EQUALITY METRICS

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ABSTRACT

This time is different. This time the death of another Black man at the hands of white police officers has prompted calls for change not only within police departments, but across all aspects of life within America and throughout the world. These calls for change have resulted in significant displays of support for the #BlackLivesMatter movement and interest in how one might eliminate systemic racism and promote racial diversity and justice within one's daily life and workplace. For the most part, corporations were quick to publicly align themselves as agreeing that it was time to make a change; that it is time for the lives of Black people in this country to be truly valued. Yet, as months pass, it becomes increasingly apparent that many of these corporate statements were largely performative. While corporations voiced support for the #BlackLivesMatterMovment, most failed to pair their marketing campaigns with measurable actions targeted at tackling race-based issues within firms' own corporate structures.

This Essay looks at how corporations could more meaningfully contribute to the #BlackLivesMatter movement, with a specific focus on the demographic composition of corporations' own organizational structures and supply chains, as well as ways in which firms might contribute to their surrounding communities. Corporations, however, often need incentives to change their behavior. Recognizing this, this Essay addresses steps the market, via institutional investors, can take to encourage firms to move past making statements and towards the implementation of strategies to confront the impact of discrimination, bias, and racism head on within their organizations.

Building on literatures discussing social movements, corporate governance, compliance, and organizational behavior, this Essay argues that institutional investors should find ways to require firms to adopt what we are terming "equality metrics." Institutional investors should incentivize firms to (i) identify a list of specific, assessable goals; (ii) adopt policies and procedures in an effort to achieve their goals that can be tested and measured; and (iii) use the results of their metrics to direct their future efforts at creating a more equitable organization, whether that means investing more dollars or abandoning certain initiatives all together for lack of success. To ensure corporations truly join the #BlackLivesMatter movement, institutional investors must demand more than marketing campaigns; they must demand what is required for a whole host of other corporate goals—empirically proven strategies targeted at specific and measurable objectives that result in success.

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INTRODUCTION

The #BlackLivesMatter movement was well underway[1] when George Floyd was killed, but his death marked a new chapter for those fighting for the right for all Black people to live free and without fear within American society.[2] Maybe it was the video—a testament of the callousness by which the officers valued the Black life pinned to the ground.[3] Maybe it was the pandemic, which had stilled so many throughout the country—shifting the rhythm of people's daily lives—allowing them to focus more completely on

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[1] Black Lives Matter, Herstory (explaining the founding story of the #BlackLivesMatter movement in 2013 in response to the acquittal of George Zimmerman for the murder of Trayvon Martin), https://blacklivesmatter.com/herstory/.

[2] Eliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows no Signs of Slowing Down*, CNN (Aug. 9, 2020) (noting that "[b]efore Floyd's killing, the highest estimate for any American protest" was 4.6 million, but "as many as of June 2020 21 million adults had attended a Black Lives Matter or police brutality protest"), https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html.

[3] Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis and Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. Times (Aug. 13, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.pan

the circumstances of yet another Black person's death at the hands of the state.[4] Maybe it was the historical context in which this particular death occurred—during a rise of overt white nationalism within the age of the Trump presidency.[5] Or maybe it was the convergence of all of these things—the death, the video, the callousness, the stillness, and the unobstructed view of hatred against Black people still existing so tangibly within American society today.

Whatever it was, George Floyd's death reinvigorated the #BlackLivesMatter movement and broadened its participants and coalitions.[6] The protestors included Black people, of all ages, educational backgrounds, and socioeconomic classes.[7] But they also included a multiracial coalition of citizens, including throngs of white people—and not just liberals and progressives—but moms, kids, and everyday people of (white) privilege who could not turn away from the importance and immediacy of the moment.[8]

[4] Naomi Schalit, *How the Pandemic Changed Social Media and George Floyd's Death Created a Collective Conscience*, The Conversation (June 15, 2020), https://theconversation.com/how-the-pandemic-changed-social-media-and-george-floyds-death-created-a-collective-conscience-140104.

[5] Adam Serwer, *Conservatives Have a White-Nationalism Problem*, The Atlantic (Aug. 6, 2019), https://www.theatlantic.com/ideas/archive/2019/08/trump-white-nationalism/595555/; Joshua Inwood, *White Supremacy, White Counter-Revolutionary Politics, and the Rise of Donald Trump*, 37 Politics and Space 579 (2018) ("tracing the rise of Trump and his connection to white nationalism and white supremacy"); Felicia Sonmez & Ashley Parker, *As Trump Stands by Charlottesville Remarks, Rise of White-Nationalist Violence Becomes an Issue in 2020 Presidential Race*, The Washington Post (Apr. 28, 2019), https://www.washingtonpost.com/politics/as-trump-stands-by-charlottesville-remarks-rise-of-white-nationalist-violence-becomes-an-issue-in-2020-presidential-race/2019/04/28/83aaf1ca-69c0-11e9-a66d-a82d3f3d96d5_story.html.

[6] Jose a. Del Real, Robert Samuels, and Tim Craig, *How the Black Lives Matter Movement Went Mainstream*, (June 9, 2020), https://www.washingtonpost.com/national/how-the-black-lives-matter-movement-went-mainstream/2020/06/09/201bd6e6-a9c6-11ea-9063-e69bd6520940_story.html.

[7] Julia Wick, Jaclyn Cosgrove, Maria L. La Ganga, Sonali Kohli, Andrea Castillo, *Voices From the Protests: 'People of All Races Out Risking Their Lives to March'*, Los Angeles Times (June 2, 2020), https://www.latimes.com/california/story/2020-06-02/we-are-tired-we-are-the-majority-we-will-be-heard-voices-from-the-protests.

[8] Id.; Jocelyn Grzeszczak, *The 'Wall of Moms' Protecting Protestors are Spreading Beyond Portland*, Newsweek (July 23, 2020), https://www.newsweek.com/wall-moms-protesters-are-spreading-beyond-portland-1520004; Alicia Lee, *An 8-year-old Boy Organized a Black Lives Matter March for Kids. Hundreds Showed Up*, CNN (July 1, 2020), https://www.cnn.com/2020/07/01/us/8-year-old-black-lives-matter-protest-missouri-trnd/index.html; Reuters, *Children Lead Black Lives Matter Protest in Berkeley*, N.Y. Times (July 9, 2020), https://www.nytimes.com/video/us/100000007231853/children-lead-black-lives-matter-protest-in-berkeley.html. *See also* Adam Serwer, *The New Reconstruction*, The Atlantic (Oct. 2020), https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475/.

Social movements, traditionally, are thought of as movements against the state,[9] and the #BlackLivesMatter movement is, in many ways, just such a social movement. It organically came into being in response to the killings of Black boys, girls, men, and women across this country, and, in part, challenged, and continues to challenge, the culture of policing practices within the United States.[10] It is, of course, untenable for Black lives to be taken—to be murdered—at the hands of state actors. But after George Floyd's death, many began to consider the multitude of ways in which Black lives are devalued and harmed by the vestiges of the state action that permitted the enslavement of Africans,[11] that constitutionalized their perceived lack of value,[12] and codified their subjugation throughout American society.[13]

As a result, the #BlackLivesMatter movement did not remain in the customary bubble of social movement activism directed toward the state. Instead of just debating policing reform, everyday Americans began rethinking the entirety of their lives.[14] They began questioning how their own discrete choices were harming Black lives. Conversations that started by focusing on the appropriate role of policing within American society, turned into debates about, quite simply, everything.[15] The ways in which one should reconceptualize an America that actually valued Black lives spilled into living

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[9] Brayden G. King & Nicholas A. Pearce, *The Contentiousness of Markets: Politics, Social Movements, and Institutional Change in Markets*, 36 Annu. Rev. Sociol. 249 (2010) (citing D McAdam, S Tarrow, & C Tilly, DYNAMICS OF CONTENTION (2001).

[10] [Cite]

[11] [Cite 1619 project-slavery]

[12] [Cite Article 1, Section 2, Constitution]

[13] [Cite – history of Jim Crow; others?]

[14] *See e.g.*, Patrisse Cullors, *'Black Lives Matter' is About More than the Polic*e, ACLU (June 23, 2020) ("Black life must be valued at every stage and in very facet in society. We won't rest until it is.", https://www.aclu.org/news/criminal-law-reform/black-lives-matter-is-about-more-than-the-police/.

[15] McLaughlin, *supra* note 2.

rooms,[16] onto kitchen tables,[17] into workplaces,[18] and, ultimately, within board rooms across the nation.[19]

This Essay focuses on the ways in which corporations have reacted to the nation's broadened support for the #BlackLIvesMatter movement in the wake of George Floyd's death. Corporations' willingness to engage with the movement during the summer of 2020 was unusually swift and largely fell into one of four categories. First, general statements of support from corporate actors, including marketing campaigns.[20] Second, statements plus tangible, but limited actions.[21] Third, statements plus a significant outlay of resources towards both internal and external mechanisms for addressing systemic racism within their organizations and throughout society more broadly.[22] And fourth, a lack of support.[23]

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[16] Hanna Lustig, *Teens on TikTok are Exposing a Generational Rift Between Parents and Kids Over How They Treat Black Lives Matter Protests*, Insider.com (June 3, 2020), https://www.insider.com/tiktok-george-floyd-black-lives-matter-teens-parents-racist-views-2020-6.

[17] Anya Kamenetz, *How to Talk to Kids About Black Lives and Police Violence*, NPR (June 4, 2020), https://www.npr.org/2020/06/04/868600478/q-a-how-to-talk-to-kids-about-george-floyd; Beata Mostafavi, *Raising Race-Conscious Children: How to Talk to Kids About Race and Racism*, Michigan Health (July 22, 2020), https://healthblog.uofmhealth.org/childrens-health/raising-race-conscious-children-how-to-talk-to-kids-about-race-and-racism.

[18] Jennifer Liu, *Talking about Racial Inequality at Work is Difficult—Here are Tips to do it Thoughtfully*, CNBC (June 5, 2020), https://www.cnbc.com/2020/06/05/how-to-thoughtfully-talk-about-racial-inequality-with-your-coworkers.html.talki

[19] Gillian Friedman, *Here's What Companies are Promising to do to Fight Racism*, N.Y. Times (Aug. 23, 2020), https://www.nytimes.com/article/companies-racism-george-floyd-protests.html.

[20] *See e.g.*, Inti Pacheco & Stephanie Stamm, *What CEOs Said About George Floyd's Death*, Wall St. J. (June 5, 2020) (analyzing most common words in 35 company statements addressing the killing of George Floyd), https://www.wsj.com/articles/what-executives-said-about-george-floyds-death-11591364538; Tracy Jan, Jena McGregor, Renae Merle, Nitasha Tiku, *As Big Corporations Say 'Black Lives Matter,' Their Track Records Raise Skepticism*, Washington Post (June 13, 2020), https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/

[21] Sephora, for example, pledged to put dedicate 15 percent of its shelf space toward black-owned brands and held trainings for its employees on racial bias and discrimination. Jemima McEvoy, *Sephora First to Accept '15% Pledge', Dedicating Shelf-Space to Black-Owned Business*, Forbes (June 10, 2020), https://www.forbes.com/sites/jemimamcevoy/2020/06/10/sephora-first-to-accept-15-pledge-dedicating-shelf-space-to-black-owned-businesses/#351af1c24b02; Bethany Biron, *On Tuesday, Sephora closed Stores for 2 Hours to Educate Employees About Racial Bias—Here's How the Cosmetics Giant is Proving its Fight Against Discrimination is More Than Just Lip Service*, Business Insider (Jul. 8, 2020), https://www.businessinsider.com/sephora-proves-fight-against-racism-is-more-than-lip-service-2020-7. It does not, however, appear that the brand has dedicated significant or new resources towards assessing the ways in which systemic racism and implicit bias might be impacting its own workforce and corporate organization.

[22] Ben & Jerry's initially expressed its support for the #BlackLivesMatter movement in 2016. Press Release, Ben & Jerry's , *Why Black Lives Matter* (Oct. 6, 2016), https://www.benjerry.com/whats-new/2016/why-black-lives-matter. Unlike many other corporations, whose initial responses were limited to marketing campaigns, Ben & Jerry's

This Essay is concerned with the first and second categories.[24] Firms in the first category appear to have been concerned with taking performative actions that met the moment without doing more. Firms in the second category took action, but not the types of actions likely to create sustained, meaningful change throughout the organization. Thus, the question, at least for those who hope to see corporations combat systemic racism and truly embrace the idea that Black Lives matter, is how might one incentivize corporations in these two categories to adopt more meaningful initiatives and what would those initiatives look like?

This Essay tackles one aspect of those questions,[25] arguing that institutional investors should require that the corporations they invest in adopt "equality metrics."[26] Specifically, firms must find ways to measure

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initial statement in response to the killing of George Floyd was more concrete, with specific steps for change outlined, making it stand out from the pack. Rebecca Stewart, *'It's Not a Marketing Exercise': Ben & Jerry's on Dismantling White Supremacy*, The Trum (June 23, 2020); Veronica Root Martinez, *A More Equitable Corporate Purpose*, in Research Handbook on Corporate Purpose and Personhood (E. Pollman & R. Thompson eds. Edward Elgar) (2021) (forthcoming). Indeed, Ben & Jerry's relied on its connections with organizations like the NAACP in ensuring it crafted a message that would meet the moment as opposed to a message that would serve pure marketing purposes. Jordyn Holman & Thomas Buckley, *How Ben & Jerry's Perfected the Delicate Recipe for Corporate Activism*, Bloomberg Businessweek (July 22, 2020), https://www.bloomberg.com/news/features/2020-07-22/how-ben-jerry-s-applied-its-corporate-activism-recipe-to-blm).

[23] Clare Duffy, *Days Before Resigning, CrossFit CEO Greg Glassman Told Gym Owners He Doesn't Mourn George Floyd*, CNN Business (June 10, 2020), https://www.cnn.com/2020/06/10/business/greg-glassman-zoom-call/index.html.

[24] *See e.g.*, Sarah Min, *Racial Injustice Will Have Greater Weight in ESG Scores, S&P Global Says*, Chief Investment Officer (July 24, 2020), https://www.ai-cio.com/news/racial-injustice-will-greater-weight-esg-scores-sp-global-says/.

[25] The #BlackLivesMatter movement encompasses a large swath of priorities, which this Essay cannot fully address. This Essay is meant to focus on the ways in which systemic racism has stopped Black lives from fully and completely accessing the equality of opportunities necessary to ensure that they are able to thrive with dignity within America. Practices within corporate America have stifled the potential of Black people by perpetuating policies and practices infected by systemic discrimination and implicit bias. This Essay suggests that corporations committed to the idea that Black lives matter should find ways to end those practices and adopt strategies likely to result in organizations that embrace and promote equality of all persons.

[26] One might wonder why we have chosen to focus on "equality" as opposed to "equity," metrics. The terms are often used interchangeably, although their meanings differ. Equality is defined as "the quality or state of being equal" while equity is defined, amongst other things, as "freedom from bias or favoritism." Merriam-Webster Online. One university explained the two terms as "Equality is typically defined as treating everyone the same and giving everyone access to the same opportunities. Meanwhile, equity refers to proportional representation (by race, class, gender, etc.) in those same opportunities." Winston-Salem State University, *Working Toward Equity*, https://www.wssu.edu/strategic-plan/documents/a-summary-of-equity-vs-equality.pdf. The goal of this piece is really a mix of those two aims. We would like to see more proportional representation, but achieving

their current state of (in)equality and use that baseline to adopt reforms that can be rigorously measured and assessed to identify the strategies that result in greater promotion and achievement of equality with their organizations. Time has demonstrated that firms measure what they value and, importantly, value what they measure. Corporations have said for quite some time that they value diversity; it is time they measure it. The challenge, however, is how to create a set of incentives to ensure corporations deliver on their stated intentions. This Essay suggests institutional investors might effective at creating the pressure needed to enact meaningful change within firms.

Institutional investors may not seem an obvious vehicle for driving changes pushed by a social movement like #BlackLivesMatter.[27] The reality, however, is that institutional investors are uniquely positioned in that many institutional investors, like mutual funds, represent the interests of every-day Americans while simultaneously sitting in a position of relative power to that of corporations.[28] Indeed, this is a power institutional investors have wielded before, as they have previously pressured companies to embrace and improve their demographic diversity.[29] Institutional investors, well-aware of the racial reckoning that occurred during the summer of 2020, have expressed support for meaningful changes within corporate structures.[30] Because of their power and influence over the corporations they invest in, institutional investors can create a unique set of incentives for corporate

greater proportionality without ensuring true equality once within those opportunities is not, in our view, an acceptable result.

[27] It is worth noting that many institutional investors engage in activities that likely are not in line with the #BlackLivesMatter movement. For example, there institutional investors often invest significantly in entities like private prisons, which would seem in conflict with certain goals within the movement. We are not suggesting that institutional investors are, themselves, acting in full support of the movement. We are, however, suggesting that institutional investors are well-positioned to incentivize firms to take more concrete steps toward improving their organizations.

[28] Gerald F. Davis & Tracy A. Thompson, *A Social Movement Perspective on Corporate Control*, 39 Administrative Science Quarterly _ (Mar. 1994) ("Social movement theorists have demonstrated that collective action by individuals and organizations is not a simple function of incentives and overcoming free-rider problems but depends on mutually acquainted actors sharing interpretations of events and seizing political opportunities.").

[29] *See e.g.*, Phil Brown, *Institutional Investors Turn up Pressure on Companies to Embrace Diversity*, Corporate Compliance Insights (March 29, 2019), https://www.corporatecomplianceinsights.com/institutional-investors-turn-up-pressure-on-companies-to-embrace-diversity/.

[30] Patrick Temple-West, *Black Lives Matter Provokes Change on Wall Street*, Financial Times (Oct. 11, 2020), https://www.ft.com/content/8813b73d-c39d-41c9-b1a8-ba2d2e2374da; Helen Chan & Julie DiMauro, *Black Lives Matter Movement Turns Up Heat for Boards to Walk the Talk of Racial Diversity*, Reuters (Oct. 5., 2020), https://www.reutersevents.com/sustainability/black-lives-matter-movement-turns-heat-boards-walk-talk-racial-diversity; Ben Ashwell, *Investor Groups Ponder Further Action on Racial Inequality*, IR Magazine (June 10, 2020), https://www.irmagazine.com/buy-side/investor-groups-ponder-further-action-racial-inequality.

firms to adopt policies and procedures aimed at creating tangible changes throughout corporate structures, like the adoption of equality metrics. Firms that are serious about their belief (i) that Black Lives Matter and (ii) that corporations should confront the ways in which they have perpetuated systemic racism, implicit bias, and other subordinating practices, should find ways to measure the current state of equality within their organizations, supply chains, and communities. They should identify potential mechanisms for improvement, and measure the effectiveness of the strategies implemented. Only by setting concrete, measurable goals will firms be able to determine what is and is not working within their particular environment and communities.

This Essay proceeds in three parts. Part I discusses firms' attempts to increase the demographic diversity within their organizations and explains why these efforts have often proven unsuccessful. It then turns to the current #BlackLivesMatter movement, which has been embraced by corporations in statements, if not as fully in practice. Part II explains why institutional investors are uniquely situated to incentivize corporations to adopt the use of equality metrics to ensure that they are implementing specific and measurable objectives aimed at ending systemic racism and promoting greater racial diversity and justice. It next outlines the types of equality metrics institutional investors should require from firms. Part III discusses some benefits to this Essay's proposal for institutional investors to mandate firms to create and disclose equality metrics. It then turns to some additional considerations raised by this Essay's suggestions.

I. (IN)EQUALITY WITHIN CORPORATIONS TODAY.

Corporations today have been touting the importance of diverse and inclusive workforces for decades.[31] They have made statements, created websites, hired chief diversity officers, created affinity programs, established diversity scholarships, and held numerous diversity trainings. And yet, Fortune 500 companies—the biggest companies in the land with, arguably, the most resources to dedicate toward the effort—have continued to remain overwhelmingly white and male within the most powerful echelons of their firms.[32] This Part begins by briefly explaining a few of the reasons efforts to improve demographic diversity at corporations have proven overwhelmingly

[31] [Cite]

[32] *See e.g.*, Khristopher J. Brooks, *Why So Many Black Business Professionals are Missing From the C-Suite*, CBS News (Dec. 10, 2019), Jeff Green, Jordyn Holman, & Janet Paskin, *America's C-Suites Keep Getting Whiter (and More Male, Too)*, https://www.cbsnews.com/news/black-professionals-hold-only-3-percent-of-executive-jobs-1-percent-of-ceo-jobs-at-fortune-500-firms-new-report-says/; Bloomberg Businessweek (Sept. 21, 2018), https://www.bloomberg.com/news/articles/2018-09-21/america-s-c-suites-keep-getting-whiter-and-more-male-too.

ineffective. The Part next discusses the ways corporations have traditionally viewed social movements and their response to the current #BlackLivesMatter social movement.

A. Corporation's Diversity Efforts.

Corporations have embraced the idea of improving the demographic diversity within their ranks for decades.[33] The reasons corporations have stated a commitment to improving the demographic diversity within their workforces are, of course, multifaceted. Some firms were forced into announcing reforms after significant civil litigation.[34] Others implemented diversity initiatives, because other firms had employed similar strategies—even when those initiatives had not been proven.[35] Still others attempted to articulate what has become known as the "business" case for diversity, arguing that diversity was good for the firm's bottom line.[36] That is not to suggest that diversity rationales have been uniformly accepted—they have not[37]—but most large firms have understood that they needed to project a commitment to diversity to their internal and external stakeholders and shareholders.[38] And yet, all of the money, resources, time, and statements have not resulted in corporate cultures that are overcoming systemic racism or improvement in firms' demographic diversity.

As a result, Black workers largely fail to reach the upper echelons of power within firms. Indeed, in 2020 only 1 percent, or four, chief executive

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[33] Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates V. Corporate Interests*, 92 Wash. L. Rev. 1473, 1478, n. 13 (2017) (collecting citations).

[34] *See e.g.*, Adam Bryant, *How Much Has Texaco Changed?*, N.Y. Times (Nov. 2, 1997) (detailing the diversity initiatives Texaco implemented after settling a $140 million discrimination lawsuit), https://www.nytimes.com/1997/11/02/business/how-much-has-texaco-changed.html; Greg Winter, *Coca-Cola Settles Racial Bias Case*, N.Y. Times (Nov. 17, 2000) (, https://www.nytimes.com/2000/11/17/business/coca-cola-settles-racial-bias-case.html.

[35] Williams, *supra* note 33, at 1479, 1483 (citing Alexandra Kalev et al., Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies, 71 AM.SOC.REV.589, 591–95 (2006); Lauren B. Edelman, Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law, 97 AM.J.SOC.1531, 1536–41 (1992)).

[36] *See e.g.*, Williams, *supra* note 33, at fn. 13 (citing Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Soc. Rev. 208, 213 (2009) (explaining that businesses with investments in diversity programs reported higher productivity than their competitors without similar investments).

[37] Stacy Hawkins, *The long Arc of Diversity Bends Toward Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 RRGC 61 (2017) (detailing criticisms of workplace diversity efforts under the theory that they amount to reverse discrimination); Stacy Hawkins, *A Deliberative Defense of diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 Colum. J. Race & L. 75 (2012) (noting that critical race scholars, amongst others, are often skeptical about "diversity" efforts within firms).

[38] *See e.g.*, Michal Barzuza, Quinn Curtis, & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 Va. L. Rev. __ (2020) (forthcoming) (explaining that Millennial have prioritized factors like board diversity and other "non-wealth" metrics).

officers of Fortune 500 companies were Black.[39] Even more concerning, "[a]mong all U.S. companies with 100 companies with 100 or more employees, Black people hold just 3% of executive or senior-level roles, according to Equal Employment Opportunity Commission data."[40] Similarly, corporate boards also lack significant demographic diversity, "[d]espite pledges to nominate members of underrepresented ethnical and racial groups."[41] "Underrepresented ethnic and racial groups make up 40 percent of the U.S. population but just 12.5 percent of board directors."[42] Black directors, specifically, "make up just 4 percent of the total, up from 3 percent in 2015, while Black women make up just 1.5 percent of . . . more than 20,000 directors."[43]

There are a variety of reasons why the efforts of firms have largely failed to promote greater equality within corporations. A full accounting of these failures is beyond the scope of this Essay, but there are a number of scholars who have looked at these issues critically and deeply in an effort to identify why corporations are not making more progress.

For example, Professor Jamillah Bowman Williams found that inclusion efforts grounded in antidiscrimination laws, as opposed to the business case rationale, are actually more effective at curbing "widely held biases and promot[ing] equitable behavior."[44] This is important, because many firms have pursued the "diversity is good for the bottom line" approach when crafting their diversity and inclusion strategies. Additionally, Professors Alexandra Kalev, Frank Dobbin, and Erin Kelly empirically demonstrated over a decade ago that diversity training and diversity evaluations, tools relied upon throughout industry through today, are not particularly effective at increasing the numbers of white women, black women, and black men in management.[45] Moreover, Professor Linda Hamilton Krieger, Professor Rachel Kahn Best, and Professor Lauren B. Edelman have found that when employees bring formal lawsuits complaining of discriminatory behavior within firms, courts often focus on the "presence of organizational structures (i.e., policies, practices, officers, and officers) to reason about whether

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[39] Te-Ping Chen, *Progress Has Stalled For Black CEOs—Just Four of America's Top 500 Companies Have a Black Chief*, Wall St. J. (2020),
[40] Id.
[41] 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?referringSource=articleShare.
[42] Id.
[43] Id.
[44] Williams, *supra* note 33, at 1473, 1509-11.
[45] Kalev, supra not , at 589.

discrimination occurred without scrutinizing the adequacy of those structures," and if they are present the employer is likely to win.[46]

Taking these research findings together, one plausible inference is that a firm could implement diversity strategies under the auspices that it is "good for business," like diversity training, which have not been proven to be effective, but because the firm has implemented strategies focused on diversity it is more likely to win in any subsequent litigation brought by employees alleging discriminatory conduct. Thus, firms have every incentive to adopt a variety of diversity strategies—both because the public expects it and because it can function as a quasi-affirmative defense in the event of discrimination lawsuits—but they do not have an equally strong incentive to ensure that the strategies they adopt are likely to make actual and tangible improvements in the demographic diversity of their organizations.

B. The Corporation and Social Movement.

Historically, corporations have avoided involvement in social movements. The traditional, and once dominant, view was that the purpose of the corporation was to maximize shareholder value.[47] Known as 'shareholder primacy,' under this framework the corporation's sole concern is with pursuing and increasing profitability for the benefit of shareholders.[48] Shareholder primacy treats the corporation as a purely economic actor for which social movements and non-financial issues are irrelevant and, indeed, bad for the firm's bottom line.[49] Corporations, therefore, have stayed silent in response to social issues in the past, preferring to remain uninvolved in the face of social and political movements.

In recent years, however, corporate silence has become a less viable option.[50] Employees, consumers, and investors expect corporations to broaden their previously narrow economic focus and to engage on significant social issues. A 2016 study found that 40% of US adults believed that the CEO was obligated to speak out on "hot-button" social issues and 31%

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[46] LH Krieger, RK Best, & LB Edelman, *When "Best Practices" Win, Employee's Lose: Symbolic Compliance and Judicial Interference in Federal Equal Employment Opportunity Cases*, 40 Law & Social Inquiry 843 (2015).

[47] Milton Friedman, The Social Responsibility of Businesses is to Increase its Profits, N.Y. TIMES MAG., Sept. 13, 1970 (stating that the "one and only one social responsibility of business" is to "use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game….").

[48] Cite

[49] Cite

[50] Sam Walker, You're a CEO--Stop Talking Like a Political Activist, WALL ST. J. (July 27, 2018), https://www.wsj.com/articles/youre-a-ceostop-talking-like-a-political-activist-1532683844 ("Now, between the endless, real-time conversation taking place on social media, and the rising tide of advocacy bubbling up from their own employees, customers, and investors, saying nothing may be just as dangerous-- if not more so.").

viewed CEOs more favorably for publicly supporting controversial topics.[51] Further, with 72% of consumers identifying as "conscious consumers"—i.e., consumers who "actively seek a brand that aligns with their values"—there may be greater risks to a corporation's profitability and reputation from remaining uninvolved in social issues than from speaking out.[52]

The shift in societal expectations has resulted in more CEOs and corporations taking a public stance on progressive social issues, such as LGBTQ rights and climate change.[53] For example, Apple CEO Tim Cook in 2015 spoke out against Indiana's religious liberty bill that discriminated against gays and lesbians.[54] Similarly, retailer Target publicly supported transgender rights, stating that it would allow customers to use restrooms and dressing rooms that match their gender identity.[55] On the environmental front, companies such as McDonalds and Starbucks have committed to reducing or eliminating the use of single use plastics, particularly straws, to combat consumer waste.[56]

Yet, increased corporate willingness to engage on social issues has not extended to (arguably) divisive issues, such race and racial injustice. The #BlackLivesMatter movement first began in 2013, but it was not until 2020 when the murder of George Floyd in Minnesota that corporate attitudes towards the movement changed.[57] In the wake of the tide of national support for the #BlackLivesMatter movement, countless corporations publicly expressed support for the movement for the first time.[58] Many corporations issued statements of support for the principles of the #BlackLivesMatter movement, including ad campaigns. Others took an extra step, pledging to undertake some limited action. But few corporations adopted a holistic approach to ameliorate internal racial inequities or to address systemic racial disparities within the communities they serve.[59]

For many consumers, particularly those who support the #BlackLivesMatter movement, these statements are viewed as empty platitudes at best or shrewd marketing ploys at worst.[60] A corporation

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51 The Dawn of CEO Activism, https://www.webershandwick.com/wp-content/uploads/2018/04/the-dawn-of-ceo-activism-2.pdf

52 Dante Disparte & Timothy H. Gentry, Corporate Activism is on the Rise, REAL LEADERS (Oct. 27, 2018), https://real-leaders.com/corporate-activism-rise/.

53 Cite

54 Cite

55 Cite

56 Cite

57 Cite

58 Cite

59 A notable exception to this is Ben & Jerry's.

60 Julia Munslow, *Corporate Response to Black lives Matter: Progress or Ploy?* ("Most brands' responses has been met with skepticism. Though there is a begrudging sense of acceptance that some action is more valuable than silence, critics say that companies' statements are

asserting that Black lives matter without making any internal changes or external commitments that would have a demonstrable impact on the lives of the Black employees and consumers seems inconsistent, raising questions about the corporation's true commitment to racial equity. For example, many criticized Amazon's #BlackLivesMatter support statement given the company's unwillingness to raise the minimum wage of its employees. What's more, Amazon had recently fired a Black employee who publicly complained of the corporation's failure to keep employees safe during the Coronavirus pandemic. Thus, the corporate failure to match their #BlackLivesMatter statement with actions proved to many that corporations were not committing to the social movement; rather, these entities sought to capitalize on the moment without engaging in meaningful change.

Interestingly, even as public sentiment has shifted against the #BlackLivesMatter movement, many corporations are adhering to their support for the social movement.[61] Employee, consumer, and investor pressure for corporate action to address racial inequity remains high, motivating corporations to stay the course in their backing of the #BlackLivesMatter movement. Therefore, it is increasingly necessary to consider how to move corporations away from superficial, performative statements and limited, ineffectual actions and towards meaningful, measurable metrics that will more fully demonstrate their commitment to valuing the lives of their Black employees, consumers, and fellow citizens.

The question, of course, is whether corporations are equipped, or likely, to take the movement across the finish line on their own initiative. Their historical, and current, strategies signal that outcome is unlikely. Yet, it may be possible to harness the power of external parties—institutional investors—to incentivize firms to craft strategies better equipped to meet the goals and objectives of the current moment.

II. EQUALITY METRICS

This Essay argues that market participants must find ways to demand that firms adopt what we are terming "equality metrics." Firms must find ways to measure their current state of (in)equality and use that baseline to adopt reforms that can be rigorously measured and assessed to identify the strategies that result in greater promotion and achievement of equality within

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platitudes until they are backed up with action.") https://news.yahoo.com/corporate-response-to-black-lives-matter-progress-or-ploy-220718586.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHyKtbNapZDjdLlS6q5VOiB9o-U9ThkMMXsQuygeJIQxzwD7yk4vYc7QIvPamDzvnnS23JIwMys2iUjTjxmg_bTMu5N-wHZ_qXUKkpzkfvuMZPJWuxV37VBQ4SK_eUalFLWNz1y7m0kVCf_gcYXWCvZqNsoRS_LdG74Ul_0XJ6TM.

[61] Ken Stern, *As Public Support for BLM Drops Off, Will Corporate America Stay the Course?* Vanity Fair, September 24, 2020.

their organizations, their supply chains, and the communities in which they are positioned. This Essay's intervention is relatively narrow when considered against the background of the entire #BlackLivesMatter movement, but it is in many ways the most direct and concrete way in which firms can tangibly impact Black lives for the better in this country.

This Part begins by suggesting that one way to incentivize firms to embrace the social movement to end systemic racism and to promote racial justice and diversity is to have institutional investors require firms to disclose their own state of equality. The Part next discusses what equality metrics might look like for today's firms. The upshot is that firms committed to contributing meaningfully to the movement, must (i) identify a list of specific, assessable goals; (ii) adopt policies and procedures to achieve their goals that can be tested and measured; and (iii) use the results of their metrics to direct their future efforts at creating a more equitable organization, supply chain, and world.

A. The Need for Institutional Investor Pressure.

The task of incentivizing corporations to adopt meaningful, impactful changes to combat racial inequities is no small feat. Corporations vary along multiple axes—such as structure, industry, consumer-base, among others—that could blunt the effectiveness of potential incentives depending on the firm. Institutional investors can play an important role, in this regard, because of their broad-based involvement in the capital markets. Institutional investors are intermediaries who manage and invest money for others. They include private and public pension funds, mutual funds, insurance companies, and endowments.[62] In the past several decades, institutional ownership of public corporations has grown significantly. Institutional ownership of the top 1000 US corporations increased from approximately 46% to 73% between 1987 and 2009.[63] Today, institutions own roughly 80% of the market capitalization of the top 500 companies in the US.[64]

Historically, institutional investors were passive investors in public corporations, preferring to do the "Wall Street Walk" when dissatisfied with corporate performance or behavior.[65] However, in the past two decades, institutional investors have become more active in monitoring and engaging

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[62] Rock, Institutional Investors and Corporate Governance at 4

[63] The Conference Board, 2010 Institutional Investment Report: Trends in Asset Allocation and Portfolio Composition (November. 2010) ("Conference Board Report").

[64] https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions#:~:text=Institutions%20own%20about%2078%25%20of,in%20the%20S%26P%20Euro%20index.

[65] Rock, *Institutional Investors and Corporate Governance* at 12 (discussing the historical passivity of institutional investors towards corporate affairs).

with management.[66] Initially, institutional investors engaged with management on issues of corporate governance, such as shareholder rights and executive compensation.[67] More recently, institutional investors have pushed for corporate engagement on ESG—environmental, social, and governance—issues, with a particular emphasis on matters related to climate change and the environment.[68] Indeed, pressure from institutional investors has led to ESG issues becoming a mainstream consideration for most firms, even as boards of directors and executives struggle with how to respond to such demands.[69]

Given the focus of institutional investors on ESG issues in recent years, it is not surprising that many of them issued statements in support of the #BlackLivesMatter movement in spring 2020. For example, BlackRock, the world's largest asset manager and a main proponent of ESG reporting, issued a broad statement discussing its commitment to racial equity and inclusion.[70] BlackRock's CEO, Larry Fink, and President, Rob Kapito, issued a statement identifying the firm's action plan "to help build a better, fairer society."[71] Notably, in addition to internal commitments to improve and increase diversity, BlackRock leadership also asserted a commitment to focusing on "racial equity and social justice in [the firm's] investment…activities."[72] Specifically, BlackRock has asked companies in which it invests to publish disclosures on the racial and ethnic composition of their US workforce and other information aligned with the Sustainability Accounting Standards Board.

Institutional investors' backing of the current social movement for racial equity is powerful and likely one of the best options to incentivize corporations to enact meaningful reforms. Their large equity ownership in the capital markets uniquely positions institutional investors to influence and

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66 [Cite]

67 Stuart L. Gillian and Laura T. Starks, *Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A global Perspective*, Journal of Applied Finance (Fall/Winter 2003) 10; Gerald F. Davis and Tracy A Thompson, *A Social Movement Perspective on Corporate Control*, Administrative Science Quarterly (Mar 1994) at 2, http://webuser.bus.umich.edu/organizations/smo/protected/resources/davisthompson.pdf (identifying topics of interest to shahreolder activism to include shareholder rights, CEO succession plans, and executive compensation).

68 Robert G. Eccles and Svetlana Klimenko, *The Investor Revolution*, Harv. Bus. Rev. (May-June 2019) (discussing the importance of ESG issues to institutional investors).

69 Willis Towers Watson, *Institutional Investors and ESG in Incentive Plans: Agnostics or Believers?* https://www.willistowerswatson.com/en-US/Insights/2020/07/Institutional-investors-and-ESG-in-incentive-plans-Agnostics-or-believers (discussing that institutional investor pressure has resulted in ESG issues being a board-level topic).

70 Larry Fink & Rob Kapito, Our Actions to Advance Racial Equity and Inclusion, BLACKROCK(June 22, 2020), https://www.blackrock.com/corporate/about-us/social-impact/advancing-racial-equity.

71 Id.

72 Id.

encourage corporate behavior, even in the face of management reticence or unwillingness.[73] This is owing to two primary factors. First, institutional investors are not afflicted with the collective action problem faces individual, retail investors.[74] Individual investors are diffuse and own such a small fraction of a public corporation that they are rationally apathetic in monitoring management. In contrast, institutional investors own a large percentage of the corporation, thereby allowing them to monitor and discipline management more effectively.

Second, institutional investors are able to influence corporate decisionmaking because of their 'salience.' Salience refers to the ability of an investor to successfully engage with and influence management.[75] Investor salience rests on three interrelated concepts—power, legitimacy, and urgency.[76]

Power is often associated with greater levels of stock ownership and reflects the extent to which an investor can influence or pressure corporate action.[77] An investor's power may arise from (i) its potential use of corporate governance mechanisms; (ii) its ability to divest or increase ownership stake; or (iii) its ability to affect the reputation of the corporation or its managers.[78] Legitimacy addresses the investor's credibility to engage on the matter at issue.[79] Such credibility may arise from the investor's reputation in the market, expertise on the matter, and a business case for the issue.[80] Lastly, urgency is based on: (i) time sensitivity, defined as the "degree to which managerial delay in attending to the claim or relationship is unacceptable" and (ii) criticality, "the importance of the claim or the relationship"[81] to the investor.

The concept of salience suggests that institutional investors are well-suited to influence corporations to enact meaningful reforms to target internal and external causes of racial inequity. Institutional investors' large equity holdings across multiple corporations grant them a source of power to pressure management by utilizing their shareholder rights, threatening to decrease ownership interest in the entity, and/or harming the corporation's

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[73] [Cite]

[74] [Cite – define collective action]

[75] Ronald K. Mitchell, Bradley R. Agle & Donna J. Wood, *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 ACADEMY MGMT. REV. 853 (1997); E. James M. Gifford, *Effective Shareholder Engagement: The Factors that Contribute to Shareholder Salience*, 92 J. Bus. Ethics 79, 79 (2010).

[76] Mitchell, Agile, & Wood supra note 75.

[77] Id. at 865.

[78] Lori Verstegen Ryan & Marguerite Schneider, *The Antecedents of Institutional Investors Activism*, 27 ACADEMY MGMT. REV. 554 (2002)

[79] Michell, Agile & Wood, *supra* note 75, at 866.

[80] ., E. James M. Gifford, *Effective Shareholder Engagement: The Factors that Contribute to Shareholder Salience*, 92 J. Bus. Ethics 79, 79 (2010).

[81] *Id.*

public image. Further, the deep investment knowledge and expertise of institutional investors, like BlackRock, Vanguard, or CalPERS (the California Public Employees' Retirement System) legitimize their demands for reforms. And, finally, the social unrest of the spring and summer of 2020 demonstrates the urgency of these reforms. Institutional investors, therefore, should leverage their salience in the capital markets and incentivize corporations to institute the types of reforms needed to respond to the current social movement.

B. A Push for Standardized Metrics.

As explained in Part I.B., corporations do seem to have bought into the idea that they should contribute to the current social movement. In particular, a movement aimed at ending systemic racism and promoting greater racial diversity and justice. But the statements and actions firms have prioritized, have not focused heavily—at least in a widespread basis—on actions that can be measured, tested, and assessed for their effectiveness.[82] As Part II.A. explains, however, institutional investors could play an important role in incentivizing firms to do just this.

This section will focus on the types of equality metrics institutional investors should require from corporations. In particular, these equality metrics should (i) identify a list of specific, assessable goals; (ii) specify policies and procedures that can be tested and measured; and (iii) use the results of these assessments to direct firms' future efforts. Institutional investors should look for equality metrics that focus on three areas: firms' own internal organizations, their supply chains, and their communities. Currently, there are a number of organizations that appear to have identified one of those three areas for reform, but there do not appear to be many who have focused in on all three.[83] Firms truly committed to this social movement should consider if and how they might adopt equality metrics targeted at improving their organizations, supply chains, and the world.

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[82] Business Roundtable did encourage companies to voluntarily disclose key diversity metrics in the workforce and leadership ranks at companies, but it is one of six suggestions in one of its six primary suggested targeted areas for focus; so not a primary focus. Press Release, Business Roundtable, Business Roundtable CEOs Announce Corporate Actions, Public Policy Recommendations to Advance Racial Equity and Justice, Increase Economic Opportunity in Aremerica (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

[83] There are a few corporations that have embraced this three-pronged approach. Ben & Jerry's appears to be one of them. Veronica Root Martinez, *A More Equitable Corporate Purpose*, in … (2021) (forthcoming).

1. Internal.

The first priority for institutional investors in creating incentives for firms to enact equality metrics should be to focus on the demographic make-up of firms' workforces. Indeed, U.S. activists and analysts have begun calling for data disclosure from firms to ensure that companies are meaningfully acting upon the pledges they have made.[84] Specifically, activities have called for companies to "release specific information such as on the racial backgrounds of their directors or pay ranges of their workers." These seem like reasonable measures to ask for, but this Essay urges institutional investors to mandate more from firms.

First, institutional investors should ask firms to provide data regarding the demographic breakdown across various segments of its workforce on at least an annual basis, starting as soon as possible. Disclosure of data of this nature will allow institutional investors and the public to determine if historically underrepresented people are concentrated or missing from certain organizational units and roles. Additionally, the mere disclosure of demographic data at specified, regular intervals will help institutional investors, and the public, to determine how and where improvement is being made at firms. This disclosure of data is necessary to allow for firms, institutional investors, and the public to get a better awareness of the demographic diversity at firms from the board level, to senior management, and beyond. There are many anecdotal or industry-specific bits of information that suggest there is a lack of demographic diversity at the board and senior management level, but without clear disclosures, those committed to reform are, in many ways, attempting to see in the dark.

Second, institutional investors should ask firms to provide information about their goals and objectives aimed at improving or increasing the demographic diversity within their workforces, and these goals should be specified in a manner similar to how the demographic data disclosures are provided. If a firm provides demographic data regarding all of the individuals within leadership roles in its marketing department, it should also provide information on how, or if, it hopes to improve those numbers. There are firms that have provided specified goals in response to the current social movement, so asking for goals of this nature does not appear to be unprecedented. For example, Adidas has committed to filling at least thirty percent of all open positions at Adidas and Reebok with black or Latinx candidates.[85] What is not as clear is where those open positions are. Are

[84] Ross Kerber, *U.S. Activists Seek Data to Test Corporate Diversity Pledges*, Reuters (Oct. 13, 2020), https://www.reuters.com/article/us-climate-change-investing-data/u-s-activists-seek-data-to-test-corporate-diversity-pledges-idUSKBN26Y2ZK.
[85] Friedman, supra note **Error! Bookmark not defined.**.

they throughout the firm? Are they at the storefront level? Or are they within the executive levels of the firm?[86]

Institutional investors should require firms to be clear in the goals they are setting each year, and equally as clear at their status towards meeting those goals in their subsequent reports. For instance, PepsiCo has established a set of clear goals regarding its targets for managers and has committed to increasing "its number of black managers by 30 percent by 2025" and has committed to "adding more than 250 black employees to its managerial positions, including a minimum of 100 black employees to the executive ranks."[87] That sort of clear target, if accompanied by regular reporting intervals that include progress on meeting the target, is the type of data that this Essay would qualify as an "equality metric." It is a clearly identified goal, that includes an initiative with an outcome that can be measured. There are, of course, a range of goals that firms could establish, and this Essay is not advocating that all corporations should adopt quotas. This Essay is arguing that for firms to make progress, they must first set specific goals and objectives so it is clear what they are working toward.

Third, firms should disclose the strategies they have employed in an effort to meet their diversity targets. Whether it is establishing or bolstering an internal mentorship program or changing where and how it typically recruits candidates, firms should be transparent on what initiatives they have

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[86] There are discussions about where firms' priorities should be—whether they should be at diversifying senior leadership or at improving the quality of life for employees much further down the ranks. *See e.g.*, Ellora Derenoncourt & Claire Montialoux, *To Reduce Racial Inequality, Raise the Minimum Wage*, N.Y. Times (Oct. 25, 2020), https://www.nytimes.com/2020/10/25/opinion/minimum-wage-race-protests.html. This Essay takes no specific view on these debates, but suggests firms should think about their organizations in a wholistic fashion when deciding what goals to pursue, and once a firm decides on its objectives, it should measure its success toward meeting them.

[87] Friedman, supra note **Error! Bookmark not defined.**. There are some who will read this sort of goal and immediately wonder about the constitutionality of the intervention. There is no constitutional concern regarding a private parties' use of quotas, because they are not state actors. Many, however, have interpreted the holding in *Ricci v. DeStefano*, 557 U.S. 557 (2009) as outlawing the use of quotas under Title VII, but that is not the actual holding in the case, which focused on the interplay between disparate treatment and disparate impact analysis. An initiative that includes specific quotes should be crafted carefully to ensure that it does not run afoul of any other legal regimes, like antidiscrimination law, but quotas initiated by private parties are not per se illegal. Some will object and say that there are good reasons to believe the Supreme Court will strike down the use of quotas, so they should be avoided. Others might argue that private employers engaged in this activity will result in litigation that will generate anti-affirmative action caselaw. Whether and how to use interventions like those announced by Adidas and PepsiCo is for individual employers to decide, and this Essay is not advocating for the use of quotas. This Essay is arguing that firms should utilize legal, nondiscriminatory tools to achieve their goals with regard to remedying the systemic racism that has impacted the demographic diversity within and throughout their organizations, and that their goals should be specific, objective, measurable, and assessed.

utilized over the past year. This is important for two reasons. First, disclosure of this type of information will demonstrate what initiatives worked and which did not. It is just as valuable to identify what does not work as it is to tout what did work. If an initiative fails to improve diversity, that does not necessarily indict the company in any way, but if a firm continues to use a strategy that doesn't work, that suggests they firm is more concerned about looking like they are doing something than actually achieving their goals. Second, the disclosure of efforts, paired with information on what worked and what did not, will allow the market to learn from the trial and error of others. No firm is going to discover the key to eliminating systemic racism on its own—this must be a collaborative process, and by disclosing what did and did not work in a transparent way, firms can contribute toward the larger effort. Importantly, disclosure of this information would be in line with the Business Roundtable's most recent initiatives on racial diversity and justice.[88]

Fourth, institutional investors should explicitly ask firms what the firms' own assessment is on whether they are meeting their stated objectives. Institutional investors should encourage firms to engage in root-cause analyses to determine why they are or are not meeting certain goals and targets and share their own assessments of that information.[89] Again, this information will allow for firms to learn from the work of others. It will also enable institutional investors to assess whether firms are meaningfully engaged in attempting to eliminate structural racism within their organizations.

2. Supply Chain.

Some firms have pledged to diversify their supply chains in response to the #BlackLivesMatter movement. For example, Sephora has taken the "15 Percent Pledge," "which means it will look to increase the amount of shelf space given over to products from black-owned business to 15 percent."[90] A focus on supply chain by corporations is important, because it can actually be a driver for changed behavior across not just one firm, but various market

[88] Press Release, supra note 82.

[89] Veronica Root Martinez, *The Compliance Process*, 94 Indiana L. J. 203 (2019) (discussing the importance of engaging in comprehensive root-cause analyses after compliance failures occur).

[90] Friedman, supra note **Error! Bookmark not defined.**. These sorts of efforts could result in litigation. *See e.g.*, Megan Rose Dickey, *Uber Eats Faces Discrimination Allegations over Free Delivery from Black-Owned Restaurants*, TechCrunch (Oct. 30, 2020), https://techcrunch.com/2020/10/30/uber-eats-faces-discrimination-allegations-over-free-delivery-from-black-owned-restaurants/. Again, this Essay is not arguing in favor of certain quotas, it is, however, arguing that firms should adopt specific goas that can be measured and assessed to track progress.

participants. When firms make explicit requests of their contracting partners, it often serves a powerful incentive for them to make change. This sort of incentive matrix is used quite a bit within compliance areas, with firms requiring their contracting partners to commit to maintaining compliance with certain items like anti-corruption efforts or environmental laws.[91] Thus, if institutional investors prioritize changes within firms' supply chains, they will impact not only the direct firm, but also that firm's contracting partners.

Institutional investors require firms to disclose information about the demographic diversity of their supply chain and, like the information gathered regarding a firm's internal organization, that information should be specific, measurable, and accompanied by concrete goals and objectives. Equality metrics involving a firm's supply chains might include information about the demographic diversity of (i) the suppliers whose goods a corporation contracts with, (ii) the demographic diversity within the supplier itself, and (iii) goals and targets to increase a firm's use of suppliers who are demographically diverse or who employ demographically diverse workforces, and. And, again, firms should be required to explicit state whether they have met their specified goals and what strategies they have implemented in an effort to do so.

3. Community.

A variety of corporations have announced initiatives meant to address the impacts of systemic racism and to promote greater equality within communities. Fitbit, for example, announced that "it would support research projects to address health conditions that disproportionately affected [B]lack people, including Covid-19."[92] Netflix shifted 2 percent of its cash assets to "financial institutions that serve the nation's Black communities."[93] Business Roundtable has explicitly embraced the idea that corporations should move to advance racial equity and justice and increase economic opportunity for Black people throughout America.[94]

However, these sorts of initiatives are likely the most fraught, by which we mean these might be the most difficult interventions for developing

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[91] Veronica Root, *Coordinating Compliance Incentives*, 102 Cornell Law Review 1003, 1016-17 (2017).

[92] Friedman, supra note **Error! Bookmark not defined.**.

[93] Nathan Vardi, *Netflix Shifts 2 percent of Its Huge Cash Pile to Financial Institutions Serving Black Communities*, Forbes (June 30, 2020), https://www.forbes.com/sites/nathanvardi/./06/30/netflix-shifts-2-of-its-huge-cash-pile-to-financial-institutions-serving-black-communities/?sh=77db14b5b313

[94] Press Release, Business Roundtable, Business Roundtable CEOs Announce Corporate Actions, Public Policy Recommendations to Advance Racial Equity and Justice, Increase Economic Opportunity in America (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.

robust and objective metrics for assessment. First, the focus on community instead of the firm runs counter to the predominant narrative that within corporate law the purpose of the corporation is to provide wealth to its shareholders.[95] Second, identifying ways to measure the impact of these sorts of investments is necessarily going to be much more challenging, because they are going to be more difficult to categorize and measure.

These sorts of initiatives are also quite important. A full accounting for how and why corporations have been complicit in creating inequality within communities of color is beyond the scope of this Essay,[96] but creating initiatives likely to result in "economic justice" are an integral part of the #BlackLivesMatter movement.[97] Institutional investors should encourage firms to continue to contribute to these greater societal initiatives, but they should ask firms whether their contributions are hands-off or hands-on. By this we mean, are the resources provided little more than donations without additional follow-up, or are they investments in a collaborative partnership targeted at eliminating systemic racism and promoting economic justice for Black people throughout this nation. That distinction communicates quite a bit about the priorities of the firm and its true commitment to the current social movement.

To encourage the latter type of initiatives, institutional investors should require firms to disclose their community commitments annually and to describe how the firm itself contributed to the initiative. Requiring this information in annual disclosures to institutional investors will help make it more apparent to investors and the public which corporations are meaningfully contributing to ending systemic racism within their communities.

III. BENEFITS & ADDITIONAL CONSIDERATIONS.

If institutional investors adopt a posture of requiring the corporations they invest in to provide specific and transparent metrics regarding firms' equality efforts, tangible change might finally be achieved within corporations that actually addresses issues related to systemic racism, racial justice, and diversity. This Part discusses two potential benefits associated with this Essay's proposal. It next discusses three additional items for consideration that scholars, policymakers, and industry leaders should keep in mind as they consider the full ramifications this Essay's proposal.

95 But see, Veronica Root Martinez, *A More Equitable Corporate Purpose*, supra note .

96 [Cite to literature addressing this more fully]

97 Tanzina Vega, *The Next Battle for Black Lives Matter: Economic Justice*, CNN Money (Aug. 2, 2016), https://money.cnn.com/2016/08/02/news/economy/black-lives-matter-the-economy/index.html

A. Benefits.

There are a number of potential benefits this Essay's proposal might have on ensuring the current social movement within corporations toward greater equality is properly incentivized and measured. This Part discusses two such benefits. First, the proposal allows for a baseline to be created regarding from which to measure progress. Second, by making equality metrics public it will provide the information necessary to empirically test what sorts of strategies result in meaningful change and which do not.

1. Creates a Baseline.

Currently, a number of corporations and coalitions of corporations are engaged in efforts to identify strategies they can implement to attempt to achieve greater racial diversity and justice within their organizations and across society in general. In 2017, CEO's came together to promote and pledge to work toward greater diversity and inclusion within their firms and to collaborate, if possible, in that effort.[98] In 2020, CEO's came together to identify ways they could address systemic racism throughout society.[99] That is admirable. And yet, if firms do not start by measuring the baseline of their own organizations' equality today, there will be no way to understand what they have accomplished tomorrow.

This Essay's proposal for each individual firm to adopt specific and measurable equality metrics will create a baseline by which the progress of the initiatives they adopt over the coming months can be measured. Currently, it is difficult to track which firms are doing what. Some firms are really focused on their internal workforces. Other firms are focused highlight on their supply chain diversity. Still other firms are focused on ways to combat systemic racism throughout society. All of these priorities are independently good, but they could be a whole lot of nothing if there is no way to assess and measure the current state of equality in these areas, so that the investments poured into these various efforts can be measured tomorrow.

Corporations have, for years, come together to pledge their commitment to improving diversity and inclusion and now to fight for racial diversity and justice, but the limited data we have suggests the results have largely been

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[98] Press Release, PWC, PwC US Inspires more than 300 CEOs to commit to Advance Workplace D&I (2017), https://www.pwc.com/gx/en/about/stories-from-across-the-world/inspiring-more-than-150-ceos-to-commit-to-advance-diversity-and-inclusion.html.
[98] R. Kress, *175 Top CEOs Pledge to Diversity and Inclusion Initiative*, Ivy Exec (2017), https://www.ivyexec.com/career-advice/2017/ceos-pledge-diversity-and-inclusion/.
[99] Press Release, Business Roundtable, *Business Roundtable CEOs Announce Corporate Actions, Public Policy Recommendations to Advance Racial Equity and Justice, Increase Economic Opportunity in America* (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.

limited. Institutional investors, however, are in a unique position to harness the power of the current social movement toward greater equality throughout American society to incentivize corporations to increase their transparency and reporting regarding the efforts they undertake. By requiring discrete, consistent data across corporations to be revealed at regular intervals, it will allow institutional investors, and the public, to better understand which firms' efforts are moving the needle and which ones are proving to be ineffective. If a baseline is not set to understand firms' current states of equality, another ten, twenty, or thirty years could pass where a variety of statements and pledges are made, while significant resources are expended, with minimal progress on particular outcomes as the result.

2. Allows for Empirical Analyses.

This Essay suggests that institutional investors should begin mandating equality metrics from the firms they invest in. In doing so, it will allow specific, consistent, and measurable information to be transparently disclosed to the public. Those disclosures will be important for a variety of reasons, but one is that it will allow a range of data to become available for empirically testing the effectiveness of various strategies employed within firms, across industries, and throughout the market.

As is noted in Part III.A.1, because the information will be provided at the individual firm-level, it will allow each individual firm to test for itself what is working for itself. But that same information can be grouped and empirically tested by scholars. For example, if 100 separate firms, fifty in the agriculture industry and fifty in the consumer goods industry, decide to employ a mentoring program between high-level executives and employees of color within their firms, scholars might be able to test what's working both at the individual firm level, but also at the industry level. In doing so, scholars might be able to identify specific types of interventions that are more likely to result in greater equality within certain professions than others. This is important, because how companies are run varies widely across firms and industries. To the extent that trends can be identified, it could result in more targeted development of initiatives for firms to implement.

Additionally, by taking information at the firm level and aggregating it across the market, scholars may be able to identify the types of interventions that might appear to be consistently successful at moving the quality of corporations in a positive way. Findings of this nature might then be adopted by different types of organizations—nonprofits, universities, privately-held corporations—who are not the subject of this Essay's focus. The upshot is that by revealing more information about firms' equality metrics, it allows both individual firms to benefit and make specific assessments regarding their own objectives and goals, but it might also have a spillover effect by providing better data for scholars to assess regarding what is likely or not likely to work at ending systemic racism and promoting greater racial justice and diversity within firms-at-large.

B. Additional Considerations.

While this Essay's proposal has a variety of upsides, it is not able, or meant, to address all aspects of the challenges firms face in attempting to create corporate cultures, supply chains, and societal norms likely to result in more equality for all persons. This section addresses three considerations that scholars, policymakers, and business leaders should keep in mind when employing a strategy of creating and disclosing equality metrics.

1. Quantity is Not Quality.

This Essay is focused on creating incentives for firms to identify, gather, and publicly disclose data regarding their efforts to achieve greater equality within their firms, supply chains, and society. The primary outputs will be data and descriptive information about the efforts undertaken. This proposal, essentially measures quantity; it aims to identify what firms and initiatives appear to be successful in improving equality as measured via greater demographic diversity. What will not, however, be measured by the proposed equality metrics is quality.

The metrics proposed might reveal information about how a firm was able to recruit and retain a more diverse workforce or how it was able to improve demographic diversity throughout its supply chain, but the metrics will not be able to provide information about the quality of the experience employees or third-party contracting partners have. Employees may stay at a firm for a variety of reasons, but they may still feel as if they are experiences discriminatory or biased treatment. A supplier may continue to provide goods to a company, but they might feel as if the terms of the relationship are not completely fair. These qualitative concerns—commonly attributed to inclusion strategies—will not be picked up by this Essay's proposal.

This Essay's proposal is not meant, however, to be a comprehensive fix for the multifaceted challenges facing firms as they attempt to confront the challenges of combatting systemic racism and promoting greater racial diversity and justice. Instead, it should be viewed as one component of a larger effort to address these issues. Firms will need to implement different initiatives to measure concerns like quality of experience. That said, if firms do not identify where they are at today, so that they can assess whether their initiatives are creating positive change tomorrow, there is unlikely to be any meaningful change towards creating greater equality at these firms, regardless of how much money they dedicate to the problem.

2. Reluctance to Share Diversity Efforts.

Some may wonder about the willingness of corporations to share information related to their diversity efforts, because there has been litigation regarding the disclosure of these efforts before. Professor Jamillah Bowman Williams has detailed how firms sometimes argue that their diversity efforts should be considered trade secrets and exempted from disclosure.[100] One might wonder whether firms should be able to pursue a competitive advantage by identifying the best methods for recruiting and retaining demographically diverse talent and keeping it a secret.

Business Roundtable has already acknowledged, albeit softly, the importance of firms collaborating on these issues. Additionally, Professor Williams work suggests that some firms' attempts to gain trade secret protection over their diversity efforts are actually a tactic to hide gender and racial imbalances, and that diversity data should be treated as "public resources." Thus, this Essay's suggestion that firms disclose what has and has not worked for their efforts toward improving demographic diversity is not unprecedented.

When one looks at corporate America today, one does not find many who are succeeding at improving the demographic diversity and equality within and throughout their organizations. Keeping diversity efforts a secret has not worked to create firms that are notable in meeting their goals regarding demographic diversity. This Essay suggests it is time to take another approach.

3. Micro- v. Macro- Demographic Impacts.

This Essay calls for institutional investors to require corporations to establish and track firms' equality metrics. That information, however, will likely be gathered at a level that prioritizes macro-level demographic information as opposed to micro-level information.[101] For example, firms will likely need to disclose to institutional investors the racial composition of its workforce and that racial composition will likely be disclosed in typical fashion—Hispanic versus non-Hispanic ethnicity and then race. There is, however, quite a bit of variation that these types of categories fail to pick up.

For example, the individuals who identify as African-American/Black on forms are often quite diverse. Some of those individuals will trace their ancestry back to a period of American slavery, while others will be more

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[100] Jamilah Bowman Williams, *Diversity as a Trade Secret*, 107 Geo. L.J. 1684 (2019).

[101] Remarks of Jessie Woolley-Wilson at the Conference on Racial Equity in Corporate Governance, Panel 1: How Can We Increase Racial Diversity in the C-Suite and Boardroom, hosted by Columbia Law School (Oct. 29, 2020) (explaining the importance of breaking down demographic groups to see who is being benefited by the various initiatives undertaken).

recent immigrants from Black-majority countries. These sorts of distinctions are important, because if, for example, only Black immigrants are making it through to upper levels of management within the firm, it raises questions about whether a firm's efforts to achieve racial equality are doing enough to address systemic racism against African-Americans. And yet, it is likely inefficient and impractical for institutional investors to attempt to receive demographic information at the micro- (i.e., Black immigrant, Caribbean American, African-American) as opposed to the macro-level (African-American/Black. Additionally, the more one breaks down categories, the more difficult it will be, particularly today, to (i) maintain worker anonymity and (ii) create pools of data of statistically significant sizes to allow for empirical analyses to be conducted.

That said, while this Essay does not propose that institutional investors require diversity information to be reported to them at a micro-level, it would seem prudent for individual firms to be mindful of the ways in which their programs are functioning at both micro- and macro-demographic levels. Further discussion of this issue is, however, beyond the scope of this Essay.

CONCLUSION

[To be written.]