

CORPORATE RACIAL RESPONSIBILITY

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The 2020 mass protests in response to the deaths of George Floyd and Breonna Taylor had a significant impact on American corporations. Several large public companies pledged an estimated \$50 billion to advancing racial equity and committed to various initiatives to internally improve diversity, equity, and inclusion. While many applauded corporations' willingness to engage with racial issues, some considered it further evidence of corporate capitulation to extreme progressivism at shareholders' expense. Others, while thinking corporate engagement was long overdue, critiqued corporate commitment as insincere.

Drawing on historical evidence surrounding the passage of Title II of the Civil Rights Act of 1964, this Article engages with the debate on corporate "racial" responsibility to demonstrate that corporate engagement on race is not new. Indeed, during the struggle to desegregate public accommodations, corporate social responsibility was invoked to encourage voluntary desegregation and avoid federal intervention. Segregation was good business for some; for others, maintaining white supremacy justified any pecuniary losses.

While this Article argues that corporations have a role to play in achieving racial equity, it cautions against reliance on corporate social responsibility to advance racial equality. Past and current iterations of corporate racial responsibility have often represented a market-fundamentalist, value-extractive approach to racial equity that reifies existing racial hierarchies. By valuing racial equity in terms of its potential profitability, corporate racial responsibility can subordinate human dignity to wealth maximization. This Article argues for a more meaningful corporate racial responsibility that addresses the structures and laws undergirding racial inequities within corporations and our larger society.

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"Corporations which do America's business must be corporations of conscience."

—Dr. Martin Luther King, Jr.¹

1. Thomas F. Jackson, *From Civil Rights to Human Rights: Martin Luther King, Jr., and the Struggle for Economic Justice 185* (2007).

INTRODUCTION

The 2020 killings of George Floyd and Breonna Taylor had a significant impact on a perhaps unexpected segment of American society: corporations. As antiracist protests increased in 2020, many activists demanded that corporations participate in the country's racial reckoning.² Corporations across the United States sprang into action, embracing the Black Lives Matter (BLM) movement and calling for an end to racial injustice.³ Amazon was one prominent example. Days after George Floyd's murder, Amazon tweeted its "solidarity with the Black community—[Amazon's] employees, customers, and partners—in the fight against systemic racism and injustice."⁴ It announced a \$10 million donation to a group of racial justice organizations, including the NAACP, the National Urban League, and the Thurgood Marshall College Fund.⁵ Amazon also updated Alexa, its virtual technology assistant, to respond favorably to questions about the BLM movement.⁶ The company even appointed its first Black executive after years of criticism concerning the racial and gender homogeneity of its leadership council.⁷ It seemed that Amazon was taking racial equity seriously.

2. See, e.g., Jena McGregor, *With Protests, Silence Is 'Not an Option' for Corporate America*, Wash. Post (June 1, 2020), <https://www.washingtonpost.com/business/2020/06/01/with-protests-silence-is-not-an-option-corporate-america/> (on file with the *Columbia Law Review*) ("Because those who remain neutral have been tagged as contributing to the problem of racism, companies that have traditionally preferred to say nothing are being forced to wade in.").

3. See *id.* (describing statements by various companies and executives condemning injustice and paying tribute to George Floyd and Black Lives Matter).

4. Amazon (@amazon), Twitter (May 31, 2020), <https://twitter.com/amazon/status/1267140211861073927> [<https://perma.cc/9DEX-Z9NM>].

5. See *Amazon Donates \$10 Million to Organizations Supporting Justice and Equity*, Amazon (June 3, 2020), <https://www.aboutamazon.com/news/policy-news-views/amazon-donates-10-million-to-organizations-supporting-justice-and-equity> [<https://perma.cc/49LY-QEDJ>] (last updated July 14, 2020).

6. See Todd Haselton, *Amazon Alexa, Apple Siri, Google Assistant Have Been Updated to Express Support for Black Lives Matter*, CNBC (June 9, 2020), <https://www.cnbc.com/2020/06/09/apple-siri-google-assistant-new-response-to-do-black-lives-matter.html> [<https://perma.cc/2V9Y-BK8U>]. As of this publication, when you ask Alexa if Black lives matter, it responds: "Black lives matter. I believe in racial equality. I stand in solidarity with the Black community in the fight against systemic racism and injustice. To learn how you can take action, I recommend visiting blacklivesmatter.com and [NAACP.org](https://naacp.org)." *Id.* Similarly, if you ask Alexa whether all lives matter, it responds: "All lives matter, however Black lives are disproportionately in danger in the fight against systemic racism and injustice. To learn how you can take action, I recommend visiting blacklivesmatter.com and [NAACP.org](https://naacp.org)." *Id.*

7. See Matt Day, *Amazon Names First Black Executive to Bezos's Ruling Council*, Bloomberg (Aug. 21, 2020), <https://www.bloomberg.com/news/articles/2020-08-21/amazon-names-first-black-executive-to-bezos-s-ruling-council> (on file with the *Columbia Law Review*) (noting that the group of executives is "largely white" and "male" and that Alicia Boler Davis's appointment came after criticism of its makeup).

Companies such as Nike,⁸ Walmart,⁹ Apple,¹⁰ and Delta¹¹ made similar pledges. These companies and many others voiced their support for BLM, announced racial equity initiatives, and emphasized their commitments to improving diversity, equity, and inclusion within their companies.¹²

Many corporate leaders called this the dawning of a new era of corporate social responsibility (CSR).¹³ As the phrase implies, CSR is the belief that corporations should pursue goals that benefit society and, in this case, view racial equity and justice as important to their operations, profits, and overarching societal obligations.¹⁴ CSR advocates believe that corporations have obligations not only to shareholders but to a broad cross section of stakeholders—employees, consumers, and society at large.¹⁵ The wave of

8. See Press Release, Nike, Inc., Jordan Brand and Michael Jordan Statement on Commitment to the Black Community (June 5, 2020), <https://about.nike.com/en/newsroom/releases/jordan-brand-statement-on-commitment-to-black-community> [<https://perma.cc/Y2KA-MFZC>] (announcing \$100 million in donations to racial justice organizations).

9. Doug McMillon, Letter to Walmart Associates on Advancing Our Work on Racial Equity, Walmart (June 12, 2020), <https://corporate.walmart.com/news/2020/06/12/advancing-our-work-on-racial-equity> [<https://perma.cc/7AD8-JLFV>] [hereinafter Letter From Doug McMillon] (announcing racial equity initiatives, including a \$100 million commitment to start a center for racial equity).

10. See Tim Cook, Speaking Up on Racism, Apple, <https://www.apple.com/speaking-up-on-racism/> [<https://perma.cc/D2KK-55TV>] (last visited Oct. 23, 2023) (announcing donations to Equal Justice Initiative and other organizations alongside a commitment to address issues impacting communities of color).

11. See Ed Bastian, Memo: Taking Action on Racial Justice, Diversity, Delta News Hub (Aug. 11, 2020), <https://news.delta.com/ed-bastian-memo-taking-action-racial-justice-diversity> [<https://perma.cc/QA23-SLTK>] (announcing a commitment to racial equity through leadership changes, talent strategy, partnerships with community organizations, and prioritizing Black business partners).

12. See Tracy Jan, Jena McGregor & Meghan Hoyer, Corporate America's \$50 Billion Promise, Wash. Post (Aug. 23, 2021), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> (on file with the *Columbia Law Review*) [hereinafter Jan et al., Corporate America's \$50 Billion Promise] (last updated Aug. 24, 2021) (detailing commitments beyond the traditional forms of philanthropy, including diversifying the workforce and buying from Black-owned businesses).

13. See, e.g., Ass'n of Corp. Citizenship Pros. & Rocket Soc. Impact, Impact of COVID-19 & Racial Justice Movement on Corporate Social Responsibility 3 (2021), <https://accp.org/resources/csr-resources/data-research/the-impact-of-pandemic-racial-justice-movement-on-csr/> (on file with the *Columbia Law Review*) (highlighting survey results showing that the racial justice movement is driving increased corporate investment in diversity, equity, and inclusion); Sustainable Inv. Team & Equity Rsch. Team, Putnam Invs., Toward Racial Justice 6–8 (2021), <https://www.putnam.com/static/pdf/325702-toward-racial-justice.pdf> [<https://perma.cc/KT39-D23X>] (describing shifts in the current cultural environment that necessitate change in business tactics).

14. David Chandler & William B. Werther, Jr., Strategic Corporate Social Responsibility: Stakeholders, Globalization, and Sustainable Value Creation 6 (3d ed. 2013). See generally Emilie Aguirre, Beyond Profit, 54 U.C. Davis L. Rev. 2077 (2021) (discussing how corporations pursue goals beyond profitability).

15. See, e.g., Stefan J. Padfield, Corporate Social Responsibility & Concession Theory, 6 Wm. & Mary Bus. L. Rev. 1, 16 (2015) (“Simply put, the CSR position is that shareholder wealth may be sacrificed if the net social gain is positive, so that a board may defend its

corporate commitments to racial equity seemed to indicate that corporations were viewing their purpose more broadly and that this purpose went beyond profitability.

Now, however, two years removed from the massive racial justice protests that gripped the United States, some corporations have backtracked on their antiracist commitments. Their financial pledges to antiracist causes have gone unfulfilled.¹⁶ Their promises to diversify their workforces have not been realized.¹⁷ Other corporate antiracist programs that were priorities in the aftermath of George Floyd's murder are no longer so.¹⁸ Those who still believe that CSR can ensure and sustain racial equity efforts are learning a tough and unfortunate lesson. As easily as a corporation might create initiatives that purport to advance racial equity, it can retreat or even end those initiatives just as easily and with no repercussions.

Fleeting corporate commitments to racial equity are nothing new. They are inherent to racial equity strategies that depend on CSR. During the civil rights movement, for example, similar problems emerged as businesses became critical sites for antisegregation protests and demands for CSR. In 1960, a wave of sit-in demonstrations erupted at segregated public accommodations throughout the South.¹⁹ These protests would change the civil rights movement forever. One of the activists' core demands was that these segregated businesses act responsibly.²⁰ Segregated lunch counters

actions by pointing to some accounted-for social benefit even when it demurs on the issue of shareholder wealth maximization.”).

16. See Shaun Harper, *Where Is the \$200 Billion Companies Promised After George Floyd's Murder?*, *Forbes* (Oct. 17, 2022), <https://www.forbes.com/sites/shaunharper/2022/10/17/where-is-the-200-billion-companies-promised-after-george-floyds-murder/> [<https://perma.cc/E8DH-8B5U>] (stating that, as of August 2021, “37 of the 50 largest companies had disbursed only \$1.7 billion of the nearly \$50 billion pledged” in the aftermath of the murder of George Floyd (citing Jan et al., *Corporate America's \$50 Billion Promise*, *supra* note 12)).

17. See Ebony Flake, *Tech Companies Are Quietly Defunding Diversity Pledges and Industry Layoffs Are Hitting Black and Brown Workers Hardest—Experts Say the Message Is Clear*, *Essence* (Dec. 8, 2022), <https://www.essence.com/news/money-career/tech-companies-quietly-defunding-diversity-pledges> [<https://perma.cc/V8XK-WX7K>] (“A 2022 study showed minimal increase in the percentage of Black employees since 2020.” (citing Donald T. Tomaskovic-Devey & JooHee Han, *The Tech Industry Talks About Boosting Diversity, but Research Shows Little Improvement*, *The Conversation* (Mar. 1, 2022), <https://theconversation.com/the-tech-industry-talks-about-boosting-diversity-but-research-shows-little-improvement-177011> [<https://perma.cc/MM4M-R952>])).

18. See *id.* (“As recession fears cause executive decision-makers to reassess their bottom lines, many have quietly divested from commitments to diversity and inclusion.”).

19. Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change 197–99* (1984); see also Julian Bond, *SNCC: What We Did*, *Monthly Rev.* (Oct. 1, 2000), <https://monthlyreview.org/2000/10/01/sncc-what-we-did/> [<https://perma.cc/TJ7B-AAH8>] (explaining the sit-ins' far-reaching implications).

20. See Ella Baker, *Bigger Than a Hamburger*, *S. Patriot* (May 1960), reprinted in *C.R. Movement Archive*, <https://www.crmvet.org/docs/sncc2.htm> [<https://perma.cc/SPV7-MBY6>] (last visited Oct. 24, 2023).

made visible injustice and corporate social *irresponsibility*—a business’s participation in an immoral and unethical social and legal code.²¹ Civil rights activists initially attempted to persuade individual businesses to end their Jim Crow practices.²² Activists appealed to businesses’ CSR, urging them to surpass their legal obligations and desegregate voluntarily because it was the right thing to do.²³

Socially minded businesses and civic and political leaders also championed CSR as a solution to the racial protests of the early to mid-1960s.²⁴ Proponents of CSR asserted that business owners’ voluntary desegregation of public accommodations could end or prevent divisive sit-ins, litigation, and legislative wrangling. CSR, therefore, was framed as a means to meet civil rights activists’ demands while preserving corporate interests and avoiding government interference.²⁵ Segregated public accommodations regularly provoked demonstrations and limited businesses’ commerce with patrons of all races.²⁶ Voluntary desegregation seemed to offer a progressive, sensible, and potentially profitable approach to the problem of Jim Crow in public accommodations. It could even enhance some businesses’ racial reputation.

Nonetheless, reliance on CSR failed to achieve meaningful desegregation in southern localities. Many white-owned businesses would agree to desegregate during negotiations with civil rights leaders but renege shortly thereafter—or they would simply refuse to desegregate.²⁷ CSR, therefore, allowed some white businesses to claim compliance with civil rights ideals without changing significant aspects of their operations, thus becoming a tool that ultimately undermined racial progress. Black activists soon moved away from CSR as a possible path toward desegregation and instead initiated a campaign that led to the enactment of Title II.²⁸ Title II profoundly transformed the debate around race and CSR. Most notably, it set

21. See *id.*

22. See Morris, *supra* note 19, at 197–213.

23. For example, the Nashville sit-ins—which lasted from February 13 to May 16, 1960—combined with a series of negotiations and economic boycotts by Black patrons helped “convince” private businesses and public facilities in downtown Nashville of the “benefits” of voluntarily desegregating. *Id.* at 205–13; see also Martin Oppenheimer, *The Sit-In Movement of 1960*, at 124–26 (David J. Garrow ed., 1989) (highlighting the negotiation effort and difficulties in desegregating Nashville).

24. See *infra* Part II.

25. See *infra* Part II.

26. See Oppenheimer, *supra* note 23, at 129 (explaining how sit-ins and other demonstrations negatively affected businesses); Ricard Gil & Justin Marion, *Residential Segregation, Discrimination, and African-American Theater Entry During Jim Crow* 7 (Nov. 23, 2015), <https://ssrn.com/abstract=2694691> [<https://perma.cc/5DFP-K9CH>] (unpublished manuscript) (detailing the effects of segregation in the movie-theater industry during Jim Crow).

27. See *infra* section II.A.

28. See Morris, *supra* note 19, at 199–203 (describing the role of the Southern Christian Leadership Conference (SCLC) in organizing the mass sit-in movement of 1960).

a federal floor for racial justice in the area of public accommodations.²⁹ After its passage, Black people no longer had to depend on corporate leaders' hearts and minds to receive service and basic human dignity. The law now guaranteed their civil rights.

This Article uses legal and social history to examine “corporate *racial* responsibility”³⁰—the engagement of businesses³¹ in racial equity—from a historical and contemporary standpoint. It argues that past and current iterations of corporate racial responsibility present a market-fundamentalist, value-extractive approach to racial equity that reifies existing racial hierarchies and fails to produce change. While the authors believe firmly that businesses have a role to play in achieving racial equity, past and present iterations of corporate racial responsibility do not reflect a meaningful attempt to engage in racial equity.³² Rather, corporate racial responsibility prioritizes corporate interests over human dignity, requiring Black and Brown communities to prove their value to the corporate bottom line before being worthy of attention. Further, in privileging a voluntary, market-based approach to corporate racial responsibility, firms stymie racial progress by undercutting regulation that would result in more meaningful change. The sum total of these strategies enacted under the guise of progressivism, therefore, is to exploit the very communities who ought to benefit from corporate racial responsibility.

This Article makes three core contributions.

29. See *infra* section II.C.

30. The Article switches between using “corporate social responsibility” (CSR) and “corporate racial responsibility” at various junctures. As discussed in the Article, “CSR” is capacious enough to describe corporate commitment to a wide range of social responsibilities, including the environment, labor rights, sustainability, and race. This Article’s focus is primarily (and in some instances exclusively) on businesses’ engagements on race-related matters. Historically and today, business engagement in racial equity is generally cabined under CSR in common parlance. But the Article uses “CSR,” primarily for historical accuracy, when discussing these efforts during the civil rights era. When analyzing contemporary efforts to engage firms in racial equity, this Article defaults to “corporate racial responsibility” to indicate its specific focus.

31. This Article uses “businesses,” “corporations,” and “firms” to refer to private enterprises engaged in commerce. The authors recognize that not all businesses and firms are corporations but use the terms somewhat loosely to refer to all forms of businesses, regardless of how they are organized.

32. This Article adopts the following definition of racial equity:

Racial equity is a process of eliminating racial disparities and improving outcomes for everyone. It is the intentional and continual practice of changing policies, practices, systems, and structures by prioritizing measurable change in the lives of people of color.

... Racial equity is the process for moving towards the vision of racial justice. Racial equity seeks measurable milestones and outcomes that can be achieved on the road to racial justice. Racial equity is necessary, but not sufficient, for racial justice.

What Is Racial Equity?, Race Forward, <https://www.raceforward.org/what-racial-equity-0> [<https://perma.cc/2UJQ-MGSW>] (last visited Oct. 23, 2023) (emphasis omitted).

First, it connects two bodies of literature in a unique way. The first body of scholarship is the civil rights canon. Civil rights scholars have used sit-ins to demonstrate the power of protest on law. They emphasize that civil rights activism created the political environment for Congress to reconsider its abilities to regulate interstate commerce, ensure equal protection, and protect private property rights.³³ This Article's reexamination of the sit-in movement innovates civil rights scholarship because it demonstrates CSR's role in proving the *need* for legal intervention to guarantee civil rights. These insights challenge civil rights scholars to recognize that civil rights history is part of corporate governance scholarship; such an account expands traditional understandings of the scope of the civil rights movement.³⁴ Civil rights activists were not only interested in transforming federal law—they were also challenging and reimagining conceptions of CSR.

The second body of scholarship is robust literature on CSR. Over the past two decades, businesses, investors, and consumers have invested more significantly in CSR and its more commonly known counterpart, "ESG" (environmental, social, and governance).³⁵ Yet despite demands for more prosocial corporations, race has not figured prominently in this scholarly literature. Rather, scholars have examined race primarily when discussing corporate board diversity.³⁶ Despite these gaps in the extant scholarship, broader societal debates will continue about how corporations can advance racial equity in ways that transcend their (minimal) legal responsibility. There has been some reckoning about race and racism in corporate life; there must also be a reckoning about the neglect of race and racism in corporate governance scholarship. This Article seeks to contribute to that conversation.

Second, this Article engages with current debates on CSR to illustrate that the primary critiques against corporate racial responsibility fail to consider the lessons from the civil rights era and misconstrue corporate

33. See, e.g., Jackson, *supra* note 1, at 170 ("In retrospect, 1963 and 1964 presented the last, best opportunity of the postwar era to institutionalize social democratic policies that could have addressed the growing crisis of joblessness at the heart of the racial and urban crises that endure to this day."). See generally Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (2011) (providing a leading social-movement history of the Civil Rights Act of 1964).

34. Cf. Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 *J. Am. Hist.* 1233, 1234–36 (2005) (describing civil rights historiography and challenging the "master narrative" of the civil rights movement, which limits the movement to a short "classical" phase culminating in the passage of the Civil Rights Act of 1964).

35. See Elizabeth Pollman, *The Making and Meaning of ESG*, *Harv. Bus. L. Rev.* (forthcoming 2024) (manuscript at 1), <https://ssrn.com/abstract=4219857> [<https://perma.cc/66FH-KKME>] (explaining that "trillions" of dollars have flowed into ESG-labeled investment products).

36. See, e.g., Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 *Va. L. Rev.* 307, 309 (2023) (arguing that ESG disclosures can be used to diversify corporate boardrooms and workplaces).

engagement's most pressing shortcomings in racial equity. For example, one of the more strident critiques against corporate racial responsibility is that corporations should not engage with race-related issues because it is beyond the ambit of their proper purpose.³⁷ This critique, however, takes a narrow and ahistorical view of corporate engagement in racial issues. Corporations actively participated in the transatlantic trade of Black Africans, profiting from the transportation, sale, and forced labor of enslaved Black people.³⁸ Doing so required denying the humanity and dignity of Black people, which corporations (and many white people) were willing to do. This is an early and striking example of business engagement in race-related issues, which shows that corporations have long cared about race, even if the reasons and ways have changed over the centuries.

In more recent history, during the civil rights era, some businesses agreed to desegregate voluntarily to avoid demonstrations and enhance their reputation, but then they often retreated from their pledges to desegregate when they deemed these pledges no longer in their interests.³⁹ Likewise, in today's environment, many corporations have reneged on their racial equity pledges.⁴⁰ This historical continuity reveals that corporate commitments to racial equity are not a modern development in deference to social pressure; rather, corporations typically make, and have historically made, these commitments to further their short-term private interests.

Third, this Article illustrates its thesis by critically assessing corporate racial responsibility. As both past and present developments demonstrate, corporate racial responsibility adopts a market-fundamentalist, value-extractive approach to racial equity that subordinates human dignity to wealth maximization, reifies existing racial hierarchies, and stymies true

37. See Andrew Edgecliffe-Johnson, *The War on 'Woke Capitalism'*, *Fin. Times* (May 27, 2022), <https://www.ft.com/content/e4a818e5-4039-46d9-abe0-b703f33d0f9b> (on file with the *Columbia Law Review*) (listing prominent critiques of corporate social responsibility, including that companies “seized . . . th[e] opportunity to teach this generation that the way to fill [the hunger to find a higher purpose at work] is to . . . order a cup of ice-cream with a cup of morality on the side” (internal quotation marks omitted) (quoting then-presidential candidate Vivek Ramaswamy)).

38. See Rashad Robinson, *Opinion, Corporations Profit From Racism. It's Time for Us to Stand Up to Them*, *The Guardian* (May 16, 2019), <https://www.theguardian.com/commentisfree/2019/may/16/racial-justice-corporations> [<https://perma.cc/8V9U-6NU2>] (discussing the role of corporations in promoting racist ideologies in America); Zoe Thomas, *The Hidden Links Between Slavery and Wall Street*, *BBC* (Aug. 28, 2019), <https://www.bbc.com/news/business-49476247> [<https://perma.cc/39NA-ABMG>] (noting that “[s]ome of the largest insurance firms in the US—New York Life, AIG and Aetna—sold policies that insured slave owners would be compensated if the slaves they owned were injured or killed”).

39. See *infra* section II.B.1.

40. See Jan et al., *Corporate America's \$50 Billion Promise*, *supra* note 12 (“[C]ompanies reported just a tiny fraction [of their collective \$49.5 billion pledge]—about \$70 million—went to organizations focused specifically on criminal justice reform . . .”).

racial progress. Both the civil rights era and today provide salient examples. During the Title II debates, some political actors argued that voluntary desegregation was sufficient to end Jim Crow.⁴¹ They cited the incremental steps in some southern localities as proof that federal intervention in the area of civil rights was unnecessary.⁴² In other words, a few businesses' willingness to engage in voluntary desegregation became a way to undermine civil rights activists' demands. As a contemporary example, corporations might resist mandatory diversity disclosures on the basis that they already provide that information voluntarily.⁴³ Corporate racial responsibility legitimates—at least implicitly—antiregulatory, temporary, and often ad hoc responses to enduring and systemic racial problems. Such an approach is far from racial equity. It often replicates an older, racist, and antidemocratic paradigm whereby the fates of racial minorities are largely in the hands of white corporate elites.

This Article proceeds in four parts. Part I chronicles the major scholarly debates around CSR and corporate purpose. It also begins a racial reckoning in the corporate governance scholarship by detailing how and why scholars should take greater account of race in this literature.

Part II details the corporate racial responsibility debates during the civil rights movement. Activists in cities like Birmingham, Alabama, and Atlanta, Georgia, learned that voluntary desegregation could not end Jim Crow in public accommodations.⁴⁴ Their activism exposed the limits of corporate-led approaches to racial justice, and these experiences ultimately drove them to seek federal civil rights legislation.⁴⁵ Title II, which desegregated public accommodations, proved to be a far more effective and durable remedy for racial discrimination in public accommodations than voluntary desegregation.

Part III analyzes the contemporary debates on corporate racial responsibility, challenging critiques that derive from different—and to some extent, opposed—political stances to show that these critiques ignore the lessons of the civil rights era and miss what is truly problematic about corporate racial responsibility. This Part excavates corporate racial responsibility's shortcomings, analyzing its market-fundamentalist, antiregulatory features that seek to extract value from the communities corporate racial responsibility is meant to benefit rather than enact meaningful change.

41. See *infra* Part II.

42. See *infra* Part II.

43. See Jeff Green, Katherine Chiglinsky & Cedric Sam, *America's Top Employers Are Winning at Race Data Transparency—Except Musk and Buffett*, Bloomberg (Mar. 21, 2022), <https://www.bloomberg.com/graphics/diversity-equality-in-american-business/> (on file with the *Columbia Law Review*) (detailing S&P 100 companies' approaches to voluntarily disclosing racial diversity information via their EEO-1 reports).

44. See *infra* section II.B.

45. See *infra* section II.B.

Part IV concludes by applying the lessons learned from civil rights history to the contemporary struggle for racial equity. It offers corporations concrete recommendations so that the recent protests and corporate racial pledges can be more than fleeting moments of racial reckoning. Justice demands far more. If corporations are sincerely committed to ensuring racial equity, they must be honest enough to learn from their past racial shortcomings, bold enough to envision a future beyond mere profit maximization, and committed enough to work for robust, progressive civil rights legislation.

I. CORPORATE SOCIAL RESPONSIBILITY AND RACE

What is the corporation's role in society? This question has occupied corporate scholars' attention for much of the twentieth and twenty-first centuries.⁴⁶ Early corporations were formed through special government grants for specific public purposes, such as public works and public transportation.⁴⁷ Over time, these early corporations gave way to the modern corporation, which needs no special government grant for creation, ensures limited liability for its shareholders, and has a legal identity separate from its incorporators and shareholders.⁴⁸

The increasing size, power, and influence of the modern corporation underlies contemporary debates on the question of the corporation's proper role in society. For much of the twentieth century, the dominant response to this foundational question was "shareholder wealth maximization": the belief that the corporation's primary (sole) purpose is to maximize shareholder profitability.⁴⁹ In recent years, as shareholders, investors, consumers, and employees have demanded that corporations be more prosocial, CSR has gained prominence as a viable countervailing theory to shareholder wealth maximization.⁵⁰

46. See, e.g., Edward B. Rock, *For Whom Is the Corporation Managed in 2020?: The Debate Over Corporate Purpose*, 76 *Bus. Law.* 363, 364–66 (2021) (detailing a variety of positions on corporate purpose).

47. See Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 *Utah L. Rev.* 1629, 1634 ("As a special government 'privilege' or 'grant,' states mainly awarded charters for enterprises that would benefit the public good . . .").

48. See *id.* at 1638–40; see also Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 *Harv. Bus. L. Rev.* 441, 446 (2019) (discussing the rise of the "modern business corporation").

49. See Lynn A. Stout, *New Thinking on "Shareholder Primacy,"* 2 *Acct. Econ. & L.*, no. 2, art. 4, 2012, at 1, 2. More accurately, shareholder wealth maximization dominated the debates starting in the 1970s with the rise of the Chicago School of economists. Before the 1970s, the debate between the two camps was "evenly matched, with perhaps a slight advantage to the 'managerialist' view that corporations should be run in the interests of not just shareholders, but also stakeholders and society at large." *Id.*

50. See generally Tom C.W. Lin, *Incorporating Social Activism*, 98 *B.U. L. Rev.* 1535, 1566–67 (2018) (discussing the rise of CSR and business leaders' recognition of their responsibilities to other stakeholders).

This Part lays the foundation for understanding CSR, situating it in the debate on corporate purpose and tracing its theoretical development and contemporary application.

A. *Defining Corporate Social Responsibility*

The modern origins of CSR in the United States can be traced to the 1930s debate between Adolf A. Berle and Merrick Dodd on the purpose of the corporation.⁵¹ Berle was a proponent of what is now known as “shareholder primacy” or “shareholder wealth maximization.” He believed that managers ought to operate the corporation to maximize shareholder profitability.⁵² Dodd, on the other hand, argued that corporate purpose ought not to be limited to shareholder interests; rather, the corporation should also act in the interests of other stakeholders that are affected by its actions.⁵³ In broadening the focus of the corporation beyond shareholders and profitability, Dodd described the modern foundations of CSR.

While Dodd laid the conceptual foundation, there is no singular definition of “corporate social responsibility.”⁵⁴ CSR refers broadly to a firm’s voluntary consideration of issues beyond its economic and legal obligations, including social, environmental, ethical, moral, and philanthropic principles.⁵⁵ CSR, therefore, can be understood as a rejection of corporate profitability as the sole or primary purpose of the corporation.⁵⁶ Even on this seemingly unifying point, however, proponents differ in their normative views of the interplay between social interests and profitability. For example, some scholars believe that corporations have a responsibility to balance profitability and the interests of other corporate constituents, whether or not they are shareholders.⁵⁷ Others posit that corporations

51. See Stout, *supra* note 49, at 2 n.3.

52. See A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 *Harv. L. Rev.* 1049, 1049 (1931) (arguing that all powers granted to corporate managers are “at all times exercisable only for the ratable benefit of all the shareholders”).

53. See E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 *Harv. L. Rev.* 1145, 1148 (1932) (“[T]he business corporation [is] an economic institution which has a social service as well as a profit-making function . . .”).

54. A study on the definitions of CSR found thirty-seven different definitions from articles published between 1980 and 2003. See Alexander Dahlsrud, *How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions*, 15 *Corp. Soc. Resp. & Env’t Mgmt.* 1, 3 (2008).

55. See *id.* at 7–11.

56. See Lance Moir, *What Do We Mean by Corporate Social Responsibility?*, 1 *Corp. Governance*, no. 2, 2001, at 16, 17–19 (presenting CSR stakeholder and social contract theories that contrast the neoclassical view of CSR).

57. See, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 *Va. L. Rev.* 247, 286 & n.82 (1999) (“[D]irectors should be viewed as disinterested trustees charged with faithfully representing the interests not just of shareholders, but of all team members . . .”).

should be legally obligated to express a social purpose.⁵⁸ Still others believe that merely considering social interests is sufficient, even if those interests remain secondary to profitability.⁵⁹

Why do U.S. corporations engage voluntarily in CSR absent legal requirements to do so? The answer often lies not in altruism but in wealth maximization—many corporations anticipate financial benefits for engaging in CSR. Over the past few decades, a large body of literature has demonstrated that CSR enhances corporate profitability in many ways.⁶⁰ Other studies have shown that engagement in CSR reduces the cost of capital for corporations⁶¹ and improves long-term corporate performance.⁶²

Despite the numerous positive attributes associated with CSR, many have criticized it. Nobel Prize-winning economist Milton Friedman aptly summarizes the main critique against CSR with his now-famous quote: “[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits”⁶³ To Friedman and other critics, allowing managers to consider social responsibility rather than solely profits would not only harm the corporation but also undermine individual freedoms.⁶⁴ Further, some note

58. See, e.g., Colin Mayer, *Prosperity: Better Business Makes the Greater Good* 23 (2018) (proposing that corporations be legally required to articulate a purpose).

59. See Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 *Am. Bus. L.J.* 167, 214 (2018) (identifying the shortcomings of current CSR definitions).

60. See, e.g., Caroline Flammer, *Does Corporate Social Responsibility Lead to Superior Financial Performance? A Regression Discontinuity Approach*, 61 *Mgmt. Sci.* 2549, 2562–63 (2015) (finding that CSR programs increase long-term profitability and listing three ways CSR programs improve operating performance).

61. See, e.g., Beiting Cheng, Ioannis Ioannou & George Serafeim, *Corporate Social Responsibility and Access to Finance*, 35 *Strategic Mgmt. J.* 1, 2, 9 (2014) (finding that better CSR performance leads to lower capital constraints given greater stakeholder engagement and increased transparency); Rob Bauer & Daniel Hann, *Corporate Environmental Management and Credit Risk* 15 (Dec. 23, 2010), <https://ssrn.com/abstract=1660470> [<https://perma.cc/A9YN-PUSP>] (unpublished manuscript) (“[Our findings] show that firms with proactive environmental engagement pay a lower cost of debt financing.”).

62. See, e.g., Robert G. Eccles, Ioannis Ioannou & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60 *Mgmt. Sci.* 2835, 2836 (2014) (finding that companies that voluntarily adopted sustainability policies by 1993 outperformed their counterparts over the long term); Kent Greenfield, *The Third Way*, 37 *Seattle U. L. Rev.* 749, 767–68 (2014) (proposing that stakeholder-inclusive boardrooms can provide a remedy to “short-termism”); see also Michael E. Porter, Mark Kramer & George Serafeim, *Opinion, Where ESG Fails*, *Institutional Inv.* (Oct. 16, 2019), <https://www.institutionalinvestor.com/article/2bswdin8nvg922puxdzwg/opinion/where-esg-fails> [<https://perma.cc/D6FL-WEDZ>] (arguing that companies that pursue social-impact goals “can outperform their peers, delivering superior returns both to society and to their shareholders”).

63. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, *N.Y. Times Mag.*, Sept. 13, 1970, at 126 (internal quotation marks omitted) (quoting Milton Friedman, *Capitalism and Freedom* 133 (1st ed. 1962)).

64. See *id.* (“But the doctrine of ‘social responsibility’ taken seriously would extend the scope of the political mechanism to every human activity. . . . That is why . . . I have

that the firm's diffused obligations under CSR would produce managers with no real accountability as they pursue various social interests and goals.⁶⁵ Critics also question corporate competency to address social issues. In their view, although corporations have resources and expertise, their skills are suited for the narrow scope of the corporation's business, not social and environmental issues, which are better handled through the markets or by the government.⁶⁶ Relatedly, some believe that increasing corporate engagement in societal issues also increases corporations' power and undermines democratic governance.⁶⁷

While shareholder wealth maximization is the dominant legal and theoretical framework of corporate purpose, CSR remains a salient alternative that is resurging in the 2020s. The debate has shifted from questions of *whether* CSR ought to exist to questions of *how* corporations can best support and engage with social and environmental issues. Today, CSR is a key feature of major publicly traded corporations, most of which variously engage in social activism, as discussed in greater detail below.

B. *The Contemporary Rise of Corporate Social Responsibility*

In the past two decades, corporate managers' commitment to CSR has increased in both intensity and scope. According to a 2019 poll, 41% of *Fortune* 500 CEOs viewed "solving social problems" as part of their core business strategy.⁶⁸ This broad embrace of CSR is a marked change in corporate America's attitude and a turning point in the corporate approach to social issues.

Larry Fink, the CEO of BlackRock—the world's largest asset manager—epitomized this changing ethos and the shift in attention from shareholders to stakeholders in a 2017 statement that called on corporations to "benefit all of their stakeholders, including shareholders,

called it a 'fundamentally subversive doctrine' in a free society . . ." (quoting Milton Friedman, *Capitalism and Freedom* 133 (1st ed. 1962)).

65. See Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. Pa. L. Rev. 2063, 2065 (2001) ("[A] stakeholder measure of managerial accountability could leave managers so much discretion that managers could easily pursue their own agenda, one that might maximize neither shareholder, employee, consumer, nor national wealth, but only their own.").

66. See Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 Temp. L. Rev. 831, 863 (2008) (arguing that corporations should tackle problems relevant to their markets and within their competencies).

67. See, e.g., Lin, *supra* note 50, at 1588–93 ("The rise of contemporary corporate social activism could lead to a corrosion of core democratic, moral values . . .").

68. Alan Murray, *America's CEOs Seek a New Purpose for the Corporation*, *Fortune* (Aug. 19, 2019), <https://fortune.com/longform/business-roundtable-ceos-corporations-purpose/> (on file with the *Columbia Law Review*).

employees, customers, and the communities in which they operate.”⁶⁹ Fink followed up his 2017 statement with a similar letter to CEOs in 2019. In this letter, Fink urged managers to embrace a purpose beyond profits that creates value for all stakeholders.⁷⁰ In the same year, the Business Roundtable—a nonprofit trade association representing corporate executives and directors—issued a statement supporting the view that corporations should be managed to serve the interests of all stakeholders, not just shareholders.⁷¹ Some viewed this statement, signed by almost 200 chief executive officers, and its rejection of shareholder primacy as a watershed moment in corporate commitment to social responsibility.⁷² The Business Roundtable’s full-throated embrace of CSR is particularly noteworthy because of the association’s prior complete rejection of any corporate purpose other than serving shareholder interests.⁷³

Investors have been one significant impetus for the increasing embrace of CSR. Over the past decade, investors have demanded more socially conscious investment options, which has led to an increase in ESG investment. ESG is more recent than CSR and arose as an investment strategy, but the two are largely synonymous today.⁷⁴ As the SEC has described it:

ESG . . . may be referred to in many different ways, such as sustainable investing, socially responsible investing, and impact investing. ESG practices can include, but are not limited to, strategies that select companies based on their stated commitment to one or more ESG factors—for example, companies with policies aimed at minimizing their negative impact on the environment or companies that focus on governance principles and transparency. ESG practices may also entail screening out companies in certain sectors or that, in the view of the fund manager, have shown poor

69. Larry Fink, Larry Fink’s 2018 Letter to CEOs: A Sense of Purpose, BlackRock, <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> [<https://perma.cc/KTA7-FFSA>] (last visited Oct. 23, 2023).

70. See Larry Fink, Larry Fink’s 2019 Letter to CEOs: Purpose & Profit, BlackRock <https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter> [<https://perma.cc/6ZPS-5LS4>] (last visited Oct. 23, 2023).

71. See Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy that Serves All Americans’, Bus. Roundtable (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/WPH3-U34B>] [hereinafter Business Roundtable 2019 Statement].

72. David Gelles & David Yaffe-Bellany, Shareholder Value Is No Longer Everything, Top C.E.O.s Say, N.Y. Times (Aug. 19, 2019), <http://nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html> (on file with the *Columbia Law Review*).

73. Bus. Roundtable, Statement on Corporate Governance 3 (1997) (“[T]he paramount duty . . . of boards of directors is to the corporation’s stockholders . . .”).

74. See Adediran, *supra* note 36, at 317 n.32.

performance with regard to management of ESG risks and opportunities.⁷⁵

Moving from the fringe and closer to the center of investment practices, ESG investments increased by 42% between 2018 and 2020,⁷⁶ reaching \$26 trillion in 2023.⁷⁷ Market demands for ESG investment have motivated corporations to take seriously and embrace socially responsible conduct.

Related to investor pressure is employee pressure. Studies have shown that employees, particularly millennials, would prefer to work for firms that engage in CSR.⁷⁸ Recently, employees have been more vocal in demanding that corporations “do the right thing” in their business dealings. For example, in 2019, Wayfair—a furniture manufacturing and distribution company—entered into a contract to supply furniture to an immigrant detention center at the United States–Mexico border.⁷⁹ Hundreds of employees demanded that the company cease doing business with detention centers and, when the company refused to terminate the contract, staged a walkout.⁸⁰ Market response to the employee walkout was almost immediate: Wayfair’s share price plummeted by more than 5%.⁸¹ By deciding to maintain the contract, Wayfair found it more difficult “to attract and retain talented employees.”⁸² Employees have made similar demands at other

75. Environmental, Social and Governance (ESG) Funds—Investor Bulletin, SEC (Feb. 26, 2021), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/environmental-social-and-governance-esg-funds-investor-bulletin> [<https://perma.cc/QZX3-2P4X>].

76. Jason Stevens, The Rise of ESG and the Importance of ESG Data, *Ultimus Fund Sols.: Blog* (Nov. 18, 2021), <https://www.ultimusfundsolutions.com/blog/the-rise-of-esg-and-the-importance-of-esg-data/> [<https://perma.cc/QTb7-2FMA>].

77. Alyssa Stankiewicz, U.S. Sustainable Funds Register First Annual Outflows in 2023, *Morningstar* (Jan. 17, 2024), <https://www.morningstar.com/sustainable-investing/us-sustainable-funds-register-first-annual-outflows-2023> [<https://perma.cc/AW6R-NQCZ>].

78. See Gallup, *How Millennials Want to Work and Live 52* (2016), <https://www.gallup.com/workplace/238073/millennials-work-live.aspx> [<https://perma.cc/9BTW-ZDTQ>] (“[S]lightly more than one in three millennial workers strongly agree that the mission or purpose of their organization makes them feel their job is important.”).

79. Abha Bhattarai, *Wayfair Is Supplying Beds to Texas Detention Centers for Children—And Its Employees Are Protesting*, *Wash. Post* (June 25, 2019), <https://www.washingtonpost.com/business/2019/06/25/wayfair-is-supplying-beds-texas-detention-centers-children-its-employees-are-protesting/> (on file with the *Columbia Law Review*).

80. *Id.*

81. See Jasmine Wu, *Wayfair Employees Protest Apparent Sale of Children’s Beds to Border Detention Camp, Stock Drops*, *CNBC* (June 25, 2019), <https://www.cnbc.com/2019/06/25/wayfair-employees-protest-apparent-sale-of-childrens-beds-to-detention-camp.html> [<https://perma.cc/3M54-9Q68>] (last updated June 26, 2019).

82. See Peter Cohen, *3 Reasons to Sell Wayfair on Today’s Employee Walkout*, *Forbes* (June 26, 2019), <https://www.forbes.com/sites/petercohan/2019/06/26/3-reasons-to-sell-wayfair-on-todays-employee-walkout/?sh=3b091501492f> (on file with the *Columbia Law Review*).

large public corporations, including Google,⁸³ Microsoft,⁸⁴ and Amazon.⁸⁵ Being competitive in the labor market thus provides a strong incentive for corporations to be attentive to CSR.

The rise of CSR has transformed the debate on corporations' role in society. Rather than *whether* corporations should engage in CSR, the question now is one of *how* and *how much*. While shareholder primacy continues to be a for-profit corporation's legal requirement,⁸⁶ many corporations are nonetheless considering the interests of stakeholders and society in their decisionmaking.⁸⁷ But on more controversial issues, such as race and racial justice, corporations have been slower to engage.

C. *Corporate Social Responsibility and the Issue of Race*

Notably, CSR scholarship, discourse, and practice have not focused on race. For example, in charting the history and evolution of CSR, scholars Mauricio Andrés Latapí Agudelo, Lára Jóhannsdóttir, and Brynhildur Davídsdóttir barely discuss race, despite their emphasis on the theory's development in the United States.⁸⁸ As Professor Atinuke O. Adediran notes in her recent scholarship on CSR disclosures: "Until recently, scholarship on ESG was largely devoid of discussions about corporate diversity," and when diversity was mentioned, it "was often acknowledged in cursory fashion."⁸⁹ Even scholars who view CSR expansively to include corporate behavior related to the environment, labor, sustainability, politics, and war, among other themes,

83. See Shirin Ghaffary, Google Employees Protest the Company's "Attempt to Silence Workers", Vox (Nov. 22, 2019), <https://www.vox.com/recode/2019/11/22/20978537/google-workers-suspension-employee-activists-protest> [<https://perma.cc/GB3N-C4LF>].

84. See Avie Schneider & Laura Sydell, Microsoft Workers Protest Army Contract With Tech 'Designed to Help People Kill', NPR (Feb. 22, 2019), <https://www.npr.org/2019/02/22/697110641/microsoft-workers-protest-army-contract-with-tech-designed-to-help-people-kill> [<https://perma.cc/Z7YD-UTHP>].

85. See Caroline O'Donovan, Amazon Employees Protest the Sale of Books They Say Are Anti-Trans, Wash. Post (June 1, 2022), <https://www.washingtonpost.com/technology/2022/06/01/amazon-trans-pride-month-books-protest/> (on file with the *Columbia Law Review*).

86. See, e.g., eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34–35 (Del. Ch. 2010) ("Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law."). But see Robert J. Rhee, A Legal Theory of Shareholder Primacy, 102 Minn. L. Rev. 1951, 1957 (2018) (asserting that "[i]t is difficult to find the locus of law" and that "[t]here is no well-established body of case law or a statute commanding [shareholder primacy]").

87. See *infra* notes 92–95, 99–101 (documenting corporate engagement in environmental causes and philanthropy).

88. See Mauricio Andrés Latapí Agudelo, Lára Jóhannsdóttir & Brynhildur Davídsdóttir, A Literature Review of the History and Evolution of Corporate Social Responsibility, 4 Int'l J. Corp. Soc. Resp., no. 1, 2019, at 1, 3–15.

89. Adediran, *supra* note 36, at 316–17.

rarely theorize race as within the scope of a corporation's social obligations.⁹⁰

Similarly, in practice, CSR has traditionally focused on environmental goals⁹¹ or philanthropy.⁹² This historical focus is reflected in the contemporary emphasis on climate change and sustainability. For example, several corporations have pledged to become net-zero producers of carbon emissions,⁹³ adopt a range of sustainability measures,⁹⁴ or donate to worthwhile causes.⁹⁵ Corporate reticence to engage in social issues is reflected

90. Before the 1950s, CSR had focused on female and child labor. See Archie B. Carroll, A History of Corporate Social Responsibility, *in* The Oxford Handbook of Corporate Social Responsibility 19, 21 (Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon & Donald S. Siegel eds., 2008). Early literature in the 1950s broadly states that businesses have social consequences and thus have social responsibility to consider their impact on society and to follow the values of society. See Archie B. Carroll, Corporate Social Responsibility: Evolution of a Definitional Construct, 38 *Bus. & Soc.* 268, 269–70 (1999). Social movements in the 1970s that focused on “the environment, worker safety, consumers, and employees” might have affected the focus and reach of CSR. See *id.* at 275.

91. See, e.g., Ofer Eldar, Designing Business Forms to Pursue Social Goals, 106 *Va. L. Rev.* 937, 940 (2020) (equating CSR with environmental concerns and noting that “[w]ithout a mechanism for ensuring that CSR actually benefits the stakeholders, companies can easily use it as a means of ‘greenwashing’”); Thomas Lee Hazen, Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies’ CSR and ESG Disclosures, 23 *U. Pa. J. Bus. L.* 740, 742 & n.6 (2021) (citing a law firm memo as indicating that “social responsibilities and good corporate governance” include “elimination of toxic corporate culture and enhancement of diversity, inclusion, and equity” (citing Clare Connellan, Maia Gez, Seth Kerschner & Jacquelyn MacLennan, ESG Takes Center Stage Amid Economic Crisis and Social Unrest, White & Case LLP (Aug. 5, 2020), <https://mergers.whitecase.com/highlights/esg-takes-center-stage-amid-economic-crisis-and-social-unrest> [<https://perma.cc/Y97V-XY5T>])); Kerr, *supra* note 66, at 846 (focusing exclusively on sustainability and the environment).

92. See, e.g., M. Todd Henderson & Anup Malani, Corporate Philanthropy and the Market for Altruism, 109 *Colum. L. Rev.* 571, 581–82 (2009) (analyzing competing views on whether philanthropy promotes shareholder interests).

93. According to the Climate Pledge, at least 464 signatories have committed to becoming net-zero producers by 2040. See Climate Pledge, <https://www.theclimatepledge.com/us/en/> [<https://perma.cc/JHM5-BP9R>] (last visited Jan. 20, 2024).

94. See, e.g., Thor Olavsrud, NHL Turns to Venue Metrics Data to Drive Sustainability, *CIO* (Jan. 3, 2023), <https://www.cio.com/article/416508/nhl-turns-to-venue-metrics-data-to-drive-sustainability.html> [<https://perma.cc/6E76-2YKH>] (overviewing the NHL's efforts to leverage data and analytics to identify resource consumption reduction opportunities); Stakeholder Metrics Initiative: Over 150 Companies Implement Sustainability Reporting Metrics, *World Econ. F.* (Jan. 11, 2024), <https://www.weforum.org/impact/stakeholder-capitalism-reporting-metrics-davos2024/> [<https://perma.cc/HTL4-23T3>] (noting that 158 companies produced sustainability reports aligned with the World Economic Forum's “Stakeholder Metrics” in 2023).

95. See, e.g., Press Release, Amazon, Amazon Donates 100 Million Returned Items to Nonprofits (May 10, 2022), <https://www.aboutamazon.com/news/operations/amazon-donates-100-million-returned-items-to-nonprofits> [<https://perma.cc/38UG-UYRG>] (“[T]hrough a partnership with Good360, a nonprofit that helps facilitate the donation of unsellable goods to those who need them most, donations have impacted 11 million lives, including 6.9 million people in 2021 alone, in communities across the U.S. and recently Canada.”); Press Release, Apple, 15 Years Fighting AIDS With (RED): Apple Helps Raise Nearly \$270 Million (Dec. 1, 2021),

in ESG scholarship, in which the *E* and *G* (environmental and governance) have often been the focus, while the *S* (social) has been more muted.⁹⁶

Corporations have feared consumer or political backlash if they assert a position on social issues.⁹⁷ Thus, even as corporations have engaged in greater levels of CSR—by, for example, adopting net-zero carbon pledges or donating money to philanthropy—they have been reluctant to take a stance on social issues, including and especially race.⁹⁸ Recently, corporations have become more willing to engage in some of these issues, such as marriage equality,⁹⁹ transgender rights,¹⁰⁰ and gender pay equity.¹⁰¹ Race, however, has been different. Before 2020, CSR as it related to race typically subsumed race under the broader banner of “diversity.”¹⁰² These diversity efforts have ranged from making statements in support of diversity; to facil-

<https://www.apple.com/newsroom/2021/12/15-years-fighting-aids-with-red-apple-helps-raise-nearly-270-million/> [<https://perma.cc/Q588-ZWJB>] (“Since 2006, Apple customers have helped raise nearly \$270 million to fund prevention, testing, and counseling services for people impacted by HIV/AIDS.”); Press Release, Bank of Am., BofA Provides Nearly \$19 Million to Local Hunger Organizations From Employee Booster Campaign (Dec. 14, 2022), <https://newsroom.bankofamerica.com/content/newsroom/press-releases/2022/12/bofa-provides-nearly-19-million-to-local-hunger-organizations-f.html> [<https://perma.cc/TYJ6-EEJ7>] (“Bank of America has a longstanding commitment to address hunger relief and strengthen local communities, having donated nearly \$150 million toward hunger relief efforts since 2015.”).

96. See Adediran, *supra* note 36, at 316 (noting the lack of discussion of corporate diversity in traditional ESG scholarship).

97. For example, Florida Governor Ron DeSantis publicly condemned Disney and threatened to revoke the company’s “special district” status for opposing Florida’s “Parental Rights in Education” law. See Gary Fineout, DeSantis and Disney: The Ride Is Hurling to the End, *Politico* (Dec. 5, 2022), <https://www.politico.com/newsletters/florida-playbook/2022/12/05/the-slow-moving-storm-at-the-florida-supreme-court-00072135> [<https://perma.cc/JWY6-GD8S>].

98. See *infra* notes 102–108 and accompanying text.

99. See, e.g., Chris Capossela, Microsoft Celebrates Pride Around the World—Even in the Metaverse—As We Donate to LGBTQIA+ Nonprofits, Release Xbox Pride Controller and More, *Microsoft* (June 1, 2022), <https://blogs.microsoft.com/blog/2022/06/01/microsoft-celebrates-pride-around-the-world-even-in-the-metaverse-as-we-donate-to-lgbtqia-nonprofits-release-xbox-pride-controller-and-more/> [<https://perma.cc/K589-Q22S>] (“To mark the launch of our campaign, we’re contributing a total of \$170,000 to LGBTQIA+ nonprofits around the world.”).

100. See, e.g., Adam Dorfman, How Google Supports Pride, *Near Media* (June 8, 2021), <https://www.nearmedia.co/google-supports-pride/> [<https://perma.cc/VMJ3-Q59P>] (“Google’s actions appear to be a genuine reflection of its culture. For instance, in 2011, Google made significant improvements to its coverage of transgender healthcare.”).

101. See, e.g., Marianne Wilson, Kohl’s Among Five Retailers on Top 75 Companies for Executive Women List, *Chain Store Age* (June 9, 2022), <https://chainstoreage.com/kohls-among-five-retailers-top-75-companies-executive-women-list> [<https://perma.cc/4KRK-JNKN>] (detailing corporate engagement on achieving gender pay equity, including efforts from Kohl’s, Best Buy, and Target).

102. See Ben Hecht, Moving Beyond Diversity Toward Racial Equity, *Harv. Bus. Rev.* (June 16, 2020), <https://hbr.org/2020/06/moving-beyond-diversity-toward-racial-equity> [<https://perma.cc/AC6K-X3VT>] (“With traditional diversity interventions failing, these [business] leaders—the majority of whom were white—reported feeling ill-equipped, even afraid, to act.”).

itating the creation of affinity groups to creating entire positions dedicated; to promoting diversity, equity, and inclusion (DEI).¹⁰³

This changed in 2020, when the murders of George Floyd and Breonna Taylor ignited the largest racial justice movement since the civil rights era.¹⁰⁴ During the summer of 2020, the United States witnessed widespread protests against the state's repeated murders of Black citizens.¹⁰⁵ Suddenly, the BLM movement had gained broad-based support from a multiracial, multiethnic, multinational group demanding racial justice.¹⁰⁶ Although the BLM movement had begun in 2013 after the murder of Trayvon Martin,¹⁰⁷ before 2020, corporations had largely spurned the movement, refusing to endorse the group's calls for racial justice.¹⁰⁸

After 2020, corporations could no longer ignore the changing tide. According to recent research from Professor Lisa Fairfax, approximately 86% of *Fortune* 100 companies and 66% of *Fortune* 500 companies released statements supporting Black communities, rejecting racism, acknowledging structural racial inequities in society, and pledging to engage in

103. Interestingly, despite these sustained corporate efforts, the demographics of America's largest corporations—particularly regarding leadership positions—have not changed meaningfully. See Veronica Root Martinez & Gina-Gail S. Fletcher, Equality Metrics, 130 *Yale L.J. Forum* 869, 887 (2021), https://www.yalelawjournal.org/pdf/FletcherMartinezEssay_8vxh887p.pdf [<https://perma.cc/4SVS-TQEP>] (“Black directors, specifically, make up just 4% of more than 20,000 directors, while Black women make up just 1.5%.”); Jeanne Sahadi, Corporate America Promised to Get More Diverse. But It's Still Mostly White Women Making Gains, *CNN* (June 8, 2021), <https://www.cnn.com/2021/06/08/success/board-diversity-corporate-america/index.html> [<https://perma.cc/BGJ6-NDZ2>] (describing how increases in board diversity are largely limited to white women); Pippa Stevens, Companies Are Making Bold Promises About Greater Diversity, but There's a Long Way to Go, *CNBC* (June 11, 2020), <https://www.cnn.com/2020/06/11/companies-are-making-bold-promises-about-greater-diversity-theres-a-long-way-to-go.html> [<https://perma.cc/85E6-YZYR>] (last updated June 15, 2020) (emphasizing uncertainty in both ascertaining corporate diversity in leadership and proving its utility).

104. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, Black Lives Matter May Be the Largest Movement in U.S. History, *N.Y. Times* (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (on file with the *Columbia Law Review*).

105. See Derrick Bryson Taylor, George Floyd Protests: A Timeline, *N.Y. Times* (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> (on file with the *Columbia Law Review*).

106. See Kim Parker, Juliana Menasce Horowitz & Monica Anderson, Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement, *Pew Rsch. Ctr.* (June 12, 2020), <https://www.pewresearch.org/social-trends/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/> [<https://perma.cc/JE4U-6265>].

107. Herstory, Black Lives Matter, <https://blacklivesmatter.com/herstory/> (on file with the *Columbia Law Review*) (last visited Oct. 24, 2023).

108. See Eugene Y. Chan, Why Companies Were So Quick to Endorse Black Lives Matter, *The Conversation* (Aug. 21, 2020), <https://theconversation.com/why-companies-were-so-quick-to-endorse-black-lives-matter-142532> [<https://perma.cc/7DQT-WDBB>] (“Not too long ago, few companies paid much attention to Black Lives Matter.”).

antiracist and racial equity work both internally and socially.¹⁰⁹ Large, well-known public companies such as Amazon, Twitter, Walmart, and Nike were among those now publicly embracing BLM.¹¹⁰ Notably, these were the same companies that had remained silent around instances of racial injustice years earlier.

Walmart illustrates the trend. In 2014, police officers shot and killed John Crawford III, a Black man, inside an Ohio Walmart.¹¹¹ At the time of his murder, Crawford was holding an air rifle, not a gun, that was for sale in the store.¹¹² His death was roundly criticized as another example of police brutality,¹¹³ but even though a Walmart store was the site of Crawford's murder, the company was noticeably silent and did not condemn the police for their role in his death.¹¹⁴

In contrast, in June 2020—as the United States was experiencing daily racial justice protests—Walmart held a virtual meeting of its associates in which its CEO, Doug McMillon, discussed racial injustice in the United States and its deep historical roots.¹¹⁵ The CEO's plans to address racial injustice included a \$100 million commitment to create a center for racial equity.¹¹⁶ The center would be responsible for directing Walmart's \$100 million pledge to philanthropic initiatives to shape four key areas: healthcare, education, criminal justice, and financial security.¹¹⁷ Despite these laudable plans, Walmart does not have

109. Lisa M. Fairfax, *Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, 2022 *Colum. Bus. L. Rev.* 118, 121 (describing the range of statements, including open-ended promises, concrete commitments, and denouncements of silence).

110. Mercey Livingston, *These Are the Major Brands Donating to the Black Lives Matter Movement*, CNET (June 16, 2020), <https://www.cnet.com/culture/companies-donating-black-lives-matter/> [https://perma.cc/4CXD-HWGV]; see also *Tech Firms Say They Support George Floyd Protests—Here's What's Happening*, CNET (June 10, 2020), <https://www.cnet.com/culture/tech-companies-say-they-support-george-floyd-protests-heres-whats-happening/> [https://perma.cc/Y3CD-2TQD].

111. *Family Sues Over Fatal Shooting at Ohio Wal-Mart*, CBS News (Dec. 16, 2014), <https://www.cbsnews.com/news/family-sues-over-fatal-shooting-at-ohio-walmart/> [https://perma.cc/S4PN-GZ7T].

112. *Id.*

113. See, e.g., Joe Coscarelli, *No Charges Against Ohio Police in John Crawford III Walmart Shooting, Despite Damning Security Video*, *N.Y. Mag.: Intelligencer* (Sept. 24, 2014), <https://nymag.com/intelligencer/2014/09/no-charges-john-crawford-iii-walmart-shooting-video.html> [https://perma.cc/YKD6-W2L9] (“[S]urveillance video, shown publicly for the first time, shows the circumstances that led to yet another young [B]lack man dead at the hands of law-enforcement.”).

114. See *Family Sues Over Fatal Shooting*, *supra* note 111.

115. Doug McMillon, *Walmart CEO, Remarks at Company Meeting: Making a Difference in Racial Equity* (June 5, 2020), <https://corporate.walmart.com/news/2020/06/05/equity> (on file with the *Columbia Law Review*).

116. *Id.*

117. *Letter From Doug McMillon*, *supra* note 9.

a stellar reputation for tackling racial injustice.¹¹⁸ As some have noted, Walmart exploits its vulnerable workforce—paying low wages and providing limited health insurance—which has contributed to significant disparities in the economic well-being of its Black workforce.¹¹⁹

Notwithstanding the emergence of racial equity as part of the CSR discourse in recent years, history provides a cautionary tale about corporate engagement in matters of race. As Part II details, CSR shaped civil rights-era debates on the desegregation of public accommodations. Civil rights activists urged businesses in the South to desegregate their restaurants, stores, and workforces, invoking businesses' potential to do well while doing good. Civil rights activists encouraged businesses to desegregate voluntarily, but they also knew that CSR alone was not enough because it did not bind businesses to their promises. For others, the nonbinding nature of CSR was its appeal: Businesses could decide whether to desegregate without government intervention, thereby protecting white businesses' private property rights.

II. THE ROAD TO TITLE II OF THE CIVIL RIGHTS ACT

The sit-in movement forced citizens, policymakers, and judges to wrestle with thorny issues of equal protection, private property rights, and interstate commerce.¹²⁰ The movement also forced Americans to wrestle with the power and limitations of an evolving concept: CSR. Yet reliance on CSR did not resolve the sit-in crisis, as developments soon illustrated. Federal action did. Congress adopted Title II,¹²¹ and the U.S. Supreme Court shortly thereafter upheld the statute in *Heart of Atlanta Motel v. United States*¹²² and *Katzenbach v. McClung*.¹²³ This Part explores the social and legal history behind Title II to show the promise, cost, and, ultimately, failure of reliance on CSR in the struggle to end racial discrimination in public accommodations.

118. See Blair Johnson, How the Black Lives Matter Movement Enhanced Corporate Governance in 2020, 8 *Emory Corp. Governance & Accountability Rev.* 99, 111 (2021) (calling Walmart's history on racial injustice issues "scarce").

119. Cat Davis & Dorian Warren, Opinion, Walmart Exploits Black Lives While Paying Lip Service to Black Lives Matter, NBC News (June 18, 2020), <https://www.nbcnews.com/think/opinion/walmart-exploits-black-lives-while-paying-lip-service-black-lives-ncna1231493> [<https://perma.cc/KH5P-6CAX>].

120. See H. Timothy Lovelace Jr., Making the World in Atlanta's Image: The Student Nonviolent Coordinating Committee, Morris Abram, and the Legislative History of the United Nations Race Convention, 32 *Law & Hist. Rev.* 385, 392 (2014).

121. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201–207, 78 Stat. 241, 243–46 (codified at 42 U.S.C. §§ 2000a–2000a-6 (2018)).

122. See 379 U.S. 241, 261 (1964).

123. See 379 U.S. 294, 305 (1964).

A. *The United States' Segregation Problem and the Promise of Corporate Social Responsibility*

Sit-ins at segregated public accommodations were catalysts for the major civil rights reforms of the 1960s. Civil rights activists appealed to businesses' CSR, urging these businesses to go beyond their legal obligations and voluntarily desegregate.¹²⁴

Yet businesses were often reluctant to do so, which led Black people toward alternative methods to ensure they received service at public accommodations. One of the most well-known alternatives was the *Negro Travelers' Green Book*, commonly referred to as the *Green Book*. Victor Green first published the book in 1936.¹²⁵ The book's national prominence and long publication run illustrated the limitations of relying solely on CSR to achieve full desegregation. The *Green Book* offered Black people a fifty-state survey of hotels, motels, tourist homes, and restaurants that would provide them with proper service.¹²⁶ The book's dual implications were clear. CSR could help Black people enjoy equal access to public accommodations because only businesses that rejected segregation and treated Black people with dignity were listed in the *Green Book*.¹²⁷ As Green realized, however, CSR was not enough to end nationwide racial discrimination in public accommodations—had CSR been sufficient, there would have been no need for the *Green Book* in the first place.

Green pled for much more than voluntary desegregation. The opening pages of the *Green Book* praised “the militancy of . . . civil rights groups . . . [that] widened the areas of public accommodations accessible to all.”¹²⁸ Green also emphasized the need for legal regulation of public accommodations, agreeing with civil rights groups that had made “it very clear that the Negro is only demanding what everyone else wants[:] . . . what is guaranteed all citizens by the Constitution of the United States.”¹²⁹

Many other civil rights activists argued that CSR was not a sufficient substitute for public accommodations legislation. Frank Stanley, a columnist

124. See *supra* note 23 and accompanying text.

125. Norrinda Brown Hayat, *Accommodating Bias in the Sharing Economy*, 83 *Brook. L. Rev.* 613, 623 (2018).

126. See Victor H. Green, *Travelers' Green Book: International Edition 1* (1963–64 ed. 1963). The *Green Book* additionally provided information about state statutes on racial discrimination in public accommodations and state commissions to which those who faced discrimination could complain. See *id.* at 2–4. But as the *Green Book's* list revealed and the U.S. Supreme Court later declared, this state-by-state approach was not enough to eliminate a national public accommodations problem. See *id.*; see also *Heart of Atlanta Motel*, 379 U.S. at 252–53 (citing “voluminous testimony” that “discrimination by hotels and motels impedes interstate travel”).

127. See, e.g., Green, *supra* note 126, at 4–6 (listing Black-friendly accommodations in various Alabama cities).

128. *Id.* at 2.

129. *Id.* (ellipsis in original).

for the *Chicago Defender*, one of the nation's leading Black newspapers, asserted that relying solely on CSR to end public accommodations discrimination actually inflicted a dignitary harm on Black people.¹³⁰ He believed that public accommodations discrimination was an "illegal and unchristian act" and that a business owner's so-called right to discriminate among patrons should come "second to the rights of those citizens against whom he discriminates."¹³¹ Hence, Stanley maintained that he was willing to "force" business owners to desegregate because "total public accommodations desegregation [would] never be achieved until there [was] a law requiring it."¹³²

Stanley noted that in Louisville, for example, Black people had presented five public accommodations ordinances in 1961 after voluntary desegregation failed.¹³³ He maintained that Black Louisvillians now preferred "political power" instead of voluntary desegregation because their experiences had shown them that they had no legal recourse against segregationists absent public accommodations legislation.¹³⁴ Others went further. Congressman Robert N.C. Nix Sr. introduced a federal civil rights bill to desegregate public accommodations nationally, although it received no traction.¹³⁵

Segregation and corporate social *irresponsibility* in the form of support for Jim Crow had domestic as well as foreign policy implications. During the early 1960s, as African countries won independence from their former European colonizers, the U.S. government often welcomed diplomats from these newly independent countries to the United States.¹³⁶ But when many of these diplomats visited Washington, D.C., they were denied service at public accommodations.¹³⁷ They faced additional humiliation on the drive from the nation's capital to the United Nations Headquarters in New York City when

130. Frank L. Stanley, *Being Frank: About People, Places and Problems*, Chi. Def., July 8, 1961, at 8.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Nix Points Up New Federal Legislation: Anti-Bias Bill Is Backed by Local Solons, Phila. Trib., Sept. 19, 1961, at 1.

136. See Harold R. Isaacs, *American Race Relations and the United States Image in World Affairs*, in *Race and U.S. Foreign Policy During the Cold War* 260, 265–66 (Michael L. Krenn ed., 1998); Michael Krenn, *The Unwelcome Mat: African Diplomats in Washington, D.C., During the Kennedy Years*, in *Window on Freedom: Race, Civil Rights, and Foreign Affairs, 1945–1988*, at 163, 163 (Brenda Gayle Plummer ed., 2003); Renee Romano, *No Diplomatic Immunity: African Diplomats, the State Department, and Civil Rights, 1961–1964*, 87 *J. Am. Hist.* 546, 551–52 (2000). See generally Brenda Gayle Plummer, *The Changing Face of Diplomatic History: A Literature Review*, 38 *Hist. Tchr.* 385 (2005) (canvassing scholarship that detailed the Cold War's effect on U.S. diplomacy with newly formed African nations).

137. See Krenn, *supra* note 136, at 165 (recounting "horror stories" of African diplomats seeking housing in Washington, D.C., in the 1960s); see also Isaacs, *supra* note 136, at 265–66 (similar); Romano, *supra* note 136, at 551–52 (similar).

they were denied access to public accommodations on Maryland's Route 40.¹³⁸ They repeatedly complained to the State Department and their home governments about this degrading treatment.¹³⁹ Racial segregation undermined the United States' position in the Cold War and provoked an important question: How could the United States preach about democracy abroad when it practiced racism at home?¹⁴⁰ Racial segregation fed Soviet propaganda machines and raised serious doubts in the newly independent countries about the United States' commitment to its creed.¹⁴¹

President John F. Kennedy had been relatively uninterested in desegregating public accommodations until he recognized how voluntary desegregation would improve the United States' image abroad.¹⁴² In September 1961, Kennedy penned a telegram read to 200 Maryland leaders in communities along the Route 40 highway, urging them to open service to "any American citizen or visitor from abroad."¹⁴³ In the telegram, Kennedy argued that this form of corporate racial responsibility was "basic to our moral strength . . . as the Nation possesses leadership in the world."¹⁴⁴ The Kennedy administration turned to the State Department for assistance in this project: Pedro Sanjuan, a Cuban American and the Assistant Chief of Protocol for the State Department, was asked to help lead "a pilot effort . . . to arouse local public sentiment in favor of voluntary desegregation in public eating and sleeping establishments."¹⁴⁵ Acting Secretary of State Chester Bowles also met with Maryland newspaper editors to arouse support for "the immediate voluntary desegregation of public accommodations in Maryland as requested by President Kennedy."¹⁴⁶ Yet the

138. Romano, *supra* note 136, at 551–52; see also U.S. Seeks Law to Stop Cafe Insults: Bias Called Worse Than Espionage, *Afro-Am. (Balt.)*, Sept. 23, 1961, at 20 ("[T]he much-travelled route between the United Nations in New York and the White House in Washington is through the State of Maryland, and it is here, as statistics prove, that the majority of these incidents are likely to take place . . ." (internal quotation marks omitted) (quoting State Department official Pedro Sanjuan)).

139. See Krenn, *supra* note 136, at 165–68 (detailing reports made by State Department officials on specific acts of discrimination against African diplomats).

140. See *id.* at 174–75 (noting that "communist propagandists were having a field day with each new incident involving an African diplomat").

141. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *Stan. L. Rev.* 61, 110–11 (1988) ("Racial segregation interfered with the Cold War imperative of winning the world over to democracy . . .").

142. See Krenn, *supra* note 136, at 167–71 (recalling the Kennedy Administration's efforts to desegregate businesses along Route 40 through a program of "voluntary cooperation").

143. *Maryland Gets Kennedy Plea on Bias*, *Wash. Post*, Sept. 26, 1961, at A4 (internal quotation marks omitted) (quoting a telegram from John F. Kennedy, U.S. President).

144. *Id.* (alteration in original) (internal quotation marks omitted) (quoting a telegram from John F. Kennedy, U.S. President).

145. *Id.*

146. Robert E. Baker, *Bowles Pleads With Md. Editors to Aid Cafe Bias Fight*, *Wash. Post*, Sept. 27, 1961, at B1.

Kennedy Administration's efforts fell short. Many business owners on Route 40 refused to desegregate voluntarily.¹⁴⁷ They feared the potentially negative economic impact of desegregation and resented what they viewed as federal interference in the public accommodations debate.¹⁴⁸ For them, segregation was profitable. Doing well, therefore, meant *not* "doing good."

So civil rights advocates in Maryland sought other means of racial redress. They launched protests at segregated public accommodations, but voluntary desegregation was both slow and piecemeal.¹⁴⁹ Public accommodations along Route 40 in Maryland were desegregated only after the enactment of civil rights legislation.¹⁵⁰

B. *Voluntary Desegregation in Practice: The Examples of Birmingham and Atlanta*

The civil rights protests in Birmingham, Alabama, produced some of the most dramatic moments in U.S. history. These protests also exposed the limitations of heavy reliance on corporate racial responsibility to desegregate public accommodations.

1. *Birmingham, Alabama.* — In 1962, Reverend Fred Shuttlesworth, a Birmingham civil rights leader and the founder of the Alabama Christian Movement for Human Rights (ACMHR), began negotiations with segregated merchants in downtown Birmingham.¹⁵¹ When negotiations did not secure full desegregation, he invited Martin Luther King, Jr., the president of the Southern Christian Leadership Conference (SCLC), to aid the Birmingham campaign.¹⁵² This alliance led to Project Confrontation (Project C): protests and boycotts of segregated downtown merchants.¹⁵³ An April 1963 protest landed King in jail.¹⁵⁴

In his *Letter From Birmingham Jail*, King highlighted the shortcomings of CSR in securing racial justice. King explained that months before SCLC and the ACMHR launched Project C, the ACMHR met with Birmingham's business leaders to desegregate downtown businesses.¹⁵⁵ King wrote, "In

147. See Romano, *supra* note 136, at 571–72.

148. *Id.* (quoting a restaurant owner who said he "wouldn't have a customer left" if he allowed the diplomats to dine there).

149. See *id.* at 572–73 (explaining the targeted sit-ins planned by civil rights advocates along Route 40 and highlighting that many restaurants proclaimed but failed to fulfill their promises to desegregate).

150. *Id.* at 574.

151. Martin Luther King, Jr., *Why We Can't Wait* 51–52 (Signet Classics mass-market ed. 2000) (1964) [hereinafter King, *Why We Can't Wait*].

152. *Id.* at 52–53. Shuttlesworth invited King to Birmingham because King had a national reputation and the ACMHR was SCLC's affiliate in Birmingham. *Id.*

153. *Id.* at 53–54.

154. *Id.* at 81–82.

155. *Id.* at 88.

the course of the negotiations, certain promises were made by the merchants—for example, to remove the stores' humiliating racial signs.¹⁵⁶ Upon receiving these promises, "Shuttlesworth and the leaders of the [ACMHR] agreed to a moratorium on all demonstrations."¹⁵⁷ But King, Shuttlesworth, and—indeed—the world saw the flaws of entrusting racial justice to the whims of merchants. King continued, "As the weeks and months went by, we realized that we were the victims of a broken promise. A few signs, briefly removed, returned; the others remained. As in so many past experiences, our hopes had been blasted, and the shadow of deep disappointment settled upon us."¹⁵⁸

King explained that the Birmingham activists also initiated an Easter boycott of downtown merchants to spur desegregation because "the Easter season . . . except for Christmas . . . [was] the main shopping period of the year" in Birmingham.¹⁵⁹ While the boycott put some financial pressure on these merchants and dramatized Black people's plight, it, too, failed to end Jim Crow in Birmingham.¹⁶⁰

King and other civil rights leaders turned to Birmingham's largest corporation, U.S. Steel, for assistance.¹⁶¹ Civil rights groups requested that U.S. Steel take a stand against segregation. The groups wrote in a letter to U.S. Steel: "It would be financially beneficial and ethically correct for you, and for the Birmingham community, if you supported . . . desegregation of public facilities . . ."¹⁶² Black activists also protested at the New York building occupied by U.S. Steel in October 1963 to condemn the company's failure to use its influence to advance civil rights.¹⁶³ These activists urged U.S. Steel to embrace its social responsibility to treat Black people as full citizens and with dignity. Roger M. Blough, Chairman of U.S. Steel, balked. He argued that "it was doubtful whether his company possessed sufficient power to influence attitudes on so controversial a subject as segregation in a Deep South community."¹⁶⁴ Moreover, he asserted that "for a corporation to attempt to exert any kind of economic compulsion to achieve a particular end in the social area seems to me to be quite beyond

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 89.

160. See Jackson, *supra* note 1, at 162–66 (detailing the negotiations following the Birmingham campaign, which did not produce a clear agreement).

161. See U.S. Steel Under Fire on Bama Fight, *N.Y. Amsterdam News*, May 4, 1963, at 31.

162. *Id.* (internal quotation marks omitted) (quoting a letter from civil rights organizations to Roger M. Blough, Chairman, U.S. Steel, and Leslie B. Worthington, President, U.S. Steel).

163. Group Here Pickets U.S. Steel Building, *N.Y. Times*, Oct. 1, 1963, at 23.

164. Andrew Hacker, Do Corporations Have a Social Duty?, *N.Y. Times Mag.*, Nov. 17, 1963, at 21, 21.

what a corporation should do.”¹⁶⁵ U.S. Steel saw its mandate as an economic one, not one of CSR.

The debate over CSR in Birmingham spotlighted what was now a much larger, national problem. In a *New York Times* article, *Do Corporations Have a Social Duty?*, Cornell University professor Andrew Hacker analyzed Americans’ competing visions over the roles corporations should play in ending racism. Hacker noted that U.S. Steel had been criticized for “not doing as much as it might to alleviate racial tensions in Birmingham.”¹⁶⁶ According to Hacker, the growing demands of the civil rights movement were challenging traditional ideas of a corporation’s purpose and responsibilities. For King and other civil rights activists, corporate governance issues were also civil rights issues.¹⁶⁷

Hacker emphasized that corporations typically selected the locations of their plants based on economic factors such as labor costs and proximity to their markets rather than race or racial issues.¹⁶⁸ On the other hand, Hacker said, “[T]here is a tacit agreement on the part of management to accept the prevailing customs of the community. In the case of U.S. Steel in Birmingham this meant abiding by the principle of segregation.”¹⁶⁹ Hacker explained that the public now knew U.S. Steel by the political company it kept. “U.S. Steel’s willingness to cooperate with the folkways of Birmingham actually served to strengthen those social patterns. For this reason the company’s officials cannot protest that they have been mere bystanders amid the racial controversy.”¹⁷⁰ According to Hacker, corporations like U.S. Steel did not need to defend segregation despite benefiting from it. “[They] can and should justify [their] position solely on economic grounds. Moreover, if corporation executives find themselves involved in politics, on however informal a basis, they ought at least to explain their involvement by pointing out that this promotes the best interests of the company that has hired them.”¹⁷¹

Hacker’s unapologetic embrace of shareholder primacy created a false distinction between “economic grounds” and considerations of race. Hence, he conveniently sidestepped the knottier question of how a corporation’s “economic” considerations had a real racial impact. In other words, racism and economics were intimately tied considerations, rather than separate and distinct, because U.S. Steel’s close ties to local politicians conferred greater legitimacy on Birmingham segregationists.

165. *Id.* (internal quotation marks omitted) (quoting Roger M. Blough).

166. *Id.*

167. *Id.* (“Today, large companies are caught on the firing line amid the civil-rights controversy . . .”).

168. *Id.*

169. *Id.* at 118.

170. *Id.*

171. *Id.*

Hacker's analysis also ignored how U.S. Steel could dismiss local racism owing to their corporate leaders' white privilege: Blough, and white U.S. Steel employees, did not have to suffer the humiliation of racism. Hacker resolved, "U.S. Steel's protest that its power in Birmingham did not extend beyond the plant gates has some validity to it, at least on a question as inflamed as race relations."¹⁷² But he left readers with a more pressing, and critical, normative question: Should corporations, even those that can shape local politics, have the same power in policy debates as ordinary citizens?¹⁷³

U.S. Steel did not wield its outsized political power to help desegregate public accommodations in Birmingham, nor did downtown Birmingham merchants desegregate voluntarily. SCLC and the ACMHR escalated their protests because CSR failed to solve the growing racial crisis.¹⁷⁴ Soon, the SCLC and ACMHR's peaceful protesters were met with incredible violence. Most infamously, Eugene "Bull" Connor, Birmingham's commissioner of public safety, unleashed snarling police dogs and high-pressure fire hoses on thousands of demonstrators. Many of those brutalized and jailed were children.¹⁷⁵ These horrific images of brutality in Birmingham became an international embarrassment for the country.¹⁷⁶

As protests in Birmingham raged, President Kennedy finally acted. He made a nationally televised speech in which he stated that ending Jim Crow was "a moral issue . . . as old as the scriptures and . . . as clear as the American Constitution."¹⁷⁷ He stressed that Jim Crow undermined the United States' "worldwide struggle" against communism.¹⁷⁸ But it was now evident, according to the President, that CSR was not enough to overcome these moral and foreign policy problems. During the speech, the President revealed that he had "recently met with scores of business leaders[,] urging them to take voluntary action to end this discrimination" across the

172. *Id.*

173. See *id.* ("The phrase 'corporate citizen' . . . assumes that the voice of a corporation and that of ordinary voters may be listened to with equal deference by those who make policy. Democracy takes on a curious form when both corporations and citizens are regarded as equal participants in the political process.")

174. See Jackson, *supra* note 1, at 155 (describing how SCLC first attempted to "win concessions on desegregation and hiring from downtown merchants" but changed tactics after demonstrations were brutally suppressed).

175. See Adam Fairclough, *To Redeem the Soul of America: The Southern Christian Leadership Conference & Martin Luther King, Jr.* 125–26 (1987) (detailing student participation in the Birmingham demonstrations and the ensuing police violence).

176. See *id.* at 126–27.

177. President John F. Kennedy, *Televised Address to the Nation on Civil Rights*, John F. Kennedy Presidential Libr. & Museum, at 04:13 (June 11, 1963), <https://www.jfklibrary.org/learn/about-jfk/historic-speeches/televised-address-to-the-nation-on-civil-rights> (on file with the *Columbia Law Review*) [hereinafter Kennedy, *Address to the Nation on Civil Rights*].

178. *Id.* at 01:24.

country.¹⁷⁹ While he was encouraged by some of their responses, many other business leaders still refused to desegregate public accommodations. Moreover, Kennedy found the “voluntary approach . . . insufficient to prevent the free flow of commerce from being arbitrarily and inefficiently restrained and distorted by discrimination in such establishments.”¹⁸⁰ The President declared, “[F]or this reason, nationwide legislation is needed” to end Jim Crow and the protests.¹⁸¹ He submitted to Congress what would become Title II of the Civil Rights Act of 1964.¹⁸²

2. *Atlanta, Georgia.* — What is most striking—and what might easily get overlooked—about the CSR debates leading up to Title II’s enactment is that voluntary desegregation had a vicious underside. CSR became a tool to undermine civil rights activists’ attempts to secure meaningful federal public accommodations legislation. The public accommodations debate in Atlanta illustrates this shortcoming.

In the mid-twentieth century, Atlanta was known as “a city too busy to hate.”¹⁸³ As the city’s nickname suggested, local leaders billed it as one so interested in economic development that it had no time to discriminate.¹⁸⁴ For these leaders, the fruits of racial moderation and economic prosperity were evident. Atlanta boasted one of America’s largest Black middle-class populations, had the world’s largest constellation of historically Black colleges, and was home to several prominent civil rights organizations.¹⁸⁵ In 1962, the city elected as its mayor Ivan Allen, Jr., the immediate past president of the Atlanta Chamber of Commerce and a racial moderate who cultivated the image of a city whose identity was intimately tied to CSR.¹⁸⁶

Allen credited an informal brokerage system for the city’s racial reputation. According to Allen, “Atlanta . . . coped with the race issue better than any other major city in America” because an interracial coalition of

179. *Id.* at 09:15.

180. Special Message to the Congress on Civil Rights and Job Opportunities, 1963 Pub. Papers 483, 486 (June 19, 1963).

181. Kennedy, Address to the Nation on Civil Rights, *supra* note 177, at 09:33; see also *id.* at 08:35 (“[I]n too many communities, in too many parts of the country, wrongs are inflicted on Negro citizens, and there are no remedies at law. Unless the Congress acts, their only remedy is the street.”).

182. See Special Message to the Congress on Civil Rights and Job Opportunities, *supra* note 180, at 484.

183. Virginia H. Hein, The Image of “A City Too Busy to Hate”: Atlanta in the 1960’s, 33 *Phylon* 205, 207 (1972).

184. See *id.* at 207–08 (describing Atlanta’s development strategy during the 1960s).

185. See *id.* at 210–11. See generally Ronald Baylor, *Race and the Shaping of Twentieth-Century Atlanta* (1996) (discussing the history of Atlanta race relations).

186. See Godfrey Hodgson, Obituary: Ivan Allen, *The Guardian* (July 9, 2003), <https://www.theguardian.com/news/2003/jul/10/guardianobituaries> [<https://perma.cc/3BLL-RJ9Z>] (describing Allen’s accomplishments on desegregation while serving as Atlanta’s mayor); International Civil Rights Walk of Fame: Ivan Allen, 1911–2003, Nat’l Park Serv., https://www.nps.gov/features/malu/feat0002/wof/ivan_allen.htm [<https://perma.cc/983Z-VVQF>] (last visited Oct. 24, 2023) (similar).

“responsible” business and civic leaders had been able to coax many segregated facilities into voluntary desegregation.¹⁸⁷ Atlanta’s desegregation was gradual in the early 1960s, but Allen boasted that voluntary desegregation had led to tangible results. In 1961, several lunch counters in department and variety stores voluntarily desegregated.¹⁸⁸ In 1962, many theaters voluntarily desegregated.¹⁸⁹ In 1963, eighteen hotels and motels and thirty restaurants voluntarily desegregated.¹⁹⁰ Allen held that other southern cities, like Little Rock, had struggled economically when their business communities did not take the lead in major racial clashes.¹⁹¹ Businesses and schools often closed during racial protests, and a city’s racial turmoil damaged its ability to attract outside investment.¹⁹² For Allen, voluntary desegregation could simultaneously advance race relations and business interests.

Local newspapers also played a significant role in branding Atlanta as “a city too busy to hate” and championing corporatist approaches to racial justice.¹⁹³ Eugene Patterson, editor of the *Atlanta Constitution*, was one of the country’s foremost advocates for voluntary desegregation. He believed that segregationists could be convinced that desegregation was the morally right thing to do and that “negotiation and persuasion” were essential tools for ensuring equal access to public accommodations.¹⁹⁴ Atlanta offered Patterson evidence. Patterson emphasized that Atlanta’s approach to desegregation had made the city a national leader, as once-segregated businesses were “moving voluntarily to meet their public responsibilities without being forced by law to do it.”¹⁹⁵

Nevertheless, Patterson’s faith in voluntarism posed real dangers for desegregationists. Although Patterson openly criticized segregationists and claimed to support civil rights, he, too, opposed Title II of the proposed Civil Rights Act. Patterson justified his position because of the “considerable voluntary progress . . . being made to desegregate hotels, theaters and restaurants,” arguing that “[n]o law should be passed unless there

187. See Ivan Allen, Jr. with Paul Hemphill, *Mayor: Notes on the Sixties* 90, 176 (1971).

188. *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Com., 88th Cong. 863* (1963) [hereinafter *Civil Rights—Public Accommodations Senate Hearings*] (statement of Ivan Allen, Jr., Mayor, Atlanta, Ga.).

189. *Id.*

190. Allen, *supra* note 187, at 107.

191. See *id.* at 52–53 (“Little Rock had virtually died on the vine when it failed to face the school-integration issue realistically four years earlier.”).

192. See *id.* at 53; see also David Andrew Harmon, *Beneath the Image of the Civil Rights Movement and Race Relations: Atlanta, Georgia, 1946–1981*, at 108–09 (1996) (explaining how a city’s racial violence could lead to economic hardships).

193. Hein, *supra* note 183, at 208.

194. Eugene Patterson, Editorial, *The Law Is Not Needed*, *Atlanta Const.*, June 21, 1963, at 4.

195. *Id.*

is an overriding need for it.”¹⁹⁶ He added, “Negotiation, persuasion and voluntary progress deserve—on their present scale in America—to continue. They are now yielding better results than would the proposed law which, if passed, could be thwarted by massive evasion.”¹⁹⁷

Georgia Governor Carl Sanders submitted similarly reasoned congressional testimony. Sanders stressed that although he opposed the federal public accommodations bill, he was not a segregationist.¹⁹⁸ He simply believed the proposed law would destroy individual rights and could open the door to “any other regulation of private business by the federal government.”¹⁹⁹ Furthermore, Sanders argued that a federal public accommodations law would actually undermine the recent racial progress.²⁰⁰ According to Sanders, race relations were improving without federal legislation, so federal intrusion in this area was unwise and untimely. He warned that if Congress enacted the proposed law, the law “would ‘put the cork in the bottle of mutual cooperation . . . erect barriers . . . and cause people now working to end discrimination to throw in the towel.’”²⁰¹

Although voluntary desegregation was mere gradualism, this process nonetheless sparked a white conservative backlash in Atlanta. Lester Maddox, a prominent restaurateur and ardent segregationist, formed an organization named “Georgians Unwilling to Surrender” to oppose public accommodations desegregation.²⁰² Maddox argued that Allen’s attempts to broker desegregation in downtown Atlanta were “a shameful capitulation to the [B]lack mobs.”²⁰³ He also ripped the purportedly “responsible members of the Atlanta Chamber of Commerce” for promoting desegregation,²⁰⁴ and he claimed that those in power were eager to infringe upon free enterprise, individual rights, and states’ rights to advance civil rights.²⁰⁵ Georgians Unwilling to Surrender held large public rallies at

196. *Id.*

197. *Id.*

198. Ted Lippman, *Bill Perils Gains, Says Sanders*, *Atlanta Const.*, July 31, 1963, at 1.

199. *Id.*

200. *See id.* (“[A] national law would cause people now working for an end to discrimination to quit and ‘leave it up to the government.’” (quoting Governor Carl Sanders)).

201. *Id.* (alterations in original) (quoting Governor Carl Sanders). Patterson publicly praised Sanders’s stance and depicted Sanders’s views as racially progressive. Eugene Patterson, *Editorial, A Question of Self-Adjustment*, *Atlanta Const.*, July 31, 1963, at 4 (stating that Sanders did not oppose the bill “on the old, empty ground that racial discrimination is all right . . . [but] on the ground that Georgia is in a self-adjusting condition, on a voluntary basis”).

202. Kevin M. Kruse, *White Flight: Atlanta and the Making of Modern Conservatism 195–97* (2005). Maddox was later able to generate a larger white backlash to civil rights gains in Georgia, and he became governor of the state in 1967. *See id.* at 233–34.

203. *Id.* at 198–99.

204. *See* Lester Maddox, *Pickrick Says*, *Atlanta Const.*, Jan. 21, 1961, at 5.

205. *See id.*

which speakers red-baited the city's political and business leaders, urging attendees to "save our country from collectivism and socialism."²⁰⁶

As voluntary desegregation at hotels and restaurants moved slowly in Atlanta, some of the city's civil rights activists found new ways to force more critical discussions on corporate legal responsibility. For these activists, while voluntary desegregation was one way to temporarily ease bigots' grip on the city, it was no substitute for public accommodations legislation.²⁰⁷ In fact, simple reliance on voluntary segregation seemed to suggest that Black people should wait for a more favorable day when white people changed their minds and decided to give Black people first-class citizenship.²⁰⁸

In late 1963 and early 1964, the Student Nonviolent Coordinating Committee (SNCC) led a new, more radical series of protests in Atlanta.²⁰⁹ The activists targeted segregated hotels, motels, and restaurants as well as Allen himself.²¹⁰ During one protest, scores of student demonstrators "play[ed] hooky for freedom" and descended upon downtown.²¹¹ The organizers urged students to "join the March on Atlanta [to] learn civics in the streets, history at the counters, and teach Mayor Allen democracy."²¹² After weeks of mass demonstrations and arrests, Allen condemned the allegedly "irresponsible elements" in the city's civil rights community and called for a "cooling off period" to "guarantee racial harmony."²¹³ The most militant demonstrators refused to relent.²¹⁴ Yet local civil rights activists had already made their point before the nation and, indeed, the world:²¹⁵ The city was not as progressive as advertised, and business owners should no longer dictate the timetable for racial justice.

206. 700 Hear Attack on Integration, Atlanta Const., Dec. 7, 1960, at 18 (internal quotation marks omitted) (quoting Representative Dale Alford).

207. Marion Gaines, Negroes Ask Aldermen to Vote Integration of Public Places, Atlanta Const., Nov. 28, 1963, at 16A.

208. See SNCC, Demonstrations Gain Additional Support, Student Voice (Atlanta, Ga.), Feb. 3, 1964, at 1. After Allen deplored civil rights demonstrations and called for more reliance on voluntary desegregation, activist Wyatt Tee Walker responded, "[I]f we waited for voluntary action, most of us would still be picking cotton." *Id.*; see also King, Why We Can't Wait, supra note 151, at 91–93 (describing the dignitary harms caused by relying on voluntarism).

209. Brown-Nagin, supra note 33, at 221–24.

210. Winston A. Grady-Willis, Challenging U.S. Apartheid: Atlanta and Black Struggles for Human Rights, 1960–1977, at 43–44, 46 (2006).

211. *Id.* at 44.

212. Lovelace, supra note 120, at 397 (alteration in original) (internal quotation marks omitted) (quoting News Release, SNCC, Now Is the Time for Action (Jan. 1964), microformed on SNCC Papers, 1959–1972, No. A:VIII:105 (Univ. Microforms Int'l)).

213. Stanley S. Scott, Allen Asks "Cooling Off Period" With Program to "Guarantee Racial Harmony", Atlanta Daily World, Jan. 30, 1964, at 1.

214. Marion Gaines, Allen Calls for a 30-Day Halt in Integration Demonstrations, Atlanta Const., Jan. 30, 1964, at 6.

215. Lovelace, supra note 120, at 417–19.

Local developments during the sit-in movement compelled Allen to reconsider his sole reliance on voluntary desegregation.²¹⁶ Some segregationists could never be persuaded into opening their businesses to all people.²¹⁷ Allen had learned a crucial lesson along the way. Making desegregation optional implicitly endorsed the idea that business owners had a right to discriminate racially.²¹⁸ Allen was also deeply concerned that without public accommodations legislation, some businesses might “slip backwards” and resegregate if business owners lost their commitments to racial progress.²¹⁹ Moreover, with Atlanta’s image in the balance and the ever-present threats of sit-ins and social turmoil, Allen realized that Atlanta needed much more than CSR to end the racial crisis. Atlanta, like the rest of the South, needed the federal government to intervene.²²⁰

C. *The Triumph of Title II*

The tension between racial justice and the alleged sanctity of private property was at the heart of Congress’s debates over Title II of the Civil Rights Act of 1964. Everett Dirksen, a Republican Senator from Illinois and Senate Minority Leader, argued, characteristically, that Congress lacked the authority to pass Title II. Dirksen called any congressional attempt to “force business . . . to accept integration a violation of constitutional protection of property rights.”²²¹ In this argument, Dirksen found common cause with congressmen such as Strom Thurmond, Barry Goldwater, and James Eastland—politicians whose views on racial justice and property rights have appropriately cast them in a dismal historical light.²²²

Mayor Allen testified before the Senate Commerce Committee in support of Title II and was the only southern mayor to do so.²²³ In his testimony, he praised the strides Atlanta had made in public accommodations,

216. Brown-Nagin, *supra* note 33, at 247–48.

217. See *id.* at 248 (explaining that although there was some voluntary desegregation in Atlanta, “segregation endured in the city as a whole” until “the Civil Rights Act . . . forced the desegregation of public accommodations”).

218. See Richard L. Lyons, *Atlanta Mayor Backs New Rights Laws*, *Wash. Post*, July 27, 1963, at A2 (“Failure to pass this bill . . . would amount, by inference, to an indorsement [sic] of private business setting up an entirely new status of discrimination throughout the Nation.” (internal quotation marks omitted) (quoting Mayor Ivan Allen, Jr.)).

219. See *id.*

220. See *id.*

221. Marjorie Hunter, *Dirksen Imperils Civil Rights Plan*, *N.Y. Times*, June 18, 1963, at 1; see also Al Kuettner, *29 States Already Have Strong Rights Laws, but They’re Snubbed*, *Chi. Daily Def.*, Aug. 1, 1963, at 6 (describing de facto segregation in northern cities despite those cities’ antidiscrimination laws).

222. See 110 Cong. Rec. 14511 (1964) (roll call vote on the Civil Rights Act of 1964, H.R. 7152, 88th Cong., showing that Thurmond, Goldwater, and Eastland opposed the bill).

223. *Civil Rights—Public Accommodations Senate Hearings*, *supra* note 188, at 861 (statement of Ivan Allen, Jr., Mayor, Atlanta, Ga.).

but he emphasized that voluntary desegregation had its limits.²²⁴ His experiences in Atlanta were instructive. Allen stressed that the current battles over voluntary desegregation frustrated many local business owners and slowed racial progress.²²⁵ Voluntary desegregation was a socially explosive issue that placed these business owners in the debate's crosshairs.²²⁶ They were forced to choose a side in the controversy. Allen testified that many Atlanta business owners actually believed federal public accommodations legislation was the answer to their dilemma. Federal legislation would speed desegregation because all business owners would be forced to comply with the desegregation mandate despite their personal feelings.²²⁷ Further, demonstrations often forced public establishments to close for the day, and major businesses rarely wanted to be located in cities with major social disruptions. He declared that without federal legislation, America would recycle "the old turmoil of riots, strife, demonstrations, boycotts, and picketing."²²⁸

On the other side of the debate, the Atlanta Chamber of Commerce submitted a statement to the Senate Commerce Committee, adopted by the Chamber's board of directors in May 1963, in opposition to the Civil Rights bill and in support of voluntary desegregation of public accommodations.²²⁹ The policy had "recognized the inherent right of a proprietor to make his own management decisions as to the use of his property by stating[:] . . . 'The chamber of commerce will never allow itself to be placed in the position of trying to tell any proprietor how he should conduct his business'"²³⁰ The policy did not, however, back down in its support for voluntary desegregation: "The board of directors of the Atlanta Chamber of Commerce appeals to all businesses soliciting business from the general public to do so without regard to race, color, or creed and to do so as expeditiously as good judgment will dictate"²³¹ Reflecting on that statement, the Committee said:

Consistent with its earlier stand for local and voluntary elimination of discrimination, the [Atlanta Chamber of Commerce] opposes passage of H.R. 7152, the proposed civil rights bill as at present drafted. The bill is calculated to narrow the role of voluntary action and to substitute the force of the Federal

224. See *id.* at 862–63.

225. See *id.* at 869–70.

226. See *id.*

227. See *id.*

228. *Id.* at 865.

229. *Id.* at 974 (statement of the Atlanta Chamber of Com.).

230. *Id.* (second and third alterations in original) (quoting Atlanta Chamber of Com., Statement of Policy on the Subject of Discrimination in Public Accommodations (May 29, 1963)).

231. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Atlanta Chamber of Com., Statement of Policy on the Subject of Discrimination in Public Accommodations (May 29, 1963)).

Government, posing a grave threat to local responsibility and personal freedom which far outweighs any possible improvement in the opportunities of minority groups. The [Atlanta Chamber of Commerce] finds particularly objectionable that section which would deprive purely private business enterprises of the right to serve or refuse service to whomever they please.²³²

Other chambers of commerce submitted statements against the bill. The Atlanta Junior Chamber of Commerce declared that the bill “would deny and negate the fundamental principle of free enterprise that allows a businessman to choose his customers and to select the economic and social groups that he will cater to and do business with.”²³³ The statement continued, “The question whether a business should discriminate upon color, race, social, or, indeed for any other reason, is peculiarly one of good business and moral judgment to be decided by the individual businessman.”²³⁴ The South Carolina State Chamber of Commerce criticized the bill for being a serious encroachment upon states’ rights, private property rights, and individual rights.²³⁵ The chamber’s statement also interjected voluntary desegregation into the debate. It concluded, “[T]he Federal Government should take action only on those problems which cannot be solved either by voluntary effort or by local or State governments. In the present situation, we believe that emotionally inspired legislation would aggravate rather than resolve the problem.”²³⁶

Burke Marshall, Assistant Attorney General for Civil Rights at the U.S. Department of Justice, testified before the Senate Commerce Committee in support of Title II.²³⁷ Marshall maintained that “[p]ersuasion will not solve the problem in a locality where all establishments but one want to desegregate, but cannot do so for fear of giving a competitive advantage, in increased white trade, to the one exception.”²³⁸ Marshall recognized desegregation’s collective action problem. Had there been a Civil Rights Act, he maintained, “the demonstrations [in Birmingham] would not have had to take place.”²³⁹

Leaders in the private sector convened in Washington during the Title II debates, and they too acknowledged CSR’s limits. President Kennedy invited the Business Council, self-described as a group of “responsible” businessmen, to the White House to discuss the nation’s segregation woes.²⁴⁰ In his comments to this group, which included many of

232. *Id.*

233. *Id.* (statement of the Atlanta Junior Chamber of Com.).

234. *Id.*

235. *Id.* at 1099 (statement of the S.C. State Chamber of Com.).

236. *Id.*

237. *Id.* at 205 (statement of Burke Marshall, Assistant Att’y Gen., C.R. Div., DOJ).

238. *Id.* at 206.

239. *Id.* at 215.

240. Businessmen Hear JFK on Rights, Wash. Post, July 12, 1963, at A10.

the nation's most prominent business voices, Kennedy declared that more robust federal efforts were necessary to end the most critical issue facing the country.²⁴¹ The Business Council's chairman agreed that while business might have a role in advancing racial justice, CSR alone could not solve America's racial problems.²⁴²

More "responsible" business leaders joined the fray. For example, Earl B. Schwulst, the Chairman of the Board of Directors of the Bowery Savings Bank, told a National Association of Real Estate Brokers meeting that "[p]roperty rights are always subject to human rights as evidenced by instance after instance of jurisprudence in this country."²⁴³ He continued, "No man can use property rights as a shield from behind which he can affront human dignity at will and insult a fellow citizen . . . who wishes merely to give him the patronage which he holds himself out as eagerly seeking from the public."²⁴⁴

U.S. Attorney General Robert F. Kennedy shared this sentiment in his testimony before the Senate Commerce Committee. He lamented that the pursuit of desegregation through "channels of voluntary cooperation" was not a completely effective means of ending racial segregation in public accommodations.²⁴⁵ The time for relying solely on corporate racial responsibility was over. The Attorney General stated that "the Federal Government has a clear responsibility to help put a stop to discrimination."²⁴⁶

One of the most persuasive critics of sole reliance on voluntary desegregation was U.S. Secretary of State Dean Rusk. His testimony before the Senate Commerce Committee highlighted the moral and foreign policy problems caused by segregation. He announced to Congress that a public establishment's denying service to diplomats of color was an affront to human dignity and violated the Vienna Convention on Diplomatic Relations, which codified that diplomats must be treated with due respect, freedom, and dignity.²⁴⁷ Rusk added that the United States' prestige abroad suffered due to the "treatment of nonwhite diplomats and visitors to the United States" in the nation's public accommodations.²⁴⁸ For Rusk, if America was truly the most exceptional country in the world, then Congress needed to pass legislation that recognized non-U.S. citizens of color as stakeholders in the public

241. *Id.*

242. See *id.* (quoting the Business Council chair as saying "[every] responsible businessman . . . is interested in finding a solution to [the problem of segregation]" and "[i]t is not only a government problem—it is a civic problem").

243. Editorial, *Who Helps Public Accommodations Bill?*, *Atlanta Const.*, Sept. 27, 1963, at 4 (internal quotation marks omitted) (quoting Earl B. Schwulst).

244. *Id.* (internal quotation marks omitted) (quoting Earl B. Schwulst)

245. *Civil Rights—Public Accommodations Senate Hearings*, *supra* note 188, at 22 (statement of Robert F. Kennedy, U.S. Att'y Gen.).

246. *Id.*

247. *Id.* at 283 (statement of Dean Rusk, U.S. Sec'y of State).

248. See *id.*

accommodations debate, too. Other members of the Kennedy Administration also testified before Congress. Sanjuan, for example, explained how the diplomatic incidents on Route 40 illustrated the need for public accommodations legislation.²⁴⁹

Roy Wilkins, Executive Secretary of the NAACP, blasted the heavy reliance on CSR in his congressional testimony. He criticized the continued calls for Black people to wait for changes in “men’s hearts” or an establishment’s “voluntary action.”²⁵⁰ Wilkins stated that Black people were citizens who had “done everything for their country that has been asked of them, even to standing back and waiting patiently, under pressure and persecution, for that which they should have had at the very beginning of their citizenship,” and that they were no longer prepared to wait patiently.²⁵¹ He testified that Black people were not impressed with the arguments that demonstrations were “hurting their cause” or that public accommodations legislation was an invasion of property rights.²⁵² He said it was “ironical that a proponent of this argument should be a representative of the State of Abraham Lincoln” (referring to Senator Dirksen of Illinois) because the same argument was used 100 years prior to oppose emancipation of the enslaved.²⁵³ Black people “ha[ve] been waiting upon voluntary action since 1876. . . . If the Thirteen Colonies had waited for voluntary action by England, this land today would be a part of the British Commonwealth.”²⁵⁴

The Senate Commerce Committee agreed with the assessments that corporate social responsibility was not enough to ensure full desegregation. A report from the Senate Commerce Committee included a quote from Mayor Allen’s testimony that discussed the role of businesses:

Surely the Congress realizes that after having failed to take any definite action on this subject in the last 10 years, to fail to pass this bill would amount to an endorsement of private business setting up an entirely new status of discrimination throughout the Nation. Cities like Atlanta might slip backward.

Hotels and restaurants that have already taken this issue upon themselves and opened their doors might find it convenient to go back to the old status. Failure by Congress to take definite action at this time is by inference an endorsement of the right of private business to practice racial discrimination and, in my opinion, would start the same old round of squabbles and demonstrations that we have had in the past.²⁵⁵

249. See Stephen E. Nordlinger, *Racial-Bills Hearing Held*, *Balt. Sun*, Jan. 30, 1963, at 21.

250. *Civil Rights—Public Accommodations Senate Hearings*, *supra* note 188, at 659 (statement of Roy Wilkins, Exec. Sec’y, NAACP).

251. *Id.* at 637.

252. See *id.* at 658 (internal quotation marks omitted).

253. *Id.*

254. *Id.* at 659.

255. S. Rep. No. 88-872, at 15 (1964) (quoting *Civil Rights—Public Accommodations Senate Hearings*, *supra* note 188, at 866 (statement of Ivan Allen, Jr., Mayor, Atlanta, Ga.)).

On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act into law.²⁵⁶ As Johnson signed the Act, he advanced a bold moral vision for corporate governance. He proclaimed that Title II now mandated that “those who are equal before God shall now also be equal . . . in hotels, and restaurants, and movie theaters and other places that provide service to the public.”²⁵⁷ Title II’s passage rejected a patchwork, corporate-dependent approach to racial justice and installed a powerful federal framework requiring business owners to respect Black customers’ dignity. More importantly for Johnson and much of Congress, Title II’s enactment showed those at home and abroad that the United States was actually seeking to live up to its creed.

* * * *

The U.S. Supreme Court upheld Title II in *Heart of Atlanta Motel v. United States*²⁵⁸ and *Katzenbach v. McClung*.²⁵⁹ These cases stemmed from the struggle to desegregate public accommodations in the Atlanta and Birmingham movements, respectively.²⁶⁰ In both cases, the Court declared that Congress had the constitutional authority to regulate interstate commerce and that the Act was a reasonable and appropriate means to remedy segregation’s burden on interstate commerce.²⁶¹

The Court emphasized that Congress had compiled an extensive record showing how segregated public accommodations caused myriad national social problems. In *Heart of Atlanta Motel*, for example, the Court explained that as millions of Americans of all races traveled the country, Black people in particular faced racial discrimination in transient accommodations.²⁶² Black people often had to travel long distances to find accommodations, and Black travelers even went as far as consulting “a special guidebook,” the *Green Book*,²⁶³ to find businesses that would serve them.²⁶⁴ Nonetheless, public accommodations discrimination persisted.²⁶⁵ The Court’s decision dealt a death blow to Jim Crow in public accommodations.

256. Civil Rights Act (1964), Nat’l Archives, <https://www.archives.gov/milestone-documents/civil-rights-act> [<https://perma.cc/272U-7N6V>] (last visited Oct. 24, 2023).

257. President Lyndon B. Johnson, Remarks Upon Signing the Civil Rights Act of 1964 (July 2, 1964), Libr. of Cong., at 05:02, <https://www.loc.gov/exhibits/civil-rights-act/multimedia/johnson-signing-remarks.html> (on file with the *Columbia Law Review*).

258. See 379 U.S. 241, 261 (1964).

259. See 379 U.S. 294, 305 (1964).

260. *Katzenbach*, 379 U.S. at 296–97; *Heart of Atlanta Motel*, 379 U.S. at 243–44.

261. See *Katzenbach*, 379 U.S. at 304–05; *Heart of Atlanta Motel*, 379 U.S. at 261–62.

262. *Heart of Atlanta Motel*, 379 U.S. at 252–53.

263. See *supra* notes 126–128 and accompanying text.

264. *Heart of Atlanta Motel*, 379 U.S. at 252–53.

265. *Id.*

Moreover, these decisions made clear the implications of the nation's experiment with CSR. Localities throughout the country had tested voluntary desegregation for years, and this approach had shown that corporations could not solve the nation's public accommodations problem. In fact, this approach had proven to be a nationwide failure. Ultimately, federal action, not CSR, had ensured racial justice in this defining phase of the civil rights movement.

III. CRITIQUING CORPORATE RACIAL RESPONSIBILITY

In hindsight, the failures of CSR and voluntary desegregation are unsurprising. As desegregation strategies, they asked Black people to accept piecemeal recognition of their humanity and dignity. Those who favored CSR as a way to end segregation of public accommodations framed it as a positive way to engage firms in the civil rights movement and achieve corporate commitment to a fraught social proposition. But for Black people and civil rights activists, CSR was a corporate-centric approach that subordinated racial equity to the protection of corporate interests and preferences. As such, CSR as it was promoted during the civil rights era was less about firms' consideration of racial equity beyond their legal obligations and more about a veneer to defend corporate preferences and profitability at the expense of Black citizens' rights and true racial equity.

Today, as during the civil rights era, corporations are being asked to play a pivotal role in efforts to achieve racial equity. And once again, corporate engagement in pressing matters of racial equity and justice is being framed as an appeal to CSR. But a closer look at contemporary corporate engagement in racial equity reveals that today's approach echoes many of the problems evident during the civil rights era, and this time, it is arguably more insidious. Corporations have pledged support for the BLM movement, launching advertising and social media campaigns to demonstrate their commitment.²⁶⁶ These displays often earn corporations considerable goodwill with consumers and even some lawmakers, which can translate to increased profitability.²⁶⁷ Yet these same corporations are major donors to politicians and interest groups that denounce BLM and its core movement

266. See *supra* notes 110–118 and accompanying text.

267. See Shannon Bond, *Senate Democrats Urge Google to Investigate Racial Bias in Its Tools and the Company*, NPR (June 2, 2021), <https://www.npr.org/2021/06/02/1002525048/senate-democrats-to-google-investigate-racial-bias-in-your-tools-and-company> [<https://perma.cc/F6UE-NQMT>] (reporting on senators' attempts to hold Google to its previous commitments to racial justice); Nat Ives, *Consumers Are More Likely to Use or Drop Brands Based on Racial Justice Response, Survey Finds*, Wall St. J. (May 6, 2021), <https://www.wsj.com/articles/consumers-are-more-likely-to-use-or-drop-brands-based-on-racial-justice-response-survey-finds-11620333257> (on file with the *Columbia Law Review*) (“Some 42% of [surveyed consumers] said they had started or stopped using a brand in the past year because of its response to protests against racial injustice . . .”).

principles.²⁶⁸ Or they may lobby against legislation to improve the lives of their marginalized employees.²⁶⁹ Corporations are therefore able to benefit from the commodification of the racial identities of Black and Brown citizens without making any meaningful changes to the internal corporate or external societal structures that create and reinforce racial inequity.

Contemporary critiques of corporate racial responsibility come from both those who believe corporations should not be engaged in racial equity and those who believe corporations are not doing nearly enough. Part III engages with each of these critiques, but it also argues that they miss the point. While these critiques derive from different—and to some extent opposed—political stances, they ignore the lessons from the civil rights era and misconstrue the most pressing shortcomings of corporate engagement in racial equity. One such lesson is that corporate racial responsibility—as implemented both today and in the past—is a market-fundamentalist approach to racial equity that subordinates human dignity to corporate interests and dilutes progress to true racial equity. Further, corporate racial responsibility’s corporate-centric focus means businesses are focused on extracting value from marginalized communities and, as much as possible, limiting their potential liability for racial discrimination rather than enacting meaningful structural changes.

A. *The Contemporary Debate on Corporate Racial Responsibility*

The modern inclusion of racial equity within CSR has not been universally lauded. Indeed, in the years since corporations pledged support for BLM and other racial equity and justice initiatives, there has been considerable backlash against this support.²⁷⁰ While there are several criticisms

268. For example, Amazon, AT&T, Disney, and Walmart have all made public commitments to racial justice. But each donated, either directly or indirectly, to the reelection campaign of Florida Governor Ron DeSantis, who has supported and passed laws limiting how race can be taught in public schools. David Smith, DeSantis’s Corporate Donors Under Fire for ‘Hypocrisy’ Over Black History Month, *The Guardian* (Feb. 13, 2023), <https://www.theguardian.com/us-news/2023/feb/13/desantis-political-donations-black-history-month> (on file with the *Columbia Law Review*).

269. See, e.g., Tony Romm, Corporate America Launches Massive Lobbying Blitz to Kill Key Parts of Democrats’ \$3.5 Trillion Economic Plan, *Wash. Post* (Aug. 31, 2021), <https://www.washingtonpost.com/us-policy/2021/08/31/business-lobbying-democrats-reconciliation/> (on file with the *Columbia Law Review*) (reporting that lobbyists representing large corporations, including Pfizer and Disney, opposed a budget proposal that would expand social welfare programs).

270. See Andrew Edgecliffe-Johnson, ‘Woke Capitalists’ Provoke Backlash From US Conservatives, *Fin. Times* (May 22, 2021), <https://www.ft.com/content/42989bc5-fd8e-4915-a6c0-41a9e22351e7> (on file with the *Columbia Law Review*) (“A right-leaning group called Consumers Research this week announced a \$1m-plus advertising campaign targeting companies which, it said, were ‘putting woke politics over consumer interests.’” (quoting Consumer First Initiative: Protecting Consumers From Woke Companies, Consumers’ Rsch., <https://consumersresearch.org/consumersfirst/> [<https://perma.cc/X6GM-Y8VW>] (last visited Feb. 10, 2024))).

of corporate racial responsibility, this section focuses on three: first, on the most negative end of the spectrum, the critique that corporate racial responsibility is evidence of a progressive “woke agenda” overtaking society; second, from those who believe that—despite the rhetoric—shareholder primacy prevails, the belief that corporate racial responsibility may negatively affect corporate profitability; and third, from those who are skeptical of but not necessarily opposed to corporate racial responsibility, the criticism that it is insincere and nothing more than “cheap talk.”

1. *The “Woke” Corporate Purpose.* — One of the most strident critiques against corporate racial responsibility is that it is an improper and unjustified extension of corporate purpose to engage in matters such as race. This camp includes those who accuse corporations of acquiescing to progressive demands and others who are concerned that racial equity initiatives are unmoored from the corporation’s main purpose—shareholder wealth maximization.²⁷¹ For these critics, corporate racial equity is problematic because it ignores basic economic principles of profit maximization and represents corporate capitulation to liberal, “woke” ideologies.²⁷²

First, this critique implies that corporate engagement in race issues is a new development, but as this Article has shown, that is inaccurate. To many critics, corporate support for racial equity is a recent response to the BLM movement and the 2020 protests for George Floyd and Breonna Taylor.²⁷³ But because businesses are focal points for change, activists and others have often sought corporate participation to achieve change. This was as true in the 1970s with antiwar protests²⁷⁴ as it is today with demands that businesses make amends for their exclusion of Black people from corporate spaces. And as detailed in Part II, civil rights activists and local leaders in the South asked businesses to desegregate voluntarily, calling on them to embrace their corporate social responsibilities to Black patrons

271. See, e.g., Heritage Explains, *Woke Corporate Capitalism*, Heritage Found., at 03:24 (Apr. 11, 2021), <https://www.heritage.org/progressivism/heritage-explains/woke-corporate-capitalism> [<https://perma.cc/B2VT-PHXY>] (discussing a perceived trend wherein corporations “are willingly becoming activated political arms for left-wing causes”).

272. See, e.g., Jessica Guynn, ‘Woke Mind Virus?’ ‘Corporate Wokeness?’ Why Red America Has Declared War on Corporate America, *USA Today* (Jan. 4, 2023), <https://www.usatoday.com/story/money/2023/01/04/desantis-republicans-woke-big-business-war/10947073002/> [<https://perma.cc/MFES-K7YT>] (last updated Jan. 5, 2023) (quoting Florida Governor DeSantis as stating that “[w]e will never surrender to the woke mob”).

273. See Ben White, *Corporate America Got More ‘Woke.’ Will It Last?*, *Politico* (May 25, 2021), <https://www.politico.com/news/2021/05/25/george-floyd-death-corporate-america-diversity-490016> [<https://perma.cc/2CRD-3AGJ>] (“The traditional position of corporate America, especially the Fortune 500, is anodyne centrism. That became untenable over the past 12 months.”).

274. See, e.g., *Napalm and the Dow Chemical Company*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/two-days-in-october-dow-chemical-and-use-napalm/> [<https://perma.cc/9M8B-UGKQ>] (last visited Oct. 24, 2023) (describing student protests against Dow Chemical during the Vietnam War).

and employees.²⁷⁵ Those demands closely resemble the demands being made on corporations today. Additionally, what is particularly interesting is that the contemporary resistance to corporate racial responsibility on the grounds of “wokeness” mirrors segregationists’ resistance during the civil rights era.²⁷⁶ Just as segregationists—such as former Georgia Governor Lester Maddox—argued against businesses caving to civil rights activists’ demands, so too are politicians today—such as Florida Governor Ron DeSantis—refusing to surrender.²⁷⁷ Thus, neither the demands nor the critiques of today are new. They instead echo in significant ways the discourse during the struggle for desegregation.

Second, this critique assumes that only progressive voices favor CSR.²⁷⁸ During the civil rights era, it was not only civil rights activists who encouraged businesses to consider voluntary desegregation. Some policy-makers and local proprietors who believed in segregation or, at a minimum, a business owner’s right to decide to remain segregated also pushed CSR. These actors were far from progressive but favored discretionary and voluntary desegregation for businesses.²⁷⁹ History thus demonstrates that encouraging businesses to participate in corporate racial responsibility was not simply a progressive issue. Rather, actors along the political spectrum saw value in businesses engaging in CSR in the form of voluntary desegregation, particularly as a way to avoid federal intervention.²⁸⁰

A similar dynamic is at play today. Many corporations that have positively supported corporate racial equity are under the same leadership and management that adopted and continue to engage in practices that hurt their vulnerable stakeholders. Although Amazon made substantial racial

275. See, e.g., *supra* note 23 and accompanying text (describing activists’ attempts to convince businesses to voluntarily desegregate in Nashville).

276. See *supra* text accompanying notes 202–206.

277. See *supra* note 272.

278. Contemporary criticism of CSR is primarily from right-leaning people and entities who view prosocial activities as beyond the proper purpose of the corporation. See, e.g., Laurent Belsie, *Are Corporations Going Liberal? Conservative Pushback on the Rise*, *Christian Sci. Monitor* (Apr. 26, 2023), <https://www.csmonitor.com/Business/2023/0426/Are-corporations-going-liberal-Conservative-pushback-on-the-rise> [<https://perma.cc/FC4B-SBC5>] (describing an alliance of nineteen Republican governors who aim to “push back against . . . [the] ESG agenda”); Press Release, House Comm. on Oversight & Accountability, *Comer: ESG Is Just Window Dressing for Liberal Activism and Far-Left Ideology* (May 10, 2023), <https://oversight.house.gov/release/comer-esg-is-just-window-dressing-for-liberal-activism-and-far-left-ideology> [<https://perma.cc/35ZS-BZTZ>] (“ESG commitments are often . . . used to force businesses to comply to a far-left ideology.”). But see Max Zahn, *What Is ESG Investing and Why Are Some Republicans Criticizing It?*, *ABC News* (Feb. 15, 2023), <https://abcnews.go.com/Business/esg-investing-republicans-criticizing/story?id=97035891> [<https://perma.cc/M5QQ-3G3Z>] (explaining that while most ESG critics are politically conservative, there are some progressive critics as well).

279. See *supra* text accompanying notes 225–236 (discussing some business leaders’ and policymakers’ preference for voluntary desegregation).

280. For more detailed analysis of this point, see *supra* section II.B.2.

equity commitments,²⁸¹ the corporation also withered under searing criticism for its policies that many have described as anti-Black.²⁸² For example, in 2020, Black employees were the largest group among Amazon's field and customer support employees, accounting for 31% of the workforce.²⁸³ In contrast, during the same time period, only 3.9% of Amazon's senior leadership was Black.²⁸⁴ Additionally, Amazon has strong ties to policing, providing police departments with facial recognition software that has falsely identified people of color with mugshots.²⁸⁵ Further, in the same year Amazon pledged support for Black lives, it donated over \$100,000 to the Republican State Leadership Committee (RSLC),²⁸⁶ which supported several candidates vehemently opposed to the BLM movement and corporate racial responsibility.²⁸⁷ Troublingly, given the opacity of campaign finance in the United States, the true depth of Amazon's giving to comparable political organizations is unknown.²⁸⁸

281. See Sean Keane, Further Tech Giants Pledge Funds, Voice to Fight Racial Injustice, CNET (June 4, 2020), <https://www.cnet.com/news/politics/tech-giants-pledge-funds-to-fight-racial-injustice-facebook-amazon-google> [<https://perma.cc/NNN6-PTE4>] (noting that Amazon pledged \$10 million toward social and racial justice causes).

282. See, e.g., Jason Del Rey, Bias, Disrespect, and Demotions: Black Employees Say Amazon Has a Race Problem, Vox (Feb. 26, 2021), <https://www.vox.com/recode/2021/2/26/22297554/amazon-race-black-diversity-inclusion> [<https://perma.cc/7KSF-6UE3>] (“Black [Amazon] employees receive ‘least effective’ marks more often than all other colleagues and are promoted at a lower rate than non-Black peers.”).

283. Our Workforce Data, Amazon, <https://www.aboutamazon.com/news/workplace/our-workforce-data> [<https://perma.cc/7HVG-KQX3>] (last visited Oct. 23, 2023). In 2020, Amazon's field and customer support workforce had 31.3% Black employees compared to 28.8% white employees and 26.4% Latine employees. *Id.*

284. *Id.*

285. See Jacob Snow, Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots, ACLU (July 26, 2018), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28> [<https://perma.cc/MXQ8-S62T>] (“[T]he software incorrectly matched 28 members of Congress, identifying them as other people who have been arrested for a crime. . . . The false matches were disproportionately of people of color, including six members of the Congressional Black Caucus, among them civil rights legend Rep. John Lewis (D-Ga.).”).

286. See Ctr. for Pol. Accountability, Corporate Enablers: Who Are the Leading Bankrollers of Voter Suppression Legislation? 35 (2021), <https://www.politicalaccountability.net/wp-content/uploads/2021/07/Corporate-Enablers.pdf> [<https://perma.cc/F7N6-QRES>] (showing that Amazon donated \$116,681 to the RSLC during the 2020 election cycle).

287. See Julia Manchester & Juliegrace Brufke, GOP Seizes on ‘Defund the Police’ to Galvanize Base, The Hill (June 27, 2020), <https://thehill.com/homenews/campaign/504805-gop-seizes-on-defund-the-police-to-galvanize-base/> (on file with the *Columbia Law Review*) (highlighting the RSLC's role in releasing advertisements claiming that “[r]adical liberals are fighting for a police-free future” and warning not to “let them put your family in danger”).

288. See generally Chisun Lee, Douglas Keith, Katherine Valde & Benjamin T. Brickner, Secret Spending in the States (2016), <https://www.brennancenter.org/media/210/download> [<https://perma.cc/GB3N-KHTP>] (identifying and quantifying corporate giving in state politics).

A third facet of the “woke” criticism is that CSR falls beyond the scope of businesses’ objectives and obligations. Both during the civil rights era and today, many have upheld the mantra that the only “social responsibility of business . . . [is] to increase its profits.”²⁸⁹ Yet this aphorism fails to appreciate the different elements that contribute to corporate profitability, including racial equity, and the myriad paths available to managers to pursue these objectives. It is undeniable that for some businesses, particularly in the South, segregation was profitable, at least in the short term.²⁹⁰ As protests mounted and businesses were unable to engage in daily operations, they undoubtedly suffered losses. Nevertheless, these businesses persisted with segregation—doubtless an unprofitable choice that violated the profit-maximization mantra.²⁹¹ Viewed from this perspective, racial equity is not anathema to profits, and conversely, racial *inequity* is not conducive to profit. Therefore, it would seem well within the scope of corporate purpose to engage in corporate racial responsibility.

In a broader sense, it is worthwhile to remember that corporations, including many large corporations that are known to us today, have been engaged—and arguably inescapably involved—in racial issues for centuries. The notion that the corporation normatively or in practice stands pristinely in its own world, concerned only with profit and insulated from social reality as it pursues this goal, is another false dichotomy that runs throughout the CSR discourse. For example, JPMorgan Chase accepted enslaved people as collateral, furthering the institution of slavery in the 1800s.²⁹² And Aetna, a large health insurer, sold policies that reimbursed enslavers for the deaths of enslaved people they owned.²⁹³ Corporations

289. Friedman, *supra* note 63, at 126 (“[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.” (internal quotation marks omitted) (quoting Milton Friedman, *Capitalism and Freedom* 133 (1st ed. 1962))).

290. See Lisa D. Cook, Maggie E.C. Jones, Trevon D. Logan & David Rosé, *The Evolution of Access to Public Accommodations in the United States*, 138 *Q.J. Econ.* 37, 42 (2023) (discussing businesses’ reluctance to desegregate in the 1950s and 1960s for fear that they would lose their discriminatory white consumers).

291. See Adedayo Akala, *Cost of Racism: U.S. Economy Lost \$16 Trillion Because of Discrimination, Bank Says*, NPR (Sept. 23, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/23/916022472/cost-of-racism-u-s-economy-lost-16-trillion-because-of-discrimination-bank-says> [<https://perma.cc/587N-RHKS>] (reporting findings from Citigroup, a major bank, that the economy lost \$16 trillion between 2000 and 2020 as a result of discrimination against Black people (citing Citi GPS, *Closing the Racial Inequality Gaps* (2020), https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMi%3D [<https://perma.cc/73KM-FME7>])).

292. See Debert Cook, *15 Major Corporations You Never Knew Profited From Slavery*, *Afr. Am. Golfer’s Dig.* (May 7, 2014), <https://africanamericangolfersdigest.com/15-major-corporations-you-never-knew-profited-from-slavery/> [<https://perma.cc/A7PB-KRS7>].

293. See *id.*; see also Thomas, *supra* note 38 (“Some of the largest insurance firms in the US—New York Life, AIG and Aetna—sold policies that insured slave owners would be compensated if the slaves they owned were injured or killed.”).

not only participated in social institutions that have shaped the racial hierarchies of today but also created these practices. Scholars have detailed the active role banks played in redlining,²⁹⁴ denying Black customers loans because of their address and skin color.²⁹⁵ This, too, is part of the history of corporations and race. It is spurious to argue that businesses that have historically created and benefited from the hierarchies foundational to racial inequities today have no role to play in dismantling them.

2. *The Tension With Profitability.* — Another related view of corporate racial responsibility focuses on the impact of racial equity initiatives on the firm's profitability. Specifically, this view differs in focus from concerns about whether corporate racial responsibility is beyond the proper scope of a corporation's purpose. Concerns about the impact on profitability accept that CSR is within the corporation's purpose but question how and to what extent engagement in race-related matters may negatively (or positively) impact corporate profits. On the positive side, one may see corporate commitments to racial equity as a rational market response to constituents' demands. For managers, corporate racial responsibility, then, is an economically rational response to indications from consumers, investors, and employees that they expect corporations to do more to address racial equity, which will have positive pecuniary benefits for the corporation and its shareholders. On the negative side, one may view corporate racial responsibility as destructive to corporate profitability. Managers who acquiesce to demands for racial equity do so to the detriment of investors and without any value in return to corporate owners.

294. See Keeanga-Yamahtta Taylor, *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership* 3–6 (2019) (detailing the role of government agencies and private brokers and bankers in redlining). See generally Camila Domonoske, *Interactive Redlining Map Zooms In on America's History of Discrimination*, NPR (Oct. 19, 2016), <https://www.npr.org/sections/thetwo-way/2016/10/19/498536077/interactive-redlining-map-zooms-in-on-americas-history-of-discrimination> (on file with the *Columbia Law Review*) (detailing the role of the Home Owners' Loan Corporation in redlining).

295. See *Banks Continue to Deny Home Loans to People of Color*, Equal Just. Initiative (Feb. 19, 2018), <https://eji.org/news/banks-deny-home-loans-to-people-color> [<https://perma.cc/AG74-KY3H>] (“Controlling for nine economic and social factors, including applicants' income, loan amount, and the neighborhood where they wanted to buy, the analysis found that racial disparities [in mortgages] persist in 61 metro areas across the country . . .” (citing Aaron Glantz & Emmanuel Martinez, *For People of Color, Banks Are Shutting the Door to Homeownership*, *Reveal* (Feb. 15, 2018), <https://revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/> [<https://perma.cc/5SCR-VYK6>])); Diana Olick, *A Troubling Tale of a Black Man Trying to Refinance His Mortgage*, *CNBC* (Aug. 19, 2020), <https://www.cnbc.com/2020/08/19/lenders-deny-mortgages-for-blacks-at-a-rate-80percent-higher-than-whites.html> [<https://perma.cc/VX47-TKY8>] (presenting the story of a Black man who began to receive mortgage offers when he stopped disclosing his ethnicity to lenders). See generally Chloe N. Thurston, *At the Boundaries of Homeownership* (2018) (detailing the government's role in restricting home ownership during the twentieth century).

Regardless of whether one's stance on corporate racial equity and profitability is positive or negative, two things are constant with this view. First, this view narrowly frames the question in terms of pecuniary gains or losses. This narrow framing fails to recognize other nonpecuniary measures that may contribute to a firm's success and stem from corporate racial equity. For example, CSR tends to foster a positive image of an organization and can thus enhance employee motivation and performance.²⁹⁶ In treating corporate racial responsibility as part of the corporation's bottom line, this view sees racial equity (and those who are served by it) as something that can and ought to be abandoned unless it yields pecuniary benefits for the corporation and its shareholders. This stance is problematic for several reasons. It illustrates a perspective that endorses including Black and Brown constituencies and issues in the sphere of business only to the extent that such inclusion can benefit businesses and their beneficiaries. In other words, it does not value racial equity for its own sake. It also assumes that investors and consumers do not value racial equity and likewise measures its "success" in economic terms.

The second commonly held view among both those who support and those who reject corporate racial equity is a strongly antiregulatory stance. Those with a positive view of corporate racial responsibility say that the market has responded to the issue and there is no need for government intervention.²⁹⁷ Critics of corporate racial responsibility point to the economic losses that accompany mandated diversity quotas, for example, as proof that regulations are not the best course.²⁹⁸ But this antiregulatory

296. See Said Id Bouichou, Lei Wang & Salman Zulfiqar, How Corporate Social Responsibility Boosts Corporate Financial and Non-Financial Performance: The Moderating Role of Ethical Leadership, *Frontiers Psych.*, no. 871334, 2022, at 1, 4 ("Corporate social responsibility is one of the most significant aspects in developing a positive image for an organization, and many organizations exhibit CSR activities to show their good image in the market . . . " (citing R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge Univ. Press ed. 2010))); see also Angela Glover Blackwell, Mark Kramer, Lalitha Vaidyanathan, Lakshmi Iyer & Josh Kirschenbaum, *The Competitive Advantage of Racial Equity* 2–4 (2017), <https://www.policylink.org/sites/default/files/The%20Competitive%20Advantage%20of%20Racial%20Equity-final.pdf> [https://perma.cc/N2UN-X67R] ("[C]ompanies . . . have found new sources of growth and profit by driving equitable outcomes for employees, customers, and communities of color. . . . [A] focus on racial equity is critical in order to innovate, to create products and services that serve a more diverse consumer base, and to cultivate a strong workforce.").

297. See Leonid Polishchuk, Corporate Social Responsibility or Government Regulation: An Analysis of Institutional Choice, 52 *Probs. Econ. Transition*, no. 8, 2009, at 73, 74 (treating voluntary CSR efforts as a "private (not requiring government intervention) institutional alternative to economic regulation"); Margaret Ryznar & Karen E. Woody, A Framework on Mandating Versus Incentivizing Corporate Social Responsibility, 98 *Marq. L. Rev.* 1667, 1690–93 (2015) (analyzing the effects of regulation and incentivization on corporate behavior).

298. See, e.g., John Dobson & Mahdi Rastad, Women on Boards: EU Board Gender Quotas, and Why the U.S. Should Avoid Them, 37 *Bus. & Pro. Ethics J.* 1, 2 (2018) (noting that the European Union's approach to board gender diversity raises concerns regarding

stance serves only to reify oppressive structures. Those with power rarely hand it over willingly to those without, and thus, government intervention is often needed to secure the rights of marginalized people. As Dr. King wrote in *Letter From Birmingham Jail*:

[I]t is an historical fact that privileged groups seldom give up their privileges voluntarily. Individuals may see the moral light and voluntarily give up their unjust posture; but, as Reinhold Niebuhr has reminded us, groups tend to be more immoral than individuals.

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed.²⁹⁹

This was evident in the desegregation debate, as CSR proponents argued against federal intervention to mandate desegregation. Activists, however, knew that they could never fully secure their civil rights through reliance on the hearts and minds of white people. Thus, even as Black activists pursued voluntary desegregation, they knew that legislation was necessary to achieve true racial equity. Likewise, many today are opposed to regulations that would mandate board diversity for public corporations and regulatory disclosures on diversity.³⁰⁰ But as discussed in greater detail in Part IV, legal responsibilities must be imposed on corporations to achieve racial equity within economic spheres of our society.

3. *Cheap Corporate Talk*. — Even those in favor of corporate racial responsibility have taken recent corporate commitments with a large dose of skepticism. To these skeptics, corporations' pledges to racial equity and justice are insincere—nothing more than a marketing campaign—and worse, further proof of corporate hypocrisy.

Evidence of alleged corporate insincerity abounds, which lends credence to these critiques. To start, many 2020 corporate statements were vague, lacked any specific commitment, and were not followed with tangible, measurable actions. For example, in expressing his support for BLM, Mark Zuckerberg, founder and CEO of Meta (formerly Facebook), pledged \$10 million to “groups working on racial justice.”³⁰¹ But as many

corporate financial performance); Jesse M. Fried, Will Nasdaq's Diversity Rules Harm Investors? 12 Harv. Bus. L. Rev. Online, no. 3, 2021, at 1, 3, <https://journals.law.harvard.edu/hblr/wp-content/uploads/sites/87/2022/02/Fried-Will-Nasdaq-Diversity-Rules-Harm-Investors.pdf> [<https://perma.cc/GXQ8-N34B>] (“[A] fair review of the evidence suggests that Nasdaq's diversity rules create real downside risks for investors Nasdaq's pursuit of social justice objectives may well cause collateral damage to investors.”).

299. King, *Why We Can't Wait*, supra note 151, at 91.

300. See, e.g., Can California Legally Require Women on Corporate Boards?, Fox Bus. (Dec. 1, 2021), <https://www.foxbusiness.com/politics/california-legally-require-women-corporate-boards> [<https://perma.cc/JHU2-XBAU>] (describing a lawsuit alleging that it is illegal to “use taxpayer funds to enforce a law that violates the equal protection clause of the California Constitution by mandating a gender-based quota”).

301. Tarpley Hitt, These Companies Have the Most Hypocritical Black Lives Matter Messaging, Daily Beast (June 4, 2020), <https://www.thedailybeast.com/the-companies-with->

noted, Zuckerberg's statement neither indicated which groups would receive funding nor explained how monetary donations would address the racial problems that the company itself faced or that are prevalent on its social media platforms.³⁰²

The fact that many of these statements were crafted by marketing teams underscores skeptics' views that these announcements were made to enhance businesses' reputations rather than enact meaningful change.³⁰³ Some skeptics have criticized businesses for simply engaging in a marketing ploy to increase their bottom line rather than investing the time to reflect on how to meaningfully participate in the discourse on racial equity and devise a plan to accomplish these goals.³⁰⁴ Corporations were accused of trying to profit from the racial equity and justice movement with little intention of actually making a difference.³⁰⁵ According to a recent Rockefeller Foundation report, companies pledged \$50 billion toward racial equity in 2020.³⁰⁶ One year later, however, only a mere \$250 million had been committed to specific initiatives or actually spent.³⁰⁷

This failure by businesses to deliver on their promises is somewhat reminiscent of the problems civil rights activists faced as they fought to desegregate public accommodations. Dr. King and other civil rights leaders negotiated with businesses to secure their commitment to voluntarily desegregate.³⁰⁸ Yet many businesses either reneged on their promises shortly thereafter or never honored their promises in the first place.³⁰⁹ The unreliable and inconsistent nature of businesses' pledges to renounce segregation caused civil rights activists to lose faith in the promise of CSR.

the-most-hypocritical-black-lives-matter-messaging-from-fox-to-facebook [https://perma.cc/9UH8-T4VW] (last updated June 5, 2020).

302. See, e.g., Linette Lopez, Opinion, Mark Zuckerberg Should Keep His Little \$10 Million Donation to Racial Justice Groups and Fix Facebook Instead, *Bus. Insider* (June 2, 2020), <https://www.businessinsider.com/mark-zuckerberg-should-keep-donation-fix-facebook-instead-2020-6> [https://perma.cc/SE8P-XA5R] (“[T]his donation isn’t about fixing anything. This donation is meant to buy respectability, to buy the appearance of values where they are wanting.”).

303. See Fairfax, *supra* note 109, at 144 (“Some have criticized the deluge of corporate statements based on the notion that they reflect corporate attempts to appeal to particular markets, and hence to increase their economic bottom line.”).

304. *Id.*

305. See Analisa Valdez, Opinion, Companies Only Use Social Justice Movements for Their Own Profit, *St. Press* (Apr. 14, 2021), <https://www.statepress.com/article/2021/04/spopinon-companies-only-use-social-justice-movements-for-their-own-profit> [https://perma.cc/GS95-SDMZ] (detailing instances of corporations sending messages regarding social movements as attempts to “us[e] social justice movements in order to gain capital”).

306. Gregory Johnson, Corporate America: It's Not Too Late to Honor Your Racial Justice Pledges, *Rockefeller Found.: Blog* (July 16, 2021), <https://www.rockefellerfoundation.org/blog/corporate-america-its-not-too-late-to-honor-your-racial-justice-pledges/> [https://perma.cc/DGC5-4JDU].

307. *Id.*

308. See *supra* section II.B.1.

309. See *supra* section II.B.1.

This skepticism persists, reasonably enough, among racial equity activists today.³¹⁰

While this critique is well supported based on past and present corporate behavior, recent scholarship from Lisa Fairfax calls some of this skepticism into question. According to Fairfax, corporations that issued statements in response to the 2020 protests “have in fact made efforts to follow through on their promise to promote diversity and work to combat racism within the corporate sphere.”³¹¹ Per Fairfax’s data, close to 90% of companies that issued a corporate statement in support of racial equity appointed a “diverse” director within a year of making the statement.³¹² To Fairfax, this indicates that corporations were not wholly engaged in “cheap talk” but rather supported their public statements with, to some extent, “concrete action.”³¹³

An additional retort to this critique is that Black people have greater influence and market power now than ever before. Undeniably, Black employees overall make less than their white peers,³¹⁴ and Black households have significantly less wealth than white ones.³¹⁵ But these disparities do not negate that Black consumers, employees, and investors are a significant segment of the economy that companies ignore to their own detriment.³¹⁶ While some companies’ statements may have been part of a marketing strategy, there is value to their public affirmations of the worth and dignity of Black life, especially in a society that so often devalues it. Indeed, given that companies may try to exploit the moment while making

310. See Zahn, *supra* note 278 (“Progressives have criticized [ESG] for imposing vague or weak standards on companies, offering the imprimatur of virtue without the requirement of substantive action.”).

311. Fairfax, *supra* note 109, at 123.

312. *Id.* at 166. Fairfax uses “diverse” here to mean a director who is Black, a person of color, or a white woman.

313. See *id.* at 169.

314. See Valerie Wilson & William Darity Jr., *Econ. Pol’y Inst., Understanding Black–White Disparities in Labor Market Outcomes Requires Models that Account for Persistent Discrimination and Unequal Bargaining Power 10* (2022), <https://files.epi.org/uploads/215219.pdf> [<https://perma.cc/6GLN-57MT>] (“In 2019, the typical (median) [B]lack worker earned 24.4% less per hour than the typical white worker . . . even after controlling for characteristics assumed to be related to productive capacity, like education and experience.”).

315. See, e.g., Emily Moss, Kriston McIntosh, Wendy Edelberg & Kristen Broady, *The Black–White Wealth Gap Left Black Households More Vulnerable*, Brookings Inst. (Dec. 8, 2020), <https://www.brookings.edu/articles/the-black-white-wealth-gap-left-black-households-more-vulnerable/> [<http://perma.cc/ABN2-KHVE>] (detailing the wealth gap and its impact on Black families during the COVID-19 pandemic).

316. Michael Chui, Brian Gregg, Sajal Kohli & Shelley Stewart III, *A \$300 Billion Opportunity: Serving the Emerging Black American Consumer*, McKinsey Q. (Aug. 6, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/a-300-billion-dollar-opportunity-serving-the-emerging-black-american-consumer> [<https://perma.cc/QJE6-246C>] (“Wooing the Black consumer is a \$300 billion opportunity beckoning companies around the world.”).

as little change as possible, a healthy level of skepticism is indeed warranted. But rather than dismissing these statements as opportunistic marketing strategies, activists ought to find ways to encourage companies to transform their statements into meaningful, tangible actions.

* * * *

The critiques of corporate racial responsibility that dominate legal discourse fail to fully excavate some of the more pernicious aspects of corporate engagement in racial equity. To be clear, the authors count themselves among those who believe that corporations have a role to play in racial equity but do not uncritically accept corporate participation in this sphere. Rather, to achieve a positive, sustainable, and meaningful version of corporate racial responsibility, we must analyze how that corporate participation has been operationalized in the past and is being operationalized today. There are two overarching concerns that the current debate on corporate racial responsibility fails to address. First, corporate racial responsibility is a market-fundamentalist, antiregulatory approach to racial equity that subordinates human dignity to wealth maximization and reifies existing racial hierarchies. Second, corporate racial responsibility is designed to extract value from Black and Brown people without engaging in structural changes needed to achieve meaningful racial equity. These critiques are detailed in sections III.B and III.C, respectively.

B. *Corporate Racial Responsibility as Market Fundamentalism*

Corporate racial responsibility, as currently implemented, is a market-fundamentalist approach that frames racial equity and its pursuit in terms of wealth maximization without government intervention. Market fundamentalism, which rose to prominence in the 1980s in the United States during the Reagan Administration and in the United Kingdom under Prime Minister Margaret Thatcher,³¹⁷ dominates the current approach to markets and businesses. “Market fundamentalism” refers to the belief that the free market can solve most economic and social problems and produce the most efficient resource distribution.³¹⁸ Under this view, strong property rights and private contracting are the best means of improving overall welfare, which, again, is defined in terms of wealth maximization.³¹⁹

317. See Sally Wheeler, *Corporations and the Third Way* 14 (2002).

318. Market Fundamentalism, Oxford Eng. Dictionary, https://www.oed.com/dictionary/market-fundamentalism_n (on file with the *Columbia Law Review*) (last visited Mar. 4, 2024). For an argument in favor of global market fundamentalism, see generally George Gilder, *The Spirit of Enterprise* (1984). For a critique of market fundamentalism, see generally Thomas Frank, *One Market Under God: Extreme Capitalism, Market Populism, and the End of Economic Democracy* (2000).

319. See Economics & Beyond With Rob Johnson, *The Big Myth of Market Fundamentalism*, Inst. for New Econ. Thinking, at 06:35 (Mar. 16, 2023), <https://www.ineteconomics.org/perspectives/podcasts/the-big-myth-of-market-fundamentalism>

Government intervention and regulation are needed only to the extent that there are market failures that the markets cannot correct on their own.³²⁰

In framing corporate racial responsibility as market fundamentalism, there are two primary drawbacks. First, applying market logic to social issues subordinates human dignity and civil rights to wealth maximization. And second, the belief in markets as the best mechanism to improve welfare embraces an antiregulatory, voluntary approach to racial equity that stymies racial progress and reifies existing racial hierarchies.

1. *Subordination of Human Dignity.* — Despite CSR (and by extension, corporate racial responsibility) being premised in theory on the rejection of shareholder primacy, it nonetheless grounds its justifications in large part on being another—or a better—path to corporate profitability. When dealing with social issues, such as racial equity, this efficiency framing is problematic for several reasons. As discussed in section III.A above, reducing corporate engagement with racial equity to monetary gains (or losses) diminishes the intrinsic value of racial equity.³²¹ More fundamentally, however, the wealth-maximization framing subjects dignitary concerns to market logic and, in so doing, denigrates civil rights and human dignity.

While all (likely) agree that civil rights and human dignity are essential components to a just rule of law, requiring that Black, Brown, and other marginalized people prove themselves valuable to business interests to be worthy of business consideration and action inherently subordinates dignitary concerns to wealth maximization. Both in the civil rights era and today, Black dignity too often must first prove itself to be valuable to business interests before becoming a worthy pursuit.

For example, even as corporations became more focused on sustainability issues, they have ignored racial equity.³²² Black dignity was not valuable enough to warrant corporate focus and attention. But when faced with a backlash that threatened their profitability, corporations suddenly became interested in rhetorically embracing racial equity.³²³ The use of marketing teams to craft corporate racial equity statements further underscores the pecuniary pragmatism that drives corporate racial responsibility—engaging in racial equity is worthwhile only if it can be monetized.

[<https://perma.cc/94CN-LWCC>] (“[O]ne of the central tenets of market fundamentalism[] [is] th[e] claim that if you allow the government to step in[] to redress market failure, even a serious market failure, it undermines freedom.”).

320. See Steven G. Medema, Pigou’s “Prima Facie Case”: Market Failure in Theory and Practice, *in* *No Wealth but Life: Welfare Economics and the Welfare State in Britain, 1880–1945*, at 42, 48–49 (Roger E. Backhouse & Tamotsu Nishizawa eds., 2010) (describing Arthur Cecil Pigou’s central insight into market failure as creating the need for “governmental measures . . . to deal with the situation”).

321. See *supra* section III.A.2.

322. See *supra* notes 91–103 and accompanying text.

323. See *supra* notes 105–110 and accompanying text.

The current discourse on corporate racial responsibility, arguably, is no more attentive to Black civil rights and dignity than the earlier civil rights-era example. Businesses that embraced racial equity platforms in 2020 are quietly retracting support or simply failing to live up to their prior promises.³²⁴ To the extent that corporate racial responsibility continues to be premised on matters of corporate profits over those of human dignity and Black civil rights, it will continue to fail to achieve meaningful progress on questions of race. And we might question if that is, in fact, the point.

Another concerning aspect of the market-fundamentalist approach to corporate racial responsibility is that the business case—that is, the promise of profits—may not be enough to compel action. This was evident in the discourse around CSR and desegregation. During the civil rights era, the appeal to pragmatism to support CSR and voluntary desegregation failed because it relied on a fatal assumption that white business owners cared more about profits than about maintaining their social, economic, and legal dominance over Black people.³²⁵ These arguments engaged not with dignity or dignitary harms but with the assertion that desegregation would help a business's bottom line. This assumption was highly flawed because white business owners had no incentives to voluntarily participate in desegregation or recognize the dignity of Black people. They were the dominant class and had the full benefit of the law and its appendages on their side. Regardless of the potential profitability of desegregation, they chose to preserve racial hierarchies and white privilege. And since the discourse itself did not invoke matters of Black dignity before the law, it failed.

Taking market fundamentalism to its natural conclusion, marginalized groups must endure their lack of rights because there is no wealth-maximization justification for businesses to engage. Appealing to profitability without considering the dignitary harms that marginalized groups face deepens corporate racial responsibility's ineffectiveness and its potential harm to Black people and people of color. As Xavier de Souza Briggs and Richard M. McGahey have stated, "Racial equity, like other forms of equity, must be understood on moral, not just pragmatic, grounds."³²⁶ There isn't always a business case for racial equity, but there is always a moral one. Business leaders must understand and embrace the moral case for racial equity for their efforts to succeed. And corporate racial responsibility advocates are likewise destined to fail today, as they did in the civil rights era, if they subordinate human dignity to corporate profits when they make their case.

324. See *supra* notes 306–309 and accompanying text.

325. See *supra* sections II.A–B.

326. Xavier de Souza Briggs & Richard M. McGahey, *Keeping Promises While Keeping Score: Gauging the Impacts of Policy Proposals on Racial Equity*, Brookings Inst. (Oct. 11, 2022), <https://www.brookings.edu/research/keeping-score-measuring-the-impacts-of-policy-proposals-on-racial-equity/> [http://perma.cc/75E4-A2UU].

2. *Antiregulatory, Market-Based Approach.* — A key feature of corporate racial responsibility is that it is voluntary. This voluntariness is in keeping with market-fundamentalist roots that hold the belief that markets thrive when regulation is kept to a minimum. The current iteration of corporate racial responsibility, which continues to reject governmental intervention, legitimates only the antiregulatory, market-based approach to racial equity. Time and experience have demonstrated that this approach does not work and, indeed, might damage true progress toward racial equity.

The desegregation of public accommodations in Atlanta illustrates this point. As CSR advocates—typically non-Black people—pressed for voluntary desegregation as the path forward, they also hoped to move slowly.³²⁷ What's more, they pointed to the "success" of voluntary desegregation to prove that federal intervention was unnecessary; businesses were handling it, and government involvement would only undercut the progress already made.³²⁸ In the end, civil rights activists recognized that a strategy grounded in voluntary commitments from businesses was insufficient to secure desegregation. Haphazard, piecemeal, and entirely voluntary desegregation on a city-by-city or state-by-state basis was unlikely to result in nationwide desegregation. Even Atlanta, where voluntary desegregation had the most success, had not achieved full desegregation.³²⁹ And cities like Birmingham, Alabama, were recalcitrant to voluntary desegregation, showing the failure of local solutions for nationwide problems.³³⁰ Federal regulation was, therefore, necessary to guarantee the civil rights and dignity of Black citizens.

These antiregulatory arguments reveal the moral and ethical underside of corporate racial responsibility, which has only become more insidious today with the expansion of corporate power in society. As during the civil rights era, corporations' voluntary actions are being used to hinder racial progress. For example, corporations have vigorously resisted ESG disclosures, arguing most prominently that they already voluntarily disclose relevant information.³³¹ But these voluntary disclosures vary in format and information, among other parameters, making it difficult for shareholders and stakeholders to compare the data being provided or even understand what is being disclosed.³³² Notably, current disclosures

327. See *supra* section II.B.2.

328. See *supra* text accompanying notes 198–201.

329. See *supra* section II.B.2.

330. See *supra* section II.B.1.

331. Eric Rosenbaum, *There's an ESG Backlash Inside the Executive Ranks at Top Corporations*, CNBC (Sept. 29, 2022), <https://www.cnbc.com/2022/09/29/the-esg-backlash-inside-the-executive-ranks-at-top-corporations.html> [http://perma.cc/75GV-KNBS].

332. See, e.g., Adediran, *supra* note 36, at 338–47 (describing the multiple steps needed to compare corporate diversity disclosures in the author's study).

do not require companies to improve their actual diversity,³³³ but corporations nevertheless resist the imposition of diversity disclosures,³³⁴ even as they purport to support racial equity.³³⁵ Avoiding racial equity mandates allows corporations to delay progress, thereby leaving Black and Brown people to the whims and preferences of corporations and with little recourse should corporations renege on their promises.

Corporations use their “seat at the table” to shape potential racial equity mandates to their benefit. Corporations have always had influence over the legislative process, which provides them with still another avenue to undercut racial progress. In the racial equity context, however, corporate power is especially concerning because corporations are unlikely to be at the vanguard of racial progress. Rather, corporations will more likely aim to limit their legal obligations and maintain the structures that facilitated their dominance. The current iteration of corporate racial responsibility thus allows corporations to set the terms on which they engage in racial equity. In so doing, it ensures that the form of racial equity that results from these efforts is palatable to corporations and others in power even if unsatisfactory to Black people and other people of color.

Importantly, rejecting regulation reifies existing hierarchies, keeping the status quo fixed for those who already benefit from it. In limiting or rejecting government intervention, businesses choose how and whether to engage with racial equity. This optionality means that businesses do so only to the extent it benefits them, which enables them to avoid meaningful and uncomfortable changes. The lack of regulation allows racial inequities to thrive unchecked and with no means of accountability.

C. *Corporate Racial Responsibility as Value Extraction*

Among those who support corporate engagement in racial equity, a prominent critique of corporate racial responsibility is that of corporate disingenuity. As discussed above, recent research shows that most corporations who have committed to racial equity have appointed a director that comes from an underrepresented background in recent years.³³⁶ Despite these gains, closer analysis reveals that this “progress” obscures a problematic aspect of corporate racial responsibility: It extracts value from Black and Brown communities without attempting to change the underlying structures that support and result in racial inequity. Value extraction is not

333. *Id.* at 348 (noting that Nasdaq and SEC diversity disclosures “merely require[] companies to explain why they lack diversity and would not actually increase board diversity per [Nasdaq] Rule 5605(f)’s ‘disclose or explain’ provision”).

334. See Green et al., *supra* note 43 (noting that Tesla and Berkshire Hathaway have refused to disclose information regarding the racial diversity of their workforces to investors).

335. See, e.g., *id.* (stating that companies, such as Target, that have previously embraced diversity disclosures are now claiming that data disclosure is an “imperfect tool”).

336. See *supra* section III.A.3.

a new phenomenon for marginalized people—from the atrocities of slavery, when Black bodies were sold for their labor, to the current practice of exploiting undocumented immigrants for domestic labor, there is no shortage of examples of white people extracting value from Black and Brown people.³³⁷

The form of value extraction in which businesses are engaging today differs, but it is nonetheless exploitative. In embracing corporate racial responsibility, businesses are commodifying and extracting value from Black racial identities for their own benefit.³³⁸ As Professor Nancy Leong has identified in her work, the legal and social preoccupation with diversity has made relationships or affiliations with nonwhite people valuable for predominantly white institutions. Corporate racial responsibility is a recognition of the economic “value” of nonwhite racial identities³³⁹ and an effort to extract value from Black and Brown people without providing any meaningful benefit in exchange. The value extraction of corporate racial responsibility goes beyond insincere corporate commitments and has damaging consequences for Black and Brown communities.³⁴⁰

The extractive nature of corporate engagement with racial equity means that businesses try to get as much from their engagement as they give. To signal their antiracist, antidiscriminatory efforts and their commitment to diversity, businesses may, for example: pledge support for BLM; encourage the creation of race-based affinity groups; lead campaigns featuring Black communities; and promote Black or Brown employees to visible positions.³⁴¹ In this regard, corporate racial responsibility can produce a range of benefits for businesses. These commitments enable a business to project a tolerant, welcoming corporate image that will positively influence recruitment efforts in the labor markets.³⁴² It may also help with

337. See, e.g., Nancy Leong, *Racial Capitalism*, 126 *Harv. L. Rev.* 2151, 2155 (2013) (“For centuries, nonwhiteness was used as a basis for withholding value by denying nonwhite people legal rights and privileges.” (emphasis omitted)).

338. Nancy Leong has termed this as “racial capitalism,” which she defines as “deriving economic and social value from the racial identity of another person.” See *id.* at 2156. This Article relies on Leong’s work on racial capitalism, but the authors emphasize the engagement’s extractive and economic nature for Black and Brown people.

339. For a critique of assigning monetary or economic “value” to human dignity and civil rights, see *supra* section III.B.2.

340. See Leong, *supra* note 337, at 2194–95 (“By showcasing nonwhite employees in prominent positions, employers signal that unsuccessful nonwhite employees are responsible for their own failures, while at the same time maintaining a system in which white employees are in fact preferred.”).

341. See Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 *N.C. L. Rev.* 1017, 1034 (2011) (describing employers’ efforts to showcase minority employees within their workforces without actually addressing shortcomings in workplace diversity).

342. See, e.g., Tara S. Behrend, Becca A. Baker & Lori Foster Thompson, *Effects of Pro-Environmental Recruiting Messages: The Role of Organizational Reputation*, 24 *J. Bus. & Psych.* 341, 347 (2009) (describing the impact of environmental-responsibility language on applicants’ intention to pursue a job); C. Maden, E. Arıkan, E.E. Telci & D. Kantur,

retaining existing customers and attracting new ones that care about diversity and racial equity.³⁴³ From a legal liability standpoint, such efforts may also help businesses refute racial discrimination suits. By highlighting their diversity and racial equity work, businesses can point to practical, real-world efforts to be nondiscriminatory—at least from a legal standpoint.³⁴⁴

Yet despite the value that businesses extract from their affiliation with Black and Brown people, they rarely engage in internal structural changes. A careful examination of many firms that claim to engage in corporate racial responsibility may reveal that, despite their DEI efforts, there is little to no change to workplace culture. This reality ultimately subjects Black and Brown employees to microaggressions—or worse.³⁴⁵ Similarly, review and promotion policies fail to recognize the additional work women and people of color consistently report doing within the workplace.³⁴⁶ Indeed, despite the prevalence of diversity initiatives and similar efforts among large public corporations, many of those same corporations have dismal demographic diversity among their employees, especially in high-ranking positions.³⁴⁷ The one race-related area public corporations have included in their CSR/ESG strategies is increasing boardroom diversity. But the number of Black or Brown directors has not seen significant increases over the past decade, further demonstrating the absence of structural changes that would be needed to grant Black and Brown executives access to boards.

An unsurprising but problematic consequence of the corporate racial responsibility's value-extractive nature is tokenism. Showcasing Black and

Linking Corporate Social Responsibility to Corporate Reputation: A Study on Understanding Behavioral Consequences, 58 *Procedia* 655, 662 (2012) (demonstrating results from a behavioral study that suggest “that when job seekers assign a good reputation to a specific firm, they are more likely to seek employment there”).

343. See Ahmad Aljarah & Blend Ibrahim, *The Robustness of Corporate Social Responsibility and Brand Loyalty Relation: A Meta-Analytic Examination*, 26 *J. Promotion Mgmt.* 1038, 1057 (2020) (presenting an analysis of case studies that suggests CSR practices are linked to brand loyalty). A related benefit may be higher employee retention rates. See Donald F. Vitaliano, *Corporate Social Responsibility and Labor Turnover*, 10 *Corp. Governance* 563, 564 (2010) (finding that a firm “can significantly reduce its turnover (quit rate by adopting policies that lead to it being rated as socially responsible”).

344. See Leong, *supra* note 337, at 2196 (discussing Walmart's initiative to “diversify its own ranks and to insist on diversity in its business partners” as the company faced class action discrimination suits).

345. See *id.* at 2195.

346. See, e.g., Virginia Gewin, *The Time Tax Put on Scientists of Colour*, *Nature* (June 24, 2020), <https://www.nature.com/articles/d41586-020-01920-6> (on file with the *Columbia Law Review*) (describing how faculty of color “are routinely asked to undertake extra, uncompensated work to address the issue [of racism] at their institutions”).

347. See Tracy Jan, *The Striking Race Gap in Corporate America*, *Wash. Post* (Dec. 15, 2021), <https://www.washingtonpost.com/business/interactive/2021/black-executives-american-companies> (on file with the *Columbia Law Review*) (“[O]nly 8 percent of ‘C-suite’ executives—the highest corporate leaders, often those reporting to the CEO—are Black.”).

Brown faces can give the appearance of racial equity within an organization without changing the workplace conditions that caused the absence of meaningful racial representation.³⁴⁸ Additionally, for firms, tokenism can provide a way to limit conversations on race. By pointing to prominent Black people who support their firms, condone their minimal efforts, or thrive within their work environment, firms can deflect more demanding expectations—for example, that they demolish existing racial hierarchies—all while maintaining a system that perpetuates the very racial inequities the firm claims to be against.

Lastly, because corporate racial responsibility can facilitate value extraction, racial equity efforts are often deemed nonessential.³⁴⁹ As Leong aptly puts it: “[W]hite people and predominantly white institutions come to view racial diversity as simply another non-essential item—not unlike catered lunches or technology upgrades”³⁵⁰ Viewing corporate racial responsibility as nonessential means that in times of economic hardship, racial equity initiatives will be among the first to be eliminated. Examples abound today. Continued inflation and fears of a recession caused many companies, particularly technology companies, to reduce their workforces in the first quarter of 2023.³⁵¹ These layoffs, notably, are decimating diversity and inclusion departments in firms that, back in 2020, had committed to increasing underrepresented groups among their employees and leadership.³⁵² What’s more, the loss of DEI positions at these firms is expected to result in much of this work being passed on to “employee resource groups, which often don’t get compensated for that work.”³⁵³ It is also significant that firms are scaling back on racial equity commitments even before they have met their goals, which only further

348. See Charisse Jones, Jayme Fraser & Dian Zhang, Racial Justice in the Workplace: In-Depth Look at Diversity’s Struggle to Crack Corporate Boardrooms, USA Today (July 18, 2021), <https://www.usatoday.com/in-depth/money/business/2021/07/18/workplace-diversity-struggles-break-into-corporate-boardrooms/7906529002/> [<https://perma.cc/VL48-GEV5>] (last updated July 23, 2021) (discussing the practice of companies “point[ing] to the diversity of their boards of directors to distract from the concentration of white men in their corporate suites” while noting that even these boards often do not reflect either the racial distribution of the companies’ workforce or the nation).

349. While this is related to a critique raised above regarding firms’ wavering commitment to racial equity if not justified by profitability, it is a different way of understanding why firms may abandon corporate racial responsibility. See *supra* section III.B.1.

350. Leong, *supra* note 337, at 2211.

351. See Ashley Capoot & Sofia Blum, Google, Meta, Amazon and Other Tech Companies Have Laid Off More Than 104,000 Employees in the Last Year, CNBC (Jan. 18, 2023), <https://www.cnbc.com/2023/01/18/tech-layoffs-microsoft-amazon-meta-others-have-cut-more-than-60000.html> [<https://perma.cc/N6EQ-LQS9>] (last updated Mar. 20, 2023) (describing vast layoffs among large technology companies in 2022 and 2023).

352. See Kelsey Butler, Big Tech Layoffs Are Hitting Diversity and Inclusion Jobs Hard, Bloomberg (Jan. 24, 2023), <https://www.bloomberg.com/news/articles/2023-01-24/tech-layoffs-are-hitting-diversity-and-inclusion-jobs-hard> (on file with the *Columbia Law Review*).

353. *Id.*

emphasizes how expendable firms view their corporate racial responsibility to be.

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As currently implemented, corporate racial responsibility is problematic. But this Article's authors firmly believe that corporations have a role to play in achieving racial equity. Doing so requires moving beyond the current paradigm and engaging in meaningful reforms to ensure that businesses participate in dismantling the very hierarchies that they helped to create and from which they have benefited. Part IV begins this conversation by offering a few suggestions on how to move forward with the work of engaging firms in embracing and appreciating racial equity both internally and in broader society.

IV. TOWARD MEANINGFUL CORPORATE RACIAL RESPONSIBILITY: CREATING CORPORATIONS OF CONSCIENCE

There are three major answers to the question of what role corporations should play in the current struggle for racial justice. The first group of answers highlights the promise of corporations in the struggle for racial justice.³⁵⁴ Although this group offers a welcome embrace of the stakeholder-over-shareholder model of corporate governance, corporate leaders who voiced support for the 2020 racial justice protests have largely failed to produce meaningful racial change.³⁵⁵ Many corporations made unprecedented financial commitments toward racial justice causes but have not delivered on their antiracist pledges.³⁵⁶ Other corporations that have publicly condemned structural racism

354. See, e.g., Business Roundtable CEOs Announce Corporate Actions, Public Policy Recommendations to Advance Racial Equity and Justice, Increase Economic Opportunity in America, Bus. Roundtable (Oct. 15, 2020), <https://www.businessroundtable.org/business-roundtable-ceos-announce-corporate-actions-public-policy-recommendations-to-advance-racial-equity-and-justice-increase-economic-opportunity-in-america> [<https://perma.cc/YCD4-MD9C>] (announcing corporate initiatives and policy recommendations to “advance racial equity and justice”).

355. Compare Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tikku, As Big Corporations Say ‘Black Lives Matter,’ Their Track Records Raise Skepticism, Wash. Post (June 13, 2020), <https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/> (on file with the *Columbia Law Review*) [hereinafter Jan et al., Big Corporations’ Track Records Raise Skepticism] (“Corporate America—including Wall Street and Silicon Valley giants—is now pledging to play a bigger role in combating systemic racism across the United States . . .”), with Jan et al., Corporate America’s \$50 Billion Promise, *supra* note 12 (“[A] Washington Post analysis of unprecedented corporate commitments toward racial justice causes reveals the limits of their power to remedy structural problems.”).

356. Marco Quiroz-Gutierrez, American Companies Pledged \$50 Billion to Black Communities. Most of It Hasn’t Materialized, *Fortune* (May 6, 2021), <https://fortune.com/2021/05/06/us-companies-black-communities-money-50-billion> (on file with the *Columbia Law Review*).

have avoided taking strong antiracist policy stances.³⁵⁷ Even worse, some corporations continue to profit from practices or policies that exacerbate racial inequity, even as they espouse antiracist rhetoric.³⁵⁸ If corporate leaders are serious about advancing racial justice and rooting out racism, they must push past their platitudes and empty statements.

The second major group of answers in this debate argues that corporations should play no role in the struggle for racial justice. Some in this group assert that corporate racial responsibility does not fundamentally restructure race relations and that it is merely “cheap talk” or racial window dressing.³⁵⁹ These critics have encouraged progressive activists to abandon their corporate-focused efforts and place their energies elsewhere.³⁶⁰ Others in this group, who are often fiscally conservative, contend that the only social responsibility of corporations is “to use [their] resources and engage in activities designed to increase [their] profits.”³⁶¹

Those in this second group—despite their varied ideological orientations—somehow consistently overlook a powerful reality: Whether they like it or not, corporations are already intimately involved in racial issues, and this relationship will no doubt continue in the future. Racial justice issues are at the core of corporate operations, even if corporate leaders are not consciously considering race. Each day, corporations recruit, hire, compensate, promote, retain, and dismiss employees, and far too frequently, the employees who experience the worst working

357. See, e.g., Chauncey Alcorn, *Corporate America Doesn't Want to Talk About Defunding Police*, CNN Bus., <https://www.cnn.com/2020/06/11/business/corporate-america-defund-police/index.html> [<https://perma.cc/B3SU-KB3Z>] (last updated June 11, 2020) (“As it stands, many businesses are showing broad public support for the Black Lives Matter movement, but they are avoiding taking a stand on specific policy initiatives that would help the movement accomplish its goals.”).

358. See, e.g., Davis & Warren, *supra* note 119.

359. Matthew Boyle, *More Workers Ready to Quit Over ‘Window Dressing’ Racism Efforts*, Bloomberg (June 9, 2022), <https://www.bloomberg.com/news/articles/2022-06-09/-it-s-window-dressing-firms-battle-trust-gap-on-racism-efforts> (on file with the *Columbia Law Review*).

360. See, e.g., Aaron Chatterji & Siona Listokin, *Corporate Social Irresponsibility, Democracy*, Winter 2007, at 52, 61–63 (arguing that progressives should consider abandoning their efforts targeting Walmart to instead focus on fighting for improvement in national labor rights); Joanna Wuest, *The Dead End of Corporate Activism*, *Bos. Rev.* (May 18, 2022), <https://bostonreview.net/articles/the-dead-end-of-corporate-activism> [<https://perma.cc/HKS2-YAQ2>] (“There are, thankfully, alternative strategies for social transformation besides heavy reliance on corporate benevolence.”).

361. See Friedman, *supra* note 63, at 126 (internal quotation marks omitted) (quoting Milton Friedman, *Capitalism and Freedom* 133 (1st ed. 1962)). For a modern expression of this idea, see Paul G. Mahoney & Julia D. Mahoney, *‘ESG’ Disclosure and Securities Regulation*, *Regulation*, Fall 2021, at 10, 10–12.

conditions and receive the lowest wages are employees of color.³⁶² Corporate boards notoriously lack racial diversity,³⁶³ and these boards often design policies that disparately affect people of color inside and outside of the corporation.³⁶⁴ Corporations lobby and support politicians whose legislation and rhetoric that influence race relations.³⁶⁵ It is a question not of *whether* corporations should be involved in racial justice efforts but of *how* they will be involved, consciously or not. As long as there are corporations, their daily activities will shape race relations, and conversely, race relations will shape their daily activities.

A third major group stakes out a middle ground. This group tends to be skeptical of corporate motives and commitments to racial justice but concedes that corporations should have some intentional role in the struggle for racial justice.³⁶⁶ This group's practical approach to corporate racial responsibility can help in the struggle, but more historical grounding might sharpen their analysis of race and racism. As this Article illustrates, many of these issues surrounding the corporate racial responsibility debate are not new. Activists during the civil rights movement faced similar dilemmas. Today's racial justice proponents would benefit by drawing insights from civil rights history.

This Part is a first step in a hopefully larger conversation about the future of corporate racial responsibility. It offers three pragmatic principles to guide corporations' roles in racial justice efforts. Each principle takes seriously conservative and progressive criticisms of corporate racial responsibility but urges critics of all stripes not to: whitewash corporate

362. See Laura Morgan Roberts & Anthony J. Mayo, *Toward a Racially Just Workplace*, *Harv. Bus. Rev. (Special Issue)*, Fall 2020, at 10, 10 (describing the variety of occupational challenges and inequalities felt disproportionately by people of color in the workforce).

363. See Peter Eavis, *Diversity Push Barely Budges Corporate Boards to 12.5%*, *Survey Finds*, *N.Y. Times* (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/business/economy/corporate-boards-black-hispanic-directors.html> (on file with the *Columbia Law Review*) (last updated Sept. 7, 2021).

364. See, e.g., Jan et al., *Big Corporations' Track Records Raise Skepticism*, *supra* note 355 ("In addition to hiring and pay disparities, banks have come under fire for allegedly discriminating against minority customers.").

365. See Naila Awan & Liz Kennedy, *Demos*, *The Racial Equity Impact of Secret Political Spending by Government Contractors 2–3* (2015), <https://www.demos.org/sites/default/files/publications/RacialEquityImpactSecretPoliticalSpending-Brief.pdf> [<https://perma.cc/6JWP-PBMB>] (describing the substantial political spending of publicly traded federal contractors and the ways in which these contractors have advanced policies that undermine racial equity); Romm, *supra* note 269 (describing how many large corporations lobbied against "Democrats' proposed overhaul to federal health care, education and safety net programs").

366. See, e.g., Laura Morgan Roberts & Megan Grayson, *Businesses Must Be Accountable for Their Promises on Racial Justice*, *Harv. Bus. Rev.* (June 1, 2021), <https://hbr.org/2021/06/businesses-must-be-accountable-for-their-promises-on-racial-justice> (on file with the *Columbia Law Review*) ("[C]ommunications and statements aren't enough: Companies need to hold themselves accountable for action so they don't simply maintain historical structures and cultures of racism.").

operations; succumb to racial defeatism; or use criticisms of corporate racial responsibility as mere cover for corporate leaders' weak commitments to racial equality. Corporations have never been on the racial sidelines, and, in fact, corporations make and remake race relations each day. Moreover, these principles look to the past to inform present and future racial justice advocacy. Civil rights history shows that social movements use every tool possible to advance their causes—they understand the deep limitations of a particular tool and know that even good solutions may not be perfect solutions. We must take the world as it is, even as we make it what it might one day become.

A. *Change Starts at Home*

If corporations seek to promote racial justice in society, then they must first change themselves. Corporations need not wait for changes in government, shifts in popular opinion, or widespread protests to become more inclusive. They can become more inclusive now. They have broad power over their own operations.³⁶⁷ Of the three principles proposed in this Part, this recommendation is perhaps the most palatable to stakeholders and the easiest for corporations to implement.

There is no shortage of actions a corporation can take unilaterally to advance racial justice. Corporations can, for example, change the compositions of their boards and management, ensure pay equity, increase philanthropic giving, establish race-based employee resource groups, require antiracism training, develop strategic diversity plans, devise internal dashboards to track the corporation's diversity goals, or create mechanisms to hold management accountable for achieving these goals. It is one thing for a corporation to issue a public statement that Black lives matter. It is more important for the corporation to take actions that reflect this sentiment, starting with actions affecting the people with whom they have direct contact with each day. It is time that corporations walk their own racial justice talk.

Corporations can also advance racial justice by requiring individuals and corporations with which they have indirect contact to advance racial justice. Although a corporation cannot, for example, change the racial demographics of a law firm it contracts with, it can require that the lawyers on the contract be from backgrounds that are typically

367. Bus. Roundtable, Principles of Corporate Governance, Harv. L. Sch. F. on Corp. Governance (Sept. 8, 2016), <https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance> [<https://perma.cc/8YG3-GLD2>] (“These [corporate governance] systems work because they give public companies not only a framework of laws and regulations that establish minimum requirements but also the flexibility to implement customized practices that suit the companies’ needs and to modify those practices in light of changing conditions and standards.”).

underrepresented in the legal profession.³⁶⁸ Similarly, corporations can influence their suppliers to be diverse.³⁶⁹ They can press their peers to adopt new standards and strategies for corporations seeking to reconcile their public statements and internal operations. As one communications executive explained during the 2020 racial justice protests, “Brands are watching other brands and companies are watching other companies to see who’s doing it right, who’s making missteps and how they can avoid it, because everybody wants to be right and nobody wants to step into a minefield.”³⁷⁰

Corporate leaders may find implementing antiracist policies to be challenging or even inconvenient. But if corporate leaders find it difficult to transform their corporate practices now, imagine how difficult it was during the civil rights movement. If these leaders find it uncomfortable to shift their corporate climates, imagine the racial discomfort stakeholders of color have endured for many years. True corporate leadership requires positive and decisive action now. As Dr. King proclaimed, “[T]he time is always right to do right.”³⁷¹

B. *Support, Not Supplant, Civil Rights Leadership*

In the wake of the 2020 racial justice protests, some corporate leaders fashioned themselves and their corporations as the vanguard of the contemporary struggle for racial justice.³⁷² Yet these leaders and their corporations should approach this topic with far more humility. Corporate leaders should be mindful that the 2020 calls for racial justice stemmed from popular protests, not corporations. Accordingly, because corporate leaders did not initiate these social changes, they should not lead them. Some

368. See Veronica Root, *Retaining Color*, 47 U. Mich. J.L. Reform 575, 602 (2014) (describing Walmart’s decision to require law firms to submit options for relationship partners that included women and people of color).

369. See Alexis Bateman, Ashley Barrington & Katie Date, *Why You Need a Supplier-Diversity Program*, Harv. Bus. Rev. (Aug. 17, 2020), <https://hbr.org/2020/08/why-you-need-a-supplier-diversity-program> (on file with the *Columbia Law Review*) (surveying the history of supplier diversity programs as well as their commercial and social benefits).

370. Jessica Camille Aguirre, “People Are Fed Up With This Level of Virtue Signaling”: Corporate America Is in a P.R. Meltdown Over the Black Lives Matter Movement, *Vanity Fair* (July 22, 2020), <https://www.vanityfair.com/news/2020/07/corporate-america-in-pr-meltdown-over-black-lives-matter-movement> (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting LaTricia Woods, Founder & President, Mahogany Xan Commc’ns).

371. Martin Luther King, Jr., *Speech at Stanford University: The Other America* (Apr. 14, 1967), <https://www.rev.com/blog/transcripts/the-other-america-speech-transcript-martin-luther-king-jr> [<https://perma.cc/8SM8-PWTV>].

372. See Jan et al., *Corporate America’s \$50 Billion Promise*, *supra* note 12 (“[T]op corporations made broad claims about what they would do, pledging to be a force for societal change and to fight racism and injustice, including violence against Black Americans.”).

corporations that now claim to support BLM have undermined and continue to undermine support for the movement.³⁷³

Corporations should support, not supplant, civil rights leadership. Corporate leaders are not racially diverse, are likely far removed from sophisticated ideas of racial change and racial change agents, and may have even helped produce racial inequities.³⁷⁴ Many conservatives and progressives alike complain that corporate leaders lack the expertise to lead racial justice reform. They are right. Collaborating with racial justice organizations on racial reform efforts provides a solution to this problem.

Major benefits could flow from partnerships between corporations and racial justice organizations. Racial justice organizations may provide a corporation with fresh insights and innovative solutions. They may help a corporation avoid often-clumsy messaging around racial justice issues and give it more racial credibility both inside and outside of the corporation. Such a partnership would illustrate that urgent social problems should not be left to corporate leaders alone. In fact, it would be ironic to have corporate leaders who have often created or exacerbated racial inequity at the forefront of the campaign to alleviate human suffering.

To be sure, partnerships between corporations and racial justice organizations are not without risk for either corporations or racial justice organizations. Corporate leaders may worry that activists will articulate visions that are too bold, lack expertise in corporate governance, or suggest plans that could reduce shareholder value. Activists might worry that corporate leaders might co-opt their efforts or appropriate and reduce them to mere tokens. Both sets of concerns are valid, and as civil rights history illustrates, neither is novel. It is crucial that corporations and activists truly committed to racial justice seize this moment. Such a collaboration could move corporations to work in closer solidarity with racial justice activists.

373. Starbucks, for example, prohibited employees from wearing T-shirts supporting the movement. It later reversed its stance only after public shaming and continued protests. Other charges of racial hypocrisy continued. Heather Murphy, Starbucks Will Allow Employees to Wear Black Lives Matter Apparel, *N.Y. Times* (June 12, 2020), <https://www.nytimes.com/2020/06/12/business/starbucks-blm-ban-reversed.html> (on file with the *Columbia Law Review*) (last updated Oct. 18, 2021). UNITE HERE, a labor union representing hotel, restaurant, and airport workers, studied pay in twenty-seven U.S. airports and reported that the median pay for Black Starbucks baristas was \$1.85 less than for white baristas. See Press Release, UNITE HERE, Median Pay Is Lower for Black Baristas Than for White Baristas Across Starbucks Stores at 27 Airports Operated by HMSHost, New Report Shows (Feb. 25, 2020), <https://unitehere.org/press-releases/median-pay-is-lower-for-black-baristas-than-for-white-baristas-across-starbucks-stores-at-27-airports-operated-by-hmshost-new-report-shows/> [<https://perma.cc/KGG8-EMQ2>].

374. Jan, *supra* note 347.

C. *From Corporate Racial Responsibility to Corporate Legal Responsibility*

If corporations are sincerely interested in advancing racial justice, they should collaborate with racial justice organizations and work to transform issues of corporate racial responsibility into issues of corporate legal responsibility. This is no doubt this Article's most provocative and important recommendation. Corporate racial responsibility relies solely on corporate generosity; a corporation's commitments to racial justice are discretionary under this model. But when corporate racial responsibility transforms into corporate legal responsibility, racial justice initiatives have greater permanence and legitimacy, and our society becomes more just and democratic.

As the history of Title II illustrated, some corporations will not advance the cause of racial justice unless required to do so.³⁷⁵ Other corporations have engaged in corporate racial responsibility precisely to avoid legal regulation.³⁷⁶ Corporations themselves should lobby for new civil rights laws; if they did so, it would spur major structural transformation.

This Article's authors strongly believe that moral arguments for racial justice are more compelling than market arguments for racial justice. Corporations of conscience seek to advance racial justice in *any* situation—regardless of profitability. But while we privilege the ethical demands of racial justice, we also realize that others might show how corporate efforts to advance racial justice can be financially profitable, too. For example, if a corporation lobbies for racial justice, that lobbying effort might enhance the corporation's public image. Recent research demonstrates that most consumers want their brands to take public stances on social justice issues.³⁷⁷ Corporations should not need a financial incentive to do social good, but here, doing good can lead to doing well.

Joining the push for corporate legal responsibility might improve society—and, subsequently, a corporation's bottom line—in other ways. The relationship between the 2020 racial justice protests and healthcare reform offers an example.³⁷⁸ During the protests, racial justice activists

375. See *supra* section II.B.

376. See Ruth V. Aguilera, Deborah E. Rupp, Cynthia A. Williams & Jyoti Ganapathi, Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations, 32 Acad. Mgmt. Rev. 836, 851 (2007) (arguing that business interest groups are engaging in CSR discourse to “forestall prescriptive government regulation”).

377. See Kantaro Komiya, A Majority of Consumers Expect Brands to Take a Stand on Issues Before Purchasing, Survey Finds, Barron's (July 7, 2020), <https://www.barrons.com/articles/a-majority-of-consumers-expect-brands-to-take-a-stand-on-issues-before-purchasing-survey-finds-51594143666> (on file with the *Columbia Law Review*) (“Nearly 60% of Americans want the companies they buy products from to have a position about issues such as racial discrimination and social justice, a survey carried out in June [2020] among 1,004 respondents found.”).

378. For background on U.S. corporate attitudes toward healthcare access, see generally Phil Galewitz, Why Some CEOs Figure ‘Medicare for All’ Is Good for Business, KFF Health News (June 7, 2019), <https://kffhealthnews.org/news/a-large-employer-frames-the>

often chanted, “I can’t breathe,” George Floyd’s last words.³⁷⁹ But the chant “I can’t breathe” soon took on broader significance. Activists increasingly highlighted how COVID-19 disproportionately infected and killed Black people.³⁸⁰ The COVID-19 pandemic exposed and exacerbated a much deeper U.S. healthcare crisis. People of color in the United States have lower rates of health insurance and face poorer health outcomes than white people.³⁸¹

In the wake of the racial justice protests, major pharmaceutical companies touted their commitments to health equity.³⁸² While the depth of these corporate commitments was questionable at that time, these companies’ racial resolve may soon be tested again. In 2023, the U.S. government moved its COVID-19 vaccine distribution efforts from the public sector to the private sector.³⁸³ Leading pharmaceutical companies have announced their plans to astronomically increase the costs of their COVID-19 vaccines in response.³⁸⁴ This dramatic spike in vaccine costs will almost certainly perpetuate health disparities along race and class lines. The uninsured and underinsured have no promise that they will continue to receive free

medicare-for-all-debate/ [https://perma.cc/4U37-VZWQ] (describing changing attitudes about single-payer healthcare among U.S. employers); Janet Nguyen, Why Don’t U.S. Businesses Show More Support for Single-Payer Health Care?, Marketplace (June 10, 2021), <https://www.marketplace.org/2021/06/10/why-dont-u-s-businesses-show-more-support-for-single-payer-health-care> [https://perma.cc/X6BT-HJSF] (discussing why U.S. business has traditionally opposed single-payer healthcare).

379. See Hannah Hagemann & Scott Neuman, ‘I Can’t Breathe’: Peaceful Demonstrators Continue to Rally Over George Floyd’s Death, NPR (June 3, 2020), <https://www.npr.org/2020/06/03/869186653/demonstrations-over-george-floyds-death-and-police-brutality-carry-on> [https://perma.cc/2LJG-7ZLT] (last updated June 4, 2020).

380. Cf. Maritza Vasquez Reyes, Student Essay, The Disproportional Impact of COVID-19 on African Americans, 22 Health & Hum. Rts. J. 299, 301–03 (2020) (studying the factors contributing to COVID-19’s disproportionate impact on Black communities).

381. See Rodney A. Brooks, Hard Hit by COVID-19, Black Americans Are Recovering Slowly, Nat’l Geographic (May 23, 2022), <https://www.nationalgeographic.com/history/article/hard-hit-by-covid-19-black-americans-are-recovering-slowly> (on file with the *Columbia Law Review*); Latoya Hill, Samantha Artiga & Anthony Damico, Health Coverage by Race and Ethnicity, 2010–2022, KFF, (Jan. 11, 2024), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-coverage-by-race-and-ethnicity/> [https://perma.cc/R892-SR7R].

382. See, e.g., Poornima Apte, Moderna Executive on Advancing Health Equity in Medical Research and What All Businesses Can Learn, CO—: The Leap (June 5, 2023), <https://www.uschamber.com/co/good-company/the-leap/moderna-advancing-health-equity> [https://perma.cc/JBM7-WNNK]; Changing the World Through Equity, Pfizer, <https://www.pfizer.com/about/responsibility/diversity-and-inclusion/changing-world-through-equity> (on file with the *Columbia Law Review*) (last visited Jan. 21, 2024).

383. See Dan Diamond, Coronavirus Vaccine Shots Will Remain Free to Uninsured Under Biden Plan, Wash. Post (Apr. 18, 2023), <https://www.washingtonpost.com/health/2023/04/18/coronavirus-vaccines-free-uninsured-biden-bridge-program> (on file with the *Columbia Law Review*).

384. See *id.* (detailing how “vaccine makers [have] plan[ned] to charge as much as \$130 per dose”).

COVID-19 vaccines.³⁸⁵ And though the Biden Administration has worked with vaccine makers to develop a temporary program to ease the financial transition to the private distribution system for COVID-19 vaccines, Administration officials have conceded the program's limitations.³⁸⁶ This new program for the uninsured and underinsured is only temporary, has a limited supply of vaccines available, and relies on manufacturers like Moderna and Pfizer to volunteer their financial assistance to those who need help covering their vaccination costs.³⁸⁷ Social justice should never be so dependent on corporate largesse.

There are meaningful and tangible ways to transform this issue of corporate racial responsibility into an issue of corporate legal responsibility. One way would be if pharmaceutical companies lobbied for and participated in, if enacted, the proposed Vaccines for Adults (VFA) program. The Biden Administration has requested that Congress create the VFA program to offer vaccines to uninsured adults at no cost.³⁸⁸ Under the VFA, modeled after the existing Vaccines for Children (VFC) program, the CDC would be authorized to purchase vaccines directly from manufacturers at negotiated prices—significantly lower prices than the vaccines' list price—and provide them to uninsured adults to expand vaccine access.³⁸⁹ Publicly purchased vaccines incentivize vaccine manufacturing, but more importantly, the passage of the VFA, like the VFC, would be an equitable structural reform and would radically reduce disparities in the vaccination rates of marginalized groups.³⁹⁰ A second, more radical approach to increasing corporate legal responsibility and vaccine equity would be to require that pharmaceutical companies provide a government-designated quantity of free vaccines to the uninsured and underinsured for a stipulated number of years. The U.S. government provided pharmaceutical companies with billions of dollars in research and development funding to help develop COVID-19 vaccines, and vaccine makers are eager to receive new federal funding to create a new generation of COVID-19

385. See *id.* (“While vaccine manufacturers Moderna and Pfizer have pledged to create assistance programs to help cover the cost of shots for uninsured Americans, ‘those are not guaranteed’” (quoting Jennifer Kates, Senior Vice President, Kaiser Fam. Found.)).

386. See *id.* (“Biden officials Tuesday characterized the [bridge access program] as a ‘temporary solution.’”).

387. See *id.* As one prominent healthcare industry leader commented about the program, “There’s going to be a group of people, those who are uninsured and, frankly, those who are underinsured who will not have a way to get a coronavirus vaccine after that supply is gone.” *Id.* (internal quotation marks omitted) (quoting Jennifer Kates, Senior Vice President, Kaiser Fam. Found.).

388. See Marquisha Johns, *The U.S. Needs a Federal Program to Expand Vaccine Access and Equity for Adults*, *Ctr. for Am. Progress* (Apr. 18, 2023), <https://www.americanprogress.org/article/the-u-s-needs-a-federal-program-to-expand-vaccine-access-and-equity-for-adults> [<https://perma.cc/DX7F-F354>].

389. *Id.*

390. *Id.*

vaccines.³⁹¹ Again, although the moral case for health equity should be case enough for any corporation, especially those that seek to provide lifesaving technology, it is also undeniable that financial benefits would flow from accepting this form of corporate legal responsibility.³⁹²

Establishing mandatory legal frameworks can help avoid the moral collective action problems that accompany a voluntarist model. For instance, Title II forced all covered corporations to recognize and respect core ideas of human dignity.³⁹³ A corporation cannot receive any social benefits from resegregating patrons because this form of segregation is now unlawful.³⁹⁴ Law created a dignitary baseline, and society benefited because all covered corporations had to conform to this basic standard. Although not our central concern, one might also note that establishing mandatory legal frameworks should appeal to those seeking business cases for justice, too, because law can end the economic collective action problems tied to voluntary racial justice efforts.³⁹⁵ Some racial justice measures, such as requiring pharmaceutical companies that receive federal research funds to provide free COVID-19 vaccines to the uninsured, might not maximize corporate profits. But if the law requires all pharmaceutical companies receiving federal funds to adopt these measures, then it levels the playing field, and the disincentive to participate in the racial justice measure disappears.

Finally, and most provocatively, the push for greater corporate legal responsibility could remake electoral politics. To be sure, citizens should be deeply concerned about the inordinate power that corporations wield in U.S. politics.³⁹⁶ But it does not appear that this longstanding issue will

391. See Benjamin Mueller, Noah Weiland & Carl Zimmer, U.S. Vaccine Program Now Flush With Cash, but Short on Key Details, *N.Y. Times* (June 26, 2023), <https://www.nytimes.com/2023/06/26/health/covid-vaccines-nextgen.html> (on file with the *Columbia Law Review*) (“[V]accine makers have hurried to line up for the new federal money . . .”).

392. See *id.* (explaining that the Biden Administration has freed up \$5 billion for new vaccines).

393. See *supra* section II.C.

394. See *supra* section II.C.

395. See Robin J. Ely & David A. Thomas, Getting Serious About Diversity: Enough Already With the Business Case, *Harv. Bus. Rev.*, Nov.–Dec. 2020, at 115, 117 (“[O]rganizations have largely failed to adopt a learning orientation toward diversity and are no closer to reaping its benefits. Instead, business leaders and diversity advocates alike are advancing a simplistic and empirically unsubstantiated version of the business case.”).

396. See Liz Kennedy, Corporate Capture Threatens Democratic Government, *Ctr. for Am. Progress* (Mar. 29, 2017), <https://www.americanprogress.org/article/corporate-capture-threatens-democratic-government/> [<https://perma.cc/C2AK-ZDR5>] (“America faces a crisis of corporate capture of democratic government, where the economic power of corporations has been translated into political power with disastrous effects for people’s lives.”).

recede anytime soon, and the costs of nonparticipation are very high.³⁹⁷ Corporations are well-resourced and uniquely positioned to influence politics, and this pattern will likely continue. Further, corporations often support politicians and public policies that conflict with their stated positions on racial justice.³⁹⁸ A sincere effort to reconcile corporations' words and actions would end such corporate hypocrisy and limit the racial tokenism that both conservatives and liberals decry. Such an effort would force corporate leaders to live their politics.

CONCLUSION

Businesses have a long and mostly problematic history of engagement in racial issues in the United States. It therefore makes sense that they have a role to play in furthering racial equity and justice for marginalized people and communities of color. As the history surrounding the passage of Title II demonstrates, CSR failed to achieve desegregation because it did not center the concerns of Black dignity and civil rights. Rather, it emphasized profitability and property rights to make the case for businesses to support desegregation. These lessons are salient today as corporations engage in racial equity work. Sadly, present-day iterations of corporate racial responsibility are repeating many of the mistakes of the past. By grounding its justifications in terms of profitability and rejecting regulation that would ensure accountability, corporate racial responsibility subordinates human dignity to wealth maximization and reifies existing racial hierarchies to the detriment of those it should benefit.

For corporate racial responsibility to be meaningful and effective, it must elevate human dignity, internally improve racial equity, and support meaningful legal changes that further racial equity within society at large. Corporations have long been involved in racial issues. It is now time to make corporate racial responsibility an effective tool in achieving racial equity.

397. Dorothy S. Lund & Leo E. Strine, Jr., *Corporate Political Spending Is Bad Business*, *Harv. Bus. Rev.*, Jan.–Feb. 2022, at 130, 136 (discussing the intense pressure on corporations to participate in election spending).

398. Igor Derysh, *Big Corporate Donors Claim to Support Racial Justice—But Fund Republicans Pushing Voting Limits*, *Salon* (Apr. 17, 2021), <https://www.salon.com/2021/04/17/big-corporate-donors-claim-to-support-racial-justice-but-fund-republicans-pushing-voting-limits> [<https://perma.cc/6GJ6-SCX4>] (detailing how corporate donors that claim to support racial justice are funding candidates that have undermined or are undermining minority voting rights).

