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

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On December 7, 1953, two of the greatest appellate advocates that this country has ever produced squared off in the Supreme Court's marble and mahogany chamber to present the final arguments in *Brown v. Board of Education*.[1] At one counsel table sat Thurgood Marshall, chief counsel for the NAACP Legal Defense and Education Fund, arguably the nation's first "public interest" law firm.[2] At the other sat John W. Davis, whose seamless blending of public service (including a stint as Solicitor General of the United States under President Wilson) and private practice (as the senior partner of the Wall Street law firm Davis, Polk, Wardwell, Sunderland & Kiendl) epitomized the power and prestige of the elite corporate bar in the years following World War II.[3]

It was both fitting and ironic that Marshall and Davis found themselves squaring off in what many now consider the most important constitutional case since *Marbury v. Madison*.[4] Fitting because of each man's skill and fame as an appellate advocate. By the time *Brown* was first argued, Thurgood Marshall had successfully litigated thirteen cases before the U.S. Supreme Court.[5] Counting his experience as Solicitor General, Davis had participated in over 250 cases before the Court, more than any other lawyer in the twentieth century, and was widely praised as one of the greatest masters of oral advocacy of all

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1 347 U.S. 483 (1954).

2 *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 282 (1994).

3 *See* W.H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS (1973). For a general description of the power and prestige of the corporate bar during the period following World War II, see ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? (2d ed. 1969); and PAUL HOFFMAN, LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS (1973).

4 5 U.S. (1 Cranch) 137 (1803).

5 *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 561 (Vintage Books 1977) (1975).

time. Indeed, as a law student, Marshall had gone to see Davis argue in the Supreme Court in order to witness Davis's "disciplined eloquence and withering logic."[6]

Yet the meeting was also ironic because of the yawning distance that separated the parts of the legal profession to which each man belonged. Marshall and Davis were products of the very segregation that brought them together in *Brown* — segregation that was as, if not more, severe in the legal profession than in the rest of society. There simply were no black lawyers in corporate law firms like Davis, Polk, Wardwell, Sunderland & Kiendl in the mid-1950s. Indeed, there were hardly any black lawyers at all: in 1950, there were a mere 1450 black lawyers in the entire country.[7] These privileged few toiled almost exclusively in low-level government jobs or in solo or small firm practice, barely eking out a living tending to the needs of black individuals and small businesses.[8] John W. Davis's world of corporate titans, elite standing, and sumptuous fees was as distant from the reality of even the most privileged black lawyer in the 1950s as the new books, fresh paint, and well-funded extracurricular activities of white Southern schools were from the "separate but equal" rat traps in which Linda Brown and her fellow plaintiffs were forced to pursue their educations.[9]

The fact that Jim Crow was alive and well within the ranks of the American legal profession of the 1950s was no accident. For almost a century, corporate lawyers like Davis had waged a pitched and protracted battle to keep anyone other than White Anglo-Saxon Protestant men of means from joining the bar or, if admitted, from moving beyond the lowest rungs on the professional ladder.[10] These "lawyer-statesmen," as they are now reverently called,[11] framed their struggle to maintain the purity of the bar in expressly moral terms. In their view, immigrants, Jews, women, and, perforce, blacks were either in-

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[6] *Id.* at 529.

[7] RICHARD L. ABEL, AMERICAN LAWYERS 100 (1989).

[8] *See, e.g.*, GERALDINE R. SEGAL, BLACKS IN THE LAW: PHILADELPHIA AND THE NATION 218 (1983); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 11–15 (1993) (discussing the challenges faced by black lawyers in the late nineteenth and early twentieth centuries). Thurgood Marshall was a struggling solo practitioner until he was tapped by his friend and mentor Charles Hamilton Houston to be the second lawyer ever hired on a full-time basis by the NAACP. *See* TUSHNET, *supra* note 2, at 18.

[9] Of course, some white schools were almost as poorly funded and maintained as their black counterparts. *See* C. Arnold Anderson, *Inequalities in Schooling in the South*, 60 AM. J. SOC. 547 (1955) (noting stark differences in educational opportunity and attainment between suburban whites and whites in rural areas). Class as well as race has always been a relevant variable in the American educational system — and in the American legal profession as well.

[10] *See infra* pp. 1560–63.

[11] *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 3 (1993).

capable of adhering to the standards of professionalism or uninterested in doing so.[12] The corporations represented by these leading lawyers appeared to agree. They too refused to hire blacks for anything other than the most menial jobs.[13] Given this state of affairs, Davis undoubtedly spoke for many members of both the corporate bar and corporate America in general when he demonstrated where he thought the "public interest" in the dispute over segregation resided by agreeing to represent the school board *pro bono publico*.[14]

The Supreme Court disagreed. In a unanimous ruling, the Justices concluded that "separate educational facilities" for blacks and whites were "inherently unequal."[15] Speaking in a measured tone intended to belie the momentous implications of his words, Chief Justice Warren made clear that segregation was not just constitutionally prohibited. It was also a grievous moral wrong to young black children who, no matter how "equal" their separate black schools might become, would still be plagued with "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[16]

For the next fifteen years, civil rights advocates took to the courts and to the streets to persuade white America of the truth of Warren's conclusions. Segregation, and more broadly any discrimination based upon race, these advocates contended, was both legally prohibited and morally wrong. Significantly, ministers replaced lawyers as the leading figures of this crusade. Declaring that "I'd kinda outlived my usefulness," Thurgood Marshall resigned his position at the Legal Defense Fund to accept President Kennedy's invitation to become a judge on the U.S. Court of Appeals for the Second Circuit.[17] Replacing Marshall as the leading icon of the civil rights struggle was a twenty-five-year-old Baptist preacher from Atlanta, Georgia, named Martin Luther King, Jr. By the time King delivered his "I Have a Dream" speech from the steps of the Lincoln Memorial in August 1963, the eloquent minister and his compatriots at the Southern Christian Leadership Council had firmly stamped the civil rights movement as a

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[12] *See infra* pp. 1560–63.

[13] *See, e.g.*, 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 380 (Transaction Publishers 1996) (1944).

[14] *See* TUSHNET, *supra* note 2, at 178.

[15] *Brown*, 347 U.S. at 495.

[16] *Id.* at 494. As many others have noted, this moral characterization may in the end have done blacks more harm than good by portraying blacks primarily as victims and focusing attention on psychological harm rather than structurally entrenched privilege. *See, e.g.*, Lani Guinier, Brown v. Board of Education *and the Interest-Divergence Dilemma*, J. OF AM. HIST. (forthcoming 2004) (manuscript at 17–25, on file with the Harvard Law School Library).

[17] TUSHNET, *supra* note 2, at 301.

moral crusade — this time, for the hearts and minds of white America.[18]

Forty years after King's now-iconic speech — and a half-century since the final arguments in *Brown* — the Supreme Court once again turned its attention to the intersection of race and education in a pair of cases that many believed to be the most significant in this area since *Brown*. This time, the issue before the Court in the cases of *Grutter v. Bollinger*[19] and *Gratz v. Bollinger*[20] was whether the antidiscrimination principle articulated in *Brown* prohibited the University of Michigan and its law school from adopting voluntary affirmative action programs designed to increase the enrollment of black and other minority students. As in *Brown*, each side in this historic battle was represented by distinguished appellate counsel. But the identity and position of these advocates could scarcely have been imagined in 1953.

Acting in the role of plaintiff's counsel — a role that Thurgood Marshall had filled so admirably a half-century before — was Kirk Kilbo. Kilbo's clients were two white women who claimed that they were discriminated against by admissions policies that had helped to increase the size of the black bar from under 1500 in 1950 to over 33,000 in 2000.[21] To add to the irony, the lawsuit was spearheaded and funded by the Center for Individual Rights, a conservative public interest law firm dedicated to fighting affirmative action that expressly patterns itself after the NAACP Legal Defense Fund.[22] Representing the defendants was a lawyer whose Harvard Law School pedigree, Ninth Circuit clerkship, distinguished record of public service, and senior partnership in a prestigious corporate law firm marked him as a worthy successor to John W. Davis. Only this time, the lawyer — John Payton — was black.[23]

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[18] *See* DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 231–86 (Vintage Books 1988) (1986).

[19] 123 S. Ct. 2325 (2003).

[20] 123 S. Ct. 2411 (2003).

[21] *See* U.S. CENSUS BUREAU, CENSUS 2000 SPECIAL EQUAL EMPLOYMENT OPPORTUNITY TABULATION, *at* http://www.census.gov/eeo2000/index.html (last visited Feb. 15, 2004) (reporting that there were 33,865 black non-Hispanic lawyers as of 2000).

[22] *See* Iris M. Diaz, *Mischief Makers: The Men Behind All Those Anti-Affirmative Action Lawsuits*, BLACK ISSUES IN HIGHER EDUC., Dec. 25, 1997 ("CIR's recent string of courtroom successes are rooted in a public advocacy model first mastered by liberal organizations such as the NAACP Legal Defense Fund and the American Civil Liberties Union."), http://www.cir-usa.org/articles/cir_profile_black_issues.html. CIR paid all of the expenses in both cases except for the legal fees. Kilbo, like Davis, handled the case pro bono. *See* Jonathan Groner, *Center Ring*, LEGAL TIMES, Dec. 13, 2002, at 1.

[23] *See A Conversation with D.C. Bar President John Payton*, WASH. LAW., June 2001, at 32 (describing Payton's career, including his Ninth Circuit clerkship, partnership at Wilmer, Cutler & Pickering, and service as corporation counsel to the District of Columbia). Payton, who argued on behalf of the undergraduate admissions program in *Gratz*, was joined in the Supreme Court by

Nor was Payton the lone representative of the corporate bar, or of the corporate clients that these lawyers typically represent, weighing in on the side of affirmative action. Literally dozens of lawyers at prominent law firms wrote amicus briefs, many on a pro bono basis, urging the Court not to overturn its twenty-five-year-old precedent in *Regents of the University of California v. Bakke*,[24] which authorized colleges and universities to use race as a factor in admissions. So did the American Bar Association (ABA), in a brief authored by lawyers from New York's Cravath, Swaine & Moore, one of the oldest and most prestigious law firms in the country.[25] And, in perhaps the most surprising, and arguably the most important, sign of corporate America's shifting views over the last half-century, the Court also received two briefs in support of the university's policies signed by a veritable who's who of the country's largest and most profitable corporations.[26] Not a single corporation weighed in on the other side — a far cry from *Bakke*, in which the Chamber of Commerce of the United States, the

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Maureen Mahoney. In the lower courts, Payton was the university's lead lawyer in both *Grutter* and *Gratz*.

[24] 438 U.S. 265 (1978). No fewer than twenty-seven corporate law firms assisted in the submission of amicus briefs supporting affirmative action. *See, e.g.*, Brief of the Harvard Black Law Students Association, Stanford Black Law Students Association, and Yale Black Law Students Association as Amici Curiae Supporting Respondents, *Grutter* (No. 02-241) (Paul, Weiss, Rifkind, Wharton & Garrison and Sidley, Austin, Brown & Wood assisting), *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/BLSA-gru.pdf; Brief for the United Negro College Fund and Kappa Alpha Psi as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241), *Gratz* (No. 02-516) (Morrison & Foerster assisting), *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/UNCF-both.pdf. Significantly, only one law firm among the nation's 250 largest authored a brief opposing affirmative action. *See* Brief for Amicus Curiae National Association of Scholars, in Support of Petitioners, *Grutter* (No. 02-241) (Covington & Burling assisting), *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/nas-grutter.pdf.

[25] *See* Brief of the American Bar Association as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241) [hereinafter ABA Brief], *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/ABA-gru.pdf. Among the lawyers from Cravath signing the brief was Rowan Wilson, Cravath's first — and only — black partner.

[26] *See* Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter* (No. 02-241), *Gratz* (No. 02-516) [hereinafter Corporate Brief], *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/Fortune500-both.pdf; Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241), *Gratz* (No. 02-516) [hereinafter General Motors Brief], *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/GM-both.pdf. Among the corporations signing the two briefs were: 3M, Microsoft, Coca-Cola, Intel, Xerox, Fannie Mae, General Motors, American Airlines, KPMG, Johnson & Johnson, Alcoa, DaimlerChrysler, Pfizer, Nike, Boeing, Shell Oil, Ernst & Young, Kraft Foods, and Lockheed Martin. 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. *See* Motion for Leave To File Brief Amicus Curiae Out of Time and Brief of BP America Inc. as Amicus Curiae in Support of Neither Party at 6, *Grutter* (No. 02-241), *Gratz* (No. 02-516) [hereinafter BP Brief], *available at* http://www.umich.edu/~urel/admissions/legal/amicus-ussc/BPA-neither.pdf.html.

largest business lobbying organization in the country, filed a brief *opposing* affirmative action.[27]

As surprising as corporate America's broad support for affirmative action would have seemed to Davis and other business leaders in 1954 (or, indeed, in 1974), the argument that today's leaders of American business put forward to justify their support would have surprised their predecessors even more. Neither 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 that once motivated the few establishment lawyers and business leaders who helped Houston and Marshall wage their campaign against separate but equal — and upon which King and others grounded the civil rights movement of the 1960s. Instead, both briefs squarely cast their defense of affirmative action in terms of the demands of the marketplace. If American business is to continue to expand and prosper in a competitive global economy, the current captains of capitalism sternly warned, then these organizations must have access to a substantial pool of talented minorities who have graduated from the nation's best educational institutions.[28] Diversity, in other words, is not only "good for business," it is essential to prosperity in the global economy. These two corporate briefs, along with one authored by a coterie of retired generals making a similar argument about the importance of diversity to the continued excellence of this nation's armed forces,[29] were prominently cited by Justice O'Connor in her majority opinion in *Grutter*.[30]

How did we come to this surprising turn of events? When did American business and the military — two institutions with long histories of racism and exclusion — become stalwart advocates for diversity and inclusion? More fundamentally, what caused the rhetoric of the black equality struggle to shift from one grounded on moral claims about integration being "the right thing to do" to economic arguments premised on the claim that "diversity is good for business"? What are the consequences of this shift for the twin goals of "equality through

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[27] *See* Brief of the Chamber of Commerce of the United States of America Amicus Curiae at 2, *Bakke* (No. 76-811) ("Reverse discrimination is the antithesis of equal employment opportunity.").

[28] *See* Corporate Brief, *supra* note 26, at 1 ("The existence of racial and ethnic diversity in institutions of higher education is vital to *amici*'s efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated and trained in a diverse environment . . . . [S]uch a workforce is important to *amici*'s continued success in the global marketplace.").

[29] Consolidated Brief of Lt. Gen. Julius W. Benton, Jr., et al. as Amici Curiae in Support of Respondents at 6–7, *Grutter* (No. 02-241), *Gratz* (No. 02-516) [hereinafter Generals' Brief], *available at* http://www.umich.edu/nuvel/admissions/legal/gru_amicus-ussc/um/MilitaryL-both.pdf.

[30] *See Grutter*, 123 S. Ct. at 2340.

integration" and "social justice through law" that *Brown* seemed to promise black America and the nation a half-century ago?[31]

These are obviously large and difficult questions and I do not purport to answer them here. Instead, in the balance of this Article I chronicle the rise of market-based diversity arguments in the legal profession itself and raise some largely unexplored questions about how this new mode of justification is likely to affect both the "equal opportunity" and "social justice" prongs of the *Brown* agenda.[32] Notwithstanding the success of black corporate lawyers like John Payton, the pace of integration in John W. Davis's world of elite corporate law practice has been frustratingly slow. Despite decades of trying to convince firm leaders that integration is "the right thing to do," fifty years after *Brown* black lawyers still constitute just over four percent of the associates — and just over one percent of the partners — in the nation's largest law firms.[33] Frustrated with this state of affairs, diversity advocates in large law firms have increasingly turned to the kind of "diversity is good for business" arguments articulated in *Grutter* to put pressure on firm managers to hire and promote minority lawyers.[34]

It is not difficult to see why market-based diversity arguments have come to dominate discussions about how to accelerate the slow pace of integration in corporate law firms. Beginning with Justice Powell's critical opinion in *Bakke*, the Supreme Court has been highly skeptical about any argument for affirmative action based on the need to remedy past (or even present) "societal discrimination."[35] Indeed, until *Grutter*, the Court — and much of the country — appeared hostile to

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[31] I explore these twin themes in depth in DAVID B. WILKINS, THE BLACK BAR: THE LEGACY OF *BROWN V. BOARD OF EDUCATION* AND THE FUTURE OF RACE AND THE AMERICAN LEGAL PROFESSION (forthcoming 2004). In connection with this project, I have interviewed over 200 black corporate lawyers about their careers. The interviews reported here, as well as much of the general information about the struggle to integrate corporate law firms, come from this data set.

[32] As I indicate below, there is a growing literature raising questions about "the diversity industry" in the corporate world. Little of this analysis has been applied to similar arguments that have been made in the context of legal practice.

[33] *See* Nat'l Ass'n of Law Placement, *Representation of Attorneys of Color at Law Firms Today* (Jan. 2002), http://www.nalp.org/nalpresearch/0102res.htm.

[34] As in my other work, my focus here is primarily on black lawyers. Diversity arguments, however, typically focus more generally on "minorities," or even more generally on "minorities and women." Notwithstanding important commonalities among these groups, this broader focus is potentially misleading since there are significant differences between the experiences of, and opportunities available to, black, Asian, and Hispanic lawyers — and between each of these groups and the situation confronted by white women. I identify some of these differences below. Nevertheless, given that most diversity advocacy — including the Michigan briefs — is based on the importance of increasing the number of "minority lawyers," I also employ this broader framework here, although with an eye toward exposing how the experiences of black lawyers may differ from those of lawyers from other marginalized groups with whom blacks are often grouped.

[35] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307–08 (1978) (opinion of Powell, J.).

affirmative action altogether.[36] Market-based arguments offer the promise of circumventing these minefields. If corporations want more minority lawyers working on their matters, for example, then hiring and promoting such lawyers is a matter of economic necessity as opposed to a remedy for past discrimination, much less an unjustified preference. It is small wonder that black lawyers (and diversity advocates generally) have increasingly staked their claim to a seat at the corporate table by using the seemingly neutral terms of the competitive marketplace.

The growing competitiveness of the market for corporate legal services in the decades since *Bakke* has only added to the appeal of market-based diversity arguments. Since 1978, large law firms have exploded in size, geographic scope, and disciplinary reach — and there are many more of them than ever before.[37] At the same time, the clients that corporate lawyers serve have become increasingly demanding and focused on the bottom line. The result has been fierce competition for both clients and talent that has transformed the world of corporate legal practice from a "gentlemanly" profession governed by nineteenth-century craft norms to a hard-edge twenty-first-century global busi-

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[36] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *see also* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (holding that any consideration of race by a state law school for the purpose of achieving diversity was not a compelling interest that would withstand strict scrutiny), *cert. denied*, 533 U.S. 929 (2001). In addition to judicial hostility, there were also a number of legislative and ballot initiatives to curb affirmative action. *See, e.g.*, CAL. CONST. art. I, § 31(a) (approved Nov. 5, 1996) (codifying Proposition 209, which eliminated affirmative action in all California state employment, education, and contracting programs). *See generally* Nat'l Asian Pacific Am. Legal Consortium, *Fact Sheet: State Initiatives/Legislation*, *at* http://www.napalc.org/programs/affirmative.action/issues/Microsoft%20Word%20%20Current%20Issues-Fact%20Sheet-state%20legislation.pdf (last visited Feb. 15, 2004) (summarizing several state legislative initiatives opposing affirmative action policies). And it is already clear that *Grutter* will not end such efforts. *See* Marcia Coyle, *Battle Over Affirmative Action Expected To Expand*, NAT'L L.J., July 11, 2003, http://www.law.com/jsp/article.jsp?id=1056139974915 (reporting that the fight against affirmative action is likely to move to the ballot box); John J. Sanko, *Group Scolds Owens on Affirmative Action; Remarks about Ending Programs at Colleges Are Called "Out of Step"*, ROCKY MOUNTAIN NEWS, Aug. 1, 2003, at 8A. Finally, there has been a flood of criticism of affirmative action in the academic and popular press. *See, e.g.*, STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (1995); TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1996); JIM SLEEPER, LIBERAL RACISM (1997); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997).

[37] For documentation of this transformation, see, for example, John P. Heinz et al., *The Scale of Justice: Observations on the Transformation of Urban Law Practice*, 27 ANN. REV. SOC. 337 (2001), which documents the transformation of urban law practice since the 1970s; and MARK GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 37–68 (1991), which discusses the changing environment of the large law firm.

ness.[38] Given this environment, diversity advocates feel substantial pressure to justify their actions in terms of the all-important bottom line.

Finally, diversity advocates in the legal profession have been encouraged to state their claims in market terms by corporate America's apparent embrace of similar justifications for its own growing attention to diversity. In the last fifteen years, there has been an explosion in corporate diversity initiatives. Responding to a series of reports proclaiming that the United States is rapidly becoming "majority minority" — in which white men will constitute less than fifty percent of all workers by 2005[39] — and to the growing purchasing power of minority consumers, companies have devoted increasing attention to diversity.[40] Virtually every large company now employs "diversity consultants" to promote the value of diversity generally and to help identify structural and attitudinal barriers inside the workplace that make it difficult for women and minorities to succeed.[41] More important, many companies have adopted "supplier diversity" programs and evaluate managers at all levels on their compliance with diversity goals.[42] These developments appear to present diversity advocates in law firms with a golden opportunity. Law firms, after all, are arguably "suppliers" of services to corporations just like any others. Why should corporate diversity initiatives not apply to them? The fact that more than 350 general counsel recently signed a letter authored by Charles Morgan, the general counsel of Bell South corporation, urging law firms to hire and retain more minority lawyers seems to confirm that corporate America has fully signed on to the business case for diversity — and that businesses expect their law firms to do the same.[43]

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[38] *See* KRONMAN, *supra* note 11, at 271–314.

[39] FED. GLASS CEILING COMM'N, U.S. DEP'T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, at iv (1995) [hereinafter GLASS CEILING REPORT] (Message from the Chairman, Secretary of Labor Robert B. Reich).

[40] *See, e.g.*, DIVERSITYINC, THE BUSINESS CASE FOR DIVERSITY 237–63 (4th ed. 2003); Jeffrey M. Humphreys, *The Multicultural Economy 2003*, GA. BUS. & ECON. CONDITIONS, Second Quarter 2003, at 2–7; *Hispanic Spending Power*, INTELE-CARD NEWS (July 2003), http://www.intelecard.com/archives/archives_read.asp?A_ID=288.

[41] ELISABETH LASCH-QUINN, RACE EXPERTS: HOW RACIAL ETIQUETTE, SENSITIVITY TRAINING, AND NEW AGE THERAPY HIJACKED THE CIVIL RIGHTS REVOLUTION 163 (2001) ("A 1992 study found that approximately 65 percent of major American companies conducted diversity training, and in a 1995 survey of the top Fortune 50 corporations cited by Lynch, 70 percent of the companies reported that they had already initiated a formal diversity management program and another 16 percent expressed their intention to do so." (footnote omitted)); Heather MacDonald, *The Diversity Industry*, NEW REPUBLIC, July 5, 1993, at 22, 22–24.

[42] *See, e.g.*, LBG ASSOCIATES, BEST PRACTICES IN EXTERNAL CORPORATE DIVERSITY 2000.

[43] *See* Charles R. Morgan, *Cover Story: General Counsel Deliver Diversity Message to Law Firms*, DIVERSITY & B., *at* http://www.mcca.com/site/data/magazine/coverstory/BellSouth.htm (last visited Feb. 15, 2004) (describing the Morgan letter); *see also* Anne Fritz, *Corporate*

Moreover, the lawyers in charge of making these decisions to purchase legal services are increasingly themselves a more diverse group. Ironically, many of the women and minorities who left large law firms in the last thirty years found their way into the expanding in-house legal departments of large corporations.[44] Today, some of these big-firm dropouts have risen to senior positions. There are now thirty-three minority general counsel of Fortune 500 corporations, including such heavyweights as Coca-Cola, Merck, and Sears.[45] And there are many more minorities employed in lower levels of these organizations.[46] If one adds the small but nevertheless significant list of minority CEOs, including Ken Chenault at American Express and Dick Parsons at Time Warner,[47] then the "business case" for diversity in the large law firms that seek to serve these corporate clients appears compelling indeed.

The attention showered on the corporate amicus briefs in *Grutter* will only accelerate this trend.[48] What better proof of corporate America's commitment to diversity, advocates are likely to contend, than the willingness of so many major corporations to sign on to a brief that publicly declares that maintaining diversity in this nation's elite institutions of higher learning is essential to their survival in the global economy? Surely, law firms that fail to embrace the economic case for

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America Commits to Diversity, MEMPHIS LAW. (Aug. 2002), http://www.memphisbar.org/magazine/augusto2/corporateamerica.html (noting that the Morgan letter has over 350 signatories).

[44] *See* ELIZABETH CHAMBLISS, AM. BAR ASS'N COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 8–11 (2000) (linking the growth of minorities working in-house to a belief by many minority lawyers that this is a better setting for them to practice in than a law firm).

[45] Veta Richardson, *Advancement Advice*, LEGAL TIMES, Sept. 15, 2003, at 26 (reporting the results of the Minority Corporate Counsel Association's annual survey of the Fortune 500).

[46] Although the statistics on minorities working in corporate counsel positions are less reliable or complete than those for law firms (due in large measure to the absence of any formal reporting requirement such as the one NALP imposes on law firms as part of the recruitment process), estimates of the percentage of minorities in in-house positions range from 9 to 12.5 percent. *See, e.g.*, Am. Corporate Counsel Ass'n, *In-House Corporate Attorneys: A Profile of the Profession*, http://www.acca.com/news/press/survey.html (last visited Feb. 15, 2004) (reporting a survey in which minorities represented 9% of general counsel in 1998); *see also, e.g.*, Am. Corporate Counsel Ass'n, *Executive Summary, Census of U.S. In-House Counsel* (Dec. 2001), http://www.acca.com/surveys/censusoi (reporting a similar survey indicating that minorities constituted 12.5% of lawyers in these offices in 2001). Given the attention to corporate diversity initiatives described above, these percentages have likely increased since 2001.

[47] *See* Johnnie L. Roberts, *The Race to the Top*, NEWSWEEK, Jan. 28, 2002, at 44.

[48] *See, e.g.*, Linda Greenhouse, *O'Connor, Thomas Held Differing Views of Affirmative Action*, HOUSTON CHRON., June 25, 2003, at A7 (noting how the University of Michigan and its corporate defenders "brilliantly" met the challenge of demonstrating a broad consensus on behalf of affirmative action). Even opponents of the Court's decision acknowledge the importance of the corporate briefs. *See, e.g.*, Roger Clegg, *Discrimination in the Name of Diversity?*, TEX. LAW., Sept. 22, 2003, at 43 (noting that Justice O'Connor cited the corporate briefs and that the media gave them "great play").

diversity do so at their peril. If diversity is so good for the business of corporate America, then perforce it must also be essential to the business of corporate law firms that both depend upon corporate clients for their survival and increasingly resemble global businesses in their size, scope, ambition, and ideology.

In the pages that follow, I argue that there is a good deal of truth in this conclusion. Corporate America does appear to have embraced arguments about the importance of diversity that have significant implications for the business of large law firms — and the fate of the growing number of black lawyers who have cast their lot with these institutions. Moreover, as Sanford Levinson reminds us, whatever else Supreme Court decisions do, they play an important role in shaping the boundaries of what is considered legitimate "law talk" by judges, lawyers, and the public at large.[49] *Bakke* and subsequent decisions undoubtedly encouraged those defending affirmative action in *Grutter* to use arguments couched in the language of "diversity," as opposed to the kind of moral arguments grounded in the existence of past or present discrimination against blacks that characterized *Brown* and the first wave of the civil rights movement. Given the weight that Justice O'Connor's opinion grants to the corporate and military briefs in *Grutter*, future advocates for racial justice in both the court of law and the court of public opinion will face strong pressure not only to argue in the language of diversity but also to justify diversity in terms of the efficient functioning of institutions and the market.

Whether linking progress on diversity to the demands of the marketplace will produce greater opportunities for black lawyers in corporate law firms, however, depends upon a closer examination of the connection between "diversity" and "business" than most proponents of the business case for diversity in the legal profession have been willing to undertake or even to acknowledge. Once again, the arguments put forward by corporate and military leaders in *Grutter* are instructive. For just as amicus briefs conform to the "law talk" of established doctrine, they also self-consciously attempt to shape this discourse for the benefit of those for whom these briefs are filed. Viewed in this light, the arguments that corporate and military leaders chose to demonstrate why diversity is good for business are an important window into how these powerful actors are likely to deploy the rhetoric of diversity to serve their self-interest.[50] In an age in which we no longer believe

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[49] Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 578 (2000).

[50] *See* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 523 (2003) (arguing that businesses attempt to fill in the gaps in the law in ambiguous areas like employment discrimination with terms "favorable to those parties most influential in the gap filling process: organizational defendants and legal compliance professionals"). In this respect, my argument about the significance of the *Grutter* briefs builds on some of the

that what is good for General Motors is necessarily good for America, we should not be surprised to see that some of these rhetorical uses will not be as good for the cause of diversity as they are for the profits of large corporations. Moreover, even arguments for the business case for diversity that work reasonably well in the context of corporate America may have less force when applied to large law firms. For all of the talk about the legal profession becoming more like a business, there are many important differences between the business of large law firms and the business clients that they typically represent — differences that are likely to make aspects of the business case articulated in *Grutter* even less persuasive in the context of the legal profession than they are in corporate America.

Ironically, whether the integration of the corporate bar in turn plays an important role in achieving *Brown*'s other fundamental promise — that law will play a positive role in the struggle for social justice for all Americans — also increasingly depends upon this same kind of examination of the relationship between "diversity" and "business." Against the backdrop of the unrelenting and aggressively enforced homogeneity of John W. Davis's powerful and privileged world of elite law practice, the integration of the corporate bar is, in and of itself, a social justice issue of considerable importance. Nevertheless, if bringing diversity to the elite ranks of the American legal profession is going to do more than accentuate the yawning gap between the legal haves and have-nots, then those who come to occupy these positions of power must have normative commitments that both shape and constrain the business interests of their powerful clients. To be sure, in today's cutthroat legal market, lawyers who attempt to articulate and act on normative commitments that appear to challenge the prerogatives of corporate power risk jeopardizing their careers. Indeed, this risk constitutes one of the unappreciated limitations of the standard claim that demographic diversity enhances profits by producing a diversity of viewpoints. Contrary to the gloomy predictions of diversity advocates who urge black lawyers to abandon social justice arguments for diversity altogether, however, there are also good reasons to believe that black lawyers who maintain a normative understanding of diversity that goes beyond corporate self-interest may also have important advantages in building a credible "business case" for diversity in their own careers.

The rest of this Article proceeds in five Parts. Part I sets the stage by briefly recounting the corporate bar's long history of excluding

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insights of public choice theory. By invoking this analogy, however, I want to be clear that I do not mean to suggest that those who signed the corporate and military briefs acted only out of self-interest or that they do not believe in the arguments these briefs present. *See id.* at 530.

blacks and other minorities on the ground that admitting these undesirables would undermine both the moral authority and the economic efficiency of the bar. Although this exclusion formally ended with *Brown*, the assumption that homogeneity is what is really good for the business of corporate law firms continued to shape the elite bar's response to racial issues long after de jure barriers had been removed. Those seeking to convince law firms of the opposite conclusion — that diversity is good for business — must find ways of unearthing and confronting these lingering assumptions. The next three Parts begin to examine whether diversity advocates are likely to succeed in this task — and how their efforts will affect *Brown*'s underlying goals — by posing an intersecting round of questions about the relationship among diversity, business, and social justice: is racial diversity good for the business of corporate law firms? (Part II); is the business of corporate America good for diversity in these institutions? (Part III); and is the business case for diversity in law firms good for social justice? (Part IV). My goal in these three parts is neither to prove that the economic case for diversity in law firms is false nor to argue that those seeking to use such claims to press for greater integration in the corporate bar (or greater opportunities for black lawyers generally) are wrong to do so. Instead, I want to expose some of the limitations of grounding the struggle for integrating the corporate bar on purely instrumental rationales and to underscore the need for reinvigorating the normative side of the debate. Part V concludes by tentatively suggesting why an express normative commitment to social justice may be less hazardous to the cause of achieving diversity in corporate law firms than the advocates of the business case for diversity seem to believe.

I. THE STRANGE CAREER OF THE ELITE CORPORATE BAR

The American legal profession's long history of racism and exclusion in the century leading up to *Brown* has been well documented, most notably by Jerold Auerbach and J. Clay Smith,[51] and I will only briefly summarize it here. No black student received a legal education until after the Civil War, and only a handful of schools admitted blacks until 1936, when Thurgood Marshall won his first desegregation case, against the University of Maryland Law School.[52] In the first decades of the twentieth century, leading lawyers and academics

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[51] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); SMITH, *supra* note 8.

[52] *See* J. Clay Smith, Jr., *In Freedom's Birthplace: The Making of George Lewis Ruffin, the First Black Law Graduate of Harvard University*, 39 HOWARD L.J. 201, 214–16 (1995); *see also* Pearson v. Murray, 182 A. 590 (Md. 1936). *Pearson* was sweet revenge for Marshall since, as a Baltimore native, he had wanted to attend the University of Maryland Law School himself, but had not applied because of the school's longstanding color bar.

assiduously tried to shut down the growing number of night law schools to keep out "emigrants [sic]" who "covet the title [of attorney] as a badge of distinction . . . but view[] the Code of Ethics with uncomprehending eyes."[53] Although these efforts were largely unsuccessful, elite law schools such as Harvard and Yale remained overwhelmingly white and male (albeit with an increasing number of Jews) until the 1960s. As late as 1964, there were only seven hundred black law students in the entire country, fully one-third of whom attended one of five historically black institutions.[54]

The few blacks who were able to become lawyers during this period were rigidly segregated from their white peers in almost every respect. Blacks were expressly barred from membership in the American Bar Association until 1943.[55] Most worked in solo practice or small minority firms serving an exclusively black clientele.[56] Wall Street firms and their counterparts across the country had little interest in hiring black lawyers, regardless of their credentials. William T. Coleman, Jr., for example, could not obtain a job with a large law firm in his native Philadelphia, even though he had graduated magna cum laude from Harvard Law School and clerked for Justice Frankfurter on the U.S. Supreme Court.[57] As late as 1964, Erwin Smigel reported in his famous study of Wall Street lawyers: "In the year and a half that was spent interviewing, I heard of only three Negroes who had been hired by large law firms. Two of these were women who did not meet the client."[58] It is no wonder that President Kennedy's Secretary of Labor characterized the legal profession in 1961 as "the worst segregated group in the whole economy."[59]

In keeping out blacks and other minorities, the leaders of the corporate bar were both reflecting what they perceived as the wishes of their clients and projecting their own understanding of professional-

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[53] SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 17 (1993) (first and second alterations in original) (quoting the Dean of the University of Wisconsin Law School in a speech made to the American Bar Association in 1915 in support of a resolution to close all part-time law schools).

[54] SEGAL, *supra* note 8, at 3 n.13.

[55] *See* SMITH, *supra* note 8, at 541–45.

[56] *See supra* note 8 and accompanying text.

[57] *See* KLUGER, *supra* note 5, at 292–93. Coleman's experience was not unique. Edward Brooke, who would go on to become the first black to serve in the U.S. Senate after Reconstruction, reported that he was not offered a job by a single Boston law firm in 1948, despite his top grades and law review membership at Boston University Law School. *See* Boston Univ. Sch. of Law, *Edward W. Brooke JD '78, LL.M. '49: Former Senator from Massachusetts* (July 11, 2003), http://www.bu.edu/law/alumni/profiles/bios/edwardbrooke.html; *see also* SEGAL, *supra* note 8, at 218 (reporting that corporate law firms were virtually closed to black lawyers regardless of credentials until the 1960s).

[58] SMIGEL, *supra* note 3, at 45.

[59] SEGAL, *supra* note 8, at 24 (footnote omitted) (paraphrasing Secretary of Labor Willard Wirtz).

ism. As Smigel noted, even when blacks were hired, it was important that they not "meet the client."[60] Similarly, Smigel reported that some Wall Street firms during this period blamed client prejudices for limiting the number of Jewish lawyers that a firm could hire or promote. As one partner remarked, "[t]here are clients to whom you can't take a Jewish lawyer."[61] Indeed, even black clients during this period often preferred to engage a white lawyer when they could afford one. Fears about the racism of judges and other decisionmakers and widely held stereotypes among both whites and blacks about the alleged incompetence of black lawyers led even the few blacks who could afford legal services to question whether hiring a black lawyer was "good for business."[62]

These apprehensions about how clients might react to the presence of blacks and Jews were reinforced by the elite bar's own commitment to preserving the "standards" and "prestige" of the bar — concepts that were inexorably linked to ideas about racial and ethnic purity. These lofty ideals were threatened, in the words of former Attorney General and leading corporate lawyer George Wickersham, by the "pestiferous horde" of lawyers whose English "is of the most imperfect character" and whose foreign background renders them "without . . . the faintest comprehension of the nature of our institutions, or their history and development."[63]

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[60] SMIGEL, *supra* note 3, at 45. Clients were not the only ones who refused to work with black lawyers. The famous entertainer and activist Paul Robeson, who may have been the first black lawyer to work on Wall Street when he graduated from Columbia Law School at the top of his class in 1923, reportedly quit after a stenographer allegedly refused to work with him, declaring, "I never take dictation from a nigger." *See* Martin Duberman, *The Higher Education of Paul Robeson*, BLACK ISSUES IN HIGHER EDUC., Autumn 1996, at 107, 111; *see also* LLOYD L. BROWN, THE YOUNG PAUL ROBESON: "ON MY JOURNEY NOW" 122 (1997) (noting the "racial discourtesies expressed by the other employees" at Robeson's "Wall Street firm"). It is possible that Robeson exaggerated this incident in later life. *See* SHEILA TULLY BOYLE & ANDREW BUNIE, PAUL ROBESON: THE YEARS OF PROMISE AND ACHIEVEMENT 113 (2001) (suggesting that Robeson routinely embellished stories about his early life).

[61] SMIGEL, *supra* note 3, at 66.

[62] *See* MARION S. GOLDMAN, A PORTRAIT OF THE BLACK ATTORNEY IN CHICAGO 29 (1972). As Goldman observed:

> Although the black attorney remains dependent upon clients of the same race, moderately affluent black clients rarely feel constrained by informal segregation when they seek legal services. Although attitudes are changing, many black clients still prefer to consult with white attorneys. Some blacks consider white attorneys to be generally more competent than blacks . . . . Blacks also hire white attorneys because they perceive that local courts often decide cases in terms of political considerations and they assume that the white attorney will have greater influence with the political machine than would a black.

Id.

[63] AUERBACH, *supra* note 51, at 121 (internal quotation marks omitted). Ironically, while serving as Attorney General in 1912, Wickersham threatened to resign his membership in the ABA when it attempted to expel a black lawyer who worked for Wickersham in the Department of Justice and whom the ABA had inadvertently admitted before learning of his race. *See*

Indeed, elite lawyers in the "golden age" of the 1950s perceived homogeneity — not diversity — as good for business.[64] Reporting on this period, Smigel observed: "[Wall Street firms] want lawyers who are Nordic, have pleasing personalities and 'clean-cut' appearances, are graduates of the 'right' schools, have the 'right' social background and experience in the affairs of the world, and are endowed with tremendous stamina."[65] As Smigel's respondents made clear, recruiting lawyers who share a common background and outlook was considered essential to a firm's ability to produce high-quality legal work and to relate to clients who come from similar stock. Even after a lawyer was hired, partners considered his ability to fit into the firm's tightly knit social structure to be almost as important as the number of hours he worked or his potential for bringing in business when deciding whether he would be elevated to partnership.[66]

The assumption that homogeneity rather than diversity was what was good for the business of the elite corporate bar was so strong that it was rarely challenged, even by the few corporate lawyers who actively participated in the struggle for racial justice in the period leading up to *Brown* — and for decades thereafter. Recent historiography about the antecedents of *Brown* indicate that prominent corporate lawyers unexpectedly came to play a far more important role in producing this historic decision than had previously been thought.[67] During World War II, civil rights leaders from A. Philip Randolph to Thurgood Marshall were quick to point out the incongruity of America's denouncing racism in Nazi Germany while openly condoning discrimination against blacks at home. Nor was this inconsistency lost on the German and Japanese propaganda machines, which routinely reported lynchings and other instances of violence and discrimination

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SMITH, *supra* note 8, at 542. Wickersham's seemingly contradictory actions underscore the complexity of the elite bar's attitude toward diversity discussed below. *See infra* pp. 1564–65.

64 *See* GALANTER & PALAY, *supra* note 37, at 20–36 (referring to the "golden age" of the large law firm "circa 1960").

65 SMIGEL, *supra* note 3, at 37.

66 *See id.* at 106. As one partner observed:

> There are intangibles. We see a man for long hours over the years, see his wife, know his family background, what outside charity activities he participates in. You get to know about these people over a ten year period. You see them in your home or when you're away on a trip with them — the word comes down about them from judges and clients. We encourage extracurricular activities. On a personal level, if we never see a man at functions we wonder if he has the qualities we want — if he measures up.
>
> He must be able to play team ball — if he can't we will not take him, for we are also looking for personal qualities, including his ability to get along with you.

Id.

67 For an excellent summary of the connection between civil rights and national security, see JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION (2002). The factual foundation for what follows (although not the connection to the corporate bar) largely comes from *id.* at 25–37.

against American blacks. After the war, the Soviet Union picked up the propaganda ball where the Nazis had left off, making the separate-but-equal doctrine and continuing violence against blacks a centerpiece of its efforts to win the hearts and minds of the citizens of new states in Africa and Asia, who were themselves just emerging from colonial rule. Presidents from Roosevelt to Eisenhower responded by pushing a number of measures designed to blunt the impact of segregation and to demonstrate America's moral authority in the emerging area of human rights and the struggle against communism.[68]

Although presidents are often given credit for foreign policy initiatives, in this case the push to connect black rights with national security — and to argue that protecting the latter meant making progress on the former — was supported, and in many cases initiated, by the national security establishment. Secretaries of State from Dean Acheson to John Foster Dulles to Dean Rusk played key roles in pressing the national security meaning of black equality.[69] All of these high-profile diplomats were prominent corporate lawyers. So too were many of the lawyers who answered President Kennedy's famous "call to action" in 1963 urging the leaders of the bar to support his civil rights initiatives.[70] The bar responded to Kennedy's call by creating the Lawyers' Committee for Civil Rights Under Law.[71] By the mid-1960s, the Lawyer's Committee had become a major force in mobilizing the resources of the corporate bar, and of corporate America generally, to support the cause of civil rights.

The corporate bar's support for civil rights in the period leading up to *Brown* and its immediate aftermath, however, rarely extended to the hiring practices of the firms themselves.[72] Paul Cravath's attitude typified that of progressive corporate lawyers during this period. By all accounts, the founding partner of New York's Cravath, Swaine & Moore grew increasingly dedicated to the "broad problems of Negro education and race relations, and particularly to his work as chairman of the board of trustees of Fisk University, the Negro school founded by his father."[73] He did not, however, hire a single black lawyer to work in his law firm. Nor were there any Jewish lawyers at Cravath

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[68] *See id.*

[69] *See id.* at 28–34.

[70] *See* Marjorie Hunter, *Lawyers Promise Kennedy Aid in Easing Race Unrest*, N.Y. TIMES, June 22, 1963, at 1; *see also* Ann Garity Connell, The Lawyers' Committee for Civil Rights Under Law: The Making of a Public Interest Law Group 96–108 (1997) (unpublished Ph.D. dissertation, University of Maryland at College Park) (on file with the Harvard Law School Library).

[71] *See* Connell, *supra* note 70, at 120–21.

[72] Even the Lawyers' Committee did not hire its first black staff attorney until 1968. *Id.* at 232.

[73] 2 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS, 1819–1948, at 256 (1948).

until five years after *Brown* was decided — and sixteen years after the firm hired its first woman.[74] Paging through the photographic record of the men who became partners in the Cravath firm and its predecessors between 1819 and 1964, one is struck by the unyielding homogeneity of the stern and elegantly clad men with patrician-sounding names — Russell Cornell Leffingwell, Donald Clinton Swatland, George Bergen Turner — who stare back from the page.[75] Cravath men had a definite look for most of the twentieth century. And it was this look, and the homogeneity that it so vividly captures, that firm leaders believed to be essential to their institutions' operations.

Even when the elite bar finally turned its attention to integrating the legal profession itself through affirmative action programs in law schools and fledgling attempts by large law firms to hire black lawyers, these efforts were justified almost exclusively on the moral terms suggested by *Brown* and elaborated by Martin Luther King. In the mid-1960s, several elite law schools, including Harvard, Columbia, Duke, Michigan, and UCLA, instituted affirmative action programs designed to increase black enrollment.[76] These early efforts, however, were typically designed to produce black lawyers who would, according to a phrase popular during the period, "go back to their communities" and address the pressing legal needs of black America.[77] The idea that this new generation of black lawyers was needed by corporate America was scarcely broached.[78]

Given this state of affairs, it is not surprising that the University of California sought to justify its affirmative action program in *Bakke* on

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[74] HOFFMAN, *supra* note 3, at 12. On Cravath's first female lawyer, see SMIGEL, *supra* note 3, at 46.

[75] *See* CRAVATH, SWAINE & MOORE, THE CRAVATH FIRM AND ITS PREDECESSORS: SUPPLEMENT 1964: CRAVATH PARTNERS AND ASSOCIATES 1948–1964 (1964); SWAINE, *supra* note 73, vols. 1 & 2.

[76] *See* Ernest Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069, 1080–83; *see also* Louis A. Toepfer, *Harvard's Special Summer Program*, 18 J. LEGAL EDUC. 443 (1966).

[77] *See, e.g.*, Earl L. Carl & Kenneth R. Callahan, *Negroes and the Law*, 17 J. LEGAL EDUC. 250, 251 (1965) (arguing that the need to increase the size of the black bar stems from the importance of providing "adequate legal representation for Negroes" and "responsible, effective Negro leadership"); Charles A. Pinderhughes, *Increasing Minority Group Students in Law Schools: The Rationale and the Critical Issues*, 20 BUFF. L. REV. 447, 453 (1971) (urging law schools to institute programs that would increase the likelihood that admitted black students would provide legal services to disadvantaged blacks); Toepfer, *supra* note 76, at 443 (justifying "special effort[s]" to attract black students on the ground that the need to provide "equal rights and opportunities for Negro citizens . . . can best be met by a Bar which includes Negro lawyers").

[78] As Professor (now Judge) Harry Edwards bitterly complained at the time with respect to the University of Michigan's affirmative action plan (the forerunner of the program upheld in *Grutter*), by "nudg[ing] or forc[ing]" black students to "return to *their* community," law schools both falsely implied that racial justice was solely a black concern and perpetuated the existing exclusion of black lawyers from the corporate bar. Harry T. Edwards, *A New Role for the Black Law Graduate — A Reality or an Illusion?*, 69 MICH. L. REV. 1407, 1416 (1971) (internal quotation marks omitted).

the ground that increasing the number of minority doctors would "improv[e] the delivery of health-care services to communities currently underserved."[79] Although Justice Powell conceded the validity of such a goal, he refused to presume that minorities were any more likely than whites to actually serve such communities simply by virtue of their race.[80] Not even the four Justices who dissented in *Bakke* suggested that minorities brought anything special to the practice of medicine (akin to the value Justice Powell ascribed to diversity in the classroom) that justified making special efforts to increase the number of minority physicians. Instead, the dissent defended the University's program as necessary to overcome the effects of past discrimination.[81]

This latter rationale, along with the evolving moral consensus that integrating all aspects of American society was the "right thing to do,"[82] undoubtedly explains why corporate law firms slowly began to expand their own efforts to recruit black and other minority lawyers in the 1970s.[83] Whatever one thinks about the extent or sincerity of these efforts,[84] there was certainly no indication that firms felt that hiring

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[79] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) (opinion of Powell, J.).

[80] Justice Powell explained:

> The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an "interest" in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority communities than the average white doctor. Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive.

Id. at 310–11 (citations omitted) (quoting *Bakke v. Regents of the University of California*, 553 P.2d 1152, 1167 (Cal. 1976)) (internal quotation marks omitted).

[81] *See id.* at 348–52 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (analogizing the university's program to other instances in which Congress recognized the need to take race into account to overcome past discrimination).

[82] *See* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 75–76 tbl.3.1 (1985) (demonstrating the growing societal consensus in favor of integration and equal opportunity throughout the 1960s and 1970s by reporting that ninety-seven percent of whites surveyed in 1972 believed that blacks and whites should have an equal chance to compete for jobs).

[83] *See* SEGAL, *supra* note 8, at 218 (discussing the growing efforts by large law firms to recruit black lawyers during this period).

[84] Needless to say, the actual scope and genuineness of these efforts were as controversial then as they are today. *See generally* Daniel G. Lugo, *Don't Believe the Hype: Affirmative Action in Large Law Firms*, 11 LAW & INEQ. 615 (1993). For my own take on the complex question of the role of affirmative action in law firm efforts to recruit and retain black lawyers, see David B. Wilkins, *On Being Good* and *Black*, 112 HARV. L. REV. 1924, 1955–57 (1999) (book review) [hereinafter Wilkins, *On Being Good* and *Black*]; and David B. Wilkins & G. Mitu Gulati, *Why Are*

black lawyers gave them any competitive advantage. By most accounts, firms made few efforts to integrate their new black colleagues into the social and cultural fabric of the organization — let alone to alter their cultural norms to incorporate the diverse experiences and ideas of their new black recruits. Black lawyers were welcome, the clear message seemed to be, so long as they were functionally indistinguishable from the white lawyers that these institutions had always hired.

Once again, in taking this position large law firms appeared to be in step with the attitudes of their corporate clients and society as a whole. Assimilation was the dominant model of integration in the 1960s and 1970s.[85] Nor had corporate America moved much beyond token integration of its managerial or professional ranks.[86] Law firms continued to fear that many corporate clients would be less than enthusiastic if they found themselves represented by a black lawyer.[87]

There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis, 84 CAL. L. REV. 493, 512–14, 598–605 (1996) [hereinafter Wilkins & Gulati, *Black Corporate Lawyers*].

[85] *See* SCHUMAN ET AL., *supra* note 82, at 210 (noting that while whites in the 1960s and 1970s expressed strong support for integrating a few token blacks, there was considerably less enthusiasm for large-scale policy changes that might disrupt existing institutions or practices). Assimilation was also the preferred stance of most blacks, especially black elites. *See* MICHAEL C. DAWSON, BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES 254 (2001). As Dawson underscores, however, the black version of liberalism has always been different than the standard version accepted by whites. For example, there has always been a strong undercurrent of black nationalism even among those blacks who have most benefited from the assimilation model. *See id.* at 2–3.

[86] *See* GEORGE DAVIS & GLEGG WATSON, BLACK LIFE IN CORPORATE AMERICA: SWIMMING IN THE MAINSTREAM 2 (1982) (citing a 1979 Equal Employment Opportunity Commission statistic that 7.2% of the managerial work force was minority, perhaps 4 or 5% black).

[87] A black woman who graduated in 1977 at the top of her class and as a member of the law review from a well-known regional law school captured the mood of this early period when describing her attempt to obtain a job with a law firm in the mid-sized city where her law school was located:

> But I talked to my friends, and they said, "Well, what are you going to do?" And I said, "Well, I don't know. I guess I'll work for the government." They said, "You can't do that." And I said, "I can't? Why?" And they said, "Because you're on Law Review." And I said, "Why? What does that mean?" And they said, "You have to work for a law firm." And believe it or not, I said, "What is a law firm?" I had no idea. "A law firm? What is a law firm?" It was still strange to me. I kept thinking, a bunch of lawyers working, who are they working for? How are they making money? And they said, "Trust me, go interview for the law firms." So I interviewed for the law firms [in town]. And they would all say to me, "Gee, you look great on paper. I mean, Law Review and all that. But what would we tell our clients? A black woman in a law office. We couldn't tell them that you were the cleaning lady." And I heard that so frequently that it was almost like they had all gotten together at country clubs and said, "You know they're going to have some black women coming out. [What should we say?]" And they all shared their own observations.

Confidential Interview 39, at 19–20 (July 14, 1997) (on file with author). As this woman eventually realized, what she was hearing had as much to do with the parochialism of the lawyers interviewing her as it did with the actual prejudices of clients. *See id.* ("It was years after they said

And even if these fears were exaggerated, there was little evidence that corporations placed any affirmative value on the diversity of their law firms.[88] Given the absence of pressure on all sides, it should not be surprising that as late as 1980 large law firms remained almost as white as they were when John W. Davis stood up to defend de jure segregation almost thirty years before.[89]

Frustrated with the slow pace of change, some black leaders began to make a subtle but important adjustment in their tactics and rhetoric. In addition to calling attention to the nation's moral obligation to integrate all aspects of society, advocates for increased black participation in corporate America began sketching out the "business case" for diversity. Ironically, given its segregationist past, the platform from which black lawyers chose to launch this movement was the organized bar.

When *Brown* was decided, there were only a handful of black lawyers who actively participated in traditional bar organizations such as the ABA. When that decision turns fifty, the ABA will be headed by Dennis Archer, a former justice of the Michigan Supreme Court and Mayor of Detroit, who will be the venerable lawyers' organization's first black president.[90] For two decades, Archer has been a pioneer in pushing the organized bar to atone for its racist past by using its considerable clout to increase the number and status of minority lawyers. In 1986, Archer spearheaded the ABA's adoption of Goal IX, committing the organization to developing programs to increase the number of minority lawyers.[91] Two years later, Archer launched a major initiative expressly designed to accomplish this goal. Significantly, the initiative did not address the target of the bar's first effort to improve diversity, the Council for Legal Education Opportunity, which sought "to

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that to me that I realized that what they were reflecting upon was their own limited experience, as in the only black women they knew who worked were their domestics. And if you bring one in, in a law firm, gee, wouldn't everybody think she was a domestic?").

[88] *See* Steven Keeva, *Unequal Partners: It's Tough at the Top for Minority Lawyers*, A.B.A. J., Feb. 1993, at 50, 53 (noting that corporate boards are inherently conservative and resist hiring minority lawyers, who typically do not have the reputation of being "the best" in their field).

[89] In 1981, black lawyers constituted just 2.3% of all associates in the nation's 250 largest law firms — and a mere 0.47% of all the partners in these institutions. Rita Henley Jensen, *Minorities Didn't Share in Firm Growth*, NAT'L L.J., Feb. 19, 1990, at 1, 28.

[90] *See* M.L. Elrick, *Consensus Builder: ABA's Chief-To-Be Is Detroit's Ex-Mayor*, NAT'L L.J., Apr. 15, 2002, at A1. And by the time the ABA gets around to discussing the historical significance of the Supreme Court's mandate in *Brown II* that desegregation take place "with all deliberate speed," it will have boldly signaled the speed of its own progress when Robert Gray, Archer's successor and the second black lawyer to head the organization, gavels the annual meeting open in 2005. *See* Alexandre Deslongchamps, *We Have Overcome*, AM. LAW., Sept. 2003, at 19.

[91] *See* AM. BAR ASS'N, ASSOCIATION GOALS, http://www.abanet.org/about/goals.html (last visited Feb. 15, 2004) ("Goal IX. To promote full and equal participation in the legal profession by minorities, women and persons with disabilities.").

encourage and assist qualified persons from minority groups to enter law school and the legal profession."[92] Instead, Archer sought directly to increase the income and status of minority lawyers by encouraging corporations to retain minority law firms and to ensure that minority lawyers working in majority firms do some of the corporations' legal work.[93] By stimulating demand for the services of minority lawyers at large law firms, Archer's initiative, titled the Minority Counsel Demonstration Program, hoped "to increase the number of minorities [that law firms] recruit, hire, retain, and promote to partnership."[94]

The rhetoric Archer used to sell the new ABA program was equally innovative. In setting out the program's goals, the ABA's newly formed Commission on Minorities in the Profession asserted that the major obstacle "impeding the full participation by minorities in the profession is the *perception* that corporate users of legal services do not desire that minorities handle their legal affairs."[95] This perception, the Commission went on to explain, was increasingly out of touch with reality. To underscore this point, the Commission pointed to a letter sent by the general counsel of General Motors (GM) to all of the law firms doing GM work specifically requesting that "minority lawyers in your firm able to provide service at the requisite level be included among those who represent G.M."[96] The Commission urged other corporations to write similar letters and to request information from their law firms to insure that their wishes in this regard were being honored.

By most estimations, the ABA's initial foray into generating corporate demand for minority lawyers produced important, but ultimately limited, gains.[97] The effort benefited a few minority law firms, and there were initial increases in minority hiring and promotion rates at the first large law firms involved in the program.[98] Most minority

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[92] Kenneth J. Burns, Jr., *C.L.E.O.: Friend of Disadvantaged Minority Law Students*, 61 A.B.A. J. 1483, 1483 (1975).

[93] *See* Wilkins & Gulati, *Black Corporate Lawyers*, *supra* note 84, at 595–96.

[94] *Id.* at 595 (quoting AM. BAR ASS'N COMM'N ON MINORITIES IN THE PROFESSION, INTO THE MAINSTREAM: REPORT OF THE MINORITY DEMONSTRATION PROGRAM 1988–1991, at 6 (1991)) (internal quotation marks omitted).

[95] *Id.* (quoting AM. BAR ASS'N COMM'N ON MINORITIES IN THE PROFESSION, *supra* note 94, at 4 (emphasis added)) (internal quotation marks omitted).

[96] *Id.* at 596 n.394 (quoting a Letter from Harry I. Pearce, General Counsel of General Motors, Feb. 29, 1988) (internal quotation marks omitted). It is interesting to note that at this early date, Pearce justified his own concern in moral terms. *See id.* (referring to the "disappointingly slow pace at which minorities are being integrated into our legal profession" as "a matter of great concern to me, and the entire bar").

[97] I explore this issue in some depth in a forthcoming article, David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. (forthcoming 2004) (manuscript at 53–59, on file with the Harvard Law School Library).

[98] *See* Wilkins & Gulati, *Black Corporate Lawyers*, *supra* note 84, at 595 (reporting that minority attorneys in both large firms and minority-owned firms collected more than $100 million in fees from corporate clients during the program's first three years and that the fifteen large firms

partners in large firms, however, failed to see any significant returns from participating in the program. After an early flurry of activity, most corporations did little more than send their legal counsel the same letter every year "requesting information" and dole out a few small projects that were often below the pricing structure of most large law firms.[99] A few corporations did nothing more than pay their dues in order to have their names listed in the program's annual report.

Although the program itself was only a modest success, the tactical and rhetorical shift toward linking progress on diversity in the legal profession to the needs and desires of corporate clients has had a far more lasting impact. In the 1990s, black bar leaders in a number of cities, including San Francisco, New York City, and Washington, D.C., launched major initiatives to put pressure on law firms to increase the number of minority lawyers hired and promoted to partnership.[100] These initiatives employed a mix of tactics, from goals and timetables and other traditional affirmative action remedies to Archer's innovative use of corporate clients to generate demand for diversity. Whatever the tactics, however, the rhetoric supporting these programs increasingly relied on building the business case for diversity. Today, groups lobbying for law firm diversity have so thoroughly embraced this language that the Minority Corporate Counsel Association has recently instructed law firms and other employers that the first requirement of any successful initiative in this area is "understanding the business case for diversity."[101]

For all of the reasons outlined at the outset of this Article, it is easy to see why diversity advocates are attracted to this approach. For all of the reasons outlined in this Part, however, it should also be clear

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filing reports increased the number of minority associates and partners by 50% and 57% respectively).

[99] The following statement from a black partner at a major firm was typical:

> [I]t is totally useless as far as black partners or black associates in major firms. The only thing it's done is to encourage the corporations and other major institutions to spin off and siphon off some pissy-ass collection effort or something else to a minority lawyer.

Confidential Interview 109, at 92 (Sept. 14, 1998) (on file with author).

[100] *See* Wilkins, *supra* note 97 (manuscript at 50–56).

[101] Scott Mitchell, *MCAA Presents its Recent Findings: Law Firm Diversity*, DIVERSITY & B., Dec. 2001, *at* http://www.mcca.com/site/data/researchprograms/lfbestpractices/lfdiversity1201.html. The explanation for this requirement leaves no doubt about the turn from normative to market-based arguments:

> To ensure senior partner commitment and firm-wide buyin, it is important that a law firm develop a written plan that elucidates the business case for diversity, including an analysis of the costs of not taking the issue of diversity seriously and of the interest of clients in having diverse legal counsel represent them. Hence, law firms commit to becoming diverse because their future, market share, retention of talent, continuation of existing relationships with corporate clients, and performance depend on understanding and anticipating the needs of an increasingly diverse workforce and marketplace.

Id.

why it will be no easy feat to convince a profession long committed to homogeneity of the merits of the business case for diversity.

II. IS RACIAL DIVERSITY GOOD FOR THE BUSINESS OF CORPORATE LAW FIRMS?

Those advancing the business case for diversity in the legal profession confront important conceptual and empirical challenges that threaten to derail the easy confluence of integration and profit that these advocates seek to promote. As a conceptual matter, the argument that diversity is good for business runs up against the widely held presumption, at the core of the original civil rights movement, that all human beings are fundamentally equal and that no group is inherently more productive or competent than any other.[102] Given this presumption, diversity advocates are generally thought to have the burden of proof with respect to empirically identifying and quantifying the benefits that they attribute to greater diversity.[103] These twin obstacles are even more daunting for diversity advocates in the context of elite law firms than in the business arena — and even more formidable still with respect to the careers of black lawyers.

To get a sense of the difficulty of convincing lawyers and their corporate clients that market forces actually justify giving greater opportunities to minority lawyers (let alone *require* such opportunities as a business necessity), one need only recall that opponents of affirmative action in education and employment routinely assume that such policies lower quality and productivity.[104] Notwithstanding the elite bar's

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[102] Martin Luther King captured this widely held sentiment in his famous "I Have a Dream" speech on the steps of the Lincoln Memorial. *See* Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963) (transcript available at http://www.wmich.edu/politics/mlk/dream.html (last visited Feb. 15, 2004)) ("[O]ne day this nation will rise up and live out the true meaning of its creed — we hold these truths to be self-evident, that all men are created equal. . . . I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. I have a dream today!"). Amy Gutmann calls this the presumption of comprehensive universalism. *See* Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 PHIL. & PUB. AFF. 171, 172 (1993). I should note that Gutmann goes on to reject this formulation in favor of what she calls deliberative universalism.

[103] Although diversity opponents are quick to place the burden of proof on those attempting to build the business case for diversity, they rarely acknowledge that comprehensive universalism poses an equal challenge to traditional assumptions about the value of homogeneity discussed in Part I. Thus, even if diversity advocates are unable to demonstrate convincingly that diversity promotes economic growth, this should not be taken as an endorsement of a status quo that, as we have seen, is the result of exclusionary practices based on similarly unproven assumptions about the efficiency of homogeneity.

[104] *See, e.g.*, DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 289–94 (1995) (suggesting instances in which workplace standards and hiring criteria are compromised to accommodate race); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 76 (1992); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 423 (1997) (describing employers

professed commitment to affirmative action over the last thirty years, there is plenty of evidence that many law firm partners share this view. As Paul Barrett discovered when doing interviews for his revealing book about race in large law firms, several partners hold the view that the real reason why firms have so few black partners is that there are too many incompetent black lawyers who have been "polished up" by affirmative action to look like Harvard Law School graduates.[105]

In my prior work, including a lengthy review of Barrett's book in the pages of this Law Review, I have attempted to demonstrate why greater efforts to hire and promote black lawyers, such as the ABA's Minority Counsel Program, are unlikely to decrease the quality of legal services that corporate clients receive.[106] I do not intend to repeat these arguments here. Instead, I want to suggest that there is significant tension between what I consider to be the best arguments for defeating the traditional claim that diversity is bad for the business of elite law firms and the new claim that such diversity affirmatively promotes profits. Thus, as I have argued extensively, those who assert that affirmative action lowers standards ignore the fact that certain key structural characteristics of modern elite law firms disproportionately disadvantage black lawyers even in the absence of intentional discrimination.[107] As a result, in the absence of affirmative measures, black lawyers have a harder time being hired by large firms and face greater barriers to succeeding if they are hired. Given this dynamic, diversity initiatives, like the ABA's that provides black lawyers special access to corporate work, are justified on the ground that they give firms an incentive to detect and correct the myriad subtle, but nevertheless pervasive, ways that their current practices differentially dis-

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forced to strike costly settlements for allegedly discriminatory hiring practices that emphasized applicant merit).

105 *See* PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA 55 (1999) (quoting an unnamed ex-partner at a prestigious law firm) (internal quotation marks omitted).

106 *See* Wilkins, *On Being Good* and *Black*, *supra* note 84, at 1959–61; *see also* Wilkins & Gulati, *Black Corporate Lawyers*, *supra* note 84; David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. STUDY LEGAL ETHICS 15 (1999) [hereinafter Wilkins, *Partners Without Power*]; David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998) [hereinafter Wilkins & Gulati, *Reconceiving the Tournament*]; David B. Wilkins, *Why Global Law Firms Should Care About Diversity: Five Lessons from the American Experience*, 2 EUR. J. L. REFORM 415 (2000) [hereinafter Wilkins, *Global Law Firms*].

107 As I make clear, these structures also disadvantage many whites — and may, paradoxically, disadvantage the firm as well by making it more difficult to deliver high quality services at reasonable prices. *See* Wilkins, *Global Law Firms*, *supra* note 106, at 423–29. For reasons set out below, this is a different kind of argument about the value of diversity than the ones underlying standard "diversity is good for business" arguments. *See infra* p. 1573; *see also infra* p. 1615.

advantage certain blacks and advantage certain whites. To the extent that firms correct for this bias, they promote, rather than undermine, the ultimate purpose behind standards — that is, ensuring that lawyers are hired and promoted on the basis of their "merit" and not unfairly disadvantaged by factors that do not affect the quality of their work — by helping to level the playing field and giving black lawyers the incentive to compete by showing them that they have a realistic chance at success.[108]

Demonstrating that initiatives aimed at increasing the diversity of corporate law firms need not lower the quality of the legal services that corporations receive, however, is not the same thing as demonstrating that there is a profit-maximizing reason for corporate consumers or their firms to adopt such policies. Not surprisingly, advocates want to go beyond arguing that corporations and firms have nothing to lose from diversity and instead assert that such programs are, in fact, good for business. It is here that the defense of affirmative action is in tension with the business case for diversity on grounds of comprehensive universalism.

One can see the force of this problem by imagining the converse of Gary Becker's classic economic argument against antidiscrimination law.[109] Becker argues that if we assume that there are no relevant biological or moral differences between blacks and whites, then even in the absence of state intervention, employers who discriminate against blacks should be driven out of business by competitors who hire qualified blacks at lower wages. The intuition is that discrimination is inefficient because it leads employers not to hire the best workers at the lowest possible price.[110]

Becker's intuition, as I have argued elsewhere, is only partially correct in the context of the market in which corporate law firms compete

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[108] The Corporate Brief in *Grutter* makes a similar argument about the value of having a diverse workforce. *See* Corporate Brief, *supra* note 26, at 7 ("[I]ndividuals who have been educated in a diverse setting are likely to contribute to a positive work environment, by decreasing incidents of discrimination and stereotyping."). As Sanford Levinson notes, "this is not an argument for diversity per se; rather, it is an argument for meritocracy, with the assumption being that a non-discriminatory hiring policy will in fact generate a heterogeneous workforce." Levinson, *supra* note 49, at 586. Nevertheless, since firms are probably more likely to root out discriminatory practices if they already employ a significant number of minority lawyers, one can characterize this process of rooting out discriminatory practices (as the Corporate Brief appears to do) as a benefit of having a more diverse workforce. *See* Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. (forthcoming 2004) (justifying affirmative action on the ground that it helps to prevent discrimination). As Yelnosky's elegant account makes clear, this is a very different account of why diversity is important than the one that underlies most "diversity is good for business" arguments. *See id.* (manuscript at 23–26, on file with the Harvard Law School Library).

[109] *See* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 39–45 (2d ed. 1971).

[110] Richard Epstein makes a similar argument in his attack on antidiscrimination law. *See* EPSTEIN, *supra* note 104, at 41–47.

for talent.[111] The ultimate success of any law firm depends upon the human capital of its lawyers. As a result, firms compete aggressively for recruits whom they consider to be "superstars" — including superstars who happen to be black.[112] A firm that refuses to hire or promote a black superstar is likely to suffer a predictable competitive disadvantage when that woman or man is hired by another firm.[113] Given the dramatic growth in the size and "leverage" rates (that is, the number of associates for every partner) of most large law firms, however, most of the lawyers of any color who are hired will not be superstars. Instead, firms have had to reach deeper into the class and recruit at a broader range of schools to fill their hiring needs.[114] It is with respect to this part of the applicant pool that Becker's intuition no longer holds. Firms that prefer white applicants over blacks in this part of the distribution are much less likely to suffer any serious competitive disadvantage since they are simply substituting one "average"[115] worker for another. Given this dynamic, market forces are

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111 *See* Wilkins & Gulati, *Black Corporate Lawyers*, *supra* note 84, at 517–23.

112 *See* Robert Schmidt, *Minority Lawyers and the D.C. Firm: Race, Culture, and Sexism Make Integration Difficult at Law Offices*, LEGAL TIMES, Sept. 26, 1994, at S42, S46 ("Major firms . . . recruit law students in the top of their class at a select group of law schools, fostering fierce competition for the few minorities who meet the traditional description of the well-qualified associate."). Needless to say, there is substantial disagreement about whether the criteria that law firms currently use to determine whether a given recruit is likely to be a "superstar" accurately predict future performance. I share much of this suspicion. As Ronald Gilson and Robert Mnookin concede, "[e]ven law teachers acknowledge that a student's performance in law school is a very noisy signal of her long-term performance as a lawyer." Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 572 n.16 (1989). For reasons that Claude Steele has persuasively documented, these signals may be even more "noisy" for blacks. *See* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 614 (1997) (describing how "stereotype threat" based on pervasive myths of black intellectual inferiority can inhibit blacks from doing well on standardized tests). Nevertheless, even conceding substantial fuzziness in the criteria, it seems plausible that the closer a candidate gets to the superstar end of the distribution, the more reliable such predictions of future performance are likely to be.

113 To the extent that racial stereotypes make it more difficult for whites to recognize black superstars as being such, the economic incentives posited by Becker will be reduced even further. This is especially true in a relationship-driven business like the law in which being a superstar depends in large measure on whether others perceive you to be one. *See* Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 106, at 1678–79 (emphasizing the importance of "relationship capital" to professional success).

114 *See* GALANTER & PALAY, *supra* note 37, at 55–62 (noting that "[t]he range of law schools from which the big firms recruit has widened and recruitment goes deeper into the class" and describing this trend in detail); Howard I. Bernstein, *Does a Hiring Crisis Threaten the Profession?*, NAT'L L.J., Dec. 28, 1987, at 1, 20 (noting that as of 1987, the hiring needs of the top 250 law firms could not be satisfied if they hired every graduate in the top fifty percent of the class at all top-twenty law schools). The growth in the size of large law firms in the decade since these accounts were written has only exacerbated these trends.

115 The word "average" will undoubtedly be jarring to those used to the standard claim articulated by every large law firm that they hire only "exceptional" lawyers. *See* Wilkins & Gulati,

unlikely to root out the subtle biases and preferences that dominate law firm hiring and promotion decisions.

This same dynamic, however, casts doubt on the claim that diversity initiatives will necessarily *increase* corporate profits. The fact that law firms do not suffer a competitive disadvantage when they fail to hire or retain minority lawyers suggests that the clients of these institutions may be perfectly well served by law firms that are all (or virtually all) white. More to the point, there is no a priori reason to believe that corporations will be better served simply by substituting "average" black lawyers for the "average" white ones that they currently employ. From the perspective of the client's bottom line, both groups of "average" lawyers are perfectly capable of doing the "average" work of the "average" corporate law firm associate. Consequently, "nondiverse" firms and "diverse" firms are likely to look functionally equivalent, thus giving corporations little incentive to press their outside counsel to move from the former to the latter status. Indeed, to the extent that corporations perceive that there are costs associated with pressing their lawyers to increase diversity — for example, if managers are worried that firm leaders will resent their decision to meddle in the firm's internal affairs or if, as I will discuss below, they fear that diverse teams may produce internal conflict — the absence of any obvious bottom line benefit from switching may persuade corporate leaders that the cost-benefit calculation comes out against anything other than exerting token pressure on law firms to change.[116]

Needless to say, those pressing the business case for diversity in the legal profession are likely to counter that characterizing diverse firms as simply substituting "average" blacks for "average" whites fails to capture the economic benefits of diversity. Minority lawyers are more than simple substitutes, according to this view: they bring unique skills

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Black Corporate Lawyers, *supra* note 84, at 524–30. But as Erwin Smigel recognized four decades ago in his classic study of Wall Street lawyers, there has always been a gap between the kind of recruit that corporate firms "prefer" — lawyers with "lineage, ability, and personality" — and the lawyers that they actually need to do the work of the firm, much of which is routine. *See* SMIGEL, *supra* note 3, at 37. By "average" I simply mean that the candidate presents a mixed array of signals (for example, average grades at an elite law school or top grades at a lesser-ranked one) that places that person in the large and largely undifferentiated center of the applicant pool. Given the fuzziness of these credentials as predictors of future success described above, there is no reason to believe that those who fall into this part of the distribution are not perfectly capable of doing the "average" work of a large law firm associate — or of developing (with the right mentoring and experience) into first-rate law firm partners.

116 *See* Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 31 FLA. ST. U. L. REV. (forthcoming 2004) (arguing that firms may actually benefit from discrimination by reducing the cost of managing a diverse workforce) (on file with the Harvard Law School Library). I return to this argument below. *See infra* notes 165–167 and accompanying text.

and experiences to their work — skills and experiences that can play a vital role in today's multicultural business environment.

Although arguments of this kind are now invoked by diversity advocates in law almost as frequently as they are by those seeking greater diversity in business, proponents in the legal context have yet to develop a well-defined substantive account of exactly how the unique skills and experiences that minority lawyers bring to their work will increase the profits of corporate firms or their corporate clients. Given that much of the momentum behind the movement toward market-based diversity arguments in law is being driven by the perception that businesses are embracing this paradigm, it seems likely that this void will be filled by borrowing arguments about the market value of diversity from those currently being deployed in the corporate context. General Motors' amicus brief in *Grutter* succinctly summarizes these arguments in urging the Court to recognize the business case for having a workforce with "cross-cultural competence":

> Such . . . competence affects a business' performance of virtually all of its major tasks: (a) identifying and satisfying the needs of diverse customers; (b) recruiting and retaining a diverse work force, and inspiring that work force to work together to develop and implement innovative ideas; and (c) forming and fostering productive working relationships with business partners and subsidiaries around the globe.[117]

Each of these three arguments — which I have reframed slightly under the general headings of markets, managerialism, and problem solving — highlights important advantages of promoting an open and diverse workforce. In the context of corporate law firms, however, each has important — and largely unexplored — limitations.

A. Serving New Markets

The Corporate Brief in *Grutter* captures the forces that have pushed many companies to draw a strong connection between diversity and the need to serve diverse clients in the global marketplace:

> The nature of American business . . . is changing. Most of the *amici* are truly international companies, and virtually all are becoming so. *Amicus* 3M is a $16.7 billion diversified manufacturing and technology company with operations in more than 60 countries and customers in nearly 200 countries. *Amicus* Boeing makes 70 percent of its commercial airplane sales to international customers. *Amicus* Procter & Gamble sold a branded product to more than 2.5 billion people across the world last year, yielding more than $40 billion in sales. Similar figures could be provided for many of the *amici*: they operate and compete in a global environment, serving and working with people and cultures of all kinds.[118]

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[117] General Motors Brief, *supra* note 26, at 12–13.

[118] Corporate Brief, *supra* note 26, at 6–7.

Given these changes, managers frequently see the need, as David Thomas and Robin Ely put it, for "a demographically more diverse workforce" to "gain access to these differentiated segments" and to "understand and serve [their] customers better and to gain legitimacy with them."[119] It is therefore not surprising that blacks have made substantial inroads in heavily regulated industries such as communications and insurance, that Asian Americans are well represented in technology companies that do substantial business with Asia, and that companies that market consumer products for use in the home often have good records for hiring and promoting women.[120]

There are powerful analogues to these developments in the world inhabited by large law firms. Consider, for example, a law firm seeking to gain business from a city with a black mayor or attempting to win a judgment in front of a primarily black jury.[121] Similarly, the growing number of black lawyers working in the in-house legal departments of large corporations suggests that firms may reap a business advantage from black partners and associates who may have a special connection with these all-important customers. Finally, as the General Motors' brief in *Grutter* underscores, the fact that "[r]acial minorities in the United States presently wield an impressive *$600 billion* in annual purchasing power — a number that is increasing exponentially with expanding minority populations"[122] — is enough to give any red-blooded American capitalist (or his or her lawyer) a reason to pay attention to this rapidly expanding market.

Nevertheless, even apart from the risks associated with this kind of race-matching marketing (a subject to which I return in Part III), there are reasons to suspect that these economic forces, powerful as they are, are likely to produce less change in corporate law firms than market changes have made in other parts of corporate America. Consider, for example, the rise in black political power. Black politicians at the state and local level frequently press to increase the number of black lawyers in private practice who are doing government work.[123] There are, however, important limitations on their ability to translate these demands into substantial business for black lawyers in major law firms. City business — the kind that black lawyers are most likely to

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119 David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.–Oct. 1996, at 79, 83.

120 *See id.*; *see also* GLASS CEILING REPORT, *supra* note 39, at 19–20.

121 *See, e.g.*, Marianne Lavelle, *A Race Factor?*, U.S. NEWS & WORLD REP., July 6, 1998, at 22, 22 (describing prosecutors' fear that it would be difficult to convict Monica Lewinsky of perjury in front of a D.C. jury given the presence of several high-profile black attorneys in the case).

122 *See* General Motors Brief, *supra* note 26, at 13.

123 *See, e.g.*, Wilkins, *Partners Without Power*, *supra* note 106 (chronicling Mayor Harold Washington's efforts to accomplish this goal and the effects on the fate of black partners in Chicago).

have "special access" to since black political power tends to be strongest at the local level — is often, as one of my informants bluntly stated, "the step child" at many law firms.[124] Government clients frequently demand lower billing rates and require firms to go through elaborate contracting procedures. Even when they are paying full freight, public sector clients don't command the cachet — or the potential for "premium billing" — associated with corporate clients. Although some firms continue to welcome public work, others do not, and some even express outright hostility toward anything that might create the impression that the firm is the type of institution that curries favor with local politicians. Black lawyers in corporate law firms tend to work for larger "national" or "international" firms, which often consider themselves in the second group.[125] Although these firms can provide blacks with many advantages, they are also among the most difficult from which to build the business case for diversity based on political connections.

Moreover, black politicians also face serious obstacles to awarding lucrative legal work to black lawyers. A string of Supreme Court decisions in the 1990s seemed to brand as "reverse discrimination" any special program to "set aside" work for minority lawyers or otherwise require a specific level of minority participation.[126] It is not clear what effect *Grutter* will have on these precedents.[127] More subtly, black politicians face political pressure to direct city business to minority *law firms*, as opposed to minority partners in majority firms. Black politicians who send business to black partners in major firms are subject to the criticism that they are simply giving the work to the same people who have gotten it in the past, albeit through the conduit of a black partner. Ironically, in the 1990s this pressure helped to produce a significant exodus of black partners *from* major law firms to small minority firms where they thought they had a better chance of capitalizing on the business case for diversity.[128]

Similar barriers confront black in-house lawyers when they seek to direct important legal work to black lawyers. My interviews provide

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[124] Confidential Interview 65, at 39 (May 24, 1997) (on file with author).

[125] *See, e.g.*, NALP FOUNDATION, KEEPING THE KEEPERS II: MOBILITY AND MANAGEMENT OF ASSOCIATES: ENTRY-LEVEL AND LATERAL HIRING AND ATTRITION 1998–2003, at 22–26 (2003) (discussing the lower attrition rates of minority lawyers in firms with over 500 lawyers).

[126] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[127] *See* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 61–63 (2003) (arguing that if taken to its logical conclusion, the Court's reasoning in *Grutter* stands in stark contrast with that in past opinions like *Croson* and *Adarand*).

[128] *See* Wilkins, *Partners without Power*, *supra* note 106, at 15–23.

strong support for the proposition, pressed by diversity advocates, that black corporate counsel actively look to provide opportunities for black lawyers inside firms.[129] There are, however, important constraints on their ability to do so. The practice of law is fundamentally a relationship business, and most companies already have strong relationships with outside counsel. Even the most concerned black in-house lawyer will find it difficult to disrupt these existing relationships. Moreover, when corporate counsel do select new lawyers, they face tremendous pressure to hire those whose "merit" is beyond question, in part to protect themselves in case something goes wrong. This pressure may be especially acute for black in-house lawyers, who, like black politicians, face charges of favoritism if they select less prominent black lawyers over better-known whites — even if the black lawyers are arguably better qualified to handle the case.

These same dynamics may also dilute the effect of the new interest in "supplier diversity" by corporate counsel generally.[130] Notwithstanding the important increase in the number of minority in-house lawyers, corporate general counsel offices, of course, remain largely white and male.[131] Although the Morgan letter and other initiatives suggest that in-house counsel are taking an active interest in diversity, whether these efforts actually move beyond the lip service that characterized the aftermath of the Pearce letter remains to be seen.[132] To the

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[129] As one senior black general counsel put it:

> [I]n the next ten years or so, . . . there are going to be a lot of minorities — particularly minority women — . . . entering the middle and senior ranks of large corporations. And those people are going to be in a position over time . . . to select counsel. And for the same reasons that . . . caucasians who were in those positions selected their friends, I expect that to happen with minorities too. . . . And I think that will be the business reason for why . . . over time, diversity will pick up steam."

Confidential Interview 95, at 91 (Sept. 30, 1998) (on file with author); *see also* Renee Deger, *Strength in Numbers*, RECORDER (S.F.), Mar. 18, 2003, LEXIS, The Recorder File (quoting a black in-house counsel as saying, "I have made sure, to the extent I can control it, that matters go to minority lawyers").

[130] *See supra* p. 1556.

[131] *See supra* notes 44–46 and accompanying text. White women have made greater inroads, a fact that appears to be benefiting female partners in law firms. *See, e.g.*, *The Color Barrier: Minority Corporate Counsel Make Diversity a Top Priority*, CORP. LEGAL TIMES, Nov. 2003, at 42 (reporting that 12.5% of in-house lawyers are minorities, compared to 31.5% who are women, and that women are 15% of all general counsels at Fortune 500 corporations, compared to 6% who are minorities); *see also, e.g.*, Grace M. Giesel, *The Business Client Is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession*, 72 NEB. L. REV. 760, 786–89 (1993). It remains to be seen whether female general counsel will be as vigilant in promoting the interest of blacks and other racial minorities. For a general discussion of the uneasy relationship between black and white women in the workplace, see ELLA L.J. EDMONDSON BELL & STELLA M. NKOMO, OUR SEPARATE WAYS: BLACK AND WHITE WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY (2001).

[132] Some companies are clearly taking this commitment seriously. Sara Lee Corporation and Sears, Roebuck are especially proactive. *See* Jahna Berry, *Agents of Change*, RECORDER (S.F.), Nov. 12, 2003, LEXIS, The Recorder File (describing how Sara Lee's and Sears's recruitment of

extent that these efforts rely on the importance of having lawyers who understand the special needs of diverse markets, one may legitimately worry that the arguments that have proven effective in the consumer products area may not translate well to the work of corporate lawyers. When AT&T is considering a new joint venture agreement, for example, it wants lawyers who know how to operate in the complex world of strategic planning and corporate finance. Notwithstanding the demographic changes in corporate America discussed above, that world remains overwhelmingly white and male. The fact that a lawyer with the skills and connections to operate effectively in that world may not "reflect" or "understand" the concerns of AT&T's customer base may not be of much concern to company officials.

Moreover, although globalization is undoubtedly reshaping the market for corporate legal services, there is little evidence that black lawyers — or most U.S.-born Latinos and Asians, for that matter — are playing much of a role in serving foreign markets or clients. In my sample of over 200 black corporate lawyers, for example, only a handful have practices that include any significant representation of foreign clients. This is hardly surprising, given that most of the countries in Africa and the Caribbean, where black American lawyers might be expected to have some special affinity or cultural competence, generate little if any legal work of the kind that corporate law firms typically undertake.[133] Even post-apartheid South Africa is too poor to generate much in the way of legal work for American lawyers.[134] Black lawyers who have ventured overseas to Europe and Asia, where there is substantial legal work, have often encountered express racism of a kind they rarely experience at home.[135] Such attitudes may cause

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black lawyers and increasing pressure by general counsel for greater diversity in firms have spawned a new industry in diversity recruiting). It is probably not a coincidence that the general counsels of both Sara Lee (Rick Palmore) and Sears (Andrea Zopp) are black. Nevertheless, it strikes me as an ominous sign that in my conversations with general counsel about the Morgan letter, few signatories had even heard of the similar effort by Harry Pearce a decade before.

[133] Whether most U.S.-born blacks actually have this kind of affinity or cultural competence with respect to Africa or the Caribbean is a separate question. Informal conversations with South African lawyers and business leaders about their perceptions of the black Americans who came to their country seeking business following the fall of apartheid suggest that the gap between U.S.-born blacks and those in Africa and other parts of the African Diaspora may be at least as great as the gap between second- and third-generation Korean Americans and Koreans discussed below. *See* source cited *infra* note 136 and accompanying text.

[134] As a lawyer familiar with the business environment in South Africa reported, "very little business is flowing out of South Africa because it is very hard for South Africa to be competitive in the global economy" and the investment flowing into the country is most likely to "benefit South African lawyers." Confidential Interview 48, at 39 (July 3, 1997) (on file with author).

[135] For example, when dealing over the phone with a client in London, a black partner from a Chicago law firm was once told that the client was worried about the "nigger in the woodpile." Confidential Interview 64, at Supp. 1 (May 16, 1997) (on file with author). Needless to say, not every black lawyer who ventures overseas encounters this kind of overt racism. *See* Kendal Tyre,

American companies worried about the sensibilities of their foreign customers to question whether assigning black lawyers to work on these matters is good for business.

Indeed, Asian and Hispanic lawyers appear to have benefited less from the expanding global market for legal services than one might suspect. A small study of Korean lawyers conducted under my supervision in 1994, for example, found that even at the height of the Asian boom, very few second- or third-generation Korean-American lawyers at large law firms were involved in Korean practice.[136] Instead, the bulk of this work was being done by members of the so-called 1.5 generation: lawyers who were born in Korea and had lived there long enough to obtain language and cultural fluency but who then immigrated to the United States, where they received their college and legal education. Although the absence of U.S.-born Korean lawyers was due in part to the fact that many were not interested in this kind of practice — a subject to which I will return below — their lack of participation also appeared due to a surprising antipathy toward them by Korean clients who felt that these American-born and -educated distant cousins were not *really* Korean.

Statistics appear to confirm that the opening of new markets for U.S. law firms overseas has had little effect on the career prospects of American minorities. For example, the most recent edition of the Diversity Scorecard, an annual head count of the number of minorities employed by large law firms conducted by the *Minority Law Journal*, reports a significant drop in the number of minorities at several prominent firms.[137] When the editors inquired about the reasons for the decline, they were informed that the firms in question had stopped including the *foreign* nationals in Europe and Asia working in their *foreign* offices in their overall diversity statistics.[138] Needless to say, the fact that firms were beefing up their diversity statistics by treating, for example, a Spanish lawyer working in Spain as a "minority" reveals a great deal about the lengths to which firms will go to cultivate an image of diversity. I return to this topic below. For present purposes, however, the fact that removing foreign nationals working abroad from the minority pool significantly reduced not only the total number of "minorities" working at many firms, but also their *percent-*

Uncharted Waters: Exploring International Job Opportunities, DIVERSITY & B., Nov.–Dec. 2003, at 51, LEXIS, The Recorder File (quoting a black woman working as a lawyer in Europe as stating that Europeans are "more willing to judge you on your performance rather than any perceived notions of race").

136 *See* Jim Lee, Korean American Lawyers in Large Law Firms (1995) (unpublished manuscript, on file with the Harvard Law School Library).

137 *See The Diversity Scorecard*, MINORITY L.J., Summer 2003, at 10–12.

138 *Id.* at 12.

age of the firm's total workforce, underscores "the inescapable fact that ethnic Americans make up a smaller percentage of all employees worldwide"[139] than they constitute if we focus solely on a firm's domestic operations. Of firms with a substantial international presence, the percentage of U.S.-born minority lawyers in the firm as a whole increases dramatically if the firm's foreign offices are excluded from the calculation.[140] Such dramatic differences clearly suggest that few U.S.-born minorities work in the overseas offices of U.S. law firms.[141]

Nor are minorities in large law firms benefiting significantly from the changing demographics of the American population or the growing economic clout of minority businesses and consumers. Advocates for the business case for diversity frequently point to the fact that the United States is rapidly becoming a "majority-minority" country to bolster their contention that diversity is now a business imperative.[142] Notwithstanding the impressive growth in minority purchasing power *in the aggregate*, most of these new minority consumers, like individuals generally, simply cannot afford the high-priced legal services offered by corporate lawyers.[143] The same is true of the growing number of minority businesses.[144] And even when such businesses can afford to pay the freight, concerns about "positional conflicts" may lead firms to discourage black lawyers from bringing in these fledgling enterprises as clients for fear that they will conflict with the interests of more established companies that the firm either currently represents or hopes to represent in the future.[145] The net effect is that growing minority purchasing power, like globalization, is having less impact on

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139 *Id.*

140 *Id.* at 28 (reporting that the percentage of U.S.-born minority lawyers increased from 4.4% to 8.3% at Altheimer & Gray, 6.2% to 16.2% at White & Case, and 2.2% to 13.09% at Baker & McKenzie when foreign offices were excluded).

141 Of course, an even better measure would be an actual head count of the number of U.S.-born minorities working in foreign offices of U.S. firms. To my knowledge, however, such a direct census does not exist.

142 General Motors emphasizes this point in its briefs in *Grutter*. *See* General Motors Brief, *supra* note 26, at 3 ("The ability of American business to thrive in the twenty-first century will depend in large measure on our Nation's responses to two inevitable forces: the increasingly global and interconnected nature of the world economy and the increasing diversity of our own population." (citations omitted)).

143 *See* Gillian Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 956, 999–1000 (2000).

144 *See* Donna Gill, *Lawyers of Color: Encouraging Diversity*, CHI. LAW., July 1992, at 1 (quoting a black lawyer who recently left a large law firm to start his own firm to service clients that "are smaller . . . or are minority businesses" and cannot afford the $250 per hour that his former employer charges). My interviews confirm that this is a widespread phenomenon.

145 *See* Wilkins, *Partners Without Power*, *supra* note 106, at 34–35. For a general discussion of the manner in which concerns over conflicts (positional and otherwise) adversely affect "weaker" partners, see SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE (2002).

the careers of black lawyers in large law firms than in other areas of corporate life. This reality, in turn, affects the strength of the managerial arguments offered in support of the business case for diversity.

B. Managerialism

In addition to producing new consumers for American business, both globalization and the "browning" of the American population are dramatically reshaping the American workforce. Developing a managerial elite capable of overseeing this increasingly diverse workforce is one of the major business imperatives cited by diversity advocates. The Generals' Brief in *Grutter* makes this point explicitly:

> In the 1960s and 1970s . . . while integration increased the percentage of African-Americans in the enlisted ranks, the percentage of minority officers remained extremely low, and perceptions of discrimination were pervasive. This deficiency in the officer corps and the discrimination perceived to be its cause led to low morale and heightened racial tension. The danger this created was not theoretical, as the Vietnam era demonstrates. As the war continued, the armed forces suffered increased racial polarization, pervasive disciplinary problems, and racially motivated incidents in Vietnam and on posts around the world. . . . The lack of minority officers substantially exacerbated the problems throughout the armed services. The military's leadership recognized that its racial problem was so critical that it was on the verge of self-destruction. That realization set in motion the policies and initiatives [for increasing the number of black and other minority officers] that have led to today's relatively positive state of affairs.[146]

The managerial argument for diversity is especially strong in the military. As the Generals' brief makes clear, "almost 40% of servicemen and women are minorities[,] . . . including 21.7% African-American[s]."[147] But the percentage of minorities working at all levels in corporate America, although not yet at these levels, is nevertheless significant and destined to grow.[148] In such an environment, developing a managerial elite that can "interact with and . . . understand the experiences of, and multiplicity of perspectives held by, persons of different races, ethnicities, and cultural histories" is indeed a business necessity.[149]

The current and the likely future demographics of corporate law firms, however, suggest that the argument from managerial necessity may be less compelling in this context than it has been elsewhere. To be sure, the percentage of minority students in law school has in-

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[146] Generals' Brief, *supra* note 29, at 6–7 (citations omitted) (internal quotation marks omitted).

[147] *Id.* at 6.

[148] *See* General Motors Brief, *supra* note 26, at 3–4 (noting that minorities are expected to be 47% of the total U.S. population by 2050).

[149] *Id.* at 4.

creased significantly since the initial affirmative action programs discussed in Part I. Today, minorities comprise approximately twenty percent of law school graduates, including at the law schools from which corporate law firms typically recruit.[150] Minority representation in large law firms, however, remains significantly below this level. In 2002, for example, minorities comprised just over fourteen percent of all law firm associates, and just under four percent of all the partners in these institutions.[151] Moreover, although these percentages have been steadily (if slowly) improving over the last decade, this growth has largely been driven by the explosion in the number of Asian lawyers working in large firms.[152] The percentage of black associates has held relatively steady and may have even declined in the last few years.[153] The same is true of black enrollment in law schools, which dropped from 7.5% to 7.1% of all law students from 2001–2002 to 2002–2003.[154] These percentages and trends present a far different case for managerial diversity than the comparable percentages and trends in the armed services or even in much of corporate America.

Moreover, large law firms have demonstrated by their past conduct that substantially greater changes in the demographics of incoming associates will not necessarily produce corresponding changes among firm managers. The obvious example here is the continued slow growth in the number of female partners. For almost two decades, women have comprised more than forty percent of the incoming associates in the nation's largest law firms.[155] Yet they still constitute just over fifteen percent of law firm partners.[156] Even adjusting for

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150 *See* ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, 2004 EDITION 824–27 (2003) [hereinafter ABA GUIDE TO LAW SCHOOLS] (figures for minorities); Am. Bar Ass'n, *Section of Legal Education and Admissions to the Bar*, *at* http://www.abanet.org/legaled (last visited Feb. 15, 2004) (figures for women). For example, Harvard Law School's class of 2006 is 29% minority. *See* Harvard Law School, *J.D. Student Body*, *at* http://www.law.harvard.edu/admissions/jd/body.php (last updated Nov. 6, 2003).

151 *See supra* note 33 and accompanying text.

152 *See* Arthur S. Hayes, *Asians Increase at Big Firms*, NAT'L L.J., Dec. 18, 2000, at A1. Asian Americans currently constitute forty-seven percent of all minority associates in the nation's largest 250 law firms. Brian Zabcik, *Familiar Faces*, MINORITY L.J., Summer 2003, http://www.minoritylawjournal.com/summer03/texts/familiar/html.

153 For example, a survey of several large law firms in Los Angeles reported that the number of black associates in these organizations fell from sixty to thirty-eight between 2000 and 2003. *See* Managing Partner Diversity Program 11 (Sept 12, 2003) (unpublished manuscript, on file with the Harvard Law School Library) (reporting aggregate numbers for nineteen firms as reported in the National Association of Law Placement's Employers' Directory).

154 ABA GUIDE TO LAW SCHOOLS, *supra* note 150, at 824–27.

155 *See* Doreen Weisenhaus, *Still a Long Way To Go For Women, Minorities*, NAT'L L.J., Feb. 1988, at 1, 48 (reporting that women made up 40% of the associates hired in the last two years, "the same percentage as women in law school"); *see also* CATALYST, WOMEN IN THE LAW: MAKING THE CASE 7 (2001) (reporting that women have constituted more than 40% of all law students since 1985).

156 CATALYST, *supra* note 155, at 7.

women's more recent entry into the profession, the percentage of new female partners lags significantly behind comparable rates for men, particularly with respect to equity partners (as opposed to the increasing number of women who are "non-equity" or contract partners).[157] Clearly, the changing demographics of law firm associates has not yet been sufficient to produce a corresponding change in the percentage of female partners.

Nor have firm leaders shown much indication that they view this imbalance as a significant management issue, as opposed to, for example, a loss of talent or potential business. Indeed, it is not clear whether law firms give significant weight at all to management considerations when making partnership decisions. Associates are promoted to partnership primarily on the basis of their legal skills and projections about their ability to bring in business.[158] There is little indication that whether a given lawyer will also be a good manager plays much of a role in this process. This is one of the reasons why law firms continue to be so poorly managed. In this respect, law firms are quite different from the military, where the ability to manage effectively has always been the key to an officer's prospects for moving up the chain of command. Yet even in the military's highly organized and rigidly hierarchical structure, it took a near armed insurrection by black troops to convince the brass that they needed to have an officer corps that reflected the diversity of the enlisted ranks.[159] Although diversity advocates in their frustration may sometimes wish for a similar state of rebellion among women and minority associates, nothing like this kind of open and wholesale defiance is likely to be forthcoming. Minorities and women who do not like the current managerial practices of large law firms simply vote with their feet by leaving.[160]

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[157] *See generally* Steve French, *Of Problems, Pitfalls, and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnerships*, 21 WOMEN'S RTS. L. REP. 189 (2000).

[158] *See* Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 106, at 1662–63.

[159] Given the attention that has been given to the Generals' Brief, it is worth noting what it took to get military leaders to pay attention to the need to create an officer corps that better reflected the diversity of the enlisted ranks. Quoting several accounts of the struggle to integrate the armed services, the generals conceded that "[v]iolence and even death [in the form of open insurrection by black troops in Vietnam] proved necessary to drive home the realization that the . . . race problem was so critical that [the military] was on the verge of self-destruction" as a result of having an overwhelmingly white officer corps. Generals' Brief, *supra* note 29, at 16 (citations omitted) (internal quotation marks omitted).

[160] *See* NALP FOUND., KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION 54–55 (1998) (reporting that while 42% and 72% of male associates have left their firms by years 3 and 7 respectively, the percentages for women, minority men, and minority women are 45% and 78%, 54% and 77%, and 52% and 86%). The fact that minority women have the highest attrition rate of all associates is particularly significant for blacks since the majority of black law students are now women.

Notwithstanding these reservations, however, the fact remains that minorities constitute a substantial segment of the talent pool from which large law firms recruit. When white women are added to the mix, the portion of the talent pool that is "diverse" approaches seventy percent. Diversity advocates have long looked for ways to get firms to pay attention to these statistics. Their task has not been easy, because firms often assume that minorities and women leave because they are either unable or unwilling to do the work. Moreover, so long as at the end of the day firms are left with one or two strong partnership candidates, the fact that most associates (including virtually all of the firm's minorities) have already left the firm by the time partnership decisions are made may not appear especially important to the long-term health of the firm. Large law firms, unlike their corporate clients, are built on attrition. Given this state of affairs, it is not surprising that the final set of economic arguments about diversity — that diverse teams make better problem solvers — has recently garnered so much attention.

C. Problem Solving

One can begin to see the importance of problem-solving arguments to the business case for diversity from the attention these claims received in the three corporate briefs filed in *Grutter*. For example, the first argument for diversity given by the sixty-five Fortune 500 corporations in their brief is that "a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives."[161] General Motors's brief goes even further, proclaiming that "[a]bundant evidence suggests that heterogeneous work teams create better and more innovative products and ideas than homogeneous teams."[162] Even British Petroleum (BP), which refused to take a position on the outcome of the litigation, flatly states in its brief that "[b]ecause BP strongly believes that innovation, one of its core brand values, can only come from encouraging true diversity of styles and ideas while leveraging multiple talents, BP has made diversity and inclusion a strategic focus of its business in the [United States] and around the world."[163]

It is a testament to how far the business community has come in the half-century since *Brown* that there is such widespread endorsement for the proposition that diversity — as opposed to the homogeneity that corporate America once craved — is what really produces in-

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161 Corporate Brief, *supra* note 26, at 7.

162 General Motors Brief, *supra* note 26, at 24.

163 BP Brief, *supra* note 26, at 2.

novation and creativity. This same history, however, should make us cautious about accepting this new commitment at face value.

Three issues relating to the relationship between "diversity" and "problem solving" have made moving from rhetoric to action on the basis of this aspect of the business case for diversity troublesome in corporate America. First, there is considerable disagreement over exactly what constitutes "diversity" for problem-solving purposes. Because many kinds of attributes and talents conceivably play a role in problem solving, the tendency has been to expand the definition of diversity to include everything from geography to organizational position to personal habits and taste in food or sports.[164] Given this expansion, the extent to which companies value the link between *racial* diversity and problem solving remains an open question.

Second, as even the proponents of the problem-solving value of racial diversity concede, "[e]mpirical research on whether and how diversity is actually related to work group function is limited . . . and the evidence is mixed."[165] Moreover, the most promising research in this area suggests that whether work group diversity improves productivity depends on the attitudes and orientations of group members.[166] To the extent that group members do not value "diversity as a resource for learning how to do the group's core work," diverse groups are less likely to benefit from their diversity and may even perform less well than homogeneous groups that do not have to negotiate the kinds of conflicts and communication issues that often beset diverse groups.[167]

Finally, not every diverse viewpoint is valued by corporate America. Specifically, views or attitudes that too strongly challenge existing understandings or practices are often not well received by managers — notwithstanding the fact that fostering dissent is one of the primary ways in which diversity improves decisionmaking.[168] Businesses are,

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164 *See generally* Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001).

165 Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229, 229 (2001); *see also* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1797–99 (2003) (summarizing studies indicating that racial heterogeneity can undermine trust, cooperation, and communication unless employers or work groups take steps to prevent such effects).

166 *See* Ely & Thomas, *supra* note 165. Ely and Thomas are among the most sophisticated researchers doing work in this area. *See also* Carbado & Gulati, *supra* note 165, at 1799–1810 (summarizing research indicating that organizations that value "collectivist" or "multicultural" environments may be better at managing diversity than those that value individualism or assimilation).

167 ROBIN ELY & DAVID THOMAS, LEARNING FROM DIVERSITY: THE EFFECTS OF LEARNING ON PERFORMANCE IN RACIALLY DIVERSE TEAMS 2 (Harvard Bus. Sch., Working Paper No. 04–017, 2003, on file with the Harvard Law School Library).

168 *See* Naomi Ellemers et al., *Sticking Together or Falling Apart: In-Group Identification as a Psychological Determinant of Group Commitment Versus Individual Mobility*, 72 J. PERS. & SOC.

of course, especially task-focused organizations. Despite all of the talk about fostering multiple viewpoints, managers are interested only in "opinions about the best way to build or sell cars or whatever other good is being produced by the business."[169] Opinions that appear to challenge the unfettered pursuit of corporate profits are neither welcomed nor, in many cases, tolerated. Managers have strong incentives to screen out potential employees whom they suspect of holding such disruptive views.[170] Minorities are likely to be especially fearful of being perceived as too "diverse" in this way, both because they may actually hold substantially divergent views and because even if they do not, they have reason to fear that others may believe that they do and that their marginal status will prevent them from correcting this perception.[171] Paradoxically, this fear may lead minorities not to present divergent views (or worse yet, not to speak at all), thereby reinforcing the view that their diversity makes no positive contribution to group problem solving.[172]

Each of these complications in the relationship between diversity and problem solving is likely to be magnified in the context of large law firms — once again, especially with respect to black lawyers. When law firms speak of the importance of "diversity" and "cultural integration" to team performance (as opposed to the benefits of mar-

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PSYCHOL. 617 (1997). For a discussion of the general value of dissent to group decisionmaking, see CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003).

169 Levinson, *supra* note 49, at 589.

170 *See* Carbado & Gulati, *supra* note 165, at 1802–09 (describing how employers screen for homogeneity).

171 *See* Karen A. Jehn et al., *To Agree or Not To Agree: The Effect of Value Congruence, Individual Dissimilarity, and Conflict on Work-Group Outcomes*, 8 INT'L CONFLICT MGMT. 287 (1997) (suggesting that race and gender diversity may produce destructive as opposed to productive conflict); *see also* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1293–98 (2000); Laura Michelle Morgan, The Nature, Antecedents and Consequences of Social Identity-Based Impression Management: Uncovering Strategies for Professional Image Construction in Cases of Negative Stereotyping (2002) (unpublished Ph.D. dissertation, University of Michigan) (on file with the Harvard Law School Library).

172 *See* Jacob H. Herring, *Derailed over Diversity*, RECORDER (S.F.), Nov. 6, 1992, at 7 (describing how not participating in meetings is interpreted differently for minorities than for whites). For an extreme example of how a strategy of not calling attention to race by "not making waves" can backfire, see Wilkins, *On Being Good* and *Black*, *supra* note 84, at 1065–67. *See also id.* (describing how a black lawyer's refusal to confront issues of race for fear of being labeled an "angry black" led partners to view him as not valuable to the firm). *See also* Rod Bond & Peter B. Smith, *Culture and Conformity: A Meta-Analysis of Studies Using Asch's (1952b, 1956) Line Judgment Task*, 119 PSYCHOL. BULL. 111 (1996) (finding that women are less likely to speak out than men even when they disagree with what is being said, especially if the speaker is a man); Gary Blasi, Default Discrimination (2002) (unpublished manuscript, on file with the Harvard Law School Library) (arguing that those who succeed in organizations like law firms that are structured around a competition among junior members to capture a few coveted senior positions are likely to display overconfidence, willingness to take risks, and "grease" — the ability to get along well with coworkers, the majority of whom are likely to be white — all of which are traits more commonly found in white males than in women and minorities).

keting to diverse or diversity-conscious clients), they are much more likely to be referring to the difficulty of bringing in foreign lawyers or dealing with the aftermath of a merger between two large law firms than they are to be discussing the value of having black lawyers working on the firm's core business.[173] Although making progress on these questions may ultimately require firms to pay greater attention to the manner in which they address questions of racial diversity, it is not evident that most law firm managers have made that connection.[174] Nor have law firms shown much of an inclination to rethink the core ideas that govern how these institutions deliver and evaluate legal work. Notwithstanding the tremendous changes that have occurred in large law firms during the past thirty years, the basic structure pioneered by Cravath, Swaine & Moore at the turn of the twentieth century remains largely in place.[175] As the experience of women dramatically underscores, law firms have typically taken the position that newcomers must conform to the traditional values of the firm (such as the value that equates number of hours worked with commitment and professionalism) rather than the other way around.[176]

Finally, there is ample evidence that law firms and the corporations that employ them are likely to resist viewpoints that are too "diverse" and to suspect black lawyers of holding such "unprofessional" views. Partners sometimes assume that minorities are "uninterested" in corporate practice and prefer to work in government or public service, where their efforts would be "more in sync with their personal politics."[177] Moreover, even when they are hired, minorities face strong

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173 The following statement by the managing partner of a global English firm is typical: "The question of culture is critical. The Clifford Chance vision is to create a genuinely multi-cultural firm. For just as business has to be global and local, so . . . global legal practice requires standardised approaches coupled with immersion in local law and culture." Keith Clark, *The Coming Together of the Common Law and Civil Law*, *in* ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 843–44 (4th ed. 2002); *see also* ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 846–47 (2002) (reporting advice from a French professor of organizational behavior about how a large law firm must foster communication and openness in order to achieve the benefits of the cultural diversity created by the firm's recent mergers (quoting Freshfields Bruckhaus Deringer)).

174 I explore this connection in Wilkins, *Global Law Firms*, *supra* note 106.

175 *See* Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 106, at 1628–34 (arguing that this surprising continuity is due in part to issues of path dependence); *see also* GALANTER & PALAY, *supra* note 37, at 9–10.

176 *See* CYNTHIA FUCHS EPSTEIN ET AL., THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER 83–91 (1999) (arguing that part-time policies have been harder to establish and operate in law firms than in other organizations because of the symbolic connection between long hours and commitment and the role that such hours play in professional bonding and the formation of professional identity).

177 COMM. ON MINORITY EMPLOYMENT, BAR ASS'N OF SAN FRANCISCO, 1993 INTERIM REPORT: GOALS & TIMETABLES FOR MINORITY HIRING AND ADVANCEMENT 17; *see also* 1

pressure to demonstrate that they "fit" into the firm's culture by carefully managing those aspects of their identities that are — or are likely to be perceived as — different from those of partners and coworkers.[178] As a result, firms have an incentive to look for what Carbado and Gulati refer to as "but for" minorities — minorities who but for their racial phenotype are similar in attitude and orientation to their white coworkers.[179] Lawyers hired on this basis are under strong pressure not to be perceived as holding divergent views, especially about issues of group advancement.[180]

Once again, none of this should be taken to mean that diversity does not contribute to better decisionmaking or that diversity advocates ought to stop trying to convince law firms and their corporate clients that it does. Like the arguments about serving new markets and managing a diverse workforce, the claim that black lawyers can bring a perspective to their work that improves the quality of the services law firms deliver highlights an important truth about the value that traditional outsiders can bring to existing institutions. In my interviews with black corporate lawyers, I have encountered many ex-

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REPORT OF THE NEW YORK STATE JUDICIAL COMM'N ON MINORITIES 74–113 (1991) (suggesting that interviewers assume that blacks are not interested in business practice).

178 On the importance of "fit" in elite law firms, see Wilkins & Gulati, *Black Corporate Lawyers*, *supra* note 84, at 547. On the pressure that minorities feel to "manage" the impressions they convey in firms, see Wilkins, *On Being Good* and *Black*, *supra* note 84, at 162–67; and Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 789–87 (2002). For examples of impression management in other contexts, see Francis J. Flynn et. al, *Getting To Know You: The Influence of Personality on Impressions and Performance of Demographically Different People in Organizations*, 46 ADMIN. SCI. Q. 414 (2001).

179 Carbado & Gulati, *supra* note 165, at 1819.

180 *See, e.g.*, Steven C. Wright & Donald M. Taylor, *Responding to Tokenism: Individual Action in the Face of Collective Injustice*, 28 EUR. J. SOC. PSYCHOL. 647 (1998); Steven C. Wright & Donald M. Taylor, *Success Under Tokenism, Co-Option of the Newcomer and the Prevention of Collective Protest*, 38 BRIT. J. SOC. PSYCHOL. 369 (1999); *see also, e.g.*, Jehn et al., *supra* note 171. The experience of the first generation of black judges is instructive. Virtually every one of these early pioneers faced recusal motions from corporate defendants in employment cases on the ground that their background and prior experience biased them against the interests of those accused of race discrimination. *See* Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 775–79 (1997) (recounting black judges' responses to race-based disqualification motions). Although these examples are about judges, not lawyers, they underscore the extent to which corporate lawyers often suspect that blacks hold views that are inconsistent with the interests of their firms' clients. It is likely that these same suspicions will be directed toward black coworkers. The fact that even a company as committed to diversity as Bell South was recently found to have hired the nephew of a black federal judge in order to force his recusal from a case in which the company was accused of racial discrimination illustrates that companies will only tolerate a limited range of divergent views. *See In re* Bellsouth Corp., 334 F.3d 941 (11th Cir. 2003); *see also* Catherine Aman, *Glass Houses at Bell South?*, CORP. COUNSEL MAG., Nov. 2002, at 20, LEXIS, Corporate Counsel Magazine File; Michael Orey, *Relationship Trouble: Uncle and Nephew Find Legal Ethics Strain Family Ties*, WALL ST. J., Aug. 7, 2002, at A1. I discuss this case at length in WILKINS, *supra* note 31.

amples that demonstrate that this value is both real and important.[181] Indeed, given how much America's racial and ethnic diversity has demonstrably enriched our social, cultural, and political lives, it would be nothing short of bizarre if it did not in some way improve our economic lives as well.

Nevertheless, there are dangers in exaggerating these benefits or grounding them on evidence that law firm managers are likely to find unpersuasive. Given the profession's historical commitment to homogeneity, it is likely that many partners (notwithstanding their public protestations) remain deeply skeptical about the business case for diversity. Sweeping statements that seem to draw easy causal connections between general trends in the economy like globalization and increased profits from integrating traditionally stigmatized groups such as black lawyers — or similar claims based on what many are likely to perceive as management-speak about the economic value of integrating "multiple perspectives" — are just as likely to reinforce this skepticism as they are to combat it. And the more law firm managers are skeptical of the business case for diversity, the more likely they are to manipulate this construct to extract the value from either real or apparent diversity that best suits their own short-term goals.[182] Whether this process will in fact help to produce real diversity in elite law firms — and at what costs — is, for the reasons set out below, a far more difficult question.

III. IS THE BUSINESS CASE FOR DIVERSITY GOOD FOR THE DIVERSITY OF LARGE LAW FIRMS?

Advocates for the business case for diversity typically assume that their only task is to convince corporate America that diversity is indeed good for business. If they accomplish this goal, then the diversity they seek will surely follow. Whether this seemingly obvious assumption holds true, however, depends upon how corporate America values

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[181] It remains to be seen whether this value will continue to be present in quite the same way in light of the fact that black law students are increasingly drawn from the same socioeconomic class and geographic and educational backgrounds as their white peers. For an insightful discussion of this convergence and its implications, see Lani Guinier, *The Supreme Court, 2003 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003). However, given the continuing significance of race for blacks (as well as for whites), it is likely that even blacks from privileged backgrounds will continue, on average, to hold views about law and legal issues that differ from those of their white peers.

[182] This same skepticism may help to explain why companies often appear to make only half-hearted commitments to implementing internal compliance structures to prevent discrimination. *See* Krawiec, *supra* note 116 (manuscript at 16–18) (discussing the widespread use of diversity training by firms even in the face of mounting evidence that it fails to do any significant good); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 514–15 (2003) (same).

diversity and how this valuation affects the careers of minority lawyers. This calculus is likely to produce a more complex picture than proponents of market-based diversity arguments appear to suspect.

The corporate briefs filed in *Grutter* provide a glimpse of this complexity. Both the Corporate Brief and the brief filed by General Motors argue that the key factor determining whether corporate America will be able to compete successfully in the global marketplace is its ability to recruit a cadre of leaders with "cross-cultural" competence and experience.[183] Given that the question before the Court was the constitutionality of affirmative action in education, and given the pivotal role of Justice Powell's claims about the educational value of diversity in *Bakke*, this emphasis is hardly surprising. Nevertheless, 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*. Although General Motors does argue 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," this claim comes toward the end of its brief and is expressly tied to the fact that "minorities will soon dominate the labor force" and "racial divisiveness" might result from a "stratified work force, in which whites dominate the highest levels of the managerial corps and minorities dominate the labor corps."[184] Indeed, only the military generals lead with the argument that producing a "highly qualified, *racially diverse*" group of leaders is essential for the business they conduct.[185] Like their corporate counterparts, though, the military leaders expressly tie this requirement to the need to "command our nation's racially diverse enlisted ranks."[186]

Taken as a whole, the logic of the position advanced in all three briefs is that in a world in which minorities do not "dominate the labor force" — a world like that of the large corporate law firm — the business value of diversity could well be served by a largely white managerial elite that has received the benefit of a diverse education.[187] Al-

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[183] *See* Corporate Brief, *supra* note 26, at 7 (emphasizing the importance of hiring individuals who have been "educated in a cross-cultural environment" and have "cross-cultural experience"); General Motors Brief, *supra* note 26, at 4 (identifying "cross-cultural competence" as the most important attribute for "effective performance in a global marketplace" and arguing that students are most likely to acquire such competence in multicultural and multiracial educational environments) (citation omitted).

[184] General Motors Brief, *supra* note 26, at 23–24.

[185] Generals' Brief, *supra* note 29, at 5 (emphasis added).

[186] *Id.*

[187] *Cf.* Guinier, *supra* note 181, at 172–98 (arguing that the *Grutter* Court's emphasis on the importance of educating students in a diverse environment shifts the focus from the benefits blacks receive from an integrated education to the benefits whites receive from the presence of blacks). As Professor Guinier points out, Justice Thomas makes a similar point in his dissent in *Grutter*. *See id.* at 181–84 (describing Justice Thomas's argument). Ironically, in this respect Jus-

though I do not mean to suggest that either the corporate or the military amici would endorse this conclusion, the experience of black corporate lawyers with the business case for diversity underscores the danger that firms may seek to capture the economic advantages associated with diversity in ways that produce few real benefits for minority lawyers.

Recall, for example, the creative accounting used by law firms who claimed foreign nationals working in their native countries as "minorities" for purposes of reporting their diversity statistics to the *Minority Law Journal*.[188] These firms were clearly engaged in what I have elsewhere dubbed "the numbers game" — an attempt to portray a firm as being more diverse than it really is.[189] The Diversity Scorecard is only one of several places where law firms are asked or required to disclose the number of minority attorneys working at the firm. These numbers provide a "visible, rankable signal of the firm's commitment to diversity."[190] This signal is important to many minority law students in deciding whether to cast their lot with a particular firm.[191] It is also likely to be important to at least some whites — especially white students at elite schools where diversity concerns tend to be salient.[192] As a result, firms have strong incentives to manipulate their numbers to appeal to these important constituencies.

These manipulations potentially mislead more than naïve law students. The tendency among many firms to report their diversity statistics in terms of the aggregate percentage of "minority lawyers" has in recent years conveyed a reassuring message to law schools and the

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tice Thomas echoes an earlier critique by Derrick Bell contending that blacks receive opportunities only to the extent that those opportunities also benefit whites. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980). For an interesting discussion of Bell's thesis, see Guinier, *supra* note 16 (manuscript at 4–12).

188 *See supra* pp. 1581–82.

189 *See* Wilkins, *On Being Good* and *Black*, *supra* note 84, at 1959–61.

190 *Id.* at 1960. For an explanation of the general importance of visible rankable signals, see Wilkins & Gulati, *Black Corporate Lawyers*, *supra* note 84, at 552–54.

191 *See* Schmidt, *supra* note 112, at S42 ("Observers agree, however, that no matter how aggressively a firm recruits minority attorneys, if it doesn't have a 'critical mass' of minority partners, minority law students or lateral associates will likely look elsewhere."). It is worth noting that the Supreme Court has now recognized the importance of "critical mass" (albeit in a somewhat different context) in approving the use of race as a factor in university admissions. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2339, 2341, 2343 (2003).

192 *See* Wilkins, *On Being Good* and *Black*, *supra* note 84, at 1961. On support for diversity among elite law students, see Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143, 154–62 (Gary Orfield & Michael Kurlaender eds., 2001). Orfield and Whitla report that 89% and 91% of students at Harvard Law School and the University of Michigan Law School, respectively, believed that diversity played a positive role in their educational experience. *Id.*

public at large that slow but nevertheless significant progress is being made on overcoming the legacy of the racist and exclusionary practices outlined in Part I. These aggregate statistics, however, mask the fact that black lawyers have not fully shared in this progress.[193] Without disparaging the significance of the rapid increase in the number of Asians in large law firms and in the profession generally, the fact that Houston and Marshall's descendents have recently lost ground in their quest to integrate corporate law practice casts the record of the elite bar in a different and less flattering light — a light that might encourage others to step up the pressure on law firms to change the ways that they go about hiring, utilizing, and promoting black lawyers.

Indeed, there is ample evidence that some law firms have tried to play the numbers game to avoid just this kind of pressure from their corporate clients. My interviews are replete with examples of black lawyers who have been trotted out to impress a black politician or corporate counsel and then trotted back into the oblivion from whence they came, never to see the work that their diversity helped to procure.[194] Even when black lawyers are formally assigned to work on matters for clients who have expressed an interest in law firm diversity, they often have difficulty translating those experiences into commensurate work for other clients. Having satisfied the literal terms of the first client's request ("put diverse associates on our matters"), firms often proceed to ignore black lawyers whose value they see as strictly tied to their role as window dressing for the benefit of the few meddlesome clients who demand diversity.

This, in turn, reinforces the tendency toward race-matching that has unfortunately become a significant byproduct of the rise of market-based diversity arguments. If diversity is valued primarily for its business advantages, then we should expect corporations to look for places where these advantages are most likely to be found. And as both the marketing and the managerial justifications for diversity described above suggest, the most obvious place for companies to look is where race already plays a prominent role. In consumer marketing, minorities often focus exclusively on marketing to minority communities, just as "[i]n investment banks, . . . municipal finance departments have long led corporate finance departments in pursuing demographic diversity because of the typical makeup of the administration of city

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193 *See supra* pp. 1578–83.

194 The following comment from a black associate who worked at a large Washington, D.C. law firm in the early 1990s is sadly typical:

> [I was] rolled out to every presentation for a black mayor or black CFO or a black city treasurer or what have you . . . . Now, I'm the junior most person in the whole department. So clearly it wasn't because my presence was of any substantive relevance to their presentation. It was purely facial, purely for cosmetic purposes.

Confidential Interview 101, at 19–20 (Dec. 11, 1999) (on file with author).

halls and county boards."[195] Law firms are no different. The plurality of the black corporate lawyers I interviewed specialized in "labor and employment law," which in large-law-firm speak is a euphemism for defending discrimination cases. When the large number of black corporate lawyers who specialize in litigation[196] (where the heavy concentration of minorities in urban jury pools is increasingly significant) and municipal bond practice (where black city officials are often the ones dispensing the work) are added to this number, it is evident that a substantial percentage of black lawyers are engaged in practice areas in which their race might be perceived as a valuable credential.[197]

The danger is that these are the only practice areas in which firms will see minorities as adding value.[198] As one respondent bluntly put it, blacks who market to other blacks or otherwise work in areas where their race is a significant credential frequently find themselves trapped inside a "black box" that severely limits their ability to broaden their horizons or, in many cases, to advance within the firm.[199] As one distinguished black litigator from a large law firm complained, notwithstanding his many successes in trying cases all over the country, both potential clients and the press continue to focus on his appeal to "minority jurors" in "criminal cases."[200] Such typecasting, he explained, makes it hard for him to attract the kind of lucrative corporate litigation upon which his success as a major rainmaker in his firm ultimately depends.

To make matters worse, minority lawyers sometimes find themselves being "matched" in areas in which they have no interest and with which they have no business being involved — a danger that anecdotal evidence suggests may have been accentuated for Latinos and Asians by globalization. A Puerto Rican associate working in a large New York law firm, for example, reported that she was often pulled off of general corporate deals where she was the senior associate to work on transactions involving Latin American clients where her responsibilities involved little more than translation.[201] Similarly, a Japanese-American litigator reported being summoned by corporate

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195 Thomas & Ely, *supra* note 119, at 83.

196 *See* Wilkins, *supra* note 97 (manuscript at 36–37) (noting the large proportion of black lawyers who specialize in litigation).

197 *See* David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 863 (1998) [hereinafter Wilkins, *Ethical Obligations*].

198 *See* Thomas & Ely, *supra* note 119, at 80 (noting that firms following such a view may "set [minorities] apart in jobs that relate specifically to their backgrounds, assigning them, for example, to areas that require them to interface with clients or customers of the same identity group").

199 Confidential Interview 175, at 2 (May 2, 2000) (on file with author).

200 Confidential Interview 166, at 15–16 (May 1, 2000) (on file with author).

201 Confidential Interview 226, at 1 (Nov. 10, 1997) (on file with author).

partners to attend a meeting at which the firm was soliciting transactional work from a Korean company.[202] Black lawyers too are dragooned into specific practice areas, often finding themselves pressured to defend discrimination cases against their wishes.[203]

Moreover, even those who choose to work in race-sensitive areas of legal practice may find these areas more risky than they anticipated. Apart from the limitations described in Part II, tying the business case for diversity to the rise in black political power, for example, has proved to be a risky strategy for many black corporate lawyers. When Harold Washington was unexpectedly elected Mayor of Chicago in 1983, many law firms saw a business case for increasing the number of black lawyers they hired and promoted to partnership. When Washington died just as unexpectedly four years later and was replaced by the scion of the previously long-reigning Irish political family, however, the business justification for having black lawyers who could "understand" and "serve" the city largely disappeared.[204] Or, to pick an even more salient example, consider black lawyers who have staked their claim to the business case on their special ability to handle employment law cases. For more than twenty years, employment litigation was a rapidly expanding part of the work of corporate law firms as corporations found themselves subject to an expanding web of employment statutes and an activist plaintiffs' bar. As a result, black lawyers who either chose to work in this area or found themselves placed there were often able to build successful practices. In recent years, however, companies have attempted to clamp down on their rising legal costs in defending employment suits by treating these cases more as a cost of doing business — for example, reducing transaction costs by capping defense fees, settling, and taking ex ante protective

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[202] Confidential Interview 227, at 1 (Mar. 1999) (on file with author). The associate reported that he did not know whether the partners (whom he had never met) actually thought that he was Korean or simply thought that an "Asian" face (regardless of ethnicity) would help their chances of landing the client.

[203] In one particularly egregious example, a black attorney reported being pressured repeatedly to work on discrimination cases in five separate jobs, despite the fact that after her first experience she made not working on such matters an express condition of her employment. When she attempted to enforce this condition, she was routinely accused of unprofessionalism:

> So this is 1990. Now remember I haven't done labor law since like 1982 or something like that. Now look at my resume, you see big case litigation, acquisitions, mergers, you'd see the technical contracts, software, hardware . . . . Employment discrimination is way back in the beginning when I'm one or two years out of law school. [Nevertheless, my new boss told me,] "We want you to do employment discrimination." I said, "I had a specific agreement when I came to [this firm] that I did not do employment discrimination." [He replied:] "No lawyer could have such an agreement."

Confidential Interview 32, at 46–47 (June 23, 1997) (on file with author).

[204] *See* Wilkins, *supra* note 97 (manuscript at 29–34) (charting the rise and fall of black partners surrounding the election and subsequent death of Harold Washington); *see also* Wilkins, *Partners Without Power*, *supra* note 106, at 35–37 (same).

measures such as requiring employees to sign mandatory arbitration agreements — than as a moral battle for the company's reputation. The result has been a dramatic decrease in the demand for high-priced employment lawyers and a gradual transformation of labor and employment law from a high-margin profit center into a commodified practice that many firms are increasingly ceding to lower-cost providers.[205] Black lawyers who have staked their futures on corporate America's need for expensive employment lawyers who "reflect" the company's commitment to diversity may find their careers in jeopardy if this trend continues.

It is also likely that the problems associated with race-matching and pigeonholing have exacerbated the high attrition rates that threaten to derail whatever benefits minority lawyers receive from increased corporate interest in law firm diversity. Blacks who feel that they are being pressed into service solely because of their race frequently come away from such encounters feeling devalued and exploited.[206] Those who feel this way end up with weak (or nonexistent) commitments to their firms and are easily lured away by other opportunities. Those who stay may nevertheless find themselves forced out when the race-specific market for which they were hired shrinks or disappears.[207]

As the business case for diversity has often produced resentment or alienation among black lawyers, it appears to have fostered a strange sense of powerlessness and downright evasiveness among law firms. There is something quite disconcerting about hearing some of the richest and most powerful law firms in America plaintively pleading with their corporate clients to "please make us be diverse!" For service providers such as law firms, the business case for diversity appears to transfer responsibility for the law firms' own failure to hire and promote black lawyers to their clients, whose demands for increased diversity are now supposed to provide a reason for firms to improve on their own dreary records. As I have argued elsewhere, however, this

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205 *See* Peter J. Howe, *Top Lawyers Jump Ship for Littler*, BOSTON GLOBE, Jan. 5, 2004, at C1 (noting that "compared to litigation or merger and acquisition legal work[,] . . . employment law yields much lower profit margins, and can often involve what lawyers call 'commodity work'").

206 As the black lawyer who found himself "rolled out" for every meeting with a black politician said with disgust:

> That was I think probably the biggest slap in the face. To spend your life getting properly validated only to get pimped once you get in the law firm and have no control over it unless you leave . . . . I worked in that area for three years until it got to the point where . . . I just couldn't take it.

Confidential Interview, *supra* note 194, at 20. Thomas and Ely report similar findings among minority executives regarding identity marketing. *See* Thomas & Ely, *supra* note 119, at 84–85.

207 *See* Wilkins, *Partners Without Power*, *supra* note 106, at 36–37 (noting that twenty percent of all of the black partners in Chicago left their firms within two years of Harold Washington's replacement by a white politician).

way of framing the issue elides a fundamental question: why should a corporate client be responsible for its *law firm*'s diversity as opposed to, for example, its own?[208] Indeed, one of the results of the corporate press for diversity has been the increasing tendency of these entities to raid law firms to satisfy their own diversity needs.[209] Although this process has increased pressure on law firms to become more diverse, it has also, ironically, made it more difficult for them to accomplish this goal in an environment where an in-house position has become, for a substantial number of lawyers of all races, the preferred job.[210]

The amicus briefs in the Michigan cases suggest another variation on this theme. As indicated above, there were several briefs filed by lawyers in large law firms on behalf of parties from the worlds of business, government, academia, and civil society arguing that the continuation of race-conscious admissions in universities and law schools was essential to the continued vitality of these amici.[211] Given this (mostly pro bono) outpouring of support for affirmative action by the corporate bar, it is surprising to note that only one brief — filed by the Boston Bar Association and signed by eight mostly medium-sized Boston law firms — expressly made a similar argument on behalf of the business needs of the corporate bar itself.[212] No 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.[213]

Even the ABA's brief pays scant attention to the business case for diversity in the legal profession itself. Instead, the ABA emphasizes the importance of diversity in the profession to the legitimacy of the justice system and the ability of blacks and other minorities to receive equal justice under law.[214] In the context of the business and military

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208 *See* Wilkins, *Ethical Obligations*, *supra* note 197, at 872–75.

209 *See, e.g.*, Berry, *supra* note 132 (reporting that Sara Lee and Sears recently hired three black partners from a large Chicago law firm).

210 *See* Wilkins, *Partners Without Power*, *supra* note 106, at 22–23 (noting the appeal of in-house positions, especially for some black lawyers).

211 *See supra* note 26.

212 *See* Amicus Curiae Brief of Boston Bar Association, Dwyer & Collora, LLP, Day, Berry & Howard, Goulston & Storrs, Krokidas & Bluestein, LLP, Shapiro Haber & Urmy LLP, Sterns Shapiro Weissberg & Garin, Testa, Hurwitz & Thibeault, LLP, and Weisman & Associates in Support of Respondents at 8–14, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241), *available at* http://www.bostonbar.org/pp/bbaia/cr/michigan_amicusbrief.pdf.

213 This fact has not escaped the attention of some senior minority corporate counsel. *See* Danielle N. Rodier, *Businesses Outpace Firms in Diversity*, LEGAL INTELLIGENCER, Apr. 1, 2003, at 3, LEXIS, Legal Intelligencer File (reporting a senior minority in-house lawyer complaining that not one law firm had signed onto the Corporate Brief in *Grutter*).

214 *See* ABA Brief, *supra* note 25, at 7–17.

briefs, the ABA's failure to address directly the diversity needs of corporate law firms seems disingenuous. It appears to be just another example of the elite bar's longstanding tendency, discussed in Part I, to deflect all diversity questions to aspects of the profession other than its own.[215] From the original perspective of *Brown*, however, the ABA's concern with social justice is downright refreshing. Justice O'Connor's majority opinion in *Grutter* makes almost no mention of the deprivations to black Americans that made affirmative action necessary in the first instance.[216] And yet, as Robert Post argues, notwithstanding the Court's current rhetoric (and indeed, its prior decisions), it is precisely these deprivations that form the most persuasive justification for programs like the one upheld in *Grutter*.[217] Proponents of the business case for diversity cannot wish away the fact that these concerns for social justice were fundamental to *Brown*'s reasoning. Thus, no matter how good diversity is for business — and business for diversity — advocates seeking to build the business case must also demonstrate that market-based diversity arguments promote a plausible and attractive vision of social justice if they want to claim that their efforts are entitled to be cloaked in *Brown*'s mantle.[218]

IV. Is the Business Case for Diversity Good for Social Justice?

The ABA begins its argument in *Grutter* with a pointed reminder about the importance of having all groups participate in the legal profession:

> Full participation of all racial and ethnic groups in the legal profession is a compelling state interest. Such participation ensures that the distinct voices of all segments of society are heard through effective representation for all people. It also creates a more inclusive legal system which better protects the rights of, and is more accessible to, the population that it governs. Furthermore, the full participation of all racial and ethnic groups in

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[215] *See, e.g.*, *supra* p. 1565.

[216] *See* Guinier, *supra* note 181, at 173–81 (describing Justice O'Connor's opinion).

[217] *See* Post, *supra* note 127, at 63–69 (noting that compensation for past harm constitutes the real justification for affirmative action). Sanford Levinson makes a similar point. *See* Levinson, *supra* note 49, at 591–92 (emphasizing the importance of "public-regarding" justifications "in contrast to the . . . self-regarding arguments proffered by the CEOs" (emphasis omitted)).

[218] Indeed, as I argue elsewhere, given the limitations of the economic case discussed above, even those who reject any broader social justice aspirations would do well to develop normative arguments that ground the responsibility for corporations to push for diversity on something other than the narrow instrumentalism of corporate interests. *See* Wilkins, *Ethical Obligations*, *supra* note 197, at 866–67, 882–95 (arguing for a change in the normative definition of the attorney-client relationship between large law firms and their clients from a principal-agent model to one based on the ethics of joint ventures).

> this country's legal profession preserves the legitimacy of our legal system and safeguards the integrity of our democratic government.[219]

Contrary to the impression one gets from listening to the nostalgic paeans of some scholars — not to mention the abundant whining by many lawyers and law students — the primary purpose of the legal profession is not to ensure the happiness or financial security of lawyers.[220] As Deborah Rhode notes in a related context, "[f]rom a societal perspective," lawyers are fundamentally important "only insofar as they serve common goals."[221]

This essential truth should not be taken to mean that lawyers' satisfaction or success is unimportant. After all, if the job of lawyer were to become too intolerable, then there would not be anyone willing to fill this role, no matter how much society needed people to do so.[222] Moreover, for present purposes it is important not to forget that the professional success and satisfaction of the new generation of black corporate lawyers is itself a matter of social justice. Corporate law jobs sit atop both the income and status hierarchies of the bar and serve as a gateway to prominent positions in government, business, and civil society.[223] Given the profession's long history of excluding blacks from these privileged positions, breaking the color barrier in this segment of the bar is an integral part of ensuring that blacks have access to every aspect of American economic, social, and political life.

Nevertheless, professional success is not necessarily coterminous with social justice, even for black lawyers.[224] Indeed, lawyers' profes-

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219 ABA Brief, *supra* note 25, at 4 (citation omitted).

220 For an example of a scholarly treatment of the profession that privileges the professional satisfaction of lawyers, see KRONMAN, *supra* note 11, at 368. I criticize Kronman's otherwise thoughtful and provocative book on this ground in David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 459, 463–72 (1994) (book review). For those interested in some first-class whining by law students and lawyers, I suggest a visit to the "GreedyAssociates.com" message board, at http://infirmation.com/bboard/clubs-top.tcl.

221 *Cf.* Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 690 (1981).

222 Recent reports that increases in malpractice insurance premiums are driving doctors from the market underscore what can happen if professional jobs become sufficiently unattractive. Needless to say, I take no position on whether such fears have been exaggerated to promote the self-interest of physicians.

223 *See generally* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (2d ed. 1994).

224 Elsewhere, I have argued that black lawyers have special obligations to the cause of racial justice by virtue of both their heritage and position. *See* David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1984 (1993) [hereinafter Wilkins, *Two Paths*]; *see also* David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1506 (1998) [hereinafter Wilkins, *Identities and Roles*]; David B. Wilkins, *Social Engineers or Corporate Tools?* Brown v. Board of Education *and the Conscience of the Black Corporate Bar*, *in* RACE, LAW, AND CULTURE 137, 138 (Austin Sarat ed., 1997) [hereinafter Wilkins, *Social Engi-*

sional status and autonomy depend upon just this fact. In the terms of the profession's classic creation myth, society has granted lawyers substantial income, prestige, and autonomy in return for the bar's commitment to deliver legal services in the public interest.[225] Although lawyers like to believe that they adequately discharge this obligation by serving their clients zealously within the bounds of the law, society has the right — and indeed the obligation — to question this easy confluence of "doing well" and "doing good."

Recent trends have placed the potential tension between these two goals in sharp relief. The legal profession has never come close to providing legal services at a level and cost that even begin to meet the legal needs of the vast majority of ordinary citizens.[226] Notwithstanding the explosion in the number of lawyers over the last twenty years, the gap between the legal haves and have-nots is arguably wider today than ever before. Corporations and other similar institutions now consume close to two-thirds of all of the legal services performed by private practitioners — up from the fifty percent of lawyer time these well-heeled clients consumed in the mid-1970s.[227] Although the absolute number of lawyers has also increased during the period, thereby increasing the total amount of lawyers' effort devoted to all matters, "the corporate client fields have grown much more rapidly than the personal client fields, and the 'hemispheres' are now even more unequal in size."[228] As Gillian Hadfield explains, this imbalance is due in part to the fact that corporate and individual clients must bid against each other in the same market for lawyer attention.[229] As anyone who follows the profession is aware, since Cravath first raised associate salaries by fifty percent in 1968 to lure elite law students back to large-firm practice from the legal services jobs and public interest law firms that were increasingly claiming these prized recruits, corporations and the law firms that represent them have consistently upped the ante in

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neers]. For the moment, however, I am simply making the claim that their prior history of exclusion does not exempt black lawyers from the general demands that society legitimately places on all lawyers to serve the public interest.

225 *See generally* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 8–12 (2000) (describing both the benefits and the responsibilities inherent to membership in the legal profession).

226 *See generally id.* at 7; *see generally also* AUERBACH, *supra* note 51, at 12.

227 *See* John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 767 (1998).

228 *Id.* at 767; *see also* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 960–61 (2000) (documenting the small fraction of combined legal effort devoted to government and pro bono work).

229 *See* Hadfield, *supra* note 228, at 998.

this bidding contest by offering salaries that cannot be matched by any other legal employer.[230]

Moreover, corporate clients' ability to control two-thirds of all lawyer effort deprives individual consumers of more than just access to a lawyer. Law is both an absolute good that facilitates the autonomy of those with access to the legal system and a relative means of entrenching economic, social, and political power over others.[231] Corporations have increasingly used their disproportionate share of legal resources to exploit the full range of law's power as a competitive tool in litigation, law making, enforcement, and public relations.[232] The result is a skewed distribution of legal talent that undoubtedly benefits the economic interests of many practitioners but that also privileges "the management of the economy over the justice of social and political relationships" in a manner that is hard to justify as socially optimal.[233] Once again, for present purposes it is important to note that this skewed distribution disproportionately disadvantages blacks, many of whom continue to reside at or near the bottom of the income distribution and all of whom arguably continue to suffer from various forms of discrimination and stereotyping.[234]

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[230] For an account of the "Cravath jump," see GALANTER & PALAY, *supra* note 37, at 55–59. For an account of the growing gap between large law firm salaries and those paid by other legal employers and how such firms use these "high wages" to influence the employment choices of law school graduates, see Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 106, at 1636–38.

[231] *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1092 (1988) (noting that the "practical value" of many important legal rights "depends more on the relative than on the absolute amount of the citizen's enforcement resources").

[232] For a description of the many ways in which corporations use law to consolidate and extend their existing advantages, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 123–24 (1974).

[233] Hadfield, *supra* note 228, at 1000; *see also* Mark Green, *The Gross Legal Product: "How Much Justice Can You Afford?"*, *in* VERDICTS ON LAWYERS 63, 63–79 (Ralph Nader & Mark Green eds., 1976). To be sure, the effects of the current distribution are offset to the extent that corporate clients use their disproportionate share of legal effort in ways that promote the overall health of our economy and political institutions. Indeed, in our capitalist economy, we are committed to this view of the value of private enterprise. Nevertheless, the spate of recent corporate scandals involving companies that have blatantly ripped off both consumers and shareholders, as well as the ever increasing gap between the incomes of Americans at the top and the bottom of the economic spectrum, underscores that it would be naïve to believe that corporate clients only use their enhanced access to the legal system for such benevolent purposes. As indicated above, corporations are task-oriented entities in which the task, at least as commonly understood, is to make as much money as possible for the sole benefit of its shareholders. *See, e.g.*, ROBERT C. CLARK, CORPORATE LAW 17–19, 688, 690 (1986); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23 (1991). In any event, one can believe (as I do) that corporations do a great deal of good in the world and still believe that the overall distribution of legal resources is unfairly skewed in favor of these already powerful consumers.

[234] *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 223–36 (1992) (collecting statistics); ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION 15–82 (1997) (same). Although Patterson rightly points out that blacks have made

As I indicated in Part I, the first wave of affirmative action programs were specifically designed to address these persistent racial disadvantages in society at large. Consistent with Charles Hamilton Houston's original vision of the *Brown* campaign, these programs sought to encourage blacks coming to law school to become "social engineers for justice" who would use their legal skills to improve the plight of black America.[235] As Harry Edwards forcefully argued at the time, these justifications unfairly constrained the interests and ambitions of black law students while at the same time letting the leaders of the corporate bar off the hook for their failure to address the persistence of racial inequality — including in their own firms.[236] Notwithstanding this important critique, however, it would be ironic, to say the least, if the very success of Houston and Marshall's campaign were to end up exacerbating the overall inequality in the distribution of legal resources that their brilliant struggle was intended to remedy.

In my prior work, I have argued that this "paradox of opportunity" resulting from the increasing migration of the best and brightest black lawyers into corporate law firms and other similar workplaces creates a moral obligation on the part of these privileged beneficiaries of Houston and Marshall's campaign to devote at least a part of their talents to ending the unjustified suffering that continues to plague less

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substantial economic progress in recent years and rejects Hacker's "two nations" thesis, he does not dispute that poverty remains a persistent and pervasive problem for many black Americans. *See id.* at 27–48. On the persistence of discrimination against and negative stereotypes of black Americans, see William A. Darity, Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, J. ECON. PERSP., Spring 1998, at 63. *See also* William J. Cromie, *Brain Shows Unconscious Prejudices*, HARV. GAZETTE, July 17, 2003 (reporting a conversation with Mahzarin Banaji about the results of the Implicit Attitudes Test, which demonstrates, for example, that white college students possess subconscious stereotypical views about blacks), http://www.news.harvard.edu/gazette/2003/07.17/15-prejudice.html. Anyone interested in taking this fascinating and revealing self-examination should visit *www.tolerance.org*. For a recent example of the use of "tester" methodology to demonstrate the existence of continuing discrimination against blacks in a study finding that applicants with "black sounding" names are significantly less likely to be interviewed for jobs, see Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (July 2003), http://www.nber.org/papers/w9873. For a skeptical critique of this study that argues that employers may not be motivated by racial animus but instead may be using "black sounding" names as a logical proxy for neighborhood and class, see Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names* (Aug. 2003), http://www.nber.org/papers/w9938. Even if Fryer and Levitt are correct, however, it simply underscores how "statistical discrimination" can harm blacks just as much as (if not more than) intentional animus. *See* GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 23–34 (2002).

[235] For a discussion of Houston's use of the phrase, see GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 217 (1983).

[236] *See* Edwards, *supra* note 78, at 1415–18.

fortunate blacks.[237] Black lawyers who endorse this "obligation thesis," I contend, can make important contributions to the overall struggle for racial justice by using their positions of power and influence to press corporate America to help to improve (or, what may be equally important, to avoid unduly contributing to) the economic, political, and social conditions that continue to deny many black Americans full participation in the American Dream. This is a controversial claim, and I do not intend to defend it here. Instead, I want to investigate how the shift from normative to market-based justifications for integrating corporate law firms is likely to affect whether black corporate lawyers endorse the obligation thesis and how they are likely to act on this commitment to social justice.

It is easy to portray the claim that diversity is justified because it is "good for business" as the antithesis of Houston's vision that black lawyers should be social engineers for justice.[238] After all, the more corporations value having black lawyers on their teams, the more they will use their substantial economic clout to lure blacks away from other areas of practice where their talents might more directly serve the cause of racial justice.[239] Indeed, there is plenty of evidence that increased pressure for corporate diversity has produced just this result. Law firms and other corporate employers have become much more aggressive in recruiting black lawyers out of government, including those with little or no prior law firm experience.[240] Moreover, as the concen-

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[237] *See supra* note 224; *see also* Wilkins, *Identities and Roles*, *supra* note 224, at 1590–94.

[238] *See, e.g.*, Edelman et al., *supra* note 164, at 1626 (arguing that "[d]iversity rhetoric replaced the legal vision of diversity . . . grounded in moral efforts to right historical wrongs . . . with a managerial vision of diversity . . . grounded in the notion that organizations must adapt to their environments in order to profit").

[239] It is likely that increased corporate demand for black lawyers has also stimulated supply by giving blacks considering a career in law reason to believe that they can make a reasonable living in private practice. Although this supply-side effect offsets the demand effect described in the text, it will ultimately do so only marginally if a substantial percentage of the new blacks who are drawn to law also go into corporate practice.

[240] For example, the firm of Piper Rudnick recently hired the outgoing head of the Urban League to act as a "senior advisor" to the firm. *See* Anthony Lin, *Firms Seek Big Names for Senior Advisers, Law Degrees Optional*, N.Y.L.J., Oct 27, 2003, at 1 (noting that the firm expects Price to "provide[] introductions for the firm" to Price's substantial contacts, which he garnered from a lifetime of public service to important figures in the business and nonprofit worlds). One can see a similar trend in the manner in which large firms have aggressively recruited black lawyers from small minority firms — a trend that has helped speed the dissolution of several once-successful black corporate law firms. *See* Cliff Hocker, *Mixed Fate for Black Law Firms*, BLACK ENTERPRISE, Nov. 2003, at 27 (reporting on the demise of many of the country's top black-owned law firms). Although most of the lawyers in these firms (especially the ones lured away by big firms) were already doing corporate work, my interviews suggest that black lawyers in these institutions are more likely than black lawyers who work in majority institutions to serve black individuals and small black businesses, to mentor young black lawyers (including ones in other institutions), and otherwise to be an important presence in the black community. The demise of these institutions, therefore, is arguably a net loss to social justice, comparable in kind (though

tration of black lawyers in employment law documented in Part III underscores, corporations and the law firms that these powerful actors employ are most likely to see black lawyers as economic assets in areas where their race serves as a credential of legitimacy. I have already heard rumblings that several black lawyers are being retained for the purpose of defending the coming wave of "reparations" cases.[241]

Nevertheless, even with respect to employment discrimination litigation and other areas where the interests of corporate America and claims of individual black litigants for racial justice are arguably directly in conflict, there are important respects in which the business case for diversity may actually make it easier for black lawyers defending such cases to make a positive contribution to social justice. One way in which black lawyers who defend employment cases seek to mitigate the dissonance between their professional obligation to their clients and their personal commitment to equality is to investigate scrupulously the merits of the cases they are asked to defend and to press hard to settle those with merit while vigorously litigating those they believe to be frivolous.[242] The business case for diversity arguably makes this task easier for two reasons. First, by calling attention to the client's interest in its own diversity, the business case gives black lawyers seeking to settle what they consider meritorious cases (and to persuade corporate managers to take affirmative steps to prevent such cases from arising in the future) a potentially potent new business rea-

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certainly not in scope) to what might happen if we were to lose our historically black colleges and universities.

[241] *See* Confidential Interview 228, at 1 (Sept. 1, 2002) (on file with author). By citing this example, I do not mean to suggest that reparations litigation necessarily advances the cause of racial justice. My point simply is that regardless of the merits of these cases (or the political wisdom of pursuing them), corporations have an incentive to hire black lawyers to defend themselves against such suits.

[242] The following statement by a black lawyer specializing in discrimination cases is typical:

> [T]he race cases . . . automatically pose problems. But internally and just within myself. But I have found in 90+% of the cases I just think they're bullshit and I mean you get into them and you realize that there's just nothing there. I mean sometimes I feel otherwise. And the nice thing why it's gotten easier is that since I've gotten into a position of some more authority, I mean I feel like I'm in a position where if something don't smell right, you do it tactfully, but you can be in a position to affect the ways it's done. And suggest that you know they pay this person some money or they do what you know, in my mind is the right thing. I wouldn't exactly present it [that way]. It's more like, . . . [o]f course we didn't discriminate, but let me tell you what the evidence is gonna look like and we've got this and we've got, you know. But, so it's much easier to handle at this stage with certain clients anyway that I feel I can positively affect the outcome and maybe it's all sort of rationalizing, but I always feel like in certain circumstances, that this brother on the other side with the claim is much better off with me defending it than [with a white lawyer] defending it. Whatever they may care about, they certainly don't care about what happens to you or what you're gonna get. And certainly, you know, I never compromise my clients' interests in that regard, but there's some things you can't separate.

Confidential Interview 51, at 41 (July 1, 1997) (on file with author).

son for doing so that goes beyond the usual arguments about saving litigation costs and safeguarding the client's reputation.[243] Second, clients who value black lawyers because they believe that they have "unique insight" into the psychology of discrimination and its victims may be less likely to discard these lawyers in order to save costs or achieve marginally better results, thereby giving blacks who defend employment cases greater space to incorporate social justice considerations into their advice and actions.[244]

Moreover, in many instances business justifications related to developing or serving new markets will actually place black lawyers in a position to assist other blacks in the pursuit of social justice. Consider the black lawyers who were hired and promoted by law firms in Chicago after Harold Washington was elected mayor. Although the fate of these lawyers underscores the inherently risky nature of a political strategy for black corporate lawyers,[245] the fact that the business justification they (and their firms) relied on proved tenuous should not obscure the important contributions these lawyers made to Washington's administration and to the black community in Chicago generally. For many blacks in Chicago, Washington's election was a near-religious experience. After years of blacks' being shut out of plum city jobs and many services, Washington pledged to give black Chicagoans (including black businesses and professionals) their fair share of city work. Black corporate lawyers played an integral role in helping Washington keep his promise — just as his promise to direct more city work to black professionals gave many of these lawyers the leverage they needed to contribute to his cause. Several black associates and partners in major firms were allowed to take leaves of absence to work in Washington's administration. Firms granted this unusual dispensation because they hoped that these lawyers would return, bringing lucrative business and contacts with them. But in the process, the firms helped create a cadre of sophisticated advisers and public servants dedicated to Washington and his cause — the likes of which the city of Chicago had never seen.[246] In addition to clients and contacts, many of these

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[243] For an example of how an employer that values its own diversity may be prompted to root out discriminatory practices, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 499–509 (2001).

[244] *See* Confidential Interview 39, at 94–95 (July 14, 1997) (on file with author) (describing how a firm tried to force out a black female employment partner only to find that when she left, all of her clients — and many of the clients of other lawyers in the firm — left with her because they felt that she "understood" their problems better than the other partners in her firm).

[245] *See supra* p. 1597.

[246] As one lawyer intimately involved in the process describes it:

> The City's legal department was an office that . . . had everything in it from a few good lawyers to a lot of people who were put there politically, and who only did what they had to do, to get a check. Harold [Washington] had been in the corporation counsel's office. And one of the things that he said to me when I met with him was that,

advisers carried the ideals they nourished in government back with them when they reentered private practice.[247]

Indeed, the bottom-line focus of market-based diversity arguments may, paradoxically, make it easier for black corporate lawyers to engage in many forms of public service. Although activities such as government service, community and political participation, bar association activity, and pro bono work are often cast in the lofty terms of *noblesse oblige* professionalism, savvy lawyers have always realized that participating in these activities also enhances their careers.[248] The fact that law firms nevertheless continue to speak of public service as a "professional duty" unconnected to the firm's bottom line, however, can discourage lawyers, especially associates, from engaging in these kinds of activities. Notwithstanding what they hear from firm leaders, young lawyers legitimately fear that their bottom-line-obsessed partners view public service as at best a distraction and at worst evidence that a lawyer is disloyal or disinterested in the work of the firm. This danger is particularly salient for black lawyers, whose marginal status within firms makes them particularly vulnerable to these charges, especially if the public service they seek to engage in is connected to black causes or interests.[249] Market-based diversity arguments provide an alternative way for black lawyers to justify their public service activity. Working in government or to elect black political officials also helps to increase one's contacts and visibility with potential clients and decisionmakers. Serving on a nonprofit board or heading a black bar association provides valuable leadership experience while raising both the lawyer's and the firm's visibility and reputation in the broader community.[250] Lawyers who wish to engage in these activities

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> "That office is a rotten shop, I know, I used to work there." He says, "So I want you to clean it up." And that's what we set about to do. That was fun, to have that free hand, to try and professionalize the office. And I can candidly say that by the time we left, we started getting some very good feedback from the judges that there was a marked improvement in how we functioned as a law office.

Confidential Interview 15, at 19 (June 23, 1997) (on file with author).

247 *See* Confidential Interview 16, at 39 (June 12, 1997) (on file with author) (describing how working in a black administration empowered a black partner to speak up about race issues when he returned to his firm).

248 I explore this theme at some length in *Doing Well by Doing Good*. *See Wilkins*, *supra* note 97 (manuscript at 16–26).

249 This is especially true since partners sometimes assume, as indicated above, that blacks are "uninterested in corporate work." *See supra* p. 1590.

250 A black lawyer who recently served as the head of his local black bar organization explained how the position helped him to be seen as a leader in the community:

> Every couple of weeks one of the partners comes up and says "I went out to such and such [important event] and I ran into so and so [important business leader or prominent lawyer] who said they knew you." [This] reaffirm[s] your existence in the firm. They see your value and they trade off you.

Confidential Interview 6, at 145 (Nov. 12, 1998) (on file with author).

can claim that they are not just doing good — they are also helping themselves and their firms do well in the future.

John Payton's representation of the University of Michigan in *Grutter* demonstrates that this strategy, although not without risk, can yield substantial dividends. Payton began doing pro bono civil rights work from the day he arrived at Wilmer Cutler. In time, he became one of the leading civil rights lawyers in America not working at the Legal Defense Fund.[251] When major universities began facing suits for "reverse discrimination" over their affirmative action policies, Payton, as both an experienced civil rights lawyer and a partner at one of the nation's premier law firms, was perfect for the job. His highly visible success in *Grutter* has firmly established Payton as the "go to" guy for universities and other entities under attack on similar issues — many of whom, like the University of Michigan, will be paying customers. It also raised the visibility and stature of his firm in a way that is destined to help both recruiting and business development.[252]

The most important contribution that the business case for diversity can make to social justice, however, may be simply to put black lawyers in positions of responsibility in corporate America where they can press these powerful actors to pay attention to the concerns of black America. Few would deny that many of the most pressing issues facing black Americans today are related to economic opportunity and advancement.[253] Once we acknowledge that resolving these concerns has as much to do with what happens in corporate boardrooms as it does with legislative pronouncements or Supreme Court victories, it becomes clear that considerations of racial justice must be brought into corporate decisionmaking.[254] Although black lawyers are certainly not the only ones who can raise these concerns, their growing presence in corporate America nevertheless presents a potent opportunity. The massive outpouring of amicus briefs written by corporate lawyers in *Grutter* suggests that this potential is, at least partially, being realized. Many factors undoubtedly contributed to corporate America's dramatic about-face on affirmative action in the quarter-century between

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[251] For a description of Payton's civil rights and community work, see *A Conversation with D.C. Bar President John Payton*, *supra* note 23, at 35–37.

[252] Given the significance and high profile of *Grutter* and the salient issues it addressed, the fact that the University lost the particular issue that Payton argued in the Supreme Court has not dampened in the slightest the recognition and attention he has received — nor should it.

[253] *See* DAVID B. WILKINS, ELIZABETH CHAMBLISS, LISA A. JONES, & HAILE ADAMSON, HARVARD LAW SCHOOL: REPORT ON THE STATE OF BLACK ALUMNI 1869–2000, at 50 (2002) (finding that 64% of respondents agree that "progress for black Americans depends more on economic change than legal changes").

[254] Indeed, as Robert Post argues, even Supreme Court decisions are heavily influenced by the "constitutional culture" that is shaped by actors in civil society. *See* Post, *supra* note 127, at 108–12. Justice O'Connor's reliance on the corporate and military briefs in *Grutter* is, as Post notes, a perfect example of this influence. *See id.* at 65–66.

Bakke and *Grutter*. But one suspects that the significant increase in the number of black lawyers in leadership positions in elite firms, corporate board rooms, and bar organizations has played a substantial role.

To continue to be influential, however, these new black corporate social engineers must also be successful — successful as defined by the parameters of the world they seek to influence. If they are not, they will have neither the opportunity to intervene to produce more socially just results nor the clout to influence decisionmaking. To the extent that the business case for diversity helps black corporate lawyers to become "partners with power" in elite firms and with corporate decisionmakers,[255] it creates the potential for bringing, to borrow Harry Edward's phrase from thirty years ago, a "Black perspective" to the inner sanctum of American business.[256]

This potential, however, is just that — potential. The mere presence of black lawyers in positions of corporate power does not guarantee that these new entrants will use their authority to press the concerns of ordinary black citizens for racial justice. This much the critics of "viewpoint" diversity have right.[257] Charles Hamilton Houston, of course, was well aware of this essential truth about essentialism. This recognition is precisely why he went about creating a cadre of black lawyers who were specially trained to be social engineers for justice.[258] Moreover, Houston's training was explicitly normative as well as instrumental. To overcome the evils of legal segregation, black lawyers had to be willing to push for social justice in ways that served more than their own narrow self-interest.

If they are to carry this struggle into corporate America in *Brown*'s second half-century, today's black corporate leaders must be willing to do the same. Although they can never lose sight of the fact that they and their clients operate in an increasingly competitive marketplace, black lawyers who push for social justice from their newfound positions of authority must be willing sometimes to challenge the dictates of the marketplace in the interests of broader structural change.

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[255] I borrow the phrase from Robert Nelson, who argues that corporate lawyers' power comes from their partnership with powerful corporate actors. *See* ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 4–5 (1988). The disadvantages that black lawyers face in developing and servicing clients however, threaten to make them "partners without power" — and therefore, for present purposes, without clout — in elite firms. *See generally* Wilkins, *Partners without Power*, *supra* note 106.

[256] Edwards, *supra* note 78, at 1417; *see also* Ellis Cose, *Rethinking Black Leadership*, NEWSWEEK, Jan. 28, 2002, at 42–43.

[257] *See, e.g.*, Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1782–84 (1989) (criticizing claims about "viewpoint diversity" in the context of evaluating the acceptance or influence of minority scholars).

[258] *See* MCNEIL, *supra* note 235, at 57–127 (1983). *See generally* Wilkins, *Social Engineers*, *supra* note 224.

Without this commitment, the quest for diversity in corporate America will simply produce an elite that, while more demographically colorful, is no more conducive to producing the kind of substantive equality that Houston and Marshall so valiantly hoped to achieve than the monochromatic one it replaces.[259]

Worse yet, for the reasons set out at the beginning of this Part, what is good for diversity might actually be bad for social justice.[260] Although market-based diversity arguments may — subject to the limitations discussed in Parts II and III — be a useful tactic for black corporate lawyers to deploy, these arguments cannot, in the last analysis, substitute for a normative politics that explains why achieving racial justice is "the right thing to do." This truth remains even in circumstances where pursuing justice risks angering powerful constituencies by underscoring the need to redistribute economic resources from those who have always had them to those who do not. By failing to argue for such a politics, black lawyers — like progressives everywhere — have allowed conservatives to grab the moral high ground and portray themselves as the true defenders of truth against the rabble of the marketplace.[261]

But is it fair to ask black corporate lawyers, whose position in elite firms and other corporate workplaces continues to be tenuous at best, to risk jeopardizing their new-found status to press these claims? To be sure, the risks associated with pressing corporations to act in ways that might improve the status of black Americans, even if these actions may decrease profits, are considerably less severe than the danger in placing one's body in front of fire hoses and snarling dogs. Nevertheless, once we acknowledge that integrating corporate America — not to mention building a stable and substantial black middle class — is itself a significant social justice issue, the career implications of placing social justice demands on black corporate lawyers cannot be so easily dismissed. For the reasons set out below, however, there are good grounds to believe that social justice may be less hazardous to the

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[259] Lani Guinier powerfully raises this danger in her cautionary analysis of the "victory" in *Grutter*. *See* Guinier, *supra* note 181, at 200.

[260] For example, it is telling that, to my knowledge, the only amicus brief filed in *Grutter* that made continuation of widespread racial discrimination and stereotyping against black Americans in employment the centerpiece of its argument was that of the AFL-CIO. *See* Brief of Amicus Curiae American Federation of Labor & Congress of Industrial Organizations at 2, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241), Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516). Significantly, no lawyer from a major corporate law firm participated in the drafting of that brief.

[261] *See* Ann Southworth, The Creation of an Infrastructure for Conservative Legal Advocacy Since 1970 and the Contest over the Meaning of "Public Interest Law" 54–56 (Dec. 21, 2003) (unpublished manuscript, on file with the Harvard Law School Library) (describing how conservative-cause organizations have "stripped the term 'public interest law' of its exclusively left-oriented connotations").

cause of diversity than the turn to "diversity is good for business" rhetoric might lead one to believe.

V. CONCLUSION: SOCIAL JUSTICE AS STRUCTURAL SUPPORT — AND STRUCTURAL CRITIQUE

It is a sad commentary on how much the legal profession has changed in the half-century since *Brown* that many lawyers (including many black lawyers) appear to view social justice and professional success as polar opposites — and arguably mortal enemies. Elite lawyers in John W. Davis's day were much more likely to confidently espouse the opposite view. For these "lawyer-statesmen," professional success implied serving the public interest — at least as they saw it.[262] Although black lawyers (as well as progressive interests everywhere) during this period had many reasons to doubt this easy congruence, Marshall's victory in *Brown* gave these advocates hope that the law — and lawyers — might truly become a force for social change. Not surprisingly, the opportunity to be a part of this new convergence of law and social justice encouraged many of today's black corporate lawyers to enter the profession in the first place.[263] Most members of this post-*Brown* generation, of course, did not follow in Marshall's footsteps and become full-time civil rights lawyers. But even those who cast their lot with corporate America continued to look for ways to serve the cause of racial justice from inside the system. Ironically, the traditional claim by Davis's generation of lawyer-statesmen that corporate lawyers play a crucial mediating role in society by convincing their powerful clientele to conform their conduct to legal rules and serve the public interest, gave new entrants with more progressive views reason to believe that they too could play such a role as associates and partners in large law firms.

Today, these descendents of Houston and Marshall fear that expressing any serious commitment to social justice will irreparably damage their careers. Their concerns are far from frivolous. The bottom-line culture of today's corporate law firms appears to have little tolerance for the pursuit of social justice — especially a vision of social justice that might jeopardize corporate profits.

And yet, some of the most successful blacks in corporate America have also been among the most socially conscious. Franklin Raines, the first black CEO of a Fortune 500 company, has used his position at Fannie Mae to open up significant new home-ownership opportunities

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262 *See* KRONMAN, *supra* note 11, at 3.

263 *See* Wilkins, *supra* note 97 (manuscript at 13 & n.46). It is important, however, not to overstate the social justice commitments of those who followed Marshall into law. *See id.* (manuscript at 12–13).

for blacks and for working-class people of all races.[264] Kenneth Frazier, general counsel of Merck & Co., Inc. helped start a private school for underprivileged children in an inner-city Philadelphia neighborhood, successfully litigated pro bono a death penalty appeal, and was integrally involved in the pharmaceutical industry's decision to make HIV/AIDS drugs available in South Africa.[265] William Coleman, who has spent virtually his entire legal career as a partner in a large law firm, has nevertheless found time to chair the Legal Defense Fund board, and has been a tireless advocate for civil rights since his early pro bono work on the brief in *Brown*.[266] The list goes on — although it is important to note, not infinitely. Once again, there is no automatic link between being a victim of injustice and having a commitment to fighting injustice, let alone acting on that commitment in the face of peril.

The reasons that many black lawyers continue to take an active role in the struggle for racial justice are undoubtedly as varied as the lawyers themselves. For some, it may be the realization that even with the growing class differences that separate those blacks who become corporate lawyers from most other black Americans, their own ability to succeed in this country is ultimately linked to making progress on racial justice as a whole.[267] For others, however, it is likely the deep knowledge that the bonds of solidarity and community with other blacks constitute an important source of strength and support that these lawyers need to flourish in what is still a frustratingly isolated and alienating professional world. For these lawyers, an active com-

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264 *See Mortgage Group Joins NAACP To Help Blacks Purchase Homes*, CHI. TRIB., Jan. 22, 1999, at 1 (describing a partnership between Fannie Mae and the NAACP spearheaded by Raines). Raines has been explicit about his commitment to expanding home ownership among blacks. *See* Franklin Raines, Editorial, *Fannie Mae's Credit History*, WASH. POST, Mar. 10, 2000, at A21 (arguing that "no other entity, public or private, has increased its service to African American borrowers more in the past decade").

265 *See* Vivia Chen, *Master of the Game*, MINORITY L.J., Summer 2001, at 17, 20 (describing Frazier's pro bono work and efforts in South Africa); Nick McCarthy, *Distinguished Above the Rest: Seven Alumni Earn Penn State's Highest Honor*, THE PENN STATER, Sept.–Oct. 2003, at 16 (describing Frazier's role in funding the Cornerstone Christian Academy); *see also* METRO. CORP. COUNSEL, MERCK: PRACTICING GOOD CITIZENSHIP WORLD-WIDE 1, 37–38 (Dec. 2001).

266 To cite only one of Mr. Coleman's important contributions to the cause of racial justice while in private practice, his testimony against the confirmation of Robert Bork is believed by many to have been the single most important factor in the defeat of Bork's nomination. *See* Jason Manning, *The Bork Nomination*, EIGHTIES CLUB (2000), at http://eightiesclub.tripod.com/id320.htm (describing the importance of Coleman's testimony against Bork).

267 As Martin Kilson argues, "if racism . . . is not eliminated or at least reduced to a benign level, the chances for *development* (social mobility) of any black individual are problematic at best and rigidly circumscribed at worst." Martin Kilson, *Realism about the Black Experience: A Reply to Shelby Steele*, DISSENT, Fall 1990, at 519, 520; *see also* MICHAEL C. DAWSON, BEHIND THE MULE (1995) (discussing the concept of "linked fate").

mitment to social justice is more than a luxury of conscience. It is a psychological and social necessity for succeeding in a world that even fifty years after *Brown* continues to be overwhelmingly white.[268]

Regardless of their individual motivations, however, maintaining a commitment to social justice in the face of personal adversity and pressure to conform requires the ability to engage in structural critique. Successful blacks are constantly told that they are different: they are not like those other blacks who lack the intelligence or determination to lift themselves out of poverty or victimhood. They are encouraged to be content with being "the best black" and to be grateful for being welcomed on that basis as "a member of the club."[269] To see past this smokescreen, successful blacks must come to a structural understanding of racial injustice. They must understand the manner in which such arguments play a crucial role in perpetuating the subjugation of blacks as a group, no matter how much they appear to advance one's individual interests and no matter how well intended by those who advance them.

Black lawyers who make this connection are also in a better position to understand how race is affecting their own careers. Research into the effects of racial stereotypes on achievement suggests, paradoxically, that high-achieving blacks may be especially vulnerable to the "stereotype threat" created by negative assumptions.[270] High-achieving blacks, unlike many of the others who have already dropped out of the system, have built their self-image on the idea that they can succeed in life while playing by society's rules. As a result, they are at the mercy of society's rulemakers, and have special reason to fear that those decisionmakers will apply background stereotypes of black intellectual inferiority to them under the neutral sounding guise of "merit." One can only see this danger, however, if one is attuned to the way in which whites often consciously or unconsciously link assumptions about high-achieving blacks to negative characterizations of the group as a whole and to the manner in which discretionary judgments about

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[268] *See* Jennifer Crocker & Brenda Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 PSYCHOL. REV. 608, 620 (1989) (reporting that "the more an individual has structured his or her self-concept around membership in a group that is . . . discriminated against, the better [he feels] in terms of self-esteem").

[269] For a discussion of the "best black" syndrome, see CARTER, *supra* note 36, at 47–69. I borrow the phrase "member of the club" from Lawrence Otis Graham's book of that name. *See* LAWRENCE OTIS GRAHAM, MEMBER OF THE CLUB: REFLECTIONS ON LIFE IN A RACIALLY POLARIZED WORLD (1995). For the record, I disagree with many of the arguments advanced in both books — and with almost everything Graham has written subsequently.

[270] *See, e.g.*, George L. Cohen & Claude M. Steele, *A Barrier of Mistrust: How Negative Stereotypes Affect Cross-Race Mentoring*, *in* IMPROVING ACADEMIC ACHIEVEMENT: IMPACT OF PSYCHOLOGICAL FACTORS ON EDUCATION 303, 305–08 (Joshua Aronson ed., 2002); Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44; Steele, *supra* note 112.

merit often provide space for such bias to be expressed.[271] Given the inherently subjective nature of judgments about lawyer quality, black corporate lawyers are especially vulnerable to this danger.[272]

Black lawyers who understand this dynamic are more likely to figure out how to succeed in these institutions. As I suggested in Part II, notwithstanding the rhetoric to the contrary, law firms are not pure meritocracies in which "the best" lawyers automatically rise to the top. Instead, to succeed in today's competitive law firm environment, one must get access to crucial developmental opportunities, such as good work, training, and career support. These goods, however, are all mediated through personal relationships — relationships that are structured not just by race, but by class, mutual interest, economic advantage, and downright luck. Lawyers who understand this essential truth, and therefore refuse to buy into the myth permeating elite law firms that hard work will automatically be rewarded, are more likely to succeed in building the kinds of relationships required for advancement. A commitment to social justice that understands race in structural terms facilitates this kind of understanding.

Ironically, in making this connection, black corporate lawyers are ultimately helping the legal profession as well as themselves.[273] If the American legal profession hopes to maintain its current prominence on the global stage, it must find ways to attract and support lawyers who aspire to be social engineers for something other than the narrow concerns of global capital. If the financial scandals of the first few years of the twenty-first century have taught us anything, it is that a world in which professionals are encouraged to bleach themselves of every commitment save the ruthless pursuit of profit is a prescription for disaster of near-biblical proportions. It will take much more, of course, than moral exhortation to prevent the corporate bar from ending up as a social parasite. But without a normative commitment to seeing the crucial role that corporate lawyers play in the structure of our economic system, no system of checks and balances is likely to be effective either. Today's black corporate lawyers have spent almost

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271 *See* David Glenn, *Minority Students with Complex Beliefs About Ethnic Identity Are Found To Do Better in School*, CHRON. OF HIGHER EDUC., June 2, 2003, *at* http://sitemaker.umich.edu/daphna.oyserman/files/chronicle_of_higher_education.htm (reporting on a study suggesting that black students who incorporate race into their self-concepts perform better academically).

272 *See* Wilkins & Gulati, *Black Corporate Lawyers*, *supra* note 84, at 527–28 (arguing that law practice involves an irreducible element of discretionary judgment that inevitably requires subjective evaluation).

273 This is yet another example of how looking at race provides important insights about the legal system as a whole, similar to those discussed by Lani Guinier and Gerald Torres in THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002).

fifty years negotiating the razor's edge of opportunity and commitment. The bar — and the country — I submit, would do well to learn from their experience.