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THE DIVERSITY DOUBLE STANDARD*

SUNG HUI KIM**

In Grutter and Gratz (2003), the twin cases that challenged the University of Michigan's affirmative action programs, corporate America praised educational diversity as a compelling interest. But as is well known, it did so not on social justice grounds but on the empirical claim that "diversity is good for business." In particular, education in a diverse environment would produce better workers for an increasingly global and competitive economy. This position has since been echoed in corporate pronouncements about diversity in corporate workplaces and boardrooms. Generally speaking, corporations have justified voluntary affirmative action within the firm only to the extent that it furthers their bottom line—i.e., only if there is a "business case" for diversity. On the surface, the corporate stances toward educational diversity on the one hand and corporate diversity on the other hand seem entirely consistent. Both emphasize a consequentialist logic and economic rationale. But if one probes more deeply, an intriguing distinction appears. Regarding corporate diversity, corporations are advocating nothing more than what is already in their own economic self-interest. By contrast, when it comes to educational diversity, corporations recommend it regardless of the university's economic self-interest. This Article argues that these positions amount to a double standard. After justifying this characterization, this Article provides a possible explanation for why the double standard exists by drawing on the psychology of human sociality in order to explore how we think differently about the commercial and educational realms. It concludes by pointing out that in light of this double standard, corporate America's public position on diversity amounts to little more than support for diversity in the abstract so long as corporations don't have to pay for it.

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INTRODUCTION

Many progressives praised the corporate amicus intervention in *Grutter v. Bollinger*¹ and *Gratz v. Bollinger*,² the twin cases brought before the United States Supreme Court in 2003. The question presented was whether the Equal Protection Clause prohibited the University of Michigan College and Law School from voluntarily adopting affirmative action programs designed to increase minority student enrollment.³ In one of the two main amicus curiae briefs,⁴ sixty-five distinguished business corporations⁵ loudly affirmed the value of educational diversity to the business sector: “[T]he skills and training needed to succeed in business today demand exposure to

1. 539 U.S. 306 (2003).

2. 539 U.S. 244 (2003).

3. *Grutter*, 539 U.S. at 322; *Gratz*, 539 U.S. at 259–60. Although I recognize that there are many different forms of diversity—including racial, ethnic, gender, and sexual orientation diversity—in this Article, my focus is on racial and ethnic diversity because that particular type of diversity was specifically challenged in *Grutter* and *Gratz*, the two cases on educational diversity. As noted below, I will compare the corporate positions on educational and corporate diversity.

4. General Motors (“GM”) submitted one of the two main amicus briefs. See Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), *Gratz*, 539 U.S. 244 (No. 02-516) [hereinafter GM Brief]. The second brief was submitted by sixty-five businesses, and GM did not sign it. See Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), *Gratz*, 539 U.S. 244 (No. 02-516) [hereinafter Sixty-five Businesses Brief]. Additionally, “British Petroleum (BP) attempted to submit a brief supporting affirmative action on similar grounds, although it declined to take a position on whether the specific programs at issue in the Michigan cases should be upheld.” David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity is Good For Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1552 n.26 (2004) (citing Motion for Leave to File Amicus Curiae Out of Time and Brief of BP America Inc. as Amicus Curiae in Support of Neither Party at 2–3, *Grutter*, 539 U.S. 306 (No. 02-241), *Gratz*, 539 U.S. 244 (No. 02-516) [hereinafter BP Brief]).

5. By “business corporations” or “corporations,” I generally refer to businesses organized as for-profit corporations who signed the corporate amicus curiae briefs and exclude nonprofit corporations, including universities.

widely diverse people, cultures, ideas and viewpoints,' and this exposure is needed at 'every level of an organization.'"⁶ The brief warned that firms must be able to recruit from a talented pool of racially and ethnically diverse student bodies for American business to succeed in the competitive global economy.⁷ In essence, corporate support for educational diversity was premised on the claim that "diversity is good for business,"⁸ which I will refer to here as the "business case for diversity."⁹

Notably, the corporations did not try to argue any corrective or distributive justice rationale as a compelling interest to justify the affirmative action programs. As David Wilkins observed, "[n]either corporate brief makes more than a passing reference to the moral arguments in favor of helping blacks to overcome slavery, segregation, or the stigma of racism"¹⁰ Instead, they focused on what was most doctrinally available after *Regents of the University of California v. Bakke*¹¹—the pedagogical value of diversity as a compelling interest.¹² And by showing that the business community

6. 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, 797 (quoting Sixty-five Businesses Brief, *supra* note 4, at 5–6).

7. Sixty-five Businesses Brief, *supra* note 4, at 5–6; see also Wilkins, *supra* note 4, at 1553.

8. Wilkins, *supra* note 4, at 1553.

9. *Id. passim* (referring throughout to "the business case for diversity"); cf. Fairfax, *supra* note 6, at 797 (noting the presence of business rationales for diversity in the *Gratz* and *Grutter* corporate amicus briefs and examining the "viability of these business rationales for diversity in an effort to determine whether such rationales can or should be used as a basis for justifying efforts to increase board diversity"); Wilkins, *supra* note 4, at 1554 (chronicling the rise of "market-based diversity arguments in the legal profession").

10. Wilkins, *supra* note 4, at 1553.

11. 438 U.S. 265 (1987).

12. The most important precedent for *Gratz* and *Grutter* at the time was *Bakke*, which authorized public colleges and universities to use race as a factor in admissions while specifically striking down U.C. Davis's affirmative action plan, which set aside spaces for racial and ethnic minorities. *Id.* at 317–20. As detailed by Rachel Moran, "[t]he *Bakke* case split the Court four-to-four with Powell . . . as the crucial swing vote." Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 OHIO ST. L.J. 1321, 1345 (2008). Powell's critical plurality opinion offered a way out of the impasse between the color-blind and color-conscious approaches to interpreting the U.S. Constitution. See *id.* at 1345–47. "Although Powell agreed that racial classifications were inherently suspect and therefore triggered the most searching level of judicial scrutiny," he did not categorically bar governments from relying on voluntary race-conscious policies. *Id.* at 1346. Turning to the First Amendment and the tradition of academic freedom in higher education, Powell appealed to the "pedagogical rationale for voluntary affirmative action," emphasizing prospective benefits rather than past wrongs. *Id.* at 1346–47. "According to Powell, diversity was a compelling interest because it promoted the free exchange of ideas by nurturing an 'atmosphere which is most conducive to speculation, experiment and creation.'" *Id.* (quoting *Bakke*, 438 U.S. at 312). As a result, *Bakke* paved

did care,¹³ this intervention may have influenced Justice O'Connor's majority opinion in *Grutter*, which prominently cited both corporate amicus briefs.¹⁴

Now, compare this corporate stance toward *educational* diversity with that toward *corporate* diversity—the way that affirmative action might operate within the firm itself. By “corporate diversity,” I refer to affirmative action efforts by for-profit business corporations to expand both workplace diversity and board diversity. Generally speaking, corporations have justified voluntary affirmative action within the firm only to the extent that it furthers their economic interest.¹⁵ For instance, in 1999, participants at a forum sponsored by the Conference Board, a nonprofit research association with over 1,400 member companies representing nearly half the Fortune 500,¹⁶ “immediately rejected the notion that board diversity for its own sake, without a business case, was sufficient reason to act.”¹⁷ In other words, corporate diversity is justified only if the economic benefits exceed the economic costs to the corporation itself.

At a quick glance, the corporations' stances toward educational diversity, on the one hand, and corporate diversity, on the other, seem entirely consistent. Neither waxes poetic about social justice. Both are forward-looking justifications, emphasizing a consequentialist logic. Both are economic in nature—educational diversity is good because it produces good inputs (employees with cross-cultural competence and experience)¹⁸ for the firm; corporate

the road for consequentialist rationales that emphasized the benefits of diversity, rather than relying on arguments predicated on the need to rectify past (or even present) societal discrimination.

13. See Fairfax, *supra* note 6, at 797 (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

14. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); see also Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 20 (2005) (noting Justice O'Connor's citation to the corporate briefs in the majority opinion); Arthur M. Wolfson, Note, *Business Support of Affirmative Action and Discriminatory Hiring Practices: Contradictory or Compatible?*, 27 W. NEW ENG. L. REV. 197, 203–04 (2005) (same).

15. See *infra* notes 35–36 and accompanying text.

16. See *Our Community*, CONFERENCE BD., <http://www.conference-board.org/about/index.cfm?id=1975> (last visited Feb. 22, 2011).

17. CAROLYN KAY BRANCATO & D. JEANNE PATTERSON, CONFERENCE BD., BOARD DIVERSITY IN U.S. CORPORATIONS: BEST PRACTICES FOR BROADENING THE PROFILE OF CORPORATE BOARDS 7 (1999); see also Fairfax, *supra* note 6, at 840 (noting that “[w]hile surveys suggest that directors and corporate executives believe board diversity to be an important goal, they also indicate their belief that rationales must go beyond moral or social appeals”).

18. See *supra* notes 6–9 and accompanying text.

diversity is good only to the extent that it furthers the firm's bottom line. In sum, both are grounded in the empirical claim that "diversity is good for business."¹⁹

But probing deeper, an intriguing distinction appears—what I call a "diversity double standard." Regarding corporate diversity, corporations are advocating nothing more than what is already *in* their own economic self-interest. In other words, they will support diversity in the workplace so long as it makes money. Seen in this light, their position is morally indistinct from saying that they will support a particular sparkplug supplier because it offers sparkplugs at lower cost with equal quality. By contrast, when it comes to educational diversity, corporations recommend it *regardless of* the university's economic self-interest. In Part I, I demonstrate that this is in fact a double standard. Of course, one could argue that it is just a different standard, not deserving of the more pejorative "double standard" label, because the corporation and university are in such different circumstances. But as I demonstrate in Part II, these two institutions are in a far more similar than different situation.²⁰ In Part III, I provide a possible explanation for why the double standard exists, drawing on the psychology of human sociality in order to explore how we generally think about the commercial and educational realms. In the Conclusion, I offer some thoughts about what to do with this double standard. In sum, if we critically examine

19. This Article does not address the hotly debated empirical question of whether diversity improves corporate performance. For views on this empirical question, see James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C. L. REV. 901, 902 (2011) ("To our knowledge, the empirical studies to date have not supported the case for board diversity on shareholder value grounds."); *see also infra* note 36 (discussing how proponents of diversity have used business rationales to advocate for board diversity). *See generally* Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809 (2011) (examining the relationship between female representation on corporate boards and stock performance).

20. The title of Professor James E. Coleman, Jr.'s commentary unfairly suggests that I am arguing that a different standard is "inherently" a double standard. James E. Coleman, Jr., *Different Strokes for Different Folks: A Different Standard Is Not Inherently a Double Standard*, 89 N.C. L. REV. 1003 (2011). For the record, I have never presumed that anything is "inherently" a double standard. Instead, the entire Part II of my Article explains why the corporate position on diversity is indeed a *double* standard and not merely a *different* standard by exploring whether corporations and universities are, in fact, *differently* situated. Regrettably, Professor Coleman never even addresses Part II (or, for that matter, Part III) of my Article. *See id.* In his only attempt to justify the different standard for universities and business corporations, Professor Coleman points out that comparing universities and corporations is tantamount to "comparing apples and oranges." *Id.* at 1007. Unfortunately, clichés aren't persuasive arguments. After all, one could respond that apples and oranges are both fruits.

the business case for diversity, we can discern an inconsistency that is not easily justified. Moreover, this inconsistency suggests that corporate America's public position on diversity is little more than a commitment to diversity in the abstract so long as one never has to pay for it.

I. THE DOUBLE STANDARD

A. *The Corporate Stance on Educational Diversity*

Both the amicus brief filed by sixty-five well-known corporations ("Sixty-five Businesses Brief") and the brief filed by General Motors ("GM Brief") make the same central argument in urging the Supreme Court to uphold the affirmative action programs of the University of Michigan College and Law School. They argue that the success of American business in the face of global competition hinges on its ability to recruit employees with "cross-cultural competence" and experience.²¹ The Sixty-five Businesses Brief argues:

In the practical experience of the *amici* businesses, the need for diversity in higher education is indeed compelling. Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints. Employees at every level of an organization must be able to work effectively with people who are different from themselves. *Amici* need the talent and creativity of a workforce that is as diverse as the world around it.²²

More specifically, the brief argues that individuals educated in a "cross-cultural environment" are better able to problem solve, to invent and market products and services appealing to various consumers, to work with employees and business partners in the United States and around the world, and to contribute to a constructive, more racially harmonious work environment.²³ Tellingly, the Sixty-five Businesses Brief sidesteps any social justice justifications for diversity, whether framed in corrective justice terms

21. See Wilkins, *supra* note 4, at 1592 & n.183 (discussing the two briefs). Accordingly, "the central argument of both briefs is the importance of producing leaders who have had *experience with diversity*—not of producing leaders who *are themselves diverse*." *Id.*

22. Sixty-five Businesses Brief, *supra* note 4, at 5–6.

23. *Id.* at 7.

or based on the indignities of de facto segregation.²⁴ Instead, the brief squarely grounds its defense of educational affirmative action in the pressing economic need for businesses to compete in an increasingly global economic environment.²⁵

Likewise, the GM Brief affirms the business case for diversity.²⁶ Citing market opportunities opened up by globalization, Internet shopping, and the increasing purchasing power of racial minorities in the United States, the GM Brief stresses the importance of having employees with “cross-cultural competence”:

Having high-level employees who possess cross-cultural competence is essential for a business to profit from these vast market opportunities. It is undeniable that consumers’ cultures can and often do influence their purchasing preferences. Businesses whose employees are able to identify and cater to these market preferences will prosper; those whose employees lack the sensitivity and domain knowledge to meet these diverse market demands will not.²⁷

And, according to these briefs, not only is cross-cultural competence essential to meeting these market challenges, universities are apparently the *best* venues to teach this “skill”:

Businesses depend upon institutions of higher learning to teach students the cross-cultural competence and cognitive skills they will need to perform at a high level in the business world. Higher education is the *best*, and for many students the only, opportunity to acquire these skills.²⁸

The implication is that corporations are, relatively speaking, inferior venues for teaching cross-cultural competence.²⁹ The GM

24. See *supra* text accompanying note 10; see also Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 591–92 (2000) (contrasting “public-regarding” justifications for diversity and the “self-regarding arguments proffered by the CEOs”) (emphasis omitted); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 63 (2003) (noting that the desire to “remedy deep social dislocations associated with race” was the actual reason for why affirmative action became prominent in American higher education).

25. See Sixty-five Businesses Brief, *supra* note 4, at 1; Wilkins, *supra* note 4, at 1553.

26. This is not to say that GM completely ignored other rationales for diversity. But even when it referred to the indignities of a racial caste system, it still brought the issue back to economics. For example, GM argued toward the end of its brief that “[t]here can be little doubt that racial and ethnic diversity in the senior leadership of the corporate world is crucial to our Nation’s economic prospects.” GM Brief, *supra* note 4, at 23.

27. *Id.* at 13–14.

28. *Id.* at 19 (emphasis added).

29. GM even made the argument in a subtitle of its brief. *Id.* (“Institutions of Higher Learning Are Ideally Equipped to Provide the Exposure to Diversity, Development of

Brief goes even beyond implication and makes the explicit comparison regarding institutional competency: “[u]niversities, *not* businesses, ‘are [the] ideal institutions to foster’ the skills and values necessary for participation in a heterogeneous society.”³⁰

In sum, corporations argue that universities should promote diversity because it’s good for business.³¹ But the *business* that they’re referring to is *their* business and not the business of universities. Indeed, the corporate briefs do not make even a passing reference to the economic self-interest of universities or, for that matter, any of the significant costs that affirmative action programs generate for universities.³² The strong implication is that, from the corporate perspective, it simply doesn’t matter whether diversity serves or diserves the economic self-interest of universities. The possibility that it might hurt the university’s bottom line doesn’t even register.

By contrast, corporations have justified voluntary affirmative action *within* the firm only to the extent that it furthers their

Cross-Cultural Competence, and Critical Thinking Skills that Graduates Need to Thrive in the Business World”).

30. *Id.* at 21 (alteration in original) (emphasis added) (quoting Expert Witness Report of Patricia Y. Gurin at 9, *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (No. 97-75231)).

31. The main argument that Professor Coleman advances in his commentary is that there can be no double standard where one party merely endorses a *voluntary* position taken by another party. *See generally* Coleman, *supra* note 20. In other words, Professor Coleman suggests that a double standard can only hold when one party *forces* a position on the other. This is the only plausible reading of the myriad statements Professor Coleman makes, stressing the *voluntary* nature of the University of Michigan’s position in *Grutter* and *Gratz*. *See, e.g., id.* at 1007 (“The University of Michigan was *not being forced* to choose among competing interests in *Grutter*; rather, it was defending its right to pursue diversity *when it chose to do so.*”) (emphasis added); *id.* at 1009–10 (“Michigan was seeking only the *autonomy and discretion* to pursue diversity; it was *not being compelled* to do so *against its will* or interest.”) (emphasis added); *id.* at 1004 (“There is nothing in this position that can fairly be characterized as a diversity standard that . . . the corporations were trying to *force* on *unwilling* universities.”) (emphasis added); *id.* at 1013–14 (“The *choice* whether to sacrifice prestige for diversity—if such a choice was presented—was made *solely* by the University of Michigan, which *voluntarily pursued* its affirmative action program.”) (emphasis added).

But Professor Coleman’s principal argument is a non sequitur. The existence of any double standard does not depend on the fact that one party is forcing a position on the other. Suppose, for example, a man thinks that women are *solely* responsible for preventing unwanted pregnancies and, therefore, women *should* actively use contraceptives to prevent unwanted pregnancies. This same man is, however, completely indifferent to male use of contraceptives. Is this a double standard? Yes it is. Does it matter that this man is not legally or physically *forcing* women to use contraceptives? Of course not. Urging women voluntarily to use contraceptives but declining to do so for men amounts to a double standard unless this difference can be justified.

32. For a discussion of the costs for universities to maintain affirmative action policies, see Part I.B.

economic self-interest. For example, as noted in the Introduction, in 1999, Conference Board participants, including representatives from companies such as Bank of America, PepsiCo, and TIAA-CREF, expressly ruled out rationales, other than the “business case,” to support board diversity.³³ Also, the Vice President of Global Workforce Diversity of IBM Corp., in his public embrace of the business case for workplace diversity, expressly noted that “[m]orality yields goodwill, not good outcomes.”³⁴ While others have not gone quite so far in downplaying moral rationales,³⁵ the mere fact that corporations feel compelled to offer business justifications for their voluntary efforts at diversity suggests that they regard moral

33. BRANCATO & PATTERSON, *supra* note 17, at 6–7; Fairfax, *supra* note 6, at 840.

34. Christine Canabou & Alison Overholt, *Smart Steps*, FAST COMPANY, Feb. 28, 2001, at 91, 108 (quoting J.T. (Ted) Childs, Jr.). Childs states:

My effort to diversify the workforce has moved from being a moral imperative to being a strategic imperative—shifting the conversation away from affirmative action and toward the marketplace. Morality yields goodwill, not good outcomes. Ultimately promoting diversity is good for business.

I recently made this statement to government workers: “You’re not the most powerful influence on equal-opportunity enforcement—the marketplace is.” I want managers to be driven primarily by the fear of losing customers who won’t spend their money on a company with a reputation for unfair treatment. When driven by the almighty dollar, executives will do what’s right. Don’t underestimate the sound of “cha-ching.”

Id.

35. Key leaders in the investment community have stressed business rationales for diversity. *See, e.g.*, COUNCIL OF INSTITUTIONAL INVESTORS, CORPORATE GOVERNANCE POLICIES § 2.8(b) (2010), available at <http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%204-13-10.pdf> (noting that the Council believes that a diverse board “can enhance corporate financial performance”); Lisa M. Fairfax, *Board Diversity Revisited*, 89 N.C. L. REV. 855, 864–65 (2011) (giving examples of companies that believe diversity improves performance); Jonathan D. Glater, *Some Companies Back Michigan in Affirmative Action Policy*, N.Y. TIMES, Jan. 29, 2003, at 1 (quoting an Exelon official: “They want to be able to have people from all backgrounds who match and mirror the populations they serve. . . . We believe they will be better equipped to work in the global environment, in diverse communities, if they are educated in an environment of diversity.”); Gary Strauss, *Good Old Boys’ Network Still Rules Corporate Boards*, USA TODAY, Nov. 1, 2002, at 1B (reporting Stephen Baum, CEO of Sempra Energy, as stating that diversity “provides diversity of opinion and a different perspective. It causes us to think a little more. The quality of our decision-making is better. If we were all right-wing Republicans, we might miss opportunities.”); Letter from William M. Tartikoff, Senior Vice President and Gen. Counsel, Calvert Grp., Ltd. & Ivy Wafford Duke, Assistant Vice President and Deputy Gen. Counsel, Calvert Grp., Ltd., to Elizabeth M. Murphy, Sec’y, SEC (Sept. 15, 2009), available at <http://www.calvertgroup.com/NRC/literature/documents/sri-20100125-SEC-Proxy-Disclosure.pdf> (noting that “[d]iversity is a critical attribute to a well functioning board” and that diversity “helps to ensure that different perspectives are brought to bear on issues, while enhancing the likelihood that proposed solutions will be nuanced and comprehensive”).

rationales as insufficient in and of themselves.³⁶ The empirical research of Lissa Broome, John Conley, and Kimberly Krawiec, published in this issue, confirms that directors of public company boards overwhelmingly rely on “functional” rationales that are “loosely associated with corporate performance” to justify board diversity.³⁷ Rarely do they raise moral or social justice rationales.³⁸ Interestingly, the authors found that when they pressed executives about the claimed benefits of diversity,³⁹ most struggled to come up with specific and coherent examples.⁴⁰

36. See, e.g., Fairfax, *supra* note 35, at 857 (“[B]oard diversity advocates have gravitated toward market- or economic-based rationales for advancing board diversity.”); Fairfax, *supra* note 6, at 840 (“Thus, the very fact that scholars and business leaders alike feel compelled to advance business justifications for board diversity indicates that moral rationales may not be enough to encourage voluntary measures for increasing diversity.”); Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351, 359 (2004) (“Arguing that corporations should embrace diversity because it makes good business sense implies that if diversity does not increase the bottom line, it is unjustified—indeed, that it should be avoided.”). See *supra* note 35 for specific examples of companies offering business justifications for diversity.

The reliance on business rationales for diversity may reflect, in part, a general trend toward celebrating selfishness. See LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* 18–19 (2011) (“Today’s experts often automatically assume that the best way to change human behavior is to harness the force of greed by using material incentives. . . . This approach reflects a long tradition in economic theory of accepting, even celebrating, selfishness. Since at least the days of Adam Smith, economists have preached that self-interest is noble and greed is good.”).

37. Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 761 (2011); see also *id.* at 763–64 (“We have identified six rationales posited in the literature or by our respondents as business justifications for board diversity.”).

38. *Id.* at 763, 799. To be sure, there are a few leaders who affirm the moral case for corporate diversity. For example, one CEO of a major public company gave the following explanation in a memo to middle management, to justify the company’s decision to devote significant resources to an affirmative action program:

“I am often asked why this is such a high priority at our company. There is, of course, the obvious answer that it is in our best interest to seek out and employ good people in all sectors of our society. And there is the answer that enlightened self-interest tells us that more and more of the younger people, whom we must attract as future employees, choose companies by their social records as much as by their business prospects. *But the one overriding reason for this emphasis is because it is right.* Because this company has always set for itself the objective of assuming social as well as business obligations. Because that’s the kind of company we have been. And with your participation, that’s the kind of company we’ll continue to be.”

Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 53, 65 (1991) (quoting a CEO in Business Products Corporation—Part 1, HBS Case Services 9-377-077).

39. Professor Coleman argues that “the principal implication of [my] article” is “that there is no credible business justification for meaningful corporate diversity.” Coleman,

One might wonder whether the lack of moral urgency for supporting corporate diversity just reflects the fact that diversity is thriving in corporate America. But that notion is quickly dispelled by the data, which confirm that our workforce is still racially and ethnically stratified. According to the 2008 statistics compiled by the U.S. Equal Employment Opportunity Commission, although racial minorities (including Asian Americans)⁴¹ comprise approximately 34% of the workforce in the entire private sector, they constitute over 53% of unskilled laborers and about 50% of service workers, while holding a mere 12% of senior level administrative and managerial positions.⁴² In 2008, twenty-two (or just over 2%) of the Fortune 1000 companies were headed by minority CEOs.⁴³ In 2005, at Fortune 500

supra note 20, at 1013. In other words, Professor Coleman thinks that my Article supports the proposition that diversity is bad for the business of corporations (i.e., that diversity impedes corporate performance). Professor Coleman's supposition is plainly false. Whether diversity actually enhances or impedes corporate profitability is fiercely contested and the complex empirical question is largely beside the point of my Article. After all, as a logical matter, one need not answer the empirical question of whether diversity is good for the business of corporations in order to argue that corporations apply different standards for themselves as compared to universities. I am more interested in *why* corporations employ disparate rationales to support educational and corporate diversity (which I discuss in Part III) than whether the empirical evidence bears out those rationales. Indeed, the empirical question of whether diversity enhances or impedes corporate performance has been amplified by other scholars. *See supra* note 19.

40. *See* Broome et al., *supra* note 37, at 786–92. The one exception to this observation is with regard to employee relations. *Id.* at 792–99.

41. The statistics use various classifications for race/ethnic identification: “White (not of Hispanic origin),” “Black (not of Hispanic origin),” “Hispanic,” “Asian or Pacific Islander,” and “American Indian or Alaskan Native.” *See Job Patterns for Minorities and Women in Private Industry: A Glossary*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/glossary.cfm> (last visited Feb. 22, 2011).

42. *See 2008 EEO-1 National Aggregate Report*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2008/us/national.html> (last visited Feb. 22, 2011). This table considers all groups other than White (not of Hispanic origin) as “minorities.”

The relevant EEOC reports (called “EEO-1 reports”) are “collected annually from private sector employers with 100 or more employees or federal contractors with fifty [or] more employees. In 2008, over 68,300 employers with more than 62.2 million employees filed EEO-1 reports.” *Job Patterns for Minorities and Women in Private Industry (EEO-1)*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/index.cfm> (last visited Feb. 22, 2011). The statistics are found at: *2008 EEO-1 National Aggregate Report*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2008/us/national.html> (last modified Mar. 11, 2009).

43. *See People of Color in the U.S.*, CATALYST, INC., 5, http://www.catalyst.org/file/318/qt_people_of_color_us.pdf (last updated Oct. 1, 2009). This publication refers to racial minorities as “people of color.” As defined, “[p]eople of color include (but are not

companies, 8.1% of corporate officer positions and just 5.1% of top earner⁴⁴ positions were held by racial minorities.⁴⁵ In 2008, 10% of the S&P 1500 board seats were held by minorities.⁴⁶ Further, as observed by Lisa Fairfax, minority representation on Fortune 1000 corporate boards “has remained virtually unchanged since 2003.”⁴⁷ These data strongly suggest that minorities continue to inhabit mainly the lower echelons of corporate hierarchies.

Objection: Taking Words Too Seriously. One might object that I’m taking words far too seriously. On this view, amicus briefs are simply public relations vehicles that don’t reflect any moral or policy commitment to anything. And the detailed doctrinal arguments therein might merely reflect the elite appellate law firm strategy of counting the noses of nine Supreme Court Justices in light of existing precedent (e.g., *Bakke*).⁴⁸ While certainly possible, this account seems too cynical.⁴⁹

First, it’s tough to believe that the arguments in the amicus briefs are attributable *solely* to the outside law firms. It’s not as if law firms were obsessively fixated on the business case for diversity. With a single exception,⁵⁰ amongst the *Grutter/Gratz* amicus briefs, no law

limited to) African Americans/Black people, Asian-Americans/Asians, Latinos/Hispanics, and Native Americans.” *Id.*

44. The definition of “top earner” used by Catalyst—a leading nonprofit membership organization devoted to expanding opportunities for women and business—seems to track the definition of “named executive officers” that public companies are required to disclose in their public periodic filings pursuant to SEC regulations. See CATALYST, 2005 CATALYST CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS OF THE FORTUNE 500, at 1 (2006), available at <http://www.catalyst.org/publication/263/2005-catalyst-census-of-women-corporate-officers-and-top-earners-of-the-fortune-500> (defining “top earner” by reference to the public filing requirements).

45. See *People of Color in the U.S.*, *supra* note 43, at 4 (“[W]omen of color held 1.7% of corporate officer positions. Men of color held 6.4% of all corporate officer positions. Women of color held just 1.0% of all top earner positions . . . [while] [m]en of color held 4.1% of all top earner positions.”).

46. *Board Practices: Trends in Board Structure at S&P 1,500 Companies*, RISKMETRICS GROUP, INC., 1 (Dec. 17, 2008) (on file with the North Carolina Law Review).

47. Fairfax, *supra* note 35, at 867 (citation omitted).

48. See *supra* note 12 and accompanying text.

49. For an argument “that corporate rhetoric has a stronger connection to corporate behavior than most [people] would presume,” see Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 771 (2007).

50. See Amicus Curiae Brief of Boston Bar Ass’n et al. in Support of Respondents at 8, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at http://www.bostonbar.org/pp/amicus/grutter_v_bollinger.pdf (arguing that law firms desire diverse attorneys to “effectively attract and retain an increasingly diverse and global client base”).

firm or bar association signed on to the business case for diversity.⁵¹ Indeed, the American Bar Association failed to even mention the business case for diversity in its own brief. Rather, it grounded its support of affirmative action at universities based on the need to maintain the legitimacy of our justice system through full minority participation in our legal institutions.⁵² Also, news reports suggest that the corporate amici carefully scrutinized the final version of the briefs before committing to signing them,⁵³ which is consistent with how corporate legal departments generally handle their litigation matters.

Second, as noted above, the empirical research of Broome et al. shows that corporate executives overwhelmingly prefer business rationales to justify board or workplace diversity.⁵⁴ This finding is not surprising because the business case for diversity is rhetorically consistent with the prevailing theory of corporate purpose—maximizing shareholder value.⁵⁵ Thus, we see a perfect alignment between their private admissions and their public pronouncements.

Third, as I explain below in Part III, it's entirely psychologically predictable that corporations would invoke a self-regarding stance within the corporate domain and an other-regarding stance within the educational domain.⁵⁶ In the end, there are good reasons to think that

51. As David Wilkins observed, “[n]o other bar organization or collection of law firms filed a brief arguing that upholding affirmative action was vital to the corporate bar’s ability to compete in the global economy—a situation made all the more remarkable by the fact that one of the cases directly addressed the issue of diversity in legal education.” Wilkins, *supra* note 4, at 1598 (citation omitted).

52. See Brief of the American Bar Ass’n as Amicus Curiae in Support of Respondents at 7–17, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); see also Wilkins, *supra* note 4, at 1598.

53. See Glater, *supra* note 35 (noting, based on the report of law firms representing these corporations, that “some companies do not want to commit themselves until they see the final version [of the amicus briefs]”).

54. Broome et al., *supra* note 37, at 800.

55. *Id.* (noting that the prevalence of business rationales in respondents’ narratives “is not particularly surprising, given the dominance of the shareholder-value theory of the corporation in this country”); cf. *infra* notes 161–64 and accompanying text (describing the potential relationship between corporate giving and profit-seeking motivations).

56. Professor Coleman asserts that the “major flaw in [my] argument is [my] assumption that this [corporate] position *intentionally* ignores the economic impact of diversity on universities.” Coleman, *supra* note 20, at 1009 (emphasis added). As evidence, he quotes my statement that: “The possibility that [meaningful affirmative action programs] might hurt the university’s bottom line doesn’t even register.” *Id.* Frankly, it’s quite a stretch to go from my “it doesn’t even register” to his “[corporations are] *intentionally* ignor[ing] the economic impact of diversity on universities.” *Id.* (emphasis added). Indeed, I don’t actually argue that the corporate disregard of the economic impact to universities is fully conscious and intentional. In fact, in Part III, in explaining why corporations might ignore the economic self-interest of universities, I rely on psychological studies that describe psychological processes that are, for the most part, unconscious and

the positions staked out in the amicus briefs do in fact reflect the corporate mindset, which in turn reveals a double standard. If I'm mistaken, then corporations would be guilty of something arguably worse.⁵⁷

B. The Economic Cost to the University

The double standard I've identified is this: on the one hand, corporations call for diversity in the workplace if and only if it serves their self-interest; on the other hand, corporations call for diversity at universities even if it cuts against universities' self-interest. At this point, one might counter that this is not really a double standard because university affirmative action programs generate trivial costs to universities and, alternatively, even if those costs are nontrivial, they are still outweighed by the economic benefits derived from these programs. In other words, the objection is that there is no double standard because the promotion of educational diversity is entirely consistent with the economic self-interest of universities; to wit, there is no trade-off between the economic self-interest of universities and the pursuit of meaningful educational diversity. Setting aside the important *normative* question of whether universities should actively pursue diversity regardless of the costs,⁵⁸ as a purely *descriptive*

automatic (rather than controlled and intentional). See *infra* note 216. Moreover, Professor Coleman never explains why the intentionality of the corporate positions even matters. After all, double standards have long endured without self-reflectiveness. Indeed, that may be one of the reasons why double standards persist.

57. See, e.g., Patrick S. Shin & G. Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1019 (2011) (exploring the problematic normative implications of showcasing female and minority board members as a "signal of a socially upstanding corporation").

58. The *normative* issue of whether universities should or should not actively pursue diversity regardless of the economic costs is an important issue, but it is one that is not germane to the purely *descriptive* issue of whether the promotion of meaningful diversity does in fact generate significant economic costs to universities, which is the only issue that is being addressed in this Part I.B. In this Part, I am only answering a likely objection that (1) there is no double standard in the corporate positions on educational and corporate diversity because university affirmative action programs generate trivial costs to universities and, (2) alternatively, even if those costs are nontrivial, they are still outweighed by the economic benefits derived from these programs. Indeed, my Article is not mainly concerned about *universities'* normative positions on educational diversity but, rather, *corporations'* normative positions on both educational and corporate diversity. But, for the record, I think that the long-term economic and noneconomic costs to *society* of not adopting meaningful affirmative action in universities significantly outweighs any economic costs that must be borne directly by universities. Moreover, racial justice requires that we, as a society, pursue both educational and corporate diversity. See *infra* note 136 (defining "racial justice"). My explicit position supporting both educational and corporate diversity, regardless of the economic costs to either institutions, is a far cry from the "damning indictment of educational diversity" that Professor Coleman accuses me of delivering. Coleman, *supra* note 20, at 1010.

matter, there is plenty of evidence to suggest that meaningful⁵⁹ affirmative action programs that admit more than token numbers of underrepresented minorities (including Latinos, African Americans, and American Indians)⁶⁰ generate more economic costs than economic benefits to universities.⁶¹ Here's why.

1. Decreased Revenues

First, meaningful affirmative action programs may negatively impact the university's prestige standing, which in turn may hamper the ability of universities to charge premium tuitions and attract alumni donations. Because nonprofit universities cannot raise equity capital to fund their operations, they must rely on monetary resources generated from two types of patrons—students and alumni. Students are effectively “customers” of the university who pay for the university's services (education) through their tuitions. Alumni, on the other hand, are past customers and current donors of the universities. Whether these student and alumni patrons will pay, and how much, is in large part a function of the university's prestige,⁶² the

59. When I speak of “meaningful” affirmative action programs or “meaningful” diversity, I don't have a precise definition but am generally referring to policies that seek to create a “critical mass” of underrepresented minorities. See *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003). Perhaps a useful reference point is the testimony of Erica Munzel, the admissions director of the University of Michigan Law School, who testified that she understood a “critical mass” to mean a “number that encourages underrepresented minority students to participate in the classroom and not feel isolated.” *Id.* at 318.

60. For purposes of this Article, when I refer to “underrepresented minorities,” I am referring to those minority groups historically underrepresented in university admissions. A useful reference point is the University of Michigan Law School's admissions process, which gave special consideration to certain minority groups but not others. See *id.* at 316 (noting “the Law School's longstanding commitment to ‘one particular type of diversity,’ that is, ‘racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.’”) (citation omitted).

61. Cf. Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1797–1802 (2003) (noting the transaction costs associated with a heterogeneous workforce and that such costs may not be recouped in the near term); Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 680 n.24 (2006) (describing the argument that “diversity beyond mere tokenism may entail significant costs without any reciprocal benefit”); Joo, *supra* note 36, at 363 (“In some situations racial justice will harm corporate profitability: antidiscrimination or affirmative action regulations may impose compliance costs, and lawsuits by employees or customers may result in adverse judgments or settlements.”).

62. To be sure, the process is significantly more complex than what I have described in the main text. As noted by Roger Geiger:

“coin of the realm in higher education.”⁶³ But prestige is an intangible quality and thus can be difficult to assess.⁶⁴ So, how can students and alumni reliably measure a university’s prestige?

Assessing prestige has, for better or worse, become easier with the advent of institutional rankings published by *U.S. News & World Report* (“*U.S. News*” or “*U.S. News* rankings”).⁶⁵ Originally published in 1983, the *U.S. News* rankings began to incorporate actuarial data in 1989.⁶⁶ These rankings produce clear and precise indicators of relative status⁶⁷ (regardless of their actual merits), which have come to be strongly associated with prestige, albeit not without tremendous

The behavior of universities is frequently described as competition for prestige to achieve or maintain status. This process is ambiguous, to say the least. Prestige is both the cause and the result of getting or having good students, good faculty, and ample financial support. This situation is most confusing in the case of students, who are both consumers demanding the product and inputs to the quality of the product. In addition, higher education markets are highly segmented—by student abilities, cultural preferences, and academic programs. The higher education market in fact is a segmented hierarchy, in which head-to-head competition occurs chiefly among roughly comparable institutions. Still, near the top, recognized national markets exist for students, faculty, and research support.

Roger L. Geiger, *The Competition for High-Ability Students: Universities in a Key Marketplace*, in *THE FUTURE OF THE CITY OF INTELLECT: THE CHANGING AMERICAN UNIVERSITY* 82, 84 (Steven Brint ed., 2002) (citations omitted).

63. *Id.* at 87. For further discussion of prestige, see also DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 159 (2003) (“[Universities’] most comprehensive objective, however, is academic distinction, or prestige—an elusive concept that embraces the quality of the students and the scholarly and scientific reputations of the faculty.”); DAVID A. GARVIN, *THE ECONOMICS OF UNIVERSITY BEHAVIOR* 22–24 (1980) (arguing that universities are, in part, prestige-maximizing organizations); *infra* notes 171–200 (discussing the commercialization of American universities).

64. See, e.g., BOK, *supra* note 63, at 159; Patricia M. McDonough et al., *College Rankings: Democratized College Knowledge for Whom?*, 39 RES. HIGHER EDUC. 513, 515 (1998) (describing the services offered by organizations, such as the university, as intangible “credence goods,” which “hinge on the reputation of the organization”).

65. See *Rankings*, U.S. NEWS & WORLD REP., <http://www.usnews.com/rankings> (last visited Feb. 22, 2011); see also BOK, *supra* note 63, at 159 (discussing the prestige expressed by rankings); Geiger, *supra* note 62, at 87 (discussing the effect of declining rankings); McDonough et al., *supra* note 64, at 515–16 (highlighting the critical role of rankings for consumers in reducing uncertainty about product quality).

66. Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1105 (2009). The first law school rankings were published in 1987. Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 208 (2006).

67. See Wendy Espeland & Michael Sauder, *Rankings and Diversity*, 18 S. CAL. REV. L. & SOC. JUST. 587, 596 (2009) (“[T]he evidence remains conclusive that rankings, in producing clear, precise indicators of relative status, have changed how students assess the quality of law schools, and this is reflected in their decisions about which law school to attend”) (emphasis omitted).

controversy.⁶⁸ To illustrate vividly how the *U.S. News* rankings can influence a school applicant's evaluation of the school's status, sociologists Wendy Espeland and Michael Sauder reported on how one informant went about deciding which law school to attend:

[Sam] applied mostly to "good schools" in New York and California. He applied to and was accepted by several schools in the Midwest and South, schools he "wasn't excited about," but only applied because they offered him fee waivers. Sam says he would not have gone to these schools unless he was offered a "really good deal, lots of scholarship money." He described these schools as "not all that prestigious and not in desirable locations." And prestige is important to Sam because it is important to the [legal] profession: "The prestige of your law school really does give you some capital later in your career. At every stage of your career, where you went to law school might help you in some way." When asked how he defined whether or not a school is prestigious, Sam quickly replies: "U.S. News and World Report. It's the only way to go."⁶⁹

The reality is that Sam's decision making is representative of many applicants to higher educational institutions⁷⁰ that are subject to

68. For views supportive of rankings, see, for example, Mitchell Berger, *Why the U.S. News and World Report Law School Rankings Are Both Useful and Important*, 51 J. LEGAL EDUC. 487, 500 (2001) ("The U.S. News rankings serve an important and valuable function for students and help promote accountability among law school[s]."); Russell Korobkin, *Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein*, 81 IND. L.J. 35, 45 (2006) [hereinafter Korobkin, *Harnessing*] ("Rankings have inherent value to students who use them for coordination purposes and therefore to institutions that compete for students."); Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 411-14 (1998); Richard Schmalbeck, *The Durability of Law School Reputation*, 48 J. LEGAL EDUC. 568, 586 (1998) (arguing that law school reputations are relatively durable and that rankings have had little effect on reputations).

For views critical of rankings, see, for example, Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News and World Report Rankings on the Admission Process of Law Schools*, 40 LAW & SOC'Y REV. 105, 105 (2006) ("[T]he rankings help create rather than simply reflect differences among law schools through the magnification of the small, and statistically random, distinctions produced by the measurement apparatus."); Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocations: Ways Rankings Mislead*, 82 IND. L.J. 229, 230 (2006) ("discuss[ing] problems created by the annual rankings of law schools"). For a criticism of Schmalbeck's thesis that rankings have little effect on law school reputations, see Sauder & Lancaster, *supra*, at 117 (criticizing Schmalbeck for failing to "address the effects of rankings on external constituencies").

69. Espeland & Sauder, *supra* note 67, at 594.

70. See, e.g., Michael N. Bastedo & Nicholas A. Bowman, *College Rankings as an Interorganizational Dependency: Establishing the Foundation for Strategic and Institutional*

the virtual monopoly of the *U.S. News* rankings system.⁷¹ In fact, quantitative analyses of admissions trends at colleges and law schools conclusively demonstrate that rankings influence how many applications a school receives, the academic characteristics of the school's applicant pool, the percentage of applicants who are accepted, and the percentage of accepted students who then matriculate.⁷² As a result, rankings have become "signals—observable

Accounts, 52 RES. HIGHER EDUC. 3, 4 (2011) (noting that "[p]rior studies have found that rankings have a strong influence on students as they make choices to enroll at research universities" and citing studies). To be sure, not every student places great importance on rankings in choosing their school. That said, the relatively scant research on student profiles suggests that rankings are heavily relied on by "high-socioeconomic-status, high-achieving students who attend highly competitive post-secondary institutions and are focused on colleges that will both provide them with a good liberal education but that will also position them well for graduate school and professional opportunities." McDonough et al., *supra* note 64, at 529–30. Since these particular students are likely to act in a more systematic and predictable fashion, their actions are likely to impact the rankings. (A useful analogy might be the mechanism by which the trades of sophisticated investors are likely to impact the prices of securities according to the Efficient Capital Markets Hypothesis.) McDonough et al. describe these students' characteristics:

[T]he top student and institutional characteristics associated with the use of newsmagazine rankings in choosing a college are students who are focused on the college's academic reputation; high-achieving students; students who seek advice from their teachers, school, and private counselors in making their college choices; students attending public universities; students motivated to choose their college because of a liberal education ideal; students attending more selective colleges and universities; and high-income students.

Id. at 529. It should be noted that the profile of students who rely on rankings may be broader today than when McDonough et al. published their research in 1998. At the time McDonough et al. conducted their surveys, the Internet had not penetrated deeply into our society and thus students often had no choice but to pay six dollars for the hard copy of the relevant *U.S. News* issue. *Id.* at 530 (noting that "low-SES students are probably not even using a \$6 magazine"). Today, however, most students have costless access to the *U.S. News* rankings, albeit perhaps not the most recently released reports.

71. Although most of my research on the impact of rankings has been confined to colleges and law schools, my arguments should also hold for universities and other graduate/professional schools that are subject to the virtual monopoly of the *U.S. News* rankings system. To be sure, *U.S. News* does not enjoy a virtual monopoly in all fields. For example, rankings for business schools are much more dispersed with multiple influential rankers employing different criteria. See Sauder & Espeland, *supra* note 66, at 206. Therefore, my arguments are less applicable to those schools not subject to the virtual monopoly of *U.S. News*.

72. See James Monks & Ronald G. Ehrenberg, *U.S. News & World Report's College Rankings: Why They Do Matter*, CHANGE, Nov.–Dec. 1999, at 42, 45, 49 (concluding, based on a quantitative analysis of thirty private colleges and universities over an eleven year period, that detrimental ranking movements lead schools to "accept a greater percentage of their applicants (an increase in its admit rate)" in response to their shrinking applicant pools, resulting in smaller percentages of the admitted applicants matriculating (a decrease in yield rate), and resulting in lower average SAT scores of their incoming freshman classes); Sauder & Lancaster, *supra* note 68, at 127–28 (finding that, based on a

indicators such as price”—of a school’s selectivity.⁷³ Thus, the higher the institution’s *U.S. News* rank, the more likely it will attract students with higher academic credentials and the more difficult it will be to gain admission.⁷⁴ As noted by Lani Guinier, “*U.S. News & World Report* is undoubtedly the most influential voice in judging who ‘wins’ and ‘loses’ in the contest for elite status.”⁷⁵

Having established that the abstract concept of prestige has been de facto operationalized into the *U.S. News* rankings, I now inquire about the relationship between diversity policies and these rankings. The empirical literature suggests that a university’s efforts at promoting racial and ethnic diversity beyond mere tokenism may be at cross-purposes with maintaining or increasing rankings. Admissions officers attest that the rankings have stepped up pressures to raise standardized test scores,⁷⁶ which can hinder diversity goals. Despite the onslaught of academic criticism against the overreliance on high-stakes standardized tests like the SAT or

quantitative analysis of ten years of law school data, “[i]ndependent of school characteristics, . . . [*U.S. News*] ranks affect how many students apply to a school, how many of those applicants have exceptionally high LSAT scores, the percentage of applicants who are accepted, and the percentage of accepted students who matriculate”).

Other studies employing qualitative methodologies and/or studying the effect of other influential rankings systems nonetheless confirm that rankings are highly influential. See, e.g., MITCHELL L. STEVENS, *CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES* 240 (2007) (quoting an admissions officer at a selective liberal arts college: “People will tell us, ‘Oh, you guys were the best in Admissions, your publications are great, the people were so nice, loved the campus, and I’m going somewhere else.’ It’s like whatever we do, kids will still choose to go to the most highly rated school they can get into.”); Kimberly D. Elsbach & Roderick M. Kramer, *Members’ Responses to Organizational Identity Threats: Encountering and Countering the Business Week Rankings*, 41 ADMIN. SCI. Q. 442, 464–65 (1996) (finding that “many business school members perceived the *Business Week* rankings as a threat to their organization’s identity,” which resulted in tactics to restore their institutional identity).

73. Sauder & Lancaster, *supra* note 68, at 106.

74. See Korobkin, *Harnessing*, *supra* note 68, at 41–42 (arguing that since legal education has a “significant status component,” “[t]he best way for a student to signal his high quality . . . is to matriculate at a school where only high-quality students can gain admission”).

75. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 144 n.126 (2003); see also BOK, *supra* note 63, at 159–60 (“Although the unreliability of [*U.S. News*] ratings is notorious, they continue to have an influence, since nothing else has been devised that provides such regular, seemingly exact measures of comparative academic quality.”).

76. Espeland & Sauder, *supra* note 67, at 598 (making this point with respect to the LSAT); Sauder & Lancaster, *supra* note 68, at 110 (noting that rankings have generated “a much greater emphasis on LSAT scores in the [law school] admissions process”); West-Faulcon, *supra* note 66, at 1107 (making this point with respect to the SAT).

LSAT in the admissions process,⁷⁷ scores generated from these tests remain a significant factor in determining the institution's selectivity which is then used to compute its overall rank.⁷⁸

While the specific algorithm is periodically revised at the discretion of *U.S. News*,⁷⁹ for the 2010 National Universities and Liberal Arts College rankings, which were published online on August 19, 2009, a college's average SAT score was given an explicit weight of half of the student selectivity score (which is one of seven general factors)⁸⁰ and 7.5% of the composite score, which is then scaled to compute the school's overall rank.⁸¹ For law school rankings, although *U.S. News* publishes test scores at the twenty-fifth and seventy-fifth percentiles, it uses the *median* LSAT score,⁸² which counts for half of the student selectivity score (which is one of four general factors)⁸³ and 12.5% of the composite score.⁸⁴ This (12.5%)

77. See, e.g., LANI GUINIER & SUSAN STURM, WHO'S QUALIFIED? 7-14 (2001) (critiquing "testocracy"); PETER SACKS, STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT *passim* (1999); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 971 (1996) (noting that the SAT correlates poorly with freshman grades); West-Faulcon, *supra* note 66, at 1106 (summarizing critiques); Jacques Steinberg, *Challenge Revives SAT Test Debates*, N.Y. TIMES, Nov. 19, 2001, at A14 (describing former University of California President's recommendation that the University of California school system eliminate the SAT as a requirement).

78. Guinier, *supra* note 75, at 145-55; West-Faulcon, *supra* note 66, at 1105.

79. West-Faulcon, *supra* note 66, at 1105.

80. The average SAT score carries the greatest weight of all subfactors used to compute the student selectivity of the entering class. See Robert Morse, *Methodology: Undergraduate Ranking Criteria and Weights*, U.S. NEWS & WORLD REP. (Aug. 17, 2010), <http://www.usnews.com/articles/education/best-colleges/2010/08/17/methodology-undergraduate-ranking-criteria-and-weights-2011.html>. The seven general factors considered to compute the composite score are peer assessment (22.5%), student selectivity (15%), faculty resources (20%), graduation and retention rates (20%), financial resources (10%), alumni giving (5%), and graduation rate performance (7.5%). *Id.*

81. *Id.*

82. For a period, *U.S. News* relied on a combination of the twenty-fifth and seventy-fifth percentiles, instead of the median, but it went back to using the median LSAT score. See Carl Bialik, *Small Change by U.S. News Leads to New Controversy in Rankings*, WALL ST. J. ONLINE (Apr. 7, 2005), http://online.wsj.com/article/0_SB111279937006999640,00.html#.

83. The four general factors considered to compute the composite score are: quality (40%), selectivity (25%), placement (20%), and faculty resources (15%). See Robert Morse, *The Law School Rankings Methodology*, U.S. NEWS & WORLD REP. (Apr. 15, 2010), <http://www.usnews.com/articles/education/best-law-schools/2010/04/15/the-law-school-rankings-methodology.html?PageNr=1>.

84. Law school rankings are computed based on four general factors: reputation (referred to by *U.S. News* as "quality assessment"), selectivity, placement success, and faculty resources. See *id.* Each factor is comprised of several weighted subfactors to create a composite score which is then scaled to compute the overall school rank. See *id.*; Espeland & Sauder, *supra* note 67, at 593.

doesn't sound like much until one considers that the weight given to the undergraduate grade point average ("UGPA") is even less—only 10% of the overall rank.⁸⁵

More importantly, for both college and law school admissions, standardized test scores appear to have a greater impact on an institution's ranking than the explicit formula would suggest⁸⁶ and a greater impact than other more highly weighted criteria.⁸⁷ For example, economist Thomas Webster concluded, based on his principal component regression analysis of national universities, that when one explicitly considers the effects of pervasive multicollinearity, the institutional average SAT score would rank *first* as "the most significant ranking criterion."⁸⁸ Senior RAND researchers, Stephen Klein and Laura Hamilton, came to similar findings in their report, which was commissioned by the Association of American Law Schools.⁸⁹ They found that ninety percent of the overall differences in ranks could be explained solely based on student selectivity, of which the entering class's median LSAT score is the "major driver."⁹⁰ In conclusion, Klein and Hamilton note that "ranking schools on LSAT alone will do a very good job of replicating the overall ranks U.S. News publishes."⁹¹ As observed by Alex Johnson, a former law school dean who has held numerous positions

85. Espeland & Sauder, *supra* note 67, at 593.

86. West-Faulcon, *supra* note 66, at 1106–07 ("There is strong anecdotal and empirical evidence that the real-world impact of a university's average SAT score on its *U.S. News* ranking is significantly greater than the explicit formula weight reported by *U.S. News* to calculate rankings.") (citations omitted).

87. *Id.* at 1107.

88. Thomas J. Webster, *A Principal Component Analysis of the U.S. News & World Report Tier Rankings of Colleges and Universities*, 20 ECON. EDUC. REV. 235, 243 (2001). Multicollinearity "refers to the degree to which changes in the value of one or more of the ranking criteria are related to, and are affected by, changes in one or more of the other ranking criteria." *Id.* at 236.

89. Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, ASS'N OF AM. LAW SCHS. (Feb. 18, 1998), <http://www.aals.org/reports/validity.html>.

90. *Id.* Klein and Hamilton note that although the median LSAT score constitutes only fifty percent of the student selectivity rating, it has a greater impact of "about 70%" of the selectivity score because *U.S. News* failed to control for differences in standard deviations among the components before weighting them. *Id.* The student selectivity rating constitutes 25% of the school's overall rating and is made up of the following components: median LSAT score (50% of student selectivity), UGPA (40%), and rejection rate (10%). *Id.* Klein and Hamilton note that when differences in standard deviations are controlled for, "the overall selectivity rank at several schools differed by several places from the way US News ranked them" and that "[t]hese differences were enough to move some schools between 'tiers' in the US News system." *Id.*

91. *Id.*

(including chair of the Board of Trustees) in the organization that administers the LSAT⁹²:

Over the last three years, there is no law school with a higher ranking than another law school with a lower median LSAT in the ranking of the top 50 law schools. Although this is one of the objective indices used to evaluate and form subjective judgments about these schools, it is quite shocking to see that none of these other so-called variables are apparently important enough or weighted heavily enough to cause a school which is superior in all other respects to be ranked higher than a law school with a higher median LSAT.⁹³

Reliance on average or median test scores might not be as controversial but for the established fact that some groups perform worse on standardized tests than other groups.⁹⁴ For example, as noted by two sociologists studying the impact on *U.S. News* rankings on law school affirmative action policies:

Generally (and it is crucial to emphasize these patterns are measures of central tendency that necessarily obscure variation), men score higher than women, whites and Asian Americans do better than African Americans, Mexican Americans and Puerto Ricans, and people living in the Northeast do better than those from the South. Studies have also found persistent class effects in standardized testing where students from wealthy or middle-class families do better than those from working-class or poor families.⁹⁵

92. Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 309 (2006) (star footnote). Johnson noted that he was “a volunteer” in all positions held at the Law School Admission Council, the “non-profit entity that produces the LSAT.” *Id.*

93. *Id.* at 311 n.14.

94. Espeland & Sauder, *supra* note 67, at 599.

95. *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS app. at 29–30 (2009) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d1020.pdf> (“Lower Average LSAT Scores and Undergraduate GPAs May Have Negatively Affected Some African Americans and Hispanics”); STEVENS, *supra* note 72, at 165 (“While average SAT scores tests have risen for all students over the years, aggregate scores for whites and Asians are consistently the highest. The racial disparities are most pronounced on the SAT math test”); Johnson, *supra* note 92, at 311 (“[M]embers of underrepresented groups—African Americans, Hispanics, Native Americans, and Puerto Ricans—score below that of similarly situated white and Asian-American test-takers.”).

Although the causes of such disparities in test scores are complex,⁹⁶ the research is clear that non-token admission of underrepresented minorities cannot be accomplished unless admissions officers rely on criteria other than standardized test scores.⁹⁷ Further, meaningful racial/ethnic diversity is not achievable at most selective colleges and universities unless race and ethnicity are explicitly considered in admissions decisions.⁹⁸ And use of other nonracial criteria, e.g., low family income, in lieu of race will often not

96. See GAO REPORT, *supra* note 95, app. at 31–33 (citing factors); STEVENS, *supra* note 72, at 164–65 (citing the “long history of residential segregation by race” and its impact on accumulated property wealth as one of the factors contributing to the pattern of racial disadvantage on measures of college readiness, including SAT scores); Espeland & Sauder, *supra* note 67, at 600 (listing possible explanations for the “test gap”); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1087–90 (2006) (summarizing stereotype threat literature); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 806 (1995) (showing that the representation of “a difficult test as diagnostic of ability can undermine the performance of Black participants, and that it can cause in them a distinct sense of being under threat of judgment by racial stereotype”).

97. With respect to racial/ethnic disparities in particular, see ANTHONY P. CARNEVALE & STEPHEN J. ROSE, CENTURY FOUND., SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 44, 47 (2003), available at http://www.tcf.org/Publications/Education/carnevale_rose.pdf (simulating the effects of an admissions model based solely on the “most easily quantifiable measures, including grades, college entrance exams scores, teacher recommendation, and participation and leadership in extracurricular activities” and concluding that there would be a “considerable drop”—from 12% to 4%—in the total number of black and Hispanic students enrolled at the 146 most selective colleges); Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487, 507 (2007) (“Our [statistical and natural experiment] analyses demonstrate that the emergence of a test-score meritocracy amid pervasive test-score gaps required selective institutions to give underrepresented minorities an admission boost to achieve campus diversity.”); Espeland & Sauder, *supra* note 67, at 601 (“Research is clear on this point: in law school admissions and more broadly in admissions to selective colleges and graduate and professional programs, non-token representation of groups like African American, non-white Hispanic, Native Americans, and students from poor or lower middle class families, cannot be accomplished apart from considerations of criteria other than test scores and undergraduate grade averages.”); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 15, 19 (1997) (concluding that an admissions process that relies solely on the LSAT and UGPA would result in a sharp decrease of underrepresented minorities being admitted).

98. This conclusion is borne out by the actual experiences of public universities who have been barred from using race-conscious admissions criteria. See West-Faulcon, *supra* note 66, at 1086 (noting the dramatic decline of African American and Latino admissions “to pre-Civil Rights Era lows” as a result of the elimination of affirmative action in those public universities whose states have passed laws prohibiting racial preferences); *id.* at 1093–95 (detailing the impact of eliminating affirmative action on African American and Latino admissions and enrollment).

generate the desired numbers of minorities.⁹⁹ Consequently, affirmative action programs that seek to meaningfully expand the numbers of underrepresented minority groups are at cross-purposes with a university's ongoing attempts to increase its prestige standing, driven primarily by standardized test scores, as represented by its *U.S. News* ranking.¹⁰⁰

Qualitative evidence provides further support of the tension between school prestige and diversity. Sociological interviews of 165 law school administrators, faculty, and staff involved in the admissions process¹⁰¹ reveal that the rankings have sharpened the emphasis on students' LSAT profiles, which has impeded their efforts to craft a racially (as well as economically) diverse class of students.¹⁰² As one respondent put it:

"The most pernicious change [due to the rankings] is that I know a lot of schools who have become so driven by their LSAT profile that they've reduced the access of people who are non-traditional students. . . . Particularly, the higher echelon you are, the more worried you are that if you let your student numbers slide to reflect your commitment to diversity, you're going to be punished in the polls for that."¹⁰³

99. As explained by Carnevale and Rose, "While African Americans and Hispanics are disproportionately from low-[socio-economic status (SES)] families, low-SES families are disproportionately White." CARNEVALE & ROSE, *supra* note 97, at 59. Accordingly,

[t]he qualified pool of low-SES students increases the number of qualified African Americans and Hispanics compared to current enrollments, but not their share of the qualified pool. Hence, income-based policies are not [an] effective substitute for racial and ethnic enrollment goals, unless low-income African Americans and Hispanics can be chosen disproportionately from the qualified pool of low-SES students or chosen as a supplement to the middle- and upper-income African Americans and Hispanics currently enrolled.

Id. at 59–60.

100. Espeland & Sauder, *supra* note 67, at 599 ("The greater the emphasis on test scores, the more costly it seems to admit racially and economically diverse students."); Johnson, *supra* note 92, at 311 (concluding that the "use of the *U.S. News* rankings, which relies heavily on objective actuarial data—including the school's median Law School Admission Test (LSAT) score—to form a subjective judgment of school quality, is inimical to the stated goal of achieving diversity in law schools and must be eliminated if we are to achieve diversity in our law schools"); Sturm & Guinier, *supra* note 77, at 992 ("[R]eliance on [current methods] for determining merit screens out a disproportionate number of . . . people of color who apply for positions."); West-Faulcon, *supra* note 66, at 1103–20 (detailing the relationship between rankings, institutional average SAT scores, and racial diversity).

101. Espeland & Sauder, *supra* note 67, at 594.

102. *Id.* at 597–601.

103. *Id.* at 597–98 (quoting a study respondent). As another law school dean put it:

Administrators report feeling “forced to choose between a higher median LSAT score and a more diverse student body.”¹⁰⁴ An administrator and law professor observed:

“The [rankings] induce some constituencies—particularly the faculty—to be very anxious, to focus admissions on students with high LSAT scores. That’s probably the single most pernicious consequence of the [*U.S. News*] survey. It puts enormous pressure on law schools to become homogeneous and to all compete for the same students.”¹⁰⁵

Even those administrators who insist that rankings will not alter their admissions objectives admit that they must pay a price in terms of their rank.¹⁰⁶ As one dean said:

“I say to the entering class that we are proud to be in the bottom quartile and that it’s because we take chances on students and it’s because our students go out and do work in public service, and so our salaries are low and our numbers are not high and that is what our mission is and that is what it should be. And if we ever got out of the fourth tier, I would be nervous; I would think that we were doing something wrong.”¹⁰⁷

By incentivizing schools to rely more on test scores in setting admissions criteria, rankings make it riskier for schools that want to maintain or enhance their prestige standing to admit significant numbers of underrepresented minorities.¹⁰⁸

“I think the rankings push you to give less weight to an applicant who has done something really interesting if they don’t have good LSAT numbers. So that might make for a less interesting class. . . . There is pressure to take people who’ve got good numbers and give less weight to other factors. . . . Certainly it has an impact on racial diversity because of all the well-known information about how Blacks tend to do not as well on standardized tests and that [effect] is not good.”

Michael Sauder & Wendy Nelson Espeland, *The Discipline of Rankings: Tight Coupling and Organizational Change*, 74 AM. SOC. REV. 63, 73 (2009) (quoting an unidentified law school dean).

104. Espeland & Sauder, *supra* note 67, at 601.

105. *Id.* (quoting study respondent).

106. *Id.* at 605.

107. *Id.* (quoting study respondent).

108. *Id.* at 601; *see also* GAO REPORT, *supra* note 95, app. at 34 (noting that lower average LSAT scores and UGPAs may have negatively impacted law school enrollment of African Americans and Hispanics and reporting that “according to representatives from LSAC, the ABA, some law schools, and one minority student group, schools are reluctant to admit applicants with lower LSAT scores because the median LSAT score is a key factor in the *U.S. News and World Report* rankings”).

To be sure, the *U.S. News* rankings are not the sole impediment to diversity in higher education nor the sole reason for the prevailing emphasis on test scores.¹⁰⁹ There are other factors that lead admissions staffs to depend more on standardized test profiles in sorting students in the admissions process. For example, the relative scarcity of high test scores compared with high grade point averages and the fact that “some numbers are easier to raise than others” will encourage admissions staffs to rely more on standardized test scores.¹¹⁰ And others have argued that efforts by accreditation bodies to promote standardization and uniformity in schools have contributed to the emphasis on standardized tests in admissions.¹¹¹ That said, the evidence overwhelmingly suggests that rankings pressure schools to emphasize standardized test scores, thereby creating a significant and not easily surmountable¹¹² obstacle to meaningful diversity in higher education.

109. While the *U.S. News* rankings may have increased reliance on standardized test scores, they cannot be said to have caused schools to require standardized tests for admission in the first place. Colleges began requiring standardized tests long before the advent of the *U.S. News* rankings. Caroline M. Hoxby, *The Changing Selectivity of American Colleges*, 23 J. ECON. PERSP. 95, 103 (2009) (noting the dramatic increase in the number of colleges requiring the SAT or ACT from 1955 to 1965 and in periods thereafter). That said, the *U.S. News* rankings remain a significant factor in increasing and entrenching reliance on standardized test scores. See SACKS, *supra* note 77, at 13–15 (describing reasons why standardized testing remains entrenched, highlighting the role of *U.S. News* rankings as a marker of prestige).

110. Espeland & Sauder, *supra* note 67, at 598.

111. Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News and World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383, 397–98 (2006) (highlighting the role of the ABA accreditation standards). *But cf.* GAO REPORT, *supra* note 95, app. at 31 (noting that most law school officials did not cite ABA accreditation standards as having an impact on minority access to law schools but acknowledging that some officials from some law schools, especially less selective schools risking de-accreditation, believed that accreditation standards impacted minority access).

112. Of course, schools do attempt to game the *U.S. News* rankings in an effort to reconcile their institutional goals (including diversity) with preserving or raising their rankings. See, e.g., Bastedo & Bowman, *supra* note 70, at 6 (summarizing ways in which universities manipulate data provided to *U.S. News*); William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163, 180–81, 191, 201–02 (2006) (discussing gaming); Sauder & Espeland, *supra* note 103, at 76–77 (summarizing law school gaming strategies and how *U.S. News* responded to them). For example, law schools can theoretically maximize the median LSAT score by admitting the top half of the class with high test scores while still emphasizing diversity or other characteristics for students scoring below the median. Espeland & Sauder, *supra* note 67, at 606; see also Moran, *supra* note 111, at 389. But many schools do not take full advantage of this tactic, and, even if they did, developing and executing gaming strategies generates economic costs. Moreover, there is no assurance that any particular gaming tactic will be available for long, as *U.S. News* has been known to revise its algorithm from time to time to foreclose gaming. For example, schools have “steer[ed] students with lower test scores into their part-time programs” in

So far, I have demonstrated the following chain: underrepresented minorities have lower median/average test scores; diversity policies that increase the number of such minorities in the student body decrease the median/average test scores of the entire student body; test scores disproportionately swing *U.S. News* rankings, which are the de facto measure of university prestige. Now, I summon the evidence to show that with this loss of prestige comes loss of revenues from the two main sources: tuition and donations.

As for tuition, economic analysis of admissions and pricing data provided by thirty private colleges and universities over an eleven year period shows that a fall in an institution's *U.S. News* ranking not only impacts the school's "admit" and "yield" rates¹¹³ but also leads to a reduction in the amount of tuition charged, as adjusted to discount for the amount of grant or financial aid awarded (referred to as "grant-aid-adjusted tuition").¹¹⁴ In other words, a "less favorable ranking prompts institutions to provide more generous grant aid" to attract students.¹¹⁵ Accordingly, "higher-ranked institutions do not have to offer deep discounts to attract matriculants."¹¹⁶

an effort to maintain diversity while not threatening their rankings. Espeland & Sauder, *supra* note 67, at 602. This tactic appeared to work (for a while) because *U.S. News* rankings had "only considered the LSAT scores and UGPAs of full-time first year students in its calculations of selectivity." *Id.* However, in 2009, *U.S. News* changed its methodology to include part-time students. *See id.* at 602-03. For a discussion of revisions to *U.S. News*' algorithm, see Sauder & Espeland, *supra* note 103, at 77 (summarizing *U.S. News*' successful measures to foreclose particular gaming strategies).

113. Monks & Ehrenberg, *supra* note 72, at 45-47 (finding that a movement from a more favorable to a less favorable rank of five places, for example, is associated with a "statistically significant increase in the institution's admit rate of almost 2 percentage points" and a decrease in its yield rate of almost one percentage point). An institution whose rank falls "must admit a greater percentage of its shrinking applicant pool in order to fill its incoming class" and may expect a decrease in the number of students matriculating. *Id.* at 46. The "admit" rate is the number of admitted students as a percentage of the total number of applicants. *Id.* at 45. The "yield" rate is the number of matriculants as a percentage of the total number of admitted students. *Id.*

114. *Id.* at 48 (finding that a movement from a more favorable to a less favorable rank of ten positions, for example, "leads to a reduction in grant-aid-adjusted tuition of approximately 4 percent"). Please note that the rankings terminology used in the Monks and Ehrenberg study may be confusing in that the authors refer to a "less favorable" movement in rank as an "increase in rank." *Id.* at 47. For example, the authors would describe a move from the number five position to a number ten position as an "increase in rank," even though such a movement obviously reflects a drop in the institution's prestige standing. *See id.*

115. *Id.* at 48. Monks and Ehrenberg believe that schools are reluctant to reduce their gross tuition levels directly because the listed amounts act, in part, as "a signal of academic quality," and an institution "does not want to reveal its declining [market] position." *Id.*

116. *Id.* at 49. For a more detailed account of the Monks-Ehrenberg study, see generally James Monks & Ronald G. Ehrenberg, *The Impact of U.S. News & World Report College Rankings on Admissions Outcomes and Pricing Policies at Selective Private*

As for donations, the evidence is more anecdotal; however, it points in the same direction. Rankings matter not only to students but also to “alumni, trustees, and the politicians who set the budgets of public colleges.”¹¹⁷ Various commentators have suggested that decreased rankings means decreased donations.¹¹⁸ As one dean described the reaction of alumni and trustees on his/her school’s change in rankings:

“The law school faculties and the smart administrators all say, ‘This [the rankings] is a bunch of hooey, we don’t care about this,’ until they drop and the board of trustees says, ‘Hey, you’re dropping; why should we give you more money?’ And the board of visitors from the law school say, ‘Man, your school’s really going to pot and you haven’t changed a thing. . . . Big changes need to be made here.’ And your monetary support—the alumni—say, ‘Well, I’m not sure I want to support a school that’s going in the wrong direction.’ And your money starts to dry up, and you go ‘We have got to have the money;

Institutions (Nat’l Bureau of Econ. Research and Cornell Higher Educ. Research Inst., Working Paper No. 7227, 1999). In addition, econometric data confirms that higher-credentialed students seek enrollment at higher status schools which can, and do, make higher educational expenditures and charge higher tuition rates. Geiger, *supra* note 62, at 87–89; Caroline M. Hoxby, *How the Changing Market Structure of U.S. Higher Education Explains College Tuition* 39 (Nat’l Bureau of Econ. Research, Working Paper No. 6323, 1997) (arguing that the higher education market induces selective institutions “to supply a more expensive education to students of higher ability who receive higher ‘wages’ [subsidies] for their inputs and pay a higher price [tuition] for their education”). Although the higher education market incentivizes schools to increase educational spending, because higher prices might discourage some high-credentialed students, institutions also give “direct subsidies to price-sensitive students in the form of need-based financial aid, and increasingly merit-based aid,” as well as increasing “spending more rapidly than prices” (in the form of tuition). Geiger, *supra* note 62, at 88; *see also* Bastedo & Bowman, *supra* note 70, at 17 (finding statistical support for the hypothesis that “[c]ollege rankings also significantly affect out-of-state tuition and fees”).

117. Guinier, *supra* note 75, at 145; *see also* Bastedo & Bowman, *supra* note 70, at 19 (finding statistical support for the hypothesis that “college rankings have an effect on research and development funding from government and industry”).

118. *See, e.g.*, Bastedo & Bowman, *supra* note 70, at 17 (finding, based on quantitative analysis, that “rankings affect the proportion of alumni who donate to their university, but this effect is not apparent for the total amount of alumni donations”); McDonough et al., *supra* note 64, at 533 (“[N]egative rankings propel colleges to engage in damage control with alumni and major donors and positive rankings become prominent features in admissions and alumni communication materials.”); Sauder & Espeland, *supra* note 66, at 213 (noting that many administrators believe that rankings influence “employers’ decisions about whom to hire, and the decisions of alumni about how much to give to their alma maters”).

we can't afford to lose funding or else it *will* spiral downhill and we will be a worse law school.' ”¹¹⁹

In conclusion, the bottom line is that promoting non-token diversity decreases university revenues collected through tuition and donations. To be clear, my personal view is that this is a deeply unfortunate fact that argues strongly against an overreliance on the *U.S. News* rankings. But my normative views cannot change the economic reality that there is a financial cost to pursuing meaningful educational diversity, given our current state of affairs. Unless *U.S. News* dramatically changes its formula to incorporate racial diversity into its overall rankings, which it has so far declined to do,¹²⁰ or the

119. Sauder & Lancaster, *supra* note 68, at 130 (quoting an unidentified dean). Quantitative research on student profiles reveals that students place great weight on rankings due, in part, to their belief that rankings affect the ability of graduates to land good jobs and gain admission to good graduate schools. Of course, today's students are tomorrow's alumni. See McDonough et al., *supra* note 64, at 523 (noting that, among students who find rankings very important, they are “influenced by a college's reputation for its alumni to get into top graduate schools” and “are twice as likely to give weight to a college's reputation for graduates to land good jobs compared to students who find them to be not important”).

120. Since 2001, *U.S. News* has “publish[ed] a ‘diversity index’ that ranks schools based on measures of the proportion of minority students.” Espeland & Sauder, *supra* note 67, at 593. However, the “diversity index is not factored into the overall rankings”—it is “presented separately.” *Id.*; see also *Best Colleges 2011, Racial Diversity: National Universities*, U.S. NEWS & WORLD REP., <http://colleges.usnews.rankingsandreviews.com/best-colleges/national-campus-ethnic-diversity> (last visited Feb. 22, 2011) [hereinafter *U.S. News Diversity Index*].

Professor Coleman disputes my claim that “there is plenty of evidence to suggest that meaningful affirmative action programs that admit more than token numbers of underrepresented minorities (including Latinos, African Americans, and American Indians) generate more economic costs than economic benefits to universities.” See *supra* notes 59–61 and accompanying text. To dispute my claim, Professor Coleman cites to the *U.S. News Diversity Index* to “find evidence for the opposite conclusion, or at least for the proposition that diversity and high ranking appear to be compatible goals.” Coleman, *supra* note 20, at 1011. But Professor Coleman offers no plausible evidence to back his claim that there is no trade-off between cultivating meaningful diversity and maintaining/enhancing one's prestige standing, as expressed by *U.S. News*, which is the only proposition that would be the opposite of my claim. Moreover, he offers no counterevidence to refute any of the evidence that I have marshaled. Basically, all that Professor Coleman does to attack my claim is to provide a statistic. He points out that Rutgers, The State University of New Jersey (Newark), whose ranking is 143/253 in its category, has the highest *U.S. News* diversity score (0.74) of all universities in the nation. *Id.* (citing *U.S. News Diversity Index*, *supra*). From this datum, he boldly concludes that “it does not obviously appear that more diversity has a negative impact on a school's ranking.” *Id.* This is not self-evident; worse, it is a non sequitur. After all, the ability to locate a school that has both a “decent” overall *U.S. News* rank (143/253) and a high diversity score (0.74) says nothing about the overall relationship between diversity and *U.S. News* rank. One wonders if Professor Coleman also thinks that there can be no

public (including students seeking admission) renounces the *U.S. News* as the marker of institutional prestige, meaningful affirmative action programs (to the extent that they exist)¹²¹ will continue to decrease university revenues.

2. Increased Administrative Expenses

I now switch to the other side of the ledger. Effective administration of affirmative action programs takes up significant financial resources.

correlation between blood cholesterol levels and heart disease, since there are certainly individuals with high cholesterol levels who don't actually have heart disease.

Moreover, Professor Coleman overlooks the critical fact that the *U.S. News* Diversity Index employs a different definition of diversity than that employed in my Article or, for that matter, employed by the University of Michigan's (and most universities') affirmative action programs. The *U.S. News* Diversity Index emphasizes the "overall mix of groups" and fails to distinguish between underrepresented and well-represented minorities (e.g., certain Asian American groups who are typically regarded as well represented minorities under most affirmative action programs). See *U.S. News* Diversity Index, *supra* (noting their use of the following categories in their calculations: "American Indians and Native Alaskans, Asian-Americans and Pacific Islanders, African Americans who are non-Hispanic, whites who are non-Hispanic, and Hispanics"). As a result, no statistic in the *U.S. News* Diversity Index can be used to refute my claim, which incorporates a different definition of diversity than the *U.S. News*' Diversity Index. The fact that *U.S. News*' definition of diversity significantly differs from mine is made clear in *U.S. News*' treatment of historically black universities. As noted by sociologists Wendy Espeland and Michael Sauder, the *U.S. News* Diversity Index "punish[es] the historically black law schools that enroll large proportions of African Americans, even though these schools create much-needed diversity at the organizational level and contribute significantly to the diversity [of] the profession." Espeland & Sauder, *supra* note 67, at 605; see also *Methodology: Campus Ethnic Diversity*, U.S. NEWS & WORLD REP., <http://www.usnews.com/articles/education/best-colleges/2010/08/17/methodology-campus-ethnic-diversity-2011.html> (last visited Feb. 22, 2011) (acknowledging that "historically black colleges score very low on this measure since they are made up of predominately one ethnic group."). By contrast, I would rate the historically black schools as very diverse.

121. Fortunately, some colleges and universities have at least staked an official commitment to creating a diverse student body and do employ variables other than test scores to determine admission. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGES AND UNIVERSITY ADMISSIONS* 23–26 (2000) (summarizing the aims of university admissions policies and noting that "[u]nderstanding the aims of the institution in choosing its students helps us see why admissions officers in virtually all selective colleges and professional schools look well beyond grades and test scores"); JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 172 (2002) ("By the mid-1970s . . . university elites clearly were committed to reaching out to minority groups, and with zeal and creativity developed reasons why it was a good idea."); STEVENS, *supra* note 72, at 143 (noting that admissions officers' ethical convictions have helped "to sustain rigorous minority recruitment efforts at the nation's most elite schools"); *id.* at 169–73 (noting that "[v]irtually every selective college and university in the country has an official commitment to racial diversity" but citing obstacles to minority recruitment).

Search costs. Administrators must expend time to consider race or ethnicity as a factor in the admissions process, and that additional time does not come free. Moreover, these costs have substantially increased as a result of the *Gratz* and *Grutter* decisions. *Grutter* clarified that postsecondary schools may only consider race or ethnicity as a “soft variable”¹²² in admissions decisions and required a “highly individualized, holistic review of each applicant’s file”¹²³ against all other applicants to withstand a constitutional challenge.¹²⁴ Of course, the type of individual review that would pass constitutional muster is “highly problematic for large universities as their applicant pool can be as high as 500% of that of smaller schools.”¹²⁵ Thus, some large universities wishing to ensure a critical mass of underrepresented minority students have had no choice but to augment their admissions staffs.¹²⁶ For example, Ohio State University spent an additional \$250,000 on the admissions process during the year following *Gratz* and *Grutter* and hired thirty-five additional application readers.¹²⁷ And the University of Michigan’s undergraduate admissions office hired additional application counselors and readers, at a cost of \$1.8 million, to move to a system of holistic review of application files.¹²⁸

Sometimes the search costs go beyond application processing. Some colleges and universities have developed special “service programs” designed to scout for promising underrepresented minority high school students and facilitate their preparation and transition to college.¹²⁹ These programs generate nontrivial search costs.¹³⁰

122. *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003) (citation omitted).

123. *Id.* at 337.

124. Leslie Yalof Garfield, *The Cost of Good Intentions: Why the Supreme Court’s Decision Upholding Affirmative Action Admission Programs Is Detrimental to the Cause*, 27 PACE L. REV. 15, 15–16, 45 (2006).

125. *Id.* at 16.

126. *Id.*

127. Greg Winter, *After Ruling, 3 Universities Maintain Diversity in Admissions*, N.Y. TIMES, Apr. 13, 2004, at A22.

128. *Id.*; see also Justin Pope, *UMass Spends Money and Time to Keep Affirmative Action Effort*, ASSOCIATED PRESS, June 20, 2004 (noting that the University of Massachusetts “hired retired faculty and recent graduates to read applications” and that UMass, Michigan, and Ohio State spent more funds on recruiting students as a result of the Supreme Court decisions); Greg Winter, *U. of Michigan Alters Policy on Using Race in Admissions*, N.Y. TIMES, Aug. 29, 2003, at A11 (estimating an increase of \$1.5 million to \$2 million for the University of Michigan’s admissions process).

129. STEVENS, *supra* note 72, at 167–69 (describing these programs).

130. *Id.* (describing the nature of the programming and some of the extensive recruitment efforts).

Yield costs. Merely offering admission to minority students will not necessarily yield a critical mass of matriculants, because minority students may have a disproportionate need for financial aid since underrepresented minorities “are more likely to come from low-income families” and “are also likely to be more price-sensitive to tuition than white and middle- or upper-income students.”¹³¹ Moreover, the rankings have intensified the intercollegiate competition for underrepresented minority students with high test scores.¹³² Indeed, those students may be offered “generous financial aid packages, expenses-paid recruitment visits,” and other benefits from selective schools jockeying to improve their minority numbers while seeking to maintain their prestige standing.¹³³

Borrowing costs. Another reason why meaningful affirmative action programs may generate more economic costs than economic benefits to universities is that affirmative action programs may negatively impact the university’s bond ratings. Average SAT scores not only affect the *U.S. News* rankings but are also relied upon by bond-rating agencies to evaluate a university’s financial viability.¹³⁴ As noted by Kimberly West-Faulcon:

The three major financial rating agencies—Moody’s Investors Service, Standard & Poor’s, and Fitch Ratings—consider average SAT scores as part of their credit analyses. Because it has become increasingly common for colleges and universities to issue bonds to raise money for major expansion projects, many institutions have a very direct financial incentive to try to increase their overall average SAT score. The fact that average SAT score is used to gauge institutional financial health as well as prestige encourages admissions officials to place even greater weight on SAT scores as an admissions criterion.¹³⁵

All of the above is to say that affirmative action programs are simply not free; in the aggregate, they decrease revenues and increase

131. Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851, 872 (2010).

132. Espeland & Sauder, *supra* note 67, at 601; see also GAO REPORT, *supra* note 95, app. at 33 (“Some law school officials said that schools compete for minority applicants with above-average LSAT scores.”); STEVENS, *supra* note 72, at 166 (“Literally every selective college in the country is after the same small number of minority kids each year.”); *id.* at 169–70 (“Virtually every selective college and university in the country has an official commitment to racial diversity, yet at the top of the college selection pyramid there are very few black and Latino students to go around.”).

133. STEVENS, *supra* note 72, at 169.

134. West-Faulcon, *supra* note 66, at 1108.

135. *Id.*

costs for universities without any guarantee of a reciprocal economic benefit. My personal belief is that those economic costs should nonetheless be borne by universities as their concrete contribution to racial justice in our society.¹³⁶ I make this clarification to provide comfort to readers who might not be able to hear my substantive argument otherwise. Again, the argument is that corporations are advocating a double standard. On the one hand, corporations call for diversity in the workplace if and only if it serves their economic self-interest. On the other hand, corporations call for diversity at universities—in well-publicized legal interventions—even if it cuts against universities' economic self-interest.

II. IS THE DOUBLE STANDARD JUSTIFIED?

One might argue that corporations are simply taking a *different* standard, not a *double* standard, regarding corporate diversity versus educational diversity. After all, different standards can be justified to the extent that corporations and universities are differently situated, e.g., subject to different sets of rules that impinge on their abilities to promote diversity. One obvious way that corporations and universities are differently situated is their for-profit/nonprofit legal status. Business corporations are by definition for-profit corporations while most (but not all) universities are organized as nonprofit corporations.¹³⁷ Accordingly, one might think that for-profit corporations must only do what is in their economic self-interest (i.e., maximize profits) and that nonprofit corporations must ignore their economic self-interest (i.e., ignore profits), thus justifying the double standard. But an examination of nonprofit and for-profit corporation laws suggests that this is not the case.

First, state corporation codes generally do not proscribe for-profit corporations from engaging in non-profit-generating activities.¹³⁸ This is so in spite of the common view, as best exemplified by Milton Friedman, that the “one and only one social

136. By “racial justice,” I refer to the substantive policy goal of reducing racial group inequalities in wealth and power. See Glenn C. Loury, *Foreword* to BOWEN & BOK, *supra* note 121, at xxi, xxii–xxiii; see also *infra* note 266 and accompanying text.

137. In 2006, only 450 out of 2,611, or 17.23%, four-year universities were organized as for-profit corporations. Accordingly, the vast majority of four-year universities were organized as nonprofit corporations. *Career/Technical Education (CTE) Statistics*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/surveys/ctes/tables/P71.asp> (last visited Feb. 22, 2011).

138. See *infra* notes 140–41 and accompanying text.

responsibility of business . . . [is] to increase its profits.”¹³⁹ Indeed, state corporation statutes generally permit for-profits to be organized to carry out “any lawful business or purposes,”¹⁴⁰ and the vast majority of corporate charters contain precisely this nonrestrictive mandate.¹⁴¹

Second, state corporation codes expressly grant directors the legal discretion to undertake certain reasonable profit-sacrificing activities. For example, every state has enacted a corporate statute providing managers the formal authority to make corporate charitable contributions out of corporate funds.¹⁴² Further, most state codes contain “other-constituency provisions,” which expressly authorize boards to consider the interests of nonshareholder constituents (i.e., employees, customers, creditors, and the

139. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32, 124. This duty to maximize shareholder profits has been preached in American business schools and embraced by many corporate managers. See Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 717 (1996); Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 654–55 (2006) (noting a study finding “that the norm of shareholder wealth maximization was implicit in most business school courses”); Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1288 (1992) (“Directors seem to believe that their legal duty is to the stockholders.”). But see *infra* note 164 (citing source that indicates that managerial adoption of the shareholder wealth maximization norm is vastly overstated).

140. See, e.g., DEL. CODE ANN. tit. 8, § 101 (2008); see also JEFFREY D. BAUMAN ET AL., *CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS* 171 (6th ed. 2007) (discussing typical corporate charters).

141. See, e.g., Amended and Restated Articles of Incorporation of Microsoft Corporation art. III (Nov. 24, 2009), available at http://www.microsoft.com/investor/corporategovernance/policiesandguidelines/articlesincorp.aspx#a_3 (“The Corporation is organized for the purposes of transacting any and all lawful business for which a corporation may be incorporated under the Washington Business Corporation Act, Title 23B of the Revised Code of Washington, now or hereafter in force (the ‘Act’).”); Charter of Lockheed Martin Corporation art. III (Apr. 23, 2009), available at http://www.lockheedmartin.com/investor/corporate_governance/corporate_charter.html (“The purpose for which the Corporation is formed is to engage in any lawful act, activity or business for which corporations may now or hereafter be organized under the Maryland General Corporation Law . . .”).

142. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763 (2005). For example, REVISED MODEL BUS. CORP. ACT § 3.02(13) (2004), authorizes corporations to make donations for the public welfare, and DEL. CODE ANN. tit. 8, § 122(9) (2008) grants corporations the power to make donations for the public welfare or for charitable purposes. Although these statutes do not limit the amount of permissible gifts, courts have implied a reasonableness limitation on the size of the charitable donations. See, e.g., *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 404 (Del. Ch. 1969) (noting that “a corporate charitable or educational gift to be valid must merely be within reasonable limits both as to amount and purpose”).

community) in making business decisions.¹⁴³ Although these constituency provisions were originally crafted during the 1980s to fend off hostile takeovers, most are not confined to takeovers and apply to any managerial decision.¹⁴⁴

Third, corporate case law also suggests that for-profit corporations can undertake reasonable profit-sacrificing activities¹⁴⁵ in the interests of other constituencies. Even *Dodge v. Ford*,¹⁴⁶ the 1919 Michigan Supreme Court opinion known for the proposition that the corporate purpose is to maximize shareholder wealth,¹⁴⁷ failed to eliminate the discretion of directors to advance other important social values. At most, *Dodge v. Ford* imposed a vague limitation requiring other-regarding motives to be incidental to the primary purpose of profiting shareholders.¹⁴⁸ In practice, that limitation has been a “toothless,” largely unenforceable one.¹⁴⁹ As many scholars have pointed out, courts have routinely upheld directors’ discretion to benefit nonshareholder constituents at the expense of shareholders, often in cases reaffirming the business judgment rule, which insulates corporate decisions (including those that allegedly do not maximize shareholder value) from judicial

143. Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 169 (2008); see also Elhauge, *supra* note 142, at 766–67. To be sure, Delaware does not have a corporate constituency statute. But Delaware does authorize (through its case law) managers to reject takeover bids due to considerations relating to nonshareholder constituencies. See Elhauge, *supra* note 142, at 848–49.

144. Elhauge, *supra* note 142, at 763; see also Fairfax, *supra* note 61, at 686 (noting that “[a]t least two thirds of the constituency statutes extend beyond takeovers, allowing directors to consider the concerns of non-shareholders when making ordinary business decisions”).

145. See Stout, *supra* note 143, at 169–72 (arguing that corporate case law does not require companies to maximize shareholder wealth).

146. 170 N.W. 668 (Mich. 1919).

147. See *id.* at 684.

148. *Id.*; see also Elhauge, *supra* note 142, at 772–73; M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 572 n.3 (2009) (noting that *Dodge v. Ford* did “not create a substantive standard that is enforceable in court, but rather an aspirational goal for corporate directors”); Stout, *supra* note 143, at 166 (“*Dodge v. Ford* is indeed bad law, at least when cited for the proposition that the corporate purpose is, or should be, maximizing shareholder wealth.”).

149. As Thomas Joo has argued:

As applied, directors’ supposed duty to “maximize” shareholder wealth is a toothless one. No courts actually require management to maximize shareholder wealth—that is, to show that they have chosen the one use of corporate resources that will generate more net wealth than any other. Indeed, such a showing would be all but impossible.

Joo, *supra* note 36, at 361.

review.¹⁵⁰ As the *Dodge* court expressly noted, directors retain “implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation.”¹⁵¹ In sum, no corporate law norm stands in the way of directors undertaking reasonable profit-sacrificing activities to benefit nonshareholder constituents or to further important social values. Accordingly, no corporate law norm prohibits a company from adopting a reasonable affirmative action plan in pursuit of diversity.

And not only are business corporations permitted to undertake profit-sacrificing activities, they have increasingly done so in recent years. For example, Patagonia, an outdoor gear and clothing company, has pledged about one percent of sales to environmental causes.¹⁵² Google Inc. has made a similar pledge¹⁵³ and, more aggressively, launched a division, Google.org, dedicated to “pursuing the company’s philanthropic goals . . . to address ‘climate change, poverty and emerging disease.’”¹⁵⁴ Google.org has already spent over \$100 million in grants and investments.¹⁵⁵ Similarly, in an effort to provide income support to farmers in the developing world, Starbucks pays fair trade prices (which can be twice as high as competitive prices) to its coffee suppliers.¹⁵⁶ Cinergy has publicly committed to voluntarily reducing carbon emissions.¹⁵⁷ AstraZeneca has provided

150. Elhauge, *supra* note 142, at 775; Fisch, *supra* note 139, at 651 (“[N]o modern court has struck down an operational decision on the ground that it favors stakeholder interests over shareholder interests.”); William H. Simon, *What Difference Does It Make Whether Corporate Managers Have Public Responsibilities?*, 50 WASH. & LEE L. REV. 1697, 1698 (1993) (“I am unaware of a single modern case in which a managerial decision has been held wrongful because it put public interests above shareholder ones.”); Stout, *supra* note 143, at 170.

151. *Dodge*, 170 N.W. at 684; Stout, *supra* note 143, at 168.

152. Henderson & Malani, *supra* note 148, at 575. In 1985 Patagonia launched a campaign called “1% for the Planet,” in which it pledges one percent of sales for the “preservation and restoration of the environment.” See *1% for the Planet*, PATAGONIA, http://www.patagonia.com/euro/en_GB_GB-/patagonia.go?assetid=1960 (last visited Feb. 22, 2011).

153. Dana Brakman Reiser, *For-Profit Philanthropy*, 77 FORDHAM L. REV. 2437, 2439–40 (2009).

154. *Id.* at 2440 (quoting *Searching for Solutions*, GOOGLE.ORG, <http://www.google.org/index.html>).

155. *Id.* at 2443.

156. Henderson & Malani, *supra* note 148, at 591; see also STARBUCKS COFFEE, LIVING OUR VALUES: CORPORATE SOCIAL RESPONSIBILITY, FISCAL 2003 ANNUAL REPORT 33 (2004), available at <http://assets.starbucks.com/assets/csr-fy03-ar.pdf> (noting that Starbucks paid a premium between 59% and 200% above prevailing market prices for coffee in 2003).

157. Henderson & Malani, *supra* note 148, at 574 n.16 (citing Mike Boyer, *Cinergy to Reduce Airborne Emissions*, CINCINNATI ENQUIRER, Sept. 10, 2003, at 1A).

free medicine to uninsured people.¹⁵⁸ Ben & Jerry's Homemade Ice Cream, Inc. sources its milk and cream from a local cooperative dedicated to environmental sustainability, brownies from another social enterprise (a bakery providing job-training), and much of its ice cream flavors from cooperatives of poor farmers (at fair trade prices).¹⁵⁹ Corporations have collectively contributed over \$10 billion to charity in a single year "even though such giving has only the most tenuous connection to shareholder interests."¹⁶⁰

To be sure, these ostensibly philanthropic activities may have been undertaken not for public-regarding reasons but, rather, for longer-term profit-enhancing reasons or because of managerial graft. After all, doing good for others can be a strategic public relations ploy, designed to improve consumer perception of the firm's brand and increase future revenues.¹⁶¹ For example, Philip Morris's \$250 million ad campaign publicizing its philanthropic activities was widely dismissed as a "smoke screen to divert attention from its cigarette business."¹⁶² But empirical research on corporate philanthropy, though not conclusive, suggests that corporate executives have mixed motives, including *altruistic* ones, when making corporate donations.¹⁶³ And other empirical research suggests that corporate

158. *Id.* (citing Press Release, AstraZeneca, AstraZeneca to Provide Free Medicines to Facilities that Serve the Uninsured in West Virginia (Jan. 23, 2008), available at <http://www.astrazeneca-us.com/about-astrazenecaus/newsroom/corporate/2041753?itemId=2041753>).

159. Reiser, *supra* note 153, at 2450 n.79 (citing *Activism: Inside the Pint*, BEN & JERRY'S, <http://www.benjerry.com/activism/inside-the-pint/>).

160. Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 116–17 (2004); see also William O. Brown, Jr. et al., *Corporate Philanthropic Practices*, 12 J. CORP. FIN. 855, 876 (2006) (citing statistic that U.S. corporations gave approximately \$12.2 billion in 2002). Despite the absence of a strong nexus to profit-making, courts have regularly upheld such charitable endeavours over the objections of complaining shareholders. See, e.g., *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969); *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 586 (N.J. 1953).

161. See STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 9.6, at 437 (2002) (suggesting that "charitable giving is simply another form of advertising").

162. Ronald Alsop, *Perils of Corporate Philanthropy*, WALL ST. J., Jan. 16, 2002, at B1.

163. Brown et al., *supra* note 160, at 856, 875–76 (concluding that evidence supports both agency cost and profit-maximization explanations (which are not mutually exclusive) for charitable giving and that "agency cost theory also contemplates that managers and directors may authorize gifts out of an altruistic belief that firms have a social responsibility to contribute to worthy causes"); Henderson & Malani, *supra* note 148, at 580–81; Peter Navarro, *Why Do Corporations Give to Charity*, 61 J. BUS. 65, 67, 89–90 (1988) (adopting a model of corporate charity that "treats the paradigms of profit maximization and managerial discretion as complementary rather than competing" and finding a correlation between charitable contributions and advertising expenditures); Bill Shaw & Frederick R. Post, *A Moral Basis for Corporate Philanthropy*, 12 J. BUS. ETHICS

executives have not embraced the shareholder wealth maximization norm as widely as previously thought.¹⁶⁴

Given obvious epistemological limitations in ascertaining the true motives of corporate executives, suffice it to say that other-regarding motives do seem to affect executives, and some executives at least profess a willingness to sacrifice profit to further certain social values. To take a vivid example, not only do Google's leaders openly "aspire to make Google an institution that makes the world a better place,"¹⁶⁵ but they have also proclaimed with respect to Google.org: " 'We're not doing it for the profit. And if we didn't get our capital back, so what? The emphasis is on social returns, not economic returns.' " ¹⁶⁶ Consider also John Mackey, founder and CEO of Whole Foods, who has criticized Milton Friedman for "undersell[ing] the humanitarian dimension of capitalism: 'Whole Foods' business model could represent a new form of capitalism, one that more consciously works for the common good instead of depending solely on the 'invisible hand' to generate positive results for society.' " ¹⁶⁷

While for-profits are not proscribed from engaging in non-profit-generating or even profit-sacrificing activities, the converse is true for nonprofits: they are not proscribed from seeking profits. Although a few states once restricted the permissible purposes of nonprofits,¹⁶⁸ many (perhaps most) nonprofits today may be incorporated to carry

745, 747–48 (1993) (reporting that the "overwhelmingly dominant" explanation for why executives engage in corporate philanthropy was "corporate citizenship").

164. Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1011–12 (2009) (citing studies).

165. Reiser, *supra* note 153, at 2439 (quoting Google Inc., Letter from the Founders: "An Owner's Manual" for Google's Shareholders, in Amendment No. 9 to Form S-1 Registration Statement Under the Security Act of 1933 (Form S-1), at 27, 32 (Aug. 18, 2004), available at <http://www.sec.gov/Archives/edgar/data/1288776/000119312504142742/ds1a.htm>).

166. Reiser, *supra* note 153, at 2452 (citing Katie Hafner, *Philanthropy Google's Way: Not the Usual*, N.Y. TIMES, Sept. 14, 2006, at A1 (quoting then-Google.org executive director Dr. Larry Brilliant)).

167. Brown et al., *supra* note 160, at 856 n.2 (quoting Reason Found., *Rethinking the Social Responsibility of Business: A Reason Debate Featuring Milton Friedman, Whole Foods' John Mackey, and Cypress Semiconductor's T.J. Rogers*, REASON, Oct. 2005, at 31, 31); see also John Mackey, *Rethinking the Social Responsibility of Business*, WHOLE FOODS MARKET: THE CEO'S BLOG (Sept. 28, 2005), <http://www2.wholefoodsmarket.com/blogs/jmackey/2005/09/28/rethinking-the-social-responsibility-of-business/> (reproducing the debate found in a Reason Foundation article with commentary).

168. See, e.g., Illinois General Not for Profit Corporation Act, § 4, 1943 Ill. Laws 481, 483 (current version at 805 ILL. COMP. STAT. 105/103.05 (2010)). Indeed, in the 1950s, the restrictive form of statute was the most common. See Note, *Permissible Purposes of Nonprofit Corporations*, 51 COLUM. L. REV. 889, 890 (1951).

on “any lawful purpose.”¹⁶⁹ Indeed, some nonprofit corporation statutes expressly permit profit-seeking activity.¹⁷⁰ More to the point, nonprofit *universities* can and do earn huge profits.

As a mounting body of scholarship recognizes,¹⁷¹ universities have increasingly become commercialized¹⁷² and profit-oriented in their never-ending quest to acquire greater financial resources.¹⁷³ Key legislative developments, such as the Bayh-Dole Act of 1980,¹⁷⁴ together with the rise of certain industries such as biogenetics, triggered a surge of corporate funding for university research, which expanded opportunities for universities to realize commercial gain.¹⁷⁵ Universities actively pursued patents for their technologies, cultivated business incubation programs, and formed venture capital funds to invest in companies founded by faculty.¹⁷⁶ By 1990, “two hundred universities had established offices to seek out commercially promising discoveries and patent them for licensing to companies.”¹⁷⁷ By 2000, “universities had increased the volume of their patenting

169. Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 510 (1981); *see also* REVISED MODEL NONPROFIT CORP. ACT §§ 3.01(a), 3.02(16) (1987) (stating that nonprofits incorporated under its auspices “ha[ve] the purpose of engaging in any lawful activity” and empowering nonprofits “to carry on a business”).

170. *See, e.g.*, MODEL NONPROFIT CORP. ACT, at viii–ix (1964); JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 81 (2006) (“Nonprofit organizations may conduct activities for pecuniary gain so long as the profit is used for the organization’s exempt purpose and there is no distribution of profits to members or exploitation of the organization for direct monetary gain.”); Hansmann, *supra* note 169, at 512.

171. *See, e.g.*, BOK, *supra* note 63, at 2; JAMES S. FAIRWEATHER, ENTREPRENEURSHIP AND HIGHER EDUCATION: LESSONS FOR COLLEGES, UNIVERSITIES, AND INDUSTRIES *passim* (1988); ROGER GEIGER, KNOWLEDGE AND MONEY: RESEARCH UNIVERSITIES AND THE PARADOX OF THE MARKETPLACE *passim* (2004); SHEILA SLAUGHTER & LARRY LESLIE, ACADEMIC CAPITALISM: POLITICS, POLICIES, AND THE ENTREPRENEURIAL UNIVERSITY *passim* (1997); David J. Collis, *New Business Models for Higher Education*, in THE FUTURE OF THE CITY OF INTELLECT: THE CHANGING AMERICAN UNIVERSITY, *supra* note 62, at 181, 181; Walter Powell & Jason Owen-Smith, *Universities and the Market for Intellectual Property in the Life Sciences*, 17 J. POL’Y ANALYSIS & MGMT. 253, 256–58 (1998); James Engell & Anthony Dangerfield, *The Market Model University: Humanities in the Age of Money*, HARV. MAG., May–June 1998, at 48, 53–55.

172. For purposes of this Article, in the university context, “commercialization” is defined as “efforts to sell the work of universities for a profit.” BOK, *supra* note 63, at 3.

173. *See id.* at 9–10.

174. Bayh-Dole Act, Pub. L. No. 96-517, § 6(a), 94 Stat. 3015, 3018–29 (1980) (codified as amended at 35 U.S.C. §§ 200–212 (2006 & Supp. III 2009)). The Bayh-Dole Act facilitated universities’ owning and licensing patents on discoveries made through publicly funded research. *See id.*

175. BOK, *supra* note 63, at 58.

176. *Id.* at 12; Geiger, *supra* note 62, at 82.

177. BOK, *supra* note 63, at 12.

more than ten-fold and were earning more than \$1 billion per year in royalties and license fees.”¹⁷⁸

But nothing epitomizes the commercialization of universities better than college athletics. Even as they slash budgets in other academic areas, universities have long invested in intercollegiate sports in search of profits.¹⁷⁹ As Derek Bok, former president of Harvard University, observed:

As football and other intercollegiate sports tightened their grip on American colleges, the quest for revenue grew more and more determined. Universities built bigger stadia to attract larger paying audiences. Gradually, students were moved further and further away from the 50-yard line to make room for “boosters” who contributed money to the athletic program. Later, athletic departments added luxury boxes to lure corporate sponsors and other wealthy patrons who could afford to pay large sums for privileged accommodations complete with food and bar service. Radio, and then television, brought increasingly lucrative contracts for the benefit of colleges with teams good enough to command a national audience. Universities negotiated agreements with apparel manufacturers Adidas, Nike, and Reebok to obtain free equipment and cash in return for having their athletes wear the corporate insignia during athletic contests. Bowl games multiplied, producing additional television revenue: over \$10 million for teams fortunate enough to win an invitation to one of the premier postseason contests. Meanwhile, the annual “March Madness” basketball playoffs came to enjoy even greater success, attracting such large audiences that the NCAA negotiated an exclusive 11 year contract with CBS for the princely sum of \$6 billion.¹⁸⁰

And commercialization hasn’t been confined to sports or research in the life sciences. Like good business corporations, universities have capitalized on profit-generating opportunities with respect to their basic operations. For example, California State University at Fresno entered into an agreement with Pepsi-Cola and

178. *Id.*

179. Oksana Koltko, Comment, *Chasing Profits—Disregarding Values: Legal Persona of Elite Schools and Their Destructive Tax-Exempt Status*, 42 J. MARSHALL L. REV. 1073, 1075–76 (2009).

180. BOK, *supra* note 63, at 37–38. Some schools take the commercialization to the next level. For example, “Georgia Tech accept[ed] \$5.5 million from McDonald’s to place the golden arches on the floor of its coliseum and on all tickets and game programs.” *Id.* at 178.

Save Mart whereby the school received \$40 million in exchange for the exclusive right to serve food and beverages on its campus.¹⁸¹ The University of Minnesota (and nine other schools) entered into agreements with TCF Bank, selling the right to attach debit and ATM features to student identification cards.¹⁸²

Further, universities have long experimented with different ways of generating a return on their core competence—teaching. Although universities in the United States have traditionally been not-for-profit, they have cultivated for-profit educational programs designed to yield surpluses to subsidize other activities and defray operating expenses.¹⁸³ In fact, as early as 1892, elite institutions had offered for-profit correspondence schools for students having difficulty accessing the campus.¹⁸⁴ These correspondence schools eventually gave way to campus-based extension programs targeted at students working full-time.¹⁸⁵ Business schools established lucrative executive programs for corporate officials and offered courses specially tailored to the distinct needs of particular corporations.¹⁸⁶ For example, Harvard Business School has generated over \$100 million in annual revenue from executive education programs catering to business corporations.¹⁸⁷ Medical schools also generate profits from their continuing education programs for practicing physicians.¹⁸⁸ To keep the costs of these programs down, they have relied on corporate sponsorships by pharmaceutical and medical supply companies.¹⁸⁹

More recently, distance education via the Internet has opened up new revenue possibilities. Although the market leader for distance education has been the for-profit, vocationally oriented University of Phoenix,¹⁹⁰ nonprofit universities—such as Duke University, University of Maryland, Stanford, and MIT—have followed suit and

181. Koltko, *supra* note 179, at 1081.

182. *Id.* at 1081–82.

183. BOK, *supra* note 63, at 81.

184. *Id.*

185. *Id.* at 82.

186. *Id.* at 84.

187. *Annual Report 2009: Statement of Activity and Cash Flows*, HARVARD BUS. SCH., <http://www.hbs.edu/about/annualreport/2009/download2009/statements-2009.pdf> (last visited Feb. 22, 2011).

188. BOK, *supra* note 63, at 85.

189. *Id.*

190. By 2001, the University of Phoenix had enrolled 110,000 students, most of whom learn online. *Id.* at 91.

cultivated distance learning programs.¹⁹¹ In fact, as early as 2000, online education was already a rapidly growing \$2 billion business.¹⁹²

Consistent with this process of commercialization, universities have become managed more like business enterprises. Universities seek administrators with financial backgrounds to ensure that capital is sensibly invested. Presidents, deans, and administrators with fundraising abilities are in demand.¹⁹³ Universities are hiring top fund managers to oversee their large and lucrative endowments.¹⁹⁴ The National Association of College and University Business Officers released a study in 2008 revealing that 785 colleges and universities amassed over \$411 billion in endowment assets.¹⁹⁵ During good economic times, the average return on university endowments was 17.2%.¹⁹⁶ The apparent profitability of nonprofit universities and other tax-exempt institutions have made them attractive targets for those clamoring for their taxation in hopes of reducing municipal budget shortfalls.¹⁹⁷ In sum, nonprofits are not proscribed from seeking profits, nor do they refrain from seeking profits.

In fact, one has to search long and hard to find any meaningful legal distinction between for-profits and nonprofits.¹⁹⁸ The sole

191. *Id.*

192. *Id.* at 87.

193. Koltko, *supra* note 179, at 1086.

194. See, e.g., Tom Petrino, *El-Erian to Be Sole Chief of Pimco: The Star Investor Had Returned in January from a Stint Managing Harvard's Endowment*, L.A. TIMES, Sept. 5, 2008, at C4 (reporting El-Erian's appointment as CEO of bond fund giant Pimco).

195. Koltko, *supra* note 179, at 1087.

196. *Id.* This "translates into \$70.7 billion in generated profits." *Id.*

197. See, e.g., Jesse Bogan, *Nonprofits May Be Hit Up by City—Budget Deficit Leads to Focus on Tax Exemptions*, ST. LOUIS POST-DISPATCH, Apr. 7, 2010, at A1; Thomas Grillo, *Pay Up, Nonprofits: City Wants \$24M More Annually from Hospitals, Colleges*, BOS. HERALD, Apr. 6, 2010, at 20; Tracy Jan, *More Cities Look to Universities to Share Costs Amid Recession*, BOS. GLOBE, Apr. 10, 2010, at A1; Karamagi Rujumba, *County Bill Seeks to Collect Fees from Nonprofits—Move Would Take Effect in Jan., Raise \$13 Million Annually*, PITTSBURGH POST-GAZETTE, Nov. 6, 2009, at A1; Stephanie Strom, *Tax Exemptions of Charities Face New Challenges*, N.Y. TIMES, May 26, 2008, at A1; Press Release, Carnegie Mellon Univ., PCHE Institutions Share Deep Concerns over Services Fee, Taxes on Future Land Purchases as Suggested in Pennsylvania Senate Bill 1175 and House Bill 2191 (Jan. 12, 2010), http://www.cmu.edu/news/archive/2010/January/jan12_pchestatement.shtml; Rich Lord, *Senate Committee Holds Hearing on Tax-Exempts*, PITTSBURGH POST-GAZETTE, Jan. 13, 2010, <http://www.post-gazette.com/pg/10013/1027733-53.stm>; see also *infra* note 198 (regarding the tax-exempt status of nonprofit universities).

198. The distinguishing feature is *not* that nonprofits are charitable and for-profits are commercial. In fact, there are many commercial nonprofits engaged in the commercial sale of products or services. For example, daycare centers, nursing homes, and hospitals are commonly organized as commercial nonprofit corporations. A "commercial" organization is one that "obtain[s] most of its income from prices charged for goods or services they

(arguably) significant difference is that nonprofits are subject to the “nondistribution constraint” and therefore may not distribute current profits, or net earnings, to those with control over the corporation’s decisions, such as its directors, officers, or members.¹⁹⁹ By contrast, for-profit corporations may distribute excess cash flows to its shareholders by paying dividends.²⁰⁰ But the nondistribution constraint does not mean that nonprofits can or should ignore profits; nor does its absence in the for-profit context mean that for-profit corporations must engage only in profit-generating activities. Moreover, it isn’t entirely clear whether the nondistribution constraint encumbers the activities of nonprofits in a way that meaningfully distinguishes them from for-profits in the first place.²⁰¹

produce.” Hansmann, *supra* note 169, at 502. The distinguishing feature is not that nonprofits are tax-exempt and for-profits are not. Although many nonprofits, including universities, happen to be tax-exempt, nonprofits do not automatically qualify for state and federal tax-exempt status but must apply for it and maintain it. “Just because an organization is a non-profit does not mean that it qualifies for tax-exempt status at either the federal or state level. Rather, the tax statutes generally exempt only a specified subset of all non-profit organizations.” *Id.* at 519. And, more recently, the tax-exempt status of nonprofit universities has come under attack as cash-strapped local governments seek new sources of revenue to close budget gaps. *See, e.g.,* Moira Herbst, *Princeton and Princeton Face Off over Taxes*, BLOOMBERG BUS. WK., July 5–11, 2010, at 28, 28 (describing conflict between the town of Princeton, New Jersey and Princeton University over taxes and noting that “municipalities from Pittsburgh to Boston turn to local universities, whose land holdings are mostly tax-exempt, to close budget gaps”); *see also* Koltko, *supra* note 179, at 1075, 1099 (proposing to uniformly tax universities). More importantly, the limitations imposed by federal tax-exempt status neither encumber nor facilitate an organization’s ability to promote diversity and thus are not relevant to justifying the double standard.

199. Hansmann, *supra* note 169, at 501, 553 (“The prohibition on distributions of net earnings to controlling individuals is the essential defining feature of a nonprofit organization.”); *see also* REVISED MODEL NONPROFIT CORP. ACT §§ 1.40, 13.01 (1987) (prohibiting payments from nonprofit corporations to their “members, directors, or officers”).

200. However, the mandate to declare dividends under state corporate law is quite weak. Declaring dividends is generally within the discretion of the board of directors, as limited by the corporation’s financial and legal ability to pay. Only when the corporation has no better use for the capital is there any risk of state courts compelling the declaration of dividends. *See, e.g.,* Schmitt v. Eagle Roller Mill Co., 272 N.W. 277, 282 (Minn. 1937); Hofeller v. Gen. Candy Corp., 275 Ill. App. 89, 96 (1934). Indeed, only a minority of firms pay dividends. For example, in 1999, only 20.8% of nonfinancial, nonutility listed firms paid dividends. William W. Bratton, *The New Dividend Puzzle*, 93 GEO. L.J. 845, 851 (2005); Eugene F. Fama & Kenneth R. French, *Disappearing Dividends: Changing Firm Characteristics or Lower Propensity to Pay?*, 60 J. FIN. ECON. 3, 4 (2001). Bratton also notes that dividend yields shrank “from 5.4% in 1980 to 1.1% in 2000 for companies in the S&P index.” Bratton, *supra*, at 851 n.24 (citing H. Kent Baker et al., *Revisiting the Dividend Puzzle: Do All of the Pieces Now Fit?*, 11 REV. FIN. ECON. 241, 254 (2002)).

201. The primary purpose of the nondistribution constraint is to provide an off-the-shelf, enforceable legal term that offers the organization’s customers or donors some assurance that the organization will “devote *all* of its income to the [production of the] services that it was formed to provide.” Hansmann, *supra* note 169, at 506, 507. That said,

Therefore, it is not the case that for-profits must only do what is in their economic self-interest or that nonprofits must ignore their economic self-interest. Accordingly, the double standard is not easily justified by the legal distinction between for-profits and nonprofits. The question remains: why does the double standard exist?

III. EXPLAINING WHY THE DOUBLE STANDARD EXISTS

Why is it that so many in corporate America regard the educational setting as one that is naturally in harmony with affirmative action while thinking of the corporate workplace as antithetical to affirmative action such that they demand such a high bar (i.e., the business case for diversity) in order to accommodate it? One explanation is simply that business corporations have evolved into “externalizing machines”²⁰²—that they have developed an

it's not entirely clear whether the nondistribution constraint achieves what it purports to achieve. First, the constraint is poorly defined and has severe limitations, which arguably help undermine its purpose. *Id.* at 507. Even statutes that proscribe distributing current profits to controlling persons permit nonprofits to distribute all of the organization's assets to its members at dissolution. *Id.* at 529–30 (noting this feature in the Model Nonprofit Corporation Act of 1952, which was adopted by many states, and noting that this “places only a limited qualification on the authors' markable willingness to abandon the nondistribution constraint”). As noted by Henry Hansmann, “[s]uch authority for distribution of assets to members on dissolution creates an enormous loophole in the nondistribution constraint, for it means that, if members of a nonprofit organization wish to derive profits from its activities, they need only wait until the organization is dissolved.” *Id.* at 574. This apparent looseness in defining the nondistribution constraint is compounded by the looseness in defining who is a “member.” Some statutes offer no meaningful definition of the term “member.” *Id.* at 578. Accordingly, it is theoretically possible that anyone entitled to vote on the organization's matters (and thus exercising control over it) will receive a profit distribution upon the organization's dissolution. Second, the nondistribution constraint, like the other fiduciary standards applicable to nonprofits, is poorly enforced by state attorneys general who typically have too few staff and no effective system of financial reporting to enable them to properly supervise nonprofits' affairs. *Id.* at 507. Third, the nondistribution constraint suffers from (perhaps unavoidably) another fairly significant loophole, which may undermine its purpose. The constraint only bars the distribution of net income. But “nonprofits are generally free to pay reasonable compensation to individuals, including controlling individuals, for labor services or capital [contributed] to the organization.” *Id.* at 501. Recurring news reports of the income of nonprofits being funneled into hefty salaries of managers who control the entity raise serious questions about the effectiveness of the nondistribution constraint in controlling agency costs in nonprofits. See, e.g., Milton Cerny et al., *New Scrutiny of College and University Executive Compensation and Unrelated Business Activity*, 37 J.C. & U.L. 93, 102 (2010); Felicity Barringer, *Pay for Charity Leaders Raises Uneasy Question*, N.Y. TIMES, Mar. 16, 1992, at A12; Jeff McDonald, *Ex-Chief of County's YMCA Was Paid Nearly \$1 Million*, SAN DIEGO UNION-TRIBUNE, Dec. 10, 2010, at A2; Peter St. Onge, *How Much Is Enough?: Nonprofit Leaders Debate Whether Charity Should Begin with Executive Paychecks*, CHARLOTTE OBSERVER, Oct. 19, 2009, at 1A.

202. See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 60 (2004).

inexorable tendency to externalize the costs of their profit-making activities while internalizing all economic benefits available to them. Accordingly, they will generally resist taking on any costs unless justified by the economic benefits.²⁰³ As the story goes, they will not do anything that smacks of altruism or advances social justice unless they are required to do so by law, even as they insist that other sectors should.²⁰⁴ While this explanation is plausible, it seems caricatured. I want to explore an alternative and more charitable explanation. In this Part, I argue that the double standard exists, at least in part, because of how we construct and construe social relationships in the university and business domains. As the theoretical basis for my argument, I borrow heavily from experimental studies and ethnographic field research on the social psychology of sociality,²⁰⁵ as informed by the cognitive science of categorization.²⁰⁶

Although most of us intellectually know that universities sometimes chase profits and that businesses sometimes embrace

203. Cf. *id.* (“Nothing in [the corporation’s] legal makeup limits what it can do to others in pursuit of its selfish ends, and it is compelled to cause harm when the benefits of doing so outweigh the costs.”).

204. Cf. *id.* (“Only pragmatic concern for its own interests and the laws of the land constrain the corporation’s predatory instincts, and often that is not enough to stop it from destroying lives, damaging communities, and endangering the planet as a whole.”).

205. A growing body of scholarship in social psychology is devoted to exploring models of human sociability—that is, how people “organize their social life in terms of their relations with other people.” Alan Fiske, *The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations*, 99 PSYCHOL. REV. 689, 689 (1992); see also JOHN F. DOVIDIO ET AL., *THE SOCIAL PSYCHOLOGY OF PROSOCIAL BEHAVIOR passim* (2006) (exploring the evolution of altruistic behavior and its many manifestations); *THE PSYCHOLOGY OF PROSOCIAL BEHAVIOR: GROUP PROCESSES, INTERGROUP RELATIONS, AND HELPING* (Stefan Stürmer & Mark Snyder eds., 2009) (compiling scholarly articles emphasizing helping in the social group context). For a recent exploration of the legal and policy implications from the new “science of unselfish prosocial behavior,” see STOUT, *supra* note 36, at 11.

206. Since the 1970s, advances in the fields of cognitive psychology, cognitive linguistics, artificial intelligence, and anthropology have provided a persuasive account of how humans categorize people, things, and abstract concepts. See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION: FROM BRAINS TO CULTURE* 94–102 (2008); ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 25–41 (1999); GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 5–154 (1987); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1145–54 (2004); Gary Blasi, *Lawyers, Guns and Money: Content Contextualism and the Cognitive Foundations of Statutory Interpretation* 49–85 (Berkeley Elec. Press, Working Paper No. 197, 2004), available at <http://law.bepress.com/expresso/eps/197>; see also Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 95–111 (2010) (exploring the cognitive science of categorical thinking in the context of the regulation of lawyers).

philanthropy, we nonetheless rely on cognitive schemas that resist this nuanced understanding. We tend to think of the university domain as being associated with what I refer to here as “communal norms” and the business domain as being associated with “market norms.”²⁰⁷ Moreover, we tend to associate diversity initiatives and their ilk with communal norms. As a result, diversity is seen as being naturally compatible with the educational setting but in tension with the business setting.

By “communal norms,” I mean the unspoken social rules that govern those social relations characterized by mutual concern for each other’s welfare.²⁰⁸ These norms emanate from our need for security and fulfillment and the desire to belong to a community that genuinely cares about one another’s physical and emotional well-being.²⁰⁹ Attributes that are associated with “communal norms” are those of generosity, kindness, sharing, helping, intimacy, nurturance, community, and mutual interdependence.²¹⁰ The typical relationship governed by strong communal norms is between family members and close friends.²¹¹

In contrast, “market norms” govern market exchange relationships and are more tightly associated with business environments. Market norms are dominated by economic analysis, embracing words like “wages, prices, rents, interest, and costs-and-benefits.”²¹² Attributes associated with market norms are self-

207. For purposes of this Article, my categorizations are rough simplifications of more complex taxonomies and relational models developed by Alan Fiske. Fiske argues that four (not two) psychological models of sociality describe all social interactions. They are communal sharing, authority ranking, equality ranking, and market pricing. See Fiske, *supra* note 205, at 689. By contrast, Margaret Clark and Judson Mills focus on two types of interpersonal relationships: communal relationships and exchange relationships. See Margaret S. Clark & Judson Mills, *Interpersonal Attraction in Exchange and Communal Relationships*, 37 J. PERSONALITY & SOC. PSYCHOL. 12, 12–13 (1979) [hereinafter Clark & Mills, *Interpersonal Attraction*].

208. Clark & Mills, *Interpersonal Attraction*, *supra* note 207, at 13 (explaining a “communal relationship” as one in which “each [person] is concerned about the welfare of the other”). The dichotomy between “communal relationships” and “exchange relationships” has been criticized and answered. See C. Daniel Batson, *Communal and Exchange Relationships: What Is the Difference?*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 677, 678–81 (1993) (criticizing the distinction); Margaret S. Clark & Judson Mills, *The Difference Between Communal and Exchange Relationships: What It Is and Is Not*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 684, 684–87 (1993) [hereinafter Clark & Mills, *The Difference*] (defending the distinction).

209. Clark & Mills, *The Difference*, *supra* note 208, at 685.

210. See Fiske, *supra* note 205, at 695.

211. See Clark & Mills, *Interpersonal Attraction*, *supra* note 207, at 12–13.

212. DAN ARIELY, *PREDICTABLY IRRATIONAL* 68 (2008); see also Fiske, *supra* note 205, at 694–95.

reliance, self-sufficiency, independence, individualism, efficiency, hard work, competition, and inventiveness.²¹³ The typical relationship governed by strong market norms is the relationship between one-time buyers and sellers.

Here's an illustration. Suppose I am incompetent at debugging computer problems. By contrast, suppose my partner is a computer whiz. One day, I have an especially hard time figuring out how to format a document using Microsoft's Styles & Formatting function. Hearing my sighs and groans, he comes to my aid and resolves the problem. It takes him fifteen minutes to debug my problem. In doing so, he has saved me two hours of valuable time. To show my gratitude, I reach into my wallet and pull out a \$100 bill to hand to him. After all, that is probably close to how much Geek Squad would charge for the service. He is shocked and offended by my response. Why?

Although the service he provided is highly commodifiable, our relationship is squarely a communal one. His favor was motivated out of a sense of caring and community, rather than out of a desire to maximize his own scarce resources. Hence, my attempt to compensate him with an equivalent value (in accordance with market norms) would be inappropriate in this situation, which clearly calls for communal norms. This is not to say that there are no reciprocity pressures in the world of communal norms. It's just that those pressures call for different responses. For example, if I asked my friend to pick up my daughter from school on a day that I can't, it would seem odd for me to say that it would be in exchange for my picking up her son the next day. However, my friend would probably be pleased if I later dropped off a small basket of delicious cream puffs to thank her.

The fact that I am in a communal relationship with someone is a strong indicator that communal norms should normally apply. But this does not mean that communal norms are absent in market domains or that market norms are entirely absent in communal domains. Rather, the domain is but one factor (albeit perhaps the most important one) to be considered when applying the complex cultural mapping rules that guide which set of norms should dominate in a given context.²¹⁴ These mapping rules will not be found in any

213. See ARIELY, *supra* note 212, at 68; Fiske, *supra* note 205, at 695.

214. For example, people seem to regard themselves as having at least weak communal ties with everyone, regardless of venue. See Clark & Mills, *The Difference*, *supra* note 208, at 685. Most people will call an ambulance for a stranger who has collapsed in front of one's house or one's office—without any expectation of repayment. See *id.* at 686.

classroom textbook; rather, they have been socially ingrained since childhood. Much of the recent research in the social psychology of sociality aims to determine what conditions might activate which set of norms in our culture. In particular, experiments seek to find out when market norms are triggered.²¹⁵ What's fascinating about these experiments is the finding that the mere mention of money is capable of activating market norms in ways that impact actual behavior.

Take, for example, the conscious priming²¹⁶ studies conducted by Kathleen Vohs, Nicole Mead, and Miranda Goode.²¹⁷ Participants were asked to rearrange sets of scrambled words to form sentences or phrases. The control group was assigned the task of forming neutral sentences, e.g., "It is cold outside." The other group (the "money" condition) was tasked to form sentences or phrases relating to money, e.g., "high-paying salary."²¹⁸ After finishing the unscrambling task, participants were asked to complete a hard puzzle that required them to arrange twelve disks into a square.²¹⁹ As the experimenter left the room, he told them that they could come to him for help.²²⁰

As it turned out, the participants in the money condition wrestled with the puzzle for an average of five and a quarter minutes before asking for help, whereas the participants in the control group (neutral condition) requested help after about three minutes.²²¹ It appears that the mere thought of money, brought about by priming "salary" during the scrambled-sentence task, activated market norms, making the participants in the money condition (unwittingly)²²² more

215. See *infra* notes 217–55 and accompanying text.

216. "Conscious priming" or "postconscious automaticity" entails the "conscious perception of the prime but no awareness of its effects on subsequent reactions." FISKE & TAYLOR, *supra* note 206, at 29. For example, in one experiment, participants who were instructed to imagine the daily routine of a typical professor subsequently ended up outscoring the other participants (who had not been so instructed) in a game of Trivial Pursuit. *Id.* Although participants were consciously aware that they were participating in the task of imagining the life of a professor, they were *not* consciously aware that doing so would affect or had affected their performance in a subsequent knowledge game. *Id.*

217. Kathleen Vohs et al., *The Psychological Consequences of Money*, 314 SCIENCE 1154 *passim* (2006); see also James Heyman & Dan Ariely, *Effort for Payment: A Tale of Two Markets*, 15 PSYCHOL. SCI. 787, 787 (2004) (describing how money triggers market norms).

218. Vohs et al., *supra* note 217, at 1154.

219. *Id.*

220. *Id.*

221. *Id.* (reporting results from Experiment 1).

222. Although participants in the money condition were consciously aware that they were unscrambling words that invoked the concept of money, they were *not* consciously aware that doing so would affect or had affected their behavior in the subsequent puzzle task. See *supra* note 216 for an explanation about the degree of automaticity typically present in conscious priming studies.

persistent, self-reliant, and less willing to solicit help from the experimenter.²²³ This experiment also suggests that we may understand the communal notions of help and helpfulness to be inconsistent with market norms.²²⁴

But the experiment did not end there. The authors of the study also planted a “stranger,” in reality a disguised confederate experimenter, who “accidentally” dropped a box of pencils.²²⁵ Did these participants come to the aid of a stranger? Participants in the money condition were less willing than participants in the neutral condition to help pick up the pencils.²²⁶ In another experimental variation, participants in the money condition were also less willing to help an experimenter enter data²²⁷ and less willing to assist another participant (in reality, a confederate) who seemed confused by the instructions.²²⁸

Overall, the “money” participants exhibited characteristics consistent with market norms: they were more independent, persistent, self-reliant, and less attentive to others. These participants preferred to spend more time alone²²⁹ and were more likely to choose tasks requiring individual input, rather than team effort.²³⁰ Even when they decided where they wanted to sit, they tended to choose seats farther away from whomever they were assigned to work with.²³¹ In short, just thinking about money made them behave more in line with what you might expect from a “perfectly rational and purely self-

223. Vohs et al, *supra* note 217, at 1154.

224. *See id.* at 1155.

225. *Id.*

226. *Id.* (reporting results from Experiment 5).

227. *Id.* (reporting results from Experiment 3).

228. *Id.* (reporting results from Experiment 4).

229. *Id.* at 1156 (reporting results from Experiment 8).

230. *Id.* (reporting results from Experiment 9).

231. *Id.* (reporting results from Experiment 7).

interested" *homo economicus*.²³² Moreover, the "money" participants were apparently unaware of this psychological transformation.²³³

Drawing on the relational models proposed by Alan Fiske, Vohs et al. hypothesized that "money is linked to a focus on personal inputs and outputs, which may manifest behaviorally as an emphasis on personal performance."²³⁴ Since money is a tool that facilitates the exchange of goods and services to satisfy personal needs, we may associate the construct of money with our individual selves.²³⁵ And because money is used to reward successful task completion which typically follows performance efforts, "reminding people of the concept of money would encourage individual performance efforts."²³⁶ At the same time, thinking of life in "transactional terms with inputs and expected outputs" seems inconsistent with the social interconnectedness that one feels and expects from relationships with family members and friends.²³⁷ Accordingly, "being reminded of money would make people less sensitive to the needs of others than they would be without that reminder."²³⁸ Thus, it appears from these studies that subtle reminders of money can powerfully activate the market norms of independence, self-reliance, persistence, and individual effort. Simultaneously, the construct of money seems to "crowd out"²³⁹ communal notions of sharing, helping, interdependence, and mutual interconnectedness.

232. Lynn A. Stout, *On the Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 9 (2003) (defining *homo economicus* as a "perfectly rational and purely self-interested actor[]"); see also STOUT, *supra* note 36, at 4 (" 'Economic Man' does not worry about morality, ethics, or other people. He worries only about himself, calculatingly and opportunistically pursuing the course of action that brings him the greatest material advantage."). Other scholars have used similar definitions. See, e.g., Harry S. Gerla, *The Psychology of Predatory Pricing: Why Predatory Pricing Pays*, 39 SW. L.J. 755, 757 n.12 (1985) (defining *homo economicus* as "the hypothetical wealth and utility maximizing creature postulated by classical microeconomists").

233. See *supra* note 216 for an explanation about the degree of automaticity typically present in conscious priming studies.

234. Kathleen D. Vohs et al., *Merely Activating the Concept of Money Changes Personal and Interpersonal Behavior*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 208, 209 (2008).

235. See *id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. "Crowding Out Theory" predicts that "[w]here individuals perceive an external intervention to be controlling, their intrinsic motivation to perform the task diminishes." Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746, 747 (1997) (citing EDWARD L. DECI & RICHARD M. RYAN, *INTRINSIC MOTIVATION AND SELF-*

In case you doubt that similar effects can be attained outside of psychology laboratories, consider the following field study. Uri Gneezy and Aldo Rustichini studied ten private day care centers in Israel to determine whether imposing a fine on parents who were late in picking up their children was a useful deterrent.²⁴⁰ Surprisingly, imposing the fine actually increased tardiness, rather than decreased it,²⁴¹ a finding that contradicts classical economic theory's prediction that increasing the penalty for a behavior will reduce the occurrence of that behavior.²⁴² Why did the fine imposition increase tardiness? One explanation is that introducing the fine inadvertently converted what was more or less a "communal contract" between teachers and parents into one that was more squarely a "market contract."²⁴³ Under the prior communal contract, if parents were late, they were taking advantage of their teacher's generosity by encroaching on her personal time.²⁴⁴ This would generate pangs of guilt and those feelings motivated them to be more punctual in the future.²⁴⁵ Once the fine was imposed, however, their understanding of the relationship was transformed.²⁴⁶ Under the terms of the new market contract, the penalty was predetermined and clear: it was the fine.²⁴⁷ Since the penalty would be paid in full under the new market contract, parents had no obvious reason to feel guilt,²⁴⁸ which turned out to be the more

DETERMINATION IN HUMAN BEHAVIOR 131 (1985)). Stated another way, "asking people to focus on extrinsic incentives can have the unfortunate effect of 'crowding out' internal incentives like trustworthiness, honor, and concern for others' welfare." STOUT, *supra* note 36, at 251.

240. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 1 (2000).

241. *Id.* at 6.

242. See STOUT, *supra* note 36, at 192 ("From an economic perspective, these results seem bizarre. How can raising the cost of an activity prompt people to 'buy' more of it?"); Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURVS. 589, 602 (2001) ("A typical economic approach (in line with the economic theory of crime . . .) would suggest introducing a fine for collecting children late. Such a punishment is expected to induce parents to reduce the occurrence of belatedly picking up their children.").

243. Cf. ARIELY, *supra* note 212, at 76–77 (distinguishing the pre-fine "social contract" with the post-fine market contract).

244. Gneezy & Rustichini, *supra* note 240, at 13–14.

245. See *id.* at 14.

246. See *id.* at 10 (assuming that "the fine changes the agents' perception of the social situation in which they are involved").

247. *Id.* at 14.

248. As explained by Gneezy and Rustichini, "Parents feel justified in their behavior by a social norm that states, approximately: 'When help is offered for no compensation in a moment of need, accept it with restraint. When a service is offered for a price, buy as much as you find convenient.' " *Id.*

effective deterrent in this situation.²⁴⁹ In short, the introduction of the fine triggered market norms, converting an offer of help in a moment of need to an extra service that could be bought at a price.²⁵⁰ Parents began acting like *homo economicus*.²⁵¹

These studies suggest that we tend to associate market norms with money; indeed, thinking of money, whether brought about by subtle reminders or actual fines, seems capable of activating market norms in our behavior. Hence, it is plausible that merely thinking about “jobs,” “work,” “business,” or “business corporations” may trigger the market norms of competition, self-reliance, independence, individualism, and self-regarding behavior. These cognitive associations in our heads may be reinforced in the real world by annual performance reviews that typically evaluate individual performance, rather than group effort or cooperation. Also, particular management practices, such as the “rank and yank” system,²⁵² starkly remind employees that they are in cutthroat competition with their colleague in the next cubicle and that they should watch out—first and foremost—for “number one.” As a result, we may perceive market norms that stress individual performance

249. The authors admit that introducing a “large enough” fee would eventually reduce the offending tardy behavior. *Id.* at 15. The fee imposed in this study, albeit not large, was not trivial. *See id.* at 5 (explaining the size of the fine).

250. The Gneezy and Rustichini study also illustrates “crowding out” theory. *See supra* note 239. Thus, interpreted from the standpoint of crowding out theory, the

introduction of a monetary fine transforms the relationship between parents and teachers from a non-monetary into a monetary one. As a result, the parents’ intrinsic motivation to keep to the time schedules is reduced or is crowded out altogether; the feeling now is that the teachers are ‘paid’ for the disamenity of having to stay longer.

Frey & Jegen, *supra* note 242, at 602.

251. So what happened when the day care center removed the fine? For this crop of parents, the tardiness did not improve. Gneezy & Rustichini, *supra* note 240, at 15. They continued to pick up their kids late. In fact, there was even a slight increase in the number of tardy pickups. *Id.* One interpretation is that when a communal norm gets replaced by a market norm, the communal norm is difficult to reinstate. As explained by Gneezy & Rustichini, “[o]nce a commodity, always a commodity.” *Id.* at 14.

252. The “rank and yank” system of performance management was popularized by Jack Welch, former CEO of General Electric. ALAN MURRAY, *THE WALL STREET JOURNAL ESSENTIAL GUIDE TO MANAGEMENT* 33, 38 (2010). Under “rank and yank,” every year employees of a company would be evaluated and ranked by their supervisors, and the lowest-ranked ten percent would be fired at each evaluation. *Id.* at 38. Some have been critical of this approach, noting that it can lower productivity and morale while also discouraging teamwork. *Id.* at 38. Notably, Enron had used a “rank and yank” system. BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* 63–64 (2003) (describing Enron’s use of the “rank-and-yank” system in conducting performance reviews).

and self-sufficiency as being fundamentally in tension with affirmative action, which is grounded in communal values and the recognition that we must sometimes transcend narrow self-interest to achieve a more just world.

Conversely, the communal values underlying affirmative action seem more naturally in line with the university setting. The university setting is perceived as embodying the communal norms of sharing, helping, mutual interdependence, and other-regarding behavior. Although we all know that money is an integral part of university life and universities have become increasingly profit-oriented, the university is still thought of as an ivory tower that is insulated from the dog-eat-dog values of the marketplace. In sum, we tend to think of universities as operating in the *safer*, educational realm, where supposedly much less is at stake.

This cognitive dichotomy, grounded in the intuitive distinction between the commercial and educational spheres, is alluded to in the GM Brief:

Businesses are primarily commercial, not educational, entities, incapable of replicating the *safe* academic environments that foster the “robust exchange of ideas which discovers truth out of a multitude of tongues.” . . . Accordingly, universities, not businesses, “are [the] ideal institutions to foster” the skills and values necessary for participation in a heterogeneous society.²⁵³

From a business viewpoint, this cognitive dichotomy might well be unfortunate, because, as others have argued,²⁵⁴ communal norms that incorporate other-regarding behavior do not necessarily clash with the values of the market world, for example, persistence and hard work. While it is plainly true that paying more money can motivate people to work harder than paying less money,²⁵⁵ it is also

253. GM Brief, *supra* note 4, at 14 (emphasis added).

254. See generally Elhauge, *supra* note 142 (arguing that optimizing corporate conduct in a public corporation requires managerial discretion to sacrifice profits for the public interest); Henderson & Malani, *supra* note 148 (arguing that for-profit corporations have played an increasingly significant role in delivering altruism to individuals, that consumers demand it, and that for-profits are capable of producing altruism efficiently and competitively); Stout, *supra* note 232 (arguing that corporate boards are more effective if they adopt an other-regarding perspective rather than a purely self-interested one).

255. There are experiments that show that if you give subjects a tedious task to complete, paying more money (rather than less) usually gets better results. However, experiments also show that paying *no money at all* also generates as good or almost as good results as paying more money. See ARIELY, *supra* note 212, at 70–74; Heyman & Ariely, *supra* note 217, at 788–92. In addition, as noted above, “crowding out” theory suggests that, in some cases, paying money for a service may have the perverse effect of suppressing the internal motivation to perform the service. See *supra* note 239, 250.

true that a shared belief in a common cause (other than money) or a strong sense of community can generate fierce loyalty and great effort.²⁵⁶ For instance, Jennifer Brooke and Tom Tyler's contribution to this conference explores how a "procedurally fair" workplace—one that genuinely treats all employees with dignity and respect²⁵⁷ and sends appropriate social signals emphasizing fairness—can cultivate *both* a strong sense of community and a strong commitment to superior performance.²⁵⁸ Moreover, these virtues can peacefully coexist with meaningful diversity.²⁵⁹

All of the above is to say that the double standard may well exist because the values underlying diversity initiatives are perceived to be in tension with the values of business but perceived to be in harmony with the values of universities.

CONCLUSION

So far, I've argued that business corporations invoke a double standard on diversity. Corporate diversity must be justified by self-interest; by contrast, educational diversity should be pursued regardless of self-interest. I've also argued that this double standard cannot easily be justified by facile distinctions, such as the for-profit/nonprofit distinction. The psychology of human sociality helps us understand why we easily fall into a double standard. But an explanation is not quite the same as justification. Although wide embrace of communal norms in the university may help *explain* why

256. Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 740–42 (2011) (citing studies). For a current real-world example of a corporation that has generated a strong sense of community while being wildly profitable, see Jeffrey M. O'Brien, *Zappos Knows How to Kick It*, FORTUNE, Feb. 2, 2009, at 54, 55–56 (describing Zappos, which ranked twenty-third in *Fortune's* 100 Best Companies to Work For); Christopher Palmeri, *Now for Sale, The Zappos Culture*, BUS. WK., Jan. 11, 2010, at 57, 57.

257. As Brooke and Tyler have pointed out, one should not expect to recoup the benefits of a diverse work force if the company recruits diverse employees but then discourages their voice by pressuring them to conform. Brooke & Tyler, *supra* note 256, at 730–31. One component of a "procedurally fair" workplace is *genuinely* considering the views of all employees. *Id.* at 728–29. Conducting employee surveys and later ignoring them is an example of superficial compliance that does not amount to a procedurally fair workplace. *Id.* at 730. On a broader scale, prosocial behavior may contribute to economic productivity. See STOUT, *supra* note 36, at 19 (noting that "emerging evidence suggests that cultural habits of unselfish prosocial behavior . . . are powerful engines for social stability and economic growth" and that "[t]rust, honesty, and cooperation turn out to be statistically associated not only with personal happiness, but with economic prosperity as well").

258. Brooke & Tyler, *supra* note 256, at 740. I would like to thank John Darley for making this point explicit to me.

259. *Id.*

affirmative action is viewed as more appropriate in the educational context, that doesn't entirely justify it. As demonstrated above, the nonprofit/communal versus for-profit/market distinction is exaggerated. Moreover, we can step back and ask the anterior question of why market norms should dominate within the corporation. We can't just say that those are our values; to do so would be to make the naturalistic fallacy. And our values are not set in stone or handed down by deities; they are in many ways chosen. What, then, should we do about the double standard?

Generally speaking, if one seeks consistency, one can either level down or level up. One could level *down* and transform educational diversity as a call for universities to pursue diversity only when it's in their self-interest. Or, one could level *up* and transform corporate diversity with a call to pursue diversity even when it's beyond self-interest. Now, some might think that "consistency is the hobgoblin of little minds."²⁶⁰ But, on this matter, I disagree. If one enters a forum of public discourse that demands reasoned justification, as in the case with amicus briefs or press releases, I think it reasonable to demand consistency.

Given space constraints, I will not try to make any systematic argument why one solution is better than the other. Instead, I simply state my view that corporations should level up—that is, support corporate diversity without narrowly demanding that it advance the economic self-interest of business corporations. My position is grounded in the conviction that it is a collective societal failure if minorities continue to dominate the lower echelons of corporate hierarchies, never quite breaking through the glass ceiling to participate meaningfully in mid-level management and beyond.²⁶¹

I don't suppose that my analysis will prompt corporations to alter their affirmative action policies or, if they don't have any, adopt them in the first place. After all, it's possible that the business case for diversity may in fact be nothing more than an expression of skepticism about the social value of diversity.²⁶² That said, my analysis may urge a certain transparency about the nature of corporate America's public, rhetorical commitment to diversity. In my view, the

260. Ralph Waldo Emerson, in *FAMILIAR QUOTATIONS* 614, 618 (John Bartlett ed., 10th ed. 1919) ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.").

261. I also believe that it is a collective societal failure if we fail to build a middle class that is not only stable and substantial but also racially diverse.

262. Some are skeptical that corporate executives can readily appreciate the social value of diversity. For a summary of views, see Joo, *supra* note 36, at 362–63.

business case for diversity is tantamount to saying that one supports diversity in the abstract so long as one never has to pay for it.²⁶³

With respect to the particulars, I believe that there is a provocative, yet robust, argument worth exploring that business corporations may actually have a competitive advantage over universities in advancing racial justice.²⁶⁴ This is a comparative institutional competency story. If we justify affirmative action as a way to decrease prejudice by promoting intergroup contact²⁶⁵ during the early stages of adulthood, then universities may well have the upper hand. But if we justify affirmative action not for its debiasing properties but for its material redistributive properties,²⁶⁶ then business corporations—with their ability to confer the critical business skills necessary to enable disadvantaged minorities to prosper economically—may well be better suited. After all, what other sector of American life can more efficiently and directly

263. Professor Coleman launches a passionate defense of the corporate commitment to diversity. See Coleman, *supra* note 20, at 1007–08 (“The corporate amici pointed to their own efforts to obtain a diverse workforce . . . as the primary rationale for intervening into a dispute involving diversity in higher education. . . . In pursuit of that goal, these amici asserted that they had invested ‘substantial financial and human resources to create and maintain a diverse workforce.’”). Professor Coleman’s reaction is predictable in light of his reading of my argument primarily as a challenge to that commitment. But my main quibble is not so much whether corporations have in fact invested “substantial financial and human resources” in pursuit of diversity (although I would generally be more hesitant than Professor Coleman in accepting naked claims at face value). Nor is my focus on the normative issue of whether educational diversity should be pursued, which no one is disputing and about which I have clearly expressed my views (notwithstanding Professor Coleman’s mischaracterizations). See *supra* notes 58, 136 and accompanying text. As I have painstakingly argued, the main focus of my Article has been on the choice of *rationales* for diversity. If we are to trust the self-reports of corporations, then they are pursuing diversity *because* it helps them make money by helping them compete in the global marketplace. In other words, corporations are pursuing diversity because it maximizes their economic self-interest. And if corporations are merely acting in accordance with what economic self-interest requires, then they should hardly be adulated for doing so. Moreover, if they are merely acting to maximize their self-interest, then the question is begged: why does Professor Coleman feel the need to defend them? Professor Coleman offers no answer to that question. Rather, in cynical fashion, Professor Coleman argues that “[i]t is naive to think that universities will pursue diversity when it is not in their interest to do so, just as it is naive to expect businesses to pursue diversity ‘for its own sake,’ whatever that implies.” Coleman, *supra* note 20, at 1015–16. It seems that Professor Coleman, just like the corporations, finds the myriad social justice rationales for diversity to be unpersuasive. As a result, Professor Coleman’s commentary sounds like a corporate apology.

264. Please see *supra* note 136 for a brief description of what I mean by “racial justice.”

265. See Kang & Banaji, *supra* note 96, at 1102–15.

266. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1783–84 (1993) (suggesting that affirmative action be viewed through a distributive justice framework, which refocuses the issue on “what would have been the proper allocation [of benefits] in the absence of the distortion of racial oppression”).

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promote the reallocation of economic resources necessary to decrease persistent racial stratification?

