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Forty Years After Title VII: Creating an Atmosphere Conducive to Diversity in the Corporate Boardroom

Donald J. Polden

Santa Clara University School of Law, dpolden@scu.edu

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Forty Years After Title VII: Creating an Atmosphere Conducive to Diversity in the Corporate Boardroom

DONALD J. POLDEN*

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* Dean and Professor of Law, Santa Clara University School of Law, Santa Clara, California. This paper follows a presentation at a symposium, “*Celebration of Title VII at Forty*,” given at The University of Memphis School of Law in April of 2005. The author expresses his appreciation to Maurice Wexler, Esq., for his efforts in organizing the symposium and for the opportunity to discuss this topic with some of the outstanding experts speaking at the conference. The author also expresses his appreciation to Erin McDermitt, a recent graduate of Santa Clara University School of Law, for her research assistance on this article. Finally, the author dedicates this article to his sister, Patricia Calhoun, who was co-founder, CFO, and member of the board of directors of White Wave Foods, a national soy product company. Her leadership of and vision for the company’s success inspired the fundamental theme of the article: that American corporations will be better run, more ethically-centered, and more effectively competitive in global markets if they have more diverse leadership in their CEO offices and on their boards of directors.

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In the forty years since Congress passed Title VII of the Civil Rights Act of 1964,¹ there have been significant changes in the landscape of American workplaces, schools, colleges, and universities, and in the number of economic opportunities to contract with government agencies. During that time, women have entered many areas of public and private employment in a steady, increasingly significant fashion. Affirmative action programs have accounted for a great deal of the increase in the number of women and minorities in the workplace. While such programs have always been controversial, they have also spurred inclusiveness in educational settings and government contracting.²

This article analyzes affirmative action in employment: one of the most controversial government policies of the last decade, and one that continues to divide the passions and sensibilities of Americans. This article also addresses the effects of Title VII on employment opportunities for women. In particular, the article considers how successful the fundamental policies of Title VII have been in increasing diversity on corporate boards of directors, and investigates whether increased diversity will improve the performance of publicly traded companies.

The Sarbanes-Oxley Act of 2002³ (SOX) reflects public outrage at highly publicized corporate excesses and, more fundamen-

1. 42 U.S.C. §§ 2000e–2000e-17 (2000).

2. See Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter*, 92 KY. L.J. 263 (2003); Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451 (2004).

3. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745-810 (to be codified at titles 11, 15, 18, 28, and 29 of U.S.C. (Supp. II 2004)).

tally, indicates widespread public disapproval of corporate boards' composition, lack of independence from management, and poor internal and external controls over corporate financial reporting and integrity.⁴ Improved gender and racial diversity of corporate governing boards would enhance SOX's fundamental policy of increased integrity in the management of large corporations through greater independence and competence of their directors. In this regard, the congruence of the policies of national employment opportunities and national economic policy favors increased opportunities for women and minorities and promotes greater corporate governance by independent and competent directors.

This article proceeds as follows: the first part briefly describes federal governmental affirmative action policy in the areas of employment, government contracting, and education, explaining how affirmative action plans have increased employment opportunities for the intended beneficiaries of the legislation; the second part discusses current issues in the application of affirmative action policies in employment relationships and examines the rates at which women and minorities have risen to leadership positions in settings outside the direct reach of Title VII. This part of the article addresses the issue of whether Title VII—with its avowed purpose of promoting fair employment practices and increased inclusion of women and minorities in the workforce—has been successful in extending the quality and scope of economic opportunity to those formerly un-enfranchised members of American society. This part of the article also demonstrates that the roles of women and minorities on the boards of publicly-held corporations have not significantly expanded, even given the pervasive application of Title VII to other sectors of the economy. The final part examines the impact of national economic policy on effectively managed corporations, and considers whether greater diversity on corporate boards advances national economic policy. In particular, this part of the article examines the policies underlying federal corporate law embraced by SOX, and concludes that greater diversity on

4. Lisa M. Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors' Fiduciary Duty Through Legal Liability*, 42 HOUS. L. REV. 393, 394–406 (2005).

corporate boards of directors helps to realize those policy initiatives.

I. GOVERNMENTAL AFFIRMATIVE ACTION POLICIES

To understand the policies underlying the Civil Rights Act and the employment provisions contained in Title VII, it is necessary to review briefly the history of affirmative action policies and of the overarching fight against paternalism for equality of opportunity. The first section describes the movement of national policy from “separate but equal” treatment of the races to equality. The following section describes the development of affirmative action programs, and promotes equality of treatment as a way of implementing broad national policy.

A. *From Plessy v. Ferguson to Brown v. Board of Education*

In *Plessy v. Ferguson*,⁵ the United States Supreme Court held that racially-segregated railway cars were constitutional and reasonable, and that they did not violate the civil rights of black Americans. This decision, astounding in hindsight, was rooted in the political perception prevalent in 1896 that federal courts lacked both the power to elevate federal law over state law and the authority to re-order social relations between races in the United States.⁶ For example, the Court stated that

[l]aws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of state legislatures in the exercises of their police power.⁷

The Court also stated,

[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences,

5. 163 U.S. 537 (1896).

6. JACK GREENBERG, *CRUSADERS IN THE COURTS* 57–58 (1994).

7. *Plessy*, 163 U.S. at 544.

and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.⁸

The rule in *Plessy v. Ferguson* continued as the law of the nation until the 1950s, when civil rights activists returned to the courts to revisit the inherent assumptions of the *Plessy* and to argue that minority Americans—despite the mandates of the Fourteenth Amendment—would never achieve equal civil and political treatment if the courts and Congress continued to permit manifest inequality in the social relations among the races.⁹ The subsequent line of Supreme Court cases reflected the validity of this argument: the Court declared racial segregation in elementary public education unconstitutional in *Brown v. Board of Education*.¹⁰ Racial discrimination in access to public beaches soon followed,¹¹ as did discrimination in public transportation on busses¹² and in access to public parks.¹³ Later, the Court declared that access to state courtrooms could not be conditioned or limited on the basis of race,¹⁴ and that discrimination in access to public golf courses was unconstitutional.¹⁵

This line of cases joined the cases implementing the remedial order in *Brown v. Board of Education*¹⁶ to set the stage for the landmark Civil Rights Act of 1964 (“Act”).¹⁷ Congress intended the Act to prevent discrimination by the states by implementing the

8. *Id.* at 551–52.

9. GREENBERG, *supra* note 6, at 85–92.

10. 347 U.S. 483 (1954).

11. *See* Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam).

12. *See* Gayle v. Browder, 352 U.S. 903 (1956) (per curiam).

13. *See* New Orleans City Park Improvement Ass'n. v. Detiege, 358 U.S. 54 (1958) (per curiam).

14. Johnson v. Virginia, 373 U.S. 61 (1964) (per curiam).

15. Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam).

16. *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (commonly referred to as *Brown II*).

17. 42 U.S.C. §§ 2000e–2000e-17 (2000).

protections inherent in the Fourteenth Amendment. It forbade discrimination in public accommodations in Titles II and III, gave the Attorney General power to enforce the order in *Brown v. Board of Education*, and prohibited discrimination in employment in Title VII.

A year after signing the Act into law, President Johnson attacked employment discrimination with Executive Order 11,246. That order required recipients of federal contracts in excess of \$50,000 to prepare and file written affirmative action plans, prohibited those companies from discriminating in employment decisions, mandated that they undertake affirmative steps in recruiting, and necessitated that they upgrade the employment condition of current minority and female employees.¹⁸ Throughout the 1960s and 1970s, Congress enacted laws, and federal government agencies implemented policies to promote greater minority ownership of businesses and employment of minorities.¹⁹ By the early 1980s, hundreds of local government agencies were following the federal government's lead, and had implemented affirmative action programs to increase the number of contracts signed with minority businesses.

In designing remedies to address past patterns and practices of discrimination in employment on the basis of gender or race, the courts and government agencies created innovative remedial orders and encouraged employers to be creative in addressing these pat-

18. Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), *reprinted as amended in* 42 U.S.C. § 2000e (2000). President Johnson expanded the list of protected categories of employees under Executive Order 11246 to include women in 1967. Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).

19. In 1967, the Economic Opportunity Act of 1964 was amended to order the Small Business Administration to assist small minority-owned businesses. 42 U.S.C. §§ 2701, 2706 (2000), *repealed by* 42 U.S.C. § 9912(a) (2000). The Public Works Employment Act of 1977, 42 U.S.C. §§ 6701, 6710 and in 1978, the Small Business Act were amended to establish percentage goals in the procurement for minority firms, requiring at least ten percent of all federal grants for local public works projects to be expended with minority businesses. It also directed the Secretary of Commerce, in cooperation with federal departments and agencies, to develop comprehensive minority enterprise programs and institute specific goals for minority firms in federal procurement. For a description of the history of Congressional efforts to promote minority business owners and employees, see *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

terns.²⁰ Moreover, the EEOC promoted the use of such programs with a goal of improving the number of women and minorities who were hired, retained, and promoted in positions that formerly were held almost exclusively by white males.²¹

Furthermore, private and public employers, for various reasons, began to consider voluntary programs aimed at increasing the number of women and minorities in both skilled and unskilled positions. In turn, public response increasingly called upon the courts to address the appropriateness and constitutionality of these remedial programs.²²

B. *The Affirmative Action Remedy in Employment Cases*

Since the passage of Title VII in 1964, the courts have frequently resorted to the use of affirmative action plans to address past discrimination.²³ These plans are designed to remedy past discrimination by affirmatively altering hiring and promotion programs in employment settings.²⁴

However, court-ordered or court-designed plans are not the only manifestations of the theory that government and business are responsible for re-ordering social relations between races and sexes. Affirmative action plans and policies have developed in essentially three major areas: government contracts, court-ordered relief for demonstrated discrimination, and voluntary employer-developed approaches.²⁵ Most pertinent to this article are those

20. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See also, ROBERT BELTON, *REMEDIES IN EMPLOYMENT DISCRIMINATION LAW* (1992).

21. 29 C.F.R. § 1608 (2004). For example, in 1978, the EEOC issued guidelines designed to promote the development of employer affirmative action plans. See *id.*

22. See Robert Belton, *Reflections on Affirmative Action After Paradise and Johnson*, 23 HARV. C.R.-C.L. L. REV. 115 (1988).

23. See MARK W. BENNETT, DONALD J. POLDEN & HOWARD RUBIN, *EMPLOYMENT RELATIONSHIPS: LAW AND PRACTICE* § 6.01 (2005).

24. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987).

25. See Richard Appel, Alison Gray & Nilufer Loy, *Affirmative Action in the Workplace: Forty Years Later*, 22 HOFSTRA LAB. & EMP. L.J. 549, 550 (2005) (hereinafter *Affirmative Action After Forty Years*); James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 901 (1985).

plans and policies created and implemented on a voluntary basis by employers, usually with subsequent review by federal courts.

In *McDonald v. Santa Fe Trail Transportation Company*,²⁶ the Court held that Title VII protects whites as well as blacks from certain forms of racial discrimination.²⁷ While the case did not involve affirmative action programs, it did lay the groundwork for later arguments that such programs, when used to remedy past discrimination, cannot discriminate against whites—even when those programs were specifically designed to promote the employment of blacks or other disadvantaged minority groups.

For example, in *United Steelworkers v. Weber*,²⁸ Kaiser, the employer, designed an affirmative action program to eliminate conspicuous racial imbalance in its steelworker work force.²⁹ The program was voluntarily created by the employer and did not stem from a compulsory order of a court or agency.³⁰ The question presented to the Court by this case was whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences.³¹

In rendering its decision, the Court stressed the voluntary and private nature of the plan, and indicated that courts should consider Title VII's ban of discrimination against the background of its legislative history.³² According to the Court, to read sections 703(a) and (b) as banning race-conscious affirmative action would bring about a result completely at variance with the purposes of the Act.³³ The Court concluded that Congress did not intend to prohibit private and voluntary affirmative action efforts as one method of solving problems of black citizens' access to the workforce.³⁴ The Court relied on the Congressional record, including a statement in the House Report, that Title VII and government leader-

26. 427 U.S. 273 (1976).

27. *Id.* at 295.

28. 443 U.S. 193 (1979).

29. *Id.* at 197–99.

30. *Id.* at 200.

31. *Id.* at 201.

32. *Id.* at 203–04.

33. *Id.*

34. *Id.* at 204–05.

ship “will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.”³⁵

The *United Steelworkers* Court, while refusing to define, in detail, the line between permissible and impermissible affirmative action plans, carefully delineated the scope of its ruling to require that:

- The purposes of the plan be aligned with the purpose of the Act—to open employment opportunities for Negroes;
- It be a voluntary plan;
- The plan not create “an absolute bar to the advancement of white employees”; and
- It be a temporary measure and conclude after its goals have been met.³⁶

In *Johnson v. Transportation Agency, Santa Clara County*³⁷ the Court considered a county government plan for hiring and promoting women and minorities in job positions and classifications in which they are underrepresented.³⁸ The plan was designed to achieve a statistically measurable yearly improvement in those classifications, and the long-term goal was to attain a workforce whose composition reflected the proportion of minorities and women in the area labor force.³⁹ A woman, Diane Joyce, was selected for promotion over a similarly “well qualified” male for a craft-worker position, for which no women had been hired previ-

35. *Id.* at 203–04 (quoting H.R. Rep. No. 914, at 18 (1963)). The cited portion of the House Report states:

No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.

Id. (citation omitted).

36. *United Steelworkers*, 443 U.S. at 208–09.

37. 480 U.S. 616 (1987).

38. *Id.* at 620–21.

39. *Id.* at 621–23.

ously—despite the fact that 238 such positions existed.⁴⁰ The male employee sued.⁴¹

The Court held it was appropriate to take sex or gender into account in determining that Joyce should be promoted.⁴² The Court found that the County's plan was a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women."⁴³ The Court also concluded that the disappointed male employee had the burden of demonstrating that the employer's affirmative action plan was invalid and that its justification was a pre-textual discrimination against white male employees.⁴⁴

Against the backdrop of the U.S. Supreme Court cases addressing the use of affirmative action programs to accomplish the broad legislative goals of the Civil Rights Act, it is clear that Title VII: (1) directly sanctions imposition of affirmative action plans to address past discrimination and patterns of discrimination; (2) permits state actors to create affirmative action plans designed to increase representation of women and minorities in job positions in which they are historically underrepresented, so long as such plans are moderate, temporary, and designed and intended to attain a balanced workforce; and (3) does not forbid private actors from voluntarily creating action plans to increase representation of women and minorities, so long as those plans are temporary and do not create an absolute bar to white or male employees.⁴⁵

The national policy of equality of opportunity in employment, manifested in the history and application of Title VII, requires the use of remedial action plans to correct the effects of past or continuing discrimination. Affirmative action plans and programs also are appropriate to increase the numbers of women and minorities in many employment settings, either by establishing government contractor hiring quotas or by encouraging voluntary plans by employers. However, many hiring decisions do not lend themselves

40. *Id.* at 619.

41. *Id.* at 625.

42. *Id.* at 631–32.

43. *Id.* at 642.

44. *Id.* at 626–27.

45. *See* Appel et al., *supra* note 25, at 559–65.

easily or explicitly to the proscriptions of Title VII, such as in the selection of corporate boards of directors or in the appointment of the federal judiciary. The question thus becomes whether the policies of Title VII apply implicitly to these selection and appointment processes, as well as to the broader employment setting.

II. THE LEGACY OF TITLE VII AND THE CREATION OF “AN ATMOSPHERE CONDUCIVE” TO EQUALITY OF OPPORTUNITY

Viewed in historical perspective, the legacy of Title VII is its success in combating discrimination in hiring, in promotion, and in other aspects of the employment relationship. Moreover, Title VII has promoted a greater degree of voluntary integration of women and minorities into the workforce through affirmative action plans and EEOC guidelines.⁴⁶ A narrower, but equally important, view of the historical impact of the Civil Rights Act and of Title VII considers the degree to which affirmative action plans combine with overarching national policy to increase representation of women and minorities in historically unrepresented fields and occupations and to create “an atmosphere conducive to voluntary and local resolution of other forms of discrimination.”⁴⁷ This language of legislative purpose captures one of the most fundamental aspirations of the civil rights movement, and the resulting legislation, which is to prevent continuing discrimination in employment and to remedy past discrimination against protected classes.

The prevalence of women and minorities in key governance positions—positions of responsibility that, while not covered by Title VII’s reach—signal the extent to which the underlying national policy of Title VII has created an atmosphere conducive to increased opportunities for women and minorities.

46. See 29 C.F.R. § 1608 (2004). The EEOC guidelines provide a safe harbor for employers, labor unions and others who create voluntary programs to advance opportunities for minorities and women. *Id.* §§ 1608.2, 1608.10(b) (2004). The guidelines make it clear that Congress did not want to expose employers to potential liability in a reverse discrimination lawsuit where they created an action plan to increase minority representation in the workforce. *Id.* § 1608.1(a).

47. *United Steelworkers v. Weber*, 443 U.S. 193, 203–04 (1979) (citation omitted).

A. *Judicial Appointments*

The appointment of federal appellate judges is accomplished by a constitutionally mandated procedure in which the President nominates a person for a judicial position and the United States Senate then confirms the appointment.⁴⁸ Because the federal nomination process is a political one, it does not fall within the oversight of the EEOC or the letter of Title VII. Because it is a political appointment of the highest national significance, the process should fall within the spirit of those provisions.

From President Johnson's through President Clinton's term of office, the pattern of judicial appointments from 1963 to 2000 demonstrates that the national policies of Title VII have not been manifested in the political appointments of appellate judges. Rather, very few women and minorities were appointed to these significant positions in federal government. Ironically, although President Lyndon B. Johnson signed Title VII into law, he appointed extremely few women and minorities to the federal appellate courts. Successors Gerald Ford and Richard Nixon appointed no women, and appointed virtually no minority lawyers out of the fifty-seven appointments they collectively made. The following table shows the number and percentage of female and minority judges appointed to federal courts of appeal, not including the United States Supreme Court, from 1993 to 2000:

President	No. Appointees	Male	Female	Minority
Johnson (1963-1968)	40	97.5%	2.5%	5%
Nixon (1969-1974)	45	100%	0%	2.2%
Carter (1977-1980)	56	80.4%	19.6%	21.5%

48. U.S. Const. art. II, § 2 (2004); *see also* STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 11-12 (Basic Books, 1994).

Reagan (1981-1988)	78	94.9%	5.1%	2.6%
Bush (1989-1992)	37	81.1%	18.9%	10.8%
Clinton (1993-2000)	61	67.2%	32.8%	26.2%

The relatively low numbers of women and minority lawyers during that time period may have contributed to the extremely low percentage of women and minorities appointed to the federal appellate courts.⁴⁹ However, the number of women and minority lawyers was high enough (and the number of overall appointments low enough) to improve these appointment statistics in keeping with the national policy evident in Title VII. Given the number of women and minority lawyers in the United States during the Reagan presidency, the paucity-of-numbers argument fails to explain the surprising appointment results during that period: ninety-five percent were men, and ninety-seven percent were white.

The history of appointments of women and minorities to the federal judiciary clearly demonstrates that the purposes of Title VII did not resonate in the White House and United States Senate, and that the Civil Rights Act had not created an atmosphere conducive to the integration of women and minority lawyers into the integral part of American society. But, as the next section demonstrates,

49. See ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 18–15 (1992). The ABA report demonstrates that in 1965–66, only 4.2 percent of students enrolled in law school were women (2,374 total). *Id.* at 18. By 1991–92, 42.5% were women (55,110 total). *Id.* The change in enrollment reflects a corresponding and significant increase in women lawyers: in 1960–61, only 2.6% of all lawyers were women, but this increased to 22% by 1990–1991. *Id.* at 20. The number of minority lawyers and the rate of growth in the number of minority lawyers were less impressive than with women. However, there was a significant increase in minority lawyers during this period of time. In 1960, there were only 2,012 African American lawyers—less than 1% of all lawyers in America. *Id.* at 23–24. By 1970, there were 3,728 African American lawyers, or 1% of all lawyers; by 1980, there were 14,839 African American lawyers (or 2.7% of all lawyers); and by 1990, there were 25,704 African American lawyers (3.3% of all lawyers). *Id.*

the federal appellate courts are not the only significant sector of the economy that was seemingly unresponsive to a national policy committed to improving the representation of women and minorities in leadership positions throughout society.

B. Women in Corporate Leadership Roles

A leadership role analogous to federal appellate judges is selection to and service on the board of directors of a publicly-held corporation. Both positions require leadership skills such as decision making abilities, substantive knowledge of interdisciplinary fields (for example, business, law, accounting, etc.), and problem-solving abilities. They also require that persons selected for the positions have values such as independence, integrity, and moral responsibility, appropriate to the high level of responsibility reposed in these positions.

The historical evidence of the integration of women into positions of responsibility—especially on boards of directors in American corporations—is as disappointing as the record is for appointments to federal courts of appeal. Several analysts and researchers have reported that the representation of women and minorities on boards of directors is unusually small. In 2002, women held only 13% of the board seats in the Standard & Poor's (S&P) largest 500 corporations, only 10% of the 7500 board seats in S&P 1500 corporations, and 11% of the board seats on Fortune 1000 corporations.⁵⁰ Another commentator reports that only 13% of board positions of national companies are held by women, and that almost half of Fortune 500 companies have only one woman—or even no women at all—on their boards.⁵¹ However, researchers have re-

50. Carol Hymowitz, *Corporate Boards Lack Gender, Racial Equality*, WALL STREET JOURNAL ONLINE, <http://www.careerjournal.com/columnists/inthlead/20030709-inthelead.html> (last visited Nov. 7, 2005).

51. Susan Estrich, *Too Bad No One Pays Attention to Gender Now*, INDYSTAR.COM, Feb. 14, 2005, <http://www.indystar.com/articles/6/222141-2636-021.html>. Professor Estrich points to a disturbing trend: the growth in appointment of women directors has essentially stagnated at about 13%, growing only 2% over a five-year period, while the growth of women in medical school (44%) and law school (51%) has been significant. *Id.* She further re-

ported a gradual trend toward more women directors of large companies. Catalyst's 2003 report on women directors notes that in 2003, 13.6% of all Fortune 500 companies' board seats were held by women, up from 9.6% in 1995.⁵² Further, it notes that in 2003, fifty-four companies had 25% or more of their board seats held by women directors, up from eleven companies in 1995.⁵³

This portrait of female leadership on boards of directors is unfortunately more optimistic than that of women in key managerial positions. In 1963, Katherine Graham, CEO of the Washington Post, was the only woman CEO of a major firm. When she retired in 1991, Graham was one of only two women CEOs in major American firms.⁵⁴ In 1999, there were only three.⁵⁵

C. Implications from Data on Leadership Roles of Women in Judicial and Corporate Positions

These reports and surveys demonstrate that the salutary effects of Title VII have not been realized in at least two significant leadership and governance positions in America. This history suggests that the goals and aspirations of the Civil Rights Act, and, more specifically, Title VII, have not been fully achieved. In particular, this history demonstrates that the anticipated beneficial effects of women and minority leaders in two of society's most significant roles have not been realized in courtrooms and boardrooms. The goals of Title VII—barring discrimination in employment on the basis of sex and race on the one hand, and encouraging more diverse workplaces because of the economic, social, and cultural implications of greater diversity of the workforce on the other—reflect a fundamental belief that an integrated, fairly accessible

ports, however, that only 30% of all business-school graduates are women. *Id.*

52. 2003 CATALYST CENSUS OF WOMEN BOARD DIRECTORS (2004), <http://www.catalyst.org/bookstore/perspective/04jan.pdf>.

53. *Id.* The evidence of representation on publically traded company boards' of directors by minorities is similar to the evidence concerning women. See Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 799-803 (2005).

54. Estrich, *supra* note 51.

55. *Id.*

workplace best serves the national economic interest, reflects prevailing social norms, and is required by the Constitution.

III. PUBLIC POLICY AND WOMEN IN CORPORATE LEADERSHIP POSITIONS

In 2002, Congress passed the Sarbanes-Oxley Act⁵⁶ (SOX) to address both significant abuses of positional power by corporate officers and also lackadaisical governance by the directors of those corporations. The underlying philosophy of SOX provokes the question of whether American publicly-held corporations will be better administered if more women directors are appointed and, correspondingly, whether the promise of Title VII is promoted by great numbers of women in leadership positions.

A. *Sarbanes-Oxley and the Importance of Independent Directors*

In the wake of recent corporate scandals surrounding corporate giants such as Enron, MCI, and Adelphi, Congress undertook a necessary and rapid examination of contemporary corporate practices.⁵⁷ In particular, embarrassed legislators and regulators attempted to discover the sources of systemic corruption in some of America's largest corporations, including schemes to inflate corporate earnings to strengthen share price, self-dealing transactions, misappropriation of corporate assets, and others.⁵⁸

This bi-partisan effort in Congress resulted in the passage of SOX. In broad terms, SOX essentially federalized the core of state law dealing with the fiduciary and due care duties of directors and officers.⁵⁹ SOX also affected the composition of boards of directors by requiring audit committees composed of "independent"

56. See *supra* note 3.

57. John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1403-05 (2002); Lisa M. Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1, 6-8 (2002).

58. See Troy A. Paredes, *Enron: The Board, Corporate Governance, and Some Thoughts on the Role of Congress*, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 495, 498-99 (Nancy B. Rapoport & Bala G. Dharan eds. 2004).

59. Fairfax, *supra* note 4, at 396-400.

directors. The legislation, together with implementing and supporting stock exchange rules, mandated greater board oversight and monitoring in several critical areas like executive compensation, disclosure of earning and profitability, and matters relating to operations of the corporation.⁶⁰

The Act also requires public companies to promulgate codes of ethics, extends protections to “whistleblowers,” and mandates that in-house counsel disclose potential management wrongdoing.⁶¹ Furthermore, SOX imposes additional obligations on directors to maintain updated knowledge about internal matters in the corporation, with particular attention to financial and reporting requirements.⁶² Significantly, SOX requires directors to monitor all attorneys, as well as any agents of the corporation suspected of engaging in fraudulent activities.⁶³ In this manner, according to Professor Lisa Fairfax, “Sarbanes-Oxley not only federalizes corporate fiduciary duties, but also adds substance to them. This federalization represents an attempt to restore directors’ fidelity to their fiduciary duties.”⁶⁴

The theme of “independence” by directors was a recurrent one in discussions about SOX, and its adoption builds on a growing body of corporate law and policy seeking to increase the independence of directors of publicly-held corporations. For example, the independence of corporate directors is a cornerstone of the American Law Institute’s Principles of Corporate Governance and Structure (Principles).⁶⁵ The Principles address the very controversial issue of the appropriate role of independent directors in the governance of the modern American corporation, and seek to increase the structural independence of directors appointed to those corporations.⁶⁶

60. *Id.* at 403–05.

61. *Id.* at 403–04.

62. *Id.* at 402–03.

63. *Id.* at 404.

64. *Id.* at 406.

65. PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS (1994).

66. Stephen M. Bainbridge, *Independent Directors and the ALI Corporate Governance Project*, 61 GEO. WASH. L. REV. 1034, 1035 (1993). *See also* Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 267–68

This contemporary focus on the independence of directors is also seen in the literature on the roles and responsibilities of corporate directors. Legal scholars and corporate lawyers tend to view the responsibilities of directors in their roles as monitors of management, as managers of the policy-setting entity of the corporation, and as figureheads defining the relationship the corporation has with shareholders and external constituencies.⁶⁷ These constructs of the duties that directors are expected to exercise and the values and competencies they are expected to bring to deliberations are increasingly premised on their independence from management and from other insiders within the corporation.

Such an emphasis on independence as a value requires a serious consideration of how to construct or compose a board that is not only independent at its core, but exhibits the fundamental attribute that independent decision makers, such as judges, would bring to the most serious decisions of the body. The result of those considerations emerges as a growing awareness in the business community that a diverse board may make better decisions than one dominated by insiders.

B. Independence, Character and Gender: Some Evidence and Theories

Empirical evidence suggests that a more diverse governance board will outperform a less diverse board in several significant ways. These findings have significant implications for the diversity of American corporations' boards of directors, especially in light of the apparent reluctance management has traditionally exhibited when considering female and minority appointments to these boards.

For example, one published survey reports that 86% of women directors and 82% of minority directors are "independent," in the sense that they do not have ties with the corporations' man-

(1997).

67. See Lynne L. Dallas, *The Multiple Roles of Corporate Boards of Directors*, 40 SAN DIEGO L. REV. 781, 787-94 (2003); Fisch, *supra* note 66, at 268-75.

agement.⁶⁸ By contrast, only 70% of directors as a whole are independent under this definition.

In addition, women and minority directors seem to ask different questions than white male directors, and bring different sets of experiences and concerns with them to the boardroom.⁶⁹ The Conference Board of Canada, in a 2002 report, found a strong link between female representation on boards of directors and good corporate governance.⁷⁰ Researchers have found that 94% of boards with three or more women members insisted on conflict-of-interest guidelines, compared to only 58% of all male boards of directors.⁷¹ Researchers also reported that female directors are more likely than are their male counterparts to pay attention to audits, as well as risk oversight and risk control.⁷² Furthermore, 72% of boards with two or more women directors conducted formal board performance evaluations, while only 49% of all male boards of directors perform such evaluations.⁷³ The Conference Board also found that boards of directors with women directors are significantly more likely to provide formal written limits on board members' authority than all male boards.⁷⁴

The empirical evidence concerning how gender diversity (and, some suggest, racial and ethnic diversity, by extension) improves efficiency and competence of corporate boards is further advanced by policy analysis suggesting that greater diversity of viewpoints improves corporate performance.⁷⁵ For example, some academic scholars have argued that corporations lacking in meaningful input from diverse leadership are more likely to engage in liability-enhancing conduct, because they are unable to empathize with their constituencies.⁷⁶ Specifically, it has been argued that firms

68. Hymowitz, *supra* note 50.

69. *Id.*

70. Judy B. Rosener, Ph.D, *Women on Corporate Boards Make Good Business Sense*, WOMENSMEDIA (2003), <http://www.womensmedia.com/new/Rosener-corporate-board-women.shtml>.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Dallas, *supra* note 67, at 810.

76. See Fairfax, *supra* note 4; Dallas, *supra* note 67; Donald C.

such as Coca-Cola and Texaco were sued by classes of employees claiming employment discrimination because the corporate leadership lacked the capacity to relate empathetically with their respective workforces.⁷⁷

There are at least two aspects of this assertion: first, there is concern that all white, male boards will lack empathy for a firm's workforce that is significantly populated by women or minority employees.⁷⁸ According to this analysis, the ability of a more diverse board of directors and management to relate with empathy to women and minorities will reduce claims of race or sexual discrimination.⁷⁹ Second, there is a concern that these boards will tend to identify with each other, and will thereby lose objectivity when called upon to make difficult or liability-enhancing decisions.⁸⁰

According to the analysis, a significantly white and male board of directors may develop an "in group" perspective to governance of the corporation.⁸¹ Without input from culturally distinct perspectives, they could lose the flexibility necessary to respond to the needs of the firm in a developing context.⁸²

The concept of "in group" cohesion has another, more significant, implication for corporate governance structures: such non-diverse governance groups also can be too sympathetic to other members of the group, to the detriment of the company as a whole.⁸³ For example, this closeness can impede individual board member decision making when a special committee of independent

Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L. J. 797 (2001).

77. Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1481–82 (2002).

78. *Id.* at 1473.

79. *Id.* at 1481.

80. Langevoort, *supra* note 76, at 810–11.

81. *Id.* at 811.

82. *Id.*

83. *Id.*

directors is asked to investigate claims of self dealing or of a breach of fiduciary duty by another director.⁸⁴

By contrast, the emerging, post-Enron description of contemporary American corporate boards of directors emphasizes the importance of balance between independent or outside directors and inside directors, as well as the importance of composing a diverse board.⁸⁵ These “balanced” governance boards are considered by many authorities to be more efficient in discharging the many roles of directors of publicly-held corporations.⁸⁶ The efficiency of this governance model may improve overall firm performance.⁸⁷ According to Professor Donald Langevoort, “[t]he most productive boards are ones that have enough diversity to encourage the sharing of information and active consideration of alternatives, but enough collegiality to sustain mutual commitment and make consensus-reaching practicable within the tight time frames in which boards must operate.”⁸⁸ These considerations indicate the growing

84. See *Zapata Corp. v. Maldonado*, 430 A.2d 779, 786–87 (Del. 1981) (acknowledging that empathy may play a role when a special committee of the board is asked to respond to a demand that the corporation bring a derivative action alleging directorial or managerial wrongdoing.). See also Wade, *supra* note 77, at 1478.

85. See, e.g., Dallas, *supra* note 67; Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363 (2002).

86. Dallas, *supra* note 67, at 791–96.

87. See Dallas, *supra* note 85, at 1406–07. The emerging literature is considering the issues associated with a new set of roles and responsibilities for directors in the context of Sarbanes–Oxley’s effect on corporate governance, and is redefining the duties by and roles of corporate directors in more complex ways than the traditional “monitor or manage” models to include broader roles in forging relationships with external constituencies and institutional investors. See, e.g., Dallas, *supra* note 67, at 801–09. Similarly, there is important analytic work being done to determine whether corporations whose boards are dominated by outside or independent directors are more profitable than more traditional boards dominated by insiders and managers. See, e.g., Banjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921, 921–22 (1999). There is also thoughtful analysis and research on how best to compose boards of directors to achieve the types of leadership and decision-making that specific firms need from the governance groups. See, e.g., Langevoort, *supra* note 76, at 810–11.

88. Langevoort, *supra* note 76, at 810–11.

recognition among scholars and businesspeople alike of the importance of and need for a diverse leadership team in the corporate boardroom.⁸⁹ Reflecting that concern, Professor Lynne Dallas states that “[w]omen, minorities, and non-nationals on corporate boards may provide needed diversity in perspectives and may increase attention in the boardroom to the interests of employees, consumers, and the international marketplace.”⁹⁰

Congress, through passage of SOX, has made a statement about the national importance of improved governance in America’s leading corporations, much as Enron (and other similar failures in corporate governance) made a statement about how inadequate governance will spawn significant economic and social problems.⁹¹ The core of the emerging theories of corporate governance is moving toward a model of diversity, independence, and representation in the composition and operation of corporate boards.⁹² Clearly, greater representation of women and minorities on governing boards serves these national interests. The literature also emphasizes the usefulness of deeper cross-disciplinary research into corporate governance and effective management of the firm, such as the application of managerial psychology to issues of the composition of the board.⁹³ As this literature grows, it may be possible to more precisely articulate the precise contributions to more objective, effective corporate governance from increased diversity on corporate boards.

IV. CONCLUSION: A CONFLUENCE OF NATIONAL POLICY CONSIDERATIONS: TITLE VII, CORPORATE GOVERNANCE, AND AN ATMOSPHERE CONDUCTIVE TO MORE DIVERSE REPRESENTATION

This article concludes with observations about the seemingly unlikely confluence of policy considerations inherent in the history and purposes of Title VII of the Civil Rights Act of 1964, and the

89. *Id.*

90. Dallas, *supra* note 85, at 1363.

91. Dallas, *supra* note 67, at 791–96.

92. *Id.*

93. Troy A. Paredes, *Too Much Pay, Too Much Deference, Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U.L. REV. 673, 762 (2005).

Sarbanes-Oxley Act of 2002. One point of congruence concerns the policy of each legislative enactment: To improve, through governmental action and public persuasion, significant aspects of the American economy, including access to employment in fair, non-discriminatory workplaces and enhanced efficiency and integrity in markets for securities and the conduct of corporations. Indeed, this article describes forty years of national pursuit of Title VII goals of workplace diversity and non-discrimination. However, it also identifies reasons to doubt that those goals have been fully achieved through the creation of an atmosphere conducive to more openly diverse workplaces. Finally, this article chronicles the failures of corporate leadership—in the offices of CEOs and in corporate boardrooms—that lead to the tragedies of Enron, MCI and others, and the widespread conviction that a lack of independence by corporate directors fostered a climate that permitted such abuses and corruption. The fundamental policies of both legislative enactments, it is argued, will be advanced by a pronounced, renewed commitment to greater diversity in key leadership positions in government, the judiciary and publicly traded corporations.

It is important to note that this article does not advocate formal affirmative action programs or policies for corporate directorships or the amendment of Title VII to include appointments to corporate boards or federal appellate judicial positions. Quota appointment policies are being considered in other industrialized countries, but, in the United States, there seems to be no demonstrated interest in such formal goals.⁹⁴ However, it is appropriate that government and business seek to find informal, voluntary means of increasing the number of women and minorities who are elected to serve on corporate boards.

The confluence in these areas of national public policy also is represented by the growing body of literature and analysis that

94. *Business: Boardroom Blues*, TIME EUROPE, Sep. 14, 2003, http://www.time.com/time/europe/gender/story_3.html. The Time Europe story reports that Norway's government was threatening "to require companies to make their boards 40% female if they did not do it voluntarily." *Id.* Apparently, the threat led to an increase in the number of women directors and the government gave the largest firms two years to achieve the 40% target goals or face loss of their government charter. *Id.*

strongly suggests that many institutions are more efficiently managed by a diverse leadership group and that many workplaces are better if they include a diverse workforce. This linkage between diversity and better led organizations was a central theme in the United States Supreme Court's recent affirmative action cases involving higher education.⁹⁵ The Court's opinion in *Grutter v. Bollinger* reveals the growing awareness that diversity is a fundamental aspect of our educational processes, and that students will be better prepared for the society and economy that they will lead if their classrooms are more diverse.⁹⁶ Indeed, the Court's analysis demonstrates the significant congruence between the policies of more effective workplaces and more diverse educational settings.⁹⁷

The Court in *Grutter* acknowledged the roles that increased diversity has played in making a more efficient military and the importance of affirmative plans to increase representation of minorities.⁹⁸ Moreover, the Court stated that the benefits of diversity "are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."⁹⁹ An amicus brief by a Fortune 500 corporation pointed out that a truly diverse workforce "creates a competitive advantage by allowing a business to leverage the diverse perspectives of its employees to improve decision-making and increase productivity."¹⁰⁰

The ideal of diversity as a fundamental goal of our society has, according to Professor Peter Schuck, gained broad acceptance in many aspects of public and private life.¹⁰¹ Affirmative action policies and programs, whether in higher education or trade and craft level employer, have had considerable effects of improving diversity in workplaces, classrooms, the military, and elsewhere.

95. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

96. *Grutter*, 539 U.S. at 330–31.

97. *Id.*

98. *Id.* at 331.

99. *Id.*

100. *Id.*

101. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 55 (2003).

So, there is reason for optimism that the fundamental policies underlying enactment of Title VII of the Civil Rights Act of 1964 have achieved many of its legislative goals and that it has created “an atmosphere conducive to voluntary and local resolution”¹⁰² of a history of racial and gender discrimination. However, in some areas, such as leadership of America’s leading corporations, there is considerable room for enhanced representation by women and minorities, and it now appears clear that such enhanced representation will help attain more effectively managed and responsibly led corporations.

102. *United Steelworkers v. Weber*, 443 U.S. 193, 203–04 (1979) (citation omitted).