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## Empowering Diversity Ambition: Brummer and Strine's Duty and Diversity Makes the Legal and Business Case for Doing More, Doing Good, and Doing Well

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# Empowering Diversity Ambition: Brummer and Strine’s *Duty and Diversity* Makes the Legal and Business Case for Doing More, Doing Good, and Doing Well

*Lisa M. Fairfax\**

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Chris Brummer and Leo Strine’s Article *Duty and Diversity* makes several significant contributions that enhance the support for greater corporate focus on diversity, equity, and inclusion (“Diversity” or “DEI”).<sup>1</sup> These contributions are particularly important not only because Diversity itself is an imperative but also because of the inevitable pushback against corporate efforts to advance Diversity. Indeed, as Brummer and Strine note, some corporate scholars contend that the corporation has no business being involved in the business of Diversity. These scholars often support this contention by relying on their interpretation of a mix of soft and hard law which they insist serves as a legal and extralegal barrier for corporate efforts aimed at significantly promoting Diversity. Brummer and Strine convincingly discredit these interpretations, and in so doing, discredit the myths surrounding the corporate law obstacles associated with the for-profit corporation’s ability to advance Diversity. In particular, Brummer and Strine demonstrate the manner in which corporate law mandates a

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1. See Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (2022).

focus on Diversity, at least to the extent that law requires legal compliance with antidiscrimination and civil rights laws. In addition, Brummer and Strine not only reveal the legal safeguards for corporate engagement of Diversity initiatives but also highlight both the costs associated with ignoring Diversity matters as well as the “money to be made by companies that take DEI seriously.”<sup>2</sup> In so doing, Brummer and Strine make an especially compelling affirmative case supporting corporations that would go beyond legal compliance and adopt more ambitious Diversity policies and practices.<sup>3</sup> In this respect, Brummer and Strine persuasively demonstrate that corporations can (1) do significantly more than comply with the law without fear of legal liability, (2) “do good,” by promoting policies that advance economic equality and inclusion, and (3) do well, by profiting from their more comprehensive Diversity policies and practices.

Brummer and Strine’s contributions fall along three broad spectrums. First, the Article convincingly links the current concern around racial inequities in the economic sphere with the underrepresentation of people of color on corporate boards of directors (“boards”) and in the C-suite. The Article also does a very nice job of highlighting *why* that underrepresentation matters for those seeking to ameliorate racial wealth and income gaps or other racial disparities in the labor market. In fact, the Article likely underemphasizes the connection between the lack of diverse leadership and racial economic inequities more broadly. However, the Article makes a very strong case for why diverse leadership matters to those seeking to address the economic inequities caused by racial bias and discrimination.

Second, although it is well-trodden ground, the Article makes one of the more compelling cases for the business rationale for Diversity, thereby helping to enhance the “building blocks” of that rationale.<sup>4</sup> The Article convincingly illustrates the reputational, and hence financial, consequences associated with the corporate failure to focus on Diversity. Of course, in light of my previous scholarship, I would have been interested in a deeper dive into the propriety of the business rationale and the potential costs of promoting Diversity in reliance on such rationale. However, that interest does not detract from the Article’s careful and compelling support for the business case for Diversity.

Third, the Article persuasively highlights and discredits the legal myths advanced by those who suggest that corporate law is a

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2. *See id.* at 90.

3. *See id.* at 88–90.

4. *See id.* at 27.

barrier to advancing Diversity. The Article nicely details the manner in which corporate focus on Diversity is entirely consistent with, and in fact required by, corporate fiduciary law. The Article makes a particularly compelling case regarding the manner in which current corporate law serves as a safe harbor for directors seeking to do more than minimally comply with the law as it relates to Diversity.

The Article's legal analysis did raise at least two concerns for me. The first centers on the limits of legal compliance with respect to Diversity goals in light of the minimal standards associated with legal compliance as well as existing law's failure to sufficiently condone the kind of implicit biases and discriminatory behavior that result in inequities in the workforce and economy.<sup>5</sup> The second concern involves the intersection of the Article's safe harbor discussion with its discussion about the impact of reputation on corporate behavior. Indeed, while the safe harbor discussion correctly focuses on the legal safe harbor afforded directors who innovate in the area of Diversity, such a focus begs the question about whether, and to what extent, there exist any safe harbors for reputational missteps, and how the answer to this question may impact the safe harbor analysis.

Of course, neither of the above-mentioned concerns detracts from the Article's strength. Its contributions are important, particularly in light of the push back from those who would contend that corporate attention to Diversity is unwise, unwarranted, and inconsistent with corporate fiduciary duties. In this regard, Brummer and Strine's Article provides both a compelling legal and business justification for Diversity, and a protective legal pathway for corporations' increased focus on Diversity.

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5. See e.g., Angela Onwuachi-Willig, *From Loving v. Virginia to Washington v. Davis: The Erosion of the Supreme Court's Equal Protection Intent Analysis*, 25 VA. J. SOC. POL'Y & L. 303 (2018); D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987 (2017); Angela Onwuachi-Willig, *Teaching Employment Discrimination*, 54 ST. LOUIS U. L.J. 755 (2010); Guy-Uriel E. Charles, *Toward A New Civil Rights Framework*, 30 HARV. J.L. & GENDER 353 (2007); Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 1010 COLUM. L. REV. 458 (2001); Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1204–07 (2000); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 496–501 (1996); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–88 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

The first Part of this Response discusses the Article's contribution to the discourse around the connection between corporate leadership and racial equity. The second Part examines the Article's contribution in support of the business case for Diversity. The third Part addresses the Article's contribution to the link between corporate law and corporate ability to attend to Diversity.

#### I. CORPORATE DIVERSITY LEADERSHIP AND RACIAL INEQUITY: A TIE THAT BINDS

Brummer and Strine's Article convincingly demonstrates the underrepresentation of people of color and women on corporate boards and in the C-suite. Section I.A of the Article paints a very clear picture of the manner in which corporate law's increased focus on board composition "has not translated into boards representative of our nation."<sup>6</sup> To be sure, studies reveal that 2021 has witnessed a sharp increase in board diversity, particularly with respect to Black people and women.<sup>7</sup> However, that increase does not eliminate the gap between board diversity and diversity reflected in the broader population and workforce. Section I.B clearly highlights the homogeneity of CEOs and C-suite officers.<sup>8</sup> This demonstration of board and C-suite underrepresentation is significant because it sets the stage for the other important arguments in the Article.

To this end, the Article also highlights *why* underrepresentation matters for those concerned about inequality in the workforce and broader economy. The Article persuasively reveals that board and C-suite diversity, particularly CEO diversity, is important to the broader struggle to ensure workplace diversity and equal economic opportunities by demonstrating that the absence of board and C-suite diversity is significantly likely to impede not only diversity lower down in the corporation but also the promotion of diverse employees.<sup>9</sup>

Importantly, the Article likely underemphasizes the manner in which diverse leadership affects Diversity and economic opportunity. Indeed, the Article's observations implicitly support at least four additional arguments related to the importance of board and C-suite diversity to equal economic opportunities. The first relates to the importance of the proverbial seat at the table. Corporations are the

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6. See *id.* at 11.

7. See Peter Eavis, *Board Diversity Increased in 2021. Some Ask What Took So Long*, N.Y. TIMES (Jan. 3, 2022), <https://www.nytimes.com/2022/01/03/business/corporate-board-diversity.html> [<https://perma.cc/7TKN-WUX6>].

8. See Brummer & Strine, *supra* note 1, at 15.

9. See *id.* at 22.

largest employers in the world, and for that reason alone, corporate policies and practices have a significant impact on employment opportunities. As the Article establishes, not only does the corporate board play a vital role in the corporation, but also the corporate board—and by extension the composition of the corporate board—has risen in prominence and importance.<sup>10</sup> The Article also underscores the important role that CEOs play with respect to the corporation and its employment practices and policies.<sup>11</sup> The Article clearly suggests that diversity in leadership positions may be important for ensuring that the full spectrum of corporate citizens have a seat at the corporate table in light of the important role that the corporation, boards and CEOs play in influencing the economic and employment sphere.

The second issue that the Article implicitly supports is the extent to which board and C-suite diversity is important for ensuring that the corporation sets strategic Diversity goals and policies that better ensure equal economic opportunity. The Article appropriately emphasizes the fact that the corporate board plays an instrumental role in overseeing corporate policies and practices, including, of course, employment policies and practices.<sup>12</sup> The Article further highlights CEOs' responsibilities for "implementing recruiting, retention, and promotion strategies at the firm and ensuring a workplace culture commensurate with the objectives of the company."<sup>13</sup> Finally, the Article makes clear that diversity within the upper realms of the corporation matters for purposes of ensuring that boards and CEOs pay closer attention to policies and practices that align with the interests of diverse communities.<sup>14</sup> Taken together, these areas of emphasis reveal that board and CEO diversity matter to economic equality because such diversity is much more likely to translate into equitable employment policies and practices, thereby increasing the likelihood that women and employees of color will be given the opportunity to fully participate in hiring, retention, and promotion opportunities.

Third, the Article implicitly supports the argument that board and C-suite diversity matter for purposes of better ensuring that the corporation affirmatively negate its own problematic employment policies and practices. While the Article does not explicitly contend that the lack of diversity on boards and in C-suites results from corporate bias and discrimination in the employment arena, the Article does

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10. *See id.* at 10.

11. *See id.* at 15.

12. *See id.* at 10.

13. *See id.* at 15.

14. *See id.* at 21.

persuasively pinpoint the legacy of discrimination and bias in the workplace and its effect on equal economic opportunities.<sup>15</sup> In so doing, the Article clearly aligns with the contention that the lack of board and CEO diversity reflects a corporate ecosystem that has relied upon bias and discrimination. It is no accident that there is a lack of diversity at the C-suite level. A 2019 Korn Ferry study of senior Black executives at Fortune 500 companies described its results as follows: “What we’ve found is that all roads lead to bias against Black leaders’ readiness. Unlike their [white] counterparts, Black executives are often perceived by the majority as not having the intellectual rigor or leadership ability to manage large, highly complex P&L positions.”<sup>16</sup> Consistent with this result, decades of studies consistently reveal that the lack of racial and ethnic diversity at the C-suite level is the direct result of historical and current discrimination and racial bias from corporate employers at every stage of the employment process.<sup>17</sup> Such studies reveal persistent and pervasive patterns of racial bias and discrimination that affect employee resume screening, interviews, hiring, retention, and promotion.<sup>18</sup> Such studies also reveal that these patterns have

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15. See *id.* at 20–21.

16. See KORN FERRY, THE BLACK P&L LEADER: INSIGHTS AND LESSONS FROM SENIOR BLACK P&L LEADERS IN CORPORATE AMERICA 6 (2019), [https://www.kornferry.com/content/dam/kornferry/docs/pdfs/korn-ferry\\_theblack-pl-leader.pdf](https://www.kornferry.com/content/dam/kornferry/docs/pdfs/korn-ferry_theblack-pl-leader.pdf) [<https://perma.cc/PAU8-EFM2>]. The study focused on interviews of 28 senior Black profit-and-loss (“P&L”) leaders.

17. See J. Yo-Jud Cheng, Boris Groysberg, & Paul M. Healy, *Why Do Boards Have So Few Black Directors?*, HARV. BUS. REV. (Aug. 13, 2020), <https://hbr.org/2020/08/why-do-boards-have-so-few-black-directors> [<https://perma.cc/NVA3-6C6Y>] (noting persistent discrimination in hiring and promotion); Laura Morgan Roberts & Anthony J. Mayo, *Toward A Racially Just Workplace*, HARV. BUS. REV. (Nov. 14, 2019), <https://hbr.org/cover-story/2019/11/toward-a-racially-just-workplace> [<https://perma.cc/9FF4-PEJ6>] (“According to both quantitative and qualitative data, working African-Americans—from those laboring in factories and on shop floors to those setting C-suite strategy—still face obstacles to advancement that other minorities and white women don’t.”); Lincoln Quillian, Devah Pager, Arnfinn H. Midtboen, & Ole Hexel, *Hiring Discrimination Against Black Americans Hasn’t Declined in 25 Years*, HARV. BUS. REV. (October 11, 2017), <https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years> [<https://perma.cc/C76K-ERN3>] (finding no change in hiring discrimination over twenty-five years); Sonia K. Kang, Katherine A. De Celles, Andras Tilcsik, & Sora Jun, *Whitened Resumes: Race and Self Preservation in the Labor Market*, 61 ADMIN. SCI. Q. 1, 2 (2016), <https://www-2.rotman.utoronto.ca/facbios/file/KangDecellesTilcsikJun2016ASQ.pdf> [<https://perma.cc/EA5F-7LU4>] (noting that discrimination in the employment market “substantially contributes to labor market inequalities by blocking racial minorities’ access to career opportunities”).

18. See Everett J. Mitchell & Donald Sjoerdsma, *Black Job Seekers Still Face Racial Bias in Hiring Process*, LIVECAREER (Sept. 2, 2020), <https://www.livecareer.com/resources/careers/planning/black-job-seekers-face-racial-bias-in-hiring-process> [<https://perma.cc/45DU-53DS>] (racial bias in hiring); Cheng et al., *supra* note 17; Roberts & Mayo, *supra* note 17; KORN FERRY, *supra* note 16, at 27 (discriminatory promotion patterns); Quillian et al., *supra* note 17 (detailing discrimination in hiring); Eva Zschirnt & Didier Ruedin, *Ethnic Discrimination in Hiring Decisions: A Meta-Analysis of Correspondence Tests 1990-2015*, 42 J. ETHNIC MIGRATION STUD. 1115, 1128 (2016) (describing discrimination against minority applicants); Dina Gerdeman, *Minorities Who “Whiten” Job Resumes Get More Interviews*,

remained essentially unchanged for decades despite the passage of legislation aimed at prohibiting racial discrimination in employment practices.<sup>19</sup> These patterns result in people of color being systematically excluded from employment opportunities and thus systematically eliminated from the highest rungs of the corporate ladder.<sup>20</sup> To put this in perspective, during most of the history of U.S. corporate law, the vast majority of corporations did not appoint Black people to the roles of CEO. The first Black CEO of a major corporation, Clifton Wharton, CEO of TIAA-CREF, was not appointed until 1987.<sup>21</sup> The first Black woman CEO of a major corporation, Ursula Burns, CEO of XEROX, was not appointed until 2010.<sup>22</sup> This means that for 200 years in the case of Black men, and more than 225 years in the case of Black women, major corporations did not promote Black people to the ranks of CEO. Studies highlight that the reason for the dearth of people of color at the top of the corporate pyramid is a corporation's own problematic employment practices.<sup>23</sup> In this regard, the relatively homogenous composition of the C-suite is the inevitable and thus unsurprising result of persistent patterns of bias and discrimination in the employment arena. Ensuring that corporations intentionally focus on CEO diversity matters because it serves to counteract these patterns.

Similarly, board diversity matters because the lack of board diversity reflects the inevitable result of nomination policies and practices that draw from a corporate ecosystem that relies upon discriminatory and biased employment practices. For the vast majority of corporate law history, boards focused their search for outside director candidates on active or retired CEOs, thereby ensuring that the vast majority of corporate directors were drawn from the C-suite.<sup>24</sup> Given

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HARV. BUS. REV. (May 17, 2017), <https://hbswk.hbs.edu/item/minorities-who-whiten-job-resumes-get-more-interviews> [<https://perma.cc/3ULR-SEC9>] (“[C]ompanies are more than twice as likely to call minority applicants for interviews if they submit whitened resumes. . . .”); Kang et al., *supra* note 17 (whitened resumes).

19. See Brummer & Strine, *supra* note 1, at 19–20, 27.

20. See *id.* at 19.

21. Susan Griffith, *Clifton Reginald Wharton Jr.*, BLACKPAST (Mar. 12, 2012), <https://www.blackpast.org/african-american-history/wharton-jr-clifton-r-1926/> [<https://perma.cc/4WAZ-ERV6>].

22. *Profile: Ursula Burns*, FORBES, <https://www.forbes.com/profile/ursula-burns/?sh=487077640a0e> (last visited Jan. 18, 2022) [<https://perma.cc/F8HF-SNFF>].

23. Lisa Fairfax, *Racial Reckoning with Economic Inequities*, 101 CORNELL L. REV. ONLINE (forthcoming 2022) (manuscript at 106); Roberts & Mayo, *supra* note 17; KORN FERRY, *supra* note 16, at 27 (discriminatory promotion patterns); Quillian et al., *supra* note 17 (detailing discrimination in hiring); Zschirnt & Didier, *supra* note 18, at 1128; Gerdeman, *supra* note 18.

24. See MYLES MACE, *DIRECTORS: MYTH AND REALITY* (1971), at 87, 107–08; Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1473 (2007); Kenneth Lehn, Sukesh Patro & Mengxin Zhao, *Determinants of the Size and Composition of U.S. Corporate Boards: 1935-2000*, 38



the lack of diversity in the C-suite, as well as the patterns of discrimination ensuring such lack of diversity, this focus inevitably resulted in boardroom homogeneity that perpetuated those patterns. In other words, the board pipeline was primarily dictated by the problematic employment practices associated with C-suite homogeneity. As one researcher explained it, “There is no getting around the uncomfortable conclusion that the levels of diversity in the C-suite are inadequate to provide a real pipeline to some version of parity among corporate leaders.”<sup>25</sup> In acknowledgement of this reality, many have encouraged boards to move beyond the hyperfocus on the C-suite for board membership and recent boards have begun to expand their recruitment and search criteria.<sup>26</sup> Nonetheless, recent research reveals that boards continue to heavily prefer, and rely upon, the C-suite for their membership.<sup>27</sup> As a result, the board nomination and recruitment process continues to rely upon and perpetuate problematic employment patterns.<sup>28</sup> The intentional focus on board diversity helps redress these patterns.

Corporations also rely heavily upon biased social and professional networks to fill board seats. Historically, boards relied upon explicitly discriminatory social and professional networks,<sup>29</sup> drawing from social clubs and settings that excluded Black people and other people of color.<sup>30</sup> Recent research reveals that boards continue to

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FIN. MGMT 747, 750–51 (2008); Harald Baum, *The Rise of the Independent Director: A Historical and Comparative Perspective* 11 (Max Planck Inst. Compar. Int’l Priv. L. no. 16/20, 2017) (forthcoming); see also SPENCER STUART, 2021 U.S. SPENCER STUART BOARD INDEX 9 (2021), <https://www.spencerstuart.com/-/media/2021/october/ssbi2021/us-spencer-stuart-board-index-2021.pdf> [<https://perma.cc/9FQX-LDZ7>]; Lisa Fairfax, *supra* note 23.

25. See Cydney Posner, *Addressing the Challenge of Board Racial Diversity*, COOLEY PUBCO (Aug. 25, 2020), <https://cooleypubco.com/2020/08/25/board-racial-diversity/> [<https://perma.cc/TDB9-KYL3>].

26. See SPENCER STUART, *supra* note 24, at 2.

27. See KORN FERRY, *supra* note 16; *Six Tips for Improving Diversity in the Boardroom*, CORP. BD. MEMBER, <https://boardmember.com/six-tips-improving-diversity-boardroom/> (last visited Jan. 21, 2022) [<https://perma.cc/JX8T-JUMM>] (“[B]oards continue to focus on appointing CEOs.”); see also DELOITTE, SEEING IS BELIEVING: 2017 BOARD DIVERSITY SURVEY (2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-about-board-diversity-survey-seeing-is-believing.pdf> [<https://perma.cc/X553-CCU2>] (finding that more than ninety-four percent of respondents would see a candidate without executive experience as unqualified, while eighty-seven percent believe that current or retired CEOs are the most effective board members).

28. See Fairfax, *supra* note 23, at 107, 117.

29. See MACE, *supra* note 24, at 89 (“The outside directors of large national and regional companies are members of a sort of club. . . . [M]any will in fact be members of the same golf or social club. . . . [E]ach city has its hard-core members of the club group.”)

30. See *id.* at 89 (quoting the president and CEO of First Pennsylvania Bank and Trust Company, Philadelphia’s largest bank at the time, as commenting that the focus on members of the same club for board seats was “no longer justifiable” because that focus served to inappropriately freeze out Blacks and other qualified people from serving on boards).

rely primarily on informal social and professional relationships and networks that tend to be racially homogenous.<sup>31</sup> As one commentator put it, the board recruitment process “has been heavily reliant on white, male boards members’ personal networks, which often don’t include minority executives.”<sup>32</sup> Research also confirms that reliance on these informal networks perpetuates racial homogeneity and inequality.<sup>33</sup> Importantly, Brummer and Strine point out that arguably the most critical obstacle to board diversity is that “women and minorities are unlikely to have the social networks and relationships necessary for candidates seeking position on boards.”<sup>34</sup> Brummer and Strine also note that researchers “have identified exclusion from professional networks as a key driver of the imbalance in C-suites.”<sup>35</sup> These arguments make clear that board diversity is important as a mechanism for counteracting problematic corporate behaviors. Importantly, such arguments build on the work of other scholars that have linked corporate discrimination and board diversity, particularly Professor Cheryl Wade, who has repeatedly contended that more diversity at the upper levels of corporate management would likely help dismantle the discriminatory hiring and promotion practices that impede the progress of women and professionals of color.<sup>36</sup>

Fourth, the Article provides implicit support regarding the importance of board diversity to ameliorating the racial income and wealth gap.<sup>37</sup> Indeed, the Article’s discussion of the racial wealth gap was especially compelling, and the Article persuasively discussed the significance of ensuring that corporations play a role in ameliorating the racial wealth gap.<sup>38</sup> To the extent corporate employment practices created and exacerbated racial disparities in the workforce, the Article clearly suggests that those practices also created and exacerbated the

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31. See Posner, *supra* note 25 (“The HBR study also found that social networks were the primary method of introduction.”); Cheng et al., *supra* note 17; DELOITTE, *supra* note 27, at 8.

32. See Jeanna Sahadi, *There’s No Excuse For Not Having Racially Diverse Boards. Here’s How To Do It*, CNN (Aug. 12, 2020, 11:02 AM), <https://www.cnn.com/2020/08/12/success/board-diversity/index.html> [https://perma.cc/UES5-ZCKB].

33. See Mitchell & Sjoerdsma, *supra* note 18; KORN FERRY, *supra* note 16, at 28.

34. See Brummer & Strine, *supra* note 1, at 14.

35. See *id.* at 18.

36. See Cheryl Wade, *Transforming Discriminatory Corporate Cultures: This is Not Just Women’s Work*, 65 MD. L. REV. 346, 354–68 (2006) [hereinafter Wade, *Transforming*]; Cheryl Wade, *Racial Discrimination and the Relationship Between Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 427 (2002) [hereinafter Wade, *Racial Discrimination*]; see also Cheryl Wade, *Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility*, 74 WASH. & LEE L. REV. 1187 (2017) [hereinafter Wade, *Effective Compliance*].

37. See Brummer & Strine, *supra* note 1, at 24–26.

38. See *id.*

racial income and wealth gap.<sup>39</sup> Moreover, it is possible that diverse leadership can influence the adoption of policies aimed at closing that gap. Consistent with this possibility, Wade has noted, “Diversity among corporate leaders is essential in addressing many of the economic disparities that big business has helped to create.”<sup>40</sup>

Brummer and Strine’s observations support the contention that board and C-suite diversity matters not only for increasing the likelihood that corporations will proactively promote Diversity, but also for increasing the likelihood that corporate policies will dismantle policies that exacerbate bias and discrimination in the workforce and broader economy.<sup>41</sup> Hence, their Article provides compelling support for the proposition that board and C-suite diversity are important to the effort at better ensuring racial equity.

## II. ANOTHER LOOK AT THE BUSINESS RATIONALE

The Article makes a particularly compelling case for the business rationale for Diversity. The Article provides a clear, comprehensive, and compelling narrative about the empirical evidence suggesting that Diversity has a positive impact on financial performance.<sup>42</sup> Perhaps most importantly, the Article persuasively demonstrates why the equivocal data does not undermine the imperative to advance Diversity in the corporation. As the Article points out, CEOs and boards take action every day—and in fact are required to take action every day—in the face of limited, uncertain, or mixed information.<sup>43</sup> We have no better example of this requirement than our experience with COVID-19 and the global pandemic, which has required that boards and CEOs take life-impacting actions in the face of limited, uncertain, imperfect, and mixed data. In light of the reality of corporate decisionmaking, the Article appropriately insists that the equivocal nature of the Diversity data should not serve as an invitation for paralysis with respect to Diversity: “Corporate leaders cannot wait for an academic consensus about a complex issue in a fast-changing

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39. See Wade, *Effective Compliance*, *supra* note 36, at 1230–34; see also Wade, *Racial Discrimination*, *supra* note 36, at 427 (“Workplace realities for working class minorities may improve with more racial diversity at the upper levels of corporate management. Minority directors and senior executive may be more conscious of the societal racism that inevitably spills over into corporate life.”).

40. See Wade, *Effective Compliance*, *supra* note 36, at 1230–34; see also Wade, *Racial Discrimination*, *supra* note 36, at 427.

41. See Wade, *Effective Compliance*, *supra* note 36, at 1201; Brummer & Strine, *supra* note 1, at 20–26.

42. See Brummer & Strine, *supra* note 1, at 28–30.

43. *Id.* at 32.

world in which action is required in the here and now. They are expected to make the best judgment they can based on the information available to them, however imprecise and imperfect.”<sup>44</sup>

The Article buttresses the empirical analysis with an analysis of the manner in which organizational theory and case studies related to cognitive diversity validate the business case.<sup>45</sup> In the corporate sphere, these insights build upon the important work of Professors Aaron Dhir, Lissa Broome, Kim Krawiec, Steven Ramirez, Marleen O’Connor, Lynne Dallas, and Janis Sarra.<sup>46</sup>

The Article also convincingly demonstrates the reputational, and hence financial, consequences associated with the corporate failure to focus on Diversity.<sup>47</sup> Put simply, reputation meaningfully influences corporate financial performance. Corporate reputation influences various stakeholder decisions about whether or not to engage with a corporation.<sup>48</sup> A positive reputation enhances the corporation’s bottom line, increasing customer and employee loyalty, corporate earnings, and market values.<sup>49</sup> A positive corporate reputation also lowers the cost of capital because the market believes that companies with a strong positive reputation will deliver sustained earnings.<sup>50</sup> Thus, a positive

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44. *Id.* at 33.

45. *Id.* at 33–41.

46. See AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY (2015); Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431 (2008); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN’S L. REV. 837 (2003); Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306–08 (2003); Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363 (2002); Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. FOR SOC. JUST. 457 (2002); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85 (2000); see also 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 (2005).

47. See also Wade, *Racial Discrimination*, *supra* note 36, at 392 (noting corporate reputational harms associated with inattention to discrimination).

48. See Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 921 (2018); DELOITTE, *supra* note 27; JUDY LARKIN, STRATEGIC REPUTATION RISK MANAGEMENT 1 (2002) (noting that corporate reputation has a significant impact on consumer and investment behavior); *Why Reputation Management is So Important in a Business*, BUS. MATTERS (Nov. 24, 2019), <https://www.bmmagazine.co.uk/in-business/advice/why-reputation-management-is-so-important-in-a-business/> [<https://perma.cc/T4XY-PSA7>] [hereinafter *Why Reputation*] (noting that stakeholders pay attention to negative and positive reputation when determining whether or not to engage with a corporation).

49. See *Why Reputation*, *supra* note 48; Robert G. Eccles, Scott C. Newquist & Roland Schatz, *Reputation and its Risks*, HARV. BUS. REV. MAG. (Feb. 2007), <https://hbr.org/2007/02/reputation-and-its-risks#:~:text=Executives%20know%20the%20importance%20of,ranges%20of%20products%20and%20services.> [<https://perma.cc/NM2H-967K>]; LARKIN, *supra* note 48, at 2 (a strong positive corporate reputation “is a valuable asset in its own right which can affect financial performance”).

50. See Eccles et al., *supra* note 49.

reputation can be a source of competitive advantage.<sup>51</sup> According to one study, companies that effectively manage their corporate reputations doubly outperformed the S&P Index over a fifteen-year period.<sup>52</sup> Of course, a negative corporate reputation also has a considerable impact on financial performance, jeopardizing short-term and long-term value.<sup>53</sup> The costs associated with negative reputation range from share premium erosion, market share loss, debt-rating decline, increased litigation, and unwanted regulatory costs.<sup>54</sup> One source suggests that negative corporate reputation may cost more than \$537 billion a year in the United States alone in lost sales revenue.<sup>55</sup> As Brummer and Strine suggest, corporate reputation, therefore, represents an important financial asset that can either improve or undermine a corporation's financial condition.

This insight is especially salient and timely given the growing significance of reputation. In recent studies, the vast majority of CEOs report that reputation has become increasingly important to their companies' overall financial health.<sup>56</sup> As a result, the portion of corporate resources dedicated to managing reputation has risen dramatically.<sup>57</sup> Consistent with such resource allocation, one study found that intangible assets like reputation account for eighty-seven percent of a company's current market value, as compared with thirty-two percent in 1985.<sup>58</sup>

Brummer and Strine's arguments regarding reputation especially resonate because of the rising importance of social issues like Diversity to stakeholders' perception of corporate reputation. Empirical and anecdotal evidence reveals that stakeholders have increasingly come to expect that corporations will manage their business with an eye towards how their business activities impact social issues ranging from environmental matters to race relations.<sup>59</sup> As a result, the nature and extent of corporate engagement around social issues has increasingly

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51. See LARKIN, *supra* note 48, at 2.

52. *Id.* at 9.

53. See *Why Reputation*, *supra* note 48; Parella, *supra* note 48, at 931 (noting that negative reputation harms an organization's bottom-line).

54. See LARKIN, *supra* note 48, at 6–7.

55. See Jonas Sickler, *What Does a Bad Business Reputation Cost*, COMMPRO, <https://www.commpro.biz/what-does-a-bad-business-reputation-cost/> (last visited Jan. 19, 2022) [<https://perma.cc/ML37-EC64>].

56. See LARKIN, *supra* note 48, at 4.

57. See *id.*

58. See *Annual Study of Intangible Asset Market Value from Ocean Tomo, LLC*, OCEAN TOMO (Mar. 5, 2015), <https://www.oceantomo.com/media-center-item/annual-study-of-intangible-asset-market-value-from-ocean-tomo-llc/> [<https://perma.cc/G2F5-T39U>].

59. See LARKIN, *supra* note 48, at 18–19.

become a core component of corporate reputation.<sup>60</sup> Consumers increasingly view a company's performance related to social matters as a core attribute, and consumer perceptions related to social matters impact their spending and other behaviors.<sup>61</sup> As one commentator notes, "People overwhelmingly prefer to buy from companies that share their beliefs and values."<sup>62</sup> Stakeholders' social responsibility perceptions thus affect corporate reputation and corporate financial performance by impacting the image of brands along with the propensity of consumers to buy particular brands.<sup>63</sup> Moreover, evidence reveals that diverse consumer groups are treating Diversity commitments as an imperative.<sup>64</sup> As a result, Diversity commitments impact how such groups will spend their money, making such commitments critical to maintaining and perhaps expanding their market share related to these groups.<sup>65</sup> Research also confirms that for Black consumers—more than any other group of consumers—brand loyalty is contingent upon a brand's commitment to Diversity and socially responsible ideals.<sup>66</sup> This research confirms the growing prominence of corporate commitment to Diversity considerations to corporate reputation.<sup>67</sup> Such research also confirms the importance of Brummer and Strine's broader arguments, underscoring the compelling nature of the Article's support for the business case.

To be sure, I would have been interested to see the Article grapple more deeply with the broader normative question around the propriety of the business case. As I have argued elsewhere, the embrace

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60. *See id.*

61. *See id.*

62. *See* Terry Nguyen, *Consumers Don't Care About Corporate Solidarity. They Want Donations.*, VOX (Jun. 3, 2020, 1:00 PM), <https://www.vox.com/the-goods/2020/6/3/21279292/blackoutuesday-brands-solidarity-donations> [<https://perma.cc/26JR-75MV>].

63. *See* Tillmann Wagner, Richard J. Lutz & Barton A. Weitz, *Corporate Hypocrisy: Overcoming the Threat of Inconsistent Social Responsibility Perceptions*, 73 J. MKTG. 77, 77 (2009).

64. *See* Peter Adams, *Starbucks' Stumble on Black Lives Matter Shows Rising Stakes for Brands in Addressing Race*, MKTG. DIVE (June 22, 2020), <https://www.marketingdive.com/news/starbucks-stumble-black-lives-matter-rising-stakes-race/580131/> [<https://perma.cc/27MK-UDDK>].

65. *See id.*

66. *See Black Impact: Consumer Categories Where African Americans Move Markets*, NIELSON (Feb. 15, 2018), <https://www.nielsen.com/us/en/insights/Article/2018/black-impact-consumer-categories-where-african-americans-move-markets/> [<https://perma.cc/QB9W-YNQE>] [hereinafter *Black Impact*]; *African American Spending Power Demands That Marketers Show More Love and Support For Black Culture*, NIELSON (Sept. 12, 2019), <https://www.nielsen.com/us/en/press-releases/2019/african-american-spending-power-demands-that-marketers-show-more-love-and-support-for-black-culture/> [<https://perma.cc/RKV2-RCNT>] [hereinafter *African American Spending Power*] (noting that Black consumers are twenty percent more likely to say that they will pay extra for a product that is consistent with their values).

67. *See* LARKIN, *supra* note 48, at 9.

of the business case is no accident. Instead, it reflects a conscious choice by those who believe the moral or social case for diversity was an ineffective means for encouraging greater diversity.<sup>68</sup> However, I and others have suggested that emphasis on the business case has both benefits and costs. On the one hand, the business case may be more palatable, especially for those who believe that corporations cannot or should not advance social issues. On the other hand, there are some downsides to emphasizing the business case.

First, the emphasis may overpromise in several problematic ways. Indeed, boards play a limited role in the corporation and thus may have a limited ability to impact corporate policies and behavior.<sup>69</sup> Of course, research does suggest that the ability to market and develop new products may depend upon the ability to understand a diverse client and customer base, and that such ability is enhanced when corporations have people of color in leadership positions.<sup>70</sup> However, board members do not actively engage in marketing and product development, thereby limiting the extent to which their presence will ensure effective corporate outreach and engagement.<sup>71</sup> Another example of potential overpromise is with respect to the workforce. To be sure, recent research indicates that boards have increased responsibility with respect to the oversight of workforce and Diversity issues.<sup>72</sup> However, even with these increased oversight roles, very few corporations have indicated that their board has oversight responsibility for workplace culture.<sup>73</sup> Nonetheless, the business case may suggest to some that the mere presence of directors of color or women on the board will enable corporations to improve race relations within the corporation or otherwise will significantly increase the likelihood that boards will be able to avoid costly employee discrimination lawsuits.<sup>74</sup> While increasing board diversity may help by increasing the possibility that the board pays closer attention to issues concerning race, it is by no means a panacea because changing the underlying dynamics that may produce a problematic corporate culture

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68. See Fairfax, *supra* note 46, at 798–99, 839–41.

69. See *id.* at 823.

70. See *id.* at 821–22.

71. See *id.* at 823–24.

72. See Era Anagnosti, Colin J. Diamond, Maia Gez, Danielle Herrick, Seth Kerschner, Laura Mulry, Henrik Patel, Victoria Rosamond, Clare Connellan & Emily Holland, *ESG Disclosure Trends in SEC Filings*, WHITE & CASE (Aug. 13, 2020), <https://www.whitecase.com/publications/alert/esg-disclosure-trends-sec-filings#> [<https://perma.cc/KAD5-RFEH>].

73. See *id.*

74. See Fairfax, *supra* note 46, at 824–28 (noting boards with diverse directors during racial incidents).

is no easy feat. Importantly, by overemphasizing the ability of diversity on the board to improve these workforce dynamics, the business case may deemphasize the importance of critical mass and substantive equality and inclusion not only on the board, but also throughout the corporation.<sup>75</sup>

Second, to the extent the business case encourages boards to believe that board diversity is a “quick fix,” it may fail to encourage corporations to embrace the extensive changes that need to occur in order to transform their workforce, or otherwise fail to realistically grapple with the significant difficulties of managing racial diversity in the workforce.<sup>76</sup> Indeed, research reveals that while corporations began embracing the business case for diversity as early as the 1990s, that embrace did not translate into meaningful change on the board or in C-suites.<sup>77</sup> Instead, despite considerable rhetoric around the importance of diversity, efforts to increase diversity at the corporate leadership level had stalled.<sup>78</sup> It may be that the reason for the lack of momentum was attributable to the business case at some level because the embrace of the business case reflected a deemphasis on notions of antidiscrimination, and hence the embrace of that case meant that corporations had not been encouraged to focus on the importance of redressing the bias and discrimination associated with their own policies.<sup>79</sup> It is therefore notable that the large increase in board diversity, alongside the increased attention on racial equity within the corporation, came after the 2020 summer of racial reckoning and an increased societal consensus around the importance of addressing racial discrimination. This suggests that the business case may not serve to motivate corporate behavior in the manner some predicted, and thus that there are some costs associated with reliance on that case.<sup>80</sup>

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75. See *id.* at 837.

76. See *id.* at 828.

77. 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, 840 (2005); DAVID WILKINS, *From “Separate is Inherently Unequal” to “Diversity is Good for Business”*, 117 HARV. L. REV. 1548, 1556 (2004).

78. See Jeff Green, *After Adding More Women to Boards, Companies Pivot to Race*, BLOOMBERG (Aug. 19, 2020, 7:13 PM), <https://www.bloomberg.com/news/essays/2020-08-19/companies-seek-more-black-directors-after-adding-women?srnd=premium> [<https://perma.cc/6U2G-FRMP>]; Stefanie K. Johnson & David R. Hekman, *Women and Minorities Are Penalized for Promoting Diversity*, HARV. BUS. REV. (Mar. 23, 2016), <https://hbr.org/2016/03/women-and-minorities-are-penalized-for-promoting-diversity> [<https://perma.cc/B54B-AELA>]; SPENCER STUART, 2009 SPENCER STUART BOARD INDEX 1–2, 20–22 (2009).

79. See Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 882 (2011).

80. See *id.*



Third, the business case may set women directors and directors of color up for failure. As I have noted elsewhere to “[i]f a director of color’s existence on a board is measured in terms of her ability to deliver on the claims underlying the business rationales, then such rationales create standards that such directors may inevitably fail to meet.”<sup>81</sup>

In each of these ways, focusing on the business case may have troubling consequences, and thus I would have been interested to see Brummer and Strine grapple with these potential consequences. Of course, that interest does not negate the fact that the Article advances compelling support for the business case and significantly and positively contributes to the scholarly debate around the benefits of embracing Diversity.

### III. CORPORATE LAW AS DIVERSITY MANDATE AND DIVERSITY SAFE HARBOR: REFUTING THE MYTHS OF DIVERSITY DETRACTORS

The Article’s argument with respect to corporate law is particularly compelling. First, the Article nicely details the manner in which corporate focus on Diversity is entirely consistent with, and in fact required by, corporate fiduciary law. The Article carefully and persuasively details the manner in which corporate law requires compliance with the law, including a good faith attempt to “try” to ensure that the corporation has in place policies and practice that promote adherence to the law.<sup>82</sup> The Article points out that this includes adherence to antidiscrimination law and civil rights legislation.<sup>83</sup> Importantly, this emphasis builds on the significant body of work of Professor Cheryl Wade, who has consistently maintained not only that corporate fiduciary law demands appropriate attention to compliance with antidiscrimination laws but also that corporate law and corporate law scholars have failed to pay sufficient attention to this compliance duty.<sup>84</sup> Indeed, as Wade notes, once we acknowledge that the lack of diversity in the workforce and even on the board may reflect problematic patterns of bias and discrimination, “what is typically discussed as a [corporate social responsibility] issue—a diversity issue—becomes a corporate governance or compliance issue” and that compliance is a mandatory obligation.<sup>85</sup>

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81. See Fairfax, *supra* note 46, at 842.

82. See Brummer & Strine, *supra* note **Error! Bookmark not defined.**, at 80.

83. See *id.* at 82–86.

84. See Wade, *Racial Discrimination*, *supra* note 36, at 390; Wade, *Transforming*, *supra* note 36, at 354; Cheryl Wade, “We are an Equal Opportunity Employer”: *Diversity Doublespeak*, 61 WASH. & LEE 1541, 1572 (2004) [hereinafter Wade, *Diversity Doublespeak*].

85. See Wade, *Effective Compliance*, *supra* note 36, at 1202.

The Article is also careful to point out the limits and benefits of the legal liability associated corporate law. On the one hand, the Article acknowledges that the impact of corporate fiduciary duty law may well be limited by the relatively low potential for personal liability associated with fiduciary duty violations.<sup>86</sup> On the other hand, the Article persuasively demonstrates the manner in which corporate fiduciary law impacts corporate behavior irrespective of the likelihood that corporate conduct may not result in liability.<sup>87</sup> Bolstering this point, the Article pinpoints examples of corporate engagement in behavioral changes related to Diversity even when directors escape liability for problematic behavior.<sup>88</sup> The Article further argues that *Caremark* has created a norm whereby corporations are more likely to take proactive, preventive measures to ensure that corporate actions comply with societal expectations, particularly Diversity expectations.<sup>89</sup> This argument builds upon claims made by other scholars about the important normative and signaling function of corporate law.<sup>90</sup> As Wade notes, the corporate decision to engage in more robust actions related to Diversity is clearly consistent with good corporate governance.<sup>91</sup> Taken together, the Article presents a very strong account of the legal influence of corporate law on corporate behavior related to Diversity.

Second, the Article makes a particularly compelling case regarding the manner in which current law serves as a safe harbor for directors seeking to do more than minimally comply with the law as it relates to Diversity. The wide discretion afforded corporate fiduciaries under the business judgment rule provides a safe harbor for boards to embrace more effective diversity, equity and inclusion strategies.<sup>92</sup> This safe harbor empowers corporate fiduciaries to adopt ambitious polices free from concerns around legal liability.

Third, the Article appropriately refutes those who would contend that corporate law serves as a barrier to a corporate focus on Diversity. As the Article indicates, such a contention is simply not an accurate interpretation of corporate law both with respect to the clear

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86. See Brummer & Strine, *supra* note 1, at 70.

87. See *id.*

88. See *id.* at 65–90.

89. See *id.*; Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

90. See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1797 (2001); David A. Skeel, *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1820 (2001); Melvin Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1269–70 (1999); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997).

91. See Wade, *Effective Compliance*, *supra* note 36, at 1189.

92. See Brummer & Strine, *supra* note **Error! Bookmark not defined.**, at 62.

requirement to comply with antidiscrimination laws and with respect to the clear freedom corporate fiduciary law grants directors and officers to pursue actions that benefit the corporation.

The Article's discussion of the manner in which corporate law supports corporate decisions to engage in Diversity efforts beyond minimal compliance is especially compelling. As the Article notes, corporate law supports corporate leaders who appreciate that effective DEI policies will enable them to avoid costly violations of the law and the corresponding reputational harm associated with policies that are incompatible with the growing consumer and stakeholder desire to support such policies. As Brummer and Strine appropriately point out, increasingly there are also costly repercussions for corporate silence and inaction. Wade and other corporate scholars have argued that an enhanced focus on compliance with antidiscrimination law can better ensure that corporations avoid those costs.<sup>93</sup> Indeed, a core tenant of the Black Lives Matter movement focused on the importance of not remaining silent in the face of racial discrimination.<sup>94</sup> Moreover, many in the Black Lives Matter movement have interpreted silence as a form of being complicit.<sup>95</sup> Consistent with these sentiments, many corporations went out of their way to both align themselves with the Black Lives Matter movement, but explicitly proclaim a rejection of silence when aligning with the Black Lives Matter movement. American Airlines insisted that those “who are privileged with leadership” have a responsibility to “use our voices within the business community to encourage and support corporate efforts to eliminate systemic racism in America.”<sup>96</sup> Netflix stated: “To be silent is to be complicit.”<sup>97</sup> To be sure, cynics of these corporate statements insist that such statements represented marketing ploys.<sup>98</sup> However, even that insistence underscores corporations' appreciation of a critical market reality about race—stakeholder expectations around race and equity have made corporate silence and inaction around race and equity a

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93. See Wade, *Racial Discrimination*, *supra* note 36, at 390.

94. See Arvind Hickman, *Generic Statements are a Distraction and Talk is Cheap—PR Leaders on Brands Supporting Black Protestors*, PR WEEK (June 1, 2020), <https://www.prweek.com/article/1684783/generic-statements-distraction-talk-cheap-%E2%80%93-pr-leaders-brands-supporting-black-protestors> [https://perma.cc/S58A-EA4Z].

95. See Nguyen, *supra* note 62.

96. See *Charting a Course to Create and Sustain Meaningful Change*, AM. AIRLINES NEWSROOM (June 18, 2020), <http://news.aa.com/news/news-details/2020/Charting-a-Course-to-Create-and-Sustain-Meaningful-Change-ID-BK-06/default.aspx> [https://perma.cc/J2H8-VYDU].

97. See Netflix (@Netflix), Twitter (May 30, 2020, 3:30 PM), <https://twitter.com/netflix/status/1266829242353893376?lang=en> [https://perma.cc/2GHN-4KFB].

98. See David Gelles, *Corporate America Has Failed Black America*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/business/corporate-america-has-failed-black-america.html> [https://perma.cc/LHV5-UK2Y]; Nguyen, *supra* note 62.

potentially damaging proposition. And in fact, companies have found themselves threatened with costly boycotts when they remained silent in the face of voting laws viewed as discriminatory.<sup>99</sup>

The Article also compellingly highlights the manner in which corporate law supports corporate innovation around Diversity for companies that appreciate that such innovation is likely to lead to sustainable long-term profits by enabling corporations to tap into the tremendous market potential associated with embracing the full range of diverse talent in the workforce and the full range of market potential associated with the increasingly diverse consumer and customer base. In recognition of the impact of demographic changes on consumer markets, one market analyst warned that if a corporation does not have a strategy for marketing to diverse consumers, “it doesn’t have a growth strategy.”<sup>100</sup> Consistent with this warning, there is considerable evidence that consumers of color represent a valuable market.<sup>101</sup> Research reveals that the Black consumer market has seen a dramatic rise, increasing by 114 percent since 2000.<sup>102</sup> As one market analyst notes, the buying power of Black consumers is “on par with many countries’ gross domestic products.”<sup>103</sup> In some cases, consumers of color represent more than fifty percent of overall spending in particular product categories.<sup>104</sup> This research also underscores Black consumers’ outsized influence over spending in particular markets.<sup>105</sup> In addition, the research reveals that corporations have been able to capitalize on Black consumer spending by creating and marketing products that align with their specific needs and interests.<sup>106</sup> Research also reveals that Black consumers have considerable influence over the broader consumer market. Market analysts have noted that Black consumer choices influence “not just consumers of colors but the mainstream as

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99. See Andrew Ross Sorkin, Jason Karaian, Michael J. de la Merced, Lauren Hirsch & Ephrat Livni, *The Cost of Staying Silent*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/30/business/dealbook/georgia-voting-boycotts.html> [<https://perma.cc/XZ42-VDEW>].

100. See *Black Impact*, *supra* note 66.

101. See *id.* (noting that Black consumers and consumers of color make “considerable contributions to the overall market”).

102. See Univ. of Ga., *Minority Markets Have \$3.9 Trillion Buying Power*, NEWSWISE, <https://www.newswise.com/Articles/minority-markets-have-3-9-trillion-buying-power> (Mar. 21, 2019), [<https://perma.cc/HLW6-HH3B>]; *Black Impact*, *supra* note 66; Ellen McGirt, *raceAhead: A New Nielsen Report Puts Black Buying Power at \$1.2 Trillion*, FORTUNE (Feb. 28, 2018), <https://fortune.com/2018/02/28/raceahead-nielsen-report-black-buying-power/> [<https://perma.cc/A2D3-YA2A>].

103. See *African American Spending Power*, *supra* note 66.

104. See *Black Impact*, *supra* note 66.

105. See *id.*

106. See *id.* (emphasizing consumer spending related to the ethnic hair care and beauty market).

well.”<sup>107</sup> This research supports Brummer and Strine’s argument that diverse markets have value, and that corporate law supports corporations who seek to innovate in order to capture that value.

I would raise at least two issues around the Article’s discussion of legal liability. The first relates to the limits of the observations around law compliance and DEI. The Article does pinpoint the limits of external law as a means of ensuring corporate attention to the full range of diversity, equity, and inclusion issues, insisting that noncompliance is just the bare minimum.<sup>108</sup> However, the Article does not really emphasize how significant that “bare” minimum may be. First, as Professor Cheryl Wade has pointed out, the quality of corporate compliance related to antidiscrimination laws leaves a lot to be desired.<sup>109</sup> This is underscored by the fact that corporations often spend billions of dollars on compliance associated with antidiscrimination laws without meaningfully moving the needle on the significant amount of documented bias and discrimination that persists in the workplace.<sup>110</sup> Second, Wade has argued that corporate law has set the bar exceedingly low with respect to compliance, enabling companies to engage in “check the box” compliance that has no significant impact on their discriminatory and biased practices.<sup>111</sup> Finally, many scholars have insisted that antidiscrimination law has been interpreted in a manner that does not curtail the kinds of discriminatory conduct that leads to racial disparities in the economic arena.<sup>112</sup> Such interpretations therefore have significantly undermined the effectiveness of antidiscrimination law as a means of reducing discrimination and bias in the employment arena.<sup>113</sup> Consequently, the fact that corporate law requires compliance with antidiscrimination law may be little comfort for those seeking to better ensure that corporations engage in conduct that would meaningfully move the needle around these issues. On the one hand, the Article’s observation that corporate law demands compliance with antidiscrimination laws is clearly correct and is vitally significant as a response to those insisting

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107. See *id.*; McGirt, *supra* note 102.

108. See Brummer and Strine, *supra* note 1, at 60.

109. See Wade, *Effective Compliance*, *supra* note 36, at 1189, 1202; Wade, *Diversity Doublespeak*, *supra* note 84, at 1545–64.

110. See Wade, *Effective Compliance*, *supra* note 36, at 1202–03; see also Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July–Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/5BUX-3XUU>].

111. See Wade, *Effective Compliance*, *supra* note 36, at 1202–03; Cheryl Wade, *Corporate Compliance That Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter*, 49 LOY. U. CHI. L. J. 611, 625 (2018).

112. See *supra* note 5.

113. See Wade, *Racial Discrimination*, *supra* note 36, at 392.

that attention on Diversity is beyond the focus of corporate law. Moreover, those observations are critical for ensuring that corporations are at least doing the bare minimum, which is of course an essential first step. On the other hand, it is clear that dependence upon corporate law's bare minimum is woefully inadequate. In fact, research reveals that diversity programs tethered to legal compliance and avoidance of lawsuits "can activate bias rather than stamp it out."<sup>114</sup> Indeed, Wade characterizes relying on corporate law compliance alone to advance Diversity initiatives in the workforce as "naively hopeful."<sup>115</sup>

To be sure, and in recognition of this point, the Article does make a compelling case about the legal and business benefits of going beyond the bare minimum. This case is all the more important given the severe limits of the bare minimum. Importantly, the Article convincingly demonstrates the business advantages of doing more related to Diversity while emphasizing the considerable costs of inaction in this area. Then too, the Article's emphasis on the manner in which corporate law provides a safe harbor for more innovation around Diversity is particularly useful support for ensuring that corporate officers and directors feel comfortable going beyond legal minimalism.

The Article's observations around the benefits of the legal safe harbor sparked my second concern. The Article is clearly correct that by giving wide discretion to business leaders, corporate law serves as a legal safe harbor for corporate innovation, including Diversity innovation. The safe harbor encourages and protects corporate leaders who may be concerned about legal liability. However, as the Article highlights, reputational harm can arise even if there is no legal liability. This means that corporate law does not serve as a protective barrier for reputational liability. In other words, there is no reputational safe harbor. This lack of safe harbor for reputational repercussions may be concerning for efforts to promote more ambitious DEI activities for at least two reasons. First, there may be pushback from those who do not embrace the value of DEI policies. In the summer of 2020, polls revealed historically unprecedented consensus among all races about the need to take action to ameliorate discrimination.<sup>116</sup> As a result, corporations

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114. See Dobbin & Kalev, *supra* note 110.

115. See Wade, *Diversity Doublespeak*, *supra* note 84, at 1572.

116. Polls revealed that a majority of Americans believed that racism and discrimination is a "big problem" and that the protests are justified. See Joel Anderson, *Why the NFL is Suddenly Standing Up for Black Lives*, SLATE (June 7, 2020, 9:34 AM), <https://slate.com/culture/2020/06/nfl-roger-goodell-black-lives-matter-players-video-kaepernick.html> [<https://perma.cc/BH84-3C4Q>]; All Things Considered, *Poll: Majority of American Say Racial Discrimination is a "Big Problem"*, NPR (June 21, 2020, 5:58 PM), <https://www.npr.org/2020/06/21/881477657/poll-majority-of-americans-say-racial-discrimination-is-a-big-problem> [<https://perma.cc/LRC4-4FXU>] (transcript); Giovanni Russonello, *Why Most Americans Support the Protests*, N.Y. TIMES, (June 5, 2020),

and the broader society experienced intense internal and external pressure to proactively adopt innovative and ambitious Diversity policies and practices. Currently, however, corporations and society are experiencing serious backlash associated with Diversity actions, including backlash with respect to efforts to improve board diversity.<sup>117</sup> A legal safe harbor may prove insufficient to encourage corporations to be more ambitious in the face of such backlash.

Second, companies also may be concerned that Diversity advocates may find fault with their Diversity efforts, resulting in reputational fallout from such advocates. Indeed, constructive dialogue around issues of race is challenging and can trigger workplace discord if not appropriately managed. Hence, even well-intentioned corporate officers and employees create offense and make mistakes that can result in reputational harm. For example, Wells Fargo is often praised for its diversity; its senior leadership team consists of twenty-one percent people of color, which includes six percent Black people.<sup>118</sup> Moreover, Wells Fargo distributed a company-wide memo announcing a host of new diversity initiatives, including a commitment to double Black leadership over the next five years and to tether executive compensation to diversity goals.<sup>119</sup> However, in the course of discussing

<https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html>  
[<https://perma.cc/KV2D-3Y6B>].

117. See Janice Gassam Asare, *The War on Critical Race Theory Continues as Some Call it Anti-White*, FORBES (May 9, 2021), <https://www.forbes.com/sites/janicegassam/2021/05/09/the-war-on-critical-race-theory-continues-as-some-call-it-anti-white/?sh=5a7658af73a7> [<https://perma.cc/2C57-VJ2U>]; Adam Harris, *The GOP's 'Critical Race Theory' Obsession*, ATLANTIC (May 7, 2021), <https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/> [<https://perma.cc/YRC5-BP5Q>]; David Smith, *There's a Concerted Backlash*, GUARDIAN (June 12, 2021), <https://www.theguardian.com/world/2021/jun/12/ibram-x-kendi-antiracism-backlash-interview> [<https://perma.cc/L2KP-AFJD>] (interviewing author Ibram X Kendi); Rosalind M. Chow, L. Taylor Phillips, Brian S. Lowery & Miguel M. Unzueta, *Fighting Backlash to Racial Equity Efforts*, MIT SLOAN MGMT. REV. (June 8, 2021), <https://sloanreview.mit.edu/Article/fighting-backlash-to-racial-equity-efforts/> [<https://perma.cc/C7NE-N6E8>]; Laura Meckler & Hannah Natanson, *As Schools Expand Racial Equity Work, Conservatives See a New Threat in Critical Race Theory*, WASH. POST (May 3, 2021), <https://www.washingtonpost.com/education/2021/05/03/critical-race-theory-backlash> [<https://perma.cc/A9Y3-QBGQ>].

118. See Jemima McEvoy, *Wells Fargo CEO Apologizes for Saying There's A 'Limited Pool of Black Talent'*, FORBES (Sept. 23, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/09/23/wells-fargo-ceo-apologizes-for-saying-theres-a-limited-pool-of-black-talent/#5f1f8aa64622> [<https://perma.cc/VN2M-XL8V>]; Imani Moise, Jessica DiNapoli & Ross Kerber, *Exclusive: Wells Fargo CEO Ruffles Feathers With Comments About Diverse Talent*, REUTERS (Sept. 22, 2020), <https://www.reuters.com/essay/us-global-race-wells-fargo-exclusive/exclusive-wells-fargo-ceo-ruffles-feathers-with-comments-about-diverse-talent-idUSKCN26D2IU> [<https://perma.cc/NS38-SBG3>] (noting that Wells Fargo's latest proxy disclosed more diversity than many other companies, including two Black directors and one additional director who identified as Latino/Hispanic, and that Scharf had added two Black executives to Well Fargo's operating committee).

119. See McEvoy, *supra* note 118; Moise et al., *supra* note 118.

the memo, the CEO of Wells Fargo made comments that many viewed as racially offensive, sparking considerable controversy and backlash, and ultimately prompting the CEO to apologize for what he referred to as an “insensitive comment” reflecting his “own unconscious bias.”<sup>120</sup> In this same vein, Starbucks’ sparked outrage, including calls for a Starbucks boycott,<sup>121</sup> when an internal memo surfaced in which Starbucks refused to allow its employees to wear #BlackLivesMatter pins and apparel, indicating that wearing such apparel could be “misunderstood and potentially incite violence.”<sup>122</sup> In the face of the outrage and hypocrisy labels, Starbucks quickly backtracked, issuing a new statement allowing its employees to wear Black Lives Matter materials, and even agreeing to create “#BlackLivesMatter” apparel under the Starbucks logo.<sup>123</sup> Starbucks actions are notable because it has been especially vocal around its diversity and social responsibility efforts.<sup>124</sup> Hence, we have seen companies with strong records on

120. Charles Scharf, the CEO of Wells Fargo, stated that the bank’s failure to achieve its diversity goals was because of “the unfortunate reality . . . that there is a very limited pool of Black talent.” Diversity advocates viewed such comments as problematic and suggestive of the corporation’s biases with respect to people of color as well as its unwillingness to seek out talented people of color. See McEvoy, *supra* note 118; Rob Lenihan, *Wells Fargo CEO Sparks Controversy With Diversity Comments*, THESTREET (SEPT. 23, 2020 8:52 AM), <https://www.thestreet.com/investing/wells-fargo-ceo-sparks-controversy-with-diversity-comments> [<https://perma.cc/BTF8-2STE>]; Moise, *supra* note 118.

121. See Noah Manskar, *Starbucks Reverses Ban on Employees Wearing Black Lives Matter Apparel*, N.Y. POST (June 12, 2020), <https://nypost.com/2020/06/12/starbucks-reverses-ban-on-staff-wearing-black-lives-matter-gear/> [<https://perma.cc/PK2H-F2EP>]; Peter Adams, *Starbucks’ Stumble on Black Lives Matter Shows Rising Stakes for Brands in Addressing Race*, MARKETING DIVE (June 22, 2020), <https://www.marketingdive.com/news/starbucks-stumble-black-lives-matter-rising-stakes-race/580131/> [<https://perma.cc/YU67-PLQ4>].

122. See Brianna Sacks & Albert Samaha, *Starbucks Won’t Let Employees Wear Gear that Supports Black Lives Matter Because It is Political or Could Incite Violence*, BUZZFEED NEWS (June 10, 2020), <https://www.buzzfeednews.com/Article/briannasacks/starbucks-is-now-very-pro-black-lives-matter-but-it-wont> [<https://perma.cc/95QX-D438>].

123. See Jordan Valinsky, *Starbucks Reverses Its Stance And Will Now Let Baristas Wear ‘Black Lives Matter’ Apparel*, CNN BUS. (June 12, 2020), <https://www.cnn.com/2020/06/12/business/starbucks-black-lives-matter/index.html> [<https://perma.cc/ZPP9-VCD5>]; Manskar, *supra* note 121; Heather Haddon, *Starbucks, In Reversal, to Distribute ‘Black Lives Matter’ T-shirts to Baristas*, WALL ST. J. (June 12, 2020), <https://www.wsj.com/Articles/starbucks-in-reversal-to-distribute-black-lives-matter-shirts-to-baristas-11591974649> [<https://perma.cc/KU59-BTQZ>].

124. See Starbucks Coffee (@Starbucks), TWITTER (June 1, 2020, 1:47 PM), <https://twitter.com/Starbucks/status/1267528175870857216> [<https://perma.cc/SP8Q-FGD6>]. “We will confront racism to create a more inclusive and just world. We stand in solidarity with our Black partners, customers and communities. We will not be bystanders.” Starbucks Coffee (@Starbucks), TWITTER (June 4, 2020, 7:03 AM), <https://twitter.com/Starbucks/status/1268513794172411905> [<https://perma.cc/F37M-M7X3>]. “We are committed to being a part of change,” Starbucks proclaimed, “We are committed to taking action, learning, and supporting our Black partners, customers and communities.” In the statement, Starbucks not only committed to work to “confront bias and racism” and “actively host[ ] open and necessary conversations” with their employees about racism faced by the Black community, but also pledged one million dollars to support organizations promoting racial equity.



diversity and inclusion suffer reputational harm because of missteps. In many cases, these missteps are the result of inevitable biases. However, they do create the possibility of reputational harm that cannot be ameliorated through the lack of legal liability. In this regard, it may be important not to overemphasize the safe harbor effects of corporate law.

To be clear, this Response does not mean to suggest that the potential for reputational harm should serve as a rationale for paralysis related to Diversity innovation. Given that reputational harm can come from both action as well as inaction, paralysis will not prevent potential reputational fallout. In this regard, Brummer and Strine's Article provides appropriate assurances that corporations do not risk legal liability for Diversity innovations. Perhaps more importantly, businesses do not operate on a principle of risk elimination, and thus we should not expect risk elimination when it comes to Diversity. Instead, every business operates based on risk management. To this end, Diversity innovation is like any other worthwhile business innovation—it offers both risks and benefits. Moreover, Diversity innovation is just like any other worthwhile business innovation—the risks associated with that innovation cannot be eliminated, but instead require effective management.<sup>125</sup> Thus, it would be imprudent and inaccurate to send the signal that taking the initiative around Diversity does not involve some risks. Of course, there are also risks associated with the failure to appropriately innovate with respect to Diversity. I do believe that Brummer and Strine not only make the case for the significant benefits associated with enhanced Diversity innovation, but also underscore the manner in which any risks can be appropriately managed to harness those benefits.

#### CONCLUSION

Brummer and Strine provide compelling support for businesses seeking to advance Diversity. This support is critical to ensuring that businesses do not succumb to the mistaken belief that corporate law serves as a barrier to their Diversity efforts. This support is also critical to the overall effort of promoting equity in the workplace and the economy given the central role that corporations play in shaping employment strategy, as well as the likelihood that increased diversity on boards and in the C-suite will matter for purposes of ensuring that employment practices and policies take into account the concerns of the diverse range of people within our population. Brummer and Strine's

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125. See Dobbin & Kalev, *supra* note 110.

persuasive observations about the benefits of promoting Diversity also serve as a warning to companies that would shy away from Diversity innovation because companies may ultimately find themselves at a competitive and reputational disadvantage. Hence, while corporate law does not compel Diversity innovation, Brummer and Strine have demonstrated that corporate law paves the way towards corporate adoption of strategies that better align with increased stakeholder expectations for a more diverse, inclusive, and equitable workforce and economy.