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## The New Cultural Diversity and Title VII

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# THE NEW CULTURAL DIVERSITY AND TITLE VII

Steven A. Ramirez\*

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## INTRODUCTION

Diversity has long been thought of as a potential justification for racial classifications.<sup>1</sup> This Article proceeds upon the premise that individuals contribute to productive cultural diversity within a properly managed diverse workforce in a facially neutral and merit-driven manner.<sup>2</sup> Thus, this Article is not about affirmative action or racial justice

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1. See e.g., *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 314–15 (1978) (Powell, J.) (stating that educational institution’s interest in a diverse student body may justify racial classifications).

2. See generally Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J. L. BUS. & FIN. 85 (2000) (providing in-depth analysis of cultural diversity initiatives within “leading

or even race-based decision making.<sup>3</sup> Instead, this paper analyzes a culture-conscious decision making that is taking root in the business world as a means of increasing workforce productivity.<sup>4</sup> Specifically, this paper assesses the diversity initiatives of the leading edge of corporate America under Title VII of the Civil Rights Act of 1964.<sup>5</sup>

The leading elements of the American business community, faced with a more culturally diverse business environment, are moving quickly to embrace diversity.<sup>6</sup> American business is rationalizing its response to

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elements” of corporate America and positing that such initiatives are facially neutral, merit-driven, and culture-conscious initiatives).

3. The differences between affirmative action and diversity management are quite significant. First, affirmative action is essentially remedial in nature, while diversity, as practiced in the mainstream business community, is essentially merit-driven, in that an individual's contributions to a well-managed diverse workforce leads to profitable insights. See Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity From Affirmative Action in Law School Admissions*, 77 N.C. L. REV. 1479, 1480 (1999) (“[W]here diversity is desirable, it is because it makes the institution better.”). Second, affirmative action, rightly or wrongly, was generally believed to entail lowering standards for persons of a given background, while diversity emphasizes that competitiveness imposes rigorous standards of performance and merit—namely productivity contribution. Third, affirmative action had a primary focus on hiring decisions, while diversity recognizes that the hiring date is only the beginning of creating an environment that unleashes the potential of all employees. Fourth, diversity is inclusive of all group identities—including White males. See generally R. Roosevelt Thomas, *From Affirmative Action to Affirming Diversity*, HARV. BUS. REV., Mar.–Apr. 1990, at 107, 112 (“Managing diversity . . . means enabling every member of your workforce to perform to his or her potential. It means getting from your employees everything they have to give.”). Since *Bakke*, the Court has not heard a case positing that diversity, when properly managed, is a dimension of merit, separate and apart from being a justification for preferential affirmative action. “Managing diversity, by contrast, is driven primarily by business trends and the quest of organizations to maximize economic performance.” TAYLOR COX, JR. & RUBY L. BEALE, *DEVELOPING COMPETENCY TO MANAGE DIVERSITY* 17 (1997).

4. Prior legal scholarship has generally not focused on the diversity initiatives discussed herein. Instead nearly all prior scholarship has focused upon diversity as a justification for racial preferences. *E.g.*, Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of “Diversity”*, 1993 WIS. L. REV. 105 (assessing the concept of diversity as it has been used as a justification for affirmative action but failing to address diversity contributions as a dimension of merit); Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1016–18 (1998) (discussing business community's desire to embrace diversity and lack of desire to assist politically in abolishing affirmative action); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 882–86 (1993) (discussing economic benefits of diversity in the context of arguing that a Euro-centric vision of America must give way to a new vision of pluralism).

5. Civil Rights Act of 1964, Pub. L. No. 88-352, § 202, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2001)).

6. For example, from Los Angeles comes the story of an auto dealership with a highly diverse sales staff, including mostly minority and immigrant managers, being able

this environment by seeking to exploit the powerful insights offered by workers who were traditionally excluded by the dominant White male business class that has controlled America throughout the nation's history.<sup>7</sup> The driving force behind this movement is competition and the imperative to be more productive.<sup>8</sup> As such, diversity initiatives are not about racial preferences but instead individual merit.<sup>9</sup> This Article will explain this nascent business movement and assess how it should be treated under Title VII.

This Article will show that the most progressive diversity initiatives taking hold in the business community are facially neutral in their approach, merit-driven, and fundamentally culture-conscious (as opposed to race-conscious).<sup>10</sup> These initiatives do not allow for any racial

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to leverage diversity into huge sales to a diverse population, catapulting the dealership to the top of the California market. Peter Y. Hong, *Diversity Driven by the Dollar*, L.A. TIMES, May 26, 1998, at A1 (recounting how a polyglot sales force helped Longo Toyota become the top dealership in the state and a multi-cultural model at the same time). See also Geoffrey Colvin, *The 50 Best Companies for Asians, Blacks, and Hispanics*, FORTUNE, July 19, 1999, at 52-57 ("The idea that many minority customers are highly aware of a company's minority friendliness is more important than many executives think."); Kenneth Labich & Joyce E. Davis, *Making Diversity Pay*, FORTUNE, Sept. 9, 1996, at 177 ("Many of [our] customers demand health care workers who are non-judgmental—and we have to make sure we provide them. With the customer base changing so rapidly, we are talking more and more about a diversity imperative within our company.") (statement of Barbara Stern, Vice President, Harvard Pilgrim Health Care). Fifty-six percent of Union Bank's new hires are minorities, 35.9% of its officials and managers are minorities, and 7 of its 17 directors are minorities. See Edward Robinson & Jonathan Hickman, *The Diversity Elite*, FORTUNE, July 19, 1999, at 62, 66.

7. See generally JOHN P. FERNANDEZ, *THE DIVERSITY ADVANTAGE* 252-267 (1993) (summarizing evidence showing vestigial racism in corporate America); Deborah A. Ballam, *Affirmative Action: Purveyor of Preferential Treatment or Guarantor of Equal Opportunity? A Call for a "Revisioning" of Affirmative Action*, 18 BERKELEY J. EMP. & LAB. L. 1, 20 (1997) (summarizing studies showing gender discrimination in the workplace).

8. "Diversity in our company is itself a business imperative vital to our ongoing renewal and our competitiveness into the 21st Century," states John A. Krol, Dupont's President and CEO. THE CONFERENCE BOARD, REPORT NO. 1195-97-CH, *MANAGING DIVERSITY FOR SUSTAINED COMPETITIVENESS 5* (1997) (on file with author) [hereinafter CONFERENCE BOARD 1997].

9. Diversity is all about hiring people to further specific corporate missions. For example: "The strategic imperative to create a synergistic organizational culture that transcends any single national culture may be particularly acute for [multinational enterprises] facing competitive environments in which there are strong, simultaneous pressures for global integration and national responsiveness. Here competitive advantage hinges on successfully managing cultural diversity across product and labor markets." Gary W. Florkowski, *Managing Diversity within Multinational Firms for Competitive Advantage*, in *MANAGING DIVERSITY* 339 (Ellen Ernst Kossek & Sharon A. Lobel eds., 1996).

10. "The blinders of a Euro-centric view of America limit our vision and viability in the international economic community. There are simply too many cultural differences that have to be considered for the United States to be effective globally. The economy

preference or gender preference and draw any such bias not from the inherent values of diversity but from the largely segregated pre-existing corporate tradition: hiring culturally aware minorities unleashes value because they bring insights previously unavailable to segregated businesses.<sup>11</sup> In other words, White males can be and are hired in the name of cultural diversity when they bring cultural insights to the business.<sup>12</sup> Nevertheless, these initiatives also serve to pave the way for traditionally excluded groups (including African Americans, Hispanics,

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increasingly demands expertise in more than American or Euro-centric ways and customs." Hing, *supra* note 4, at 882.

11. Specifically, corporate America has, in general, operated based upon an assumption that only White males were qualified for corporate positions in general, and particularly senior management positions. This pervasive discrimination has left corporate America in dire need of diverse perspectives. As Secretary of Labor, Robert Reich stated in 1995, after completing an intensive study of the "glass ceiling" that limits the progress of women and minorities in the business world: "the glass ceiling is not only an egregious denial of social justice that affects two-thirds of the population, but a serious economic problem that takes a huge financial toll on American business." FEDERAL GLASS CEILING COMMISSION, *A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 4* (1995) [hereinafter GLASS CEILING I]. "The 'glass ceiling' is a concept that betrays America's most cherished principles. It is the unseen, yet unbreachable barrier that keeps minorities and women from rising to the upper rungs of the corporate ladder, regardless of their qualifications or achievements." *Id.* "Title II of the Civil Rights Act of 1991 created the 21-member, bipartisan Federal Glass Ceiling Commission." *Id.* at 9. The Commission consisted of Senators, Representatives, business leaders, and other political leaders, all appointed by President Bush. The Commission concluded: "The glass ceiling is a reality in corporate America." *Id.* The Commission's mandate was to study the barriers to the advancement of minorities and women within corporate hierarchies, to issue a report on its findings and conclusions, and to make recommendations on ways to dismantle the glass ceiling. See FEDERAL GLASS CEILING COMMISSION, *GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 6-7* (1995) (finding that a "glass ceiling" exists, that it operates to exclude women and minorities, and that it is detrimental to business) (citing ANN M. MORRISON, *THE NEW LEADERS: GUIDELINES ON LEADERSHIP DIVERSITY IN AMERICA 34-39* (1992) (suggesting that prejudice is the primary barrier to corporate advancement, manifesting itself in a prejudice that someone "different," such as a female, is less able to do the job)) [hereinafter GLASS CEILING II].

12. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *TASK FORCE REPORT ON "BEST" EQUAL EMPLOYMENT OPPORTUNITY POLICIES, PROGRAMS AND PRACTICES IN THE PRIVATE SECTOR 261* (1997) (diversity initiatives should include all employees, including white males, and should not cause or result in unfairness) [hereinafter TASK FORCE REPORT]. In fact, diversity theory recognizes that White males also contribute to a diversity within a workforce; for example, Xerox is considered a "trailblazer" in diversity initiatives and is ranked number 20 in Fortune's "Diversity Elite," with 38% of its new hires being minorities. See Robinson & Hickman, *supra* note 6, at 64. Still, when Xerox discovered a dearth of White males at the entry level salesperson position, it adjusted its recruitment to hire more White males. See Jaqueline A. Gilbert et al., *Diversity Management: A New Organizational Paradigm*, 21 J. BUS. ETHICS 61, 71 (1999). "Diversity management is a voluntary organizational program designed to create greater inclusion of all individuals . . ." *Id.* at 62.

and women) to participate in American economic life in a more meaningful fashion, and in far greater numbers than in the past.<sup>13</sup>

Part I of this Article will summarize the business case for pursuing a culturally diverse workforce, define how the leading edge of the business community is going about its pursuit of diversity, and provide an overview of the empirical evidence showing the productivity gains achieved by the best diversity practitioners. Part II of this Article will respond to the critiques leveled against diversity thus far and will show that these criticisms do not apply to the diversity initiatives now being pursued by the leading edge of corporate America and that therefore there is no policy basis for rejecting these initiatives. Part III suggests that courts should uphold these diversity initiatives under Title VII because they have empirical support showing that they entail culture-conscious employment decisions (not color-conscious decisions), are merit-driven, and are facially neutral. Moreover, because these diversity initiatives are the best compliance means available to business, rejecting these initiatives would be unnecessarily reactionary and disruptive of the business community's settled expectations regarding Title VII liability.<sup>14</sup> The Article concludes with a summary of a theoretical framework that could provide a degree of resolution of some aspects of race and gender issues on a more generalized basis.

## I. AN OVERVIEW OF THE NEW CULTURAL DIVERSITY IN BUSINESS

The American business community increasingly recognizes that embracing diversity<sup>15</sup> is a source of strategic strength that can enhance

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13. For example, 43% of new hires at Dupont are minorities. Two of its directors are minorities, 10.4% of its officers and managers are minorities, and two of its 24 highest-paid officers are minorities. See Robinson & Hickman, *supra* note 6, at 70. Other business leaders who have made similar statements regarding the positive use of diversity have similar statistical support showing they mean business about diversity: "We are in a war for talent. And the only way you can meet your business imperatives is to have all people as part of your talent pool—here in the United States and around the world." Colvin, *supra* note 6, at 52–57 (statement of Lucent Technologies CEO Rich McGinn). Thirty percent of Lucent's new hires are minorities. Nine of its 25 top paid officers are minorities, 19.5% of its officers and managers are minorities, and one of its nine directors are minorities. Robinson & Hickman, *supra* note 6, at 63. See also Rachel Emma Silverman, *On Wall Street, A New Push to Recruit Gay Students*, WALL ST. J., Feb. 9, 2000, at B1 (reporting that the securities industry is facing an "unusually tight" labor market, and has for the first time focused recruiting efforts on gay and lesbian business students); *supra* notes 6, 12; *infra* notes 20, 25.

14. See TASK FORCE REPORT, *supra* note 12, at 3–7 (finding that diversity initiatives are the best practices of private employers for purposes of complying with Title VII and achieving equal employment opportunity).

15. For purposes of this Article, the phrase "embracing diversity" has the meaning ascribed to the phrase in mainstream business circles. Specifically, embracing diversity

competitiveness.<sup>16</sup> A culturally diverse workforce unleashes critical thinking, innovation, and creativity. Diverse perspectives provide an employer with valuable insights, much like a graduate degree or other intellectual qualification, that can serve as a basis for achieving important institutional missions, such as market penetration or increased innovation. These insights are becoming more valuable as the nation's business environment becomes more diverse.

### A. *The Demographic Context of American Business*

The nation's business environment is in the midst of dramatic demographic and economic changes that will challenge our business community's ability to deal with diversity. First, the nation's population (and hence its labor, investor, and consumer pools) is undergoing an historic change: the nation's minority populations are increasing rapidly, while the labor pool as a whole is stagnating.<sup>17</sup> White males, therefore, constitute a decreasing percentage of key constituencies.<sup>18</sup> Second, the

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means implementing organizational systems to manage people so that the potential advantages of diversity are maximized. Implicit in this concept is the goal of maximizing the potential of all employees. While diversity management is thus inclusive of all groups, an essential part of embracing diversity is recognition that value can be unlocked by including traditionally excluded groups, especially given the multi-cultural business environment of the future. See Elaine K. Yakura, *EEO Law and Managing Diversity*, in *MANAGING DIVERSITY*, *supra* note 9, at 34–44. This Article, like the business community, uses the terms “embracing diversity,” “diversity management,” and “diversity initiatives” as essentially synonymous ideas.

16. As one commentator has stated, “Without total acceptance of diversity and a business plan that completely integrates it into corporate strategic plans, a corporation cannot succeed in the global market.” FERNANDEZ, *supra* note 7, at 14–15.

17. The expected shortage of working-age people will be a world-wide issue early next century. “Today the ratio of working taxpayers to non-working pensioners in the developed world is around 3:1. By 2030, absent reform, this ratio will fall to 1.5:1 . . . .” Peter G. Peterson, *Gray Dawn: The Global Aging Crisis*, FOREIGN AFFAIRS, Jan.–Feb. 1999, at 42, 44. The problem may be especially acute in the United States:

Plummeting birthrates have corresponded with the rise of the knowledge-based economy, which demands more and more white-collar workers. Between 1998 and 2010, the number of managerial jobs will rise by 21%, according to Development Dimensions International, while the number of people between 35 and 50 will fall by 5%. Already, the median age of the U.S. workforce is nearly 40, up from 34.9 in 1979. Even with productivity gains and immigration, there won't be enough people to meet the demand.

Jennifer Reingold & Diane Brady, *Brain Drain*, *BUS. WK.*, Sept. 20, 1999, at 112, 114.

18. “By the year 2040, one-half of the U.S. population will be African American, Hispanic/Latino American, Native American and/or Asian American. Women will fill 65 percent of the new jobs created during the 1990s; by the year 2000, nearly one-half of

business of America is increasingly integrated into the world economic system, meaning that American business must now deal with important constituencies (labor, investor, and consumer pools) that are as multicultural as the world.<sup>19</sup> The leading elements of the American business community are seizing the opportunities implicit in these changes.

The leading elements of corporate America are rapidly moving to embrace diversity in response to these trends.<sup>20</sup> These programs include hiring a greater number of traditionally excluded persons. But these initiatives also typically entail diversity training, affinity groups, mentoring programs, and assistance with career development. The touchstone of all these programs is to create an environment that allows all of the talents of a diverse workforce to achieve maximum potential. These programs most often target women, African Americans, and Latinos, although many companies also target Native Americans, Asian Americans, and disabled Americans. Many organizations with diversity programs have staff dedicated to such initiatives. The most progressive companies now recognize that embracing diversity goes beyond (but no doubt includes) bringing increased numbers of women and minorities into an organization; it also requires fostering an environment of

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civilian workers will be female." FERNANDEZ, *supra* note 7, at 11. When this Article refers to "traditionally excluded groups" it is referring primarily to the foregoing groups. However, diversity theory is broad enough to cover virtually any group. Thus, this Article argues that homosexuals should not be unfairly excluded from the workforce, and it posits that White males may in appropriate circumstances add diversity to a given organization.

19. "The strategic imperative to create a synergistic organizational culture that transcends any single national culture may be particularly acute for [multinational enterprises] facing competitive environments in which there are strong, simultaneous pressures for global integration and national responsiveness. Here competitive advantage hinges on successfully managing cultural diversity across product and labor markets." Florkowski, *supra* note 9, at 339.

20. Recent reports from the business world support a major premise of this Article: many companies are moving aggressively to embrace diversity. The best diversity practitioners have posted statistics showing that they mean business about diversity. For example, at SBC Communications, 51% of new hires are minorities, as is 36.4% of its total work force and nearly 20% of its board. See Robinson & Hickman, *supra* note 6, at 62-70. At Public Service Company of New Mexico, 48% of new hires are minorities, 33% of its board members are minorities, and 47.3% of its workforce are minorities. See *id.* These are not isolated examples. The top 50 companies identified by Fortune Magazine as the "Diversity Elite" all post impressive statistics. See *id.* Still, outside of those companies that are the leading edge of the diversity movement, the situation is grim, and much more needs to be done. In Northeast Ohio, for example, the Cleveland Plain Dealer surveyed the top 50 largest public companies in the region and found that only 5 of 417 executive officers in such companies were Black, and only 38 are women or minorities. See Sandra Livingston & Zach Schiller, *Glass Ceiling Cracks—But Barely Few Executives Are Minorities, Survey Shows*, CLEVELAND PLAIN DEALER, Oct. 3, 1999, at 15A.



sensitivity and tolerance for differences. Under such circumstances diversity can be a powerful way to increase organizational effectiveness.<sup>21</sup>

On a very pragmatic level, globalization and demographic developments create an imperative for corporate America to embrace diversity. Business can use diversity initiatives to eliminate racial hostility and to ensure that all workers enjoy an environment that is conducive to maximizing employee potential.<sup>22</sup> This will give companies embracing diversity a competitive advantage in the escalating "war for talent." Such an environment will attract all members of the contracting labor pool.<sup>23</sup> Diversity initiatives will provide corporate America with the insights needed to achieve maximum market penetration in more diverse domestic and inherently diverse global markets.<sup>24</sup> Diversity sparks productivity gains by fostering innovation and creative thinking about ways to do business in a more diverse business environment.<sup>25</sup> Increasingly, this is the most progressive and sophisticated thinking in leading edge firms and influential business organizations. In short, those firms that excel at managing diversity will outperform diversity laggards.<sup>26</sup>

### B. *The Case for Embracing Diversity*

Leading professional business associations have studied diversity management in great detail. The Conference Board<sup>27</sup> has sponsored a

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21. See David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.-Oct. 1996, at 79.

22. See Thomas, *supra* note 3, at 107.

23. See Colvin, *supra* note 6, at 52-57; Robinson & Hickman, *supra* note 6, at 63; Silverman, *supra* note 13, at B1.

24. See *supra* note 6.

25. As one prominent CEO has stated, in explaining why his company needs more diversity: "If everybody in the company is the same, you'll have a lot fewer arguments and a lot worse answers." Colvin, *supra* note 6, at 54 (statement of Bell Atlantic CEO Ivan Seidenberg). Thirty percent of Bell Atlantic's new hires are minorities, 19.2% of its officers and managers are minorities, and 4 of its 22 directors are minorities. Robinson & Hickman, *supra* note 6, at 66.

26. See TAYLOR COX, JR. & CAROL SMOLINSKI, *MANAGING DIVERSITY AND GLASS CEILING INITIATIVES AS NATIONAL ECONOMIC IMPERATIVES* i-ii (1994) (University of Michigan, School of Business, Working Paper No. 9410-01, on file with author) (undertaking extensive review of literature regarding diversity management programs and finding that companies able to successfully manage diversity can achieve greater human resource efficiencies, increased marketing effectiveness, greater creativity, and innovation, and will, therefore, achieve better financial performance).

27. The Conference Board was founded in 1916 for the purpose of improving the business enterprise system and enhancing the contribution of business to society. "The Conference Board strives to be the leading global business membership organization that enables senior executives from all industries to explore and exchange ideas of impact on business policy and practices." THE CONFERENCE BOARD, REPORT NO. 1130-95-RR,

series of reports exploring the utility of diversity in achieving greater business performance. The Board has specifically refused to endorse the pursuit of diversity for its own sake; instead, the Board endorses profit-driven diversity management.<sup>28</sup> The Conference Board concluded, as early as 1995, that business should recognize that diversity can be used to enhance the bottom line, or can have negative consequences for companies that choose to ignore diversity issues.<sup>29</sup> Moreover, “leading edge companies” are executing diversity strategies based upon business imperatives notwithstanding the lack of certain evidence showing benefits.<sup>30</sup> The conclusions of the Conference Board, however, do have support in a study undertaken by the American Management Association.<sup>31</sup> The study included a survey of over 1,000 managers and executives and evaluated the impact of diversity upon corporate performance objectives such as productivity and net operating profits. The study concluded that diversity in senior management consistently correlates to superior corporate performance.<sup>32</sup>

Psychological research on the diversity of small working groups directly supports the value of cultural diversity.<sup>33</sup> Heterogeneous working groups offer more creative solutions to problems than homogenous working groups.<sup>34</sup> They also show greater inclination for critical thinking and are likely to avoid problems associated with “group think,” where members mindlessly conform to group precepts.<sup>35</sup> Ethnicity provides the

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DIVERSITY: BUSINESS RATIONALE AND STRATEGIES 2 (1995) (on file with author) [hereinafter CONFERENCE BOARD 1995].

28. See *id.* at 7 (“As with any business function, program or initiative, diversity initiatives must prove to be essential components of business operations and meet the standards of good business practice.”).

29. See *id.* at 7–8 (citing the threats of lawsuits, low morale, loss of talent, and negative publicity).

30. See *id.* at 11.

31. See American Management Association, *1998 AMA Survey Senior Management Teams: Profiles and Performance*, available at <http://www.amanet.org/research/pdfs/senior.pdf>. See also SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *SURVEY OF DIVERSITY PROGRAMS 10* (1999) (“SHRM has long recognized the competitive advantage gained by companies that seek and support a diverse workforce.”) (on file with the *Michigan Journal of Race & Law*).

32. See SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *supra* note 31, at 1.

33. Poppy Laretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 *SMALL GROUP RES.* 248, 252, 257 (1996) (finding that ethnically diverse workgroups including Asian Americans; African Americans; and Hispanic Americans produced higher quality ideas than all-Anglo groups).

34. See *id.* at 256–57 (“The ideas produced by the heterogenous groups were judged as significantly more feasible . . . and more effective . . . than the ideas produced by the homogeneous groups.”).

35. See IRVING L. JANIS, *VICTIMS OF GROUPTHINK* 192 (1972) (undertaking intensive case studies of “groupthink” and finding: “Groups of individuals showing a

necessary heterogeneous cultural perspective sufficient to trigger “kaleidoscope thinking” by providing a variety of perspectives and to combat “group-think.”<sup>36</sup> This is consistent with data showing that people of different ethnic backgrounds hold distinct “world views” and that Latino, Asian, African, and Native Americans have not been so assimilated that these unique views have been lost.<sup>37</sup> This is the difference that drives the value of diversity.<sup>38</sup> In sum, the findings based upon feedback directly from managers are consistent with a wide variety of studies examining the impact of diversity upon group action.<sup>39</sup> What these managers are saying is thus backed by scientific evidence: managers who can manage diversity well will be more productive than those who are unable to cope with increasing diversity.<sup>40</sup>

Another area where the value of diversity is unleashed is the ability to achieve greater market penetration.<sup>41</sup> Obviously, if there are different “world views” among traditionally excluded cultures, then there are real insights that can be provided by a culturally diverse workforce. Indeed, researchers theorize that cultural background plays a major role in con-

preponderance of certain personality and social attributes may prove to be the ones that succumb most readily to groupthink.”).

36. See IRVING L. JANIS, *GROUPTHINK* 250 (2d ed. 1982) (undertaking further intensive case studies and finding that group heterogeneity can stem “groupthink”).

37. See TAYLOR COX, JR., *CULTURAL DIVERSITY IN ORGANIZATIONS* 27–36 (1993) (reviewing nine studies of Hispanic Americans, Asian Americans, and African Americans and finding strong ethnic identities retained by each group as a result of fundamental life experiences; and concluding that therefore these traditionally under-represented groups offer employers value).

38. See Susan E. Jackson, *Team Composition in Organizational Settings: Issues in Managing an Increasingly Diverse Workforce*, in *GROUP PROCESS AND PRODUCTIVITY* 138–73 (Stephen Worchel, et al, eds., 1992) (suggesting that ethnic diversity is related to organizational creativity and flexibility).

39. Such research shows, for example, that diverse groups are more flexible, innovative, and creative. ANTHONY P. CARNEVALE & SUSAN C. STONE, *THE AMERICAN MOSAIC* 60–61 (1995) (reviewing and collecting empirical data regarding the benefits of diversity in decision making processes).

40. As one manager has stated: “If you don’t have empathy and aren’t able to communicate in diversity, are uncomfortable around a multicultural workforce, or if you are not confident enough to give an opportunity to someone who has a heavy accent or is different, you’ll be a miserable failure as a manager.” *The World Comes to the American Workplace*, *WASH. POST*, Mar. 20, 1999, at A1 (quoting William Edwards, General Manager of the Washington Hilton).

41. Indeed, Professors McLoed, Lobel, and Cox specifically focused upon a marketing task in their experimental study of ethnic diversity in the context of small groups. The working groups were asked to generate ideas on how to increase tourism in the United States. See McLoed, *supra* note 33, at 254. Their ideas were then judged, blindly, by tourist industry experts, based upon feasibility and effectiveness. See *id.* at 255. Ethnically diverse workgroups, including African Americans, Hispanic Americans, and Asian Americans scored higher than all-Anglo groups. See *id.* at 252, 256–57.

sumer behavior.<sup>42</sup> Thus, leading business academicians argue that the insights and sensitivities brought by people from varying ethnic backgrounds help companies reach a wider variety of markets.<sup>43</sup> They note, for example, that “people with similar frames of mind, similar values and principles have a strong basis for communication and communication is the art of sales.”<sup>44</sup> Economists have similarly found that “individuals with similar characteristics communicate at lower cost.”<sup>45</sup> Therefore, “efficiency and competition dictate matching employees and customers.”<sup>46</sup> In other words, it is the invisible hand driven by the need for efficient communication between customer and employee that often drives hiring decisions. It is not, however, just a matter of communication. “What minority consumers respond to most eagerly is a level of respect that too often is missing in their transactions with mainstream businesses.”<sup>47</sup> It is noteworthy, though, that the business case for diversity does not rest on morphological features and racial affinity, but rather cultural insights and understanding.<sup>48</sup>

### C. The Empirical Proof to Date

Empirical research testing the business case for diversity management has thus far provided strong support for all of its major premises. First, in a detailed study of the effects of diversity management upon the stock price valuation of a firm, empirical data suggest that announcements that a firm has obtained diversity awards are associated with

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42. See, e.g., Thomas C. O’Guinn et al., *The Cultivation of Consumer Norms*, 16 *ADVANCES CONSUMER RES.* 779, 785 (1989) (“[C]ultivation theory assumes that different demographic groups . . . will have had different life experiences which will lead to different perception of social reality.”).

43. See COX & SMOLINSKI, *supra* note 26, at 26–28.

44. *Id.* at 27 (quoting managers of insurance agency).

45. Stacey Kole & Glenn MacDonald, *Economics, Demography and Communication* 3 (May 1999) (unpublished manuscript on file with the *Michigan Journal of Race & Law*). Kole and MacDonald focused upon the ability of gender identification to act as a facilitator of efficient communication between customers and employees. Their study utilized employment data from 12 developed nations. This data evidenced sectoral employment patterns across the 12 economies consistent with this “communication-based theory of diversity.” It appears that women are being drawn into product delivery positions (where communication skills have great value) rather than product production positions. See *id.* at 39–40.

46. See *id.* at 3.

47. COX & SMOLINSKI, *supra* note 26, at 27–28 (quoting Miami Toyota dealer Richard Goldberg).

48. Indeed, indulging customers’ bigoted attitudes by hiring people reflecting their preferences has always been illegal under Title VII. *E.g.*, *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (holding that gender preferences of customers did not justify hiring only males).

competitive advantage (as reflected by increased stock prices) and that announcements that a firm has been sanctioned for discrimination are associated with inability to achieve such advantage.<sup>49</sup> Second, sound diversity management programs are associated with higher productivity and higher profitability.<sup>50</sup> Third, diversity management programs reduce stigmatization (compared to affirmative action programs), thereby contributing to the success of traditionally excluded groups of employees and providing a further competitive advantage.<sup>51</sup> Fourth, firms with diversity management policies are more creative and flexible and better problem solvers.<sup>52</sup> Finally, organizations perceived to be pursuing diversity management were more attractive employers to potential recruits (of all backgrounds) than those not having that perception; this implies yet another competitive cost advantage.<sup>53</sup>

All of this evidence showing the value of diversity in terms of increased productivity is also consistent with the actual market performance of those companies that aggressively embrace diversity. "A study of the Standard and Poor's 500 by Covenant Investment Management found that businesses committed to promoting minority and women workers had an average annualized return on investment of 18.3 percent over a five-year period, compared with only 7.9 percent for those with the most shatter-proof glass ceilings."<sup>54</sup> Similarly, *Fortune* magazine and the Council on Economic Priorities have attempted to assess a company's overall diversity efforts.<sup>55</sup> The 50 companies chosen as the "Diversity

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49. See Janine S. Hiller & Stephen P. Ferris, *Separating Myth from Reality: An Economic Analysis of Voluntary Affirmative Action Programs*, 23 MEM. ST. L. REV. 773, 795 (1993) (finding that empirical data showing future profitability is enhanced by efforts to encourage the development of a diverse workforce).

50. See Gilbert, *supra* note 12, at 65–66 (summarizing "bottom line results" achieved at 11 companies "from effectively managing diversity").

51. See Jacqueline A. Gilbert & Bette Ann Stead, *Stigmatization Revisited: Does Diversity Management Make a Difference in Applicant Success*, 24 GROUP ORG. MGMT. 239, 252 (1999) ("With the majority of new hires in years to come being women and minorities, providing an active diversity management policy appears to shape a strong competitive edge.").

52. See McLeod, *supra* note 33, at 256–57 (concluding, based upon empirical studies, that heterogeneous work groups produce more effective and more feasible ideas than homogenous work groups).

53. Margaret L. Williams & Tayla N. Bauer, *The Effect of a Managing Diversity Policy on Organizational Attractiveness*, 19 GROUP ORG. MGMT. 295, 305–06 (1994) ("[F]irms that have adopted policies and procedures concerning managing diversity may be able to enhance" their recruiting efforts.).

54. GLASS CEILING I, *supra* note 11, at 5.

55. See Robinson & Hickman, *supra* note 6, at 62–70. In order to determine which companies were the best in terms of diversity issues, the authors surveyed 1,200 U.S. companies. From the 137 responses, 50 companies were chosen as the top companies in dealing with diversity. See *id.*

Elite" for 1999 as "a group have performed terrifically, about matching the S&P 500 over the past year, and beating it over the past three and five years."<sup>56</sup> The 1998 list also outperformed the S&P 500.<sup>57</sup>

Simply stated, the most innovative and sophisticated elements of the business community have concluded that embracing diversity can, when properly managed, create powerful benefits.<sup>58</sup> The evidence thus far strongly suggests that companies adept at managing diversity can do so in a manner that achieves greater profitability.<sup>59</sup>

#### D. *The Penalties for Ignoring Diversity*

Some of the most persuasive evidence in favor of embracing diversity is the devastating losses suffered by those companies that have allowed sexism or racially hostile environments to fester within their business. The most notorious example of such a casualty is Texaco Oil Company and the unfortunate Texaco shareholders during the time that the racism within Texaco came to light.<sup>60</sup> Texaco's nightmare began in 1994, when African American employees filed a class action lawsuit alleging pervasive racial discrimination.<sup>61</sup> The extent of Texaco's discriminatory misconduct was revealed in late 1996, when a senior executive released highly controversial tapes that appeared to have contained racial slurs emblematic of a racially hostile environment.<sup>62</sup> Once allegations of Texaco's misconduct surfaced, its shareholders suffered stunning losses, as its market capitalization plunged by one billion

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56. Colvin, *supra* note 6, at 53.

57. *See id.*

58. *See id.*

59. There are many reports that companies often stumble in managing diversity. *See, e.g.,* Gillian Flynn, *The Harsh Reality of Diversity Programs*, 77 *WORKFORCE* 12 (1998) (outlining ways in which diversity programs can fail to achieve goals). However, this Article merely posits that the business community is finding advantages to pursuing diversity initiatives in a value-driven, well-defined manner. Such reports are consistent with the growing pains of a nascent movement rather than indicative of widespread rejection of well-planned diversity policies by the business community.

60. *See* BARI-ELLEN ROBERTS, *ROBERTS V. TEXACO* 273 (1998) (stating that Texaco suffered from a "poisonous racial atmosphere that had enveloped Texaco for decades").

61. *See id.* at 196.

62. Originally those who heard the infamous Texaco tapes reported a series of racially derogatory remarks, including a specific use of a racial slur. *See id.* at 1. Texaco commissioned a special inquiry, and utilizing digital technology concluded the slur was not used. *See* Kurt Eichenwald, *Investigation Finds No Evidence of Slur on Texaco Tapes*, *N. Y. TIMES*, Nov. 11, 1996, at A1. Other audio experts concluded to the contrary, and participants to the conversations did not deny the use of racial slurs. *See* ROBERTS, *supra* note 60, at 257.

dollars.<sup>63</sup> Subsequent reports demonstrated that the tapes were not isolated circumstances of racial bigotry, which instead appears to have permeated Texaco's business culture.<sup>64</sup> Ultimately Texaco paid \$176 million, then the largest amount ever paid in a racial discrimination suit, to settle the class action claims of over 1,400 African American employees.<sup>65</sup> Texaco also suffered from a serious bout of negative publicity that caused investors to flee the company<sup>66</sup> and consumers to threaten boycotts.<sup>67</sup> As our population gets more diverse, and globalization proceeds apace, our nation is certain to see more "Texacos," and the amount of damage to be absorbed by such firms for failing to remedy misconduct is sure to increase exponentially, as investors learn to avoid closed corporate cultures and consumers and labor markets react to patent racism.

#### E. Conclusion: The Need to Manage Diversity

Certainly, diversity, although a powerful tool, is not a magical sure-fire road to enhanced profitability. Managing diversity is as important as bringing diversity to a business. Many corporations, most notably Texaco, have suffered dire consequences from an inability to manage diversity. These instances, however, do not detract from the central thesis of this Article that businesses are using diversity as a competitive advantage in order to maximize profits, and that the legal system should accommodate, encourage, and respond positively to this new paradigm of viewing diversity as a strength. These instances highlight the need for policies that assure that business organizations truly embrace diversity rather than pursue policies of tokenism or tacit exclusion. The point is that cultural diversity must be properly managed.<sup>68</sup>

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63. See Kenneth Labich, *No More Crude at Texaco*, FORTUNE, Sept. 6, 1999, at 205 (recounting "the crisis" at Texaco, and how Texaco is now becoming a model for diversity).

64. See Kurt Eichenwald, *The Two Faces of Texaco*, N. Y. TIMES, Nov. 10, 1996, at 31 (quoting sources within Texaco alleging that supervisors used racial slurs and derogatory terms to refer to African Americans).

65. See ROBERTS, *supra* note 60, at 276.

66. See Peter Fritsch, *Fund Trustee Rebukes Texaco for Racist Remarks*, WALL ST. J., Nov. 6, 1996, at A5 (stating that mutual fund was considering selling because of discrimination and its impact on performance).

67. See Allanna Sullivan & Peter Fritsch, *Texaco Chairman Meets Advocates for Civil Rights*, WALL ST. J., Nov. 13, 1996, at B3 (discussing planned boycotts and picketing of Texaco stations).

68. A study focusing upon "unmanaged" diversity, for example, found that in an increasingly diverse environment, White males had increased levels of detachment to their organizations. See Anne S. Tsui et al., *Being Different: Relational Demography and Organizational Attachment*, 37 ADM. SCI. Q. 549 (1992). Increased unmanaged diversity can impede the efficiency of intra-organization communications. Still, empirical findings show that study participants rated organizations significantly more positively under a

The EEOC has studied the “best practices” of the business community in the area of diversity management and has released a task force report that defines and summarizes the “best practices” that the leading firms have adopted.<sup>69</sup> Combined with the empirical evidence in support of diversity management and the work of other diversity management scholars, a fairly clear picture has developed illuminating proper diversity management practices. In sum, diversity theory posits that initiatives permeate all aspects of a business, that senior management support and foster diversity, that diversity be implemented in a manner that is inclusive of all groups (including White males), that racial and gender intolerance be eliminated, and that companies seek productive uses for the benefits of diversity.<sup>70</sup> In other words, cultural differences should be tolerated, appreciated, and valued so that the full potential of each employee can be realized. These diversity practices are also what distinguishes naked racial preferences from the business imperative of managing a diverse workforce in an increasingly diverse business environment.

## II. THE CRITIQUE OF DIVERSITY

Valuing diversity means: the ability to exploit the synergy that occurs from diversifying working groups; to use a diverse work force to provide insights for greater market penetration; to achieve advantageous international relationships; to tap expanded labor pools; to avoid the costly pitfalls of increased diversity; and, therefore, to generate increased profits. Tapping these benefits can hardly be termed “reverse discrimination” or “racial nepotism.”<sup>71</sup> Instead, it simply recognizes that people

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scenario of proactive diversity management than those participants who were not aware of a diversity management policy. See Williams & Bauer, *supra* note 53, at 305–06. Thus, diversity management policies must permeate the entire business organization.

69. See TASK FORCE REPORT, *supra* note 12, at 261–269; Gilbert et al., *supra* note 12, at 66 (“Based upon the preceding literature review, we define diversity management as a complete organizational cultural change designed to foster appreciation of demographic, ethnic, and individual differences.”)

70. See generally Ramirez, *supra* note 2, at 90–123 (describing in detail the best cultural diversity practices based upon the EEOC’s report and the empirical evidence of how cultural diversity enhances productivity).

71. Professor Derrick Bell has summarized the concept of racial nepotism:

[W]hites tend to treat one another like family, at least when there’s a choice between them and us. So that terms like ‘merit’ and ‘best qualified’ are infinitely manipulable if and when whites must explain why they reject blacks to hire ‘relatives’—even when the only relationship is that of race.



bring merit—the ability to generate value—through many different talents and insights, including fundamentally different cultural experiences.

#### A. *An Affirmative Action Retread?*

Embracing cultural diversity is not affirmative action, at least under most accepted definitions of that ill-defined term, because it entails no racial preference.<sup>72</sup> This is because embracing cultural diversity is simply

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DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 56 (1992). This Article does not address the notion of “racial nepotism,” except to note, perhaps, that based upon compelling scientific evidence, such a concept is about as genetically rational as choosing friends based upon shoe size. It should be recalled, however, that the value of diversity depends, in part, upon the ability of a diverse workforce to exploit superior marketing insights, to facilitate communication with diverse consumers, and to assure that all customers are treated with a high degree of respect. It does not depend upon “racial nepotism” to achieve greater profitability. This Article does not argue that law firms hiring White lawyers because White clients like only White lawyers is appropriate; nor does this Article argue that hiring Black lawyers because Black clients only like Black lawyers is appropriate. Standing alone, such thinking indulges racism and invidious discrimination. See *supra* note 48.

72. The perception that affirmative action necessarily entails racial preferences has some basis. The term “affirmative action” has a colorful history. President John F. Kennedy is often credited with first using the term “affirmative action” in the context of an Executive Order regarding federal contracting and equal employment opportunity. See Exec. Order No. 10,925, 3 C.F.R. 448 (1961). The meaning of “affirmative action” is variable. See LINCOLN CAPLAN, *UP AGAINST THE LAW: AFFIRMATIVE ACTION AND THE SUPREME COURT* 17–21 (1997) (tracing the “trial and error” progression of federal affirmative action programs); ELLIS COSE, *COLOR BLIND* 97 (1997) (“[G]overnmental bureaucrats have their definitions [of affirmative action], and courts and law professors have theirs. And anti-affirmative action ideologues have yet another.”).

There simply is no generally accepted definition of affirmative action. One commentator has identified five models of affirmative action:

[S]trict quotas favoring women and minorities (Model I); preference systems in which women and minorities are given some preferences over white men (Model II); self-examination plans in which the failure to reach expected goals within expected periods of time triggers self-study, to determine whether discrimination is interfering with a decision making process (Model III); outreach plans in which attempts are made to include more women and minorities within the pool of persons from which selections are made (Model IV); and affirmative commitments not to discriminate (Model V).

David Benjamin Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 *BERKELEY WOMEN'S L.J.* 42, 42 (1989). None of these definitions focuses on the management of diversity (and making decisions in an effort to enhance workforce diversity) in order to tap new sources of value and to enhance profitability.

valuing a dimension of merit—nothing more, nothing less.<sup>73</sup> However, not all commentators are convinced.<sup>74</sup> Some have called proponents of increased corporate diversity “Diversity Hucksters.”<sup>75</sup> Others seem to believe that valuing diversity necessarily diminishes the value of merit.<sup>76</sup> Still others assume that diversity is simply a pseudonym for affirmative action.<sup>77</sup> These arguments miss the point of this Article. This Article does not address whether affirmative action should be taken to remedy the longstanding racial discrimination and oppression that has traditionally been practiced in our society.<sup>78</sup> Nor does the thesis of this Article in any

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73. See *supra* Part I (discussing how diversity forms a basis for merit as measured by the success of companies that have embraced diversity).

74. Thus far, the legal system has essentially failed to address the kinds of diversity initiatives—specifically those based solely upon maximizing output—focused upon in this Article. For example, there is no scholarship focusing solely upon this kind of diversity, that which is driven by business imperatives. Those authors mentioning diversity in the course of articles focusing upon other topics do not appear to comprehend that business is using diversity initiatives in order to maximize profits and secure a competitive advantage. See, e.g., Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1187–90 (1999) (analyzing economics of diversity initiatives but failing to consider profit enhancement).

75. See Brigid McMenamin, *Diversity Hucksters*, FORBES, May 22, 1995, at 174 (stating that efforts by shareholders to increase diversity is all about “enforcing political correctness” and that some directors believe there is no proof that diverse boards are more effective).

76. See John Leo, *The Mantra of Diversity*, U.S. NEWS & WORLD REP., Mar. 29, 1999, at 20 (stating that diversity should be abandoned in favor of “merit”).

77. Mortimer B. Zuckerman, *Piling on the Preferences: The Time has Come to Hit the Brakes on Affirmative Action*, U.S. NEWS & WORLD REP., June 28, 1999, at 88 (equating diversity initiatives with affirmative action and concluding that both should be abolished).

78. The issue of affirmative action has generated much legal scholarship. See Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 813 (1998) (calling affirmative action one of the most overwritten topics in legal scholarship). Amazingly, commentators opposing affirmative action generally fail to suggest any alternative method for remedying the astounding wrongs rising from our nation's apartheid tradition. The proposal of this paper is hardly such an alternative. Instead, such commentators appear quite content to ignore the basic premise of our legal system that “where there is a wrong, there is a remedy.” Vincene Verdun, *The Only Lonely Remedy*, 59 OHIO ST. L.J. 793, 801 (1998) (“Affirmative action is the only remedy that has been offered to correct the injury inflicted . . . on African Americans by 250 years of slavery, 100 years of Jim Crow, and a generation of less virulent discrimination.”). Perhaps direct legal action is the most sensible means of achieving reparations for the decades of American Apartheid, as ultimately the wrongfully interred American citizens of Japanese descent and the heirs of Jewish victims of the Nazi holocaust achieved. Vincene Verdun, *If the Shoe Fits Wear It: An Analysis of Reparations to African Americans*, 67 TULANE L. REV. 597 (1992) (analyzing bill introduced to study reparations to African Americans). See also DERRICK BELL, *AND WE ARE NOT SAVED* 123–34 (1987) (discussing ideas regarding racial reparations). Some scholars have argued that affirmative action should be broadened in the name of social justice. See CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 249–69 (1997) (arguing for more affirmative action for all subordinated classes).

way de-emphasize the importance of merit.<sup>79</sup> Instead this Article merely posits that business should address diversity issues rationally and that the legal system should not act as a reactionary force against valuing diversity. This Article specifically argues that appropriate diversity policies should maximize profit opportunities and minimize risks relating to the increased diversity of the business environment.<sup>80</sup> Ultimately, this paper proceeds upon the premise that well-managed diversity adds value to a business enterprise. Perhaps some skeptics cannot be convinced that embracing diversity has value, regardless of the evidence showing that it enhances corporate performance.<sup>81</sup> Nevertheless, even though it is quite difficult to measure the effect of diversity upon a business' bottom line, recent history is replete with examples of diversity-related issues either enhancing a company's profits or causing real financial setbacks to a business.<sup>82</sup>

Some arguments against using America's diversity as a strategic strength are retreats from the affirmative action arena. One such argument is that race cannot serve as a proxy for anything but race—and to hold otherwise indulges stereotypical thinking.<sup>83</sup> Under this view, it is inappropriate to consider race in employment decisions in any way whatsoever. This argument collapses, and is devoid of any logical content, once one accepts that race is a social construct.<sup>84</sup> Professor Ian F.

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79. See *supra* Part I (especially notes 49–57 summarizing empirical evidence showing benefits to business of meritorious diversity contributions).

80. See *supra* note 15.

81. See *Johnson v. Transp. Agency*, 480 U.S. 616, 673 (1987) (Scalia, J., dissenting) (stating, without the support of any empirical evidence, that it requires a “willing suspension of disbelief” to accept that a company would start a diversity program voluntarily).

82. See *supra* notes 6, 13, 23, 25.

83. “[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America.” Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12.

84. Professor Haney Lopez explains:

There are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites. One's race is not determined by a single gene or gene cluster, as is, for example, sickle cell anemia. Nor are races marked by important differences in gene frequencies, the rates of appearance of certain gene types. The data compiled by various scientists demonstrates, contrary to popular opinion, that intra-group differences exceed inter-group differences. That is, greater genetic variation exists within the populations typically labeled Black and White than between these populations. This finding refutes the supposition that racial divisions reflect fundamental genetic differences.

Haney Lopez has deconstructed and reconstructed race in a thorough and careful fashion.<sup>85</sup> Professor Haney Lopez concludes that because “race” has no genetic content, the only meaning that can be ascribed to “race” is that of “a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry.”<sup>86</sup> In other words, “social meanings” linked to group “characteristics” is the essence of “race.”<sup>87</sup> These meanings accrue to specific morphological features and ancestry as a result of a dynamic and ongoing process of “racial fabrication.”<sup>88</sup> Simply stated, race is best conceived as a shared cultural experience involving a complex set of social conventions triggered by morphology and perceived ancestry. Thus, race is not a proxy for different cultural experiences, it *is* different cultural experiences, shaped by the operation of highly complex social conventions.<sup>89</sup> That is, unique cultural experiences are inherent to “race.” It is the different cultural experiences of traditionally excluded individuals, forming a didactic paradigm compared to the dominant White male experience, that is the key to unlocking the value of diversity.<sup>90</sup> This is the dimension of “race” that employers are seeking to exploit. In any event, the empirical evidence shows that “race” is linked (at least by correlation) to cultural diversity, that cultural diversity exists, that it influences consumer behavior,<sup>91</sup> and that it is the basis for contributing diversity to group dynamics, making working groups more productive.<sup>92</sup>

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Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C. R.-C.L. L. REV. 1, 11 (1994) (citing Masatoshi Nei & Arun K. Roychoudhury, *Genetic Relationship and Evolution of Human Races*, 14 EVOLUTIONARY BIOLOGY 1, 11, 41 (1982)).

85. See generally Lopez, *supra* note 84 at 1, 11 (arguing that “race” does not have a biological basis).

86. *Id.* at 7.

87. See *id.*

88. *Id.*

89. “What is important is not that people are genetically different but that they approach one another with dissimilar perspectives. It is in the social setting that race is decisive. It is significant because people have given it significance.” RICHARD T. SCHAEFER, *RACIAL & ETHNIC GROUPS* 12 (5th ed. 1993).

90. See *id.* Note that the cultural perspectives of traditionally excluded persons are different from White male perspectives, not better or more unique; just less integrated into mainstream business. See *Comfort ex. rel. Neumyer v. Lynn Sch. Committee*, 100 F. Supp. 2d 57, 65 n.12 (D. Mass. 2000) (stating that seeking diversity may be permissible when not accompanied by stereotypes that minority groups hold some unique diversity advantage).

91. See *supra* notes 41–48.

92. See *supra* notes 31–40.

So, whatever "race" is, cultural diversity, if properly managed, can enhance business profitability.<sup>93</sup>

Fundamentally, these diversity initiatives reflect the efforts of the business community to rationalize its approach to a more diverse business environment.<sup>94</sup> The decisions undertaken pursuant to these initiatives are based upon a complex of factors in which race or gender is really a side issue. Employers are truly seeking cultural diversity, in the sense that a workforce include diverse cultural skills and facilities; and besides being a "race," African Americans or Latinos, for example, also represent a cultural identity or experience.<sup>95</sup> In many cases, employers can even be expected to hire Whites who possess cultural insights or cultural identity that can be a basis for valuable cultural insights.<sup>96</sup> In the end employers are not seeking the attributes of "race," so much as specific mental abilities, such as particular cultural communication skills.

Put simply, racial identity and specific cultural skills are not co-extensive. For example, an employer may wish to hire individuals with insights into how to market equipment needed to transform a vehicle into a "low-rider." Market data may indicate that 80% of their target market consists of young male Mexican-Americans. Nevertheless, a White male brought up in the west side of Chicago may offer superior insights into how to market a product to fans of "low rider" automobiles when compared to a Mexican American raised in Chicago's north suburbs. Cultural diversity does not depend upon indulging racial stereotypes or assuming that any individual has any particular cultural

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93. Moreover, over time business can be expected to largely displace racial or gender conscious decisionmaking in favor of more diversity conscious decisionmaking. Specifically, as business develops experience with diversity, the sources of its benefits will be defined based upon observed productivity gains. As such, experience will ultimately replace race or gender as a proxy for purposes of this nascent movement. See Kole & MacDonald, *supra* note 45, at 3.

94. See *id.* at 34 (demonstrating business rationale for seeking employees with common characteristics with customers for purposes of facilitating communications).

95. The business literature appears to use the terms "culture" and "ethnicity" interchangeably. This is because the terms carry no significant differences from the point of view of management science. Of course, from a legal point of view, under Title VII, discrimination based upon national origin is prohibited while discrimination based upon cultural insights is not. This is discussed in greater detail in *infra* Part III. For purposes of the present discussion, what is important is this: neither the fact of a person's skin color nor the fact of her national origin (or that of her ancestors) is what logically supports the value of diversity; instead it is cultural insights, cultural experiences, and cultural communication skills. No group has a monopoly on these facilities; they can transcend racial, gender, or other group identity. See generally *supra* notes 10, 19, 33, 42, 52 (illustrating link between culture and ethnicity in business literature and showing importance of cross-cultural communication). In the end it is diverse thinking that pays handsome dividends, not mere group affiliation or skin color.

96. See *supra* note 12 (citing the example set by Xerox when it decided to target hiring of White men when it found that they were underrepresented in some positions).

background. It is simply about exploiting differences and matching people's skills and facilities with jobs.<sup>97</sup> Economists studying diversity have found it to be driven by a rational business response to market pressures; thus, it would be senseless for business to hire on the basis of mere stereotypes.

"Race" and culture are highly intertwined in modern America, as a matter of correlation, but it is not the morphological elements of "race" in which employers are interested; it is instead purely the cultural insights, perspectives, and experiences that drive the value of a diversified workforce and form the meritorious individual contributions that employers value.<sup>98</sup> Diversity does not logically support any notions of racial essentialism. Business would not rationally proceed on such a basis because, as has been shown, no particular views can be associated with given morphological features.<sup>99</sup> Different perspectives do not in any way imply uniform perspectives.

Because diversity initiatives value cultural insights as distinct from the "group characteristics" elements of race, it can fairly be termed not only facially neutral, but culture-conscious decision making as opposed to race-conscious decision making. To the extent that these decisions correlate to race it reflects a conclusion based upon experience as to which individuals are likely to offer an employer the greatest diversity benefits based upon the individual's background and the workforce context with which that the employer is currently faced. As companies accumulate more experience with diversity management, these decisions will be backed by a growing rationalization of each employer's experience with diversity-based decisions. Businesses certainly will seek those individuals who offer the greatest diversity contributions based upon a multitude of factors relating to cultural facility—including geographic background, family history, socioeconomic background, and exposure to multi-cultural experiences.<sup>100</sup> But, because race in America has always included morphological features (on a direct or ancestral basis) and the value of these diversity initiatives rests exclusively upon cultural

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97. See *supra* note 9.

98. See *supra* notes 32–53 (showing that cultural diversity benefits stem from insights and thinking, not morphology or skin color).

99. See CORNEL WEST, *RACE MATTERS* 25–27 (1993) (stating that there is no "authenticity" to any particular racial identity).

100. Indeed, there is reason to conclude that businesses may develop tests to screen candidates for multi-cultural facility or for specific cultural expertise. While such tests may be several years away from common use, in the meantime business can be expected to informally test for these same abilities through interview questions, reference checks, and thinking carefully about the cultural experience and background of the individual. These expectations flow from the rational basis that has thus far driven the diversity movement in the world of business. See, e.g., note 46.

phenomena, these initiatives entail fair cultural discrimination, not race discrimination.<sup>101</sup>

### B. Notions of White Superiority

Similarly, many still argue that “diversity” is no more than an excuse for pursuing policies that favor minorities at the expense of “qualifications.”<sup>102</sup> This, they claim, necessarily entails a sacrifice of “merit,” and imposes unnecessary costs to business.<sup>103</sup> Typically, these arguments rely on narrow,<sup>104</sup> even discredited<sup>105</sup> definitions of merit, such

101. See *infra* part III (discussing diversity initiatives within the context of Title VII).

102. Indeed, African Americans, Latinos, and women benefit the most from corporate diversity efforts. See SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *supra* note 31, at 9. Diversity management itself, however, is essentially “race” neutral; it draws any bias not from its essential values but rather from the existing largely segregated corporate order. See *supra* note 11.

103. See Lino A. Graglia, *Professor Loewy’s “Diversity” Defense of Racial Preference: Defining Discrimination Away*, 77 N.C. L. REV. 1505, 1513–15 (1999) (utilizing LSAT scores to show gap in merit between White and non-White law students).

104. IQ tests and IQ descended tests, like the SAT, do not test commitment, persistence, creativity, social skills, practical judgment, or any other skill other than, at best, “scholastic aptitude.” NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE SAT 95*, 230 (1999). Even with respect to this narrow measure, it is not clear that the SAT, for example, even tests something akin to “scholastic aptitude.” See DAVID OWEN, *NONE OF THE ABOVE: BEHIND THE MYTH OF SCHOLASTIC APTITUDE* (1985) (“The correlation between SAT scores and college grades is lower than the correlation between height and weight.”).

Statistical studies have suggested that test scores reflect income and socio-economic status. It has been demonstrated again and again that scores vary in relation to cultural background; the test’s questions assume a certain uniformity in educational experience and lifestyle and penalize those who, for whatever reason, have had a different experience and lived different kinds of lives. In short, what is being measured by the SAT is not absolutes like native ability and merit but accidents like birth, social position, access to libraries, and the opportunity to take vacations or to take SAT prep courses.

Stanley Fish, *Reverse Racism*, ATLANTIC MONTHLY, Nov. 1993, at 128, 132. *But see* Thomas Sowell, *Ethnicity and IQ*, in *THE BELL CURVE WARS* 72 (Steven Fraser ed., 1995) (“In terms of logic and evidence, the predictive validity of mental tests is the issue least open to debate.”).

105. Indeed, the inventor of the SAT, and an early pioneer of IQ testing generally, ultimately denounced the whole idea of “native intelligence” as “one of most glorious fallacies in the history of science.” LEMANN, *supra* note 104, at 34 (quoting Carl C. Brigham). One prominent geneticist has stated that it is “unfortunate” that society has forgotten that the original purpose of IQ was to determine if certain students should be placed in special schools. Instead, such tests have been used “for the very ambitious aim of ‘measuring intelligence.’ This aim is probably unattainable with modern techniques, and there is a culture-bound element in the usual tests that is impossible to recognize and

as intelligence tests or SAT tests.<sup>106</sup> Recent studies tend to show, however, that firms embracing diversity outperform those that do not positively manage diversity.<sup>107</sup> This suggests that traditional definitions of merit are fundamentally flawed and not that embracing diversity implies an inherent sacrifice in quality.<sup>108</sup>

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eradicate.” LUIGI LUCA CAVILLI-SFORZA & FRANCESCO CAVILLI-SFORZA, *THE GREAT HUMAN DIASPORAS* 270 (1995). See also Howard Gardner, *Cracking Open the IQ Box*, in *THE BELL CURVE WARS*, *supra* note 104, at 26–27 (stating that “links between genetic inheritance and IQ, and then IQ and social class, are much too weak to draw the inference that genes determine an individual’s ultimate status in society” and that “IQ is at most a paper airplane, not a smoking gun”).

106. Compare RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* 340 (1996) (stating that inferior cognitive ability, measured by IQ tests or SAT scores, accounts for most of the lower socioeconomic status of Blacks and Latinos, not oppression) with LEMANN, *supra* note 104, at 227–32 (demonstrating how SAT provides “an official way for people with money to pass on their status to their children”).

107. See *supra* notes 49–57 and accompanying text.

108.

To admit on the merits, then, is to follow complex rules derived from the institution’s own mission and based on its own experiences of educating students with different talents and backgrounds. These rules should not be thought of as abstract propositions to be deduced through contemplation in a Platonic cave. Nor are they rigid formulas that can be applied mechanically. Rather, they should be rough guidelines that are established largely through empirical examination of the actual results achieved over long experience. For a school, that means asking how many students with characteristic *x* have done well in college, contributed to the education of their fellow students, and gone on to make major contributions to society. The specifics of these rules will differ from one institution to another because no two schools are identical—some place more emphasis on research, for example, some have deeper pools of applicants, and so on. The criteria should also be expected to change as circumstances change and as institutions learn from their mistakes.

As is the case with selective colleges and universities, top companies throughout the United States have more applicants than they can hire for professional jobs. Like the academic institutions, companies and other organizations need to decide whether it is in their interest to have a diverse workforce. Increasing diversity does not mean setting quotas or accepting unqualified applicants. But it probably requires being sensitive to race when setting recruiting policies, and it surely requires a greater degree of thoughtfulness about merit. The overriding lesson is that making progress on diversity requires a thoughtful articulation of the meaning of merit in the specific context of the organization.

Above all, merit must be defined in light of what an institution is trying to accomplish.

William G. Bowen, et al., *A Report Card on Diversity: Lessons for Business from Higher Education*, *HARV. BUS. REV.*, Jan.–Feb. 1999, at 139.



Ultimately, addressing the argument that diversity implies a sacrifice of merit leads directly to a confrontation with the concept of inferiority, or a genetic or cultural basis.<sup>109</sup> Although the world community long ago formally abandoned concepts of “racial inferiority,”<sup>110</sup> the idea is alive and well in America.<sup>111</sup> For example, Richard Herrnstein and Charles Murray sparked an intense debate in America when their book, *The Bell Curve*, argued that Latinos and African Americans were intellectually inferior to Whites. Their book has been castigated as “hoodoo social science” and as “racism in a tuxedo.”<sup>112</sup> I will not explore here, exhaustively, the large body of scholarly criticism, from a host of academic fields, the book has generated.<sup>113</sup> Nor do I wish to assess the evidence cited within the work of Herrnstein and Murray that severely undermines many of their primary conclusions.<sup>114</sup> Instead, I only wish to

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109. For example, one of the most outspoken critics of the value of diversity, Professor Lino Graglia, has also criticized African American and Mexican American students as unable to compete with Whites because their cultures fail to value achievement or to sanction failure. See Katherine S. Mangan, *Professor's Comments on Affirmative Action Inflamm a Campus*, CHRON. HIGHER EDUC., Sept. 26, 1997, at A33–34. Interestingly, Professor Graglia's comments caused real problems for his institution, the University of Texas School of Law, which ranged from funding threats to student protests. See *id.*

110. In 1950 UNESCO stated that “for all practical social purposes ‘race’ is not so much a biological phenomenon as a social myth” and that there is no proof that human groups “differ in innate mental characteristics.” SCHAEFER, *supra* note 89, at 12–13.

111. See HERRNSTEIN & MURRAY, *supra* note 106, at 311 (“It seems highly likely to us that both genes and the environment have something to do with racial differences” in scores on standardized tests); see also PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* 10 (1995) (openly deploring immigration of people of color and stating that “the American nation has always had a specific ethnic core. And that core has been white.”); Daniel J. Losen, *Silent Segregation in our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 521 (1999) (suggesting that “racist beliefs about intelligence and ability are deeply embedded in our culture.”); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1757–58 (1993) (“Whiteness as property continues to perpetuate racial subordination through the courts' definitions of group identity and through the courts' discourse and doctrine on affirmative action . . . and remains a central part . . . of the protection that the court extends to whites' settled expectations of continued privilege.”)

112. See Joel L. Kincheloe & Shirley R. Steinberg, *Who Said It Can't Happen Here?*, in *MEASURED LIES: THE BELL CURVE EXAMINED* 3, 7, 23 (Kincheloe et al eds., 1996).

113. See generally *MEASURED LIES*, *supra* note 112; *THE BELL CURVE WARS* (Steven Fraser, ed. 1995); *THE BELL CURVE DEBATE: HISTORY, DOCUMENTS AND OPINION* (R. Jacoby & N. Glauber eds., 1995). The scholarly critiques of *The Bell Curve* are not completely negative. See, e.g., Sowell, *supra* note 104, at 70, 74–77 (stating that *The Bell Curve* is “a very sober, very thorough, and very honest book,” but that it fails to explain apparent variability of IQs within “racial” groups (such as higher IQ scores of Black females compared to Black males) or over time within “racial” groups (such as below average test scores of American Jews before WWI)).

114. For example, how does the fact of coachability affect the conclusions of Herrnstein and Murray that innate intelligence exists, that it can be measured, and that it is genetically based and essentially immutable? Certainly, coachability is inconsistent with

highlight that the authors' suggestion that the extent of economic disparity between African Americans, Latinos, and Whites is largely due to IQ differentials is exactly backwards. Rather, alleged IQ differentials stem from pervasive social oppression.<sup>115</sup> So, a simple answer to enhancing intelligence, and thus one element of the multidimensional concept of performance, is to eliminate oppressive environments.<sup>116</sup>

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a static, innate native intelligence. But Herrnstein and Murray are unphased. See HERRNSTEIN & MURRAY, *supra* note 106, at 399–402 (citing Samuel Messick & Ann Jungeblut, *Time and Method in Coaching for the SAT*, 89 PSYCHOL. BULL. 191 (1981) (demonstrating that as little as 60 hours of coaching could raise SAT scores 41 points; 200 hours raised scores 63 points)); see also R. S. Nickerson, *Project Intelligence: An Account and Some Reflections*, in FACILITATING DEVELOPMENT: INTERNATIONAL PERSPECTIVES, PROGRAMS, AND PRACTICES 83 (M. Schwebel & C. A. Maher eds., 1986) (summarizing Venezuelan efforts to raise IQ scores, which led to net increases of 1.6 to 6.5 IQ points). Other studies discussed within *The Bell Curve* similarly refute Herrnstein & Murray's central thesis that intelligence is genetically driven and variable across "racial" differences, but fail to deter them from their drive to justify the abolition of affirmative action, based upon the idea of racially based intelligence. HERRNSTEIN & MURRAY, *supra* note 106, at 310 (discussing study of 4,000 children born out of wedlock of mixed racial origin born to German women during World War II era, that found no difference in IQ between illegitimate children of Black servicemen and illegitimate children of White servicemen); HERRNSTEIN & MURRAY, *supra* note 106, at 309 (studies showing Black children having mean IQ of 106 when adopted into affluent families of various racial backgrounds); see also Stephen Jay Gould, *Curveball*, in THE BELL CURVE WARS, *supra* note 104, at 11, 15 (stating that Herrnstein & Murray downplay the strong circumstantial case for substantial malleability of intelligence and little average genetic difference).

115. E.g., Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (invoking social science studies showing that racist speech tends to create in the victim the traits of inferiority); John U. Ogbu, *The Consequences of the American Caste System*, in THE SCHOOL ACHIEVEMENT OF MINORITY CHILDREN 19 (Ulric Neisser ed., 1986) (arguing that victims of social caste systems, such as African Americans, suffer from lower academic success worldwide, even if caste is not racially based); Arthur R. Jensen, *Cumulative Deficit in IQ of Blacks in the Rural South*, 13 DEVELOPMENTAL PSYCHOL. 184 (1977) (demonstrating that as Blacks lived longer in racially oppressive environments their IQs eroded—elder siblings had lower IQs than younger siblings—and the greater the age difference, the greater the IQ differential). In America the IQ differential between African Americans and Whites has eroded by 30 percent since the advent of affirmative action. See CAVILLI-SFORZA & CAVILLI-SFORZA, *supra* note 105, at 269.

116.

Research on the educational performance of low-status groups in other countries provides important insight into the shortcomings of *The Bell Curve*. In Sweden, Finnish people are viewed as inferior—the failure rate for Finnish children in Swedish schools is very high. When Finnish children immigrate to Australia, however, they do well—as well as Swedish immigrants. Koreans do poorly in Japanese schools where they are viewed as culturally inferior; in American schools, on the other hand, Korean immigrants are very successful. The examples are numerous, but the results generally follow the same pattern: racial, ethnic, and class

Diversity management is all about managing work environments in a manner that enhances the performance of all employees by, among other things, eliminating racial hostility and sexism.<sup>117</sup> Indeed, empirical studies suggest that when diversity is properly managed, performance can be enhanced.<sup>118</sup> Moreover, arguing that diversity management can lead to productivity gains for employers is hardly tantamount to arguing that it is the only measure of merit. This Article merely posits that the evidence as it now stands shows that diverse workforces add value to employers, and that individuals offering greater diversity offer one indicia of merit.<sup>119</sup>

An additional fatal flaw in *The Bell Curve* analysis is that it “use[s] racial terminology incautiously, implying a biological basis.”<sup>120</sup> Race is a

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groups who are viewed negatively or as inferiors in a nation’s dominant culture tend to perform poorly academically. Herrnstein and Murray don’t want to understand that power relations between groups must be considered when individuals’ abilities are analyzed. Without the insights derived from such environmental understandings brilliant and creative people from marginalized backgrounds will continue to be relegated to the vast army of the inferior and untalented. To speak of a custodial state for such people as outlined in *The Bell Curve* is morally unacceptable in any society.

Kincheloe & Steinberg, *supra* note 112, at 15; see also John Ogbu, *Immigrant and Involuntary Minorities in Comparative Perspective*, in *MINORITY STATUS & SCHOOLING* 3, 13–27 (1991) (finding that disfavored Japanese minority (the Buraku), who have no cultural or physical differences from mainstream Japanese, suffer from poor academic performance and from low IQ scores relative to Japanese, but perform at the same level as majority Japanese when transplanted to the United States). Ogbu specifically suggests that removing the burdens of discrimination enhances the performance of previously oppressed peoples. See *id.*

117. See *supra* notes 3, 15, 22, 68–70.

118. See Gilbert & Stead, *supra* note 51, at 241–252.

119. Indeed, this Article specifically eschews any single talisman of merit and specifically takes an iconoclastic view of SAT scores and IQ tests. The evidence shows they are a flawed measure of merit, and they currently are relied upon excessively. Such reliance is comparable to building a basketball team based upon free throw percentages. If, for example, you would pick the top ten free throw shooters of all time you would lose Michael Jordan, Jerry West, Wilt Chamberlain, Magic Johnson, John Stockton, John Havlicek, Kareem Abdul Jabbar, Karl Malone, Bill Russell, and Julius Erving; and the team you had selected would get crushed by those you had excluded. See *INSIDE HOOPS, NBA ALL-TIME STAT LEADERS: NBA FREE THROW LEADERS—FREE THROWS*, at [http://www.insidehoops.com/nba\\_alltime\\_stats\\_leaders\\_freethrows.shtml](http://www.insidehoops.com/nba_alltime_stats_leaders_freethrows.shtml) (Mar. 27, 2001) (Listing top ten players in free throw percentage: Mark Price, Rick Barry, Calvin Murphy, Scott Skiles, Larry Bird, Bill Sharman, Reggie Miller, Jeff Hornacek, Ricky Pierce, and Kiki Vandeweghe). A basketball team, too, needs diversity.

120. Donald Braman, *Of Race and Immutability*, 46 *UCLA L. REV.* 1375, 1432 (1999) (stating that in some scientific and social science texts, such as *The Bell Curve*, “the scientific expertise and authority of the author[s] does not extend to the study of human biological variation.”); see also MAREK KOHN, *THE RACE GALLERY* 7 (1995) (“When Steve Jones, Professor of Genetics at the Galton Laboratory of University College London,

social construct and has no biological basis.<sup>121</sup> Psychometrics is a rather primitive and anachronistic manner of looking for biological variation in light of modern genetic research. The Human Genome Diversity Project has for ten years investigated biological variation, not through giving multiple choice exams, but by looking at human genetic material. So far, “[t]he more we learn about humankind’s genetic differences . . . the more we see that they have . . . nothing to do with what we call race,” and, consequently, geneticists reject any link between “race” and intelligence.<sup>122</sup> The evidence from the world of genetics is becoming increasingly compelling that “racial” differences are literally skin deep.<sup>123</sup> Consequently, diversity initiatives in no way compromise any performance standard, and they serve only to create an environment where the potential of all employees may be tapped.

Indeed, the traditional and narrow definitions of merit must be wrong.<sup>124</sup> According to such measures of merit the United States would be simply too hobbled by intellectually inferior minorities to compete internationally. The argument is this: these minority populations, comprising over 35% of the American population, score significantly lower on standardized tests, and that is the primary reason for the egregious differential between minority and White populations in terms of income, wealth, and power.<sup>125</sup> If these measures of merit held sway, a country with such a huge segment of inferior people would be greatly disadvantaged in the world arena.<sup>126</sup> Instead, America is one of the most technologically advanced and productive countries on the face of the earth.<sup>127</sup> Moreover, the nation is in the midst of an innovation boom at

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remarked . . . that race would not return to science, I objected that it was already thriving in psychology. Yes, he replied, but not in science.”).

121. See *supra* notes 84–89.

122. See Sharon Begley, *Three is not Enough*, NEWSWEEK, Feb. 13, 1995, at 67 (quoting Luca Cavalli-Sforza, chair of the committee that directs the Human Genome Diversity Project); see also CAVALLI-SFORZA & CAVILLI-SFORZA, *supra* note 105, at 267–82 (1995) (critiquing methodology of *The Bell Curve* and rejecting any link between “race” and intelligence.)

123. See, e.g., Natalie Angier, *Do Races Really Differ? Not Really Genes Show*, N.Y. TIMES, August 23, 2000, at F1 (summarizing conclusions of geneticists recently involved in mapping the human genome).

124. See Alan Wolf, *Has There Been a Cognitive Revolution in America? The Flawed Sociology of the Bell Curve*, in THE BELL CURVE WARS, *supra* note 104, at 117 (“When all is said and done, IQ predicts neither later success in life nor job performance.”).

125. See HERRNSTEIN & MURRAY, *supra* note 106, at 340 (explaining economic inequality between Whites and minorities as based largely upon differences in cognitive ability and that therefore “flamboyant rhetoric” regarding oppression should be rejected).

126. See CARNEVALE & STONE, *supra* note 39, at 20 (“In the past few decades . . . major demographic changes have made us more diverse than ever before.”).

127. “As the century draws to a close, the U.S. economy is the envy of the world. This country sets the standard for technology, and nowhere do creativity and innovation

the same time that its population is becoming greatly more diverse.<sup>128</sup> So either the performance of America is illusory or the whole premise of racial inferiority is illusory; they cannot logically co-exist. In fact, those claiming that diversity necessarily entails a sacrifice of merit are at odds with the fundamental concept of modern America.<sup>129</sup> Consequently, embracing diversity further, to the logical ends of its inherent value, will only enhance our nation's competitiveness.

Compelling evidence shows that the essential need for diversity comes not from some genetically determined dimension of merit, but from deeply entrenched policies of exclusion.<sup>130</sup> For example, the status of women in corporate America demonstrates the exclusionary policies traditionally practiced by corporate America. Women do not suffer from any putative genetic or cultural inferiority relative to men, yet they are essentially as absent from the ranks of leadership in corporate America as non-Whites.<sup>131</sup> The time is now to eliminate artificial barriers. These barriers will increasingly hobble American competitiveness.<sup>132</sup> As a nation, America needs to tap the talents of its entire diverse workforce.<sup>133</sup> Diversity policies can operate to break down these traditional barriers without sacrificing merit.

### C. Diversity as "Color-blind" Merit

A further critique of diversity management is that it is in conflict with the Supreme Court's "color blind jurisprudence."<sup>134</sup> Is the profit-

flourish more." Albert R. Hunt, *Americans Look to 21<sup>st</sup> Century With Optimism and Confidence*, WALL ST. J., Sept. 16, 1999, at A9.

128. See *supra* notes 126–27.

129.

Despite the gloomy picture [regarding race in America] . . . the United States internationally is in the forefront of awareness on issues of race and gender. Because of its expertise with immigrants, racial minorities, religious minorities, and women, the United States is better positioned to accept the aged, the disabled, and those with various sexual orientations and create the world's most competitive and dominant economic power.

FERNANDEZ, *supra* note 7, at 14.

130. See *supra* notes 7, 11; see also Ramirez, *supra* note 2, at 100, 112–15.

131. See Ballam, *supra* note 7 (summarizing studies showing gender discrimination in the workplace).

132. See *supra* note 10 (noting need for experience outside American culture to compete internationally).

133. See *supra* notes 17, 18, 23 (citing declining birthrates and changing racial demography).

134. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (holding that affirmative action programs instituted to assist subordinated groups are subject to strict scrutiny); *Miller v. Johnson*, 515 U.S. 900 (1995) (holding that state may not use

oriented, value-driven diversity management movement headed for a collision with the Court's drive to erect roadblocks to any kind of race-conscious decision making? It is unclear how far the Court will go in leaving our society landlocked in addressing racial disparities and leaving significant portions of our people economically adrift. Taken to an extreme, the Court might hold that many private sector affirmative action programs violate Title VII.<sup>135</sup> On the other hand, the Supreme Court has recognized an explicit distinction between discrimination on the basis of race and action that addresses race-related matters in a neutral fashion.<sup>136</sup> Stated simply, correlation between some legitimate independent value and race, even very high correlation, is not tantamount to discrimination.<sup>137</sup>

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race as a "predominant purpose" in drawing electoral districts); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (holding that the City of Richmond failed to demonstrate "compelling governmental interest" in affirmative action set-asides). There is much scholarship addressing the propriety of this approach. *E.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color Blind,"* 44 *STAN. L. REV.* 1, 4 (1991) ("A color blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.")

135. No court has explicitly held that "color blind jurisprudence" dictates that Title VII be interpreted to obviate private sector affirmative action, and the Supreme Court has not overruled its decisions approving affirmative action under Title VII. *See, e.g.*, *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (upholding affirmative action benefiting women); *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (upholding affirmative action benefitting African Americans). *See also* *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir. 1997) (holding that Title VII did not preempt state law prohibiting racial preference and relying upon "color-blind jurisprudence").

136. *See* *Hunt v. Cromartie*, 526 U.S. 541, 549, 551 (1999) (holding that seeking a "strong democratic district" is acceptable, as a race-neutral criterion, even though such a district may have a correlation to percentage of African American population); *see also* *Coalition for Econ. Equity*, 122 F.3d at 705 ("The Supreme Court has recognized an explicit distinction 'between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters.'") (quoting *Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, 538 (1982)). Of course, even a facially neutral value will not mask an underlying racially discriminatory intent and purpose. *Rice v. Cayetano*, 528 U.S. 495, 514-17 (2000) (holding that state impermissibly used "ancestry" as a "proxy for race" to attempt to mask a voting requirement that had a "racial purpose."). In *Rice* the Court restated the rule that "[d]istinctions between citizens solely because of" race are not constitutionally permissible because a person should be judged "by his or her own merit and essential qualities." 528 U.S. at 517. I argue here that diversity initiatives do not entail discrimination "solely" based upon race, but instead seek some individual element of merit—specifically, an individual's contributions to the insights and productivity gains arising from a well-managed diverse workforce.

137. *See* *Hernandez v. New York*, 500 U.S. 352, 375 (1991) (O'Connor, J., concurring) ("No matter how closely tied or significantly correlated to race the explanation for [an action] may be, the [action] does not implicate the Equal Protection Clause unless it is based on race."); *see also* *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (holding that preference employed by Bureau of Indian Affairs for living representatives of tribes

The more sound analysis therefore is for the Court (and society generally) to recognize that the kind of diversity management programs discussed in this Article is a means for the business community to address major race-related challenges in a race-neutral fashion that allows business to dissipate the effects of traditionally excluding certain groups. This follows from two facts. First, considering the diversity contribution of an individual means that White males, as well as women or African Americans, could be hired to further diversity.<sup>138</sup> Second, to the extent that now, at the dawn of the 21st Century, diversity management initiatives, in practice, operate to benefit mainly traditionally excluded groups, this is not because of race or gender preferences, but rather because of the dearth of such perspectives within most levels of corporate America, arising from past exclusionary practices on a society-wide basis.<sup>139</sup> Simply stated, because every individual's ability to add productive diversity is a facially race- and gender-neutral consideration, making employment decisions designed to maximize profits from a more diverse workforce is as much a "color blind" criterion as any other traditional measure of merit.<sup>140</sup>

Diversity initiatives do not run afoul of the Court's color blind jurisprudence for another reason: they are culture-driven not color-driven. "For a majority of the current Supreme Court race is skin color."<sup>141</sup> The Supreme Court has never held discrimination on the basis of culture to

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governed by BIA was "reasonably and directly related to a legitimate non-racially based goal" and thus did not constitute racial discrimination).

138. See *supra* note 12.

139. See *supra* notes 7, 11.

140. Some measures of "merit" are clearly inferior to the diversity contributions offered by individuals. Beyond the notorious overuse of standardized tests is the idea of an applicant's status as a "legacy" in the context of educational admissions. In *Hopwood v. Texas*, the Fifth Circuit specified that an applicant's "relationship to school alumni" is a valid admissions consideration. 78 F.3d 932, 946 (5th Cir. 1996). The problem with such a factor is that almost all of the "legacy" applicants are White; this was especially true at the University of Texas Law School (at issue in *Hopwood*), which had a long-standing tradition of excluding African and Hispanic Americans. Thus, this factor serves only to perpetuate exclusionary admissions policies of yesteryear. Diversity management seeks the opposite result. Diversity is thus more "color blind" by any rational measure. *E.g.*, *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100, 102 (6th Cir. 1992) (defining a race-neutral policy or standard as one that applies equally to all persons and does not establish any racial preference). Moreover, what value does a legacy bring? Diversity management policies, on the other hand, enhance profitability. See Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 COLO. L. REV. 1065, 1117 (1997) (concluding that the existence of objective, fair, and race-neutral admissions processes is thin at best).

141. Eric Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 847 (1997) (citing *Shaw v. Reno*, 509 U.S. 630, 657 (1993)).

be illegal in any context.<sup>142</sup> Yet, the value the business community is pursuing here is cultural insights,<sup>143</sup> cultural communication skills,<sup>144</sup> and diverse ways of thinking.<sup>145</sup> All diversity initiatives, as defined by the best practices of diversity management, ultimately seek to unleash these benefits.<sup>146</sup> Diversity theory holds no place for unleashing value based upon morphological features such as skin color.<sup>147</sup> At the theoretical level, then, diversity initiatives are color blind in that they constitute culture-conscious decisions, not race-conscious decisions.

It does appear that employers are conscious of skin color when making diversity-driven employment decisions; but there is no requirement that employers be deprived of the use of their eyes when making employment decisions (although perhaps there should be under a pure color blind regime) or otherwise be blindfolded to skin color when making employment decisions.<sup>148</sup> However, if the real value driving employment decisions is not morphology, then the most that can be said is that race or gender or other status as a member of a traditionally excluded group is used as a marker for cultural insights. It is not a “predominant factor” in employment decisions, if it is a factor at all.<sup>149</sup> Morphology is not an illegitimate proxy for cultural diversity because of the link between cultural experience and race, and because it can reasonably be expected that business will rationalize its pursuit of cultural diversity by hiring those individuals offering superior diversity benefits given the experience of the business in hiring such persons, based upon interviews, essays, reference checks, and other standard investigatory tools.<sup>150</sup>

Diversity management therefore poses a stark choice. Here is an element of individual value—the ability to inject diversity into a business—that is proven (as a preliminary matter, at least) to positively affect

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142. Cases involving cultural discrimination are cited *infra* notes 227–30. Of course if culture discrimination is just a cover for race discrimination it would be illegal race discrimination. See *Rice v. Cayetano*, 528 U.S. 485, 516–17 (2000) (rejecting use of ancestry as a voting requirement because it closely correlates to race).

143. See *supra* notes 31–41, 93–95.

144. See *supra* notes 31–40.

145. See *supra* notes 41–47.

146. See *supra* notes 68–70.

147. See *supra* note 71.

148. There is reason to believe that if employers were blindfolded with respect to candidate they might make very different employment decisions. See Ramirez, *supra* note 2, at 112–15 (summarizing evidence suggesting that much of corporate America is still infected with pervasive racial and gender discrimination).

149. See *Miller v. Johnson*, 515 U.S. 900, 917 (1995) (stating that constitutional standards are violated only when race is a “predominant” factor).

150. See *supra* notes 42–48.



profits.<sup>151</sup> For now, women, people of color, and the disabled all offer greater diversity contributions than the typical White male can offer, but only because of shortages of these perspectives due to traditionally exclusionary practices. Compare, however, this source of value to standardized tests. White males, especially those from elite New England backgrounds, like those who created the tests, have long offered greater test scores (in general) to employers than the typical person of color (or woman) can offer.<sup>152</sup> But those scores mean little<sup>153</sup>—except perhaps as an indicator of socioeconomic status and social alienation.<sup>154</sup> Thus, when a business makes a “race”-conscious decision to unlock the value of diversity, it is a more “merit”-driven act than any business decision based, directly or indirectly, upon standardized tests.<sup>155</sup> Simply stated, we as a

151. See *supra* notes 49–57.

152. In 1997, the average SAT score nationwide was 1,016. See Antoine M. Garibaldi, *Four Decades of Progress . . . and Decline: An Assessment of African American Educational Attainment*, 66 J. NEGRO EDUC. 105, 109–10 (1997). Asian American students had the highest average score (1,056), followed by White Americans (1,052), Native Americans (950), Hispanic Americans (934), Mexican Americans (909), Puerto Ricans (901), and African Americans (857). See *id.* On the ACT, the average score nationwide was 21.0 in 1997. See *id.* Asian Americans and White Americans recorded the highest averages (21.7), followed by African Americans (17.1). See *id.* Women also score lower on standardized tests than men. On average women scored 42 points lower than men on SAT composite scores. See Leo Reisberg, *Disparities Grow in SAT Scores of Ethnic and Racial Groups*, CHRON. OF HIGHER EDUC., Sept. 11, 1998, at A42.

Standardized tests have a long history of favoring New Englanders and harming Southerners. See LEMANN, *supra* note 104, at 67 (“[S]tatistics on the Army-Navy Qualification Test showed far-below-average scores for Southerners, African American, and the poorly educated.”); *id.* at 76 (referring to IQ testing used to determine eligibility for deferment from Korean War draft and stating that the Educational Testing Service successfully concealed that Southerners qualified for deferment at the rate of 42% but New Englanders qualified at the rate of 73%).

153. See CAVILLI-SFORZA & CAVILLI-SFORZA, *supra* note 105, at 270 (Stating that IQ measures a “small” and “almost dull” form of intelligence and that intelligence is varied and difficult to define. “The variety of abilities of which the human brain is capable is extremely impressive, and it is important to give recognition to all of them.”).

154. See *supra* note 115. “I am convinced . . . that there are so many types of intelligence that no single test can measure them, not even those that are socially important. [T]he IQ view of intelligence is extremely limited and dull.” CAVILLI-SFORZA & CAVILLI-SFORZA, *supra* note 105, at 281.

155. Nicolas Lemann argues that IQ descended tests, like the SAT, are central to the modern American “meritocracy,” and they operate to lock-in class privilege at a relatively early age. Further, universities act essentially as “national personnel offices” and “all powerful arbiter of fates” and that, more and more, “the elite universities determine who is going to manage society and who is going to get the best jobs.” See LEMANN, *supra* note 104, at 343–50.

Thus, standardized tests have become a central talisman of merit. It is difficult to overstate the degree to which standardized tests have infected our “meritocracy.” If an employer utilizes graduation from elite universities as a hiring criterion, then the employer is relying indirectly upon SAT scores, at least to an extent.

society should recognize that anything that positively affects productivity, and, in turn, profitability, for a corporation must be merit driven, given that the primary objective of the business corporation is profit maximization.<sup>156</sup> In the world of business such decisions are unobjectionable, so long as not constituting or indulging invidious discrimination.<sup>157</sup>

Corporate America is showing, in a rather dramatic fashion, that businesses need more diversity to compete successfully, and implicit in this realization is that business has for too long been hidebound by exclusionary definitions of merit and the predominance of a single cultural view: that of the upper middle-class White male. To open up the definition of merit, and to plug the concept more directly into productivity and competitiveness, can hardly be termed "reverse discrimination."<sup>158</sup> Similarly, recognition that the current business environment is sorely in need of more diversity in no way devalues the perspective of White males; it only shows that we still suffer from the hangover of yesteryear's essentially apartheid society and vestigial attitudes of White supremacy. Business is demanding more diversity because it pays and to ignore this fact or insist that seeking out non-Whites and females is always wrong indulges a sexist or racist assumption that diversity necessarily means lack of merit.

#### D. Conclusion: Diversity as a Rationalized Element of Merit

In the final analysis, commentators arguing against the value of diversity ignore the source of these calls for diversity: the business community itself, its CEOs, its consultants, and its best managers.<sup>159</sup> These captains of industry are intensely focused on profits, and they tend to be White males.<sup>160</sup> They are saying that diversity pays, and that it has great value.<sup>161</sup> Clearly if embracing diversity was costly to business, business would not be embracing diversity.<sup>162</sup> This further suggests that

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156. Rightly or wrongly, in the contemplation of the law, it is axiomatic that a corporation exists to generate profits for shareholder gain. See AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, § 2.01 (1994) ("A corporation should have as its objective the . . . enhancing [of] corporate profit and shareholder gain."). It is also axiomatic that "above all, merit must be defined in light of what an institution is trying to accomplish." Bowen et al, *supra* note 108, at 145.

157. See *infra* Part III.

158. Nicolas Lemann specifically argues that an improved meritocracy would de-emphasize the importance of test scores and would seek a diversified elite. See LEMANN, *supra* note 104, at 346.

159. See *supra* notes 6, 8, 23, 25, 27, 31.

160. See *supra* notes 7, 11.

161. See *supra* notes 6, 8, 31.

162. See *supra* note 29.

pursuing the opportunities posed by diversity does not involve a trade-off with merit.

Moreover, it would be arrogant and reactionary for the courts to overrule these business practices as unlawful. If the business judgment rule means anything it means that business leaders are in the best position to determine the value of embracing diversity in light of the increased globalization of our economy and the increasing diversity within our population.<sup>163</sup> Diversity is emerging, then, as a rationalized measure of merit, not as any kind of racial preference.

Federal law does not prohibit discrimination based upon merit.<sup>164</sup> Nor does it mandate that merit be measured by some static criterion of yesteryear. If an African American employee can offer an employer insights on selling products to the African American community, the employer achieves value from such an employee. This value means that the employee offers merit, by supplying unique (and thus far rare, at least in the business community) insights gained from being an African American in our society. There is no basis for exalting some other measures of merit over merit flowing from diversity. From the front lines of the business world, stories of employers deriving profits from the merit offered by a diverse workforce are becoming legion.<sup>165</sup> The value of increasing workforce diversity can be thought of in the following terms: increasing workforce diversity will continue to pay dividends for business to the extent that business suffers from a disproportionate surplus of the insights and experiences of upper-middle class White males, plus to the degree to which diversity is expected to increase within the business environment in the future. Unlocking this value is wholly appropriate.

This also means that diversity management contains the seeds of its own destruction, at least to the extent it is viewed as a means of paving the way for the advancement of women and other traditionally excluded groups. Once business reaps the benefits of diversity in full, then it

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163. See *Sanchez v. Phillip Morris, Inc.*, 992 F.2d 244, 248 (10th Cir. 1993) (holding that the district court improperly substituted its business judgment for that of business managers and reversing judgment for plaintiff because of an absence of intent to discriminate in violation of Title VII); see also *Herbert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1114 (1st Cir. 1989) (finding that poor business judgment was an insufficient basis for Title VII liability); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir. 1987) (holding that Title VII is not violated by the exercise of erroneous or even illogical business judgment).

164. For example, the legislative history of Title VII is quite clear that "its primary task is to make certain that the channels of employment are open to persons regardless of their race and . . . strictly . . . on the basis of qualification." H. REP. 88-914, part 2, at 29 (1963); cf. *Bakke*, 438 U.S. at 307 (Powell, J., concurring) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

165. See *supra* note 6.

would rationally seek to maintain that level of diversity.<sup>166</sup> When is that point reached? This is an impossible question to answer, and in the final analysis turns, as diversity management in general, upon valid, good faith, business judgement.<sup>167</sup> In general, the courts should defer to the informed business judgment of business people with respect to this issue. But, fundamentally, how can diversity management be termed discriminatory if it allows both White and non-White employees to advance based upon the same objective standard—their contribution to workforce productivity based upon valuable cultural insights and perspectives?

In the end, it appears that these diversity initiatives have a powerful policy basis. This movement within the business community can drive increased economic growth, can serve to usher great numbers of traditionally excluded groups into our nation's economic power structure in a fair, non-preferential manner, and can therefore serve as beacon in an otherwise grim forecast for dealing positively with our nation's continued racist hangover. It is certainly true that our legal system, including the legal academy, has thus far failed to assess these fully integrated, facially neutral, and merit-driven measures in any degree of depth. Nevertheless, there is no valid policy-based attack upon this new form of cultural diversity. The law should therefore strive to accommodate and facilitate this movement.

### III. TITLE VII AND DIVERSITY

A balanced analysis of the Title VII treatment of diversity initiatives should begin with a candid acknowledgment: those invoking diversity in the name of racial preferences have not fared well.<sup>168</sup> Notwithstanding this record, no court has ruled on the cultural diversity initiatives discussed herein: facially neutral, merit-driven, and culture-conscious

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166. Obviously, the degree of diversity needed to achieve profit maximization is utterly unrelated to any concept of "racial balance" or "racial quota." Any such quota would be divorced from any concept of merit and contrary to diversity theory. Such a quota is inconsistent with Title VII. See 110 CONG. REC. S6986 (daily ed., Apr. 8, 1964) (statement by Justice Department that "any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII"). *But see* *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (upholding such an affirmative action plan under Title VII); *supra* notes 245–48 (discussing *Weber*).

167. See *supra* note 163.

168. *E.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (striking down minority set-aside program and overruling prior "diversity"-based affirmative action decision); *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487, 491 (D.C. Cir. 1998) (rejecting diversity as a justification for racial preferences); *Taxman v. Bd. of Educ. of Piscataway Township*, 91 F.3d 1547, 1558–59 (3d Cir. 1996) (holding that "diversity"-based affirmative action violated Title VII); *Hopwood*, 78 F.3d at 944 (holding that diversity is not a compelling state interest for purposes of racial classification).

initiatives.<sup>169</sup> In other words, courts should not allow just the invocation of the word “diversity” to drive their analysis (one way or the other) of these particular diversity initiatives, which are defined in accordance with the best practices of the business community and are the focus of this Article.<sup>170</sup>

This part of this Article will examine the interplay between diversity initiatives, as practiced by the most successful managers of diversity within corporate America, and the legal system. I posit that diversity management policies are, and should remain, fully accommodated by the law generally, and employment discrimination law in particular. Diversity management policies should be viewed not as “racial preferences” but rather for what they are: integrated efforts to accommodate all available talents within the workforce to achieve maximum productivity in a new era of business diversity.<sup>171</sup> Under this view persons are hired or promoted based in part upon their individual ability to add productive cultural diversity to a workforce, which is a merit-driven decision.<sup>172</sup> Diversity management draws any racial or gender bias not from its essential values, which are race neutral, but from the pre-existing segregation of corporate America.<sup>173</sup> Fundamentally, diversity initiatives are not about morphology, they are about culture.<sup>174</sup> As such, diversity policies should enjoy the full support of the legal system. To hold otherwise would create an unnecessary conflict between the best business practices of the most progressive elements of the business community and the law.<sup>175</sup>

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169. Ironically, Justice Powell articulated a similar theory of cultural diversity in *Bakke* over two decades ago. Still, that case did not address the initiatives discussed herein, focusing instead upon the racial classification at issue in that case. See *Bakke*, 438 U.S. at 314–20 (discussing ethnic diversity as one part of attaining a heterogeneous student body). It may be that those challenging affirmative action are not choosing to attack plans focusing upon cultural diversity.

170. Rumors of the demise of the diversity rationale for affirmative action may be greatly exaggerated. See *Wessman v. Gitlens*, 160 F.3d 790, 796 (1st Cir. 1998). It may be more accurate to say that mere invocation of the word “diversity” will not, standing alone without empirical support, justify racial preferences. See *id.* at 797. There is significant authority for the position that the only classifications that can survive equal protection scrutiny are those aimed at remedying past discrimination. At the same time, specific non-remedial uses of race found to pass equal protection analysis seem to be proliferating. See, e.g., *Hunter v. Regents of the Univ. of Calif.*, 190 F.3d 1061, 1067 (9th Cir. 1999) (holding that race may be used to further interest in experimental education, even in a non-remedial context).

171. See e.g., *supra* notes 3, 15, 22, 69.

172. See e.g., *supra* notes 46, 108.

173. See *supra* notes 7, 11 (citing support for the existence of the “glass ceiling” problem).

174. See e.g., *supra* notes 10, 19, 46, 52 (mentioning value of diverse workforce and difficulty of competing internationally with a single cultural viewpoint).

175. See *supra* Parts I, II.

The EEOC has already recognized the diversity initiatives discussed herein and deemed them to be lawful, fair and, the “best practices” of industry.<sup>176</sup> Diversity initiatives have developed in a manner that reflect a reasonable accommodation between business, the legal environment, and the primary fair employment regulator, the EEOC.<sup>177</sup> The pressures giving rise to this accommodation are the profit opportunities being discovered in the business world from a properly managed diverse workforce, including true merit-based equal opportunity, as well as the business world’s legal and regulatory obligations not to discriminate unfairly.<sup>178</sup> Given that diversity management has evolved in response to these values, it could be termed only reactionary for the legal system to reject the efforts of the business world (backed by the primary regulator in this area) to embrace diversity and to reject the merits offered by a diverse workforce.

Diversity initiatives require consideration under three areas of employment discrimination law: hostile environment liability; disparate treatment liability, and disparate impact liability. This Article will consider diversity initiatives under each theory of employment discrimination. This Part concludes that diversity initiatives are the best means for reconciling the legitimate objectives of business and its equal employment obligations. Thus, on balance diversity initiatives are the best means available for business to comply with its legal obligations while maximizing profits. This conclusion supports the position of this Article that the legal system should facilitate the efforts of the business world to embrace diversity; to do otherwise would needlessly upset the settled expectations of the business world.

### A. *Hostile Environment*

Diversity policies are crucial to securing the maximum degree of protection from liability for employment discrimination under Title VII of the Civil Rights Act of 1964.<sup>179</sup> For example, in the context of claims

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176. See TASK FORCE REPORT, *supra* note 12, at 259–69. An assessment of the legal effect of the EEOC’s Task Force Report on “Best Practices” is included in Part III of this Article. See also *Jones v. Glickman*, No. 01941940, 1997 WL 151491 (EEOC 1997) (holding that federal agency may consider agency diversity goals without engaging in unlawful discrimination).

177. See Reginald E. Jones, *Are We Witnessing a Kinder, Gentler EEOC?*, 14 LAB. LAW. 317, 324 (1998) (“A primary goal of the Task Force was to promote voluntary compliance. This was the aim of its examination of business practices that are consistent employers’ business priorities (usually producing quality goods or services and turning a profit) as well as with their EEO obligations and diversity objectives.”).

178. See *id.*

179. Civil Rights Act of 1964, Pub. L. No. 88-352, § 202, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2000)).

alleging employer liability for “hostile work environment” amounting to discrimination based upon race or gender, the United States Supreme Court has placed an employer’s policies at the center of hostile environment lawsuits.<sup>180</sup> In *Burlington Industries v. Ellerth*<sup>181</sup> and *Faragher v. City of Boca Raton*<sup>182</sup> the Supreme Court articulated standards by which employers may escape liability for Title VII hostile environment claims that focus on an employer’s anti-harassment policies, including its efforts to prevent harassment and its actions in taking prompt corrective action when such conduct is uncovered. Specifically, the court held that defendants in “hostile work environment” cases may avail themselves of an affirmative defense based upon employment policies if the employer can show by a preponderance of the evidence that: (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.<sup>183</sup> An employer may be held liable for a “hostile work environment” even in the absence of a tangible job detriment, unless it can prove this defense.<sup>184</sup> In *Faragher*, the Court clarified the operation of the new affirmative defense. The Court held as a matter of law that the City of Boca Raton could not establish the defense because it had failed to disseminate the policy to all of its employees, and its policy failed to include a provision allowing the complaining person to bypass the harassing supervisor.<sup>185</sup> The Supreme Court has thus made clear that employers have an affirmative obligation to take steps to eliminate hostile work environments, pervaded by bigoted employees, or face strict liability when plaintiffs establish such an environment.

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180. In *Meritor Saving Bank v. Vinson*, 477 U.S. 57 (1986), the court first recognized sexual harassment as a cognizable claim under Title VII of the Civil Rights Act. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court defined when sexual harassment constitutes a “hostile work environment,” holding that conduct must be so severe or pervasive that a reasonable person would find it hostile or abusive. *See id.* at 21. In *Meritor*, the Court’s theory was that a severe or pervasive environment of harassment constituted discrimination with respect to the terms or conditions of employment. 447 U.S. at 65.

181. 524 U.S. 742 (1998).

182. 524 U.S. 775 (1998).

183. *See Burlington Indus.*, 524 U.S. at 765. Subsequently, the Court held that “good faith efforts to comply with Title VII,” including “antidiscrimination programs” designed “to detect and deter Title VII violations,” can operate to insulate employers from liability for punitive damages in a Title VII action. *Kolstad v. Am. Dental Ass’n.*, 527 U.S. 526, 545–46 (1999).

184. *See Burlington Indus.*, 524 U.S. at 751–67. Justice Thomas, joined by Justice Scalia, dissented on the ground that vicarious liability should be imposed only upon a showing of fault. *See id.* at 772–73 (Thomas, J., dissenting).

185. *See Faragher*, 524 U.S. at 808–09.

These holdings have been extended to the race discrimination context.<sup>186</sup> The Americans with Disabilities Act<sup>187</sup> also plays a role in diversity policies, and lower courts have applied the centrality of appropriate employment policies under *Ellerth* and *Faragher* to claims brought under the Americans with Disabilities Act.<sup>188</sup>

The essential problem here is one of bigoted and racist supervisory employees. Such employees can manifest racial hatred or sexist views on the job without specific authority from or even knowledge of the employer. Using racial slurs or insults with racial overtones or giving voice to racist stereotypes have all contributed to a finding of a “hostile work environment” and exposure to liability.<sup>189</sup> The same type of bigoted conduct will give rise to liability in the sexual harassment context.<sup>190</sup> The United States Supreme Court has reversed prior law and now holds an employer liable for the racists, bigots, and sexists among its workforce, subject only to the affirmative defense of appropriate employment policies.<sup>191</sup> As such, the implementation of aggressive diversity management policies is essentially mandated for those employers who wish to avail themselves of this new affirmative defense. Employers must consequently exercise due care to prevent harassment through appropriate employment policies. This is the only means of obtaining insulation from liability for the harassment of their bigoted supervisory employees.

In addition, an employer will be held strictly liable for a “hostile work environment” if the plaintiff suffers a “tangible employment

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186. See e.g., *Allen v. Mich. Dep't. of Corr.*, 165 F.3d 405 (6th Cir. 1999) (finding that an African American was the victim of unreasonable abusive and offensive racial harassment). Long before sexual harassment was recognized as a basis for sex discrimination, the courts had held that a racially hostile work environment amounted to discrimination in the terms, conditions, and privileges of employment. See *Rogers v. EEOC*, 454 F.2d 234, 238 (1971) (finding that doctor's practice of racially segregating patients amounted to racially hostile environment).

187. See 42 U.S.C. §§ 12101–12213 (1994).

188. *Wallin v. Minn. Dep't. of Corr.*, 153 F.3d 681, 687–88 (8th Cir. 1998).

189. See *Allen* at 410–411 (citing *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 593 (5th Cir. 1998); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998)).

190. See *Smith v. Sheahan*, 189 F.3d 529, 534–35 (7th Cir. 1999) (Holding, in context of prison employment, “that employers who tolerate workplaces marred by exclusionary practices and bigoted attitudes” cannot use past discrimination as Title VII shield by arguing that woman “voluntarily” entered an “aggressive setting.”). Same-sex sexual harassment also may violate Title VII. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78 (1998) (holding that male employee may pursue claims of harassment against employer for conduct of male co-workers so long as they can show they were treated differently because of their sex). Employers should take steps to protect all employees from all forms of unlawful harassment.

191. See *Allen*, 165 F.3d at 411 (“The Supreme Court has modified the ‘tolerated and condoned’ standard to allow vicarious liability of employers in harassment cases.”).



action” as a result.<sup>192</sup> Here, again, diversity initiatives can serve to limit the liability of employers. Although policies alone aimed at stemming bigoted conduct will not protect employers, fostering an environment where diversity is valued and avoiding employees with bigoted attitudes should greatly limit exposure for this second basis of vicarious liability for sexism and racism.<sup>193</sup> These two principles of liability militate in favor of aggressive anti-harassment policies, even to the extent that firms should investigate applicants and refuse to hire those with patently racist or sexist inclinations.<sup>194</sup> Thus, diversity policies, including the fundamental premise of such policies that cultural differences be valued by employees, are an ideal means of eliminating hostile environments.<sup>195</sup>

### B. Disparate Treatment

Title VII prohibits employers from discriminating on the basis of race, color, sex, or national origin.<sup>196</sup> Diversity management practices at the best corporations also prohibit such discrimination.<sup>197</sup> Thus, properly enforced, such policies should protect companies from discrimination claims. However, White male employees may object to the value that a given employer assigns to the diversity contributions of an applicant of color, a woman, or a member of another traditionally excluded group.<sup>198</sup>

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192. The Supreme Court defines “tangible employment action” as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Burlington Indus.*, 524 U.S. at 761; see also *Saurers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993) (“If the plaintiff can show she suffered an economic injury from her supervisor’s action, the employer becomes strictly liable without any further showing . . .”).

193. See *supra* note 69 (describing diversity management as change in organizational culture in order to value difference).

194. I have argued in a related article that such a policy is essentially a best practice for companies seeking to pursue cultural diversity. See Ramirez, *supra* note 2, at 113–15.

195. In a more detailed analysis of the best diversity practices, I showed how integrated diversity policies operate in practice, and how difficult it would be to encourage valuing differences in the workplace without similarly valuing cultural differences in hiring. The two goals are complementary to each other. See *id.* at 109–23.

196. See 42 U.S.C. § 2000e-2 (2001).

197. See *supra* notes 68–70.

198. Some commentators have observed that the prospect of such so-called “reverse discrimination” claims places employers in a Title VII “trap.” See Don Munro, *The Continuing Evolution of Affirmative Action Under Title VII: New Directions After the Civil Rights Act of 1991*, 81 VA. L. REV. 565, 601 (1995). Cases alleging discrimination as a result of affirmative action programs have become common. See *id.* at 568 n.15. Combined with potential liability for minority under-representation under disparate impact theory, these claims do put employers in an often difficult position. I argue that diversity initiatives provide employers with the best solution to this dilemma.

The Civil Rights Act of 1991 included a provision that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”<sup>199</sup> This means that disparate treatment by employers, based upon race, gender, or ethnicity is impermissible.

As previously demonstrated, employment decisions taken in part upon diversity considerations are not based upon race, gender, or ethnicity, but are instead based upon an employee’s expected contribution to increasing productive diversity.<sup>200</sup> If embracing diversity were based upon race or gender, there would be no basis for diversity initiatives to benefit White males. But, the diversity being embraced by leading businesses posits that diversity management excludes no class of workers, favors no class of workers, and protects all classes of workers from hostile environments.<sup>201</sup> As previously discussed, therefore, seeking greater workforce diversity is a facially neutral value.<sup>202</sup> Moreover, seeking greater diversity in the name of enhanced profitability from the valuable

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199. See 42 U.S.C. § 2000e-2 (m) (2001).

200. See *supra* notes 6, 9, 10, 16, 19, 23, 25, 28, 31–57, 108.

201. For example, we know that leading diversity managers have hired White males in the name of diversity, and there is every reason to expect that, as diversity management spreads and the past effects of apartheid fade, such instances will increase. See *supra* note 12 (discussing the fact that Xerox hired White males in order to achieve a more productive level of diversity in one segment of its business). The reason White males can benefit from diversity initiatives is because proper diversity management is not based upon race but based upon the neutral value a diverse workforce offers. See *supra* text accompanying note 12 (showing that diversity management draws any race or gender bias not from its essential values but from preexisting segregation of corporate America); *supra* note 22 (demonstrating the focus of cultural diversity on all employees).

202. A facially neutral employment standard is one that does not on its face discriminate against a protected class. An employment standard that seeks to increase workforce diversity, in order to enhance productivity in accordance with best diversity practices, does not on its face, as a matter of definition, exclude any racial, ethnic, or gender group. See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 140–41 (1977) (holding that leave policies requiring pregnant employees to take leave of absence and forfeit accumulated seniority was facially neutral, insofar as disparate treatment claims are concerned, but that policies violated Title VII because of disparate impact). The test for whether a policy is race- or gender- neutral is whether it applies to men in the same way as to women, or whether it applies to, for example, Whites in the same way as African Americans. See *Int’l Union v. Johnson Controls*, 499 U.S. 187, 198–99 (1991). Employment practices that are facially neutral in their treatment of different groups may still lead to liability under the disparate impact theory of discrimination. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609–11 (1993) (explaining distinctions between disparate treatment and disparate impact theories of discrimination). Moreover, a facially neutral practice undertaken with a discriminatory intent will also lead to liability under Title VII. See *infra* notes 239–42; see also *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100, 102 (6th Cir. 1992) (affirming finding that a policy applying equally to all persons, and not establishing a preference, is facially neutral).

insights offered by a diverse workforce (in accordance with the business outlined in Part I of this Article) is not acting with a discriminatory motive. The pursuit of increased profitability through the benefits of a well-managed diverse workforce is not a discriminatory motive. Diversity initiatives are not based upon mere generalities but instead have detailed definition and structure, supported by powerful empirical evidence showing them to enhance productivity.<sup>203</sup> These factors should operate to defeat a disparate treatment claim because diversity management seeks greater workforce productivity, not race-based or gender-based decision making.<sup>204</sup> Thus far, however, the courts have not tested integrated and

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203. *Compare* *Iadimarco v. Runyon*, 190 F.3d 151, 167 (3rd Cir. 1999) (reversing summary judgment in favor of employer raising diversity justification in Title VII claim, without any analysis of business benefits of diversity) *and* *Taxman v. Bd. of Educ. of Piscataway Township*, 91 F.3d 1547, 1564 (3d Cir. 1996) (holding that affirmative action plan seeking greater educational diversity failed to pass muster under Title VII and stating that policies at issue suffered from “utter lack of definition and structure”) *with* *Wittmer v. Peters*, 87 F.3d 916, 918, 920 (7th Cir. 1996) (upholding race-based hiring decision under Fourteenth Amendment and stating: “defendants’ experts—recognized experts in the field of prison administration—did not rely on generalities about racial balance or diversity. . . . They opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots.”) *and* *Comfort v. Lynn Sch. Comm.*, 100 F. Supp.2d 57, 65–66 (D. Mass. 2000) (holding that expert testimony premised upon social science evidence showing benefits of diversity in educational context could justify racial classification). In virtually all contexts, it appears that courts are less likely today to accept the simple invocation of the word “diversity” as a basis for race related decisions; but, when such decisions are shown to have a strong evidentiary basis demonstrating important diversity benefits, courts hold that the action may even satisfy strict scrutiny. *See* *Wessman*, 160 F.3d at 797 (“It follows that, in order to persuade us that diversity may serve as a justification for the use of a particular racial classification, the School Committee must do more than ask us blindly to accept its judgment. It must give substance to the word.”); *Patrolmen’s Benevolent Ass’n of New York, Inc., v. City of New York*, 74 F. Supp. 2d 321, 327 (S.D.N.Y. 1999) (holding that “operational needs” may support transfer of minority police officers to precinct with minority population in order to quell riot); *see also* *Talbert v. City of Richmond*, 648 F.2d 925, 931–32 (4th Cir. 1981) (holding diversity interest sufficient to support race-based hiring); *Baker v. City of St. Petersburg*, 400 F.2d 294, 301, n.10 (5th Cir. 1968) (suggesting that race may be considered for the infiltration of a racially based crime network). On the other hand, where race cannot be linked to any relevant merit factor, race-based decisions rarely pass constitutional muster. *See* *McNamara v. City of Chicago*, 138 F.3d 1219, 1223 (7th Cir. 1998) (finding no evidence that White firefighters could not be effective firemen); *see also* *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355–56 (D.C. Cir. 1998) (holding that diversity rationale did not justify government sponsored affirmative action in a case that showed no empirically based, independent, and non-racial value).

204. *See* *Int’l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 335 (1977) (distinguishing between disparate treatment claim and disparate impact claim and stating that latter applies even without showing of “discriminatory motive” to “facially neutral” employment practices); *Eiland v. Trinity Hosp.*, 150 F.3d 747, 750–51 (7th Cir. 1998) (disparate treatment claim requires proof of intentional discrimination).

comprehensive diversity management policies against Title VII standards for disparate treatment.<sup>205</sup>

Diversity management initiatives posit that workforce diversity can enhance productivity, and thus far our society generally fails to apprehend the strengths arising from our diversity; consequently there are few analogous circumstances available for testing diversity initiatives.<sup>206</sup> The point is this: seeking greater diversity in support of greater profitability is a facially neutral employment practice, and there are sound doctrinal as well as policy reasons for so holding.<sup>207</sup>

This approach appears to enjoy support from the legislative history of Title VII. In the crucial Senate floor debates considering Title VII, an interpretative memorandum specifically approved of essentially the diversity rationale for hiring.<sup>208</sup> This memorandum, drafted by the Senate floor managers of the Civil Rights Act, states: "A director of a play or movie who wished to cast an actor in the role of [an African American], could specify that he wished to hire someone with the physical appearance of [an African American]—but such a person might actually be a [non-African American]."<sup>209</sup> The memorandum specified that this would not violate the Act.<sup>210</sup> Certainly, "the appearance of [an African American]" is a characteristic that will eliminate virtually all Whites from a given job. But, in context (specifically, a movie company making "an extravaganza on Africa"<sup>211</sup>), such a hiring criterion is a legitimate, merit-driven qualification.<sup>212</sup> Thus, it is not a race-based qualification.<sup>213</sup> The

205. *But see* Univ. and Cmty. Coll. Sys. v. Farmer, 930 P.2d 730, 735–36 (Nev. 1997) (holding that diversity needs of a university can support affirmative action in faculty hiring under Title VII).

206. *See* Ferrill v. Parker Group, Inc., 168 F.3d 468, 472–73 (11th Cir. 1999) (holding, in a case not involving diversity policies, that employer may not hire and fire persons of a given race solely to engage in marketing effort targeted at that racial group).

207. *See supra* Part II.

208. The Civil Rights Act of 1964 bypassed any committee referral in the Senate. Thus, the central legislative history insofar as the Senate is concerned occurred on the floor of the Senate. *See* BERNARD SCHWARTZ, II STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1089–92 (1970).

209. 110 CONG. REC. S6996 (daily ed. Apr. 8, 1964) (memorandum of Sen. Clark and Sen. Case).

210. *See id.*

211. *Id.*

212. *See id.*

213. The court in *Ferrill* drew this same distinction. 168 F.3d at 474 n.10. The court stated that it is permissible to hire based upon factors such as racial appearance (i.e., looking like an African American or looking White for a role in a play or movie) or a racial accent, speech pattern, or dialect, "but not expressly on race." *Id.* *Ferrill* involved the use of African American telephone solicitors to get out the African American vote. *See id.* at 471. But, in the end the employer relied on the theory that Blacks would respond better to Blacks. This indulges invidious discrimination as much as if a White

race-neutral hiring criterion under the diversity theory is the increased productivity of a diverse workforce resulting from the diverse cultural experiences and insights of traditionally excluded groups. In the context of operating a business to maximize profitability, this hiring criterion is similarly a legitimate, merit-driven, qualification. The legislative history is replete, however, with affirmations that hiring on race grounds, and solely for the sake of race, is prohibited, even if it leads to enhanced profitability.<sup>214</sup> “Any other criterion or qualification for employment is not affected,” however, by Title VII.<sup>215</sup> Thus, the Senators recognized that even if race discrimination was “essential” to the success of a business, it was illegal under Title VII, if not accompanied by some non-racial merit-driven benefit to the employer.<sup>216</sup>

Certainly, as some Justices of the Supreme Court have highlighted, other portions of the legislative history of the Civil Rights Act of 1964 can be read as supporting a purely color blind approach, whereby decisions must be made without even looking at skin color as if employers can view prospects through some monochrome curtain.<sup>217</sup> Senator Humphrey, the Senate Floor manager of the debate, stated, for example, that “if race is not a factor, we do not have to worry about discrimination because of race . . . .”<sup>218</sup> This is tautological, however. Of course there can be no discrimination if race is not a factor. The more relevant inquiry is whether race can play *any* role in employment decisions. The answer, as a matter of current law and legislative history, is that it can play some role.<sup>219</sup> What is critical, according to Senator Humphrey’s view of discrimination, is that there be no distinction in treatment given to different individuals because of their race, religion, or national ori-

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law firm hired only White lawyers to please their White clients. It is hiring on the basis of race for the sake of race with no neutral value in sight. *See id.* at 474–75.

214. “Title VII prohibits discrimination. In effect it says that race, religion and national origin are not to be used as the basis of for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications not race or religion.” SCHWARTZ *supra* note 208, at 1229 (statement of Sen. Humphrey).

215. 110 CONG. REC. S6993 (daily ed., Apr. 8, 1964) (memorandum of Sen. Clark and Sen. Case) (stating that Title VII prohibits discrimination based upon only race, color, religion, sex and national origin; no other criterion is affected).

216. *See* SCHWARTZ, *supra* note 208, at 1306 (statement of Sen. McClellan) (objecting to Title VII on the grounds that it would make it illegal to hire Baptists in order to get business from the Baptist community); *see also* Morton v. Mancari, 417 U.S. 535, 554 (1974) (holding that preference for Indians for employment with the Bureau of Indian Affairs did not amount to a racial preference because it was “reasonably and directly related to a legitimate nonracially based goal” of increasing Indian input into Indian governance).

217. *See Bakke*, 438 U.S. at 415 n.16 (Stevens, J., dissenting).

218. *See id.* at 415 (citing 110 CONG. REC. 5864 (1964)).

219. *See supra* notes 3, 203, 205–10.

gin.<sup>220</sup> Again, under the cultural diversity initiatives being pursued in the business world, culture, not race, is the overriding factor and source of value in employment decisions.<sup>221</sup> Race may serve as a marker (among many) for culture on a transitional basis but only because it now rationally serves as a preliminary indicator of valuable, diverse cultural insights.<sup>222</sup> As business becomes more adept at assessing diversity benefits and measuring diversity applications, race will recede and culture will become more rationally assessed independently of race.<sup>223</sup> To the extent the decisive factor is culture, not race, as the empirical data suggests, the distinction in treatment given to different individuals is not based upon race.<sup>224</sup>

Cultural discrimination has never been held to be actionable under Title VII. Indeed, culture certainly is not immutable—and discrimination based upon immutable physical characteristics is generally required to state a claim under Title VII.<sup>225</sup> Culture is invariably a function of exposure and experiences and evolves over time.<sup>226</sup> The insights the business world seeks are not monopolized by any single race.

Title VII cases have declined to protect any kind of cultural identity. For example, the courts have rejected any cultural interest in speaking Spanish as a basis for Title VII discrimination.<sup>227</sup> Similarly, the

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220. See *Bakke*, 438 U.S. at 415.

221. See *e.g.*, *supra* notes 10, 19, 46, 52.

222. In the course of considering a program that set aside a specific number of admission slots at a medical school for racial minorities, Justice Powell articulated a similar concept of cultural diversity, stating that in addition to race “exceptional personal talents, unique work or service experience, leadership potential maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important” may contribute to “educational pluralism.” *Bakke*, 438 U.S. at 317. I would add: socioeconomic background, employment history, exposure to international cultures, geographic background, and other significant cultural experiences or background elements. In specific employment contexts, each of these factors can be a source of valuable insights separate and apart from mere affinity.

223. See *supra* notes 93, 94, 98.

224. See *supra* notes 10, 19, 32–52 (demonstrating that diversity benefits are not dependent upon morphology).

225. “Under disparate treatment theory, discrimination on the basis of an immutable characteristic associated with race, such as skin color or facial features, violates Title VII even though not all members of the race share the characteristic.” BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 290 (1983).

226. Hence the term acculturation. Random House defines acculturation to mean: “adoption of the traits or patterns of another group.” *RANDOM HOUSE DICTIONARY* 7 (Concise ed. 1980). Webster’s offers this definition: “a process of intercultural borrowing marked by the continuous transmission of traits and elements between diverse peoples.” *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY* 13 (1976).

227. See *Garcia v. Spun Steak*, 998 F.2d 1480, 1487 (9th Cir. 1993) (“[T]here is nothing in Title VII which requires an employer to allow employees to express their cultural identity.”); *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (rejecting Title

Supreme Court has defined national origin discrimination for purposes of Title VII in a distinctly non-cultural fashion: discrimination based upon national origin means discrimination based upon “the country where a person was born, or more broadly, the country from which his or her ancestors came.”<sup>228</sup> This formulation leaves little room for any cultural dimension of national origin and is consistent with the lack of a prohibition upon cultural discrimination under Title VII.<sup>229</sup> It is also consistent with the basis for the Court’s color blind jurisprudence. As Justice O’Connor has explained: race discrimination stems from the “belief, held by too many for too much of our history that individuals should be judged by the color of their skin.”<sup>230</sup> There are no relevant differences based upon skin color; thus distinctions based upon race are generally not rational, and therefore they are generally not legitimate.<sup>231</sup> Cultural differences, however, may rationally support important distinctions, as this paper has shown in great detail.<sup>232</sup> In sum, there is little basis for holding that non-preferential, merit-driven cultural discrimination is forbidden by Title VII.<sup>233</sup>

It is no doubt true that, for now, the primary beneficiaries of diversity initiatives are minorities and women.<sup>234</sup> This only means that, for now, the facially neutral value of diversity is highly correlated to race and

VII claim despite expert testimony that “the Spanish language is the most important aspect of ethnic identification for Mexican-Americans, and it is to them what skin color is to others”).

228. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88, 95 (1973) (holding that discrimination based upon citizenship is not discrimination based upon race).

229. “*Espinoza* leaves the connection between ‘culture,’ defined as behavioral patterns associated with a particular ancestry, and ‘national origin’ tenuous at best—despite the fact that As critics have argued, ‘differences in dress, language, accent and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself.’” Angela P. Harris, *What We Talk About When We Talk About Race* (unpublished manuscript on file with *Michigan Journal of Race & Law*) (citing Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 *YALE L.J.* 1164, 1165 (1985)).

230. *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (O’Connor, J.). For the Supreme Court race has always been about immutable physical characteristics, particularly skin color. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973); see also Gotanda, *supra* note 134, at 40 (demonstrating that courts utilize formal race based upon morphological features).

231. See *supra* notes 170, 203 (showing examples where morphological discrimination is rationally based)

232. See *supra* Parts I, II.

233. See Harris, *supra* note 229 (“The new received wisdom is . . . that race is a biological fact that has no connection to cultural difference.”); Eric Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post Civil Rights America*, 95 *MICH. L. REV.* 821, 847–48 (1997) (“Culture discrimination is not necessarily wrong and may even be rational; antidiscrimination law allows it.”).

234. See *supra* note 102.

gender.<sup>235</sup> But, so what? No measure of merit has ever been diminished because of its correlation with race or gender; it would be a quite dull world if merit were quashed simply because of some magical correlation threshold with race or gender.<sup>236</sup> Just recently, the Supreme Court specifically rejected simple correlation between race and some facially neutral value as a basis for finding unconstitutional discrimination.<sup>237</sup> There, the state drew the lines of a Congressional district with the purported intent of creating a “strong Democratic district;” the fact that there was a “strong correlation between racial composition and party preference” in the district did not mean that the state acted in a discriminatory manner.<sup>238</sup> Diversity initiatives designed to unlock the value of a well-managed diverse workforce should be treated in accordance with these principles. Discrimination on the basis of a need for a diverse workforce is not discrimination on the basis of race.

Even in the absence of a facially discriminatory employment practice, disparate treatment may be inferred upon a showing of:<sup>239</sup> i) an adverse employment decision; ii) the person’s qualifications did not justify the adverse decision; and iii) that the position remained open or that a person hired, retained or promoted was a member of a favored class.<sup>240</sup>

235. *Supra* notes 12, 102 (but this is not perfectly correlated; Xerox hired White males in the name of diversity).

236. As stated by Justice O’Connor in the context of the Fourteenth Amendment: “No matter how closely tied or significantly correlated to race the explanation for [an action] may be, the [action] does not implicate the Equal Protection Clause unless it is based on race.” *Hernandez v. New York*, 500 U.S. 352, 375 (1991) (holding that dismissal of Spanish-speaking jurors is not race discrimination under the Fourteenth Amendment, but merely language discrimination).

237. See *Hunt v. Cromartie*, 526 U.S. 541, 549, 552 (1999) (holding that assertion that district was drawn in order to create a “strong Democratic district” rebutted finding that largely African American district was drawn in discriminatory fashion as a matter of law).

238. See *id.*; see also *Bush v. Vera*, 517 U.S. 952, 968 (1996).

239. This test has its genesis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). I have omitted the first factor, member of a protected class, because everyone is a member of a protected class. See *Iadimarco*, 190 F.3d at 158. Some courts impose a higher burden upon Whites to show “background circumstances” to support an inference of discrimination. See *Mills v. Health Care Serv. Corp., Inc.*, 171 F.3d 450, 457 (7th Cir. 1999). For purposes of this discussion, however, I assume that those pursuing diversity initiatives will admit the impact of the initiative. The issue is whether diversity initiatives are “facially neutral” or whether pursuing diversity is a “legitimate non-discriminatory purpose,” not whether Whites should have a special burden.

240. *E.g.*, *W.G. Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1060 (5th Cir. 1998) (dealing with age discrimination claim); see also *McDonnell Douglas*, 411 U.S. 792. Disparate treatment may also be inferred from statistical evidence. See *Int. Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). However, because of the historic domination of White males in the business world, it would be unlikely that such an employee would be able to show statistical evidence of disparate treatment.



If a plaintiff can carry this burden, then the defendant has the burden to produce evidence showing a "legitimate nondiscriminatory reason" for the adverse decision.<sup>241</sup> The plaintiff then may prevail only by showing this reason to be a pretext.<sup>242</sup>

Nevertheless, in applying these factors for determining if an inference of disparate treatment is justified, courts do not sit as a "super-personnel department," and courts must respect an employer's "unfettered discretion" to choose among qualified candidates.<sup>243</sup> In terms of addressing employment decisions made pursuant to detailed and carefully integrated diversity policies, courts should treat an individual's contribution to value-producing workforce diversity as it would any other indicia of business merit that adds to profitability, and defer to the business judgment of business leaders.<sup>244</sup> This means that courts should consider a well-founded claim of pursuing the profit-generating opportunities implicit in diversity as a legitimate non-discriminatory reason. In sum, because business emphasizes merit in embracing diversity and not race or gender, and because embracing diversity inherently includes managing workforce diversity in a way that maximizes the productivity of all segments of a workforce, including White males, it does not constitute disparate treatment.

Given its merit-driven nature, and given that even White males can, in appropriate circumstances, and increasingly in the future, add valuable workforce diversity, diversity initiatives should be treated more generously than preferential affirmative action. The Supreme Court has already held that even preferential treatment is not per se prohibited by Title VII. In *United Steelworkers v. Weber*,<sup>245</sup> the Court upheld "affirmative action" efforts that were "designed to break down old patterns of racial segregation and hierarchy [and] . . . [did] not unnecessarily trammel the

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241. *Teamsters*, 411 U.S. at 802.

242. *See id.*; *see also* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) ("[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") (quoting *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

243. *Mills*, 171 F.3d at 459 (refusing to second-guess "honest" judgments regarding qualifications when offered as legitimate non-discriminatory basis for decision in absence of "egregious" error); *see* *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1556 (D.C. Cir. 1997) ("[A] court must respect the employer's unfettered discretion to choose among qualified candidates.") (quoting *Fishbach v D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996)).

244. Such deference is fully supported by the legislative history of Title VII. As Congress stated, "[m]anagement prerogatives . . . are to be left undisturbed to the greatest extent possible." H. REP. 88-914, part 2, at 29 (1963).

245. 443 U.S. 193, 199, 209 (1979) (upholding affirmative action plan that reserved 50% of openings in apprenticeship program to African Americans until proportion of such workers approached proportion of African American population in area).

interests of white employees.”<sup>246</sup> With respect to the first point, the Court acknowledged that the employer in *Weber* had a long history of discriminatory practice.<sup>247</sup> With respect to the second point, the Court emphasized that the plan did not require the discharge of any White employees, did not prevent the training or promotion of White employees, and that the measure was intended to end as soon as the racial imbalance ended.<sup>248</sup> This result is fully consonant with the statutory text of Title VII that specifically addresses the question of racial preferences and impliedly authorizes voluntary efforts to erase the effects of prior discrimination.<sup>249</sup> Section 703(J) states the “nothing contained in this title shall be interpreted to require” preferences based upon race or sex.<sup>250</sup> These same principles apply with the same force in the context of affirmative action to remedy the effects of past sex discrimination.<sup>251</sup>

The EEOC has also issued affirmative action guidelines that provide that preferences are permissible if three conditions are met: “reasonable self-analysis; reasonable basis for concluding that action is appropriate; and reasonable action.”<sup>252</sup> According to the EEOC, compliance with these affirmative action guidelines is a complete defense to any action based upon Title VII.<sup>253</sup> It is unclear how much deference the Court is likely to give these guidelines.<sup>254</sup> However, it appears that these regulations would provide a Title VII safe-harbor for nearly all diversity initiatives, if the EEOC’s view should prevail.

It is critically important to comply with the EEOC’s requirements. First, a company should authorize a “reasonable self-analysis” that should focus on the reasons why “previously excluded groups have been artificially limited,” why the company is burdened with a non-diverse workforce, and whether there is some basis for believing that prior discrimination occurred.<sup>255</sup> Based upon such findings, the company may then take “reasonable action” to remedy the identified deficiencies. Reasonable actions include enacting race-conscious remedies that do not necessarily

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246. *Id.* at 208.

247. *See id.* at 198.

248. *See id.* at 208.

249. *See id.* at 205–06.

250. 42 U.S.C. § 2000e-2(J) (1994).

251. *See Johnson v. Transp. Agency*, 480 U.S. 616, 636 (1987) (upholding affirmative action plan that supported hiring of female instead of comparatively qualified male based upon multi-factored analysis).

252. 29 C.F.R. § 1608.4. (1999).

253. 29 C.F.R. § 1608.2 (1999) (citing 42 U.S.C. § 2000e-12 (b) (1)).

254. *See Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 517 (1986) (according guidelines “some” deference). *See also Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971) (giving EEOC guidelines “great deference”); *General Electric v. Gilbert*, 429 U.S. 125, 140–45 (1976) (giving guidelines almost no deference).

255. *See* 29 C.F.R. § 1608.4 (1999).

entail racial preferences, such as establishing hiring “goals” and outreach programs, revamping selections procedures, and utilizing other means of addressing perceived equal opportunity problems.<sup>256</sup>

The diversity initiatives discussed in Part I of this Article seek to use diversity as a means of increasing profit and thereby are merit-driven. These initiatives therefore do not constitute racial preferences. Because the theory of diversity taking hold in the business world is not exclusive to Whites, they do not “unnecessarily trammel the interests of white employees.”<sup>257</sup> Consequently, diversity management techniques should be treated substantially more generously than “affirmative action” policies, with explicit, exclusive, and merit-compromising racial preferences.

Even if diversity management policies are not protected by the EEOC’s safe-harbor, it is still unlikely that decisions that are based upon unleashing diversity benefits would be found to violate Title VII, even though such decisions are, in some sense, “race-conscious” or “gender-conscious.” Fundamentally, decisions undertaken in order to achieve the benefits of diversity are not decisions based upon racial disparate treatment. Diversity management policies emphasize that value is derived from having all perspectives represented within a business organization. Consequently, companies seeking to further their efforts to achieve diversity benefits are making decisions based upon qualifications. Such a decision has “legitimate, nondiscriminatory” reasons; it is not a pretext.

### C. Disparate Impact

When an employer’s facially neutral practice disproportionately harms a racial or gender group of workers, the workers may sue for disparate impact discrimination under Title VII.<sup>258</sup> A disparate impact claim is typically proven through the presentation of evidence showing a statistical disparity between those selected by the employment practice in question and the composition of the relevant qualified candidate pool.<sup>259</sup>

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256. See *id.*

257. *Weber*, 443 U.S. at 208; see *supra* Parts I, II.

258. 42 U.S.C. § 2000e-2(k) (1) (A)–(B) (2001); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that facially neutral practices having discriminatory effect violate Title VII); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986–87 (1998) (O’Connor, J., plurality opinion) (“[F]acially neutral employment practices that have significant adverse effects on protected groups have been held to violate [Title VII] without proof that the employer adopted those practices with a discriminatory intent.”). The Supreme Court extended the disparate impact theory to Whites in *McDonald v. Santa Fe Trans. Co.*, 427 U.S. 273, 280 (1976).

259. See *Cureton v. NCAA*, 37 F. Supp.2d 687, 697 (E.D. Pa. 1999) (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–55 (1989)). *Cureton* was one of a handful of cases that have held that a college’s reliance upon the SAT constitutes an unlawful disparate impact. See *id.* at 698, 715.

An employer whose practice is found to have such an impact may avoid liability by proving that the challenged discriminatory practice is required by "business necessity."<sup>260</sup> (Long the subject of case-law development, the business necessity defense secured a statutory foundation in the 1991 Civil Rights Act.<sup>261</sup>) Although the new provision aspired to provide statutory guidelines for the business necessity defense,<sup>262</sup> it ultimately left open precisely the questions that prior case law had failed to resolve.<sup>263</sup>

Companies that seek to embrace diversity can expect two different consequences. First, the best diversity practices should serve to greatly protect employers from many disparate impact claims since such policies normally serve as a basis for hiring greater numbers of women and people of color.<sup>264</sup> Second, Whites males will, at least until current imbalances are diminished, generally offer more limited diversity benefits.<sup>265</sup> Thus, in order to achieve maximum protection from the claims of such employees, the employer will have to establish that any disparate impact is a consequence of business necessity.<sup>266</sup> Unfortunately, the definition of "business necessity" is unclear.<sup>267</sup> Nevertheless, any reasonable definition must accommodate legitimate diversity management practices. Fundamentally, such practices represent the best, informed judgment of the business community on how best to achieve their business goals, and they are backed by strong empirical evidence as to both the methods to be employed and the results that can be achieved through proper diversity management.<sup>268</sup> This should satisfy even stringent tests of business necessity, which emphasize a valid prediction of job performance and a compelling business purpose.<sup>269</sup> Obviously profitability gains are a "compelling business purpose" and diversity management can enhance

260. 42 U.S.C. § 2000e-2(k) (1) (A)-(B); *Griggs*, 401 U.S. at 431.

261. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071, 1071 (1991).

262. 42 U.S.C. § 2000e-2(k) (1) (A)-(B).

263. See Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMPLOY. & LABOR L. 315, 361 (1998) (providing detailed history of business necessity defense and concluding that "the cases interpreting the post-1991 Act business necessity standard illustrate the extensive confusion shrouding the disparate impact model").

264. See *e.g. supra* note 102.

265. See *supra* Parts I, II.

266. The burden of showing business necessity rests with the employer. See 42 U.S.C. § 2000e-(2) (k) (1994).

267. See MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION § 10.03 (1999) (reviewing the confusing history and law regarding definition of "business necessity").

268. See *supra* Parts I, II.

269. See *Nash v. Consol. City of Jacksonville*, 895 F. Supp. 1536, 1545 (M.D. Fla. 1995), *aff'd* 85 F.3d 643 (11th Cir. 1996).

profit performance.<sup>270</sup> There is no basis for courts to intrude upon these merit-based judgments.<sup>271</sup>

In sum, the federal employment discrimination laws provide a compelling basis for the world of business to implement and enforce strong diversity policies. There are admittedly some risks that some parts of these diversity initiatives may lead to legal exposure. Nevertheless, the protections from liability seem to heavily outweigh the risks.<sup>272</sup> In other words, in addition to all of the policy justifications diversity initiatives enjoy, and in addition to the strong legal basis for upholding these initiatives, there is a final reason for upholding the business community's efforts to embrace diversity: they represent the best means available to businesses to fulfill their economic objectives and to comply with the legal mandates of Title VII.

### CONCLUSION

The thesis of this Article is that the new cultural diversity initiatives taking hold in the most progressive elements of the business community are consistent with any reasonable analysis under Title VII, and it would be reactionary for the courts to strike down these initiatives in the same way they have dealt with diversity justifications for racial preferences. These initiatives do not involve racial or gender preferences or classifications. They are merit-driven, as shown by powerful empirical data. They seek to exploit cultural differences and not morphological differences based upon gender or national origin. While employers may be "conscious" of skin color or gender when making these decisions, such considerations are not a factor in these initiatives and are certainly not a "predominant" factor. Cultural insights are the predominant factor business is seeking.

There is no policy justification for depriving the business community of the ability to exploit this factor. On the contrary, these initiatives allow greater equality of opportunity and enhance the competitiveness of our economy on a long-term basis. Most of the critique of this movement is somewhat off-point; the arguments against diversity have been made most forcefully in the affirmative action arena. Nevertheless, this Article can articulate no good reason why these cultural diversity initiatives should be rejected under Title VII. The use of race as a marker for valuable cultural insights on a transitory basis is hardly a good reason for aborting this movement prematurely, especially since the business community can be expected to further rationalize this

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270. See *supra* part I.

271. See *supra* note 163 (listing cases giving deference to business judgment).

272. See Scott A. Holt, *Reverse Discrimination—Too Much of a Good Thing?*, DEL. EMPLOY L. LETTER, Nov., 1999, at 1 (stating that "statistics show that you are far more likely to be sued by a minority than a non-minority").

movement in a fashion that de-emphasizes the irrelevant consideration of skin color, national origin, and gender.

Despite this primary focus, however, this Article also seeks to provide a theoretical framework, founded upon developments in the business community, for rationalizing the legal system's treatment of "race" through embracing the opportunities inherent in cultural diversity. In other words this framework may well transcend the business context and apply to other areas where cultural diversity may be important, ranging from education to public employment. Thus, legal scholars interested in achieving greater equality of opportunity should think about ways to harness our nation's cultural diversity in other contexts.

