THE YALE LAW JOURNAL FORUM

JUNE 1, 2021

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 prompted calls for change not only within police departments, but across all aspects of American life. Those calls for change resulted in significant displays of support for the Black Lives Matter movement and interest in how to 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 with the movement. When carefully examined, however, many of the statements issued by corporations in support of the Black Lives Matter movement look more like marketing campaigns than like blueprints for the implementation of specific strategies aimed at tackling issues of race within firms' own corporate structures and their contracting partners.

Yet, there are concrete steps that can be taken to incentivize corporations to more meaningfully contribute to the Black Lives Matter movement. This Essay addresses steps the market, via institutional investors, can take to encourage firms to move past mere statements and towards the implementation of strategies crafted to address discrimination, bias, and racism within firms' own organizational structures and supply chains. Building on social movement, corporate governance, compliance, and organizational behavior literatures, this Essay argues that institutional investors should require that firms adopt "equality metrics." Equality metrics refer to systematized corporate disclosure of the current demographic diversity of the workforce and supply chain, as well as measurable, specific plans to improve racial equity. Specifically, institutional investors should incentivize firms to (i) measure the state of (in)equality in their organizations and supply chains; (ii) identify a list of specific, assessable equality goals; (iii) implement policies and procedures aimed at achieving those goals that can be tested and measured; (iv) disclose their progress toward meeting these goals at regular intervals; and (v) use their own and others' measured performances on these metrics to direct future efforts at creating a more equitable organization. Corporations have demonstrated general support for the Black Lives Matter movement, but firms often need incentives to alter their behavior. Institutional investors are well-placed to apply pressure likely to encourage firms to enact meaningful change. To properly align corporation's incentives, institutional investors must demand more than marketing campaigns; they must demand empirically proven strategies targeted at specific and measurable objectives aimed at eliminating inequality within firms.

INTRODUCTION

The Black Lives Matter movement was well underway[1] when George Floyd was killed, but his death marked a new chapter for those fighting for the right of all Black people to live free and without fear within American society.[2] Maybe it was the video—a testament of the officers' callousness and indifference to 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 and allowing them to focus on 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 under the Trump presidency.[5]

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1. *See Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory [https://perma.cc/VF6G-WH2T] (explaining the #BlackLivesMatter movement's founding in 2013 in response to the acquittal of George Zimmerman for the murder of Trayvon Martin). When discussing the movement, it is sometimes referred to as #BlackLivesMatter movement to acknowledge how social media was used to publicize and garner support for the movement, although the phrases "#BlackLivesMatter movement" and "Black Lives Matter movement" have often been used interchangeably. For consistency, throughout this Essay, we have chosen the latter phraseology.

2. *See, e.g.*, Eliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020), https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html [https://perma.cc/G6XE-LYLA] (noting that "[b]efore Floyd's killing, the highest estimate for any American protest" was 4.6 million, but "as of mid-June [2020], as many as 21 million adults had attended a Black Lives Matter or police brutality protest").

3. *See, e.g.*, Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/2WFN-VUG7].

4. *See* Naomi Schalit, *How the Pandemic Changed Social Media and George Floyd's Death Created a Collective Conscience*, CONVERSATION (June 15, 2020), https://theconversation.com/how-the-pandemic-changed-social-media-and-george-floyds-death-created-a-collective-conscience-140104 [https://perma.cc/SYY2-HKJV].

5. *See* Joshua Inwood, *White Supremacy, White Counter-Revolutionary Politics, and the Rise of Donald Trump*, 37 POL. & SPACE 579, 590 (2018) ("racing the rise of Trump and his connection to white nationalism and white supremacy"); *see also* Adam Serwer, *Conservatives Have a White-Nationalism Problem*, ATLANTIC (Aug. 6, 2019), https://www.theatlantic.com/ideas/archive/2019/08/trump-white-nationalism/595555 [https://perma.cc/N75W-DFNR] (discussing President Trump's relationship to the rise of white nationalism in the United States); Felicia Sonmez & Ashley Parker, *As Trump Stands by Charlottesville Remarks, Rise of White-Nationalist Violence Becomes an Issue in 2020 Presidential Race*, WASH. POST (Apr. 28, 2019, 10:47 PM EDT), 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 [https://perma.cc/QH3V-PGSZ] (noting "the rise of white-nationalist violence during Trump's tenure" and its emergence "as an issue as the president turn[ed] his attention toward his reelection campaign").

Or maybe it was the convergence of all of these factors—the death, the video, the callousness, the stillness, and the unobstructed view of hatred against Black people still so tangible within American society today.

Whatever the explanation, George Floyd's death reinvigorated the Black Lives Matter movement and broadened its participants and coalitions.[6] The protests that occurred throughout the summer of 2020 included Black people of all ages, educational backgrounds, and socioeconomic classes.[7] But it also included a multiracial coalition of citizens, and not just politically-engaged progressive activists, but everyday people of (white) privilege who could not turn away from the importance and immediacy of the moment.[8]

When a group of citizens comes together in pursuit of "social and political change,"[9] it sometimes evolves into a social movement.[10] The Black Lives Matter movement, in many ways, fits this mold. It arose in response to the killings of

6. *See, e.g.*, Jose A. Del Real, Robert Samuels & Tim Craig, *How the Black Lives Matter Movement Went Mainstream*, WASH. POST (June 9, 2020, 4:35 PM EDT), https://www.washingtonpost.com/national/how-the-black-lives-matter-movement-went-mainstream/2020/06/09/201bd6e6-a9c6-11ea-9063-e69bd6520940_story.html [https://perma.cc/X7GM-UF6W].

7. *See* 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,'* L.A. TIMES (June 2, 2020, 5:00 AM PT), https://www.latimes.com/california/story/2020-06-02/we-are-tired-we-are-the-majority-we-will-be-heard-voices-from-the-protests [https://perma.cc/3K3H-NWHY].

8. *See, e.g.*, Jocelyn Grzeszczak, *The 'Wall of Moms' Protecting Protestors Are Spreading Beyond Portland*, NEWSWEEK (July 23, 2020, 11:04 AM EDT), https://www.newsweek.com/wall-moms-protesters-are-spreading-beyond-portland-1520004 [https://perma.cc/Z37A-SG8E]; Alicia Lee, *An 8-Year-Old Boy Organized a Black Lives Matter March for Kids. Hundreds Showed Up*, CNN (July 1, 2020, 5:49 PM ET), https://www.cnn.com/2020/07/01/us/8-year-old-black-lives-matter-protest-missouri-trnd/index.html [https://perma.cc/3VAG-SEQV]; 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 [https://perma.cc/ZN86-RH28]; Wick et al., *supra* note 7; *see also* Adam Serwer, *The New Reconstruction*, ATLANTIC (Oct. 2020), https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475 [https://perma.cc/2F8S-DWF2] ("Trump's presidency has radicalized millions of white Americans who were previously inclined to dismiss systemic racism as a myth, the racial wealth gap as a product of Black cultural pathology, and discriminatory policing as a matter of a few bad apples.").

9. Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 878 (2013) (internal quotation marks omitted).

10. *See, e.g.*, Brayden G. King & Nicholas A. Pearce, *The Contentiousness of Markets: Politics, Social Movements, and Institutional Change in Markets*, 36 ANN. REV. SOC. 249, 254 (2010) (citing Charles Tilly, *Conclusion: From Interactions to Outcomes in Social Movements*, *in* HOW SOCIAL MOVEMENTS MATTER 253, 257 (Doug McAdam, Sidney Tarrow & Charles Tilly eds., 1999)).

Black boys, girls, men, and women across this country, and it continues to challenge the policing practices responsible for many of these killings.[11] 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 Americans 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,[12] that constitutionalized their perceived lack of value,[13] and that codified Black Americans' subjugation throughout American society.[14]

As a result, the Black Lives Matter movement did not remain in a bubble of social-movement activism directed toward the state. Beyond debating police reform, everyday Americans began rethinking the entirety of their lives.[15] They began questioning how their own discrete choices were harming Black lives. Conversations that initially focused on the appropriate role of police within American society turned into debates about, quite simply, everything.[16] These broader discussions of how to create an America that values Black lives spilled

11. *See* Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015, 5:00 PM EDT), https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement [https://perma.cc/HH4H-KYT2]; *Herstory*, *supra* note 1; Shannon Luibrand, *How a Death in Ferguson Sparked a Movement in America*, CBS NEWS (Aug. 7, 2015, 5:39 AM), https://www.cbsnews.com/news/how-the-black-lives-matter-movement-changed-america-one-year-later [https://perma.cc/TJ8J-5DH2].

12. *The 1619 Project*, N.Y. TIMES MAG., https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html [https://perma.cc/TJ8J-5DH2]; *see also* Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html [https://perma.cc/XM3D-GRR5] ("[O]ut of slavery . . . grew nearly everything that has truly made America exceptional.").

13. U.S. CONST. art. 1, § 2, cl. 3.

14. *Jim Crow Laws*, HISTORY (Feb. 15, 2021), https://www.history.com/topics/early-20th-century-us/jim-crow-laws [https://perma.cc/YS5A-2Z4H]; Nadra Kareem Nittle, *How the Black Codes Limited African American Progress After the Civil War*, HISTORY (Jan. 28, 2021), https://www.history.com/news/black-codes-reconstruction-slavery [https://perma.cc/JP4T-A99S].

15. *See, e.g.*, Patrisse Cullors, *'Black Lives Matter' Is About More than the Police*, ACLU (June 23, 2020), https://www.aclu.org/news/criminal-law-reform/black-lives-matter-is-about-more-than-the-police [https://perma.cc/S6DQ-R76J] ("Black life must be valued at every stage and in every facet in society. We won't rest until it is.").

16. *See* McLaughlin, *supra* note 2.

into living rooms and kitchens,[17] workplaces,[18] and, ultimately, boardrooms across the nation.[19]

This Essay focuses on the ways in which corporations have reacted to the nation's broadened support for the Black Lives Matter movement in the wake of George Floyd's death. Indeed, 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, including marketing campaigns, but no tangible actions;[20] second, statements plus tangible, but limited, actions;[21] third, statements plus a significant outlay of resources towards

17. *See, e.g.*, Anya Kamenetz, *How to Talk to Kids About Black Lives and Police Violence*, NAT'L PUB. RADIO (June 4, 2020, 7:03 AM ET), https://www.npr.org/2020/06/04/868600478/q-a-how-to-talk-to-kids-about-george-floyd [https://perma.cc/E9KG-BRD8]; Hanna Lustig, *Teens on TikTok Are Exposing a Generational Rift Between Parents and Kids Over How They Treat Black Lives Matter Protests*, INSIDER (June 3, 2020, 10:17 AM), https://www.insider.com/tik-tok-george-floyd-black-lives-matter-teens-parents-racist-views-2020-6 [https://perma.cc/X6RR-KPTL]; Beata Mostafavi, *Raising Race-Conscious Children: How to Talk to Kids About Race and Racism*, MICH. HEALTH (July 22, 2020, 10:35 AM), https://healthblog.uofmhealth.org/childrens-health/raising-race-conscious-children-how-to-talk-to-kids-about-race-and-racism [https://perma.cc/GQQ2-A838].

18. Jennifer Liu, *Talking About Racial Inequality at Work Is Difficult—Here Are Tips to Do It Thoughtfully*, CNBC (June 5, 2020, 11:08 AM EDT), https://www.cnbc.com/2020/06/05/how-to-thoughtfully-talk-about-racial-inequality-with-your-coworkers.html [https://perma.cc/2FXP-TBGA].

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 [https://perma.cc/9X68-Q964].

20. *See e.g.*, Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As Big Corporations Say 'Black Lives Matter,' Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020, 6:21 PM EDT), https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter [https://perma.cc/8FG2-VYC5]; Inti Pacheco & Stephanie Stamm, *What CEOs Said About George Floyd's Death*, WALL ST. J. (June 5, 2020, 9:42 AM ET), https://www.wsj.com/articles/what-executives-said-about-george-floyds-death-11591364538 [https://perma.cc/UZC4-TH3S] (analyzing the most common words in thirty-five company statements addressing the killing of George Floyd).

21. Sephora, for example, held trainings for its employees on racial bias and discrimination. Sephora also pledged to dedicate fifteen percent of its shelf space toward Black-owned brands. *See* 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*, BUS. INSIDER (July 8, 2020, 3:01 PM), https://www.businessinsider.com/sephora-proves-fight-against-racism-is-more-than-lip-service-2020-7 [https://perma.cc/YY55-V25Q]; Jemima McEvoy, *Sephora First to Accept '15% Pledge,' Dedicating Shelf-Space to Black-Owned Business*, FORBES (June 10, 2020, 7:24 PM EDT), https://www.forbes.com/sites/jemimamcevoy/2020/06/10/sephora-first-to-accept-15-pledge-dedicating-shelf-space-to-black-owned-businesses/#351af1c24b02 [https://perma.cc/267V-YW3K].

addressing systemic racism within the organization and throughout society more broadly;[22] and fourth, a lack of support completely.[23]

This Essay is concerned with the first and second categories of response. 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 actions, but not the types of actions likely to create sustained, meaningful change throughout their organizations. Thus, the questions, at least for those who hope to see corporations combat systemic racism and truly embrace the idea that Black lives matter, are how might one incentivize corporations in these two categories to adopt more meaningful initiatives,[24] and what would those initiatives look like.[25]

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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 [https://perma.cc/N22V-PXYF]. Unlike many other corporate responses to George Floyd's killing that were limited to marketing campaigns, the response from Ben & Jerry's' was concrete and outlined specific steps for change. *See* Veronica Root Martinez, *A More Equitable Corporate Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert Thompson eds.) (forthcoming 2021) (manuscript at 3, 24) (on file with authors); Rebecca Stewart, *'It's Not a Marketing Exercise:' Ben & Jerry's on Dismantling White Supremacy*, DRUM (June 23, 2020, 8:30 AM), https://www.thedrum.com/news/2020/06/23/its-not-marketing-exercise-ben-jerry-s-dismantling-white-supremacy [https://perma.cc/5HNY-C4EL]. Indeed, Ben & Jerry's relied on its connections with organizations like the NAACP to ensure that it crafted a message that would actually 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, 9:15 AM EDT), https://www.bloomberg.com/news/features/2020-07-22/how-ben-jerry-s-applied-its-corporate-activism-recipe-to-blm [https://perma.cc/3CTH-Y2PS].

23. CrossFit, for example, failed to issue an official statement immediately following George Floyd's killing, and its CEO, Greg Glassman, indicated his opposition to the ensuing nationwide protests. Clare Duffy, *Days Before Resigning, CrossFit CEO Greg Glassman Told Gym Owners He Doesn't Mourn George Floyd*, CNN BUS. (June 10, 2020, 11:38 PM ET), https://www.cnn.com/2020/06/10/business/greg-glassman-zoom-call/index.html [https://perma.cc/D9YN-7A48].

24. It would, of course, be wonderful if firms in the fourth category also moved to embrace initiatives aimed at combatting systemic racism and racial injustice, but as discussed in Section III.A.5, there may be some firms that lack any interest in participating in these sorts of initiatives. Thus, this Essay focuses on firms that have demonstrated an interest in supporting the #BlackLivesMatter movement, but that have failed to do so in a fulsome manner.

25. Importantly, the pressure required to achieve a successful social movement might look different today than it did in, for example, the 1960s. When businesses were smaller in size and owned by local members of the community, a boycott by members of that community could result in significant change. *See e.g.*, *Greensboro Sit-In*, HISTORY (Feb. 1, 2021), https://www.history.com/topics/black-history/the-greensboro-sit-in [https://perma.cc/PM49-3JKS]. Today, however, businesses have become larger and more complex, which

This Essay tackles one aspect of those questions,[26] arguing that corporations should adopt "equality metrics."[27] Equality metrics refer to systematized corporate disclosure of the current demographic diversity of the workforce and supply chain, as well as measurable, specific plans to improve racial equity. Specifically, firms should (i) measure the state of (in)equality in their organizations and supply chains; (ii) identify a list of specific, assessable equality goals; (iii) implement policies and procedures aimed at achieving those goals that can be tested and measured; (iv) disclose their progress toward meeting these goals at regular intervals; and (v) use their own and others' measured performances on these metrics to direct their future efforts at creating a more equitable organization. Time has demonstrated that firms measure what they value and value what they

might make it challenging for the social movement practices of half a century ago to be as effective as they were then. As such, this Essay takes a different approach than many social movements have historically. Instead of relying solely on the social movement to bubble up from activists and members of the public, this Essay looks at ways to start at the top, so to speak, so that pressure is coming at firms from all sides. Activists are demanding change, but so are firms' employees and other stakeholders. This Essay proposes adding institutional investors as another source of pressure that can incentivize firms to adopt policies and procedures likely to result in meaningful changes to the way they address systemic racism and racial injustice.

26. 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.

27. One might wonder why this Essay focuses 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," *Equality*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/equality [https://perma.cc/FAP5-QLHY], while equity is defined, amongst other things, as "freedom from bias or favoritism," *Equity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/equity [https://perma.cc/L7AP-EJFD]. One university differentiated between the two terms in the following way: "[e]quality 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 [https://perma.cc/Z984-R9DG]. The goal of this Essay is a mix of those two aims. It would be beneficial to see more proportional representation. However, achieving greater proportionality without ensuring true equality once one has accessed those opportunities is not, in our view, an acceptable result.

measure.[28] 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 be effective at creating the pressure needed to enact meaningful change within firms.[29]

Institutional investors are among the largest actors in the global capital markets today, owning approximately eighty percent of the outstanding equity in the top 500 companies.[30] They include pension funds, mutual funds, and endowments, among others, and wield considerable influence over corporate behavior.[31] Institutional investors may not seem an obvious vehicle for driving changes advocated by a social movement like #BlackLivesMatter given their own issues with diversity and racial equity.[32] The reality, however, is that institutional

28. For example, firms care about profits, revenue, and customer satisfaction and each is often meticulously measured, updated, and reported on an ongoing basis whether through accounting statements or internal reports. We propose treating efforts to improve demographic diversity and racial equity within the firm and its supply chains similarly.

29. To be clear, we do not oppose the Securities and Exchange Commission (SEC) mandating these disclosures. We note that some firms have begun to reveal diversity information as part of the SEC's new human-capital disclosures, but there is no requirement for diversity disclosures as part of that rulemaking. *See* Matt Kelly, *Digging into Diversity Disclosures*, RADICAL COMPLIANCE (Feb. 15, 2021), http://www.radicalcompliance.com/2021/02/15/digging-into-diversity-disclosures [https://perma.cc/WJ67-TCUP]. To date, the SEC has not undertaken a fulsome attempt to address racial disparities within firms in a meaningful way. As such, our proposal to rely on institutional investors should be viewed as an alternate path to achieve meaningful progress on racial equity and inclusion in light of the SEC's reluctance to act, rather than as a rejection of the SEC. With that said, there is value to our proposal's voluntary and non-standardized disclosures. This method will help regulators see the wealth of possibilities in terms of available data and be better positioned to identify the metrics most useful to aiding investors' decision-making and to influencing corporate behavior.

30. Charles McGrath, *80% of Equity Market Cap Held by Institutions*, PENSIONS & INVS. (Apr. 25, 2017, 1:00 AM), https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions [https://perma.cc/KV83-NPMP].

31. *See infra* Section II.A.

32. *See, e.g.*, Sarah Min, *Racial Injustice Will Have Greater Weight in ESG Scores, S&P Global Says*, CHIEF INV. OFFICER (July 24, 2020), https://www.ai-cio.com/news/racial-injustice-will-greater-weight-esg-scores-sp-global-says [https://perma.cc/DJV4-Q2GY]. It is worth noting that many institutional investors engage in activities that likely are not in line with the #BlackLivesMatter movement. For example, some institutional investors invest significantly in entities like private prisons, which would seem in conflict with certain goals within the movement. This Essay is not suggesting that institutional investors are, themselves, acting in full support of the movement. *See,* Paul R. La Monica, *BlackRock and Vangaurd Are the Biggest Investors in Private Prisons*, CNN (July 1, 2019, 9:52 AM EDT), https://www.cnn.com/2019/06/28/investing/prison-stocks-mutual-funds [https://perma.cc/23DS-RDWS]. It is, however, suggesting that institutional investors are well-positioned to incentivize firms to take more concrete steps toward improving their organizations.

investors are uniquely positioned to do so. Many institutional investors, like mutual funds, provide an important financial service to everyday Americans,[33] while simultaneously sitting in a position of relative power to corporations.[34] Indeed, this is a power institutional investors have wielded before to pressure companies to embrace and improve their demographic diversity.[35] After the events of summer 2020, institutional investors, expressed renewed support for meaningful changes related to demographic diversity within corporate structures.[36] Because of their power and influence over the corporations they invest in, institutional investors can create a unique set of incentives for corporations to adopt and implement a program of equality metrics.[37]

Firms that are serious in their beliefs that Black lives matter and 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 (in)equality within their organizations and supply chains. They should identify potential strategies for improvement and measure

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33. *See, e.g.*, A GUIDE TO UNDERSTANDING MUTUAL FUNDS, INV. COMPANY INST. 20, 36 (2004) (explaining that mutual fund regulation is "specifically designed to ensure that funds are operated in the best interest of fund shareholders," which typically include individuals saving for retirement and families saving for their children's college educations); Phil Brown, *Institutional Investors Turn up Pressure on Companies to Embrace Diversity*, CORP. COMPLIANCE INSIGHTS (March 29, 2019), https://www.corporatecomplianceinsights.com/institutional-investors-turn-up-pressure-on-companies-to-embrace-diversity [https://perma.cc/2HMR-SA2N] (describing CalPERS, a pension fund that represents California's "public employees and retirees").

34. *See infra* Section II.A.

35. *See, e.g.*, Brown, *supra* note 33.

36. *See, e.g.*, Ben Ashwell, *Investor Groups Ponder Further Action on Racial Inequality*, IR MAG. (June 10, 2020), https://www.irmagazine.com/buy-side/investor-groups-ponder-further-action-racial-inequality [https://perma.cc/K567-SQMV]; 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 [https://perma.cc/9NZ9-GJQN]; Patrick Temple-West, *Black Lives Matter Provokes Change on Wall Street*, FIN. TIMES (Oct. 11, 2020), https://www.ft.com/content/8813b73d-c39d-41c9-b1a8-ba2d2e2374da [https://perma.cc/H224-45FJ].

37 *See* Gerald F. Davis & Tracy A. Thompson, *A Social Movement Perspective on Corporate Control*, 39 ADMIN. SCI. Q. 141, 142 (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."). It appears that in the summer of 2020, American citizens, corporations, and institutional investors collectively reached a turning point regarding the treatment of Black Americans. The question, of course, is how to properly and effectively seize the opportunity that has been presented.

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 organizational structures and at their contracting partners.

This Essay proceeds in four parts. Part I begins by examining the ways in which corporations have traditionally responded to social movements and, specifically, their response to the Black Lives Matter movement. It then discusses firms' attempts to increase the demographic diversity within their organizations and explains why these efforts have often proven unsuccessful. It next highlights the general lack of disclosure by firms of data regarding their demographic diversity. Part II explains why institutional investors are uniquely situated to incentivize corporations to adopt equality metrics to ensure that they implement specific and measurable objectives aimed at ending systemic racism and promoting greater racial diversity and justice. Part II next outlines the types of equality metrics institutional investors should require from firms. Part III discusses potential benefits of this Essay's proposal. Part IV outlines additional considerations raised by the Essay's argument.

I. (IN)EQUALITY WITHIN CORPORATIONS TODAY

Corporations have been touting the importance of diverse and inclusive workforces for decades.[38] They have made statements,[39] created websites,[40]

38. *See The Evolution of Diversity in the Workplace—2000 to 2020*, VSOURCE BLOG (Aug. 3, 2020, 10:30 AM), https://www.vsource.io/blog/evolution-of-diversity-in-the-workplace [https://perma.cc/LT6T-4HMS] (describing the evolution of diversity initiatives in the workforce over the past twenty years).

39. *See, e.g.*, Laszlo Bock, *Getting to Work on Diversity at Google*, GOOGLE KEYWORD BLOG (May 28, 2014), https://blog.google/outreach-initiatives/diversity/getting-to-work-on-diversity-at-google [https://perma.cc/BEJ6-PAXJ] (releasing diversity data and noting that "it's time to be candid about the issues. Put simply, Google is not where we want to be when it comes to diversity"); Jon Swartz, *Google, Apple, Facebook, Others Oppose N.C. Law*, USA TODAY (March 27, 2016, 5:38 PM), https://www.usatoday.com/story/tech/2016/03/25/tech-leaders-join-ranks-opposing-nc-law/82263478 [https://perma.cc/A2DF-GW8K] (describing statements released by corporations in response to an anti-LGBT law); Pat Wadors, *LinkedIn's Workforce Diversity*, LINKEDIN OFFICIAL BLOG (June 12, 2014), https://blog.linkedin.com/2014/06/12/linkedins-workforce-diversity [https://perma.cc/4CAR-LUPZ] (releasing diversity data and explaining "[t]rue inclusion is something that can only be achieved through a workforce that reflects the rich diversity of our member base, and this is something we strive to do in all of our hiring efforts").

40. *See, e.g.*, Robert Algeri, Dion Algeri, Daniel Lurman & Paul Chauvin, *Six Top Diversity Sections on Corporate Websites*, GREAT JAKES (Sept. 22, 2020), https://www.greatjakes.com/blog/six-top-diversity-sections-on-corporate-websites [https://perma.cc/8QBT-MAUH] (discussing the diversity websites for HP, Groupon, Apple, Accenture, and Adobe).

hired chief diversity officers,[41] created affinity programs,[42] established diversity scholarships,[43] and held numerous diversity trainings.[44] And yet, the upper echelons of Fortune 500 companies—the largest companies with, arguably, the most resources to dedicate toward these efforts—have remained overwhelmingly white and male.[45] The Part begins by discussing the ways corporations have traditionally viewed social movements and their responses to the current Black Lives Matter movement. It then briefly explains a few of the reasons that efforts to improve demographic diversity within corporations have proven overwhelmingly ineffective. It next discusses the dearth of information currently available regarding firms' demographic diversity.

A. *Corporations and Social Movements*

The history of corporations' involvement in social movements has, in many ways, been a complicated one. The traditional, and once dominant, view was

41. *See* Mita Mallick, *Do You Know Why Your Company Needs a Chief Diversity Officer?*, HARV. BUS. REV. (Sept. 11, 2020), https://hbr.org/2020/09/do-you-know-why-your-company-needs-a-chief-diversity-officer [https://perma.cc/HJ3W-8VZU] (highlighting that many companies are hiring chief diversity officers in response to the social unrest in 2020).
42. *See* Daniel Bortz, *5 Reasons Why Every Workplace Should Have Employee Affinity Groups, and How to Start One*, BUS. INSIDER (Sept. 22, 2020, 9:10 AM) https://www.businessinsider.com/reasons-why-you-should-start-employee-affinity-group-at-work-2020-9 [https://perma.cc/U8HH-LSZJ] (noting that Xerox started the first company affinity group in 1970 and that sixty-six Fortune 100 firms had affinity groups in 2017).
43. *See, e.g.*, Jordan Kahn, *Apple Announces $10K Inclusion and Diversity Scholarships for Minorities in Tech*, 9TO5MAC (Sept. 2, 2014, 1:12 PM PT), https://9to5mac.com/2014/09/02/apple-offers-10k-product-integrity-inclusion-and-diversity-scholarship-for-minorities-in-tech [https://perma.cc/CT39-4UTL]; *Blacks at Microsoft Scholarship*, MICROSOFT, https://www.microsoft.com/en-us/diversity/programs/blacks-scholarships.aspx [https://perma.cc/K4E7-H2K4].
44. *See* Edward H. Chang, Katherine L. Milkman, Laura J. Zarrow, Kasandra Brabaw, Dena M. Gromet, Reb Rebele, Cade Massey, Angela L. Duckworth & Adam Grant, *Does Diversity Training Work the Way It's Supposed to?*, HARV. BUS. REV. (July 9, 2020), https://hbr.org/2019/07/does-diversity-training-work-the-way-its-supposed-to [https://perma.cc/PE7A-Q4RK] ("Virtually all Fortune 500 companies offer diversity training to their employees.").
45. *See, e.g.*, Khristopher J. Brooks, *Why So Many Black Business Professionals Are Missing from the C-Suite*, CBS NEWS (Dec. 10, 2019, 9:14 AM), 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 [https://perma.cc/8J5N-YZFU]; Jeff Green, Jordyn Holman & Janet Paskin, *America's C-Suites Keep Getting Whiter (and More Male, Too)*, BLOOMBERG BUSINESSWEEK (Sept. 21, 2018, 7:00 AM EDT), https://www.bloomberg.com/news/articles/2018-09-21/america-s-c-suites-keep-getting-whiter-and-more-male-too [https://perma.cc/R36F-844H].

that the purpose of the corporation is to maximize shareholder value.[46] Under this framework, known as "shareholder primacy," the corporation's sole concern is to pursue and increase profitability for the benefit of shareholders.[47] Shareholder primacy treats the corporation as a purely economic actor for which social movements and nonfinancial issues are irrelevant and, indeed, bad for the firm's bottom line.[48] Corporations, therefore, have been reluctant to publicly respond to social issues, focusing instead on economic and sometimes political matters that impact their profitability.[49]

The recent example of Colin Kaepernick's silent protest is illustrative. In 2016, Kaepernick—then a quarterback for the San Francisco 49ers—began

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46. For a foundational articulation of this view, see Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/D67X-ZGKB], which argues 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."

47. *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 646-47 (2006).

48. *Id.* at 646-48. Some might question whether it is advisable for firms to commit to pursuing certain diversity initiatives without a demonstration that those initiatives are consistent with ensuring shareholder wealth maximization. Others, however, have argued that pursuing voluntary diversity, equity, and inclusion initiatives is not inconsistent with directors' fiduciary duties. *See* Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity* (Ctr. for Law & Econ. Studies, Columbia Univ. Sch. Law Working Paper No. 642, 2021), https://ssrn.com/abstract=3788159 [https://perma.cc/BP3V-B8V5] (arguing that adoption of diversity, equity, and inclusion policies is in keeping with shareholder primacy and is an affirmative obligation under the fiduciary duties of boards of directors).

49. *See* Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 443 (2019) (noting that "on most social issues, corporations have historically been reluctant to speak out" due to fear of consumer backlash); Patrick Quinlan, *Corporate Activism: Three Reasons Staying Silent Is the Bigger Risk*, FORBES (Apr. 17, 2018, 8:45 AM EDT), https://www.forbes.com/sites/forbestechcouncil/2018/04/17/corporate-activism-three-reasons-staying-silent-is-the-bigger-risk/?sh=3c0a0f131beb [https://perma.cc/4J5K-2596] ("Not long ago, 'lay low' was the appropriate CEO response to political and social debates. Business leaders felt they could (and in fact *should*) stay quiet."); *see also, e.g.*, Nicole Friedman, *Buffett's Berkshire Hathaway Won't Boycott Gun Makers*, WALL ST. J. (Feb. 26, 2018, 4:32 PM ET), https://www.wsj.com/articles/buffett-my-political-views-shouldnt-sway-berkshire-investments-1519652278 [https://perma.cc/ZR7V-9K2D] ("Berkshire Hathaway Chief Executive Warren Buffett said it would be 'ridiculous' for the conglomerate not to do business with gun owners, noting that he doesn't want to impose his political views on Berkshire's investment decisions or business operations."). *But see* ELIZABETH TANDY SHERMER, SUNBELT CAPITALISM: PHOENIX AND THE TRANSFORMATION OF AMERICAN POLITICS (2013) (discussing how businesses became involved in politics in Arizona in the 1930s to slow and mute the impact of New Deal policies on corporations).

kneeling during the U.S. national anthem to protest racism and police brutality.[50] Kaepernick's protest not only (re)ignited a national conversation on racial justice and extrajudicial police killings, but it also transformed the athlete into a divisive figure.[51] On the one hand, scores of professional and student athletes similarly began to kneel during the anthem in solidarity with Kaepernick.[52] On the other hand, President Trump and the National Football League (NFL) Commissioner Roger Goodell labelled Kaepernick's actions as unpatriotic.[53] Kaepernick's continued protests likely impacted his employment prospects with the NFL as he has remained unsigned since the end of the 2016 NFL season.[54]

Notably, kneeling also almost cost Kaepernick his relationship with his corporate sponsor, Nike.[55] Although Nike now supports Kaepernick's protest, the company initially came close to severing ties with Kaepernick to avoid reputational damage. Nike feared that any support of Kaepernick would raise the ire of the NFL and its consumers and threaten Nike's profitability.[56] Indeed, even when the corporation decided to keep Kaepernick as a sponsored athlete, Nike

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50. Julie Creswell, Kevin Draper & Sapna Maheshwari, *Nike Nearly Dropped Colin Kaepernick Before Embracing Him*, N.Y. TIMES (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/sports/nike-colin-kaepernick.html [https://perma.cc/5XUF-NGD4].

51. *See id.* (stating that NFL executives considered Kaepernick "radioactive" for his protests).

52. Ken Belson, *Colin Kaepernick, Who Began Anthem Kneeling, Files Complaint Against N.F.L.*, N.Y. TIMES (Oct. 15, 2017), https://www.nytimes.com/2017/10/15/sports/colin-kaepernick-nfl-collusion.html [https://perma.cc/4D3R-D8UB] (stating that Kaepernick's "protests have spread beyond the N.F.L."); Victor Mather, *A Timeline of Colin Kaepernick vs. the N.F.L.*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/sports/nfl-colin-kaepernick-protests-timeline.html [https://perma.cc/JF65-CFB6] (noting other professional athletes' support for Kaepernick's protests).

53. *See* P.R. Lockhart, *Trump Praises NFL Anthem Rule, Says Kneeling Players "Maybe Shouldn't Be In the Country*,*"* VOX (May 24, 2018, 12:40 PM), https://www.vox.com/2018/5/24/17389288/donald-trump-nfl-kneeling-protest-national-anthem [https://perma.cc/R4NC-KFC2] (quoting the NFL Commissioner saying that the protests "created a false perception among many that thousands of NFL players were unpatriotic" and describing President Trump's repeated criticisms of athletes kneeling).

54. Victor Mather, *Colin Kaepernick Is Unemployed. Is It Because of His Arm, or His Knee?*, N.Y. TIMES (Mar. 27, 2017), https://www.nytimes.com/2017/03/27/sports/football/free-agent-colin-kaepernick-national-anthem-protest.html [https://perma.cc/ATM2-NSD9].

55. Creswell, Draper & Maheshwari, *supra* note 50.

56. *Id.*

did not use him in any ad campaigns for close to a year for fear of public backlash.[57] Kaepernick was not an aberration. Corporate concern with negative public reaction has often resulted in corporations' unwillingness to participate in social movements.[58]

In recent years, however, corporate silence has become less viable.[59] 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 approximately forty percent of U.S. adults believed that a CEO was obligated to speak out on "hot-button" social issues and thirty-one percent viewed CEOs more favorably for publicly supporting controversial topics.[60] Further, with seventy-two percent of consumers identifying as "conscious consumers"—that is, consumers who "actively seek a brand that aligns with their values"[61]—there may be greater risks to a corporation's profitability and reputation from remaining uninvolved in social issues than from speaking out.

The shift in societal expectations has resulted in more CEOs and corporations taking a public stance on progressive social issues, such as LGBTQ rights

57. *Id*. Nike later reversed course and recognized that supporting Kaepernick would help it reach a key demographic—the urban youth. Nike embraced Kaepernick and his protests, revealing him as the face of a major ad campaign in 2018, which has proved beneficial to Nike. *Id.*

58. Fan *supra* note 49, at 43 ("[C]orporations typically choose to remain out of the fray of social issues, fearing consumer backlash."); Patrick Quinlan, *Corporate Activism: Three Reasons Staying Silent Is the Bigger Risk*, FORBES (Apr. 17, 2018, 8:45 AM), https://www.forbes.com/sites/forbestechcouncil/2018/04/17/corporate-activism-three-reasons-staying-silent-is-the-bigger-risk/?sh=28d235631beb [https://perma.cc/K95J-4GBN] ("Not long ago, 'lay low' was the appropriate CEO response to political and social debates."); *see also* Nicole Friedman, *Buffett's Berkshire Hathaway Won't Boycott Gun Makers*, WALL ST. J. (Feb. 26, 2018, 4:32 PM ET), https://www.wsj.com/articles/buffett-my-political-views-shouldnt-sway-berkshire-investments-1519652278 [https://perma.cc/UV52-WVDA] ("Chief Executive Warren Buffett said it would be 'ridiculous' for the conglomerate not to do business with gun owners, noting that he doesn't want to impose his political views on Berkshire's investment decisions or business operations.").

59. *See* 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 [https://perma.cc/36KP-2KT2] ("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.").

60. *The Dawn of CEO Activism*, KRC RES. & WEBER SHANDWICK 5 (2016), https://www.webershandwick.com/wp-content/uploads/2018/04/the-dawn-of-ceo-activism-2.pdf [https://perma.cc/P4TC-CJSA].

61. Dante Disparte & Timothy H. Gentry, *Corporate Activism Is on the Rise*, REAL LEADERS (Oct. 27, 2018), https://real-leaders.com/corporate-activism-rise [https://perma.cc/M8EZ-4SFD].

and climate change.[62] For example, Apple CEO Tim Cook in 2015 spoke out against Indiana's religious-liberty bill that discriminated against gays and lesbians.[63] Similarly, retailer Target publicly supported transgender rights, stating that the company would allow customers to use the restrooms and dressing rooms that matched their gender identity.[64] On the environmental front, companies such as McDonalds and Starbucks have committed to reducing or eliminating their use of single-use plastics, particularly straws, to combat consumer waste.[65]

Yet increased corporate willingness to engage on social issues has not necessarily extended to (arguably) more divisive issues, such as race and racial injustice. The Black Lives Matter movement first began in 2013, but it was not until the 2020 killing of George Floyd in Minnesota that corporate attitudes towards the movement changed.[66] In the wake of the tide of national support for the Black Lives Matter movement, countless corporations publicly expressed support for the movement for the first time.[67] Many corporations issued statements of support for the principles of the Black Lives Matter movement, including ad

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62. *See* Elizabeth Pollman, *Social and Asocial Enterprise*, *in* THE CAMBRIDGE HANDBOOK ON SOCIAL ENTERPRISE LAW (Benjamin Means & Joseph W. Yockey eds., 2019); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535 *passim* (2018); Leslie Gaines-Ross, *What CEO Activism Looks Like in the Trump Era*, HARV. BUS. REV. (Oct. 2, 2017), https://hbr.org/2017/10/what-ceo-activism-looks-like-in-the-trump-era?registration=success [https://perma.cc/54HL-PBX9] (describing the increase in public CEO responses to LGBTQ laws, climate change, and immigration policies).

63. Tim Cook, *Tim Cook: Pro-Discrimination 'Religious Freedom' Laws Are Dangerous*, WASH. POST (Mar. 29, 2015), https://www.washingtonpost.com/opinions/pro-discrimination-religious-freedom-laws-are-dangerous-to-america/2015/03/29/bdb4ce9e-d66d-11e4-ba28-f2a685dc7f89_story.html [https://perma.cc/5SGQ-AAN5].

64. Target, *Continuing to Stand for Inclusivity*, BULLSEYE VIEW NEWSLETTER (Apr. 19, 2016), https://corporate.target.com/article/2016/04/target-stands-inclusivity [https://perma.cc/F4Z5-NDAT].

65. *Packaging & Waste*, MCDONALDS, https://corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/our-planet/packaging-and-waste.html [https://perma.cc/7S89-G4LH]; *Starbucks to Eliminate Plastic Straws Globally by 2020*, STARBUCKS STORIES & NEWS (July 9, 2018), https://stories.starbucks.com/press/2018/starbucks-to-eliminate-plastic-straws-globally-by-2020 [https://perma.cc/CQN7-SX96]; *see also* Lauren Brown West-Rosenthal, *22 Big Companies That Are Getting Rid of Plastic for Good*, READER'S DIG. (May 24, 2020), https://www.rd.com/article/companies-getting-rid-plastic [https://perma.cc/TKX6-W59G].

66. *See* Tiffany Hsu, *Corporate Voices Get Behind 'Black Lives Matter' Cause*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html [https://perma.cc/Z83H-C395]; Kevin Stankiewicz, *CEOs Are Offering Plans and Investments to Address Racial Inequality After George Floyd Death*, CNBC (June 11, 2020, 9:35 AM EDT), https://www.cnbc.com/2020/06/11/ceos-unveil-plans-against-racial-inequality-after-george-floyd-death.html [https://perma.cc/3X4D-NJSN].

67. Friedman, *supra* note 19.

campaigns. Others took an extra step, pledging to undertake some limited actions to address racial inequality. But few corporations adopted a holistic approach to ameliorate internal racial inequities or to address systemic racial disparities within the communities they serve.[68]

For many consumers, particularly those who support the Black Lives Matter movement, these statements are viewed as empty platitudes at best or shrewd marketing ploys at worst.[69] Corporations asserting that Black lives matter without making any internal changes or external efforts to improve the lives of Black employees and consumers is inconsistent, raising questions about the corporation's commitment to racial equity. For example, Amazon may have publicly supported #BlackLivesMatter, but it has often been critiqued for its treatment of its warehouse employees and eighty-five percent of its Black employees work in these warehouse positions.[70] What's more, prior to issuing its statement, Amazon recently had fired a Black employee who publicly complained about the corporation's failure to keep employees safe during the COVID-19 pandemic.[71] Thus, the corporate failure to match #BlackLivesMatter statements with actions proved to many that corporations were not committed to the social movement; rather, these entities sought to capitalize on the moment without engaging in meaningful change.

Interestingly, even as general public support for the Black Lives Matter movement has waned in the face of more recent current events,[72] many corporations are continuing their efforts to address systemic discrimination and racial

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68. A notable exception to this is Ben & Jerry's. *See supra* note 22.

69. *See* Julia Munslow, *Corporate Response to Black Lives Matter: Progress or Ploy?*, YAHOO NEWS 360 (June 25, 2020), https://news.yahoo.com/corporate-response-to-black-lives-matter-progress-or-ploy-220718586.html [https://perma.cc/EQP7-F3PX] ("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 platitudes until they are backed up with action.").

70. *See, e.g.*, Micha Frazer-Carroll, *Empty Statements Like Amazon's Show Black Lives Only Matter to Big Business When There's Profit to Be Made*, INDEPENDENT (June 1, 2020, 5:16 PM), https://www.independent.co.uk/voices/amazon-racism-george-floyd-protests-blm-jeff-bezos-a9542891.html [https://perma.cc/5H9Q-7WS7].

71. Jason Del Rey, *Amazon Fired 3 Employee Activists Who Criticized Its Warehouse Safety Measures*, VOX (Apr. 14, 2020, 4:30 PM EDT), https://www.vox.com/recode/2020/4/14/21220899/amazon-fired-activist-employees-warehouse-conditions-emily-cunningham-bashir-mohamed-maren-costa [https://perma.cc/4NPK-W3RR].

72. Ken Stern, *"This Does Feel Like a Different Moment": As Public Support for Black Lives Matter Drops Off, Will Corporate America Stay the Course?*, VANITY FAIR (Sept. 24, 2020), https://www.vanityfair.com/news/2020/09/will-corporate-america-stay-the-course-with-black-lives-matter [https://perma.cc/7HAN-5QK9].

injustice while embracing general diversity and inclusion initiatives.[73] This is likely related, at least in part, to the fact that employee and investor pressure for corporate action to address racial inequity remains high,[74] motivating corporations to stay the course in their backing of the Black Lives Matter movement. Therefore, we are at a unique moment when meaningful change at firms might be possible. This moment is important, in part, because corporations' diversity efforts to date have not appeared to focus on the creation of meaningful, measurable actions that will deliver on their stated commitment to valuing the lives of their Black employees, consumers, and fellow citizens.

B. Corporations' Diversity Efforts

Corporations have embraced the idea of improving the demographic diversity within their ranks for decades.[75] The reasons that corporations have expressed commitment to improving their own demographic diversity are, of course, multifaceted. Some firms were forced to announce reforms after significant civil litigation.[76] Others implemented diversity initiatives because their

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73. 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 [https://perma.cc/7DDM-MAJ2] [hereinafter Business Roundtable 2020 Press Release].

74. *See e.g,* Bobby Allyn, *Google Employees Demand Company Rehire Black Scientist Who Spoke up About Diversity*, NAT'L PUB. RADIO (Dec. 17, 2020), https://www.npr.org/2020/12/17/947693839/google-employees-demand-company-rehire-black-scientist-who-spoke-up-about-divers [https://perma.cc/87E3-5G92] (noting that employees at Google were demanding that "the company rehire and promote a Black research scientist who spoke out for more women and people of color" within the firm); Julie Creswell & Kevin Draper, *Adidas Pledges to Increase Diversity. Some Employees Want More*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/06/10/business/adidas-black-employees-discrimination.html [https://perma.cc/K5NT-783B] (noting a push by employees for Adidas to recognize that the firm "had a problem with racism and discrimination"); Marcela Pinilla, *Investors Are Committing to Action on Diversity. Now What?*, BUS. FOR SOC. RESPONSIBILITY (Oct. 7, 2020), https://www.bsr.org/en/our-insights/blog-view/investors-are-committing-to-action-on-diversity-now-what [https://perma.cc/ZH2Q-4TVU] (noting a push from investors for transparency related to firms' diversity, equity, and inclusion efforts).

75. Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473, 1478 n.13 (2017) (collecting citations).

76. *See, e.g.*, Adam Bryant, *How Much Has Texaco Changed?*, N.Y. TIMES (Nov. 2, 1997), https://www.nytimes.com/1997/11/02/business/how-much-has-texaco-changed.html [https://perma.cc/E88B-4VVW]; 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 [https://perma.cc/G4B4-PUSX] (detailing the diversity initiatives that Texaco implemented after settling a $140 million discrimination lawsuit).

peers had employed similar strategies—even when those initiatives had not proven effective.[77] 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.[78] That is not to suggest that diversity rationales have been uniformly accepted—they have not[79]—but most large firms have understood that they needed to project a commitment to diversity to their internal and external stakeholders.[80]

And yet, all of the money, resources, time, and statements do not appear to have resulted in corporate cultures that overcome systemic racism. For example, Black workers largely fail to reach the upper echelons of power within firms. Indeed, in 2020, only 1%, or four, chief executive officers of Fortune 500 companies were Black,[81] despite the fact that Black Americans make up 13.4% of the general population.[82] Even more concerning, according to Equal Employment Opportunity Commission data, Black people hold just 3% of executive or senior-

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77. Williams, *supra* note 75, at 1479 (citing Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 591-95 (2006)); *id.* at 1483 (citing Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1536-41 (1992)).

78. *See, e.g.*, Williams, *supra* note 75, at 1478 n.13 (citing Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 219-20 (2009) (concluding that diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits); *see also* Vijay Eswaran, *The Business Case for Diversity in the Workplace Is Now Overwhelming*, WORLD ECON. F. (Apr. 29, 2019), https://www.weforum.org/agenda/2019/04/business-case-for-diversity-in-the-workplace [https://perma.cc/W4ZC-XRZT] (arguing in favor of the business case for diversity and explaining that "[t]here "is substantial research to show that diversity brings many advantages to an organization").

79. *See, e.g.*, Stacy L. 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, 78 (2012) (noting that critical-race scholars, amongst others, are often skeptical about "diversity" efforts within firms); Stacy L. Hawkins, *The Long Arc of Diversity Bends Toward Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 61, 76-95 (2017) (detailing criticisms of workplace-diversity efforts that advance the theory that these efforts amount to reverse discrimination).

80. *See, e.g.*, Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1265-72 (2020) (explaining that millennials have prioritized factors like board diversity and other "nonwealth" metrics).

81. Te-Ping Chen, *Why Are There Still So Few Black CEOs?*, WALL ST. J. (Sept. 28, 2020, 10:16 AM ET), https://www.wsj.com/articles/why-are-there-still-so-few-black-ceos-11601302601 [https://perma.cc/79SE-DLDA].

82. *Quick Facts: United States*, U.S. CENSUS BUREAU https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/N8WY-NWTQ] (noting that 13.4% of the U.S. population identifies as Black or African American, not including those who identify with two or more races).

level roles among U.S. companies with 100 or more employees.[83] Corporate boards also lack significant demographic diversity. Despite pledges to diversify board membership, nonwhite groups make up just 12.5% of board directors, even as they represent 40% of the U.S. population.[84] Black directors, specifically, make up just 4% of more than 20,000 directors, while Black women make up just 1.5%.[85]

There are, of course, a variety of reasons explaining why firms' efforts have largely failed to promote greater equality within corporations.[86] For example, Jamillah Bowman Williams has 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."[87] This finding is important because some firms have pursued the "diversity is good for the bottom line" approach when crafting their diversity and inclusion strategies.[88] Additionally, Alexandra Kalev, Frank Dobbin, and Erin Kelly empirically demonstrated over a decade ago that diversity training and diversity evaluations—tools relied upon throughout industry to this day—are not effective at increasing the numbers of white women, Black women, and Black men in management.[89] Moreover, Linda Hamilton Krieger, Rachel Kahn Best, and Lauren B. Edelman have found that when employees bring formal lawsuits complaining of discriminatory behavior within firms, courts often focus only on the "presence of organizational structures (i.e., policies, practices, offices, and officers) to reason about whether discrimination occurred without scrutinizing the adequacy of

83. Chen, *supra* note 81.

84. 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 [https://perma.cc/7HMT-GUM9].

85. *Id.*

86. While a full accounting of these failures is beyond the scope of this Essay, a brief review of scholarship on this question to date is provided.

87. Williams, *supra* note 75, at 1473, 1509-11.

88. *See* Robin J. Ely & David A. Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, HARV. BUS. REV. (Nov.-Dec. 2020), https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case [https://perma.cc/EF46-SSS5] (explaining that CEOs frequently use the business case as a "rallying cr[y] for more diversity in companies"); Lily Zheng, *The Business Case for Diversity Is a Sinking Ship*, MEDIUM (July 24, 2019), https://medium.com/swlh/the-business-case-for-diversity-is-a-sinking-ship-d7a42d61f884 [https://perma.cc/YFK5-HXSV] ("Today's forms of D&I work increasingly rely on making a profit; private corporations are accountable to their shareholders. Marginalized communities are seen as valuable because they represent untapped markets, and companies are increasingly courting these communities in an effort to grow their bottom line.").

89. Kalev et al., *supra* note 77, at 589.

those structures."[90] As long as these structures are present, the employer is likely to win.[91]

In short, a firm might implement diversity efforts that have been empirically proven to be ineffective--perhaps because they are unaware of the literature or because they are attempting to adhere to industry standards--and it might be rewarded for doing so. For instance, because a firm that has implemented certain diversity initiatives may be more likely to win in 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 them to and because it can function as a quasi-affirmative defense in the event of discrimination lawsuits—but they do not currently appear to have an equally strong incentive to ensure that the strategies they adopt are likely to make actual and tangible improvements in the demographic diversity and inclusiveness of their organizations. Importantly, this Essay takes no position on whether firms that have failed to empirically test the effectiveness of their diversity strategies are necessarily engaged in bad-faith diversity efforts.

Instead, this Essay argues that it is time for firms to implement strategies aimed at improving demographic diversity that are specific, measurable, and assessable. Importantly, part of the reason these strategies have not already been implemented by firms may be related to the fact that firms have traditionally kept their demographic diversity data private.

C. Current Data Regarding Firms' Demographic Diversity.

Despite corporations' long-standing statements in support of diversity within their organizations, they have traditionally disclosed very little regarding the state of demographic diversity within their ranks. As noted by SEC Commissioner Allison Herren Lee in the fall of 2020:

> 72 percent of companies in the Russell 1000 do not disclose any racial or ethnic data about their employees and only four percent disclose the complete information they are required to collect and maintain under

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90. Linda Hamilton Krieger, Rachel Kahn Best, & Lauren B. Edelman, *When "Best Practices" Win, Employee's Lose: Symbolic Compliance and Judicial Interference in Federal Equal Employment Opportunity Cases*, 40 LAW & SOC. INQUIRY 843, 844 (2015).

91. *Id.* at 861.

> EEOC rules. Less than half of all Fortune 100 companies disclose data on the ethnic and gender compositions of their boards.[92]

As a result of this lack of disclosure, most of the information known about firms' demographic diversity has been limited to roles where it was relatively easy for outsiders to survey the information on their own—like the demographic composition of boards of directors or chief executive officers.[93] More expansive data about firms' demographic diversity has not been disclosed publicly. Indeed, firms have engaged in explicit efforts to attempt to keep their diversity numbers hidden from the public's eye, even going so far as to argue that their diversity statistics are trade secrets.[94]

This lack of information was noted during the summer of 2020, as "American companies [came] under increasing pressure from investors to publicly disclose information about diversity among employees in the wake of nationwide protests against racial discrimination."[95] More recently, there does appear to be a small increase in disclosure of diversity data by firms,[96] but on the whole very little is known today about the demographic diversity within and throughout firms. This Essay hopes to change that; the question is how.

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92. Allison Herren Lee, Comm'r, SEC, Remarks at the Council of Institutional Investors Fall 2020 Conference: Diversity Matters, Disclosure Works, and the SEC Can Do More (Sept. 22, 2020), https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922 [https://perma.cc/5237-HUS9] [hereinafter Lee Remarks] (internal citation omitted).

93. *See, e.g.*, *Women and Minorities on Fortune 500 Boards: More Room to Grow*, DELOITTE (Mar. 12, 2019), https://deloitte.wsj.com/riskandcompliance/2019/03/12/women-and-minorities-on-fortune-500-boards-more-room-to-grow [https://perma.cc/5UBM-TAUP] (detailing a study that found that thirty-four percent of the Fortune 500's board seats were held by women and people of color in 2018).

94. *See* Jamillah Bowman Williams, *Why Companies Shouldn't Be Allowed to Treat Their Diversity Numbers as Trade Secrets*, HARV. BUS. REV. (Feb. 15, 2019), https://hbr.org/2019/02/why-companies-shouldnt-be-allowed-to-treat-their-diversity-numbers-as-trade-secrets [https://perma.cc/K5JN-XDXG].

95. Ross Kerber & Simon Jessop, *The Heat's on Corporate America to Reveal Racial Diversity Data*, REUTERS (July 2, 2020, 7:20 AM), https://www.reuters.com/article/us-minneapolis-police-corporatediversity/the-heats-on-corporate-america-to-reveal-racial-diversity-data-idUSKBN2431JY [https://perma.cc/KZ6U-YSJM].

96. *See* Kavya Vaghul, *A Small Fraction of Corporations Share Diversity Data, but Disclosure Is Rapidly on the Rise*, JUST CAPITAL (Jan. 19, 2021), https://justcapital.com/news/a-small-fraction-of-corporations-share-diversity-data-but-disclosure-is-rapidly-on-the-rise [https://perma.cc/4JP8-DYJR].

Corporations' historical work on issues of race and equality suggests that they may be ill-equipped to take their support of the movement across the finish line of effective policies and practices on their own initiative. Yet it may be possible to harness the power of external parties—in particular, institutional investors—to incentivize firms to craft strategies that are more likely to meet the goals and objectives of the current moment.

II. EQUALITY METRICS

Improving the state of equality within firms is one of the most direct and effective options that institutional investors and firms can take to directly impact Black lives for the better in this country. In order to do so, market participants must find ways to demand that firms adopt "equality metrics." Firms must rigorously measure and assess their reforms to identify the strategies that result in greater equality within their organizations, their supply chains, and their communities. Equality metrics refer to systematized corporate disclosure of the current demographic diversity of the workforce and supply chain, as well as measurable, specific plans to improve racial equity. More specifically, they must (i) measure the state of (in)equality in their organizations and supply chains; (ii) identify a list of specific, assessable equality goals; (iii) implement policies and procedures aimed at achieving those goals that can be tested and measured; (iv) disclose their progress toward meeting these goals at regular intervals; and (v) use their own and others' measured performances on these metrics to direct their future efforts at creating a more equitable organization.

One powerful way to incentivize firms to embrace the social movement to end systemic racism and to promote racial justice is to have institutional investors mandate those changes.[97] This Part begins by explaining why institutional investors are well-positioned to play this catalyzing role. It then discusses what equality metrics might look like for today's firms.

97. As was mentioned previously, institutional investors are just one external actor who can act to incentivize firms to adopt equality metrics. *See supra* note 29 (discussing why we are relying on institutional investors rather than the SEC). The SEC very well may adopt a set of robust mandatory disclosures at some point in the future. The focus on institutional investors in this piece is not meant to be at the exclusion of other efforts. Institutional investors are, however, well-positioned to move quickly and harness the support for the movement seen throughout corporate America at this time.

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. Institutional investors can play an important role in this regard because of their broad-based involvement in the capital markets.[98]

Institutional investors are intermediaries who manage and invest money for others. They comprise "public and private pension funds, mutual funds, insurance companies, and endowments."[99] Included among institutional investors are commonly known names, such as Vanguard, BlackRock, State Street, and CalPERS (the California Public Employees' Retirement System), to name a few. In the past several decades, institutional ownership of public corporations has grown significantly. Institutional ownership of the top 1,000 U.S. corporations

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98. The broad equity ownership of institutional investors recently has raised antitrust concerns because of "common ownership" that may be implicated by this Essay's proposal. Common ownership exists when one institutional investor is the largest equity holder of companies in the same industry. The concern is that common ownership results in reduced competition among companies because the common owner (i.e., the institutional investor) is better off when the companies do not aggressively compete. There is a rich academic and policy debate regarding whether the common ownership of institutional investors implicates antitrust laws, with the question being largely unresolved. *See* Douglas H. Ginsburg, *Why Common Ownership Is Not an Antitrust Problem*, HARV. L. REV. F. ON CORP. GOV. (Dec. 4, 2018), https://corpgov.law.harvard.edu/2018/12/04/why-common-ownership-is-not-an-antitrust-problem [https://perma.cc/B842-L93G] (discussing the three main schools of thought regarding institutional investors' common ownership and antitrust issues). Currently, mutual funds are exempt from reporting their holdings and acquisitions to the Federal Trade Commission. However, a recent advanced notice of proposed rulemaking from the FTC proposes ending the exemption for mutual funds involved in "shareholder engagement." This would include investors that engage on issues such as diversity, thereby directly implicating this Essay's proposed framework. Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77042 (proposed Dec. 1, 2020) (to be codified at 16 C.F.R. pts. 801-03). Adoption of this proposed rule would make the Essay's proposal less tenable but not impossible. If the exemption is eliminated, institutional investors are not prohibited from engaging with corporations, but would have to report their holdings and await government review before making sizable acquisitions. However, given that the proposed rule is still in its early stages, the Essay's proposal—to utilize institutional investors to incentivize firms to engage equality metrics programs—remains a powerful (and legal) option.

99. Edward B. Rock, *Institutional Investors and Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 363, 364 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2015).

increased from approximately forty-six percent to seventy-three percent between 1987 and 2009.[100] Today, institutions own roughly eighty percent of the market capitalization of the top 500 companies in the United States.[101]

Historically, institutional investors were passive investors in public corporations, preferring to do the "Wall Street Walk" when dissatisfied with corporate performance or behavior.[102] In the past two decades, however, institutional investors have more actively monitored and engaged with management.[103] Institutional investors initially engaged on issues of corporate governance, such as shareholder rights and executive compensation.[104] More recently, institutional investors have pushed for corporate engagement on environmental, social, and governance (ESG) issues, with a particular emphasis on the first category: climate change and the environment.[105] As one scholar has noted, "[T]oday investors are backing up their public statements with year-round private engagement with corporate executives and, increasingly, board members. This engagement, which defines a new era of corporate governance, occurs behind closed doors and represents the investors' soft power to persuade companies to change voluntarily."[106] As a result of this pressure from institutional investors, ESG issues are now mainstream considerations for most firms, even as boards of directors and executives struggle with how to respond to such demands.[107]

Given institutional investors' focus on ESG issues in recent years, it is not surprising that many of them issued statements in support of the Black Lives

100. CONFERENCE BOARD, THE 2010 INSTITUTIONAL INVESTMENT REPORT: TRENDS IN ASSET ALLOCATION AND PORTFOLIO COMPOSITION (2010), https://ssrn.com/abstract=1707512 [https://perma.cc/77AD-UL3U].

101. McGrath, *supra* note 30.

102. Rock, *supra* note 99, at 372-74 (discussing the historical passivity of institutional investors towards corporate affairs).

103. *See* Stuart L. Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, 19 J. APPLIED CORP. FIN. 55, 56-58 (2007).

104. Stuart L. Gillian & Laura T. Starks, *Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective*, J. APPLIED FIN., Fall-Winter 2003, at 10; *see also* Davis & Thompson, *supra* note 37, at 142 (identifying topics of interest to shareholder activism, including shareholder rights, CEO succession plans, and executive compensation).

105. Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May-June 2019), 106, 108-10 (discussing the importance of ESG issues to institutional investors).

106. Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 U.C. DAVIS L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3675968, [https://perma.cc/HZV5-QH5S].

107. Andreas Burkard, *Institutional Investors and ESG in Incentive Plans: Agnostics or Believers?*, WILLIS TOWERS WATSON (July 30, 2020), https://www.willistowerswatson.com/en-US/Insights/2020/07/Institutional-investors-and-ESG-in-incentive-plans-Agnostics-or-believers [https://perma.cc/BEA8-KAUR] (discussing that institutional-investor pressure has resulted in ESG issues being a board-level topic).

Matter movement in 2020. For example, BlackRock, the world's largest asset manager and a proponent of ESG reporting,[108] issued a statement on its commitment to racial equity and inclusion.[109] Unlike vague corporate statements in support of the Black Lives Matter movement,[110] the BlackRock statement was notable for its disclosure of its workforce diversity and for its specific and measurable goals of improving Black representation among employees and senior leadership. Further, the statement discusses how BlackRock intends to address racial justice internally, in its investments for its clients, and within the communities in which it operates. The specificity and thoughtfulness of BlackRock's statement demonstrates its commitment to enacting meaningful changes that improve racial equity within the firm. Additionally, BlackRock also has asked corporations in which it invests to publish disclosures on the racial and ethnic composition of their U.S. workforces and other information aligned with the Sustainability Accounting Standards Board (SASB), a nonprofit organization that has developed standardized reporting metrics for ESG data, including data related to diversity and inclusion.[111]

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108. INVESTMENT STEWARDSHIP GROUP, BLACKROCK, SUSTAINABILITY REPORTING: CONVERGENCE TO ACCELERATE PROGRESS (2020), https://www.blackrock.com/corporate/literature/publication/blk-commentary-sustainability-reporting-convergence.pdf [https://perma.cc/HT4P-ZZCW].

109. 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 [https://perma.cc/H5L6-YA7L].

110. For example, Amazon tweeted support for the Black Lives Matter movement and Jeff Bezos, the company's CEO, has also publicly expressed support. Additionally, the company has pledged to donate $10 million to organizations that support justice and equity. However, the corporation has failed to put forward a comprehensive plan of how it intends to address racial equity and social justice internally. Thus, Amazon has not moved beyond performative acts and empty statements to enact meaningful changes within the corporation, a common critique of the corporation's conduct to date. *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/669K-4N24]; Kari Paul, *Amazon Says 'Black Lives Matter.' But the Company Has Deep Ties to Policing*, GUARDIAN (June 9, 2020, 6:00 AM EDT), https://www.theguardian.com/technology/2020/jun/09/amazon-black-lives-matter-police-ring-jeff-bezos [https://perma.cc/X9DY-CD4M].

111. BLACKROCK, OUR 2021 STEWARDSHIP EXPECTATIONS: GLOBAL PRINCIPLES AND MARKET-LEVEL VOTING GUIDELINES 13-14 (2020), https://www.blackrock.com/corporate/literature/publication/our-2021-stewardship-expectations.pdf [https://perma.cc/7J7C-AHRG]. SASB standards on diversity and inclusion, for example, require disclosure of the corporations' gender and racial/ethnic breakdown of the workforce, its diversity policies, and any mentorship programs the corporation has implemented to foster equitable employee representation. SUSTAINABILITY ACCOUNTING STANDARDS BOARD, MEDIA & ENTERTAINMENT: SUSTAINABILITY ACCOUNTING STANDARD 8-9 (2018).

Institutional investors' backing of the current social movement for racial equity is powerful. In fact, it is likely one of the best options to incentivize corporations to enact meaningful reforms.[112] Institutional investors' large equity ownership in the capital markets uniquely positions them to influence corporate behavior, even in the face of management reticence or unwillingness.[113] This influence is due to two primary factors. First, institutional investors are not afflicted with the collective-action problem facing both individual retail investors and corporations themselves.[114] Individual investors are diffuse. Each owns such a small fraction of a public corporation that they are rationally apathetic and do not monitor management. In contrast, institutional investors own a large percentage of the corporation. This sizeable ownership stake incentivizes institutional investors to monitor and discipline management more effectively. Similarly, corporations may not want to take the step of implementing an equality-metrics program if their peers are not engaged in similar efforts. If one firm takes an empirically-driven assessment of its diversity efforts and finds them lacking, it may worry that it will be labeled as failing in its diversity efforts, even as other firms are in similar states but choose not to engage in these assessments. The power to incentivize and monitor corporations' disclosure of activities is particularly useful in this regard, because it enables institutional investors to hold corporations accountable for their disclosures and their goals.

Second, institutional investors are able to influence corporate decision-making because of their "salience." Salience refers to the ability of an investor to successfully engage with and influence management.[115] Investor salience rests on three interrelated concepts – "power, legitimacy, and urgency."[116] Power is often associated with greater levels of stock ownership and reflects the extent to which an investor can influence corporate action.[117] An investor's power may arise from

112. *See* note 29 *supra* (discussing why we are relying on institutional investors rather than the SEC).

113. *See* McGrath, *supra* note 30 (explaining that institutions own eighty percent of the market value of the 500 largest U.S. companies).

114. *See* Keith Dowding, *Collective Action Problem*, BRITANNICA (2013), https://www.britannica.com/topic/collective-action-problem-1917157 [https://perma.cc/CE8N-Y9FK] (explaining that collective action problems occur because "while each individual in any given group may share common interests with every other member, each also has conflicting interests. If taking part in a collective action is costly, then people would sooner not have to take part").

115. *See* E. James & M. Gifford, *Effective Shareholder Engagement: The Factors that Contribute to Shareholder Salience*, 92 J. BUS. ETHICS 79, 79 (2010); 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 ACAD. MGMT. REV. 853, 854 (1997).

116. Mitchell et al., *supra* note 115, at 881.

117. *Cf. id.* at 865 ("[A] party to a relationship has power, to the extent it has or can gain access to coercive, utilitarian, or normative means[] to impose its will in the relationship").

(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.[118] Legitimacy addresses the investor's credibility to engage on a particular matter.[119] Such credibility may arise from the investor's reputation in the market or its expertise on the matter at issue.[120] 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, critically, (ii) "the importance of the claim or the relationship" to the investor.[121]

The concept of salience suggests that institutional investors are well-suited to incentivize corporations to address internal and external causes of racial inequity. Institutional investors' large equity holdings across multiple corporations provide power to pressure management decision-making. Institutional investors can utilize their shareholder rights, threaten to decrease ownership interest in the entity, or harm the corporation's public image. Additionally, the deep investment knowledge and expertise of institutional investors legitimize their demands for reforms. Finally, the social unrest of the spring and summer of 2020, combined with the importance of the institutional investor-corporation relationship, creates a real sense of urgency. Institutional investors, therefore, can leverage their salience to incentivize corporations to institute the types of reforms needed to respond to the current social movement.

Importantly, there remains the question of whether institutional investors *would* undertake the role this Essay envisions for them. There are a number of reasons to believe they would be willing to take on this role. First, the role for institutional investors is a powerful but narrow one—they would use their position to encourage (or demand) that firms disclose data related to demographic diversity and corporations' specific, measurable goals for improvement.[122] Institutional investors would not dictate *how* corporations gather and disclose this information.[123] Instead, institutional investors would receive and assess the disclosures provided, allowing them to determine whether corporations were

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118. Lori Verstegen Ryan & Marguerite Schneider, *The Antecedents of Institutional Investor Activism*, 27 ACAD. MGMT. REV. 554 (2002).

119. Mitchell et al., *supra* note 115, at 866-67.

120. James & Gifford, *supra* note 115, at 91.

121. Mitchell et al., *supra* note 115, at 867.

122. *See infra* Section II.B for more details.

123. One potential drawback on utilizing institutional investors to incentivize firms to provide equality metrics is that the disclosures will likely not have the same sort of standardization as they would if they were responding to SEC-mandated disclosures. One might be concerned that corporations will cherry-pick the types of information they disclosure. Or one might worry that information will be difficult to compare across firms. These are valid concerns.

achieving their stated goals. Second, institutional investor support for ESG and the current Black Lives Matter movement demonstrates a willingness and interest in engaging with corporations on these issues.[124] Indeed, institutional investors are already demanding more and better disclosures on ESG issues from the corporations in which they invest, for example. This Essay's proposal is in line with these requests and would provide guidance that would improve the quality of the data disclosed. Lastly, even if an institutional investor is equivocal in its support for improving diversity or racial justice at the corporations within its portfolio, it should nonetheless want the information this Essay proposes to be disclosed. At best, the data may improve investment decisions and provide a more fulsome and accurate picture of the corporation. And, at worst, the data do not change the institutional investor's view of the corporation. In sum, institutional investors may willingly undertake this role because it enables them to (i) see whether and how a corporation has improved or attempted to improve its demographic diversity and (ii) have better data as they make investment decisions regarding corporations in their portfolios.

B. A Push for Metrics

As explained in Section I.B, corporations have publicly embraced the idea that they should contribute to the current social movement to end systemic racism and promote greater racial justice. But the statements and actions firms have prioritized have not focused heavily—at least on a widespread basis—on actions

And yet, if institutional investors can successfully incentivize firms to begin disclosing (i) data on their demographic diversity at regular intervals and (ii) their efforts toward meeting certain diversity goals, that would lead to the public dissemination of a significant amount of information that is not available today. Moreover, institutional investors are sophisticated actors and may be able to identify if or when a firm is not acting in good faith in making its disclosures. This Essay's proposal is not perfect, but one should not let the perfect become the enemy of the good.

124. There is another fundamental question of whether institutional investors are also engaged in performative conduct in expressing support for the current social movement but not undertaking meaningful changes within their own organizations. Recognizing this possibility, the authors believe that institutional investors should also adopt equality metrics for themselves. As institutional investors demand these disclosures from corporations in which they invest, they ought to lead by example and make similar disclosures regularly to markets, clients, and shareholders. BlackRock has already demonstrated a willingness and ability to engage in this sort of effort. *See, e.g.*, *Enhancing Diversity Disclosures*, BLACKROCK (July 2020), https://www.blackrock.com/corporate/literature/continuous-disclosure-and-important-information/blk-ee01-data-disclosure.pdf [https://perma.cc/2NVQ-PPL6].

that can be measured, tested, and assessed for their effectiveness.[125] As a result, their words are all too often empty promises. It does not have to be this way. Institutional investors can play an important role in incentivizing firms to take meaningful action by demanding that firms adopt equality metrics.

To further racial equality, firms must commit to a more comprehensive approach and rigorously measure their performance in each of these areas. Firms adopting equality metrics should (i) measure the state of (in)equality; (ii) identify a list of specific, assessable equality goals; (iii) implement policies and procedures aimed at achieving those goals that can be tested and measured; (iv) disclose their progress toward meeting these goals at regular intervals; and (v) use their own and others' measured performances on these metrics to direct their future efforts at creating a more equitable organization. The following Sections detail how these equality metrics can be applied to corporations' internal organizations and supply chains.[126] We argue that by demanding that firms adopt these metrics, institutional investors can help firms achieve greater racial equality.

1. *Internal*

The Black Lives Matter movement has grown to encompass numerous areas of American life. That complexity can make it difficult to identify the best ways to support that movement, because institutional investors and corporations have a variety of options available to them. The reality, however, is that corporations have the most direct power to make concrete, tangible, and immediate changes within their own organizational structures. Thus, this Essay suggests that 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.

Importantly, starting with firms themselves aligns with the work of U.S. activists and analysts, who have begun calling for data disclosure from firms to

125. The Business Roundtable did encourage companies to voluntarily disclose key diversity metrics in the workforce and leadership ranks at companies, but it is just one suggestion in one of its four primary targeted areas for focus—so, in other words, not a primary focus. Business Roundtable 2020 Press Release, *supra* note 73.

126. There is an additional area that firms have navigated towards—community initiatives. *See infra* Section IV.A. Currently, a number of organizations have focused on one of three areas—internal, supply chains, and communities—for reform, but only a corporations appear to have focused on all three. Ben & Jerry's appears to be one of them. *See* Martinez, *supra* note 22.

ensure that companies are meaningfully acting upon their pledges.[127] Specifically, activists have called for companies to "release specific information such as on the racial backgrounds of their directors or pay ranges of their workers."[128] More recently, Nasdaq has filed a proposal with the SEC "to adopt new listing rules related to board diversity and disclosure."[129] These are reasonable requests, and requests for information about boards of directors are good starting points. But this Essay encourages institutional investors to mandate more from firms.

First, institutional investors should encourage firms to measure the current state of (in)equality within their ranks. Specifically, institutional investors should ask firms to provide data regarding the demographic breakdown across various segments of their workforces on at least an annual basis, starting as soon as possible. This sort of disclosure request was promulgated by BlackRock in 2020,[130] and this Essay argues that other institutional investors should follow suit. To date, much of the disclosure conversations regarding demographic diversity has revolved around boards of directors, but that is just one aspect of a firm's composition. Requiring firms to disclose demographic information about their workforces more broadly will empower institutional investors, and the public, to determine if historically underrepresented people are concentrated in or missing from certain organizational units and roles.

Importantly, disclosure of this information would be in line with the Business Roundtable's most recent initiatives on racial diversity and justice, which encouraged "companies to voluntarily disclose key diversity metrics in the workforce and leadership ranks" within firms.[131] Yet, while Business Roundtable can encourage companies to engage in certain activities, they do not wield the leverage that institutional investors have at their disposal. One potential benefit, however, of Business Roundtable's current policy positions is that they may make it

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127. Ross Kerber & Simon Jessop, *U.S. Activists Seek Data to Test Corporate Diversity Pledges*, REUTERS (Oct. 13, 2020, 4:44 PM), https://www.reuters.com/article/us-climate-change-investing-data/u-s-activists-seek-data-to-test-corporate-diversity-pledges-idUSKBN26Y2ZK [https://perma.cc/2UL5-GMUF].

128. *Id.*

129. Press Release, Nasdaq, Nasdaq to Advance Diversity Through New Proposed Listing Requirements (Dec. 1, 2020, 7:15 AM) [hereinafter Nasdaq Press Release], https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01 [https://perma.cc/E4CS-UPM5]. The SEC has delayed ruling on Nasdaq's proposed diversity plan. *See* Alexander Osipovich, *Ruling on Nasdaq Diversity Plan for Boards Is Delayed by SEC*, WALL ST. J. (Mar. 10, 2021, 6:32 PM ET), https://www.wsj.com/articles/ruling-on-nasdaq-diversity-plan-for-boards-is-delayed-by-sec-11615419177 [https://perma.cc/UJT6-ZEES].

130. BLACKROCK, *supra* note 111.

131. Business Roundtable 2020 Press Release, *supra* note 73.

more difficult for firms to resist demands from institutional investors for disclosure of equality metrics. If a firm has signed onto the Business Roundtable initiatives related to diversity and inclusion, it might be difficult for that firm to then object to contributing towards efforts aimed at ensuring firms' goals in that regard are actually met.

Additionally, the disclosure of demographic data at specified, regular intervals will help institutional investors, and the public, to determine how and where improvement is being made across firms. This disclosure is necessary to allow 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 demographic diversity within their workforces. Some firms have provided specific goals in response to the current social movement. For example, Adidas has committed to filling at least thirty percent of all open positions at Adidas and Reebok with Black or Latinx candidates.[132] But such broad promises leave the critical questions unanswered: Where are those open positions? Are they throughout the firm? Are they at the storefront level? Or are they within the executive levels of the firm? To avoid such indeterminacy, corporate goals should be specified in a manner consistent with how demographic data disclosures are provided. If a firm provides demographic data regarding the leadership of its marketing department, it should also provide information on how it hopes to improve those numbers.[133]

Third, firms should disclose the strategies they have employed 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 utilized over the past year. This is important for two reasons. Disclosure of this information will demonstrate which initiatives worked and which did not. It is just as valuable to identify

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132. Friedman, *supra* note 19.

133. 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 [https://perma.cc/UGB8-K58Y]. This Essay takes no specific view on these debates, but suggests firms should think about their organizations in a holistic fashion when deciding what goals to pursue, and once a firm decides on its objectives, it should measure its success toward meeting them.

what does not work as it is to tout what does. 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 does not work, that suggests the firm is more concerned about appearances than to actually achieving their stated goals. Additionally, the disclosure of efforts, paired with information on what worked and what did not, will allow firms 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 to the larger effort.

Fourth, institutional investors should explicitly ask firms to self-assess whether they are meeting their stated objectives. That is, institutional investors should encourage firms to engage in root-cause analyses to determine why they are or are not meeting certain goals and to share their own assessments of that information.[134] These disclosures will enable institutional investors to assess whether firms are meaningfully attempting to eliminate structural racism within their organizations. For instance, PepsiCo has committed to increasing "its number of [B]lack managers by 30 percent by 2025" and has committed to "adding more than 250 [B]lack employees to its managerial positions, including a minimum of 100 [B]lack employees to the executive ranks."[135] That sort of clear target, if accompanied by regular reporting on progress, is the type of data that 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

134. *See* Veronica Root Martinez, *The Compliance Process*, 94 INDIANA L.J. 203, 228-29 (2019) (discussing the importance of engaging in comprehensive root-cause analyses after compliance failures occur).

135. Friedman, *supra* note 19. Some may read this sort of goal and immediately wonder about the constitutionality of the intervention. There is no constitutional concern regarding a private party's use of quotas, because they are private parties and not state actors. Though many have interpreted the holding in *Ricci v. DeStefano*, 557 U.S. 557 (2009), as outlawing the use of quotas under Title VII, that is not the actual holding in the case, which focused instead on the interplay between disparate treatment and disparate impact analysis. An initiative that includes specific quotas 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 trigger 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. Rather, 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 firms' goals should be specific, objective, measurable, and assessed.

of goals that firms could establish, and this Essay is not advocating that an equality metric must include a quota. For instance, a firm could set a goal of doubling the retention of certain demographic groups over the next three years—this would be a specific, measurable, and assessable goal, and it is not a quota.

Finally, institutional investors should encourage firms to use the information they have learned during their own assessment of progress towards their goals, as well as the successful initiatives of other market participants, to direct future efforts targeted at creating a more equitable organization. By following the steps detailed above—measuring a firm's current state of demographic diversity, setting a goal, measuring the firm's progress toward that goal in light of the strategies it employed—the firm and those with knowledge of the firm's activities can begin to identify which strategies are resulting in meaningful change and which ones are not. A key component missing from diversity and inclusion efforts at firms today is that many of the strategies utilized have not been empirically proven to be effective. This Essay's proposal aims to directly combat that lack of data, by providing avenues for the creation and assessment of firms' diversity efforts. Importantly, the empirical data generated will provide valuable insights for not only the firm itself, but also for the market more generally. If institutional investors were to adopt this Essay's proposal and the information learned were shared amongst market participants, then institutional investors might have the ability to improve the firms they invest in at a market, as opposed to firm by firm, level.

2. *Supply Chain*

Some firms have pledged to diversify their supply chains in response to the Black Lives Matter 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 [B]lack-owned business to 15 percent."[136] A focus on supply chain is important because it can actually drive a change in behavior across

136. Friedman, *supra* note 19. 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, 12:17 PM EDT), https://techcrunch.com/2020/10/30/uber-eats-faces-discrimination-allegations-over-free-delivery-from-black-owned-restaurants [https://perma.cc/W4G9-WSQJ]. Again, this Essay is not arguing in favor of certain quotas. It is, however, arguing that firms should adopt specific measurable goals that can be assessed to track progress.

not just at one firm, but various market participants.[137] When firms make explicit requests of their contracting partners, it often serves as 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 on certain issues like anticorruption efforts or environmental laws.[138] Thus, if an institutional investor prioritizes changes within a firms' supply chain, it may impact not only that specific firm, but also that firm's contracting partners. This intervention, if adopted by institutional investors and acted upon by firms, would extend the reach of this Essay's proposed equality-metrics program beyond the publicly traded companies that institutional investors have direct power over, enabling investors to have a broader impact throughout the economy.

In sum, institutional investors should require firms to disclose information about the demographic diversity of their supply chain. Like the information gathered regarding a firm's internal organization, this information should be specific, measurable, and accompanied by concrete goals and objectives. Equality metrics involving a firm's supply chains might include information about (i) the demographic diversity of 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. Again, firms should be required to state explicitly whether they have met their specified goals and what strategies they have implemented in an effort to do so.

III. BENEFITS

If institutional investors require the corporations they invest in to provide specific metrics regarding equality efforts, corporations might finally address issues related to systemic racism, racial justice, and diversity. This Part discusses potential benefits of this Essay's proposal. It groups the discussion of benefits into two broad categories. First, it details how the disclosure of equality metrics can serve to create a baseline that will allow for empirical analysis. Second, it demonstrates how equality metrics may influence corporate behavior.

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137. It is worth noting that some supply chains are more complicated and extensive than are others. This Essay is including supply chains in this proposal, because (i) their inclusion provides an opportunity to broaden the reach of institutional investors' impact and (ii) some firms have already committed to making changes within their supply chains. That said, more research on how best to utilize supply chains to promote racial justice and economic equality within and throughout communities is needed.

138. Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1016-17 (2017).

A. *Creating a Baseline That Allows for Empirical Analyses*

1. *Creating a Baseline*

A number of corporations and coalitions of corporations are actively 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 2017, for example, CEOs came together to pledge to work toward greater diversity and inclusion within their firms and to collaborate, if possible, in that effort.[139] In 2020, CEOs again came together to identify ways they could address systemic racism throughout society.[140] That is admirable. And yet, if firms do not start by measuring and releasing the baseline of their own organizations' equality today, there will be no way to capture what they might accomplished tomorrow. Specific and measurable equality metrics will create a baseline against which the progress of the initiatives they adopt over the coming months can be measured.

Currently, it is also difficult to track which firms are employing which diversity efforts. Some firms are focused on their internal workforces. Other firms are focused 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 amount to little 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 in the future. Again, equality metrics will create a baseline here against which corporations, investors, and the broader public can assess performance.

Corporations have, for years, come together to pledge their commitment to improving diversity and inclusion and, now, to fight for racial diversity and justice. However, little is known about the effectiveness of these efforts, and the limited data available does not suggest firms have achieved robust results. Again, take diversity within boards of directors. As one article noted, "[d]espite years of research and data that clearly demonstrate that diverse organizations—and boards of directors—outperform homogenous groups, corporate and nonprofit boards have barely moved the needle on diversification."[141] Additionally, the more recent calls for action within firms have lacked specificity. For example, as of November 2020, approximately "189 companies in the S&P 250 [had] released

139. 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 [https://perma.cc/7LSF-46TC].

140. Business Roundtable 2020 Press Release, *supra* note 73.

141. Molly Brennan, *A Strategic Approach to Board Composition and Diversity*, CORP. BOARD MEMBER, https://boardmember.com/a-strategic-approach-to-board-composition-and-diversity [https://perma.cc/QY6Y-FK69].

statements on commitments to racial justice in the wake of George Floyd's death," but only sixteen had "released specific data on the inclusion of Black employees in their workforce."[142]

Institutional investors are in a unique position to harness the power of the current social movement to incentivize corporations to increase their transparency and reporting regarding the diversity efforts they undertake. By requiring corporations to release discrete, consistent data at regular intervals, equality metrics 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, significant resources are expended, and minimal real progress is achieved.

2. *Allowing for Empirical Analyses*

Equality metrics will also create a range of data that can be used to test empirically the effectiveness of various strategies employed within firms, across industries, and throughout the market.

As is noted in Section III.A.1, because equality metrics will provide information at the individual-firm level, it will allow each firm to test for itself what works. But that same information can be grouped and empirically tested by scholars, social activists, and other outside actors. 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, scholars might be able to test what is working both at the individual-firm level, but also at the industry level. In doing so, scholars might identify that specific types of interventions are more likely to improve equality within certain professions than others. This is important because how companies are run varies widely across firms and industries.[143] The upshot is that to the extent

142. Sue Reisinger, *Does the Data Back up S&P Cos.' Diversity Pledges?* LAW 360 (Nov. 18, 2020), https://www.law360.com/pulse/amp/articles/1330434 [https://perma.cc/NR8S-84J4].

143. Take, for example, the gender equality within law firms versus that in accounting firms. Accounting firms were able to standardize the assignment process in a manner that helped remedy disparities between male and female accountants. *See, e.g.*, Roberto Concepciòn, Jr., Note, *Organizational Citizenship Through Talent Management: An Alternative Framework to Diversity in Private Practice*, 42 COLUM. J. L. & SOC. PROBS. 43, 61 (2008) (discussing how standardizing the assignment process at an accounting firm remedies disparities between male and female accountants). It is, however, more difficult to quantify the experiences associated with assignments within law firms, so that sort of standardized assignment system is not an initiative law firms are able to efficiently incorporate. *See* Veronica Root, *Retaining Color*, 47 U. MICH. J. L.

that trends can be identified, it could result in more targeted development of initiatives for firms to implement.

Beyond the public corporation setting, by taking information at the firm level and aggregating it across the market, outside actors may be able to identify the types of interventions that improve organizational equality. Findings of this nature might then be adopted by different types of organizations—nonpublic corporations, nonprofits, universities, governments—who are not influenced by institutional investors and therefore not the direct subject of this Essay's focus.

B. Influencing Corporate Behavior

1. The Impact of Disclosure on Behavior

Disclosure is key to the efficacy of equality metrics. Under our proposal, corporations would disclose their equality metrics in response to demands of institutional investors, providing the markets and investors with information on demographic diversity, specific and measurable corporate goals to improve racial equity, and expected future efforts based on past experiences. These disclosures will allow for more informed decision-making, particularly for investors that consider diversity important in assessing long-term corporate value.

Scholars have widely discussed and acknowledged the benefits of disclosure, and therefore, they will not be recounted here.[144] However, there is one benefit

REFORM 575, 606-07 (2014). These are, of course, nonpublic companies, but the general observation that different organizations and industries might encounter a variety of challenges in need of a range of strategies for improving demographic diversity still stands. *See also* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 268-72 (2020) (discussing the increasingly complex organizational structure of firms).

144. This Essay focuses on an incentive from private parties to drive change within corporations, but public actors could also step in to provide these incentives. For example, the SEC could promulgate regulations requiring disclosure of diversity information. *See* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923 (2019) (arguing for the incorporation of sustainability information into SEC-mandated financial disclosure reporting); Cynthia A. Williams & Jill E. Fisch, Petition for Rulemaking to Brent J. Fields, Sec'y, SEC (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf [https://perma.cc/V8K6-L4Y4] (petition to the SEC to engage in notice and comment rulemaking regarding the disclosure by firms of environmental, social, and governance information). Additionally, while disclosure is typically thought of as being for investors, scholars have argued that other stakeholders can benefit from the disclosure of information. *See generally* Ann Lipton, *Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. REG. 499 (2020) (arguing in favor of mandatory disclosures for the benefit of stakeholders).

that is of particular note. Specifically, disclosure can affect corporate behavior.[145] As SEC Commissioner Allison Herren Lee notes, "[W]hen companies have to formulate disclosure on topics it can influence their treatment of them."[146] This is the principle that "what gets measured gets managed" and leads to changes in how corporations think about and approach matters they disclose.[147] Additionally, disclosure allows investors, employees, and the public to make comparisons among corporate disclosures, which can result in pressure being brought to bear on corporations to improve their conduct.[148] Indeed, such pressure may extend beyond the public markets, with privately-held firms choosing to adopt these practices in anticipation of a public offering or to meet investor demand.

Importantly, disclosure of equality metrics may result in corporations changing how they think about and approach racial equity, resulting in more impactful changes within organizations and industries.[149] As proposed, disclosure of equality metrics would be voluntary. There would certainly be a number of benefits associated with a mandatory disclosure regime for equality metrics but the reality is that the SEC has mostly declined to require diversity-related disclosure. While it is true that the SEC requires corporations to disclose whether and how diversity is considered in nominating board candidates,[150] the disclosure re-

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145. *See, e.g.*, Morten Bennedsen, Elena Simintzi, Margarita Tsoutsoura & Daniel Wolfenzon, *Do Firms Respond to Gender Pay Gap Transparency?* 26-27 (Nat'l Bureau of Econ. Research, Working Paper No. 25435, 2019) (explaining that firms subject to disclosure laws hire and promote more women and close their gender wage gap).

146. Lee Remarks, *supra* note 92.

147. Nigel Topping, *How Does Sustainability Disclosure Drive Behavior Change?*, 24 J. APPLIED CORP. FIN. 45, 45 (2012).

148. Lee Remarks, *supra* note 92.

149. *See* Etienne Farvaque, Catherine Refait-Alexandre & Dhafer Saïdane, *Corporate Disclosure: A Review of Its (Direct and Indirect) Benefits and Costs*, 128 INT'L ECON. 5, 10–15 (2011); Nigel Topping, *How Does Sustainability Disclosure Drive Behavior Change?*, 24 J. APPLIED CORP. FIN. 45, 46 (2012) (describing the benefits of climate change data disclosure, such as its usefulness for scenario planning and deciding where to invest resources); Julia Carpenter, *How Publishing Diversity Numbers Helps Companies*, CNN: BUSINESS (Dec. 14, 2018, 11:03 AM EST), https://www.cnn.com/2018/12/14/success/company-diversity-numbers/index.html [https://perma.cc/859J-7KS4] ("The company's willingness to publish the numbers shows an openness to address diversity issues . . . which incentivizes people to stay at the company."); Charlie Mahoney & Steffen Bixby, *Chart of the Week: Companies that Embrace Full Disclosure on Workforce Diversity Outperform their Peers*, JUST CAPITAL (June 12, 2020), https://justcapital.com/news/chart-of-the-week-companies-that-embrace-full-disclosure-on-workforce-diversity-outperform-their-peers [https://perma.cc/P64E-4EE8] ("This [data] suggests that transparency regarding and a focus on ethnic and gender diversity does not negatively impact company performance during good times, and that it may even provide downturn protection in bad ones.").

150. *See* 17 C.F.R § 229.407(c)(2)(vi) (2021).

quirement is both so narrow (it only applies to the board) and so broad (diversity is undefined) that it does not provide meaningful information or drive meaningful change in corporate behavior. Despite the voluntary nature of the proposed disclosures, institutional investors have demonstrated an ability and willingness to impact corporate behavior in a variety of areas within firms, and the time seems ripe for them to focus on firms' diversity efforts. Further, failure to comply with requests for equality metrics is likely to result in "naming and shaming," which may ultimately encourage corporations to change their behavior and adopt equality metrics.

2. Combating Resistance to Diversity Efforts

Researchers have identified that one obstacle to broad-based support from within firms for efforts to improve demographic diversity is the difficulty of establishing that there is in fact a diversity problem to be addressed. Research has "consistently reveal[ed] that many Whites do not believe that racism continues to result in the oppression of people of color."[151] Indeed, one study determined that "Whites in the United States believe that systemic anti-Black racism has steadily decreased over the past 50 years—and that systemic anti-White racism . . . has steadily increased over the same time frame."[152] Additionally, other studies have "demonstrated that the presence of diversity values and structures can . . . lull[] an organization into complacency and mak[e] Blacks and ethnic minorities more likely to be ignored or harshly treated when they raise valid concerns about racism."[153] It may be that the events surrounding George Floyd's death have helped to dispel some of the documented resistance to diversity efforts, but to the extent it persists or arises once again, the equality metrics proposed by this Essay might help to provide support for diversity initiatives.

Without clear data, it may be easier for people to rely upon their own opinions or inclinations about why there is or is not a lack of diversity within firms. Additionally, without clear data, people who are not accustomed to observing and experiencing racial disparities may not consider the extent to which their workplaces and supply chains lack demographic diversity. But the equality metrics proposed by this Essay are meant to allow for objective assessments of the

151. Robert Livingston, *How to Promote Racial Equity in the Workplace*, HARV. BUS. REV. (Sept.-Oct. 2020), https://hbr.org/2020/09/how-to-promote-racial-equity-in-the-workplace [https://perma.cc/A2CQ-5SND].

152. *Id.* (citing Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 216-17 (May 2011)).

153. *Id.* (citing Cheryl R. Kaiser, Brenda Major, Ines Jurcevic, Tessa L. Dover, Laura M. Brady & Jenessa R. Shapiro, *Presumed Fair: Ironic Effects of Organizational Diversity Structures*, 104 J. PERSONALITY & SOC. PSYCHOL. 504, 504-06 (2013)).

state of firms' equality and their success, or lack thereof, toward improving their demographic diversity. Either a firm is meeting its equality targets or it is not, and if it is not, it should determine why it has failed, just as it would if it failed to meet targets related to sales, production, or any other goal that is set. Importantly, the information required for assessments of this sort can be gathered and analyzed even if individual employees are not convinced of the importance of diversity efforts. One benefit of equality metrics as have been presented in this Essay is that they strip out some of the subjective conversations about whether the pursuit of diversity is or is not a good. Instead, the conversation will, potentially, be focused on whether stated goals have been met.

3. *Reveal the Mere Performers*

This Essay is premised, in part, on the idea that corporations made a number of lofty statements suggesting support of the Black Lives Matter movement, but that those statements lacked concrete actions. This Essay hopes to contribute toward the implementation of incentives to encourage firms to move from making statements to taking tangible, measurable actions. The reality, however, is that there may be some firms that do not want to take more significant steps. Indeed, there may be firms that are content with making statements in an effort to garner positive publicity. This Essay's proposal, if adopted and implemented by institutional investors, may serve to reveal those firms that are more invested in making performative statements than taking tangible actions in support of the Black Lives Matter movement.

Knowing which firms are truly committed to making changes to their workforces and supply chains—and those that are not—will allow stakeholders to make more informed decisions. Potential employees may be better able to assess whether a firm is a good fit for them professionally. Investors might be better able to determine whether a firm aligns with their values, particularly as certain classes of investors, like millennial investors, have demonstrated preferences for investments that meet ESG principles. Implementing this Essay's proposal would provide customers the opportunity to obtain more information about the businesses they frequent. And, importantly, activists might be able to better target their lobbying efforts toward particular segments of the market.[154] The up-

154. There are, of course, potential downsides to the possibility of increased pressure from activists. If firms become apprehensive that information disclosed by them may be perceived as negative, it might result in firms developing concerns about potential boycotts or other similarly harmful activities. If firms fear sufficient negative ramifications from disclosure, they may be (i) hesitant to capitulate to institutional investors' demands for equality metrics, or shot is that this Essay's proposal will both (i) allow institutional investors to incentive firms to implement equality metrics and (ii) reveal those firms that have no interest in doing so. Both types of information are potentially valuable.

IV. ADDITIONAL CONSIDERATIONS

While equality metrics have a variety of upsides, they are not able, or meant, to address all aspects of the challenges firms face in creating more equal corporate cultures, supply chains, and societies. This Part addresses four considerations that institutional investors, business leaders, policymakers, and academics should keep in mind when employing a strategy of creating and disclosing equality metrics.

A. Firm Investments in Community Initiatives

A variety of corporations have announced initiatives meant to address the impacts of systemic racism and to promote greater equality within their communities. FitBit, for example, announced that "it would support research projects to address health conditions that disproportionately affected [B]lack people, including Covid-19."[155] Netflix shifted two percent of its cash assets to "financial institutions that serve the nation's Black communities."[156] These are just a few examples, but there are numerous others.[157] Indeed, 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.[158] It has stated that it is the responsibility of corporations "to create opportunities for people of all backgrounds across America," because "all of us

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(ii) incentivized to manipulate the information they provide. These scenarios, while possible, should not excuse firms from prioritizing the pursuit of diversity and inclusion strategies that are not specific, measurable, and assessable – equality metrics. Firms value what they measure and measure what they value – if they are truly committed to improving equality within their organizations, they should take the steps necessary to ensure the goals they have set are in fact met.

155. Friedman, *supra* note 19.

156. Nathan Vardi, *Netflix Shifts 2% of Its Huge Cash Pile to Financial Institutions Serving Black Communities*, FORBES (June 30, 2020, 7:50 AM EDT), https://www.forbes.com/sites/nathanvardi/2020/06/30/netflix-shifts-2-of-its-huge-cash-pile-to-financial-institutions-serving-black-communities/?sh=7d4b7fcd5b31 [https://perma.cc/T9NH-B9HU].

157. *Partnering with Communities*, BUS. ROUNDTABLE, https://www.businessroundtable.org/policy-perspectives/diversity/partnering-with-communities [https://perma.cc/2RAA-WZ3H] (providing hyperlinks to various firms' policies and statements, which include information on their community partnerships).

158. Business Roundtable 2020 Press Release, *supra* note 73.

are responsible for making the world a better place than we found it."[159] Additionally, it has announced its support for "Black-owned small businesses and entrepreneurs," as well as efforts to implement initiatives to "[h]elp Americans of color develop financial security."[160]

The problem, of course, is that statements of support for initiatives are just that—statements. A firm could issue a statement expressing a willingness to engage in community initiatives, and it may be willing to provide significant donations to community organizations, but if firms rely on donations alone to demonstrate their support for the Black Lives Matter movement, they may become complacent about engaging in activities where they have more direct involvement in combatting systemic racism and racial injustice. There may, however, be opportunities to develop a separate set of equality metrics surrounding firms' commitments to community initiatives in an effort to ensure that these efforts are meaningful partnerships as opposed to more arms-length transactions.[161]

It may, however, be more challenging to discern the parameters for evaluating firms' involvement with community initiatives and developing robust and objective metrics for assessment. The equality metrics being proposed by this Essay have relatively concrete starting points—what is the current demographic make-up of the firm and its suppliers. That sort of baseline might be more challenging to determine, as the types of community initiatives firms are engaged in are quite diverse, making them more challenging to categorize and measure. A firm might decide to give a one-time donation to a nonprofit within its community to signal its support for the community generally. A firm might give a recurring donation to a nonprofit with overlapping interests of the firm. Or a firm might enter into a cooperative partnership with a community organization. The possibilities for community engagement are numerous, which makes crafting a set of consistent metrics for institutional investors to require from corporations a potentially more challenging endeavor.

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159. *Advancing Diversity and Inclusion*, BUS. ROUNDTABLE, https://www.businessroundtable.org/policy-perspectives/diversity [https://perma.cc/9R78-TDWX].

160. Business Roundtable 2020 Press Release, *supra* note 73.

161. For some, the focus on community instead of the firm may be perceived as running counter to the narrative within corporate-law scholarship that the proper purpose of the corporation is to provide wealth to its shareholders. The larger corporate purpose debate is beyond the scope of this Essay. That said, as firms' and scholars' understandings of how to create long-term, sustainable value continue to shift, it may be determined that robust community investment actually aligns with shareholder value. Additionally, the debates on corporate purpose are, themselves, rooted in understandings of the corporation that took place when people of color were in many ways disenfranchised within America society. Martinez, *supra* note 22, at 8-11. As corporate law scholars begin to confront the impact of that historical truth, it may change or modify modern debates regarding the appropriate purpose of the corporation.

However, community initiatives are also quite important. Corporations long have been complicit in creating inequality within communities of color.[162] Now, initiatives to undo that harm and achieve greater "economic justice" are an integral part of the Black Lives Matter movement.[163] Thus, institutional investors likely should encourage firms to continue to contribute to these greater societal initiatives, but they might consider asking firms whether their contributions are hands-off or hands-on. More specifically, institutional investors should inquire whether the resources provided by firms to community groups are donations without additional follow-up or 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 might 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. The key, however, to any disclosure of this type would be for institutional investors to attempt to find a balance between dictating certain types of community initiatives and encouraging some standardization in reporting. If firms are disclosing a hodgepodge of information, it will make it more difficult for market participants, intermediaries, or other actors within corporate governance efforts to meaningful use the disclosures.

B. Quantity Is Not Quality

The equality metrics proposed by this Essay measure quantity; they aim to identify what firms and initiatives appear to be successful in improving equality

162. *See* Sharon M. Collins, *Blacks on the Bubble: The Vulnerability of Black Executives in White Corporations*, 34 SOC. Q. 429 (1993); Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 AM. SOC. REV. 542 (2001); Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. SOC. ISSUES 5 (1987); *see also* Gerald F. Davis & J. Adam Cobb, *Corporations and Economic Inequality Around the World: The Paradox of Hierarchy*, 30 RES. ORGANIZATIONAL BEHAV. 35 (2010) (describing how organizations generate inequality in society).

163. Tanzina Vega, *The Next Battle for Black Lives Matter: Economic Justice*, CNN MONEY (Aug. 2, 2016, 6:34 PM ET), https://money.cnn.com/2016/08/02/news/economy/black-lives-matter-the-economy/index.html [https://perma.cc/3ED3-4U5R].

as measured via greater demographic diversity. They will not, however, measure quality at a meaningful level.

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 be limited in their ability to provide information about the quality of the experiences employees or third-party contracting partners have. Employees may stay at a firm for a variety of reasons, but they may still experience 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 unfair. These qualitative concerns—commonly attributed to inclusion strategies—will not be picked up by the equality metrics this Essay proposes.

This is not an indictment of this Essay's proposed equality metrics. Rather, it reflects the fact that this Essay's proposal is not an attempt to suggest a comprehensive fix for the multifaceted challenges facing firms as they attempt to combat systemic racism and promote greater racial diversity and justice. Instead, this Essay's suggestions should be viewed as one component of a larger effort to address these issues. Others, like Nasdaq, are prioritizing the disclosure of demographic information as an important first step.[164] Currently, there is a dearth of information available regarding basic demographic information within and throughout firms. Addressing this lack of data, as an initial starting point, may serve to push firms toward the implementation of strategies that will result in firms' meeting their stated diversity and inclusion goals.

Importantly, the focus on quantity is not meant to suggest that quality of experience is of lesser importance. The experience of demographically diverse employees, managers, and directors is, of course, important for a variety of reasons, including the likelihood of retention and subsequent advancement. Qualitative assessments, however, may require more investment of resources—in terms of time and money—than the disclosures contemplated by this Essay's proposal. Qualitative assessments by firms might include a range of activities, including climate surveys, which would be relatively low in cost to administer, as well as individual interviews with employees or one-on-one exit interviews, which would probably require a more significant outlay of resources.

This Essay takes no position on whether it would make sense for external parties—whether institutional investors, the SEC, or others—to attempt to incentivize firms to engage in qualitative assessments. In part, this is because the more qualitative the assessment, the greater the likelihood that it will require customization based on the organizational structure of the firm. The best routes

164. Nasdaq Press Release, supra note 129.

for incentivizing qualitative assessment should be the subject of further research, inquiry, and study.

That said, if firms do not identify where they are today quantitatively, 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 and improved quality of experience in these firms, regardless of how much money they dedicate to diversity initiatives. Thus, this Essay argues in favor of the implementation of equality metrics, so that firms can begin to engage more robustly in efforts that are likely to result in improving the demographic diversity of their workforces and supply chains.

C. 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. Jamillah Bowman Williams has detailed how firms sometimes argue that their diversity efforts should be considered trade secrets and exempted from disclosure.[165] 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, Williams's 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."[166] 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 firms that are succeeding at improving the demographic diversity and equality within and throughout their organizations. Keeping diversity efforts a secret has not worked to incentivize or enable firms to meet their goals regarding demographic diversity. This Essay suggests it is time to take another approach.

D. 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

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165. Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1684, 1690-98 (2019).

166. *Id.* at 1690.

macro-level demographic information as opposed to micro-level information.[167] For example, institutional investors will likely require that firms disclose the racial compositions of their workforces and that racial compositions 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 within that categorization. Some of those individuals will trace their ancestry back to a period of American slavery, while others will be more 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-level (e.g., Black immigrant, Caribbean American, African American) as opposed to the macro-level (e.g., African American/Black). Additionally, the more one breaks down categories, the more difficult it will be, particularly today, to maintain worker anonymity and create pools of data of statistically significant sizes to allow for empirical analyses.

Still, while this Essay does not propose that institutional investors require diversity information to be reported to them at a micro-level, it would be prudent for individual firms to consider the ways in which their programs are functioning at both micro- and macro-demographic levels.

CONCLUSION

The moment in which we, as a society, find ourselves is historic and powerful. Many within American society are becoming more aware of the ways in which Black lives are devalued and are motivated to do something to address these inequities. To do their part to combat systemic racism and racial injustice within their own organizations and supply chains, corporations must move beyond performative actions and must instead adopt meaningful changes.

Achieving these changes may require institutional investors to push corporations to embrace equality metrics—measurable, assessable goals to improve

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

demographic diversity and racial equity. As significant equity owners in the largest American corporations, institutional investors are well-positioned to incentivize corporations to adopt, assess, reformulate, and disclose equality metrics. This Essay urges institutional investors to require firms to provide them with equality metrics – systematized corporate disclosure of the current demographic diversity of the workforce and supply chain, as well as measurable, specific plans to improve racial equity. Specifically, institutional investors should require firms to (i) measure the state of (in)equality in their organizations and supply chains; (ii) identify a list of specific, assessable equality goals; (iii) implement policies and procedures aimed at achieving those goals that can be tested and measured; (iv) disclose their progress toward meeting these goals at regular intervals; and (v) use their own and others' measured performances on these metrics to direct their future efforts at creating more equitable organizations.

The work needed to achieve racial equity within corporations is not easy nor will it be quick, but without measurable goals, corporations cannot truly know whether or to what extent their well-meaning efforts are bearing fruit. For institutional investors and corporations that do not wish to squander the current social movement, adopting equality metrics is a necessary first step on the path to achieving meaningful, long-lasting changes for racial equity within corporate America.

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The authors would like to thank Afra Afsharipour, Matthew Barrett, Colleen Campbell, Guy-Uriel Charles, Felipe Ford Cole, G. Marcus Cole, Brittany Farr, Bruce Huber, Kristin Johnson, Kathryn Judge, Paul Miller, Melissa Murray, Patricia O'Hara, Govind Persad, Elizabeth Pollman, and Stephen Yelderman for helpful comments and conversations. Also, many thanks to the participants of the University of Denver Sturm College of Law Faculty Workshop Series, the Columbia Law School Law and Economics Workshop, University of Miami School of Law Legal Theory Workshop, Notre Dame Law School Faculty Colloquia Series, University of Connecticut Faculty Workshop Series, Tulane Corporate and Securities Law Roundtable, University of Pennsylvania Journal of Business Law Volume 23 Symposium, and the "Reckoning and Reformation: Reflections and Legal Responses to Racial Subordination and Structural Marginalization" Symposium. Chelsea Carlson, Nathanial Hall, Caitlin-Jean Juricic, and Michelle Le provided invaluable research assistance. Finally, the authors are incredibly grateful for the substantive feedback and superb editing from the Yale Law Journal, *with particular thanks to Liam Gennari and Grace Judge.*