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Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It

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I. Introduction

At its foundations, critical race theory holds 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.[1] Recent events in corporate America illustrate these key points. First, as ever, the bastions of corporate governance remain the nearly exclusive province of white males,

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1. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY 6–7 (2001) ("Because racism advances the interests of both white elites (materially) and working class people (psychically), large segments of society have little incentive to eradicate it."). The most renowned example of the power of interest convergence is *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (showing that *Brown* was the "subordination of law to interest group politics").

with no realistic end in sight.[2] Second, this racial homogeneity 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.[3] It just so happens that upper class white males are frequently most culturally proximate to upper class white males.[4] Third, any reform is unlikely unless sufficient political and economic pressure is levied upon the people with the power to restructure the law in this specific context. Simply put, this homosocial reproduction will end only when those with sufficient power see it in their interest to end it.[5] In fact, the Sarbanes-Oxley Act of 2002[6] can only be termed a wasted opportunity to disrupt legally the homosocial reproduction that plagues board selection processes.[7] Reform did not happen because the political calculus governing the reform effort failed to comprehend the racial stakes of the issues at hand.

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2. *See* 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, 838 (2003) (showing that only 4.1% of all board seats for the Fortune 1000 are held by African Americans and Latinos, and that 90% of senior officers are white males).

3. One may be tempted to think that all of the recent reforms undertaken pursuant to the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of U.S.C. titles 11, 15, 18, 28, and 29) (and accompanying changes implemented at the NYSE and the NASDAQ) somehow had enhanced the "independence" of boards of publicly held companies. It is true that there are now more stringent independence requirements for all publicly held companies. Ramirez, *supra* note 2, at 843. Still, the independence requirements that these initiatives impose are modest at best, in terms of the real independence demanded. Thus, a CEO's college friend can still serve as an "independent" member of the audit committee, and the CEO's father is still legally permitted to hold the position of Chairman of the Board. David Enrich, *Capitol Federal Financial Director Reynolds to Resign*, DOW JONES CORP. FILINGS ALERT, Dec. 30, 2003, WL 12/30/03 FEDFILE 19:42:00.

4. The corps of senior executives is even *less* diverse than the corps of directors at Fortune 1000 firms. *See* Ramirez, *supra* note 2, at 838 (comparing board and executive diversity). Thus, it appears that, on whole, CEOs select boards that are only slightly more diverse than themselves.

5. Homosocial reproduction describes the phenomenon of those with power selecting those with a high degree of cultural similarity to themselves. This operates to perpetuate yesteryear's power structure, including its racially exclusive tradition. Business scholars have identified the phenomenon as a major barrier to achieving cultural diversity within business organizations. *See* VAL SINGH, MANAGING DIVERSITY FOR STRATEGIC ADVANTAGE 21 (2002) (discussing discriminatory effect of homosocial reproduction). Legal scholars have recently applied this "homogeneity begets homogeneity" dynamic to corporate boards. *See* Thomas W. Joo, *A Trip through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 744–47 (2003) (predicting actions of homogeneous boards).

6. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-24, 116 Stat. 745 (codified as amended in scattered sections of U.S.C. titles 11, 15, 18, 28, and 29).

7. "[T]he failure to even discuss enhanced board diversity as a means of enhancing board monitoring and breaking the grip of groupthink in the boardroom is emblematic of a

Implicit in that conclusion is cause for an optimism of sorts.[8] The political calculus could have been different and fundamentally more in favor of a superior outcome in terms of race. Interest convergence theory holds that reform occurs when the interests of the racially oppressed align with the interests of the people who have the power to bring about reform.[9] This process requires that the alignment be fully understood before reform can occur.[10] This in turn underscores the importance of educating and persuading the relevant powers.[11] Competing interests must be overcome. Alliances must be formed—and re-formed—as needed in each specific context. In short, the interest alignment that is fundamental to convergence theory is manipulable.[12]

This Article seeks to demonstrate that convergence theory holds the promise of real and durable reform in the specific context of board selection processes and, by extension, in a host of other areas that may be key to racial progress. Part I of this Article posits that CEOs of many of the largest, most

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governing elite that still believes in racial mythology." Ramirez, *supra* note 2, at 865; *see also* Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 137 (2003) ("The role of interest convergence in determining the course of minority fortunes is a well-known tool of critical analysis, useful both in explaining the course of history and in determining when the time may be right to strike.").

8. Interest convergence theory is not typically cast in optimistic terms. As Richard Delgado and Jean Stefancic have stated: "Civil rights gains for communities of color coincide with the dictates of white self-interest. Little happens out of altruism alone." DELGADO & STEFANCIC, *supra* note 1, at 18.

9. The original formulation of interest convergence from Bell's analysis of *Brown v. Board of Education*, 347 U.S. 483 (1954), is that the decision "cannot be understood without some consideration of the decision's value to whites." Bell, *supra* note 1, at 524. Professor Bell shows that the decision had value to whites in "policymaking positions" on three grounds. First, the decision helped America's credibility in Africa and Latin America where cold war struggles put American apartheid on the defensive. *Id.* Second, *Brown* relieved the tension implicit in relegating African-American veterans from World War II to racial peonage and enhanced the ability of the military to recruit African Americans. *Id.* Third, *Brown* would provide the necessary social and labor underpinnings to an economic transformation of the South from a relatively stunted economic backwater to the modern Sun Belt. *Id* at 524–25.

10. Professor Bell recognized that interest convergence not only explained the occurrence of racial reform, but also provided a prescription for racial reform: "Further racial progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized." Bell, *supra* note 1, at 528. This Article merely focuses on the logical implication of the Bell prescription for racial progress; the progress will occur when sufficient interests align.

11. As Richard Delgado states, "moments of interest-convergence," once pointed out, provide valuable opportunities to benefit excluded groups. Delgado, *supra* note 7, at 143.

12. *See supra* note 9 and accompanying text (describing interest convergence theory). Delgado argues that the current war on terrorism may well present opportunities for beneficial interest convergence. *See* Delgado, *supra* note 7, at 138 (noting that the present political atmosphere may present opportunities for interest alignment).

powerful corporations in America have exploited America's racial blind spots to entrench their power and enrich themselves. The Article does not seek to show that any particular CEO has engaged in intentional racial discrimination. Nor does the Article even attempt to argue that any CEO is, or is not, a racist. That is beside the point. The point is that race continues to operate in this specific context to favor whites and disadvantage blacks. Simply stated, CEOs seem highly inclined to take affirmative actions to favor culturally proximate (white) candidates for board membership over (less culturally proximate) candidates of color.[13] They do this for the purpose of rationally maximizing their payoffs in a context ripe for strategic behavior.[14] Thus, this is yet another context where race matters in our society even in the absence of any intent to discriminate on the basis of race. Part II concludes that CEOs seek to maximize their payoffs by playing the homosocial reproduction game.

Part III of this Article hypothesizes that this dynamic of inadvertent discrimination can be disrupted by law. This type of legal reform could well enjoy broader support among key constituencies, leading to an interest alignment sufficient to support progressive reform. Senior level diversity serves to enhance corporate profitability, and board diversity should serve to quell corporate corruption, thereby further enhancing shareholder wealth.[15] Moreover, there is little doubt that race has imposed billions in macroeconomic costs annually upon our society.[16] Therefore, race operates in the context of board selection to frustrate many broadly defined interests. The sway of race here, as expressed through the operation of the current legal structures governing board selection, only serves the narrow interests of sitting CEOs to maximize their autonomy over corporate wealth and, institutionally, to indulge racial mythology and allow it to impede economic performance. In sum, there is much more pressure for potential reform, and little in favor of the

13. *See infra* notes 24–28 and accompanying text (discussing the phenomenon of homosocial reproduction in corporate management).

14. *See infra* notes 33–34 and accompanying text (noting a correlation between homogenous boards and increased CEO compensation).

15. *See* Ramirez, *supra* note 2, at 855 ("[T]he theoretical case for cultural diversity as a tool for greater corporate integrity is sound. Moreover, strong empirical evidence suggests a link between firm financial performance and cultural diversity in the boardroom."); *see also* David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 51 (2003) ("After controlling for size, industry, and other corporate governance measures, we find statistically significant positive relationships between the presence of women or minorities on the board and firm value . . . .").

16. *See* Steven A. Ramirez, *What We Teach About When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEG. EDUC. 365, 375 (2004) (positing that race costs the United States nearly $1 trillion annually).

status quo. Part III concludes that the issue of board diversity is one ripe for reform under an interest convergence lens.

The legal issues underlying the homosocial reproduction mechanism have important implications for corporate governance. This Article raises the concern that CEOs will naturally seek boards that are as similar as possible to themselves in all socially relevant characteristics. This Article consequently suggests that real corporate governance reform should focus on neutralizing CEO influence over the board selection process and in the boardroom generally. This may be the only way to assure diversity in the boardroom, as well as sound corporate governance, at least in this lifetime.[17] Perhaps the most important suggestion of this Article, however, transcends mere corporate governance, as salient as that issue has recently become. Specifically, convergence theory is not just a cynical lens for viewing supposed white benevolence; it also reflects a historic truism applicable to all progressive reform. Real and durable reform in America requires the consent and support of the vested interests and political actors with specific political and economic power over any prospective reform. In short, convergence theory not only signals when reformers can seize opportunities, but it also counsels how to proceed: build coalitions of convenience and apply pressure atomistically.[18]

II. Diversity in the Boardroom and the Games CEOs Play

Diversity in the boardroom enhances corporate profitability according to the consensus of scholars of business management, finance, and economics.[19] In addition, diversity seems to add a dimension of abrasion that can serve to mitigate groupthink and thereby heighten the cognitive functioning of the corporate boards.[20] All of this is mainstream management science and is a logical outgrowth of the now established reality of race: race is a function of

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17. I have previously referred to this kind of entrenched and durable racial bias as a "racial half-life" to connote that, left unchallenged, these mechanisms may project yesteryear's racial hierarchy far into a "color-blind" future. Ramirez, *supra* note 2, at 857.

18. *See* Delgado, *supra* note 7, at 137–46 (considering the development and modern application of convergence theory).

19. *See* Ramirez, *supra* note 2, at 839–41, 845–56 (discussing the financial impact of corporate diversity).

20. *See id.* at 840–41 (stating that homogenous boards avoid conflict); *see also* Lynne L. Dallas, *The New Managerialism, and Diversity on Corporate Boards of Directors*, 76 TULANE L. REV. 1363, 1403–05 (2002) (explaining that the presence of women and minorities on corporate boards tends to combat like-mindedness); Marlene A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1241 (2003) ("[I]ncreasing diversity . . . reduces the existing homogeneity that can lead to groupthink.").

legal and social construction that leads to cultural diversity, but it has no biological or genetic significance.[21] Due to the cultural moorings of race, diverse board members bring enriched perspectives to the boardroom with no offsetting diminution of merit, defined in accordance with the institutional mission of the business.[22] It is not skin color or other morphological features traditionally associated with race that gives rise to different and valuable experiences and insights; rather it is cultural diversity that leads to cognitive skills that can and do transcend race.[23]

Of course, this being America at the turn of the twenty-first century, many still do believe in race.[24] Because many of these maleducated denizens of our racialized society are shareholders or board members, the pressure to insist upon culturally diverse boards is diluted.[25] Similarly, it is clear that our

21. *See* Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33, 51–61 (2001) (discussing the positive practical impact of diversity on various segments of society).

22. Thus, virtually every empirical analysis of the financial impact of diversity finds that companies that embrace cultural diversity financially outperform companies that do not. *See, e.g.*, Carter et al., *supra* note 15, at 51 ("After controlling for size, industry and other corporate governance measures, we find statistically significant positive relationships between the presence of women or minorities on the board and firm value."); Janine S. Hiller & Stephen P. Ferris, *Separating Myth from Reality: An Economic Analysis of Voluntary Affirmative Action Programs*, 23 MEM. ST. L. REV. 773, 794–95 (1994) (finding that stock prices react favorably to companies announcing pro-diversity events); *see also* DAVID A. BROWN ET AL., WOMEN ON BOARD: NOT JUST THE RIGHT THING .... BUT THE BRIGHT THING, CONFERENCE BOARD OF CANADA i–ii (The Conference Bd. of Canada, May 2002) (finding that gender diversity enhanced corporate governance); Ramirez, *supra* note 2, at 853 (finding a positive correlation between board diversity and financial performance) (citing Amy J. Hillman & Albert A. Cannella, Jr., *Diversity on the Board and Firm Performance: The Mediating Role of Stakeholder Management* (working paper on file with the Washington and Lee Law Review)).

23. *See* Ramirez, *supra* note 21, at 63 ("The premise of cultural diversity is that all persons offer cultural insights and experiences.").

24. Economist Glenn Loury uses the term "racial stigma" to capture the continuing sway that race holds over the American psyche, even in the absence of attitudinal racial hostility. *See* GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 70–71 (2002) (defining racial stigma). Professor Loury uses the examples of incarceration rates and the greeting received by the publication of *The Bell Curve* (in 1994) to show that racial thinking continues to distort how our society responds to racial issues. *See id.* at 80–85 (providing examples of racially motivated policies). This kind of racial stigma distorts thinking across society, including the views that shareholders and managers may harbor about appointing directors of color.

25. It is unclear, for example, if individual shareholders would vote on the basis of diversity considerations even if they had the power to do so in fair and balanced corporate elections. One corporate law scholar has raised the prospect that shareholder votes would mirror the politics of affirmative action, and affirmative action has a spotty record at the polls at best. *See* Joo, *supra* note 5, at 757 (doubting shareholder approval of affirmative action proposals). Moreover, there is reason to believe that individual shareholder votes would be *less* successful than the politics of affirmative action may indicate. First, blacks invest in stocks at

racialized society fails to invest in the human capital of minority groups at the same rate it invests in whites.[26] Economists also have shown that minority groups generally do not have access to the same social capital—or social networks—that are accessible to whites.[27] Proportionately, this means an artificial shortage of elite people of color throughout our society in general, and for board service in particular.[28] Thus, CEOs may be tempted, under cover of these facts, to avoid any compulsion for diversifying their boards.[29] Instead, studies have demonstrated that executives will seek to fill boards with

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significantly lower rate than whites. Robyn Greenspan, *Black Investors Reduce Stock Holdings*, ClickZ Stats: Demographics, (June 30, 2003), *at* http://www.clickz.com/stats/big_picture /demographics/article.php/2229601 (on file with Washington and Lee Law Review). Second, in addition to having far fewer numbers, blacks only hold a fraction of the wealth held by white households—as of 1992 the median net worth of blacks was only 8% of the median net worth of whites. Lisa Keister, *Family Structure, Race, and Wealth Ownership: A Longitudinal Exploration of Wealth Accumulation Processes*, 47 SOC. PERSP. 161, 161 (2004). Therefore, anything that smacks of racial politics is likely to be roundly defeated in corporate America.

26. *See* Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, THE BROOKINGS REV., Spring 1998, at 28 (noting discrepancies in educational opportunities between whites and minorities). Hammond stated:

> [E]ducational outcomes for minority children are much more a function of their unequal access to key educational resources, including skilled teachers and quality curriculum, than they are a function of race. In fact, the U.S. educational system is one of the most unequal in the industrialized world, and students routinely receive dramatically different learning opportunities based on their social status. In contrast to European and Asian nations that fund schools centrally and equally, the wealthiest 10 percent of U.S. school districts spend nearly 10 times more than the poorest 10 percent, and spending ratios of 3 to 1 are common within states. Despite stark differences in funding, teacher quality, curriculum, and class sizes, the prevailing view is that if students do not achieve, it is their own fault. If we are ever to get beyond the problem of the color line, we must confront and address these inequalities.

Id.

27. *See* Ramirez, *supra* note 16, at 370 (discussing scholarly studies evincing the value of social networks).

28. This artificial shortage of elite people of color in no way justifies the very extreme homogeneity prevailing on the boards of corporate America; the *de minimus* number of directors of color betrays forces much more powerful than the standby excuse for racial exclusion that there are not enough qualified directors of color available. *See supra* note 2 (detailing the lack of minority representation among corporate directors).

29. This Article addresses only the impact of homosocial reproduction on boards. Rosabeth Kanter originally coined the term "homosocial reproduction" to explain why white male managers seemed inclined towards homogeneity. ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 48, 63 (1977). Thus, homosocial reproduction may be a significant factor in disparate treatment of women and minorities throughout the corporate hierarchy, particularly when senior management signals that it is an expected practice. *See* SINGH, *supra* note 5, at 21 (discussing effect of senior management's implied messages on promotion).

demographic and cultural reproductions of themselves.[30] This conclusion enjoys empirical support from abroad suggesting that the selection of board members and senior management teams are naturally subject to homosocial reproduction.[31] It is no accident that boards are not diverse.

After all, most people do not get to pick their bosses. Yet in America, even today after much heralded reforms, CEOs of publicly held companies get to pick their bosses—the board of directors.[32] As I have previously demonstrated, in corporate America director elections resemble elections in Soviet Russia—there is only one candidate to vote for because generally only management solicits proxies and SEC rules do not require the inclusion of candidates running against management's nominees.[33] Given this power, it would be natural for a CEO to select a board of directors comprised of the CEO's clones. Certainly this would be a formula that would encourage

30. *See* James D. Westphal & Edward J. Zajac, *Who Shall Govern?: CEO/Board Power, Demographic Similarity, and New Director Selection*, 40 ADMIN. SCI. Q. 60, 77 (1995) (finding that "when CEOs are relatively powerful, new directors are likely to be demographically similar to the firm's incumbent CEO"). Westphal and Zajac's study is based upon data from 413 Fortune/Forbes 500 companies from 1986 to 1991. *Id.* at 61. They define demographic diversity in terms of age, educational background, tenure with the organization, and insider/outsider status. *Id.* at 63–65. Nevertheless, the authors proceed from the assumption that "in-group bias" is "quite powerful" even when based upon irrelevant factors. *Id.* at 62. Therefore it seems reasonable to extend their findings to factors such as race that have powerful social meaning in our society.

31. *See* ANNA STAFSUDD, MANAGERS IN THE CONTEXT OF STRATEGIC CONTENT 17 (May 2001) ("[T]raditional personal background variables still seem to be more used as signals of ability in recruitment decisions than others based on context.") (working paper on file with the Washington and Lee Law Review); CHRISTOPHE BOONE ET AL., THE GENESIS OF TOP MANAGEMENT TEAM DIVERSITY 28–32 (Feb. 2003) (finding that top management team tendencies toward homogeneity resist competitive and environmental pressure to diversify within the Dutch newspaper publishing industry) (working paper on file with author).

32. *See* Ramirez, *supra* note 2, at 856–57 ("[D]irectors are selected by management and not elected by shareholders.").

33. *See* 17 C.F.R. § 240.14a-8(i)(8) (2003) (excluding shareholder proposals relating to board elections). Theoretically, shareholders can launch a proxy fight against management to attempt to elect a slate of director candidates in opposition to management's nominees. Three factors make this virtually impossible. First, the cost of such a contest is prohibitive, including postage, printing, and legal costs. *See* Joo, *supra* note 5, at 758 (assessing costs of proxy fights). Second, management may use the corporate coffers to fund its position against shareholders, and this source of funds will generally far exceed the funds available to dissidents. *See Designed by Committee: Corporate Governance*, ECONOMIST, June 15, 2002, at 71 (recounting a proxy contest at Hewlett-Packard in which the company spent $150 million to fend off a proxy challenge brought by the company founder, Walter Hewlett). Third, under NYSE rules, shares not voted by shareholders may be voted by brokers holding shares on behalf of shareholders, and these broker votes are generally cast in favor of management. Joo, *supra* note 5, at 759–60. In sum, proxy contests are not likely to break the control of management.

maximum, even excessive, pay and benefits for the CEO.[34] Instead, CEOs do the next best thing—they select their cultural and demographic clones. This effectively achieves the same outcome: CEO power over board selection leads to enhanced compensation of CEOs.[35] Recent history confirms that American CEOs have received excessive, even outrageous, compensation.[36] Homosocial reproduction is likely a prime cause of this malady.[37]

Another outcome that could be expected from allowing CEOs to select their boards would be that boards reflect the cultural background of the selecting CEO. Again, this is exactly the longstanding reality in corporate America. CEOs and boards demographically mirror each other.[38] Quite

34. Perhaps as effective as stacking a board with clones is stacking a board with other CEOs, particularly CEOs on mutually interlocked boards. This means one CEO supervises another CEO and vice-versa. This practice, quite common in corporate America, also leads to higher compensation for CEOs. *See* Eliezer M. Fich & Lawrence J. White, *CEO Compensation and Turnover: The Effects of Mutually Interlocked Boards*, 38 WAKE FOREST L. REV. 935, 947–51 (2003) ("[T]he number of mutual director interlocks is found to be significant and positively associated with total compensation.").

35. *See* Westphal & Zajac, *supra* note 30, at 79 ("[D]emographic similarity between the CEO and board members was positively related to subsequent increases in CEO compensation.").

36. Recent reports suggest that the corporate reforms associated with the Sarbanes-Oxley Act of 2002 have done little to stem the ever-rising compensation paid to corporate executives. *Business Week* found that CEO paychecks at 365 major companies (in terms of salary, bonus and long-term compensation) increased 9.1% in 2003. Louis Lavelle, *Special Report: Executive Pay*, BUS. WEEK, Apr. 19, 2004, at 106. The *New York Times* reported that, aside from the theoretical value of stock option grants, CEO compensation at 200 large companies increased by 14.4%, compared to a 2% increase for the average American worker. Patrick McGeehan, *Is CEO Pay Up or Down? Both*, N.Y. TIMES, Apr. 4, 2004, at sec. 3, page 1. Even in years of significant stock market declines, like 2002, CEO pay did not decline overall, and salaries and bonuses surged 15% to compensate CEOs for any decline in the value of stock options as a result of the stock market collapse. *See* Gary Strauss & Barbara Hansen, *Special Report: Bubble Hasn't Burst on CEO Salaries Despite the Times*, USA TODAY, Mar. 31, 2003, at 1B (providing examples of increasing CEO compensation). It is true that the "outrageous" pay package that Oracle paid to Larry Ellison ($706 million) in 2001 or the options that Apple granted to Steven Jobs ($872 million) seem to be things of the past. *Id.*; Geoffrey Colvin, *The Great CEO Pay Heist*, FORTUNE, June 25, 2001, at 64. Nevertheless, the stock market crash of 2001–2002 and the corporate corruption reforms of 2003 have not even put a dent in executive compensation. *See* Andrew Hill, *Buffett Hits Out at Cosiness in the Boardroom*, FIN. TIMES, Mar. 10, 2003, at 28, 2003 WL 14181372 (quoting Warren Buffett as expressing doubts that corporate reforms will change board cultures that facilitate excessive executive compensation).

37. For example, 25% of the directors sitting on compensation committees are themselves CEOs. As such, they have incentives to create upward pressure on CEO compensation and are cognitively inclined to justify higher rather than lower CEO pay packages. *See* Tod Perry & Marc Zenner, *CEO Compensation in the 1990s: Shareholder Alignment or Shareholder Expropriation?*, 35 WAKE FOREST L. REV. 123, 128 (2000) (linking changes in compensation committees with more vigilant monitoring of CEOs).

38. *See supra* note 2 (analyzing racial diversity on boards of directors).

frequently CEOs select other CEOs for their boards, and even place them on the all-important compensation committee.[39] It is only natural that a CEO would prefer someone that is culturally proximate to himself; nevertheless, it effectively perpetuates yesteryear's tradition of racial apartheid.[40] I have previously referred to this dynamic as a "racial half-life," meaning an entrenched social convention that leads to racially disparate results with no prospect of disruption or violation of law.[41] If directors select CEOs and CEOs select directors, a preexisting apartheid tradition can deteriorate very slowly before giving way to a racially equitable process.[42] Indeed, at today's rate of board diversification, the arrival of racial equity at this level may be measured in centuries rather than decades.[43]

In economic terms, it is increasingly difficult to portray CEOs as rational maximizers fixated on furthering the interest of their corporations in order to further their own self-interest, as the once dominant optimal contracting approach suggested.[44] Under the optimal contracting approach, directors address inherent agency costs that arise from the divergent interests of the shareholders and management by structuring executive compensation packages in a way that minimizes these agency costs.[45] This optimal contract

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39. *See supra* note 37 and accompanying text (discussing selection of board and compensation committee members).

40. With respect to racial disparities in the boardroom, the impact within communities of color is far broader than just the fact that many board positions are not held by people of color. The conduct of CEOs in signaling the acceptability of homosocial reproduction likely echoes throughout the corporation in terms of hiring, promotions, and layoffs. Even beyond the impact of homosocial reproduction throughout specific corporations, and the consequent loss of jobs to communities of color, is the influence of corporations generally throughout our society. *See* Ramirez, *supra* note 2, at 837 (contemplating financial influence of corporations).

41. *See* Tracy Anbinder Baron, *Keeping Women out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 271–73, 283–306, 320 (1994) (finding that "traditional Title VII analyses are ill-suited" to resolve the problems plaguing upper level advancement, including the problem of homosocial reproduction); *supra* note 17 (discussing the phrase "racial half-life").

42. *See supra* note 2 and accompanying text (describing racial homogeneity on corporate boards of directors).

43. *See* Baron, *supra* note 41, at 270 (citing study showing that, based upon 1991 projections, women could expect parity with men in the management of corporate America in about 475 years).

44. *See* Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 754, 761–63 (2002) ("Financial economists, both theorists and empiricists, have largely worked within [the optimal contracting] theory in attempting to explain the various features of executive compensation arrangements as well as cross-sectional variation in compensation practices among firms.").

45. *Id.* at 761–62.

would serve to align the interests of shareholders with the interests of management.[46] Since the early 1980s, this model of CEO compensation has held great sway within the legal academy.[47] The model supports a generally sanguine view of executive compensation.[48] However, by the summer of 2002, it became clear that pervasive managerial overreaching outstripped examples of optimal contracting.[49] Thus, CEOs can, and often do, exercise power to enhance their compensation at the expense of their corporation. At some firms, it is now clear that optimal contracts do not curb self-serving CEO conduct, and "executives may only be constrained by what they can get away with."[50] The lack of CEO enthusiasm for diversity on the board, notwithstanding the economic rationality of pursuing senior-level cultural diversity in terms of enhancing the financial performance of the corporation, is likely one means of furthering this goal.[51]

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46. *See id.* at 761 (explaining that the board seeks to establish incentives for executives that will maximize shareholder wealth).

47. *See id.* at 753 (noting that the dominant approach to the study of executive compensation is the optimal contracting approach) (citing Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories: Theories and Evidence*, 9 DEL. J. CORP. L. 540 (1984); Daniel L. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982); Nicholas Wolfson, *A Critique of Corporate Law*, 34 U. MIAMI L. REV. 959 (1980); Robert Thomas, *Is Corporate Executive Compensation Excessive?*, *in* THE ATTACK ON CORPORATE AMERICA 276 (Bruce Johnson ed., 1978)).

48. *See* Bebchuk et al., *supra* note 44, at 754 (stating that despite public criticism of the level of executive compensation, there has been "relatively little attention and analysis in the academic literature"). *But see* Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 572–73 (2000) (stating that regulatory competition among states to induce management to incorporate within a given state had weakened constraints on management power, leading to the "erosion of fiduciary duties" and "greater latitude" for managers to set their own compensation).

49. *See* Steven A. Ramirez, *Fear and Social Capitalism: The Law and Macroeconomics of Investor Confidence*, 42 WASHBURN L. J. 31, 61–62 (2002) ("[M]anagers now have the ability to harvest millions in compensation while shareholders go bust. So long as executives of bankrupt firms haul in millions while shareholders are left penniless, reality suggests that we have allowed blinding adoration of market efficiency to lead us into the corporate governance gutter."); Rajesh Aggarwal, *Executive Compensation and Corporate Controversy*, 27 VT. L. REV. 849, 869 (2003) (finding that where management holds unchecked power "excessive compensation" is associated with poor corporate governance); *see also* Bebchuk et al., *supra* note 44, at 846 ("[E]xecutives can use their power to influence compensation arrangements and to extract rent."); Kevin J. Murphy, *Explaining Executive Compensation: Managerial Power Versus the Perceived Cost of Stock Options*, 69 U. CHI. L. REV. 847, 850 (2002) ("The [Bebchuck, Fried, and Walker] analysis is comprehensive and provocative, and their evidence that pay practices reflect more than optimal contracting concerns is compelling.").

50. Aggarwal, *supra* note 49, at 869.

51. *See supra* notes 19–22 and accompanying text (discussing the economic benefits of corporate diversity); *see also* Bebchuk et al., *supra* note 44, at 785 (stating that CEO "influence" over directors will give the CEO additional power to extract additional rents from the

Instead of acting rationally in pursuit of corporate welfare and in response to market forces, CEO conduct very often seems to be the product of strategic behavior.[52] It would be difficult for any individual CEO to exploit their power over board selection in a way that adversely affected the corporation, unless they could count on some combination of market insensitivity and a failure of other CEOs to compete on this score.[53] Many CEOs, however, stand to gain more from nondiverse boards than they would from diversifying their boards, as demonstrated by studies showing that CEOs of culturally homogenous boards are paid more than CEOs with diverse boards.[54] Some CEOs clearly are addressing the particular issue of board diversity.[55] At the same time, CEOs can skirt any responsibility to pursue a diverse board with relative impunity, even given today's heightened focus on corporate governance, just as they may avoid pressures for nonexcessive compensation.[56] In fact, there is

corporation); Marianne Bertrand & Sendhil Mullainathan, *Are CEOs Rewarded for Luck? The Ones Without Principals Are*, 116 Q. J. ECON. 901, 925 (2001) (mapping executive pay to presence of insiders on the board); MARIANNE BERTRAND & SENDHIL MULLIANATHAN, DO CEOS SET THEIR OWN PAY? THE ONES WITHOUT PRINCIPALS DO, 3 (Mass. Inst. Of Tech. Dep't of Econ., Working Paper no. 00-26, 2000), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id'223736 ("By packing the board with their friends . . . many CEOs de facto set their own pay.").

52. I use strategic behavior here in the game theory sense. Specifically, I use strategic behavior to denote behavior that "anticipate[s] what others will do and what others will infer from [one's] own actions." COLIN F. CAMERER, BEHAVIORAL GAME THEORY 2 (2003).

53. If CEOs exploited power to attain excessive compensation, capital markets could conceivably punish firms employing such CEOs, and the CEOs would suffer damage to their reputation. *See* Bebchuk et al., *supra* note 44, at 774 (stating that an important school of thought believes that markets for managerial labor effectively align managers' and shareholders' interests). Markets have proven to be insufficient to deter CEOs from extracting rents from their corporations. The fundamental problems are that: (1) CEOs are likely to gain much more from excessive compensation than they would lose by virtue of their equity holdings in a company that suffers a corresponding loss of firm value; (2) most CEOs do not generally compete for CEO jobs at other firms, and to the extent they do, their compensation has been shown to *increase* at the new firm; (3) CEOs do not face a material risk of dismissal; (4) excessive compensation does not generally lead to a significant increase in the risk of takeovers; (5) any increase in the firm's cost of capital as a result of excessive compensation is not likely to be material; and (6) shareholders are given insufficient legal rights to contest management compensation. *Id.* at 775–83.

54. *See* Westphal & Zajac, *supra* note 30, at 79 ("[D]emographic similarity between the CEO and board members was positively related to subsequent increases in CEO compensation."); *see also supra* notes 34, 37, and accompanying text (showing that having CEOs on a board leads to higher executive compensation).

55. *See* Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J. L. BUS. & FIN. 85, 86 (2000) (stating that many corporations have embraced diversity, including diversity at the board level, in an effort to harness it for superior financial performance).

56. *See supra* note 53 (discussing how the market has proven ineffective at curbing excessive compensation). Many of the dynamics Bebchuk, Fried, and Walker identify that

no reason to think that the issue of diversity will be managed more benevolently than CEO compensation. For example, there are no reports of CEOs being dismissed for mismanaging diversity at the board level,[57] so the threat of dismissal is most likely even smaller than the threat of dismissal for rent extraction in the form of excessive compensation.[58] More fundamentally, in the United States of 2004, race can be counted on to distort market behavior in a way that gives CEOs more latitude to reject diversity and engage in homosocial reproduction.[59] Thus virtually every mechanism that permits CEOs to extract rents in the form of excessive compensation would also permit CEOs to wield more power generally through homosocial reproduction.[60]

In terms of market pressure to diversify, economists, including Nobel laureate Kenneth Arrow, have already shown that race has often exceeded mere economic incentives.[61] From automobile sales to labor markets,

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militate against market pressure alone deterring CEOs from extracting rents also apply to the issue of board diversity. For example, to the extent that CEOs can earn higher compensation as a result of stacking boards with cronies and cultural siblings, it is very likely that the benefit of higher compensation exceeds the cost to the CEO stemming from any diminution in firm value from the lack of a diverse board. *See* Bebchuk et al., *supra* note 44, at 775–79 (arguing that the market forces that drive managerial behavior are unlikely to deter excessive executive compensation).

57. At Westar Energy, in Topeka, Kansas, a "Special Committee of the Board of Directors" found that a former CEO engaged in a pattern of inappropriate conduct and that a lack of diversity contributed to poor corporate governance, but that the CEO resigned for reasons unrelated to diversity in the boardroom. *See* Westar Energy, Inc., *Report of the Special Committee to the Board of Directors*, Apr. 29, 2003, at 218 (finding that the CEO engaged in unlawful breaches of fiduciary duty and, consequently, recommended dismissal), *available at* http://media.corporate-ir.net/media_files/nys/wr/reports/custom_page/WestarEnergy.pdf (last visited Sept. 5, 2004). The Committee also found that the "future composition of the Board [should] reflect greater diversity," although it found that the present lack of diversity did not implicate the integrity of any director. *Id.* at 256–58. The CEO of W.R. Grace was purportedly forced out amidst allegations that he sexually harassed employees (not board directors), and commentators subsequently claimed that this was subterfuge for a power struggle. Thomas M. Burton & Richard Gibson, *Fighting to the Death: How 2 Top Officials of Grace Wound Up in a Very Dirty War*, WALL ST. J., May 18, 1995, at A1 (suggesting that the chairman of W.R. Grace decided to fire the CEO at least one month before allegations of sexual harassment were raised and that the decision came after the CEO and chairman "erupted into a full-scale feud" over control of the company).

58. *See* Bebchuk et al., *supra* note 44, at 777 (reporting that threat of dismissal inflicted an expected cost of $0.30 per $1000 of corporate wealth reduction, meaning that a CEO could rationally expect costs of $0.30 for every $1000 of excessive compensation).

59. *See* Ramirez, *supra* note 16, at 370 (discussing the distorting effects of race on market behavior in the context of employment).

60. *See supra* note 53 (listing the reasons why markets have been insufficient to deter CEOs from extracting rents from their corporations).

61. *See* Ramirez, *supra* note 16, at 370–71 (stating that market transactions are also social events and that transactors bring a whole set of social attitudes to the transaction that are not

economists have now identified the power of race to cause market distortions across the American economy,[62] and there is no evidence that CEO gains from pursuing homosocial reproduction at the board level could somehow be trumped by market forces that have failed to overcome the pursuit of excessive compensation and have failed to trump the power of race in a wide variety of economic contexts.[63] Mainstream economics would consequently support the likelihood that social conventions (such as race) would instead outweigh the economic pressure to diversify.[64] It is therefore quite easy for CEOs to resist any need to diversify and continue to pursue homosocial reproduction. When it comes to explaining race, any market-based model of behavior fails to comport with reality and has failed to comport with reality throughout our history.[65] This is not to say that economic doctrine cannot provide some degree of insight to explain why many CEOs refrain from diversifying their boards.

While any market-based theory of CEO behavior in selecting directors suffers from severe infirmities, economic theory can nevertheless help explain the strategic behavior of CEOs in this context.[66] Game theory suggests that much behavior can be explained by substituting strategic behavior (where actors have knowledge of and are influenced by the expected behavior of others) for mere rational maximization in the context of impersonal markets.[67]

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comprehended by market-based models of behavior).

62. *See id.* at 367 (stating that "[m]arket discrimination in labor, credit, residential, and other markets persisted for decades under free markets"). *See generally* Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Causes*, 94 MICH. L. REV. 109, 142 (1995); William A. Darity, Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSP. 63 (1998); John Yinger, *Evidence on Discrimination in Consumer Markets*, J. ECON. PERSP., Spring 1998, at 63.

63. *See supra* notes 61–62 and accompanying text (asserting that various economists have found that race distorts markets in the American economy).

64. *See* Kenneth J. Arrow, *What Has Economics to Say About Race?*, 12 J. ECON. PERSP. 91, 98 (1998) ("Profit maximization is overcome by the values inherent in the maintenance of the network or other social interaction.").

65. *See* Ramirez, *supra* note 16, at 367 (criticizing the shortcomings of the neoclassical economic model of racial discrimination).

66. CEO power over director selection often leads to the neutralization of the board in terms of negotiating compensation. Bebchuck et al., *supra* note 44, at 764–75. As previously highlighted, CEOs opting for homogenous boards can expect higher compensation than those opting for more diverse boards. *Supra* notes 34–35, 37, and accompanying text. Thus, pursuit of a diverse board is one element of the executive compensation and director selection dynamic. Issues of race, however, tend to create additional complexities in market behavior. Board diversity, then, is both an element in the compensation conundrum, as well as part of more complex social dynamic.

67. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 462 (5th ed. 2001)

This strategic behavior is a function of each actor's expected payoffs, determined in light of the expected behavior of other actors.[68] A fundamental heuristic of game theory is the Prisoner's Dilemma.[69] The Prisoner's Dilemma illustrates how two parties striving to maximize their payoffs will conduct themselves in a way that may not maximize their joint welfare, once they take into account the behavior of others.[70] Assume two individuals are in custody for suspicion of a crime. If they cooperate and agree not to testify against each other, they would serve two-year sentences as the result of a plea bargain. If one confesses and testifies against the other at trial, the confessor will receive a one-year sentence, and the other will receive a ten-year sentence. If both confess, they will receive sentences of five years.[71] Obviously, the best option is for neither to confess, for they would then only serve a combined four years. Nevertheless, if they do not know what the other will do, they are each best served by confessing, which eliminates the worst outcome and creates an opportunity for the confessor to serve only one year.[72] If both do this, which they rationally may, they jointly serve ten years instead of four.[73] Simply stated, their strategic behavior will prevent both from rationally maximizing their utility.[74]

(defining a game as any situation in which market participants make strategic decisions that take into account the actions and responses of others). Game theory has been applied to explain behavior in an ever increasing number of legal contexts. *See, e.g.*, Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 FLA. ST. U. L. REV. 603 (2004) (using game theory to examine changes in the regulatory world brought on by the False Claims Act); Note, *Finding Strategic Corporate Citizenship: A New Game Theoretic View*, 117 HARV. L. REV. 1957 (2004) (applying game theory analysis to the problem of corporate social responsibility).

68. *See* PINDYCK & RUBINFELD, *supra* note 67, at 462 (describing the general concepts behind optimal strategies in game theory). The authors state:

> The optimal strategy for a player is the one that maximizes [the player's] expected payoff. We will focus on games involving players who are rational, in the sense that they think through the consequences of their actions. In essence, we are concerned with the following question: If I believe that my competitors are rational and act to maximize their own payoffs, how should I take their behavior into account when making my decisions?

Id. (emphasis omitted).

69. *Id.* at 443–44.

70. *See id.* (illustrating how the players in a Prisoner's Dilemma game will optimally choose a strategy that offers them less than the highest possible payoff).

71. *Id.*

72. *Id.*

73. *Id.*

74. *See* HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 37–43 (2003) (posing a similar Prisoner's Dilemma and showing that "the game is said to be a dilemma for

So, will CEOs rationally act to maximize the profitability and value of their businesses by pursuing a diverse board so that the company will have additional profits to share with the CEO as the optimal contracting approach would suggest?[75] I posit they will not always do so. Instead, many will play the homosocial reproduction game, secure in the knowledge that neither shareholders nor capital markets will limit their options.[76] First, each CEO will be able to garner enhanced compensation by creating very homogenous boards complete with other CEOs.[77] Usually this will outweigh any direct benefit to the CEO in the form of enhanced firm value.[78] Second, any payoffs from enhanced diversity are likely to accrue to the shareholders and not the CEO; such an accrual will occur over a long period that can be measured in years, not quarters.[79] It is much more difficult for a CEO to capture such gains than to obtain excessive compensation. Third, there is the distorting influence of race. There is a growing body of scholarship demonstrating the distortions in market behavior associated with race.[80] When a CEO is selecting board candidates, he is competing in a noncooperative game with other CEOs in the sense that CEOs will not contract to assure that other CEOs behave in accordance with expectations.[81] Instead, CEOs will attempt to deduce how

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the prisoners because they jointly make themselves worse off when each attempts to pursue his interest").

75. *See supra* notes 44–48 and accompanying text (stating that under the optimal contracting approach, CEOs would seek to minimize the costs associated with divergent interests of shareholders and management).

76. *See supra* notes 24, 33, 53, and accompanying text (arguing that shareholders may have distorted views on race, that shareholders have little control over director elections, and that market forces are insufficient to deter CEOs from exploiting their power over board selection).

77. *See supra* notes 34–35, 37, and accompanying text (discussing homogeneity on corporate boards).

78. *See* Bebchuk et al., *supra* note 44, at 774–77 (stating that the economic benefits of higher CEO salaries outweigh any economic losses from their reduced stock option values or threat of dismissal).

79. *See* Ramirez, *supra* note 55, at 109–23 (articulating the best practices for embracing diversity, which amount to a cultural transformation of the business culture in an all encompassing manner—such a transformation requires effort and time).

80. *See supra* notes 61–62, 65 and accompanying text (discussing the power of race to cause market distortions and trump economic incentives, and arguing that market-based models of behavior fail to comport with reality when explaining race).

81. The impossibility of enforceable contracts among CEOs regarding diversity in the boardroom means that in game theory terminology this is a "noncooperative game." *See* PINDYCK & RUBINFELD, *supra* note 67, at 443 (defining a "noncooperative game" as a "[g]ame in which negotiation and enforcement of binding contracts are not possible").

other CEOs will behave.[82] If enough CEOs succumb to the temptation not to compete in diversifying their boards, then CEOs will face even less market pressure to diversify, just as CEOs appear not to compete in terms of compensation.[83] Thus, many CEOs will refrain from pursuing a more diverse board and seize opportunities for greater control and compensation arising from homosocial reproduction; in game theory parlance, these are the payoffs.[84] A complete game theoretic framework is beyond the scope of this Article. The central point is this: CEOs will have incentives to engage in strategic behavior to avoid diversification of their board. They will be tempted to play the homosocial reproduction game, and many will succumb.

All available evidence supports the game theory explanation for board selections. CEOs clearly want other CEOs to serve on their boards. CEOs also mirror directors in other significant demographic ways—including in terms of race.[85] Studies show that when CEOs have power, they choose more demographically similar board members.[86] Shareholders seem largely insensitive to these facts. CEOs indulging this temptation towards homosocial reproduction achieve higher payoffs in the form of higher compensation.[87] Finally, this homosocial reproduction and excessive compensation seems associated with inferior corporate governance, leading to greater CEO power.[88] All of the pieces of the game theory model fit. Thus, at least some CEOs appear to be sacrificing sound corporate

82. For example, if the market operated in accordance with the conditions of perfect competition, there is little doubt that markets would respond appropriately to laggards with respect to diversity, and CEOs would have much more limited options. *See supra* note 22 (citing various analyses of the financial impact of diversity that show that companies that embrace cultural diversity financially outperform companies that do not).

83. *See* Bebchuk et al., *supra* note 44, at 764–83 (describing the failures of standard market mechanisms to encourage optimal contracting for CEO compensation).

84. *See* JACKSON ET AL., *supra* note 74, at 34–36 (stating that game theory deals with situations where actors try to maximize payoffs in light of the anticipated conduct of others).

85. *See* Ramirez, *supra* note 2, at 838 (showing that only 4.1% of all board seats of Fortune 1000 companies are held by African Americans and Latinos and that 90% of senior officers are white males).

86. *See supra* notes 30, 34, 37, and accompanying text (asserting that executives will seek to fill boards with demographic and cultural reproductions of themselves, a phenomenon that leads to higher compensation among CEOs and board members).

87. *See supra* notes 34–35, 37, and accompanying text (stating that the common practice of CEOs sitting on each other's boards leads to higher compensation).

88. *See supra* note 22 (concluding that companies that embrace cultural diversity outperform companies that do not); *supra* note 49 (citing recent articles that associate excessive compensation with poor corporate governance).

governance and maximum firm value in pursuit of homosocial reproduction and the expectancy of higher payoffs.

III. Disrupting the Homosocial Reproduction Game and Converging Interests

All of this suggests an intriguing interest convergence. With all the power that CEOs hold in our managerial corporate state, they are not monarchs that may hold themselves above the law—yet.[89] Very broad constituencies have large economic stakes in the performance of the macroeconomy. To the extent that the full costs of our continued apartheid hangover are fully comprehended, these constituents are a source of potential political and economic power in favor of reform.[90] Corporate capitalists, while clearly on the wane in terms of power over the past several decades, are nevertheless powerful and fundamentally in favor of reducing the power of CEOs.[91] Politicians intuitively fear anti big-business and populist cries for reining in the power of business elites.[92] Combined with advocates for racial reform, whether Latino, African-American, Native-American, white, or Asian-American, these forces would be a formidable political and economic power.[93] Add to this mix the interest of feminists in board diversity, and a convincing convergence of interests in favor of reform emerges.[94]

89. *See* Ramirez, *supra* note 49, at 31–32, 32 n.11 (recounting market meltdown in the summer of 2002 and the passage of historic corporate reform in the U.S. Senate by a vote of 97–0).

90. *See* Ramirez, *supra* note 16, at 375 (estimating macroeconomic costs of race in America as approaching $1 trillion per year).

91. *See* Ramirez, *supra* note 2, at 847–48 (stating that many of the largest institutional investors strongly support more diverse boards); Wendy Tanaka, *Silent Partners No Longer*, PHIL. INQ., Apr. 22, 2003, at C1 (noting that diversity initiatives are one of the top subjects of shareholder proxy proposals). Institutional investors and shareholder activists are much more educated regarding the potential benefits of board diversity than the investing public as a whole. It is unclear how institutional shareholder enthusiasm for diverse boards would interact with putative individual shareholder ambivalence.

92. *See* Ramirez, *supra* note 49, at 32 n.11, 59–61 (positing that such fear explains the 97–0 vote on the Sarbanes-Oxley Act after years of politicians in Washington voting in favor of more lax regulation)

93. *See, e.g.*, Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 366 (2003) (noting that one measure of the strength of those seeking racial progress was the volume of amici briefs filed in support of affirmative action in *Grutter v. Bollinger*, 539 U.S. 306 (2003)). There were 102 amici briefs filed in *Grutter*; the great weight of these briefs supported affirmative action in higher education. *Id.*

94. Indeed, recently a group of feminist business leaders formed a council specifically for the purpose of facilitating the diversification of boardrooms—both in terms of gender and race. Thor

Under the once prevailing neoclassical dogma—specifically, public choice theory—if this admixture of interests truly supported reform and truly had the power to make reform happen, it would have already occurred.[95] The public choice approach uses market constructs to explain political dynamics. Although it has receded in the face of recent attacks, the majority of legal scholars still think that it can explain some aspects of political action.[96] Even a cursory review of the reforms that occurred during the summer of 2002, however, suggests the need for prime movers to harness potential political and economic forces before such forces express themselves in law.[97] For example, a major reworking of the professional rules of responsibility was foisted upon the influential legal profession at the last minute thanks to the efforts of a small band of law professors.[98] Prior to this effort, there was virtually no movement in this direction.[99] Richard Painter is widely credited with being the prime mover on this historic reform effort.[100] Once Painter began to bring

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Valdmanis, *Directors' Council Seeks Diversity*, USA TODAY, Oct. 20, 2003, at 2B, 2003 WL 5321444.

95. *See* Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw Out That Baby*, 87 CORNELL L. REV. 309, 310–11 (2002) (arguing that public choice, the application of economics and market behavior to law and regulation, is a poor explanation of political activity).

96. *See id.* at 311 (noting that most scholars find public choice useful, if not comprehensive, in explaining political action).

97. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of U.S.C. titles 11, 15, 18, 28, and 29) (directing the SEC to promulgate rules requiring attorneys representing publicly held companies and appearing or practicing before the SEC to undertake new reporting obligations for a "material violation of law"); Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6296–97 (Feb. 6, 2003) (to be codified at 17 C.F.R. § 205) (stating that the SEC has not determined whether further standards of professional conduct are provident, including the proposed rule requiring a "noisy withdrawal" for counsel with credible evidence of a material violation of law that has not been appropriately acted upon by a publicly held company).

98. *See* Otis Bilodeau, *Senate Puts Corporate Bar in Its Sights*, LEGAL TIMES, July 15, 2002, at 1 (recounting how a letter from forty legal scholars to the SEC led to legislative action regarding the duties of corporate counsel); Lisa Girion, *Attorneys Fear Being Turned Into Informers*, L.A. TIMES, July 26, 2002, at C1, 2002 WL 2492345 (stating that Sarbanes-Oxley reforms of the role of corporate counsel was "unprecedented incursion" into traditional state judicial authority over the professional obligations of attorneys).

99. *See* Renee Deger, *Law Professors Led Fight For New SEC Rules, Say ABA Brought Problems On*, MIAMI DAILY BUS. REV., Dec. 13, 2002, at 9 (documenting the efforts of law professors to reform professional rules of responsibility).

100. *See* Otis Bilodeau, *Painter's Putsch: Richard Painter Argued for Years that Corporate Law Needed Policing. Enron Gave Him His Opening.*, LEGAL TIMES, Dec. 30, 2002, at S21. Bilodeau stated:

> Painter . . . was the driving force behind the provision of the Sarbanes-Oxley Act of 2002 that targets corporate lawyers. As required under that law, the Securities and

this issue to life, alert lawmakers were able to divert part of the effort to reform corporate America to "reform" the role of corporate counsel.[101] While lawyers have recently proven to be an effective force against some elements of the SEC's reform efforts, Painter has demonstrated the utility of persistent and opportunistic reform efforts, even in the face of otherwise powerful and entrenched interests.[102]

So where were the Richard Painters in favor of utilizing these same pressures for reform to achieve a more diverse reality at the pinnacle of corporate governance? On one level, this question requires an inquiry into why those seeking racial justice regarding a single issue—such as affirmative action or racial profiling—have not themselves internalized one key message of critical race theory: race is everywhere.[103] Consequently, it is expressed across society, and remedies are likely to span not just the full range of law, but the full range of social, political, and economic issues.[104] More pointedly, this Article proposes that those seeking racial reform must be prepared to play the same game by the same rules of all effective reformers throughout American history.[105] Racial reformers must be prepared to forge coalitions

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> Exchange Commission has been racing to promulgate new rules designed to force lawyers to alert a client-company's senior management, and ultimately its board, to serious wrongdoing.

Id. Painter's effort aroused the resistance of the American Bar Association, the American Corporate Counsel Association, legal malpractice insurers, and a large part of the corporate bar. *Id.*; *see also* Sue Reisinger, *Two State Bars Protest SEC Rules*, NAT'L L. J., Sept. 15, 2003, at 1 (recounting efforts by state bar associations to assert primacy in the regulation of attorneys notwithstanding Sarbanes-Oxley and the SEC's rules implementing Sarbanes-Oxley).

101. *See* Deger, *supra* note 99, at 9 (explaining how Painter and others were able to effect reforms).

102. *See supra* notes 98–101 and accompanying text (documenting Painter's success in getting reforms passed post-Enron). One measure of the strength of the forces resisting the Painter reform effort is the recent resistance the SEC has encountered in implementing Section 307 of the Sarbanes-Oxley Act. For example, one part of the SEC's efforts was to require counsel representing publicly held companies to blow the whistle on misconduct to the SEC. Richard S. Dunham, *A Quiet Retreat for 'Noisy Withdrawal'*, BUS. WK., May 3, 2004, at 61 (stating that the SEC is hesitating in finalizing a "noisy withdrawal" rule in the face of resistance from corporate lawyers).

103. *See* DELGADO & STEFANCIC, *supra* note 1, at 7 ("[R]acism is ordinary, not aberrational—'normal science,'—the usual way society does business, the common, everyday experience of most people of color in this country.").

104. The breadth of legal disciplines represented by the articles included in this Symposium demonstrates the range of race in America.

105. In many ways the Court's recent decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), illustrates the kind of interest alignment necessary to sway legal elites. Among the many amici briefs filed, 137 congressional representatives joined briefs on filed in support of the University of Michigan, while no representative joined briefs supporting the plaintiffs.

with similarly interested parties along the very broad range of issues where race is lurking and to apply pressure to the specific political actors with power over a specific issue.

In my view, the essence of Derrick Bell's convergence theory was well-stated in an entirely different context by Gabriel Kolko in 1963. In *The Triumph of Conservatism*, Kolko demonstrated that so-called progressive era reforms were "invariably controlled" by business leaders and that, consequently, only reforms they deemed "acceptable or desirable" occurred.[106]

Devins, *supra* note 93, at 367. Twenty-three states joined briefs supporting the university; one state opposed. *Id.* Ninety-one colleges and universities supported the defendants, and zero supported the petitioner. *Id.* at 367–68. Big business and the military filed briefs supporting diversity in higher education and demonstrated their need for diversity to achieve their respective institutional missions. *Id.* at 366–70. Even the Bush administration could only muster a half-hearted opposition to the university given the political landscape it faces. *Id.* at 370–72. Thus:

> By approving race-conscious university admissions, the Rehnquist Court echoed the opinions of Congress, the states, big business, academics, newspapers, and, to a lesser extent, the Bush administration. In short, rather than join forces with the politically isolated opponents of affirmative action, the Court issued a ruling that conformed to social and political forces.

Id. at 347; *see also* Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1452 (2004) ("By upholding Michigan's program not as a remedy for past discrimination but as a source of benefits for all students in the form of a diverse student body, the Court made its clearest statement yet that affirmative action is not for Blacks, but for Whites."). Professor Perea is correct in his conclusion; nevertheless, the thesis of this Article implies that it would be astonishing if our government (including the judiciary) ever did anything that affirmatively harmed the interests of whites, given their stranglehold on both political and economic power. *Id.* at 1446–53. Indeed, one could argue that such an action would be profoundly undemocratic. I have instead criticized *Grutter* because its approach fails to comprehend the devastation that race wreaks upon our entire society, particularly those elites with interests in the broad success of our economy. For further discussion, see Ramirez, *supra* note 16, at 376–77.

106. *See* GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM 2–3 (1963) (commenting on progressive era reforms). Kolko stated:

> Progressivism was initially a movement for the political rationalization of business and industrial conditions, a movement that operated on the assumption that the general welfare of the community could be best served by satisfying the concrete needs of business. But the regulation itself was invariably controlled by the leaders of the regulated industry, and directed toward ends they deemed acceptable or desirable. In part this came about because the regulatory movements were usually initiated by the dominant business to be regulated, but it also resulted from the near universal belief among political leaders in the basic justice of private property . . . a belief that ultimately set limits on the leaders' possible actions. It is business control over politics . . . rather than the political regulation of the economy that is the significant phenomenon of the Progressive Era.

Id.

Just as *Brown v. Board of Education*[107] was precisely what American foreign policy desired, Kolko shows that "the results of progressivism were precisely what . . . business interests desired."[108] Both Bell and Kolko posit that change occurs on terms acceptable to those with power.[109] But, significantly, Bell and Kolko differ on an important point. Kolko is quite clear that "under conditions of political capitalism the form of the industrialization process, and of the political machinery of society, take on those characteristics necessary to fulfill the peculiar values, attributes, and goals of the ascendant class of that society."[110] Nevertheless, Kolko does not deem the outcome of this fact to be "inexorable destiny."[111]

Instead, Kolko suggests that reform, though dominated by the preexisting power establishment, is in fact an outcome of the highly personal characteristics of those involved—with their own peculiar motives, interests, and weaknesses.[112] Kolko rejects any thought that the power establishment is any kind of monolithic, conspiratorial entity.[113] Rather, it is a reflection of the highly diffused nature of political and economic power in the United States. During the progressive era, those with specific power over specific reforms sought specific results. Each of the relevant agents of reform acted out of certain widely held assumptions and preconceptions. One such preconception was that "it was proper for an industry to have a decisive voice or veto over the regulatory process within its sphere of interest."[114] Not all business interests approved of all progressive reforms; what is significant is that crucial elements

107. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

108. *Id.* at 280. The New Deal has inspired a similar finding. *See* COLIN GORDON, NEW DEALS: BUSINESS, LABOR AND POLITICS IN AMERICA 1920–1935, 4 (1994) ("This study contributes to a broad stream of interpretation that has stressed the primacy of business interests in the formulation of U.S. public policy and the essential conservatism of the New Deal.").

109. *See* Bell, *supra* note 1, at 524 ("I contend that . . . *Brown* . . . cannot be understood without some consideration of the decision's value to . . . those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation."); KOLKO, *supra* note 106, at 279–80 ("[A]t no point did [the Progressive Movement] . . . conflict in a fundamental way with business supremacy . . . [i]t was not a coincidence that the results of progressivism were precisely what many major business interests desired.").

110. KOLKO, *supra* note 106, at 302.

111. *Id.* at 303.

112. *See id.* at 2 ("[T]he triumph of conservatism that I . . . describe . . . was the result not of any impersonal, mechanistic necessity but of the conscious needs and decisions of specific men and institutions.").

113. *See id.* at 282 (denying a common identity or scheme among the power establishment).

114. *See id.* at 283 (discussing preconceptions of agents of reform).

of big business supported all significant progressive reform initiatives.[115] In other words, reforms were driven by atomistic actors with specific and limited powers rather than any monolithic elite.[116] In contrast, Professor Bell thinks the nation is dominated by a white monolith—as it well may have been in the 1960s and 1970s, at least when it came to issues of race.[117]

Kolko differs less on another important element of Professor Bell's interest convergence theory. Kolko, like Bell, is open to the possibility that interest convergence may be an engine of real progress and real reform, although both admittedly embrace this in a less than fully enthusiastic fashion.[118] Kolko holds that the progressive reform movement could have occurred if realistic alternatives had been promulgated.[119] According to Kolko, the problem during the progressive era was that few, if any, understood the dynamics of political capitalism as it then operated. Essentially, reformers failed to propose measures that big business could support.[120] In any event, both Professor Bell and Kolko concur that in the right context progressive reform can operate in accordance with the needs of the "ascendant class" as those needs are shaped and aligned by adept reformers.

Assuming that those interested in influencing reforms could operate at this level and could propose reform initiatives that could appeal to the "ascendant class," Kolko hypothesizes that a more positive direction for reform is possible.[121] Speaking to the progressive era of reforms, Kolko posits that: "Populism rejected the values of business" and Socialism "suffered from

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115. *See id.* at 283–84 (supporting the concept of the power establishment as individuals acting individually).

116. *See id.* at 283 (restating the idea that the power establishment is not a monolithic, conspiratorial entity).

117. *See, e.g.*, Bell, *supra* note 1, at 523 ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."). My point is that in today's more diverse times (and certainly in tomorrow's even more diverse times) the operative term should not be "whites" but rather "those elites with power over a given issue."

118. *Compare* Bell, *supra* note 1, at 528 ("Further progress to fulfill the mandate of [*Brown v. Board of Education*] is possible to the extent that the divergence of racial interests can be avoided or minimized.") *with* KOLKO, *supra* note 106, at 304–05 (stating that the Progressive Era could have been "radically different" if some group had promulgated a "relevant measure of fundamental opposition").

119. *See* KOLKO, *supra* note 106, at 304 (hypothesizing that interest convergence may have been one means to effectively enact reforms).

120. *See id.* at 304–05 (explaining why the progressive movement did not take a different approach); *id.* at 286 (explaining why the progressive movement stalled).

121. *See id.* at 302 (expressing a belief that opportunities like interest convergence might be effective).

a fetishistic belief in centralization."[122] Consequently, there was an intellectual and political vacuum left in favor of the two major political parties that did not differ materially on the supremacy of business interests and maintaining the status quo. "In brief, the Progressive Era was characterized by a paucity of alternatives to the status quo, a vacuum that permitted political capitalism to direct the growth of industrialism in America, to shape its politics, [and] to determine the ground rules for American civilization for the twentieth century . . . ."[123] The issue, according to Kolko, is one of comprehension; elites will not accept radical reforms that are not in their interests and must be educated with respect to potential reforms that converge with their interests.

I posit that just as the Populists and Socialists of yesteryear failed to comprehend fully the context in which they operated, racial reformers of the twenty-first century have thus far failed to comprehend fully the opportunities implicit in political capitalism today.[124] Durable racial reform is possible to the extent that it is aligned with the interests of those with political and economic power. The key is to exploit opportunistically events and political pressure to achieve reform that is consistent with racial progress.[125] This is the driving reality of all reform in America. Real and durable change cannot occur in a democracy without the concurrence of those holding political and economic power. While one may bemoan the current distribution of political and economic power, there is little to be gained from dwelling on this point. The end result is merely to burden racial reform with distribution issues that are far more prone to headwinds. A more effective approach is to take the current distribution of economic and political power as a given and find a way to operate within those constraints.

Certainly, there may be more ideal distributions of wealth and power than those currently prevailing in the United States. To a certain degree, I have

122. *Id.* at 304–05.

123. *Id.* at 305. In a candid snapshot of the attitudes of the business elite regarding the relationship between business and government, *Bankers' Magazine* stated in 1901: "The business . . . seeks to shape politics and government in a way conducive to his own prosperity . . . . More and more the legislatures and the executive powers of the government are compelled to listen to the demands of organized business interests." *Id.* at 161–62 (citing Bankers' Magazine, LXII (1901), 497–99). *Bankers' Magazine* concluded as of 1901 that the reason government was not "entirely controlled" by business was because business had not yet reached "full perfection." *Id.* at 162. One hundred years later it is difficult to imagine that the political grip of business interests has diminished, which is why durable reform without the support of economic power is also difficult to imagine.

124. *See* Delgado, *supra* note 7, at 143 (stating that scholars should seek to identify "moments of interest convergence").

125. For example, Delgado suggests that the War on Terrorism may hold opportunities—and perils—for communities of color. *Id.* at 137–43.

suggested as much.[126] Race could become bundled up with these issues relatively easily, given its historical role as a means of enhancing class chasms.[127] I suggest now that decoupling race from macro-distributional issues can serve to help eliminate one source of oppression, to the extent racial progress is achievable without addressing distributional issues.[128] In all events, law is rarely a source of durable fundamental reform. The ability of the law to alter a distributional outcome that is essentially acceptable to all major sources of political and economic power is dubious at best.[129] On the other hand, there is good reason to think that racial reform is to some degree achievable within the current framework of economic and political power. First, the costs of race in terms of destruction of human capital is staggering, particularly in an era when human capital is increasingly the predominate source of wealth creation.[130] Second, the "ascendant class" is increasingly of

126. *See* Steven A. Ramirez, *Bearing the Costs of Inequality: Brown and the Myth of the Efficiency/Equality Trade-Off*, 44 WASHBURN L.J. (forthcoming 2004) (showing that enhanced equality spurs economic performance); *see also* Steven A. Ramirez, *Market Fundamentalism's New Fiasco: Globalization as Exhibit B in the Case for a New Law and Economics*, 24 MICH. J. INT'L. L. 831, 849–51 (2003) [hereinafter Ramirez, *Market Fundamentalism's New Fiasco*] (arguing in favor of democratizing international institutions and implementing appropriate regulatory infrastructures); Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 546–61 (2003) (proposing that legislative acts like the G.I. Bill were highly successful in encouraging achievements among all levels of society, but noting that similar legislation has failed to be enacted in the post-New Deal era).

127. There has been undeniable racial progress in America, even in the boardrooms of major corporations. Thus, while it is true that only 4.1% of all Fortune 1000 directors are African-American or Latino, this is certainly a very high multiple of the number of such directors in, for instance, 1953. *See supra* note 2 (providing statistics regarding minority board membership).

128. My own suspicion is that too much reform energy is being expended on issues where political and economic elites, consisting mostly of white males, have little interest in common with communities of color. Specifically, the issues of affirmative action (often mistaken for unlawful quotas) and reparations, while founded on powerful notions of justice and equity, may well impede the forging of effective interest convergence coalitions. In fact, these issues can be recast in ways that highlight the commonality our society harbors with respect to racial progress, as Justice O'Connor did in finding diversity in higher education to be a "compelling state interest." Grutter v. Bollinger, 539 U.S. 306 (2003); *see also* William Raspberry, *Optional Reparations*, WASH. POST, May 27, 2002, at A23 (proposing that reparations might be effective if they offered an approach that was "fair to everybody").

129. I am much more sanguine about possible distributional reform that is coupled with enhanced macroeconomic performance. *See* Ramirez, *Market Fundamentalism's New Fiasco*, *supra* note 126, at 849–51 (noting that countries with the most successful economic growth also provide educational investments for everyone).

130. *See* Ramirez, *supra* note 16, at 372–75 (discussing racial discrimination and its impact on human capital).

color and diverse.[131] Third, compared with any other era of American history, the "ascendant class" realizes the untapped potential of people of color in the United States.[132] Fourth, in contrast to the dark ages of race, when the vast majority of society truly believed in race-based differences that were largely dictated by genetic consequences of racial phenotypes, today's holders of political and economic power are increasingly aware that race is an illusion and that all of its social consequences are the result of its social construction.[133] Finally, in coming years, it will be inescapably clearer that allowing the effects of yesteryear's racial hierarchy to malinger and fester will entail macroeconomic catastrophe.[134] These factors taken together suggest that there will be episodes of opportunity for racial reformers to align their interests with the interests of the "ascendant class," such that breakthroughs like *Brown* or the Civil Rights Act of 1964 are possible again.[135]

Of course, none of this is "inexorable destiny."[136] The only elements that are inexorable are that continuation of today's racial paradigm will be increasingly costly and that opportunities to align interests with politically potent forces will increase. The theory of interest alignment articulated in this Article, however, requires prime movers to exploit a new paradigm that will simply be more open to racial reform.[137] In order to align interests with the current and future holders of power over relevant areas of potential reform, coordinated campaigns of education and persuasion must be undertaken, focusing on the most powerful atomistic interests that can be marshaled in favor of reform.[138] This is precisely what occurred in 1954 when the NAACP

131. *See* Ramirez, *supra* note 55, at 91 n.15 (showing that communities of color will constitute one-half of the population and that women are entering the workforce at a disproportionate rate).

132. *See* Kevin M. Williams, *A Month to Remember*, CHI. TRIB., Feb. 1, 2002, at A1, 2002 WL 2618871 (noting that highly successful African Americans are now legion in America, as statesmen, presidential advisors, judges, performing artists, athletics, writers, and doctors, and their success is widely trumpeted, at least at times).

133. The scientific fact that race is a social construct has now reached mainstream media. *Race: The Power of an Illusion* (California Newsreel 2003), *available at* http://www.pbs.org/race/000_General/000_00-Home.htm (last visited Aug 29, 2004).

134. *See* Ramirez, *supra* note 16, at 371 (noting that racism "results in underdeveloped human capital on a massive scale throughout society").

135. Professor Bell has suggested as much. Bell, *supra* note 1, at 528.

136. KOLKO, *supra* note 106, at 303.

137. *See supra* notes 97–100 and accompanying text (discussing interest alignment in the context of recent reforms made in the area of professional responsibility).

138. Richard Painter apparently mobilized a cadre of prominent law professors and was successful because of the political context facing Senator John Edwards. This illustrates well the opportunities available to racial reformers in terms of mounting support for timely

convinced nine Supreme Court justices to move boldly away from "separate but equal" to racial integration.[139] The NAACP coordinated a concerted campaign to persuade nine white males endowed with political power over the specific issue of segregation in public education to fundamentally rewrite American constitutional law.[140]

This is also precisely what could have occurred when Congress and other regulatory authorities imposed the far-reaching Sarbanes-Oxley Act of 2002[141] and related reform initiatives.[142] A key element of the initiative was to limit CEO power.[143] Restricting CEO power over the director selection process would have been a natural extension of this initiative.[144] Indeed, since the passage of the Act, the SEC has taken affirmative steps to restrict CEO power over director selection.[145] First, the SEC issued rules requiring publicly held companies to disclose information relating to their director selection processes and the function of any nomination committees.[146] Second, the SEC proposed

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initiatives.

139. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (overturning the doctrine of "separate but equal" and ordering the racial integration of schools).

140. *See* JACK GREENBERG, CRUSADERS IN THE COURTS 163–75, 177–99 (1994) (recounting the assiduous efforts of the NAACP Legal Defense and Educational Fund to amass social science and political support for overturning segregation in education).

141. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of U.S.C. titles 11, 15, 18, 28, and 29). For an overview of the effect of the Sarbanes-Oxley Act, see Ramirez, *supra* note 2, at 842–44. Essentially, the Act limited management autonomy (and therefore CEO power) over the audit function, the legal function, and imposed an enhanced role for directors that are not dependent upon management for payments other than directors' fees. *Id.* at 843–44. *See also Annual Review of Federal Securities Regulation*, 58 BUS. LAW. 747, 748 (2003) [hereinafter *Annual Review*] (providing a detailed overview of the Sarbanes-Oxley Act of 2002).

142. Both the NYSE and the NASDAQ Marketplace imposed new listing requirements that enhanced board independence from management. Ramirez, *supra* note 2, at 843–44; *see also Annual Review*, *supra* note 141, at 748 (providing a detailed overview of the Sarbanes-Oxley Act of 2002).

143. *See supra* notes 141–42 and accompanying text (discussing similar provisions in the Sarbanes-Oxley Act of 2002).

144. *See supra* notes 141–42 and accompanying text (same); *infra* notes 145–46 (discussing recent SEC regulation of the nomination and election of directors in public companies).

145. There is no doubt that the SEC has run into significant political resistance in its initiatives to trim CEO power. *See* Dunham, *supra* note 102, at 61 (discussing hesitation by the SEC in promulgating rules regarding "noisy withdrawal" in light of complaints voiced by corporate lawyers); *see also* Amy Borrus, *SEC Reform: Big Biz Says Enough Already*, BUS. WEEK, FEB. 2, 2004, at 43 (noting opposition to the corporate reforms). Nevertheless, my point is that the time to strike for reforms was at the same time that Richard Painter struck—spring and summer of 2002.

146. *See* Disclosure Regarding Nominating Committee Functions and Communications

rules broadening the rights of shareholders to nominate directors.[147] Throughout 2002 and 2003, there was significant political and regulatory pressure in favor of trimming CEO prerogatives.[148] In fact, the Sarbanes-Oxley Act passed the Senate by a vote of ninety-seven to zero; it is difficult to imagine a more powerful context for lasting reform of corporate governance at the federal level.[149]

This Article cannot answer these queries:[150] whether the Sarbanes-Oxley reform initiatives[151] could have included provisions weakening CEO prerogatives over board selection (thereby disrupting homosocial reproduction and enhancing diversity within corporate America); or whether the Act could have directly required measures to enhance diversity in the boardroom (thereby weakening CEO prerogatives over board selection).[152] Presumably, however, insulating the CEO from the director selection process—by, for example, requiring an independent nominating committee—would limit homosocial reproduction in three important ways. First, to the extent director-

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Between Security Holders and Board of Directors, 68 Fed. Reg. 69204 (Dec. 11, 2003) (to be codified at 17 C.F.R. pts 228, 229, 240, 249, 270, and 274) (adopting new disclosure requirements and amendments to existing disclosure requirements to enhance the transparency of the operations of boards of directors).

147. *See* Security Holder Director Nominations, 68 Fed. Reg. 60784 (proposed rules, Oct. 23, 2003) (to be codified at 17 C.F.R. pts. 240, 249, and 274) (proposing new rules that would, under certain circumstances, require companies to include in their proxy materials security holder nominees for election as director).

148. *See supra* notes 97, 141–42, 146–47, and accompanying text (discussing the Sarbanes-Oxley Act of 2002 and other proposed changes to securities law).

149. *See supra* note 92 (suggesting that politicians' fear of antibig business and populist cries for reining in the power of business elites explains the unanimous vote for the Sarbanes-Oxley Act of 2002 after years of voting in favor of more lax regulation).

150. It is, unfortunately, beyond the scope of this Article to articulate an ideal director selection process for purposes of enhancing diversity while achieving more optimal corporate governance. Consequently, I can only address the viability of general approaches to the issue of how to disrupt homosocial reproduction.

151. I specifically mean to include within these initiatives: Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of U.S.C. titles 11, 15, 18, 28, and 29); Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Board of Directors, 68 Fed. Reg. 69204 (Dec. 11, 2003) (to be codified at 17 C.F.R. pts. 228, 229, 240, 249, 270, and 274); Security Holder Director Nominations, 68 Fed. Reg. 60784 (proposed October 23, 2003) (to be codified at 17 C.F.R. pts. 240, 249, and 274); and the NYSE and NASDAQ Marketplace reforms. *See supra* notes 97, 140–41, 145–46 (discussing these initiatives and the conditions surrounding them).

152. *See* Ramirez, *supra* note 55, at 124–32 (proposing that publicly held companies be required to disclose to the investing public their policies and approaches to diversity management (which would include diversity in the boardroom) and that directors be stripped of business judgment rule protection for mismanaging diversity).

selection power is shifted from the CEO to independent board members, it is shifted to individuals with diminished incentives to indulge in homosocial reproduction because unlike the CEO, the new directors would generally not be setting the compensation package for those who selected them.[153] Second, the selectors—independent directors—would now be a slightly more diverse group than management, and their reduced inclination for homosocial reproduction would be more favorable in terms of diversity.[154] Therefore, any legal mechanism that shifted selection power for new directors to the board and away from the CEO would likely lead to a significant uptick in the presence of diversity in the boardrooms of corporate America as well as an improvement in corporate governance.[155]

Although there were many influential interests in favor of restricting CEO power over the board of directors, the political and regulatory process still defies prediction.[156] There was a wealth of recent scholarship suggesting that diverse boards would enhance board scrutiny of CEO action.[157] In a broad political sense, the environment was ripe for real reform, and there was some recognition that the hold of the CEO over most boardrooms was a root problem of the crisis in investor confidence in the summer of 2002.[158] Moreover, there is constant political pressure for measures that would tend to erase embedded racial inequality within our society.[159] On the other hand, management interests wield considerable power, and recent events suggest there are limits to the degree to which law can rein in this power, at least in a

153. *See supra* notes 34–35, 37 and accompanying text (supporting the proposition that the phenomenon of mutually interlocking boards of directors, particularly those made up of CEOs of other companies, leads to higher compensation for CEOs).

154. *See* Westphal & Zajac, *supra* note 30, at 77 (noting that directors seek demographic similarity when they have more power relative to the CEO); *supra* note 4 (noting that the corps of directors is slightly more diverse than the corps of CEOs)

155. Until recently, there was some degree of skepticism that corporate governance even mattered in terms of firm performance. Today, the consensus is that it does. *See* Ramirez, *supra* note 2, at 854 n.101 (stating that "corporate governance matters to financial performance").

156. *See supra* note 95–96 and accompanying text (noting the shortcomings of public choice theory as applied to racial issues); *see also* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 4–5 (1998) (articulating four competing theories of regulation and finding that none squares with reality).

157. *See supra* note 20 (noting the benefits of diverse boards and their tendency to avoid like-mindedness and groupthink).

158. *See* Ramirez, *Fear and Social Capitalism*, *supra* note 88, at 63 (discussing the state of investor confidence in the summer of 2002).

159. This political pressure was also manifest in the volume of *amici* briefs submitted in the *Grutter* case. *See supra* note 104 (discussing the large number of amici briefs filed in support of the University).

more ordinary environment than that which prevailed in 2002–03.[160] Thus, in the final analysis, the question of whether CEO power over the director nomination process would command sufficient political and economic support to become a durable feature of American corporate law is a question that can only be answered in a nonhypothetical manner after some racial reformer plays the hand that our system of political capitalism deals.[161]

IV. Conclusion

The United States is a capitalist democracy. Consequently, the law in the United States responds to political and economic power. The American legal system is also a highly diffused system. Therefore, reformers must orchestrate political and economic power to bring pressure to bear upon the specific legal actors vested with responsibility over a particular issue if they wish to achieve durable reform. Interest convergence theory is the key to reform and progress in any area of law from race to corporate governance. As Derrick Bell has correctly stated: "Further progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized."[162] The converse of Bell's observation is equally true: To the extent interest convergence is maximized, reform opportunities are maximized. This Article seeks to extend interest convergence theory to its logical ends—specifically, to include the possibility that interests can be aligned to further the goal of reform, racial or otherwise. This possibility can come to fruition when individuals seeking specific reforms can convince specific individuals with economic or political power over that specific issue. This is essentially what the NAACP achieved in the *Brown* decision. This alignment of interests was achieved in the *Grutter* opinion fifty years later, where it succeeded in securing qualified support for affirmative action from a fundamentally

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160. While it is true that CEO power is a factor that must be considered in crafting any corporate governance reform, it is also true that many influential voices are beginning to understand that the relationship between the CEO and the board must give primacy to the monitoring duties of directors, rather than any obligation that directors have to furnish operational advice to the CEO. *See No More Mr. Nice Guy*, THE ECONOMIST, March 20, 2004, at 15 ("The primary function of independent board directors . . . is to monitor the firm's managers, not to give strategic or managerial advice, and directors should allow nothing to impair their monitoring role."). Thus, there will be continuing pressure for reform.

161. *See* KOLKO, *supra* note 106, at 3 (defining political capitalism as the use of politics and law to secure conditions of stability, predictability, and security for the ascendant class). I prefer the term social capitalism, connoting a broader set of beneficiaries. Ramirez, *supra* note 49, at 37.

162. Bell, *supra* note 1, at 528.

conservative Court. It also explains Richard Painter's efforts to relandscape professional responsibility for attorneys representing publicly held companies. In each case, economic and political power was brought to bear on lawmakers vested with specific power over a specific issue.

The Article also seeks to illustrate these points in the specific context of corporate corruption and the Sarbanes-Oxley Act of 2002. This Act presented an historic opportunity to facilitate more diverse boards. In the end, this reform was forestalled in favor of weaker reforms that will not contribute to the goal of racial reform in any material way. This Article posits that this result flows more from the fact that there was no prime mover striving to forge an interest alignment sufficient to accomplish the specific reforms needed to enhance board diversity than from either the merits of any particular proposal or the support any proposal may have inspired. The lesson to be learned from this reality is the lesson of this Symposium. Race is everywhere; therefore, possibilities for racial reform are similarly ubiquitous. It is even present within issues related to CEO domination of the director selection process. CEOs play the game of homosocial reproduction when selecting directors. Given our apartheid tradition, this means that the upper echelons of corporate America will be essentially the exclusive province of white males far into the future. But, because board diversity can improve corporate governance, racial reformers may find many allies that can serve to facilitate reform in this arena. The challenge is to find economic and political interests that can gain either from enhanced diversity or from improved corporate governance and to educate and mobilize those interests.