

THE NEXT PHASE IN SUPPORTING WOMEN AT WORK:  
BALANCING FIDUCIARY DUTIES AND CORPORATE  
LEGITIMACY

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Goals, not quotas. As a woman in the workforce, I'm 40 years old, I hope to be in the workforce a long time. I never want to get a job because they have to have me. I want to get a job because I earn it.  
- Sheryl Sandberg, COO, Facebook<sup>1</sup>

INTRODUCTION

As the economy continues through turbulent reassembly, corporations remain in the spotlight of public criticism for ethical failures and surreptitious

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1. Sheryl Sandberg, *The Gender Agenda: Why Sex Matters*, A special televised debate from the World Economic Forum in Davos, Switzerland, CNBC (February 8, 2010), <http://www.cnbc.com/id/15840232?video=1407973482&play=1>.

transactions.<sup>2</sup> Chief Executive Officers from Fannie Mae and Freddie Mac were called before the U.S. House Committee on Oversight and Government Reform in December 2008 to discuss the extent to which the actions and policies of their corporations may have contributed to the housing and financial crisis.<sup>3</sup> In April 2010, former Lehman Brothers CEO Richard Fuld testified before the U.S. House Financial Services Committee and was challenged as to whether he would take responsibility for the corporation's downfall.<sup>4</sup> Former CEO of British Petroleum, Tony Hayward, faced the U.S. House Subcommittee on Oversight and Investigations in June 2010.<sup>5</sup> During a hearing, Congressional committee members questioned the risks British Petroleum executives knowingly took; risks that led to the Deepwater Horizon rig disaster.<sup>6</sup> When corporate ethical failures significantly impact the livelihood and health of society, people have often turned to a legal system of duties and accountability to restore balance. As discussed in this comment, these legal theories of fiduciary duty and corporate legitimacy establish the need to support women in the corporate workplace, but they also demand careful scrutiny over the execution of gender-specific initiatives.

Corporate executives have a fiduciary duty to act in the best interests of the corporation and its shareholders.<sup>7</sup> This includes not only making prudent decisions on a daily basis but also monitoring operations and success over time.<sup>8</sup> Historically, the business judgment rule<sup>9</sup> provided corporations with

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2. See Claudia Parsons, *From Madoff to Merrill Lynch, 'Where was Ethics Officer?'*, N.Y. TIMES, Feb. 9, 2009, available at <http://www.nytimes.com/2009/01/29/business/worldbusiness/29iht-ethics.4.19786426.html>

3. *The Role of Frannie Mae and Freddie Mac in the Financial Crisis, Before the H. Committee on Oversight and Government Reform*, (Dec. 9, 2008) (list of witnesses scheduled to testify), [http://democrats.oversight.house.gov/index.php?option=com\\_content&task=view&id=4712&Itemid=2](http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=4712&Itemid=2) (last visited Dec. 19, 2011).

4. See *Public Policy Issues Raised by the Report of the Lehman Bankruptcy Examiner: Hearing Before the H. Comm. on Financial Services*, 111<sup>th</sup> Cong. 69-71 (2010) (statement of Richard Fuld, CEO, Lehman Brothers), available at <http://financialservices.house.gov/Media/file/hearings/111/Printed%20Hearings/111-124.pdf>

5. *The Role of BP in the Deepwater Horizon Explosion and Oil Spill: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 111<sup>th</sup> Cong. 62-66 (2010), available at <http://democrats.energycommerce.house.gov/documents/20100617/transcript.06.17.2010.oi.pdf>

6. *Id.* at 4-6.

7. DENNIS J. BLOCK ET AL., *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 1 (5th ed.1998).

8. *Id.* at 126.

9. The business judgment rule is a rule of deference to and an assumption of good faith on the part of corporate directors. This rule prevents courts from second guessing business decisions which may be complicated and out of the realm of the court's expertise. This policy also protects business leaders from the fear of constant scrutiny and judicial reprisal. See BLOCK, *supra* note 7, at 12.

significant discretion and held corporate directors<sup>10</sup> responsible only when they were guilty of such a gross error “that a man of common sense, and ordinary attention, would not have fallen into it.”<sup>11</sup> Today, modern corporations exert increasing influence over society and grapple with evolving challenges, such as the growth of corporate culture and public expectation of corporate gender parity. This increased influence sets not only corporate standards but societal roles and expectations. Because of this, corporations play a key role in determining the rights and image of women across the country. The treatment of women in the workplace, therefore, can be seen as an important indicator of societal gender equality.

Over the years, the role of women in the workplace has evolved in accordance with the production demands.<sup>12</sup> As World War II left traditionally male workplace roles open, women rose to the challenge and, as sung in the “Rosie the Riveter” song, women finally believed that they “will do more than a male will do.”<sup>13</sup> As women took on the roles of their male counterparts, Congress enacted federal protections for women, such as the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.<sup>14</sup> Under these protections, the percent of women in managerial jobs grew from 20 percent in 1970s to 46 percent by 2002 according to the Bureau of Labor Statistics.<sup>15</sup> Tracking corporate efforts to ensure these female professionals were encouraged and retained in corporations, Catalyst, a non-profit organization which tracks the growth of women in business, found that 65 percent of responding member corporations implemented a formal women’s leadership development initiative or program by 2009.<sup>16</sup> From Rosie the Riveter to a pinstripe suit-wearing Barbie,<sup>17</sup> Congressional protections and corporate initiatives opened doors necessary to move women from roles of equality to positions of leadership.

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10. For the purposes of this comment, “directors” is meant to refer to any corporate officer, official, or director who can be found to owe a fiduciary duty to the corporation and its shareholders.

11. *Percy v. Millaudon*, 8 Mart. (n.s.) 68, 78 (La. 1829).

12. In *Corning Glass Works v. Brennan*, the U.S. Supreme Court held that women were entitled to equal base pay based on the equal work performed. This case is also an example of changes in women’s roles at work when World War II caused manpower shortages. See generally *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

13. Sheridan Harvey, *Rosie the Riveter: Real Woman Workers in World War II, Journeys and Crossings*, THE LIBRARY OF CONGRESS, <http://www.loc.gov/rr/program/journey/rosie-transcript.html> (last visited Dec. 19, 2011).

14. See generally Michael E. Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 454 (1981).

15. Bureau of Labor Statistics, *Women at Work: A Visual Essay*, MONTHLY LAB. REV. 46, 48 (Oct. 2003), available at <http://www.bls.gov/opub/mlr/2003/10/ressum3.pdf>.

16. EMILY POMEROY & HEATHER FOUST-CUMMINGS, CATALYST, 2009 CATALYST MEMBER BENCHMARKING REPORT 5, available at [http://www.catalyst.org/file/306/bench\\_web.pdf](http://www.catalyst.org/file/306/bench_web.pdf).

17. *Pinstripe Power Giftset*, BARBIE COLLECTOR, available at <http://www.barbiecollector.com/shop/doll/pinstripe-power-giftset-19791> (released in 1998).

Increased focus on female directors led to a rise in the number of women on the boards of Fortune 500 companies, from 69 percent in 1993 to 86 percent in 1998.<sup>18</sup> With the changing landscape of corporate leadership, new methods of managerialism developed and changed corporate monitoring and decision-making.<sup>19</sup> Before this new wave of gender diversity swept across the world, there was mixed support for this heterogeneity.<sup>20</sup> A 2010 study confirmed a new phase in corporate diversity theories as all corporate insiders interviewed overwhelmingly cited board diversity as an important goal worth pursuing.<sup>21</sup> From hesitancy to undisputed support, modern corporations have enacted gender diversity initiatives with real results.<sup>22</sup> In this new regime, change in corporate culture continues to be driven by management, which stands at the base of corporate change.<sup>23</sup> Because of this gender parity progress and a new cultural tool, gender-focused promotion initiatives must be revisited.

Corporate culture can be described as an unarticulated vision an organization has of itself, which is manifested in values, rituals, heroes, symbols, and practices.<sup>24</sup> Diversity programs inherently affect corporate culture as they impress upon the organization values and practices to further the goal of gender parity.<sup>25</sup> As with any culture, changes in corporate culture require long-term strategies, policies, messaging, and practices.<sup>26</sup> Although intangible, cultural perceptions of women can be directly influenced by deliberate actions. Cultural goals of significant change, therefore, require intentional efforts on behalf of corporate leaders.<sup>27</sup> Effective diversity efforts require a multifaceted approach to change organizational culture, structure, and behavior.<sup>28</sup> While there may be no perfect approach, certain tactics, such as setting mandatory hiring quotas or evaluating job performance based on gender diversity, could negatively impact corporate culture by incentivizing affirmative action over meritorious work. Because each corporate culture is different, some tactics may

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18. Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1386 (2001).

19. *See id.* at 1403.

20. *Id.* at 1406.

21. Interviews with corporate directors, executives, regulators, and consultants revealed that nearly all believed gender is a relevant consideration in board candidate selection. Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 760 (2011).

22. *See Dallas, supra* note 18, at 1386.

23. Cheryl L. Wade, *Transforming Discriminatory Corporate Cultures: This is Not Just Women's Work*, 65 MD. L. REV. 346, 347 (2006).

24. Bella Rose Ragins, *Diversity, Power, and Mentorship in Organizations: A Cultural, Structural, and Behavioral Perspective*, in DIVERSITY IN ORGANIZATIONS: NEW PERSPECTIVES FOR A CHANGING WORKPLACE 91, 92 (Martin M. Chemers et al. eds., 1995).

25. *See id.* at 95.

26. *See id.* at 92.

27. *See id.* at 94.

28. *Id.* at 125.

contribute to a pluralistic, encouraging culture in one corporation, while adversely impacting morale and unity in another.

This comment does not seek to promote any specific method of cultural gender change; rather, it discusses the importance of close and responsible oversight by corporate directors when installing programs and policies that have long-term and deep-seated effects. While corporate directors and executives must exercise their best business judgment as fiduciaries, balancing a competing social duty to promote women in the workplace can lead to an imbalance in corporate culture and messaging if not carried out carefully.<sup>29</sup> As the importance of corporate gender equality continues to exist, corporate directors should recognize a new duty to know the effects of gender diversity initiatives. Because corporate directors are responsible for ensuring that known potential dangers are monitored and addressed with a proper process, they must establish an open environment in which individuals can provide feedback on gender initiatives.

Part I of this comment discusses the fiduciary duties associated with corporate directors and shareholders. Judicial rulings from the application of these duties produced the business judgment rule, which provides directors with significant protection from liability due to their fiduciary duties.<sup>30</sup> Breaches of corporate fiduciary duties, in spite of the business judgment rule, often require intent, which is elaborated upon with respect to the corporate oversight duty.

Part II introduces the concept of corporate legitimacy as it originated from public charters of corporations during the United States' formative years. This corporate legitimacy analysis sets the stage for recognizing a legal duty to reflect societal ideals, including diversity. Corporations have long been based on privileges granted by states in the furtherance of public service.<sup>31</sup> By chartering businesses via special statute, legislators effectively established a pattern for organizing certain human relations.<sup>32</sup> Corporations were recognized legal entities or persons, and corporate governance promotes the interests of the corporate "person."<sup>33</sup> These communicated interests create the basis of

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29. R. Roosevelt Thomas, Jr. discusses a similar frustration due to cultural imbalance as a result of a deteriorating affirmative action program. See R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirming Diversity*, in HARVARD BUSINESS REVIEW ON MANAGING DIVERSITY 1, 9 (2001) (explaining that, in the context of failed affirmative action for women in corporations, an imbalanced culture may be plagued with low confidence in senior management, a discouraged workforce, and retention problems).

30. *Infra* Part I.

31. See JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATIONS IN THE LAW OF THE UNITED STATES 1780-1970* 60 (1970) ("We reconciled such grants with our egalitarian conscience, first, by insisting that government's action must be legitimated by determining that it was in the public interest to confer special privileges to obtain services for public convenience or necessity").

32. *Id.* at 17.

33. DAVID SCIULLI, *CORPORATIONS VS. THE COURT: PRIVATE POWER, PUBLIC INTERESTS* 65 (1999).

corporate culture.<sup>34</sup> In governing, therefore, directors should seek not only what is good for the corporation, but also what furthers the interest of the public.<sup>35</sup> When these pursuits conflict, corporate directors should carefully balance the competing duties.

Part III continues discussing diversity initiatives by introducing the specific example of women in the corporate workplace. Women have historically and statistically been underrepresented in corporations, specifically in positions of corporate leadership. Because of this underrepresentation, corporations have developed initiatives to recruit, develop, and encourage women in their workplaces. This is crucial not only for retention, but also for the economic success and profitability of the company.

Part IV explores the effect of diversity initiatives on corporate culture. Corporate initiatives are based upon management strategies, discussions, and programming. Messaging and visions that permeate a corporate organization quickly become the basis of the corporation's culture. This part argues that negative effects on corporate culture due to diversity initiatives are within the purview of corporate oversight because these initiatives require intentional corporate execution.

Part V suggests guidelines for balancing corporate duties of social legitimacy and fiduciary oversight. Corporate social responsibility demands the introduction of cultural monitoring to ensure that diversity initiatives are not negatively impacting other corporate objectives. While the business judgment rule provides protection for corporate directors when determining details related to corporate oversight, the lack of an appropriate monitoring system for corporate culture as it relates to diversity initiatives should be considered a breach of the duty of care.

#### I. CORPORATE FIDUCIARY DUTIES AND THE BUSINESS JUDGMENT RULE

It is well established that corporate directors and executives owe a fiduciary duty to their shareholders to do what is best for the corporation.<sup>36</sup> The state of incorporation governs the extent and details of these fiduciary duties.<sup>37</sup> Many corporations choose to incorporate in Delaware because of its liberal

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34. See Ragins, *supra* note 24, at 92.

35. See Hurst, *supra* note 31, at 105.

36. "A fiduciary duty is an obligation to act in the best interest of another party. For instance, a corporation's board member has a fiduciary duty to the shareholders, a trustee has a fiduciary duty to the trust's beneficiaries, and an attorney has a fiduciary duty to a client." *Breach of Fiduciary Duty Law & Legal Definition*, USLEGAL, <http://definitions.uslegal.com/b/breach-of-fiduciary-duty> (last visited Oct. 25, 2010).

37. "Each state's corporate law provides a basic legal framework that governs the relations of investors with senior managers, directors, and controlling shareholders." Barry D. Baysinger & Henry N. Butler, *The Role of Corporate Law in the Theory of the Firm*, 28 J.L. & ECON. 179, 180 (1985).

corporation law and well-developed body of common law.<sup>38</sup> Delaware law presumes that

‘in making a business decision the directors of a corporation act[] on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.’ Those presumptions can be rebutted if the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith.<sup>39</sup>

The assumption of good faith provides protection for directors who would otherwise decline responsibility for fear of personal liability.<sup>40</sup> The business judgment rule also prevents the courts from interfering with decisions and governance with which they lack expertise.<sup>41</sup> This so-called business judgment rule provides a presumption of propriety on behalf of the corporate director.<sup>42</sup>

There are several policies supporting the deference of courts to the judgment of corporate decision-makers.<sup>43</sup> First, courts acknowledge that directors are fallible individuals who will sometimes make decisions that later prove to be irresponsible:<sup>44</sup> “Sitting judges and state legislators alike began pulling back from their earlier activism in monitoring corporate power.”<sup>45</sup> Second, courts apply the business judgment rule to encourage corporate directors to “enter new markets, develop new products, innovate, and take other business risks.”<sup>46</sup> Third, the courts are often ill-equipped to determine which corporate actions are prudent in complex corporate situations.<sup>47</sup> Finally, use of the courts by shareholders can undermine the authority of corporate directors:

Independence means that a director’s decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences. While directors may confer, debate, and resolve their differences through compromise, or by reasonable reliance upon the expertise of their colleagues and other qualified persons, the end result, nonetheless, must be that each director has brought his or her own informed business judgment to

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38. *Id.* at 184.

39. *In re Walt Disney Co.*, 906 A.2d 27, 52 (Del. 2006).

40. BLOCK, *supra* note 7, at 12.

41. *Id.* at 5-6 (“The rule thus ‘has two components – one which immunizes directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors’”).

42. *See in re Walt Disney Co.*, 906 A.2d at 52.

43. *See* BLOCK, *supra* note 7, at 12.

44. *Id.*

45. SCIULLI, *supra* note 33, at 96.

46. *Rosenfield v. Metals Selling Corp.*, 643 A.2d 1253, 1262 (Conn. 1994).

47. BLOCK, *supra* note 7, at 15.

bear with specificity upon the corporate merits of the issues without regard for or succumbing to influences which convert an otherwise valid business decision into a faithless act.<sup>48</sup>

The courts often reinforce the relationship between corporate directors and shareholders by recognizing that “unhappy shareholders can always vote the directors out of office.”<sup>49</sup>

#### A. Breach of Fiduciary Duties Within the Business Judgment Rule

Despite these policies and the protection of the business judgment rule, courts continue to find breaches of fiduciary duty. For example, in *Francis v. United Jersey Bank*, the Court found that a corporate director breached her fiduciary duty of care because “[d]irectors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect.”<sup>50</sup> In *In re Caremark International Inc. Derivation Litigation*, the Delaware Court of Chancery explained that the plaintiffs would have to show either

(1) that the directors knew or (2) should have known that violations of law were occurring and, in either event, (3) that the directors took no steps in a good faith effort to prevent or remedy that situation, and (4) that such failure proximately resulted in the losses complained of.<sup>51</sup>

Finding a breach of the corporate fiduciary duty of good faith, in spite of the protection of the business judgment rule, is highly fact-dependent and inconsistently described by Delaware common law: “While the Delaware cases have not been precise in articulating the standard by which the exercise of business judgment is governed, a long line of Delaware cases hold that director liability is predicated on a standard which is less exacting than simple negligence.”<sup>52</sup>

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48. *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984).

49. *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342, 1351 (D. Nev. 1997) (quoting *Shoen v. Amerco*, 885 F. Supp. 1332, 1340 (D. Nev. 1994)).

50. *Francis v. United Jersey Bank*, 432 A.2d 814, 822 (N.J. 1981).

51. *In re Caremark Int’l Inc. Derivation Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

52. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Examples of the varying standards of Delaware breach of fiduciary duty include: *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 722 (Del. 1971) (“fraud or gross overreaching”); *Getty Oil Co. v. Skelly Oil Co.*, 267 A.2d 883, 887 (Del. 1970) (“gross and palpable overreaching”); *Warshaw v. Calhoun*, 221 A.2d 487, 492-93 (Del. 1966) (“bad faith . . . or a gross abuse of discretion”); *Moskowitz v. Bantrell*, Del. Supr., 41 Del. Ch. 177, 190 A.2d 749, 750 (1963) (“fraud or gross abuse of discretion”); *Penn Mart Realty Co. v. Becker*, 298 A.2d 349, 351 (Del. Ch. 1972) (“directors may breach their fiduciary duty . . . by being grossly negligent”); *Kors v.*

In addition to finding a breach based on a “negligence” or “gross abuse of discretion” gradient, the Supreme Court of Delaware also recognizes a breach of fiduciary duty based on intentional acts:

A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.<sup>53</sup>

Corporate directors play a key role in making short- and long-term decisions.<sup>54</sup> Establishing intent or negligence for a short-term business decision may be difficult due to the protection of the business judgment rule.<sup>55</sup> Generally, these decisions are protected because the business judgment rule only calls for an informed decision based on material reasonably available at the time and not below a standard of gross negligence.<sup>56</sup> So if a shareholder challenges a director’s decision to merge with another company which later turned out to be unprofitable, the director is protected by the business judgment rule if she made this decision using all materials reasonably available to her at the time, did not exhibit gross negligence, and made the decision in good faith.<sup>57</sup>

#### *B. Breach Through Long-Term Corporate Strategies and Planning*

Corporate fiduciaries are responsible for more than just business decisions.<sup>58</sup> A corporate director’s duty of care applies both to the decision-making function and the oversight function.<sup>59</sup> Unlike business decisions, the oversight function involves “ongoing monitoring of the corporation’s business and affairs over the period of time.”<sup>60</sup> The duty of oversight requires that “[d]irectors must exercise reasonable care to see that company executives carry out their managerial responsibilities and comply with the law.”<sup>61</sup> Along the

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Carey, 158 A.2d 136, 140 (Del. Ch. 1960) (“fraud, misconduct or abuse of discretion”); *Allaun v. Consolidated Oil Co.*, 147 A. 257, 261 (Del. Ch. 1929) (“reckless indifference to or a deliberate disregard of the stockholders”).

53. *In re Walt Disney Co.*, 906 A.2d 27, 67 (Del. 2006).

54. See BLOCK, *supra* note 7, at 126.

55. “The circumstances surrounding a corporate decision are not easily reconstructed in a courtroom years later, since business imperatives often call for quick decisions, inevitably based on less than perfect information.” *Id.* at 17.

56. *Id.* at 75.

57. *Id.* at 21, 75.

58. *Id.* at 126 (“The director’s duty of care applies both to the decision-making function and to the oversight function.”).

59. BLOCK, *supra* note 7, at 126.

60. *Id.*

61. *Id.* at 126-27

same lines of the fallibility permitted by the business judgment rule, this oversight duty does not require absolute control over that which is under the director's management.<sup>62</sup> While directors must inquire when "suspicions are aroused or should be aroused," the business judgment rule does not require directors to "ferret-out" wrong-doing absent a specific warning or other obvious "red flag."<sup>63</sup>

While directors are not required to identify problems without warnings or red flags, directors must investigate when suspicious should be aroused.<sup>64</sup> Directors set the ethical tone of the company, both by establishing standards that trickle down through the organization and by regulating operational and cultural processes.<sup>65</sup> The standard level of due care without an exculpatory charter provision is gross negligence: "If gross negligence means something other than negligence, pleading it successfully in a case like this requires the articulation of facts that suggest a *wide* disparity between the process the directors used to ensure the integrity of the company's financial statements and that which would have been rational."<sup>66</sup>

The Delaware Supreme Court has established that directors may be held liable when there is a "sustained or systematic failure of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable information and reporting system exists."<sup>67</sup> Good faith is implied by measuring the directors' actions to assure this system exists and not by adverse outcomes.<sup>68</sup> In deference to the directors, the Delaware Chancery Court found that the "duty to act in good faith to be informed cannot be thought to require directors to possess detailed information about all aspects of the operation of the enterprise."<sup>69</sup> Large-scale gender initiatives and corporate culture, however, should not be categorized as "detailed information" as they are often listed as major corporate goals and require significant planning.<sup>70</sup> Within a modern era in which many large corporations programmatically support gender parity initiatives which include target hiring, retention programs, and strategic succession planning, the fiduciary duties of directors should evolve with general practice.

While the fiduciary duty continues to be upheld and clarified in recent years, as in *In re Walt Disney*, dicta on the corporation as a member of society has not kept up with the modern economic landscape: "Aside from the duties

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62. *See id.* at 127-28.

63. *Id.* at 127.

64. *Id.* at 127.

65. *See* Martin M. Chemers and Susan E. Murphy, *Leadership and Diversity in Groups and Organizations*, in *DIVERSITY IN ORGANIZATIONS: NEW PERSPECTIVES FOR A CHANGING WORKPLACE* 157, 171-173 (Martin M. Chemers et al. eds., 1995).

66. *Guttman v. Huang*, 823 A.2d 492, 507-08 n.39 (Del. Ch. 2003).

67. *Stone v. Ritter*, 911 A.2d 362, 364 (Del. 2006).

68. *Id.* at 373.

69. *In re Caremark Int'l Inc. Derivation Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

70. *See infra* Part III.B.

imposed by the corpus of doctrine known as ‘corporate law,’ however, no single code of behavior governs the actions of professionals who oversee America’s public companies.”<sup>71</sup> The business judgment rule was created to shield individuals from liability as they make necessary business decisions.<sup>72</sup> These individuals, however, should continue to be held to a duty of ethical and cultural care: “The Enron debacle makes clear that a corporate code of behavior is only as good as the people charged with enforcing it and those who must demonstrate the importance of compliance by their example.”<sup>73</sup>

These principles are directly applicable to gender-based management decisions made in corporations today. Business decisions related to affirmative action programs for women are explicitly protected as discussed in *Johnson v. Transportation Agency*.<sup>74</sup> Specifically, the Supreme Court places a significant burden upon employee plaintiffs to prove the unconstitutionality of affirmative action programs:

‘[T]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program,’ and we see no basis for a different ruling regarding a plan’s alleged violation of Title VII . . . . Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer’s employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer’s decision, the burden shifts to the plaintiff to prove that employer’s justification is pretextual and the plan is invalid . . . . The burden of proving its invalidity remains on the plaintiff.<sup>75</sup>

In this particular case, the Court found that the Transportation Agency appropriately accounted for gender as one factor in promoting Diane Joyce over petitioner Paul Johnson.<sup>76</sup> By shifting the burden to the employee petitioner in this case, the Court again protects short-term business decisions. The Court protects the business’ decision to install an affirmative action program because the program seeks to address a “manifest imbalance.”<sup>77</sup> These

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71. Note, *The Good, the Bad, and their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123, 2125 (2003) [hereinafter *The Good, the Bad, and their Corporate Code of Ethics*].

72. See Block, *supra* note 7, at 40

73. *The Good, the Bad, and their Corporate Code of Ethics*, *supra* note 71, at 2130.

74. See *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 630 (1987) (“[A]n employer seeking to justify the adoption of a[n affirmative action] plan need not point to its own prior discriminatory practices . . . rather, it need only point to a ‘conspicuous . . . imbalance in traditionally segregated job categories.’”).

75. *Id.* at 626-27.

76. *Id.* at 641.

77. See *id.* at 632.

imbalances are a reflection of societal expectations, as discussed in Part III.<sup>78</sup> Although the *Johnson* Court protects a business' ability to establish affirmative action programs, it does not comment on the long-term administration of this program and how it may affect the corporation's societal duties. Within the business judgment rule, the duty of oversight governs a corporation's management of affirmative action programs after the programs are established. Because of this duty, these long-term cultural corporate initiatives remain subject to potential findings of breach and, therefore, require careful management.

## II. CORPORATE LEGITIMACY

The interplay between the law and corporations is both natural, due to the historical emergence of corporations as a social entity, and manufactured by state legislatures seeking to exercise control over this new entity.<sup>79</sup> As the U.S. economy encouraged the centralization of workers and the process of conglomeration, businesses increased in incorporation.<sup>80</sup> The development of these organizations sparked the need for growth in the law:<sup>81</sup>

A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of the law. . . Among the most important [properties conferred] are immortality, and . . . individuality. . . It is chiefly for the purpose of clothing bodies of men, in succession with these qualities and capacities, that corporations were invented, and are in use.<sup>82</sup>

As individuals, corporate charters were crafted to address the potential impacts and behaviors of each corporation: “[S]tate legislatures acted on republican principles by keeping their ‘artificial persons’ on a short leash. In incorporating each private business on a case-by-case basis, the charters often mandated that the business contribute to the general welfare.”<sup>83</sup>

### A. *The History of Corporate Legitimacy*

The historical genesis of corporate private power is important when trying to understand the intent of corporate policies and procedures. The history of the

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78. *See infra* Part III.

79. *See generally* HURST, *supra* note 31, at 14 (“The rapid elaboration of the law of partnership by the early nineteenth century undoubtedly reflected the long-standing popularity of that style of unincorporated enterprise. . . After independence the desire of businessmen to use the corporation mounted rapidly; state legislatures chartered 317 business corporations from 1780 to 1801.”).

80. *Id.* at 18.

81. *Id.* at 73.

82. *Trustees of Dartmouth Coll. v. Woodward*, 4 U.S. 463, 489 (1819).

83. SCIULLI, *supra* note 33, at 86.

legal formation of corporations provides that social policies encouraged corporate growth.<sup>84</sup> Policies were shaped by “men’s ideas about productive and acceptable ways of organizing behavior and their partly deliberate, partly trial-and-error conceptions of the instruments and conditions which were functionally necessary to the kind of social patterns they trusted and wanted to adopt.”<sup>85</sup>

Until 1888, each act of incorporation was thoroughly lobbied and debated as any other item on a state legislature’s agenda.<sup>86</sup> As an artificial entity that can wield practical power, corporations must hold themselves to standards established externally.<sup>87</sup> Corporate legitimacy requires that “no arrangement of relations or of power recognized in law should be treated as an end in itself or as autonomous. An institution must be legitimated by its utility to some chosen end other than its own perpetuation.”<sup>88</sup> The concept of corporate legitimacy is based on the inherent responsibility of corporations to contribute to the public because of the corporation’s ability to effect change.<sup>89</sup> The importance of this legitimacy stemmed from “using public power to affect private power.”<sup>90</sup> This private power was given with conditions so that the states could ensure corporations would contribute not only to general economic growth, but also to normative standards of behavior.<sup>91</sup> Charter provisions allowed states to consider whether a corporation contributed to community services, prohibited owners of one corporation from owning stock in another corporation, limited the amount of capital a corporation could accumulate as well as the duration of the charter, and protected vulnerable parties, such as shareholders, creditors, and employees, against corporate power.<sup>92</sup> States ensured these behaviors would be maintained by writing “self-destruction” clauses in special charters, which would cause corporations to forfeit their charter and legal rights if they did not adhere to their social obligations.<sup>93</sup>

As corporations established a public market in which external investors could own shares of the company, corporate roles and responsibilities grew to account for this expanded population of interested parties:

The conventional view assigned the stockholder two roles in legitimating corporate power. His interest in a share of the corporation’s earnings defined a primary goal of the enterprise . . .

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84. See HURST, *supra* note 31, at 153.

85. *Id.* at 153-54.

86. SCIULLI, *supra* note 33, at 85.

87. HURST, *supra* note 31, at 58 (“An institution which wields practical power – which compels men’s wills or behavior – must be accountable for its purpose and its performance by criteria not wholly in the control of the institution itself.”).

88. *Id.*

89. *Id.*

90. *Id.*

91. SCIULLI, *supra* note 33, at 86.

92. *Id.*

93. *Id.*

also to play an active role – and in some respects a superior role – in the internal governance of the corporation . . . insure that those immediately in charge of the enterprise would be held to a profit-seeking performance, which under market discipline would make the firm an acceptably productive contributor to the economy.<sup>94</sup>

As the public market grew, courts loosened restraints on corporate behavior by weakening the shareholder's influence on internal corporate governance.<sup>95</sup> After multiple stock market crashes in the 1800s, state courts began to develop a new doctrinal approach towards corporations outside that of the state legislatures.<sup>96</sup> This doctrine reflected the courts' opinion that "private commercial enterprises had a 'natural right' to accumulate private wealth."<sup>97</sup> The new doctrine also reflected a change in corporate structure, as corporation owners began to delegate control to full-time managers.<sup>98</sup> In this new era of incorporation and separation of corporate ownership and power, states began drafting standard charters rather than corporation-specific guidelines.<sup>99</sup> To maintain responsibility through changing organizational roles, state courts began to set "*normative duties on corporate owners and corporate managers independently of public law norms in their states' standard charters.*"<sup>100</sup> These were standards of behavior codified in English and U.S. courts' fiduciary law.<sup>101</sup> In effect, state legislatures began to withdraw from close monitoring of corporate social duties and acknowledged "that the corporate natural person has interests 'of its own,' and that the corporate agent has discretion to interpret and advance these interests in 'its' behalf."<sup>102</sup>

During the 1920s and 1930s, the U.S. economy transitioned from a commercial society to an industrialized, urbanized society.<sup>103</sup> In this regime, state courts respected the autonomy of corporate governance boards.<sup>104</sup> Moving away from state charters, courts used fiduciary laws to ensure that corporations continued to comply with internal and external expectations.<sup>105</sup> As of the 1970s, corporate law had

successfully endowed central control [to realize the organizational potential of the corporate instrument], while it had only dubious

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94. HURST, *supra* note 31, at 85.

95. SCUILLI, *supra* note 33, at 97-98.

96. *Id.*

97. *Id.*

98. *Id.* at 90.

99. *See id.* at 91, 93.

100. *Id.* at 92.

101. Sciulli, *supra* note 33, at 92-93.

102. *Id.* at 97.

103. *Id.*

104. *See id.*

105. *See* HURST, *supra* note 31, at 93.

effect in helping stockholders to effective roles, either collectively or separately. We now relied primarily upon legal regulations external to the corporation's own constitution to enforce its responsibility to its immediate economic function and to its broader social relations.<sup>106</sup>

This industrial shift contributed to the rise of the business judgment rule and general deference to corporate directors and boardrooms. Without detailed state charters, which often granted power to corporations only when the corporation served a legitimate public purpose, corporate directors were free to serve one master: the shareholders. Big businesses enjoyed greater discretion from bench activism as courts withdrew from corporate monitoring. In the new urban society, the tone of corporate legitimacy changed to one of judicial deference.

### *B. Modern Corporate Legitimacy: Judicial Deference*

As history has shown, oversight of corporate responsibilities and social duties has been unwinding since incorporation by special state charters began in the early 1800s.<sup>107</sup> Though the courts continue to hold corporations fiscally and ethically responsible, the courts' growing deference to corporate oversight has allowed increased flexibility of corporate discretion. Recent corporate scandals and controversies such as Enron, Lehman Brothers, and British Petroleum have sparked a new and heated debate on the role of the courts and legislatures in enforcing an ethical standard for corporate oversight.<sup>108</sup> The courts have shifted from "normatively mediating corporate governance on public law grounds to instrumentally facilitating private contracting. That is, the courts have been evolving from a position of *republican vigilance* to one of *liberal complacency*."<sup>109</sup>

By the end of the century, judges began transferring the courts' then established practice of deference to management's interpretations. With one significant exception, judges thereby transferred to management the discretion – the scope of moral hazard – to determine the corporation's place and purpose within society.<sup>110</sup>

The revival of corporate legitimacy should be adapted to modern gender diversity initiatives to balance social and business responsibilities.

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106. *Id.* at 110-11.

107. *See supra* Part II.A.

108. *See* C.G. Hintmann, Comment, *You Gotta Have Faith: Good Faith in the Context of Directorial Fiduciary Duties and the Future Impact on Corporate Culture*, 49 ST. LOUIS U. L.J. 571, 595 (2005).

109. SCIULLI, *supra* note 33, at 80.

110. *Id.* at 171.

## III. WOMEN IN CORPORATIONS

[The first female director] I thought was fairly weak. Not a strong member. I think – and this is just my conjecture – I think when she was picked or brought on the board I think they picked her for diversity reasons not for strengthening the board which I’m totally against, but I realize why it happened. When [the second female director] came on she was picked for strength.

- A white male respondent in an interview.<sup>111</sup>

Historically, “men and women are thought to differ both in terms of achievement-oriented traits . . . and in terms of social- and service-oriented traits. . . .”<sup>112</sup> Specifically, women are often stereotypically characterized as kind, helpful, sympathetic, and concerned about others, whereas men are aggressive, forceful, independent, and decisive.<sup>113</sup> This can affect the managerial roles or responsibilities awarded to women since “top management and executive level jobs are almost always considered to be ‘male’ in sex-type. They are thought to require an achievement-oriented aggressiveness and an emotional toughness that is distinctly male in character.”<sup>114</sup> Professor Virginia Schein conducted empirical investigations of managerial sex role stereotyping in the early 1970s, which “revealed that ‘think manager-think male’ was a strongly held belief among middle managers in the United States.”<sup>115</sup> Since the 1970s, women have made not made significant progress in advancing male perceptions of females in positions of power.<sup>116</sup>

Though gender discrimination may sound like a pre-industrial era relic, it persists in corporations today.<sup>117</sup> From 1997 to 2007, employment in large companies increased by approximately fifteen million.<sup>118</sup> Despite this

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111. Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 445-46 (2008).

112. Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent Up the Organizational Ladder*, 57 J. SOC. ISSUES 657, 658 (2001).

113. *Id.*

114. *Id.* at 659.

115. Virginia E. Schein, *A Global Look at Psychological Barriers to Women’s Progress in Management*, 57 J. SOC. ISSUES 675, 676 (2001).

116. *Id.* at 678 (“On the other hand, the male managers in the replication studies hold attitudes similar to those of male managers in the 1970s.”).

117. See Casey B. Mulligan, *When Will Women Become a Work-Force Majority?*, ECONOMIX (May 6, 2009, 6:59 am), <http://economix.blogs.nytimes.com/2009/05/06/when-will-women-become-a-majority-of-the-workforce/>.

118. Compare U.S. CENSUS BUREAU, STATISTICS OF U.S. BUSINESSES (1997), available at [http://www2.census.gov/econ/susb/data/1997/us\\_state\\_totals\\_1997.xls](http://www2.census.gov/econ/susb/data/1997/us_state_totals_1997.xls) (listing the employment total as approximately 105 million) with U.S. CENSUS BUREAU, STATISTICS OF U.S. BUSINESSES (2007), available at [http://www2.census.gov/econ/susb/data/2007/us\\_state\\_totals\\_2007.xls](http://www2.census.gov/econ/susb/data/2007/us_state_totals_2007.xls) (listing the employment total as approximately 120 million).

expanding population, women continue to be statistically underrepresented in corporate leadership roles. Although women comprised nearly fifty percent of the workforce in 2009,<sup>119</sup> less than three percent of Fortune 500 chief executive officers were female.<sup>120</sup> Only 10 percent of senior managers in Fortune 500 companies are female.<sup>121</sup> Although gender discrimination may not be as blatant as it once was when women were first introduced into the corporate workplace, it “lingers in a plethora of work practices and cultural norms that only appear unbiased. They are common and mundane – and woven into the fabric of an organization’s status quo – which is why most people don’t notice them, let alone question them.”<sup>122</sup>

Sexual harassment claims in the workplace continue to drop as the U.S. Equal Employment Opportunity Commission provides legal recourse for victims.<sup>123</sup> Because various legislative reforms, such as Title VII of the Civil Rights Act and the Equal Pay Act, were passed in the 1960s, access to education, training, and jobs gradually increased, changing the corporate culture landscape for women at work.<sup>124</sup> Gender inequalities, however, continue in the workplace as negative treatment based on gender bias evolved into two mechanisms: hostile work environment and disparate treatment.<sup>125</sup> Modern examples of these more subtle mechanisms include “daily phone calls about when she would return to work while she was recovering from an injury, even though her male coworkers had been permitted reasonable disability leaves,”<sup>126</sup> denial of training, information, and support needed to succeed at work,<sup>127</sup> and tense work atmospheres due to complete disengagement.<sup>128</sup> This deeper layer of gender fracture within corporations has sparked studies of the underlying cultural differences between men and women in the workplace.<sup>129</sup> Gender initiatives, therefore, must address deeper corporate society.

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119. Mulligan, *supra* note 117.

120. See Del Jones, *Women CEOs Slowly Gain on Corporate America*, USA TODAY, Jan. 2, 2009, [http://www.usatoday.com/money/companies/management/2009-01-01-women-ceos-increase\\_N.htm](http://www.usatoday.com/money/companies/management/2009-01-01-women-ceos-increase_N.htm).

121. Debra E. Meyerson & Joyce K. Fletcher, *A Modest Manifesto for Shattering the Glass Ceiling*, in HARVARD BUSINESS REVIEW ON MANAGING DIVERSITY 67, 67 (2001).

122. *Id.* at 70.

123. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, SEXUAL HARASSMENT CHARGES: EEOC & FEPAS COMBINED: FY 1997 – FY 2010, [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm) (last visited Feb. 29, 2012).

124. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, LAWS ENFORCED BY EEOC, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Feb. 29, 2012).

125. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1714 (1998).

126. *Id.* at 1718.

127. *Id.* at 1721.

128. *Id.* at 1722.

129. See, e.g., Joan MacLeod Heminway, *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN’S L.J. 173, 196 (2007).

*A. The Business Case for Women in Corporations*

According to Professor Heminway, “men base their trust in others most prominently on shared group status (collective trust), while women base their trust in others on *both* shared group status *and* the existence of personal relationships (relational trust).”<sup>130</sup> These trust variations have been shown to actually lead to greater trustworthiness within corporations and yet women continue to lack in corporate executive representation:

[I]nvestors do not trust female corporate leaders . . . despite evidence of the success of women in the corporate environment, prospective investors in an initial public offering (“IPO”) are willing to invest more in a corporation that has a male Chief Executive Officer (“CEO”) than they would invest in a corporation that has a female CEO – and they are also willing to compensate that male CEO better than they would compensate a woman with the *exact* same qualifications for service in that *exact* same role.<sup>131</sup>

These public perceptions can discourage women from pursuing top corporate positions.<sup>132</sup> Ironically, the different ways in which men and women trust and evaluate circumstantial decisions make gender parity valuable to corporations:

Because of differences in their bases for trusting behavior and trustworthiness, female directors may exhibit trusting behaviors or trustworthiness in different circumstances or environments than male directors exhibit trusting behaviors and trustworthiness . . . varied bases for trusting and trustworthiness among board members should enhance thoroughness and caretaking in the boardroom, since not all directors (at least initially) will trust or be trusted by the same people.<sup>133</sup>

The business case for gender parity, therefore, is based in the value of innovative thought and competing approaches: “Growth is thus best pursued when a firm has appropriate and sufficient human capital to manage an expanding organization . . . diversity can provide the breadth of experience and knowledge that is likely to benefit a firm pursuing such growth.”<sup>134</sup> In other

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130. *Id.* at 178. Professor Heminway is an Associate Professor at the University of Tennessee College of Law. *Id.* at 173.

131. *Id.* at 185.

132. *See id.* at 193.

133. *Id.* at 196.

134. Sean Dwyer et al., *Gender Diversity in Management and Firm Performance: The Influence of Growth Orientation and Organizational Culture*, 56 J. BUS. RES. 1009, 1010 (2003).

words, two heads are truly better than one, especially if those heads address issues differently. Studies have shown this to be quantitatively true: companies with more women board members have a 53 percent higher return on equity, a 42 percent higher return on sales, and a 66 percent higher return on invested capital.<sup>135</sup> Beyond cognitive diversity, women also reflect over 75 percent of primary shoppers for households.<sup>136</sup> Commanding this significant purchasing power, women control \$12 trillion of the overall \$18.4 trillion in global consumer spending.<sup>137</sup> Marketing and product development strategies developed by female leaders are likely to better target these shoppers and reflect their customer base.<sup>138</sup> By recruiting and developing female leaders, corporations are better equipped to direct efforts towards female customers and capture a share of that multi-billion-dollar market. Because of these and other business reasons, corporations have become very focused on gender parity.<sup>139</sup>

### B. Corporate Gender Diversity Initiatives

Diversity in general has risen to the top of many long-term goals as organizations vie for recognition and accolades for diversity initiatives.<sup>140</sup> Companies actively strive to earn national gender initiative-related awards, such as being listed on *Working Mother's* "Working Mother 100 Best Companies"<sup>141</sup> *Equal Opportunity* magazine's Reader's Choice list of Top 50 Employers,<sup>142</sup> and *Catalyst Award*<sup>143</sup> winners. In 1986, only thirty companies made *Working Mother* magazine's "best companies" list, whereas the 2010 list

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135. Lois Joy, et al., *The Bottom Line: Corporate Performance and Women's Representation on Boards*, CATALYST (2007), <http://www.catalyst.org/file/139/bottom%20line%202.pdf>.

136. *Buying Power*, CATALYST 1, 2 (March 2011), <http://www.catalyst.org/publication/256/buying-power>.

137. *Id.*

138. See GLOBAL MKTS. INST. OF GOLDMAN SACHS, *THE POWER OF THE PURSE: GENDER EQUALITY AND MIDDLE-CLASS SPENDING* 14 (2009), available at <http://www.goldmansachs.com/our-thinking/women-and-economics/power-of-purse.pdf>.

139. See Dwyer et al., *supra* note 134, at 1010.

140. See, e.g., *New Job Creation and Economic Impact Dominate Big Numbers for Minority Business Development Agency*, U.S. DEP'T OF COMMERCE, MINORITY BUS. DEV. AGENCY, [http://www.mbda.gov/?section\\_id=9&bucket\\_id=873&content\\_id=6475&well=entire\\_page](http://www.mbda.gov/?section_id=9&bucket_id=873&content_id=6475&well=entire_page) (last visited Mar. 4, 2012) (providing an example of government agency's focus on diversity).

141. See *Working Mother Best Companies Then and Now*, WORKING MOTHER, <http://www.workingmother.com/BestCompanies/100-best-companies/2010/09/working-mother-best-companies-then-and-now> (last visited Feb. 29, 2012) [hereinafter *Working Mother: 100 Best Companies Website*].

142. *Readers' Choice Awards*, EQUAL OPPORTUNITY PUBLICATIONS, <http://www.eop.com/awards-EO.php> (last visited Mar. 4, 2012).

143. *Catalyst Award Winners*, CATALYST, <http://www.catalyst.org/page/69/catalyst-award-winners> (last visited Mar. 4, 2012).

was limited to the top one hundred companies.<sup>144</sup> This growth is directly related to the rise in corporate gender diversity initiatives.<sup>145</sup>

Gender diversity initiatives have made notable progress.<sup>146</sup> In 1993, the percentage of Fortune 500 firms without women on company boards was 51 percent.<sup>147</sup> By 2007, however, that percentage had fallen to 12 percent.<sup>148</sup> Many corporations provide training opportunities and networking groups to advance women in the corporate workplace.<sup>149</sup> These initiatives, which often lead to promotions, can set the tone of the company's culture and overtake other corporate culture messages.<sup>150</sup> To encourage women into positions of leadership, corporations often sponsor women's affinity groups and establish programs to increase the promotion of women by facilitating networking opportunities and skills.<sup>151</sup> Leaders also signal the importance of gender parity through the selection of their board members, which can show that the company "embraces equality in employment and has removed the glass ceiling and the last vestiges of discrimination."<sup>152</sup> These messages are intended to reverberate through the organization and are essential to setting a cultural tone of gender equality: "For men to behave more responsibly toward their female colleagues, they must work in a corporate culture that supports and affirms gender equity advocacy. The chief executive officer (CEO) establishes that

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144. *Compare Working Mother: 100 Best Companies Website*, *supra* note 141, with *2010 Working Mother 100 Best Companies*, WORKING MOTHER, <http://www.workingmother.com/2010/08/2010-working-mother-100-best-companies> (last visited Mar. 17, 2012).

145. *Working Mother: 100 Best Companies Website*, *supra* note 141.

146. *See* Dwyer et al., *supra* note 134, at 1009.

147. Broome & Krawiec, *supra* note 111, at 443.

148. *Id.*

149. *See generally* note 16, at 5-10. Many corporations have examples of diversity initiatives. *See e.g.*, *About WOLF*, BEST BUY WOMEN'S LEADERSHIP FORUM, [http://www.wolfatbestbuy.com/about\\_wolf/](http://www.wolfatbestbuy.com/about_wolf/) (last visited Mar. 4, 2012); *Diversity and Inclusion*, CAMPBELL SOUP COMP., [http://www.campbellsoupcompany.com/csr/employees\\_diversity.asp](http://www.campbellsoupcompany.com/csr/employees_diversity.asp) (last visited Mar. 4, 2012); *Women's Initiative*, DELOITTE, <http://www.deloitte.com/us/women> (last visited Mar. 4, 2012); *Women's Network*, GENERAL ELECTRIC, <http://www.ge.com/company/culture/people/womensnetwork.html> (last visited Mar. 4, 2012); *Women's Networking Group*, SCHIFF HARDIN, <http://www.schiffhardin.com/diversity/womens-networking-group> (last visited Mar. 4 2012).

150. *See, e.g.*, Kimberly D. Krawiec et al., *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say about Why Diversity Matters*, DUKE LAW SCHOLARSHIP REPOSITORY: FACULTY SCHOLARSHIP (2010), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2964&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2964&context=faculty_scholarship).

151. Sylvia Ann Hewlett & DeAnne Aguirre, *When Female Networks Aren't Enough*, HARV. BUS. REV. BLOG NETWORK (May 12, 2010, 12:00 PM), [http://blogs.hbr.org/hbr/hewlett/2010/05when\\_female\\_networks\\_arent\\_eno.html](http://blogs.hbr.org/hbr/hewlett/2010/05when_female_networks_arent_eno.html).

152. Broome & Krawiec, *supra* note 111, at 452-53.

culture.”<sup>153</sup> While culture may appear to be a purely social enterprise, it falls within the scope of fiduciary duties because it affects employee behavior and productiveness.

Studies suggest that “an appropriately configured and supportive organizational environment may need to be in place before the beneficial aspects of gender diversity can be fully realized.”<sup>154</sup> Modern gender discrimination in the workplace may be so subtle that it can only be addressed by examining the fabric of the corporation itself.<sup>155</sup> Mere messaging from “the top down” will not necessarily effect the cultural changes needed to establish gender parity.<sup>156</sup> Companies seeking to increase gender diversity “may be advised to cultivate a set of organizational values that focus closely on employee affiliation and consensus-building, paternal leadership styles, and strategic emphases that are internally oriented and informal – all aspects of the clan culture type.”<sup>157</sup> By establishing corporate values, leadership standards, and strategic emphases, the next level of gender parity should focus on rejecting the suggestion of a token female on a corporate board and build the inextricable link between gender diversity and merit within corporate culture.

#### IV. EFFECT ON CORPORATE CULTURE

By culturally prioritizing gender diversity over qualifications, corporations can disincentivize merit-based promotions and send unintended messages to their employees. This can occur because “corporate culture is the deeply felt system of shared values and assumptions, conveyed through stories, myths, and legends, that explains how members of the organization think, feel, and act. These shared values operate both consciously and unconsciously to define an organization’s view of itself and its environment.”<sup>158</sup> Just as state legislatures formerly established charters detailing the values and limitations for these private powers, corporate leaders create vision statements, policies, and practices that form the fabric of the corporation’s culture.<sup>159</sup>

##### A. Corporate Culture Messaging

Corporate messaging can also come in the form of promotions and hiring decisions.<sup>160</sup> Gender can be appropriately used after two candidates are determined to be equally qualified: if gender is only a “tie-breaking” factor in a decision in which qualifications were not too disparate, then use of this factor

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153. Wade, *supra* note 23, at 347.

154. Dwyer et al., *supra* note 134, at 1009.

155. *See id.* at 1017.

156. *See id.* at 1016.

157. *Id.* at 1017.

158. Wade, *supra* note 23, at 347.

159. *See id.*

160. *See generally* Ragins, *supra* note 24, at 98-99.

does not violate the equal protection rights under the U.S. Constitution.<sup>161</sup> Before women can even reach the stage of being “tied” with male competitors, they must overcome stereotypical and social barriers as discussed in Part III. Professor Heilman argues that these stereotypes are not only descriptive but prescriptive by setting the norms for suitable behavior.<sup>162</sup> Because women are often perceived to lack stereotypically male traits (e.g., aggression and decisiveness), they will often be seen as a poor fit for positions of leadership and great responsibility.<sup>163</sup> Even when women do deviate from their stereotypical behaviors and take on “male traits,” these deviations often “spark disapproval and negative reactions. . . [f]or example, female managers exhibiting a masculine rather than a feminine leadership style have long been found to elicit less enthusiasm and to produce expectation of less satisfaction among employees.”<sup>164</sup> Even in situations where gender is used in the place of merit-based qualifications, such as experience, past performance, or a “good behavioral fit,” discouraged employees may view gender initiatives as detrimental to a meritocracy.<sup>165</sup> These opinions can color their interactions with other women in the workplace, bringing gender under constant negative scrutiny.<sup>166</sup>

The promotion of or focus on the development of women in a corporation is a form of messaging within a corporate culture.<sup>167</sup> These messages can be confusing when companies focus more on the promotion of women and less on the promotion of those who work hard regardless of gender. The effect of this misaligned messaging can be quite damaging and hard to detect.<sup>168</sup> If diversity increases without anti-discrimination efforts, women at work will suffer from more “instances of sexual harassment, and situations where women receive fewer promotions and less pay than their male counterparts for the same work.”<sup>169</sup> High level messaging, therefore, should be followed by low-level feedback opportunities to understand subtle changes in corporate culture.

Promoting or hiring a woman who is ill-equipped to handle the job also creates a cultural division within the corporation.<sup>170</sup> Not only is the company losing return on an asset, but also both men and women who witness this woman’s negative impact on the organization may question the company’s

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161. See *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989).

162. Heilman, *supra* note 112, at 659.

163. Heilman’s “Lack of Fit model is based on the idea that expectations about how successful or unsuccessful a person will be in working at a particular job are a driving force underlying personnel decisions.” *Id.* at 660.

164. *Id.* at 667.

165. See Ragins, *supra* note 24, at 106.

166. *Id.*

167. Wade, *supra* note 23, at 371.

168. *Id.*

169. *Id.* at 350.

170. See Ragins, *supra* note 24, at 106.

fidelity to its vision statement.<sup>171</sup> Although a vision statement is merely a statement, there are two potential problems when employees get disenchanted with their company's stated values. First, employees may lose respect for management in all areas and adopt a more graded approach towards direction.<sup>172</sup> This kind of dispersion of behavior can make large populations of employees difficult to manage.<sup>173</sup> Second, employees can begin to take the company's actions and messaging as aggressive or contrary to their personal beliefs.<sup>174</sup> While not all employees need to agree with a company's values, they should be able to work under them without feeling personally conflicted. Though there may be no law that requires companies to encourage their employees through vision statements and policies, cultural cohesiveness and respect are keys to meeting goals.<sup>175</sup>

One example of how diversity initiatives and company visions can become conflicted is when companies set hiring or promotion goals to address underrepresented populations.<sup>176</sup> If a manager's success is based on the recruiting and professional development of women, that manager is pursuing a gender employment goal.<sup>177</sup> Corporate executives may employ a variety of tactics to incentivize diversity: "Wal-Mart's CEO announced 'that he would cut executive bonuses if the company fails to meet diversity goals.'"<sup>178</sup> Incentivizing gender parity with financial gain or needed staffing can turn a gender/diversity initiative into the 800-pound gorilla in the room. It obstructs forward progress, but no one is willing to discuss it for fear of appearing sexist or against company policy. Despite this danger, some executives can still carefully make these types of diversity incentive strategies culturally effective. A pioneer in building company policy and culture, Sam Walton, the founder of Wal-Mart, established a strong, vertically unified corporate culture which has helped sustain the company's vision through an annual earnings growth of

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171. As an example, Lockheed Martin's value statements include: "Perform With Excellence: We understand the importance of our missions and the trust our customers place in us. With this in mind, we strive to excel in every aspect of our business and approach every challenge with a determination to succeed." *Ethics*, LOCKHEED MARTIN, <http://www.lockheedmartin.com/us/who-we-are/ethics.html> (last visited Mar. 6, 2012).

172. Ragins, *supra* note 24, at 102.

173. *See id.* at 106.

174. Ewart E. Smith, *Individual Versus Group Goal Conflict*, 58 J. ABNORMAL AND SOC. PSYCHOL. 134, 134 (1958).

175. *See* Ragins, *supra* note 24, at 94.

176. *See* Douglas M. McCracken, *Winning the Talent War for Women: Sometimes It Takes a Revolution*, in HARVARD BUSINESS REVIEW ON MANAGING DIVERSITY 171, 182 (2001).

177. DELOITTE, WOMEN'S INITIATIVE ANNUAL REPORT (2010), available at [www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/WAR\\_sm%20FINAL.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/WAR_sm%20FINAL.pdf).

178. *Id.*

fifteen percent and sales over \$200 billion over five years.<sup>179</sup> At Wal-Mart, “[f]or the corporate culture to catch on, the messages had to be communicated personally. . . [Sam Walton] wanted to build and then spread a culture, because only if the messages were transmitted consistently and with great clarity would the organization function effectively.”<sup>180</sup> Culture is, therefore, shaped not only by the messages sent through the organization via policies, procedures, and strategies, but also by the careful solicitation and implementation of feedback.<sup>181</sup>

### *B. Corporate Cultural Damage and Breach of Oversight Duties Through Over-Promotion*

Promotion can be similar to hiring in diversity initiatives, because if women are over-promoted (promoted without being appropriately prepared) or promoted over a more qualified man, the corporation may be sending a message to its populace that prioritizes gender over merit. Corporations must marry the vision of gender diversity with the company’s overarching goals:

Transmitting the vision is not enough. Each level of management should be accountable to the next highest level, reporting the extent to which managers have accomplished the vision of gender equity . . . the middle of the hierarchy . . . serve the company both as managers and leaders. They help to create and articulate a corporate vision and policy of gender equity and they are also responsible for its implementation by supervising the managers who report to them. It is the ultimate responsibility of each store manager to carry out the corporate policy of gender equity by training and monitoring employees.<sup>182</sup>

In fact, all corporate individuals must get involved in changing corporate gender disparities, from managers to CEOs.<sup>183</sup> This means that those who are at the front line of production and profitability are also responsible for corporate

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179. Mike Troy, *The Culture Remains the Constant*, DISCOUNT STORE NEWS, June 8, 1998,

[http://findarticles.com/p/articles/mi\\_m3092/is\\_n11\\_v37/ai\\_n27536852/?tag=content;coll](http://findarticles.com/p/articles/mi_m3092/is_n11_v37/ai_n27536852/?tag=content;coll).

180. Wade, *supra* note 23, at 358.

181. See generally Ragins, *supra* note 24, at 92.

182. Wade, *supra* note 23, at 367.

183. *Id.* at 368. (“Unfortunately, senior officers and managers have a conflict. It is in their best interest to say that ‘all is well,’ even when it is not. . . managers should be challenged by corporate leaders whenever there are disparities in pay and promotion rates for female and minority employees. This is everyone’s task and not work that should be delegated to diversity officers and human resources professionals alone. The CEOs must get involved. Men, not just women, must get involved. Whites, not just people of color, must get involved.”)

culture and messaging.<sup>184</sup> Managers whose duty it is to promote individuals due to merit, therefore, also carry the burden of ensuring corporate gender visions are followed. This conflict can disincentivize hard work or attack a cultural belief in merit-based promotion. Over-promotion can also put the corporation at a competitive disadvantage if the woman is not prepared to perform.

As discussed earlier, corporate culture and gender initiatives require long-term corporate messaging.<sup>185</sup> The duty of oversight over long-term strategies may be fulfilled by assuring proper monitoring and feedback systems are in place to identify and raise any concerns.<sup>186</sup> An imbalance of corporate productivity and gender diversity can occur if the entire organization is not properly engaged in the fulfillment of the oversight duty:

Understanding the role of corporate officers beyond the CEO in establishing a firm's culture, particularly a culture of racial and gender equity, requires a consideration of the levels and types of corporate management. Understanding differences among corporate managers is essential to understanding management's responsibility in establishing the information-gathering systems that monitor compliance with law, including the law prohibiting discrimination.<sup>187</sup>

This imbalance can be an intentional breach of the oversight fiduciary duty if it can be proved that corporate directors should have known of this potential threat to corporate culture and productivity.<sup>188</sup> Because corporate culture initiatives require activism at all levels of the corporation, evidence that corporate directors should have known about these initiatives and that they should have been monitoring for the initiatives' effects is highly likely:

The potential to transform Wal-Mart's culture in a way that includes the interests of female employees is in the hands of the company's leaders – the CEO and senior executives. As the company's leaders, it is up to them to state corporate beliefs, values and policies concerning gender equity.<sup>189</sup>

Because gender equity requires affirmative corporate actions to drive diversity initiatives, directors must be held accountable for understanding the impact of these initiatives. The fiduciary duty of care requires that corporate directors stay engaged in and informed on corporate activities which may affect

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184. *Id.*

185. See generally Ragins, *supra* note 24, at 94-95.

186. See Block, *supra* note 7, at 130.

187. Wade, *supra* note 23, at 365.

188. See *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963) (“If [a director] . . . has ignored either willfully or through inattention obvious danger signs of employee wrongdoing, the law will cast the burden of liability upon him.”).

189. Wade, *supra* note 23, at 367.

the health of the corporation.<sup>190</sup> Diversity initiatives can directly affect corporate health when the over-promotion of women supersedes the corporation's focus on rewarding hard work and diligence. Balancing diversity initiatives and a focus on the corporation's bottom line is crucial to the legitimacy and success of modern corporations.

#### V. SUGGESTED BALANCE OF DUTIES

Corporate culture is closely intertwined with the corporation's ability to execute its visions and reach its goals.<sup>191</sup> Negatively impacting corporate culture can have several deleterious effects, from lowering efficacy to negating retention efforts.<sup>192</sup> To ensure cultural impacts are understood by those setting the cultural tone, corporate directors should be actively involved in "identifying the fundamental elements of corporate culture . . . [and] [d]etermining the nature of the company's roots."<sup>193</sup> Directors can get involved by executing or overseeing "in-depth interviews, written surveys, reviews of relevant company documents . . . and direct observations."<sup>194</sup> Proactive feedback is essential to the fiduciary oversight duty, especially for those areas of corporate initiative and cultural change. Managers who are successful at promoting change in their organizations "consistently demonstrated their commitment to the process and to all employees by setting a tone of honest discourse, by acknowledging tensions, and by resolving them sensitively and swiftly."<sup>195</sup> Honest disclosure is a fundamental barrier to the oversight of this area of corporate culture because employees may be reluctant to make comments that could be seen as adverse towards minorities or women. Corporate directors should install a monitoring program that not only solicits candid and anonymous feedback that is reviewed by an organization independent of management, but also that tracks metrics, such as general retention rates and succession planning factors, to look for any negative shifts over time. The unfiltered results of this program should be presented to corporate directors without the influence of internal management concerns.

In addition to feedback, full implementation and employee engagement are keys to balancing corporate oversight and social duties. Corporate governance is defined as "the relationship among various participants in determining the direction and performance of corporations. The primary

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190. *Francis v. United Jersey Bank*, 432 A.2d 814, 822 (N.J. 1981).

191. See generally R. ROOSEVELT THOMAS JR., *BEYOND RACE AND GENDER* 59 (1991).

192. Valerie I. Sessa & Susan E. Jackson, *Diversity in Decision-Making Teams: All Differences Are Not Created Equal*, in *DIVERSITY IN ORGANIZATIONS: NEW PERSPECTIVES FOR A CHANGING WORKPLACE* 133, 146-47 (Martin M. Chemers et al. eds., 1995).

193. THOMAS, *supra* note 191, at 50-51.

194. *Id.* at 51.

195. David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, in *HARVARD BUSINESS REVIEW ON MANAGING DIVERSITY* 33, 64 (2001).

participants are (1) the shareholders, (2) the management (led by the chief executive officer), and (3) the board of directors. . . Other participants include the *employees*, customers, suppliers, creditors, and the community.”<sup>196</sup> As a result, responsibility for corporate gender diversity is the responsibility of more than internal managers and leaders. Their responsibilities, therefore, should extend to corporate executives and directors to a reasonable extent:

Leaders and managers must be enrolled in the process of implementing managing diversity. Because this concept is “on the cutting edge” and pioneering in nature, management’s enrollment, ownership, and creativity will be critical to any successful implementation.<sup>197</sup>

Rather than effecting cultural change subtly through staffing initiatives and vague vision statements, corporate directors and leaders should implement any changes with as much transparency and two-way communication as possible. A culture which is seemingly built from all members has a greater chance at balance than one that is enforced in one direction.

Beyond feedback and implementation processes, there are multiple other means by which corporate culture can be influenced to ensure fiduciary and social duties are balanced. Perceived conflicts in group and individual goals can result in diverging execution of corporate goals.<sup>198</sup> Consistent and clear messaging is important to ensure culture is influenced in a uniform and effective manner. As discussed by Professor Hurst, the formation and rise of corporations in the late 1900s was based on viewing the corporation as a social entity with principles valued by those who founded the corporation.<sup>199</sup> Although the size and activities of corporations has changed since Professor Hurst began this discussion, the concept of a corporation’s duty to the public remains.<sup>200</sup> Modern expectations of gender parity, though essential to fulfilling public duties, should be carefully balanced with fiduciary duties to protect and preserve a healthy corporate culture.

#### CONCLUSION

What if the modern, postindustrial economy is simply more congenial to women than to men? For a long time, evolutionary psychologists have claimed that we are all imprinted with adaptive

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196. Wade, *supra* note 23, at 377 (quoting ROBERT A.G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 1 (2d ed. 2001)).

197. THOMAS, *supra* note 191, at 110.

198. *See generally* Smith, *supra* note 174, 134.

199. HURST, *supra* note 31, at 8.

200. *Supra* Introduction (“When corporate ethical failures significantly impact the livelihood and health of society, people have often turned to a legal system of duties and accountability to restore balance.”).

imperatives from a distant past: men are faster and stronger and hardwired to fight for scarce resources, and that shows up now as a drive to win on Wall Street; women are programmed to find good providers and to care for their offspring, and that is manifested in more-nurturing and more-flexible behavior, ordaining them to domesticity . . . What if that era has now come to an end? More to the point, what if the economics of the new era are better suited to women? Once you open your eyes to this possibility, the evidence is all around you.<sup>201</sup>

The struggle towards gender equality is not over.<sup>202</sup> This is true within the confines of the corporate world, which is a reflection of societal expectations and perspectives.<sup>203</sup> Society and corporations, however, have come a long way from era of Rosie the Riveter. For example, a 1995 Gallup poll revealed that 57 percent of respondents thought that the U.S. would be better governed if more women were in political office.<sup>204</sup> The 2000 U.S. Census reported that women possess 51 percent of all bachelor's degrees and 45 percent of advanced degrees that have been awarded.<sup>205</sup> Despite these statistical gains, gender-specific affirmative action programs and corporate monitoring fiduciary duties may not be evolving with these changes. Without a legal responsibility to play a more active role in monitoring affirmative action programs for women, corporation directors run the risk of breaching their fiduciary duties by deconstructing a merit-based workplace. If gender takes the place of merit in the eyes and culture of employees, the corporation as a whole may suffer from a disillusioned workforce which hears one message but sees the effects of a contradictory message. More significantly, women themselves may find themselves the target of a new form of skepticism and discrimination<sup>206</sup> even though the importance of gender parity is now widely understood and supported.<sup>207</sup> Though the business judgment rule provides legal protections for corporate decisions, the potentially significant negative impacts of unmonitored gender initiatives demand careful oversight and constant reevaluation in this new phase of supporting women at work.

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201. Hanna Rosin, *The End of Men*, ATLANTIC MAG, July/August 2010, at 5, available at <http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/8135/>.

202. "To borrow former President Clinton's phrase, the tops of managerial and government hierarchies do not 'look like America.'" Linda L. Carli and Alice H. Eagly, *Gender, Hierarchy, and Leadership: An Introduction*, 57 J. SOC. ISSUES 629, 630 (2001).

203. *Supra* Part III.

204. Carli and Eagly, *supra* note 202, at 630.

205. *Id.*

206. *See* introductory quote, *supra* Part III.

207. *See* Broome, Conley, and Krawiec, *supra* note 21, at 805.