share their worldviews.[150] Individuals may credit or discredit factual information related to politically- and socially-charged subjects depending on whether the information accords with their own value set.[151] In addition, whether an individual perceives the person presenting the data as holding values consistent with the individual's values influences the individual's perception of the legitimacy of data.[152]

Third, cultural-identity-protective cognition, discussed above, asserts that it threatens people to think that the conduct they value harms others in society or to think that the conduct they despise is beneficial to others in society.[153] Because of cognitive dissonance, individuals would tend

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145. Kahan et al., *supra* note 144, at 504 (defining "biased assimilation" as "the tendency of individuals selectively to credit and dismiss information in a manner that confirms their prior beliefs").

146. *See id.* at 509 (noting differences in risk perception depend on the amount of information the subject receives, but also on other factors, such as predisposed worldviews).

147. *See id.* at 504 ("[P]eople will selectively credit or discredit information on *risk* in a manner that fits their cultural predispositions toward them, and thus polarize along cultural lines . . . .").

148. *Id.*

149. *See id.* at 509 ("[C]ultural affinity and cultural difference supply the relevant in-group/out-groups references that in turn determine whom people see as knowledgeable, honest, and unbiased . . . .").

150. *See id.* (explaining that credibility heuristic allows individuals to determine whom is "worthy of being credited in debates about risk").

151. *See id.* at 502 (arguing that theories focusing only on heuristic reasoning fail to account for "political conflict" and disagreement over a range of personal and societal risks).

152. *See id.* at 512 ("[A] deliberative climate is likely to emerge in which culturally diverse members of the public consistently see advocates they identify with presenting arguments they are already predisposed to accept . . . .").

153. *See* Kahan et al., *Second National Risk*, *supra* note 38, at 5 (explaining that in "identity-protective cognition," in order to "avoid[] dissonance and estrangement from valued groups, individuals subconsciously resist factual information that *threatens* their defining values").

to dismiss information that might conflict with their views of the values they hold.[154]

Positive, normative, and prescriptive implications arise from the studies of cultural cognition and the mechanisms underlying cultural cognition. First, a positive implication is that getting the word out will not necessarily quell bias.[155] In other words, educating individuals about the facts will not lead necessarily to a change in viewpoint.[156] Second, a normative implication is that not all risk variation is risk bias to be mitigated. "If fact and value are intertwined, then cultural cognition is not bias—it is moral perception."[157] Third, a prescriptive implication is that policy makers should engage in "deliberative debiasing strategies—identify risk delivery strategies in a way that reduces the motivation to resist the information."[158]

B. Critiques

Critiques of cultural cognition theory should be recognized before examining the theory's implications for board diversity. Some critiques are aimed at the studies' methodologies. For example, the studies measure attitudes and not behavior or factors other than cultural cognition that may impact behavior.[159] The goal of the Cultural Cognition Project is to devise strategies to resolve contentious policy disputes—in other words, to effect changes in attitudes and in behavior. Although attitudes should drive behavior, other factors beyond the scope of the studies may also influence behavior.

Another criticism is that the variance in risk perception is not explained entirely by worldviews and/or converging worldviews and

154. *See id.* at 16 ("When *policies* are framed in ways that affirm rather than threaten citizens' cultural values, people are less likely to dismiss information that runs contrary to their prior beliefs."); *see also* Dan Kahan, *Nuclear Power Makes Individuals See Green*, SITUATIONIST (Oct. 2, 2007, 12:01 AM), http://thesituationist.wordpress.com/2007/10/02/nuclear-power-makes-individualists-see-green/ (applying the "cultural cognition of risk" theory to explain individualists' perceptions of the risks and benefits of nuclear power).

155. *See* Kahan et al., *supra* note 144, at 512–14 (noting individual values must also be taken into account in order to explain how information can adjust risk perception in different societal groups).

156. *See id.* (suggesting that in order to persuade individuals to alter their perception of risk, the targeted individual must also share the values or worldviews of the expert presenting the information).

157. Kahan, *supra* note 120.

158. *Id.*

159. *But see* Kahan et al., *supra* note 144, at 513 (discussing a study that found the impact of cultural cognition to be relatively small, as subjects observed persons of diverse values on both sides of a debate).

status in society based on cultural artifacts related to gender and race.[160] However, although cultural cognition does not explain all of the bias, it explains and quantifies a significant portion of the bias.

Another question is whether worldviews are stable; i.e., whether people are always egalitarians, or whether they are egalitarians on only some issues and individualists on others. At bottom, worldviews are usually stable; attitudes and values are slow to change over time.[161]

A larger question posed by Cass Sunstein is whether cultural cognition is a result of bounded rationality, a concept stating that rational people use heuristics—or mental shortcuts—when acting to maximize their best interests or expected utility.[162] The response to this criticism is that risk misperception originates in conflicting values, not in peoples' need to resort to heuristics to process information.[163]

In sum, though the above criticisms are aimed at cultural cognition theory, the theory will still prove useful in illustrating the potential effects of worldview diversity on corporate boards, and in suggesting methods of introducing and managing diversity and bias in the boardroom.

IV. Diversity for Equity and Fairness

The Cultural Cognition Project may add detail to our understanding of the nature of the cultural bonds shared among corporate directors. The Project points to evidence of the impact of bias on decision making specifically as it relates to directors' evaluation of risk. These studies demonstrate that cultural cognition—the board members' views of the ideal society—along with competencies and behavioral characteristics are important factors in board decision making. Cultural cognition aligned with moral values is not biased thinking; board members' decisions should be informed by moral values. But moral values may not be aligned with the best interests of shareholders or society in general. Convergence of the cultural cognition theory, corporate social responsibility, and critical race theory may shed new light on the value

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160. *See* Kahan et al., *Culture and Identity*, *supra* note 38, at 482.

161. *See, e.g.*, K.C. Calman, *Evolutionary Ethics: Can Values Change*, 30 J. MED. ETHICS 366, 366–70 (2004) (testing the hypothesis that values in the medical profession change and evolve over time).

162. *See* Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110, 1110–12 (2006) ("'[C]ultural cognition' is largely a result of bounded rationality, not an alternative to it.").

163. *See* Kahan & Slovic, *supra* note 42, at 169–72 ("[M]any of the public (mis)perceptions of risk that Sunstein attributes to bounded rationality in fact express coherent cultural worldviews, and as such must be taken seriously in any policymaking scheme that purports to be democratic.").

of board diversity in a broad sense and on strategies to achieve diversity.

The research points to several implications regarding boards of directors and diversity on boards. First, these studies lend support to the notion that intentional racial discrimination on corporate boards is not the main issue. Instead, "racial homogeneity [on corporate boards] exists with little overt racial discrimination and few violations of antidiscrimination law. Indeed, it appears far more likely that board members are chosen based upon cultural proximity to CEOs rather than color."[164] Also, the research lends support to the notion that gender and racial diversity may increase worldview diversity, but the better way to achieve worldview diversity is to seek board diversity in terms of board members' worldviews, rather than trying to achieve worldview diversity by using gender and racial diversity as a proxy for worldview diversity.[165]

In "The Myth of the Unbiased Director," I hypothesize that individual board members' values and worldviews influence their risk perceptions.[166] Further, I hypothesize that the majority of corporate boards are composed of directors whose values reflect predominantly hierarchical and individualistic worldviews.[167] Moreover, board perception of risks may be impacted by risk perception bias due to the predominance of hierarchical and individualistic worldviews on boards.[168]

A. The Changing Role of Risk in Corporate Law

Although as a practical matter, boards rely on the CEO and management for pointers on decisions and guidance on the board's monitoring duties, ultimately corporate directors, acting as a board, are legally responsible for control of corporate assets and oversight of corporate activities.[169] Moreover, post-Sarbanes-Oxley, boards have paid more attention to governance matters.

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164. Ramirez, *supra* note 30, at 1584.

165. Race and gender alone do not account for an individual's worldview. For example, an African American male director may hold hierarchical and individualistic worldviews.

166. *See generally* Burch, *supra* note 34 (discussing why problems in corporate governance continue despite reforms).

167. *See id.* at 513 (discussing the effect of board members' behavioral characteristics on the decision-making process).

168. *See id.* at 514 (suggesting that boards of directors take steps to ensure diversity of worldviews).

169. *See, e.g.*, CAL. CORP. CODE § 300(a) (West 2010) ("[T]he business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the day-to-day operation of

Corporate boards greatly influence the health and wealth of the global economy. Corporate boards determine whether corporations merge or sell off assets, relocate within or outside of the United States, invest in research and development, divest product lines, or hire or lay off employees, and whether and to whom to make political campaign contributions. To provide some perspective on the influence of board members on the health and welfare of economic markets, in July 2010, the market capitalization[170] of corporations publicly traded on U.S. stock exchanges accounted for $11.794 trillion, while total global market capitalization was around $44 trillion.[171] In other words, publicly traded U.S. corporations comprised approximately 27 percent of global market capitalization.[172] Investment in the securities of such corporations accounted for approximately "[45] percent of the value of equities traded worldwide."[173] Clearly, the economic health of U.S. publicly traded corporations is essential to the smooth functioning of the U.S. economy, if not the world economy. Thus, directors' decisions—not just CEOs' and CFOs' decisions—are critically important.

As a result of the accounting scandals of 2002, federal legislators enacted Sarbanes-Oxley.[174] Sarbanes-Oxley gave the SEC the power to require more independence on corporate boards and board committees, in the hope that independence would lead to better oversight of

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the business of the corporation to a management company or other person provided that the business and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board."); DEL. CODE ANN. tit. 8, § 141(a) (West 2010) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . ."); MODEL BUS. CORP. ACT § 8.01 (2005) ("All corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight of its board of directors . . . .").

170. Market capitalization is a measure of how much money is invested in a particular firm and is based on the number of shares of a firm multiplied by the share price. For example, a firm with 100 shares total in the hands of its investors, each share worth $10, has a market capitalization of $1,000.

171. WORLD FED'N OF EXCHANGES, MARKET HIGHLIGHTS FOR FIRST HALF-YEAR 2010 (July 2010), http://www.world-exchanges.org/files/file/stats%20and%20charts/July%202010%20WFE%20Market%20Highlights.pdf.

172. Twenty-seven percent was calculated by dividing U.S. GDP by global GDP.

173. GLENN YAGO ET AL., MILKEN INST., HOME BIAS IN GLOBAL CAPITAL MARKETS: WHAT IS THE POTENTIAL DEMAND FOR U.S. ASSET-BACKED SECURITIES? 1 (2006), *available at* http://www.milkeninstitute.org/publications/publications.taf?function=detail&ID=565&cat=resrep; Rick Newman, *Five Reasons Foreign Money Boosts the U.S. Economy*, U.S. NEWS & WORLD REP. (Jan. 11, 2008), http://www.usnews.com/blogs/flowchart/2008/1/11/five-reasons-foreign-money-boosts-the-us-economy.html.

174. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.) (providing significant changes to the regulation of financial practices and corporate governance).

accounting matters and better corporate governance.[175] Also, subsequent regulations required more disclosure of executive compensation information with the hope that more disclosure would lead to more thoughtful and justifiable compensation practices.[176]

After the Lehman Brothers collapse in 2008, the Standard & Poor's index of the top 500 publicly traded companies fell by 39 percent, the worst year on record since 1934.[177] The collapse of the housing price bubble, the existence of a shadow banking system, and the overuse of leverage among publicly traded financial institutions engaged in the credit derivatives and subprime mortgage markets, among other factors, contributed to a worldwide economic recession from which global financial markets are still recovering.[178] Congress again focused on corporate governance structures as one factor contributing to the financial crisis.[179] Also, regulators questioned whether financial institution executives understood the systemic risk posed by the large market in debt-financed derivative instruments.[180] The Dodd-Frank Act contains corporate governance provisions designed to empower

175. *See id.* § 301 (establishing public company audit committees); Standards Relating to Listed Company Audit Committees, Securities Act Release No. 33-8220, 79 SEC Docket (CCH) 2876 (Apr. 9, 2003) (providing that national securities exchanges and national securities associations must comply with the requirements of the statute).

176. *See* Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Exchange Act Release No. 33-9178 (Apr. 4, 2011) (implementing Dodd-Frank's provisions related to shareholder say-on-pay); Proxy Disclosure Enhancements, *supra* note 44 (requiring disclosures related to stock options, compensation policies, and compensation consultants); Executive Compensation and Related Person Disclosure, Securities Act Release No. 33-8732A, Exchange Act Release No. 34-54302A, Investment Act Release No. 27444A, 71 Fed. Reg. 53,158 (Sept. 8, 2006) (overhauling executive compensation disclosures in proxy statements and annual reports).

177. Jim's Finance and Investments, *Historical Annual Returns for the S&P 500 Index*, ISTOCKANALYST (July 4, 2009), http://www.istockanalyst.com/article/viewarticle/articleid/3331526.

178. *See* Juscelino F. Colares, *Global Imbalances and Liquidity-Induced Bubbles: Reflections on the Great Recession and the Need for International Monetary Reform*, 60 SYRACUSE L. REV. 603, 603–06 (2010) (discussing the liquidity bubble as one factor in the Great Recession); Jeffrey N. Gordon & Christopher Muller, *Confronting Financial Crisis: Dodd-Frank's Dangers and the Case for a Systemic Emergency Insurance Fund*, 28 YALE J. ON REG. 151, 152 (2011) (proposing that all large financial firms, including hedge funds and mutual funds, should pay into an insurance fund to protect against systemic risk in the shadow banking system).

179. *See* NAT'L COMM'N ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., CONCLUSIONS OF THE FIN. CRISIS INQUIRY COMM'N, at xviii–xix (2011), *available at* http://c0182732.cdn1.cloudfiles.rackspacecloud.com/fcic_final_report_conclusions.pdf (concluding that failures of corporate governance and risk management, among other matters, contributed to the Great Recession).

180. *See id.*

investors.[181] In addition, it contains provisions designed to manage business-specific and economy-wide risks.[182]

The Dodd-Frank Act requires certain publicly traded financial institutions to establish board-level risk committees "in order to prevent or mitigate risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, inter-connected financial institutions."[183] Prior to the Dodd-Frank Act, the SEC increasingly focused on the board's role in risk management. For example, in 2009, the SEC mandated disclosure of "the board's role in the oversight of risk."[184] One purpose of the disclosure is to "provide important information to investors about how a company perceives the role of its board and the relationship between the board and senior management in managing the material risks facing the company."[185] However, given the homogeneous makeup of most boards, the risk provisions in the Dodd-Frank Act and in the 2009 SEC release may have little or no effect on a board's evaluation of the credit, liquidity, operational, and other material risks a company faces.[186] First, hierarchical, individualistic board members may resist the disclosure mandate if the provision is perceived as an indictment of board members' risk assessment practices. In the release describing the risk disclosures, the SEC stated, "We were persuaded by commenters who noted that risk oversight is a key competence of the board . . . ."[187] Second, the predisposition heuristic could further polarize board members who may blame financial companies, mortgage brokers, the government, Fannie Mae, Freddie Mac, and unscrupulous homebuyers for the current economic woes. Finally, the provision lacks specificity

181. *See, e.g.*, Dodd-Frank Act, Pub. L. No 111-203, § 951, 124 Stat. 1376, 1899–900 (2010) (providing shareholders a non-binding vote on executive compensation); *id.* § 952 (requiring independent compensation committees); *id.* § 953 (providing enhanced disclosures regarding executive compensation policies, including pay versus performance); *id.* § 954 (providing for executive compensation clawback), *id.* § 971 (providing for shareholder nominations); *id.* § 972 (providing for disclosures regarding whether the same individual holds both the chief executive officer and board chair positions); *id.* § 989G (addressing small business issuer exemption from Sarbanes-Oxley § 404(b)).

182. *See, e.g.*, *id.* Title I.A. (establishing a risk oversight council); *id.* Title II (creating a resolution regime for too-big-to-fail firms).

183. *See id.* § 165 (Enhanced Supervision and Prudential Standards for Nonbank Financial Companies Supervised by the Board of Governors and Certain Bank Holding Companies).

184. Proxy Disclosure Enhancements, *supra* note 44, at 7.

185. *Id.* at 44.

186. *See supra* Part II.A (discussing the lack of gender and racial diversity on boards of directors).

187. Proxy Disclosure Enhancements, *supra* note 44, at 44.

and may lead to the boilerplate statements that characterize the recent board diversity disclosures.

Risk plays a critical role in corporate fiduciary duty law at the state level. Corporate directors are rarely held liable for breach of the fiduciary duty of care. Courts are reluctant to second-guess directors' evaluations of the risks and rewards of certain actions.[188] Instead, directors may engage in behavior that may be deemed to be negligent—the directors were aware of the risks and engaged in the behavior regardless of the risks—without fear of liability for breach of the duty of care. In the very few cases where directors were found to have breached the duty of care, the courts engaged in a risk versus reward analysis and determined that the directors had taken unreasonable risks. For example, in *Brane v. Roth*, outside advisors recommended that a closely held grain elevator's board of directors engage in hedging against falling grain prices.[189] The directors did not have the expertise to engage in hedging, and so they hired a manager.[190] However, the manager also was inexperienced in hedging.[191] The directors themselves did not recognize that the manager lacked the experience to hedge against the risk of falling grain prices, even after the financial statements provided evidence that the manager was unsuccessful in hedging attempts.[192] Further, the directors did not attempt to understand hedging.[193] The directors were held liable for breach of the duty of care because they failed to hedge against the risk of falling grain prices.[194] Although this case provides one example where directors' failure to assess risks led to liability, it should be noted that this is an outlier. Few directors have been found liable for breach of the duty to carefully oversee corporate operations.[195]

One possible strategy to mitigate risk bias on boards would be to increase board worldview diversity. The next section discusses how corporate social responsibility theories and strategies are congruent with

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188. *See* Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 812 (Sup. Ct. 1976) (holding that absent fraud, collusion, or illegal or unconscientious acts, courts will not interfere with directors' discretion in managing the corporation).

189. *See* Brane v. Roth, 590 N.E.2d 587, 592 (Ind. Ct. App. 1992) (holding that directors breached their fiduciary duty in failing to supervise the manager).

190. *Id.* at 589.

191. *Id.*

192. *Id.* at 592.

193. *Id.*

194. *Id.*

195. *See* Regina F. Burch, *Director Oversight and Monitoring: The Standard of Care and the Standard of Liability Post-Enron*, 6 WYO. L. REV. 481, 490–500 (2006) (discussing the standard of liability for claims that directors failed to monitor corporate activities).

cultural cognition theory.[196] The following section describes how cultural cognition theory and critical race theory suggest similar approaches to create worldview diverse boards that operate effectively.[197]

B. Diversity and Corporate Social Responsibility

The dominant, traditional conception of corporate law takes the shareholder primacy norm as a given. This norm

> holds that directors of public corporations ought to be accountable only to the shareholders, and ought to be accountable only for maximizing the value of the shareholders' shares. This perspective rests on the conventional contractarian assumption that the shareholders are the sole residual claimants and risk bearers in a public firm.[198]

Corporate social responsibility and progressive corporate law theories hold, in contrast, that stakeholders' interests may be as important a driver of corporate decision making as shareholder value.[199] A number of rationales underlie corporate social responsibility theories. For example:

> [O]ptions theory and the growing literature on the contracting difficulties associated with firm-specific investment both support the claim that a wide variety of groups are likely to bear significant residual risk and enjoy significant residual claims on firm earnings. These groups include not only shareholders, but also creditors, managers, and employees. Thus economic efficiency may be best served not by requiring corporate directors to focus solely on shareholders' interests, but by requiring them instead to maximize the sum of all the interests held by all the groups that bear residual risks and hold residual claims.[200]

Under the shareholder primacy norm, board diversity would be desirable if it maximizes shareholder value. However, under corporate

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196. *See infra* Part IV.B.

197. *See infra* Part IV.C.

198. Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 404 (2001).

199. Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. CORP. L. 719, 738 (2006) (expressing the view that corporate directors should balance the needs of various corporate constituencies in order to protect corporate economic health). According to Blair and Stout, "[B]oards of directors, who alone are empowered to make the decision about the distribution of surpluses, should try to make sure every team member gets at least enough of the surplus to make sure all the contributing team members are motivated to stay with the team." *Id.*

200. Blair & Stout, *supra* note 198, at 404.

social responsibility norms, diversity would be desirable because it could maximize stakeholders' interests as well.

Under the umbrella of corporate social responsibility, one rationale for corporate board diversity is that a diverse board would better represent the various stakeholder groups with which diverse directors identify. These stakeholder groups include the communities in which corporations operate, corporate employees, and creditors of the corporation.

The cultural cognition hypothesis supports this rationale in the following way. First, the hypothesis supports the notion that directors may not be predisposed to identify with the myriad of groups that have an interest in the corporation. Corporate directors are a relatively small, monolithic group of individuals that tend to be white, male, and come from the same types of educational and socioeconomic backgrounds.[201] Although diversity in gender and race, as previously discussed, does not necessarily provide desired diversity of worldviews, correlations exist between these physical characteristics and diverse views: individuals with the above characteristics also tend to adhere to hierarchical and individualistic worldviews.[202] Most large public corporations operate nationally if not internationally. Thus, the communities in which corporations operate are not likely to be homogeneous in terms of worldviews. The purported mechanisms underlying worldviews would tend to reinforce decision making that is in the interests of only those corporate constituencies that hold hierarchical and individualistic worldviews. In contrast, a diverse board would better relate to stakeholder groups beyond those corporate constituencies.

Second, cultural cognition theory suggests that corporate constituencies perhaps should be given greater voice in corporate affairs.[203] Although boards and the impact of their decisions received little attention until the late twentieth century, boards have come under increasing scrutiny not only by legislators, regulators, institutional investors, and other major participants in the financial markets, but also

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201. *See supra* Part II.A.

202. *See* J. Flynn, P. Slovic & C.K. Mertz, *Gender, Race and Perception of Environmental Health Risks*, 14 RISK ANALYSIS 1101, 1105–06 (1994) (analyzing evidence that white men who are highly educated, have high incomes and who hold individualistic and hierarchical worldviews also are highly risk skeptical when compared to women and minorities); *see also* Dan M. Kahan et al., *Culture and Identity*, *supra* note 38, at 567 (discussing empirical evidence that describes a discrete group of hierarchical, individualistic white men who are highly risk skeptical). Other characteristics that correlate with risk perception include socioeconomic status, educational background, and community of residence. *See id.* at 472.

203. *See* Kahan & Slovic, *supra* note 42, at 169–72 § II.

by the general public.[204] Much of the general public is invested in corporations through mutual funds, 401(k)s, and other instruments. In addition, the taxpayer bailout raised the profile of executives and boards, especially with respect to bonuses and other compensation.[205] The public perceived that executive bonuses were excessive and that corporate boards' decisions to award bonuses were unfair.[206] The relatively new SEC compensation disclosure requirements and the Dodd-Frank Act's say-on-pay, say-on-golden parachutes, and pay-for-performance disclosure requirements indicate that legislators and regulators are heeding viewpoints other than those of corporate executives who assert that they are paid the going rate.[207] Of course, legislators must heed their constituencies' calls or face election defeat, and regulators must consider whether they will be reappointed. In general, directors do not face the same threats to retaining their positions on corporate boards. Perhaps more diversity on corporate boards would have made boards more sensitive to the public outcry that eventually accompanied ever-increasing executive compensation.

C. Critical Race Theory and Board Diversity

Critical race theory suggests that "race in modern America is ubiquitous, that color-blind lawmaking is likely to address only the most blatant racism, and that any progress occurs only when the interests of the powerful converge with the interests of the racially oppressed."[208] Note that the racially oppressed and the powerful each retain their own interests—progress only occurs when those interests converge. Interests derive from a variety of factors, but extrapolated to worldviews, critical race theory would seem to suggest that distinct worldviews may be

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204. *See* LEBLANC & GILLIES, *supra* note 58, at 1; CORPORATE BD. MEMBER MAGAZINE & FTI CONSULTING, FEELING THE HEAT: RESULTS OF THE *CORPORATE BOARD*/FTI CONSULTING 2010 LEGAL STUDY 2 (2010), *available at* http://www.boardmember.com/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=5218 (describing how directors perceive increased scrutiny from politicians and the public on certain issues such as executive compensation and risk management).

205. *See, e.g.*, Sewell Chan, *Both Parties Play the Wall Street Card, Sometimes from the Bottom of the Deck*, N.Y. TIMES, Nov. 1, 2010, at A16 (discussing how populist anger at Wall Street fueled political campaigns in the November 2010 election cycle); *This Angry Moment: Populist Outrage Building*, NPR (Mar. 19, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=102118227 (discussing a Gallup poll showing public anger at taxpayer bailouts).

206. *See* Frank Ahrens, *Isn't That Rich? The Bonus Controversy of 2009*, WASH. POST OUTLOOK (Jan. 3, 2010), *available at* http://www.washingtonpost.com/wp-srv/special/opinions/outlook-bonus/ (discussing the controversy regarding corporate bonuses).

207. *See supra* notes 177, 182 and accompanying text (discussing the financial collapse and responses to the crisis).

208. Ramirez, *supra* note 30, at 1584.

retained, even if those worldviews converge around a common goal, such as corporate decision making on a board.

The cultural cognition hypothesis also supports critical race theory's claim that political debate, public policy, and law "should be informed by the voices of people 'on the bottom' of discrimination."[209] In the context of corporations, "[c]orporate law and corporate culture concentrate power in the hands of privileged, middle-age white males over the fate of (relatively more) diverse shareholders, employees and others."[210] Those voices can "illuminate our understanding of discrimination and identify the means by which to eradicate it."[211] If a legitimate law is defined as the outcome of a process "sufficiently connected to the will of those governed by [the result] so that we can impute the law's commands to them,"[212] then a legitimate decision also should be the outcome of a similar process. In other words, legitimate decisions should be the outcome of a process that considers the voices of both the empowered and the disempowered in the corporate structure.

V. OVERCOMING ROADBLOCKS TO INCREASING WORLDVIEW DIVERSITY ON CORPORATE BOARDS

Common law and state statutes provide little incentive to increase the diversity of worldviews on corporate boards.[213] State court judges have tended to minimize the impact of director cognitive bias on corporate decision making, except when bias may arise from a financial interest in a transaction.[214] The notion that cognitive biases may impact corporate decision making in a way that should concern courts and legislators only recently has begun to impact judicial and legislative actions. Courts and legislators should give weight to the notion that cultural cognition affects board decision making. However, corporate boards truly concerned about governance should begin to define diversity in terms of cultural worldviews, as well as in terms that are used more often, such as gender and race.

209. Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1284 (2000); *see also* Gabaldon, *supra* note 30, at 546–49 (discussing critical race theory in the context of the power structure of corporations and corporate law).

210. Gabaldon, *supra* note 30, at 547.

211. Carbado, *supra* note 209, at 1284.

212. Kahan et al., *supra* note 117, at 47.

213. *See* Burch, *supra* note 34, at 526–32 (stating that business judgment review provides great deference to directors' decisions made in good faith, with due care, and in the best interests of the corporation; courts discount cognitive biases not borne of a financial interest in the transaction).

214. *See id.* at 531 (describing how state courts tend to be skeptical of shareholder claims that directors' decisions are biased).

The board director who is also a woman and/or a person of color could be the only non-white, non-male board director. It may be that due to background, the person adheres to a worldview more consistent with the white, male majority with respect to corporate decisions and risk profile. As described above, the research on cognitive biases suggests that while gender and race correlate with worldviews, other factors, such as socioeconomic status, career experiences, and education, also influence worldviews.[215] Therefore, adding more women and people of color to corporate boards may not mitigate skewed risk perception if the addition of women and people of color does not increase worldview diversity. What strategies could be used to increase worldview diversity on corporate boards? What barriers to effective communication among board members exist, and would those barriers negate the positive impact of greater worldview diversity? What strategies might serve to overcome these barriers? The cultural cognition theory, critical race theory and director behavior studies shed light on these questions and may provide the foundation for mitigating strategies.

The following subsections identify three possible barriers that may negate the positive and powerful impact of greater diversity—fear, consensus and assimilation, and distrust—and discuss how these barriers may be surmounted.

A. Fear

Directors may fear differing viewpoints. Research on board dynamics indicates that board cultures tend towards conservative and consensus decision making.[216] While directors may be open to hearing different viewpoints, they may not credit those viewpoints in making decisions if the person delivering the viewpoint is perceived as being from outside of the directors' cultural norm.

Boards may benefit from hiring consultants who may lend credibility to the "outsider's" view. However, critical race theory suggests that ultimately the board as a whole would need to agree that outsider opinions are credible and should be given due weight in board decisions.

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215. *See supra* note 202 (discussing the effect of culture on the cognitive process).

216. *See, e.g.*, J.W. LORSCH, PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS 91–95 (1989) (describing how board norms favor the appearance of board consensus and support for the CEO's agenda, and disfavor forthright discussion during board meetings).

B. Consensus and Assimilation

Directors must understand and work within the board's and the organization's culture without losing their unique perspectives. A good understanding of board dynamics is important to a director's ability to generate consensus around that director's ideas. Board dynamics result from how directors "'fit' together and balance one another's personality, competency and behavioral type."[217] Creative tension must also exist in the boardroom. This chemistry results from the interaction of directors who bring different interpersonal skills to the boardroom. LeBlanc and Gillies' qualitative study of board dynamics suggests:

> [A] board cannot work, that is, reach good decisions, unless there are directors who, through credibility, leadership and interpersonal and communication skills, are on occasion able to persuade other directors and management of their point of view or of a particular course of action. At the same time, a board cannot work unless there are directors who can find common themes within dissenting views and bring about a consensus.[218]

Research on the experience of women and people of color on boards indicates that these directors must prove their qualification to serve on the board and build credibility in a way that is qualitatively different from the experience of white male directors.[219] Also, research suggests that a minimum of three directors who are women or people of color increases the credibility of the directors and facilitates the directors' ability to build consensus around ideas that may conflict with established behavioral norms.[220]

Does cultural cognition suggest worldviews that are more concerned about or adept at building credibility or facilitating consensus? (One might hypothesize that communitarians are more concerned with facilitating consensus, but are they more adept at it?) Do the

217. LEBLANC & GILLIES, *supra* note 58, at 141.

218. *Id.*

219. *See* DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE KEEPS WOMEN OUT OF AMERICA'S BOARDROOMS 161–75 (2007) (describing stereotyping and tokenism that prevent women from advancing and remaining at the top of the corporate hierarchy).

220. *See* Alison M. Konrad, Sumru Erkut & Michele J. Hooper, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance* 3–4 (Wellesley Ctrs. for Women, Report No. WCW 11, 2006), *available at* http://www.wcwonline.org/pdf/CriticalMassExecSummary.pdf (asserting that greater board diversity often leads to better dispersal of information and better decision making); *see also* Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1309 (2003) (asserting that heterogeneity enhances the ability of a group to make decisions).

mechanisms underlying cultural cognition suggest that directors with "outsider" worldviews also must build credibility in a different way?

C. Trust

To the extent that there is significant worldview diversity on a public company board, the board may make decisions that are more legitimate because the board fully considered—and questioned—various perspectives that are representative of the people affected by the board's decisions. While the Cultural Cognition Project studies demonstrate that diversity may have that effect, insights derived from critical race and feminist theory show that diversity alone is not enough; board members' views must be seen as credible. Trust is another critical component of board dynamics, and is part of the foundation for credibility.

Trust is built over time and arises from decisions that, in hindsight, show good judgment. However, is trust between hierarchs and egalitarians built in a way that is qualitatively different from the way trust is built between hierarchs and egalitarians, or between male and female directors?

VI. CONCLUSION

This Article asserts that cultural cognition theory, corporate social responsibility theories and strategies, and critical race theory may shed new light on the value of board diversity in the broad sense and strategies to achieve diversity. The convergence of cultural cognition, corporate social responsibility, and critical race theories could support a broadened definition of board diversity that includes gender, race, age, and geographic location, as well as a worldview or one's vision of the ideal society. Empirical research could determine whether the worldview of a labor union representative is more or less likely to be hierarchical or egalitarian, individualistic or communitarian. And the same evidence could be gathered regarding CEOs and board members.

Boards with greater worldview diversity may consider a wider variety of views and approaches to decision making. Further, while studies at the Yale Cultural Cognition project demonstrate that gender and racial diversity may not correlate completely with gender and racial diversity, a strong positive correlation exists between worldviews, gender, and race on some issues. Moreover, critical race theory suggests that worldviews do not change merely because a person of a certain gender or racial group participates in activities that are characteristic or supportive of a different worldview—adding to the importance of determining an individual's worldview to obtain and evaluate board diversity.

Fairness, equity, and economic considerations are legitimate and not mutually exclusive goals of board worldview diversity. This Article has summarized, from equity and fairness viewpoints, the rationales and the goals for worldview diversity on corporate boards. In doing so, it has reviewed the results from empirical studies supporting the case for greater gender and racial diversity on corporations. The Article has discussed research on cultural cognition and how worldview relates to gender and race. In addition, the Article has tied together the literature from the corporate social responsibility movement, critical race theory, and cultural cognition research to conclude that gender, race, and worldview diversity may lead to more legitimate business decisions.

While more diversity (in terms of gender, race, and worldviews) may lead to more in-depth discussion of alternative courses of action, board diversity alone may not have a large impact on board decision making. Critical race and social science scholarship suggests that barriers may negate the positive impact of greater diversity. However, the scholarship also suggests that the barriers are not insurmountable. More research on director behavior is needed to determine the extent that cultural cognition impacts board decision making and board members' interactions.

This Article has proposed a number of reasons for seeking diversity on corporate boards. While such diversity may be achieved voluntarily, some may argue that the move to board diversity has been slow, and that nonvoluntary measures are needed. Unfortunately, while courts may be willing in various degrees to recognize both conscious and unconscious bias, to date no cases consider failure to diversify along worldview, gender, or racial lines as an argument in favor of finding a breach of fiduciary duty.[221] Other countries mandate board diversity.[222] However, their corporate governance, economic, and political systems differ from these systems in the United States to such a degree that it is more likely that greater worldview diversity would become inculcated into standard business practices than such legal requirements would be adopted in the United States. Nonetheless, it is reasonable to

221. *See supra* notes 213–14.

222. *See Percent of Women Board Directors in Select Countries*, CATALYST, http://www.catalyst.org/publication/433/women-on-boards (last visited Mar. 24, 2011). As of December 2010, six countries (Finland, Iceland, Norway, Spain, Israel, and Quebec) mandated gender diversity, ranging from at least one woman on the board to at least 40 percent women. Other countries implemented mandatory disclosure rules (e.g., United States) or encourage diversity as a best practice (e.g., Australia and Sweden).

hypothesize that such requirements would lead to more equitable and legitimate decision making.