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

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

While this Article argues that corporations have a role to play in achieving racial equity, it cautions against reliance on corporate social responsibility to advance racial equality. Past and current iterations of corporate racial responsibility have often represented a market-fundamentalist, value-extractive approach to racial equity that reifies existing racial hierarchies. By valuing racial equity in terms of its potential profitability, corporate racial responsibility can subordinate human dignity to wealth maximization. This Article argues for a more meaningful corporate racial responsibility that addresses the structures and laws undergirding racial inequities within corporations and our larger society.
INTRODUCTION .............................................................................................................. 362

I. CORPORATE SOCIAL RESPONSIBILITY AND RACE .............................................. 371
   A. Defining Corporate Social Responsibility .................................................. 372
   B. The Contemporary Rise of Corporate Social Responsibility .................. 374
   C. Corporate Social Responsibility and the Issue of Race .......................... 377

II. THE ROAD TO TITLE II OF THE CIVIL RIGHTS ACT ........................................ 382
   A. The United States’ Segregation Problem and the Promise of Corporate Social Responsibility .......................................................... 383
   B. Voluntary Desegregation in Practice: The Examples of Birmingham and Atlanta ................................................................. 386
      1. Birmingham, Alabama .................................................................. 386
      2. Atlanta, Georgia ........................................................................ 390
   C. The Triumph of Title II ................................................................. 394

III. CRITIQUING CORPORATE RACIAL RESPONSIBILITY ................................... 400
   A. The Contemporary Debate on Corporate Racial Responsibility .............. 401
      1. The “Woke” Corporate Purpose ............................................. 402
      2. The Tension With Profitability .............................................. 406
      3. Cheap Corporate Talk .......................................................... 408
   B. Corporate Racial Responsibility as Market Fundamentalism .................. 411
      1. Subordination of Human Dignity ............................................. 412
      2. Antiregulatory, Market-Based Approach .................................. 414
   C. Corporate Racial Responsibility as Value Extraction ............................... 415

IV. TOWARD MEANINGFUL CORPORATE RACIAL RESPONSIBILITY:
    CREATING CORPORATIONS OF CONSCIENCE ............................................. 419
   A. Change Starts at Home ..................................................................... 422
   B. Support, Not Supplant, Civil Rights Leadership .................................... 423
   C. From Corporate Racial Responsibility to Corporate Legal Responsibility .... 425

CONCLUSION ............................................................................................................. 429

“Corporations which do America’s business must be corporations of conscience.”

—Dr. Martin Luther King, Jr. 1

INTRODUCTION

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

---

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

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


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

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

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

15. See, e.g., Stefan J. Padfield, Corporate Social Responsibility & Concession Theory, 6 Wm. & Mary Bus. L. Rev. 1, 16 (2015) (“Simply put, the CSR position is that shareholder wealth may be sacrificed if the net social gain is positive, so that a board may defend its
corporate commitments to racial equity seemed to indicate that corporations were viewing their purpose more broadly and that this purpose went beyond profitability. Now, however, two years removed from the massive racial justice protests that gripped the United States, some corporations have backtracked on their antiracist commitments. Their financial pledges to antiracist causes have gone unfulfilled. Their promises to diversify their workforces have not been realized. Other corporate antiracist programs that were priorities in the aftermath of George Floyd’s murder are no longer so. Those who still believe that CSR can ensure and sustain racial equity efforts are learning a tough and unfortunate lesson. As easily as a corporation might create initiatives that purport to advance racial equity, it can retreat or even end those initiatives just as easily and with no repercussions.

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

---

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


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


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

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

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

\textsuperscript{21} See id.
\textsuperscript{22} See Morris, supra note 19, at 197–213.
\textsuperscript{23} For example, the Nashville sit-ins—which lasted from February 13 to May 16, 1960—combined with a series of negotiations and economic boycotts by Black patrons helped “convince” private businesses and public facilities in downtown Nashville of the “benefits” of voluntarily desegregating. Id. at 205–13; see also Martin Oppenheimer, The Sit-In Movement of 1960, at 124–26 (David J. Garrow ed., 1989) (highlighting the negotiation effort and difficulties in desegregating Nashville).
\textsuperscript{24} See infra Part II.
\textsuperscript{25} See infra Part II.
\textsuperscript{27} See infra section I.A.
\textsuperscript{28} See Morris, supra note 19, at 199–203 (describing the role of the Southern Christian Leadership Conference (SCLC) in organizing the mass sit-in movement of 1960).
a federal floor for racial justice in the area of public accommodations.\textsuperscript{29} After its passage, Black people no longer had to depend on corporate leaders’ hearts and minds to receive service and basic human dignity. The law now guaranteed their civil rights.

This Article uses legal and social history to examine “corporate racial responsibility,”\textsuperscript{30}—the engagement of businesses\textsuperscript{31} in racial equity—from a historical and contemporary standpoint. It argues that past and current iterations of corporate racial responsibility present a market-fundamentalist, value-extractive approach to racial equity that reifies existing racial hierarchies and fails to produce change. While the authors believe firmly that businesses have a role to play in achieving racial equity, past and present iterations of corporate racial responsibility do not reflect a meaningful attempt to engage in racial equity.\textsuperscript{32} Rather, corporate racial responsibility prioritizes corporate interests over human dignity, requiring Black and Brown communities to prove their value to the corporate bottom line before being worthy of attention. Further, in privileging a voluntary, market-based approach to corporate racial responsibility, firms stymie racial progress by undercutting regulation that would result in more meaningful change. The sum total of these strategies enacted under the guise of progressivism, therefore, is to exploit the very communities who ought to benefit from corporate racial responsibility.

This Article makes three core contributions.

\begin{itemize}
\item \textbf{29.} See infra section II.C.
\item \textbf{30.} The Article switches between using “corporate social responsibility” (CSR) and “corporate racial responsibility” at various junctures. As discussed in the Article, “CSR” is capacious enough to describe corporate commitment to a wide range of social responsibilities, including the environment, labor rights, sustainability, and race. This Article’s focus is primarily (and in some instances exclusively) on businesses’ engagements on race-related matters. Historically and today, business engagement in racial equity is generally cabined under CSR in common parlance. But the Article uses “CSR,” primarily for historical accuracy, when discussing these efforts during the civil rights era. When analyzing contemporary efforts to engage firms in racial equity, this Article defaults to “corporate racial responsibility” to indicate its specific focus.
\item \textbf{31.} This Article uses “businesses,” “corporations,” and “firms” to refer to private enterprises engaged in commerce. The authors recognize that not all businesses and firms are corporations but use the terms somewhat loosely to refer to all forms of businesses, regardless of how they are organized.
\item \textbf{32.} This Article adopts the following definition of racial equity:

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

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

\textsuperscript{29} See infra section II.C.

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

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

\textsuperscript{32} This Article adopts the following definition of racial equity:

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

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

\textsuperscript{29} See infra section II.C.

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

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

\textsuperscript{32} This Article adopts the following definition of racial equity:

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

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

\textsuperscript{29} See infra section II.C.

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

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

\textsuperscript{32} ThisArticle adopts the following definition of racial equity:

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

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

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

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

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

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


36. See, e.g., Atinuke O. Adediran, Disclosing Corporate Diversity, 109 Va. L. Rev. 307, 309 (2023) (arguing that ESG disclosures can be used to diversify corporate boardrooms and workplaces).
engagement’s most pressing shortcomings in racial equity. For example, one of the more strident critiques against corporate racial responsibility is that corporations should not engage with race-related issues because it is beyond the ambit of their proper purpose.37 This critique, however, takes a narrow and ahistorical view of corporate engagement in racial issues. Corporations actively participated in the transatlantic trade of Black Africans, profiting from the transportation, sale, and forced labor of enslaved Black people.38 Doing so required denying the humanity and dignity of Black people, which corporations (and many white people) were willing to do. This is an early and striking example of business engagement in race-related issues, which shows that corporations have long cared about race, even if the reasons and ways have changed over the centuries.

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

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

37. See Andrew Edgecliffe-Johnson, The War on ‘Woke Capitalism’, Fin. Times (May 27, 2022), https://www.ft.com/content/e4a818e5-4039-46d9-abe0-b703f33d0f9a (on file with the Columbia Law Review) (listing prominent critiques of corporate social responsibility, including that companies “seized . . . th[e] opportunity to teach this generation that the way to fill [the hunger to find a higher purpose at work] is to . . . order a cup of ice-cream with a cup of morality on the side” (internal quotation marks omitted) (quoting then-presidential candidate Vivek Ramaswamy)).


39. See infra section II.B.1.

40. See Jan et al., Corporate America’s $50 Billion Promise, supra note 12 (“[C]ompanies reported just a tiny fraction [of their collective $49.5 billion pledge]—about $70 million—went to organizations focused specifically on criminal justice reform . . . .”).
racial progress. Both the civil rights era and today provide salient examples. During the Title II debates, some political actors argued that voluntary desegregation was sufficient to end Jim Crow. They cited the incremental steps in some southern localities as proof that federal intervention in the area of civil rights was unnecessary. In other words, a few businesses’ willingness to engage in voluntary desegregation became a way to undermine civil rights activists’ demands. As a contemporary example, corporations might resist mandatory diversity disclosures on the basis that they already provide that information voluntarily. Corporate racial responsibility legitimates—at least implicitly—antiregulatory, temporary, and often ad hoc responses to enduring and systemic racial problems. Such an approach is far from racial equity. It often replicates an older, racist, and antideocratic paradigm whereby the fates of racial minorities are largely in the hands of white corporate elites.

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

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

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

41. See infra Part II.
42. See infra Part II.
43. See Jeff Green, Katherine Chiglinsky & Cedric Sam, America’s Top Employers Are Winning at Race Data Transparency—Except Musk and Buffett, Bloomberg (Mar. 21, 2022), https://www.bloomberg.com/graphics/diversity-equality-in-american-business/ (detailing S&P 100 companies’ approaches to voluntarily disclosing racial diversity information via their EEO-1 reports).
44. See infra section II.B.
45. See infra section II.B.
Part IV concludes by applying the lessons learned from civil rights history to the contemporary struggle for racial equity. It offers corporations concrete recommendations so that the recent protests and corporate racial pledges can be more than fleeting moments of racial reckoning. Justice demands far more. If corporations are sincerely committed to ensuring racial equity, they must be honest enough to learn from their past racial shortcomings, bold enough to envision a future beyond mere profit maximization, and committed enough to work for robust, progressive civil rights legislation.

I. CORPORATE SOCIAL RESPONSIBILITY AND RACE

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

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


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


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

50. See generally Tom C.W. Lin, Incorporating Social Activism, 98 B.U. L. Rev. 1535, 1566–67 (2018) (discussing the rise of CSR and business leaders’ recognition of their responsibilities to other stakeholders).
This Part lays the foundation for understanding CSR, situating it in the debate on corporate purpose and tracing its theoretical development and contemporary application.

A. Defining Corporate Social Responsibility

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

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

51. See Stout, supra note 49, at 2 n.3.
52. See A.A. Berle, Jr., Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049, 1049 (1931) (arguing that all powers granted to corporate managers are “at all times exer-cisable only for the ratable benefit of all the shareholders”).
53. See E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145, 1148 (1932) (“[T]he business corporation [is] an economic institution which has a social service as well as a profit-making function . . . .”).
55. See id. at 7–11.
57. See, e.g., Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247, 286 & n.82 (1999) (“[D]irectors should be viewed as disinterested trustees charged with faithfully representing the interests not just of shareholders, but of all team members . . . .”).
should be legally obligated to express a social purpose.\(^\text{58}\) Still others believe that merely considering social interests is sufficient, even if those interests remain secondary to profitability.\(^\text{59}\)

Why do U.S. corporations engage voluntarily in CSR absent legal requirements to do so? The answer often lies not in altruism but in wealth maximization—many corporations anticipate financial benefits for engaging in CSR. Over the past few decades, a large body of literature has demonstrated that CSR enhances corporate profitability in many ways.\(^\text{60}\) Other studies have shown that engagement in CSR reduces the cost of capital for corporations\(^\text{61}\) and improves long-term corporate performance.\(^\text{62}\)

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

---

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


64. See id. (‘But the doctrine of “social responsibility” taken seriously would extend the scope of the political mechanism to every human activity. . . . That is why . . . I have
that the firm’s diffused obligations under CSR would produce managers with no real accountability as they pursue various social interests and goals. Critics also question corporate competency to address social issues. In their view, although corporations have resources and expertise, their skills are suited for the narrow scope of the corporation’s business, not social and environmental issues, which are better handled through the markets or by the government. Relatedly, some believe that increasing corporate engagement in societal issues also increases corporations’ power and undermines democratic governance.

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

B. The Contemporary Rise of Corporate Social Responsibility

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

Larry Fink, the CEO of BlackRock—the world’s largest asset manager—epitomized this changing ethos and the shift in attention from shareholders to stakeholders in a 2017 statement that called on corporations to “benefit all of their stakeholders, including shareholders, called it a ‘fundamentally subversive doctrine’ in a free society . . . .” (quoting Milton Friedman, Capitalism and Freedom 133 (1st ed. 1962)).

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


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

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

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

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

73. See Business Roundtable, Statement on Corporate Governance 3 (1997) (“[T]he paramount duty . . . of boards of directors is to the corporation’s stockholders . . . .”).
74. See Adediran, supra note 36, at 317 n.32.
performance with regard to management of ESG risks and opportunities.75

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

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


78. See Gallup, How Millennials Want to Work and Live 52 (2016), https://www.gallup.com/workplace/238075/millennials-work-live.aspx [https://perma.cc/9BTW-ZDTQ] (“[S]lightly more than one in three millennial workers strongly agree that the mission or purpose of their organization makes them feel their job is important.”).


80. Id.


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

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

C. Corporate Social Responsibility and the Issue of Race

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

86. See, e.g., eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34–35 (Del. Ch. 2010) (“Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors’ fiduciary duties under Delaware law.”). But see Robert J. Rhee, A Legal Theory of Shareholder Primacy, 102 Minn. L. Rev. 1951, 1957 (2018) (asserting that “[i]t is difficult to find the locus of law and that “[t]here is no well-established body of case law or a statute commanding [shareholder primacy]”).
87. See infra notes 92–95, 99–101 (documenting corporate engagement in environmental causes and philanthropy).
89. Adediran, supra note 36, at 316–17.
rarely theorize race as within the scope of a corporation’s social obligations.90

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

90. Before the 1950s, CSR had focused on female and child labor. See Archie B. Carroll, A History of Corporate Social Responsibility, in The Oxford Handbook of Corporate Social Responsibility 19, 21 (Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon & Donald S. Siegel eds., 2008). Early literature in the 1950s broadly states that businesses have social consequences and thus have social responsibility to consider their impact on society and to follow the values of society. See Archie B. Carroll, Corporate Social Responsibility: Evolution of a Definitional Construct, 38 Bus. & Soc. 268, 260–70 (1999). Social movements in the 1970s that focused on “the environment, worker safety, consumers, and employees” might have affected the focus and reach of CSR. See id. at 275.


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

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


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

97. For example, Florida Governor Ron DeSantis publicly condemned Disney and threatened to revoke the company’s “special district” status for opposing Florida’s “Parental Rights in Education” law. See Gary Fineout, DeSantis and Disney: The Ride Is Hurting to the End, Politico (Dec. 5, 2022), https://www.politico.com/newsletters/florida-playbook/2022/12/05/the-slow-moving-storm-at-the-florida-supreme-court-00072133 [https://perma.cc/JWY6-GD8S].

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

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

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

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

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

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

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


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

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

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

---

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


112. Id.


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


116. Id.

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

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

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

The sit-in movement forced citizens, policymakers, and judges to wrestle with thorny issues of equal protection, private property rights, and interstate commerce.120 The movement also forced Americans to wrestle with the power and limitations of an evolving concept: CSR. Yet reliance on CSR did not resolve the sit-in crisis, as developments soon illustrated. Federal action did. Congress adopted Title II,121 and the U.S. Supreme Court shortly thereafter upheld the statute in Heart of Atlanta Motel v. United States122 and Katzenbach v. McClung.123 This Part explores the social and legal history behind Title II to show the promise, cost, and, ultimately, failure of reliance on CSR in the struggle to end racial discrimination in public accommodations.

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

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

Yet businesses were often reluctant to do so, which led Black people toward alternative methods to ensure they received service at public accommodations. One of the most well-known alternatives was the Negro Travelers’ Green Book, commonly referred to as the Green Book. Victor Green first published the book in 1936. 125 The book’s national prominence and long publication run illustrated the limitations of relying solely on CSR to achieve full desegregation. The Green Book offered Black people a fifty-state survey of hotels, motels, tourist homes, and restaurants that would provide them with proper service. 126 The book’s dual implications were clear. CSR could help Black people enjoy equal access to public accommodations because only businesses that rejected segregation and treated Black people with dignity were listed in the Green Book. 127 As Green realized, however, CSR was not enough to end nationwide racial discrimination in public accommodations—had CSR been sufficient, there would have been no need for the Green Book in the first place.

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

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

---

124. See supra note 23 and accompanying text.
126. See Victor H. Green, Travelers’ Green Book: International Edition 1 (1963–64 ed. 1963). The Green Book additionally provided information about state statutes on racial discrimination in public accommodations and state commissions to which those who faced discrimination could complain. See id. at 2–4. But as the Green Book’s list revealed and the U.S. Supreme Court later declared, this state-by-state approach was not enough to eliminate a national public accommodations problem. See id.; see also Heart of Atlanta Motel, 379 U.S. at 252–53 (citing “voluminous testimony” that “discrimination by hotels and motels impedes interstate travel”).
127. See, e.g., Green, supra note 126, at 4–6 (listing Black-friendly accommodations in various Alabama cities).
128. Id. at 2.
129. Id. (ellipses in original).
for the *Chicago Defender*, one of the nation’s leading Black newspapers, asserted that relying solely on CSR to end public accommodations discrimination actually inflicted a dignitary harm on Black people. He believed that public accommodations discrimination was an “illegal and unchristian act” and that a business owner’s so-called right to discriminate among patrons should come “second to the rights of those citizens against whom he discriminates.” Hence, Stanley maintained that he was willing to “force” business owners to desegregate because “total public accommodations desegregation [would] never be achieved until there [was] a law requiring it.”

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

Segregation and corporate social irresponsibility in the form of support for Jim Crow had domestic as well as foreign policy implications. During the early 1960s, as African countries won independence from their former European colonizers, the U.S. government often welcomed diplomats from these newly independent countries to the United States. But when many of these diplomats visited Washington, D.C., they were denied service at public accommodations. They faced additional humiliation on the drive from the nation’s capital to the United Nations Headquarters in New York City when
they were denied access to public accommodations on Maryland’s Route 40.\footnote{Romano, supra note 136, at 551–52; see also U.S. Seeks Law to Stop Cafe Insults: Bias Called Worse Than Espionage, Afro-Am. (Balt.), Sept. 23, 1961, at 20 (“[T]he much-travelled route between the United Nations in New York and the White House in Washington is through the State of Maryland, and it is here, as statistics prove, that the majority of these incidents are likely to take place . . . .” (internal quotation marks omitted) (quoting State Department official Pedro Sanjuan)).} They repeatedly complained to the State Department and their home governments about this degrading treatment.\footnote{See Krenn, supra note 136, at 165–68 (detailing reports made by State Department officials on specific acts of discrimination against African diplomats).} Racial segregation undermined the United States’ position in the Cold War and provoked an important question: How could the United States preach about democracy abroad when it practiced racism at home?\footnote{See id. at 174–75 (noting that “communist propagandists were having a field day with each new incident involving an African diplomat”).} Racial segregation fed Soviet propaganda machines and raised serious doubts in the newly independent countries about the United States’ commitment to its creed.\footnote{See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61, 110–11 (1988) (“Racial segregation interfered with the Cold War imperative of winning the world over to democracy . . . .”).}

President John F. Kennedy had been relatively uninterested in desegregating public accommodations until he recognized how voluntary desegregation would improve the United States’ image abroad.\footnote{See Krenn, supra note 136, at 167–71 (recalling the Kennedy Administration’s efforts to desegregate businesses along Route 40 through a program of “voluntary cooperation”).} In September 1961, Kennedy penned a telegram read to 200 Maryland leaders in communities along the Route 40 highway, urging them to open service to “any American citizen or visitor from abroad.”\footnote{Id. (internal quotation marks omitted) (quoting a telegram from John F. Kennedy, U.S. President).} In the telegram, Kennedy argued that this form of corporate racial responsibility was “basic to our moral strength . . . as the Nation possesses leadership in the world.”\footnote{Id.} The Kennedy administration turned to the State Department for assistance in this project: Pedro Sanjuan, a Cuban American and the Assistant Chief of Protocol for the State Department, was asked to help lead “a pilot effort . . . to arouse local public sentiment in favor of voluntary desegregation in public eating and sleeping establishments.”\footnote{Id.} Acting Secretary of State Chester Bowles also met with Maryland newspaper editors to arouse support for “the immediate voluntary desegregation of public accommodations in Maryland as requested by President Kennedy.”\footnote{Robert E. Baker, Bowles Pleads With Md. Editors to Aid Cafe Bias Fight, Wash. Post, Sept. 27, 1961, at B1.} Yet the
Kennedy Administration’s efforts fell short. Many business owners on Route 40 refused to desegregate voluntarily. They feared the potentially negative economic impact of desegregation and resented what they viewed as federal interference in the public accommodations debate. For them, segregation was profitable. Doing well, therefore, meant not “doing good.” So civil rights advocates in Maryland sought other means of racial redress. They launched protests at segregated public accommodations, but voluntary desegregation was both slow and piecemeal. Public accommodations along Route 40 in Maryland were desegregated only after the enactment of civil rights legislation.

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

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

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

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

---

147. See Romano, supra note 136, at 571–72.
148. Id. (quoting a restaurant owner who said he “wouldn’t have a customer left” if he allowed the diplomats to dine there).
149. See id. at 572–73 (explaining the targeted sit-ins planned by civil rights advocates along Route 40 and highlighting that many restaurants proclaimed but failed to fulfill their promises to desegregate).
150. Id. at 574.
151. Martin Luther King, Jr., Why We Can’t Wait 51–52 (Signet Classics mass-market ed. 2000) (1964) [hereinafter King, Why We Can’t Wait].
152. Id. at 52–53. Shuttlesworth invited King to Birmingham because King had a national reputation and the ACMHR was SCLC’s affiliate in Birmingham. Id.
153. Id. at 53–54.
154. Id. at 81–82.
155. Id. at 88.
the course of the negotiations, certain promises were made by the merchants—for example, to remove the stores’ humiliating racial signs.”156 Upon receiving these promises, “Shuttlesworth and the leaders of the [ACMHR] agreed to a moratorium on all demonstrations.”157 But King, Shuttlesworth, and—indeed—the world saw the flaws of entrusting racial justice to the whims of merchants. King continued, “As the weeks and months went by, we realized that we were the victims of a broken promise. A few signs, briefly removed, returned; the others remained. As in so many past experiences, our hopes had been blasted, and the shadow of deep disappointment settled upon us.”158

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

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

156. Id.
157. Id.
158. Id.
159. Id. at 89.
160. See Jackson, supra note 1, at 162–66 (detailing the negotiations following the Birmingham campaign, which did not produce a clear agreement).
162. Id. (internal quotation marks omitted) (quoting a letter from civil rights organizations to Roger M. Blough, Chairman, U.S. Steel, and Leslie B. Worthington, President, U.S. Steel).
what a corporation should do.”

U.S. Steel saw its mandate as an economic one, not one of CSR.

The debate over CSR in Birmingham spotlighted what was now a much larger, national problem. In a *New York Times* article, *Do Corporations Have a Social Duty?*, Cornell University professor Andrew Hacker analyzed Americans’ competing visions over the roles corporations should play in ending racism. Hacker noted that U.S. Steel had been criticized for “not doing as much as it might to alleviate racial tensions in Birmingham.”

According to Hacker, the growing demands of the civil rights movement were challenging traditional ideas of a corporation’s purpose and responsibilities. For King and other civil rights activists, corporate governance issues were also civil rights issues.

Hacker emphasized that corporations typically selected the locations of their plants based on economic factors such as labor costs and proximity to their markets rather than race or racial issues. On the other hand, Hacker said, “[T]here is a tacit agreement on the part of management to accept the prevailing customs of the community. In the case of U.S. Steel in Birmingham this meant abiding by the principle of segregation.”

Hacker explained that the public now knew U.S. Steel by the political company it kept. “U.S. Steel’s willingness to cooperate with the folkways of Birmingham actually served to strengthen those social patterns. For this reason the company’s officials cannot protest that they have been mere bystanders amid the racial controversy.”

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

---

165. Id. (internal quotation marks omitted) (quoting Roger M. Blough).
166. Id.
167. Id. (“Today, large companies are caught on the firing line amid the civil-rights controversy . . . .”)
168. Id.
169. Id. at 118.
170. Id.
171. Id.
Hacker’s analysis also ignored how U.S. Steel could dismiss local racism owing to their corporate leaders’ white privilege: Blough, and white U.S. Steel employees, did not have to suffer the humiliation of racism. Hacker resolved, “U.S. Steel’s protest that its power in Birmingham did not extend beyond the plant gates has some validity to it, at least on a question as inflamed as race relations.” But he left readers with a more pressing, and critical, normative question: Should corporations, even those that can shape local politics, have the same power in policy debates as ordinary citizens?

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

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

172. Id.
173. See id. (“The phrase ‘corporate citizen’ . . . assumes that the voice of a corporation and that of ordinary voters may be listened to with equal deference by those who make policy. Democracy takes on a curious form when both corporations and citizens are regarded as equal participants in the political process.”).
174. See Jackson, supra note 1, at 155 (describing how SCLC first attempted to “win concessions on desegregation and hiring from downtown merchants” but changed tactics after demonstrations were brutally suppressed).
176. See id. at 126–27.
178. Id. at 01:24.
country. While he was encouraged by some of their responses, many other business leaders still refused to desegregate public accommodations. Moreover, Kennedy found the “voluntary approach . . . insufficient to prevent the free flow of commerce from being arbitrarily and inefficiently restrained and distorted by discrimination in such establishments.” The President declared, “[f]or this reason, nationwide legislation is needed” to end Jim Crow and the protests. He submitted to Congress what would become Title II of the Civil Rights Act of 1964.

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

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

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

179. Id. at 09:15.


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

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


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


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

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

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

\begin{footnotes}
\item 188. \textit{Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Com., 88th Cong. 863 (1963)} [hereinafter \textit{Civil Rights—Public Accommodations Senate Hearings}] (statement of Ivan Allen, Jr., Mayor, Atlanta, Ga.).
\item 189. Id.
\item 190. Allen, supra note 187, at 107.
\item 191. See id. at 52–53 (“Little Rock had virtually died on the vine when it failed to face the school-integration issue realistically four years earlier.”).
\item 192. See id. at 53; see also David Andrew Harmon, \textit{Beneath the Image of the Civil Rights Movement and Race Relations: Atlanta, Georgia, 1946–1981}, at 108–99 (1996) (explaining how a city’s racial violence could lead to economic hardships).
\item 193. Hein, supra note 183, at 208.
\item 195. Id.
\end{footnotes}
is an overriding need for it." He added, “Negotiation, persuasion and voluntary progress deserve—on their present scale in America—to continue. They are now yielding better results than would the proposed law which, if passed, could be thwarted by massive evasion.”

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

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

196. Id.
197. Id.
199. Id.
200. See id. (“[A] national law would cause people now working for an end to discrimination to quit and ‘leave it up to the government.’” (quoting Governor Carl Sanders)).
201. Id. (alterations in original) (quoting Governor Carl Sanders). Patterson publicly praised Sanders’s stance and depicted Sanders’s views as racially progressive. Eugene Patterson, Editorial, A Question of Self-Adjustment, Atlanta Const., July 31, 1963, at 4 (stating that Sanders did not oppose the bill “on the old, empty ground that racial discrimination is all right . . . [but] on the ground that Georgia is in a self-adjusting condition, on a voluntary basis”).
203. Id. at 198–99.
204. See Lester Maddox, Pickrick Says, Atlanta Const., Jan. 21, 1961, at 5.
205. See id.
which speakers red-baited the city’s political and business leaders, urging attendees to “save our country from collectivism and socialism.”

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

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

206. 700 Hear Attack on Integration, Atlanta Const., Dec. 7, 1960, at 18 (internal quotation marks omitted) (quoting Representative Dale Alford).
207. Marion Gaines, Negroes Ask Aldermen to Vote Integration of Public Places, Atlanta Const., Nov. 28, 1963, at 16A.
208. See SNCC, Demonstrations Gain Additional Support, Student Voice (Atlanta, Ga.), Feb. 3, 1964, at 1. After Allen deplored civil rights demonstrations and called for more reliance on voluntary desegregation, activist Wyatt Tee Walker responded, “[I]f we waited for voluntary action, most of us would still be picking cotton.” Id.; see also King, Why We Can’t Wait, supra note 151, at 91–93 (describing the dignitary harms caused by relying on voluntarism).
211. Id. at 44.
212. Lovelace, supra note 120, at 397 (alteration in original) (internal quotation marks omitted) (quoting News Release, SNCC, Now Is the Time for Action (Jan. 1964), microformed on SNCC Papers, 1959–1972, No. AVIII:105 (Univ. Microforms Int’l)).
215. Lovelace, supra note 120, at 417–19.
Local developments during the sit-in movement compelled Allen to reconsider his sole reliance on voluntary desegregation.\textsuperscript{216} Some segregationists could never be persuaded into opening their businesses to all people.\textsuperscript{217} Allen had learned a crucial lesson along the way. Making desegregation optional implicitly endorsed the idea that business owners had a right to discriminate racially.\textsuperscript{218} Allen was also deeply concerned that without public accommodations legislation, some businesses might “slip backwards” and resegregate if business owners lost their commitments to racial progress.\textsuperscript{219} Moreover, with Atlanta’s image in the balance and the ever-present threats of sit-ins and social turmoil, Allen realized that Atlanta needed much more than CSR to end the racial crisis. Atlanta, like the rest of the South, needed the federal government to intervene.\textsuperscript{220}

C. \textit{The Triumph of Title II}

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

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

\begin{itemize}
\item[\textsuperscript{216}] Brown-Nagin, supra note 33, at 247–48.
\item[\textsuperscript{217}] See id. at 248 (explaining that although there was some voluntary desegregation in Atlanta, “segregation endured in the city as a whole” until “the Civil Rights Act . . . forced the desegregation of public accommodations”).
\item[\textsuperscript{218}] See Richard L. Lyons, Atlanta Mayor Backs New Rights Laws, Wash. Post, July 27, 1963, at A2 (“Failure to pass this bill . . . would amount, by inference, to an endorsement [sic] of private business setting up an entirely new status of discrimination throughout the Nation.” (internal quotation marks omitted) (quoting Mayor Ivan Allen, Jr.)).
\item[\textsuperscript{219}] See id.
\item[\textsuperscript{220}] See id.
\item[\textsuperscript{221}] Marjorie Hunter, Dirksen Imperils Civil Rights Plan, N.Y. Times, June 18, 1963, at 1; see also Al Kuettner, 29 States Already Have Strong Rights Laws, but They’re Snubbed, Chi. Daily Def., Aug. 1, 1963, at 6 (describing de facto segregation in northern cities despite those cities’ antidiscrimination laws).
\item[\textsuperscript{222}] See 110 Cong. Rec. 14511 (1964) (roll call vote on the Civil Rights Act of 1964, H.R. 7152, 88th Cong., showing that Thurmond, Goldwater, and Eastland opposed the bill).
\item[\textsuperscript{223}] Civil Rights—Public Accommodations Senate Hearings, supra note 188, at 861 (statement of Ivan Allen, Jr., Mayor, Atlanta, Ga.).
\end{itemize}
but he emphasized that voluntary desegregation had its limits.\textsuperscript{224} His experiences in Atlanta were instructive. Allen stressed that the current battles over voluntary desegregation frustrated many local business owners and slowed racial progress.\textsuperscript{225} Voluntary desegregation was a socially explosive issue that placed these business owners in the debate’s crosshairs.\textsuperscript{226} They were forced to choose a side in the controversy. Allen testified that many Atlanta business owners actually believed federal public accommodations legislation was the answer to their dilemma. Federal legislation would speed desegregation because all business owners would be forced to comply with the desegregation mandate despite their personal feelings.\textsuperscript{227} Further, demonstrations often forced public establishments to close for the day, and major businesses rarely wanted to be located in cities with major social disruptions. He declared that without federal legislation, America would recycle “the old turmoil of riots, strife, demonstrations, boycotts, and picketing.”\textsuperscript{228}

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

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

\textsuperscript{224} See id. at 862–63.
\textsuperscript{225} See id. at 869–70.
\textsuperscript{226} See id.
\textsuperscript{227} See id.
\textsuperscript{228} Id. at 865.
\textsuperscript{229} Id. at 974 (statement of the Atlanta Chamber of Com.).
\textsuperscript{230} Id. (second and third alterations in original) (quoting Atlanta Chamber of Com., Statement of Policy on the Subject of Discrimination in Public Accommodations (May 29, 1963)).
\textsuperscript{231} Id. (alteration in original) (internal quotation marks omitted) (quoting Atlanta Chamber of Com., Statement of Policy on the Subject of Discrimination in Public Accommodations (May 29, 1963)).
Government, posing a grave threat to local responsibility and personal freedom which far outweighs any possible improvement in the opportunities of minority groups. The [Atlanta Chamber of Commerce] finds particularly objectionable that section which would deprive purely private business enterprises of the right to serve or refuse service to whomever they please.  

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

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

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

232. Id.
233. Id. (statement of the Atlanta Junior Chamber of Com.).
234. Id.
235. Id. at 1099 (statement of the S.C. State Chamber of Com.).
236. Id.
237. Id. at 205 (statement of Burke Marshall, Assistant Att'y Gen., C.R. Div., DOJ).
238. Id. at 206.
239. Id. at 215.
the nation’s most prominent business voices, Kennedy declared that more robust federal efforts were necessary to end the most critical issue facing the country.\textsuperscript{241} The Business Council’s chairman agreed that while business might have a role in advancing racial justice, CSR alone could not solve America’s racial problems.\textsuperscript{242}

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

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

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

\begin{itemize}
\item \textsuperscript{241} Id.
\item \textsuperscript{242} See id. (quoting the Business Council chair as saying “[every] responsible businessman . . . is interested in finding a solution to [the problem of segregation]” and “[i]t is not only a government problem—it is a civic problem”).
\item \textsuperscript{243} Editorial, Who Helps Public Accommodations Bill?, Atlanta Const., Sept. 27, 1963, at 4 (internal quotation marks omitted) (quoting Earl B. Schwulst).
\item \textsuperscript{244} Id. (internal quotation marks omitted) (quoting Earl B. Schwulst).
\item \textsuperscript{245} Civil Rights—Public Accommodations Senate Hearings, supra note 188, at 22 (statement of Robert F. Kennedy, U.S. Att’y Gen.).
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Id. at 283 (statement of Dean Rusk, U.S. Sec’y of State).
\item \textsuperscript{248} See id.
\end{itemize}
accommodations debate, too. Other members of the Kennedy Administration also testified before Congress. Sanjuan, for example, explained how the diplomatic incidents on Route 40 illustrated the need for public accommodations legislation.249

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

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

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

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

251. Id. at 657.
252. See id. at 658 (internal quotation marks omitted).
253. Id.
254. Id. at 659.
On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act into law. As Johnson signed the Act, he advanced a bold moral vision for corporate governance. He proclaimed that Title II now mandated that “those who are equal before God shall now also be equal . . . in hotels, and restaurants, and movie theaters and other places that provide service to the public.” Title II’s passage rejected a patchwork, corporate-dependent approach to racial justice and installed a powerful federal framework requiring business owners to respect Black customers’ dignity. More importantly for Johnson and much of Congress, Title II’s enactment showed those at home and abroad that the United States was actually seeking to live up to its creed.

* * * *

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

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

261. See *Katzenbach*, 379 U.S. at 304–05; *Heart of Atlanta Motel*, 379 U.S. at 261–62.
263. See supra notes 126–128 and accompanying text.
265. Id.
Moreover, these decisions made clear the implications of the nation’s experiment with CSR. Localities throughout the country had tested voluntary desegregation for years, and this approach had shown that corporations could not solve the nation’s public accommodations problem. In fact, this approach had proven to be a nationwide failure. Ultimately, federal action, not CSR, had ensured racial justice in this defining phase of the civil rights movement.

III. CRITIQUING CORPORATE RACIAL RESPONSIBILITY

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

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

266. See supra notes 110–118 and accompanying text.
267. See Shannon Bond, Senate Democrats Urge Google to Investigate Racial Bias in Its Tools and the Company, NPR (June 2, 2021), https://www.npr.org/2021/06/02/1002525048/senate-democrats-to-google-investigate-racial-bias-in-your-tools-and-company [https://perma.cc/F6UE-NQMT] (reporting on senators’ attempts to hold Google to its previous commitments to racial justice); Nat Ives, Consumers Are More Likely to Use or Drop Brands Based on Racial Justice Response, Survey Finds, Wall St. J. (May 6, 2021), https://www.wsj.com/articles/consumers-are-more-likely-to-use-or-drop-brands-based-on-racial-justice-response-survey-finds-11620333257 (on file with the Columbia Law Review) (“Some 42% of [surveyed consumers] said they had started or stopped using a brand in the past year because of its response to protests against racial injustice . . . .”).
principles. Or they may lobby against legislation to improve the lives of their marginalized employees. Corporations are therefore able to benefit from the commodification of the racial identities of Black and Brown citizens without making any meaningful changes to the internal corporate or external societal structures that create and reinforce racial inequity.

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

A. The Contemporary Debate on Corporate Racial Responsibility

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

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


270. See Andrew Edgecliffe-Johnson, ‘Woke Capitalists’ Provoke Backlash From US Conservatives, Fin. Times (May 22, 2021), https://www.ft.com/content/42989bc5-ld8e-4913-ac03-41a9e22551e7 (on file with the Columbia Law Review) (“A right-leaning group called Consumers Research this week announced a $1m-plus advertising campaign targeting companies which, it said, were ‘putting woke politics over consumer interests.’” (quoting Consumer First Initiative: Protecting Consumers From Woke Companies, Consumers’ Resh., https://consumersresearch.org/consumersfirst/ [https://perma.cc/X6GM-Y8VW] (last visited Feb. 10, 2024)).
of corporate racial responsibility, this section focuses on three: first, on the most negative end of the spectrum, the critique that corporate racial responsibility is evidence of a progressive “woke agenda” overtaking society; second, from those who believe that—despite the rhetoric—shareholder primacy prevails, the belief that corporate racial responsibility may negatively affect corporate profitability; and third, from those who are skeptical of but not necessarily opposed to corporate racial responsibility, the criticism that it is insincere and nothing more than “cheap talk.”

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

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


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

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

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

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

276. See supra text accompanying notes 202–206.

277. See supra note 272.


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

280. For more detailed analysis of this point, see supra section II.B.2.
equity commitments, the corporation also withered under scathing criticism for its policies that many have described as anti-Black. For example, in 2020, Black employees were the largest group among Amazon’s field and customer support employees, accounting for 31% of the workforce. In contrast, during the same time period, only 3.9% of Amazon’s senior leadership was Black. Additionally, Amazon has strong ties to policing, providing police departments with facial recognition software that has falsely identified people of color with mugshots. Further, in the same year Amazon pledged support for Black lives, it donated over $100,000 to the Republican State Leadership Committee (RSLC), which supported several candidates vehemently opposed to the BLM movement and corporate racial responsibility. Troublingly, given the opacity of campaign finance in the United States, the true depth of Amazon’s giving to comparable political organizations is unknown.

---


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


284. Id.

285. See Jacob Snow, Amazon’s Face Recognition Falsely Matched 28 Members of Congress With Mugshots, ACLU (July 26, 2018), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28 [https://perma.cc/MXQ8-S62T] (“The software incorrectly matched 28 members of Congress, identifying them as other people who have been arrested for a crime. . . . The false matches were disproportionately of people of color, including six members of the Congressional Black Caucus, among them civil rights legend Rep. John Lewis (D-Ga.).”).


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

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

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

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


\textsuperscript{293.} See id.; see also Thomas, supra note 38 (“Some of the largest insurance firms in the US—New York Life, AIG and Aetna—sold policies that insured slave owners would be compensated if the slaves they owned were injured or killed.”).
not only participated in social institutions that have shaped the racial hierarchies of today but also created these practices. Scholars have detailed the active role banks played in redlining, denying Black customers loans because of their address and skin color. This, too, is part of the history of corporations and race. It is spurious to argue that businesses that have historically created and benefited from the hierarchies foundational to racial inequities today have no role to play in dismantling them.

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


Regardless of whether one’s stance on corporate racial equity and profitability is positive or negative, two things are constant with this view. First, this view narrowly frames the question in terms of pecuniary gains or losses. This narrow framing fails to recognize other nonpecuniary measures that may contribute to a firm’s success and stem from corporate racial equity. For example, CSR tends to foster a positive image of an organization and can thus enhance employee motivation and performance.\footnote{See Said Id Bouichou, Lei Wang & Salman Zulfiqar, How Corporate Social Responsibility Boosts Corporate Financial and Non-Financial Performance: The Moderating Role of Ethical Leadership, Frontiers Psych., no. 871334, 2022, at 1, 4 (“Corporate social responsibility is one of the most significant aspects in developing a positive image for an organization, and many organizations exhibit CSR activities to show their good image in the market . . . .” (citing R. Edward Freeman, Strategic Management: A Stakeholder Approach (Cambridge Univ. Press ed. 2010))); see also Angela Glover Blackwell, Mark Kramer, Lalitha Vaidyanathan, Lakshmi Iyer & Josh Kirschenbaum, The Competitive Advantage of Racial Equity 2–4 (2017), https://www.policylink.org/sites/default/files/The%20Competitive%20Advantage%20of%20Racial%20Equity-final.pdf [https://perma.cc/N2UN-X67R] (“The companies . . . have found new sources of growth and profit by driving equitable outcomes for employees, customers, and communities of color. . . . [A] focus on racial equity is critical in order to innovate, to create products and services that serve a more diverse consumer base, and to cultivate a strong workforce.”).} In treating corporate racial responsibility as part of the corporation’s bottom line, this view sees racial equity (and those who are served by it) as something that can and ought to be abandoned unless it yields pecuniary benefits for the corporation and its shareholders. This stance is problematic for several reasons. It illustrates a perspective that endorses including Black and Brown constituencies and issues in the sphere of business only to the extent that such inclusion can benefit businesses and their beneficiaries. In other words, it does not value racial equity for its own sake. It also assumes that investors and consumers do not value racial equity and likewise measures its “success” in economic terms.

The second commonly held view among both those who support and those who reject corporate racial equity is a strongly antiregulatory stance. Those with a positive view of corporate racial responsibility say that the market has responded to the issue and there is no need for government intervention.\footnote{See Leonid Polishchuk, Corporate Social Responsibility or Government Regulation: An Analysis of Institutional Choice, 52 Probs. Econ. Transition, no. 8, 2009, at 73, 74 (treating voluntary CSR efforts as a “private (not requiring government intervention) institutional alternative to economic regulation”); Margaret Ryznar & Karen E. Woody, A Framework on Mandating Versus Incentivizing Corporate Social Responsibility, 98 Marq. L. Rev. 1067, 1090–93 (2015) (analyzing the effects of regulation and incentivization on corporate behavior).} Critics of corporate racial responsibility point to the economic losses that accompany mandated diversity quotas, for example, as proof that regulations are not the best course.\footnote{See, e.g., John Dobson & Mahdi Rastad, Women on Boards: EU Board Gender Quotas, and Why the U.S. Should Avoid Them, 37 Bus. & Pro. Ethics J. 1, 2 (2018) (noting that the European Union’s approach to board gender diversity raises concerns regarding}
stance serves only to reify oppressive structures. Those with power rarely hand it over willingly to those without, and thus, government intervention is often needed to secure the rights of marginalized people. As Dr. King wrote in *Letter From Birmingham Jail*:

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

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

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

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

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

---

300. See, e.g., Can California Legally Require Women on Corporate Boards?, Fox Bus. (Dec. 1, 2021), https://www.foxbusiness.com/politics/california-legally-require-women-corporate-boards (describing a lawsuit alleging that it is illegal to “use taxpayer funds to enforce a law that violates the equal protection clause of the California Constitution by mandating a gender-based quota”).
301. Tarpley Hitt, These Companies Have the Most Hypocritical Black Lives Matter Messaging, Daily Beast (June 4, 2020), https://www.thedailybeast.com/the-companies-with-
noted, Zuckerberg’s statement neither indicated which groups would receive funding nor explained how monetary donations would address the racial problems that the company itself faced or that are prevalent on its social media platforms.  

The fact that many of these statements were crafted by marketing teams underscores skeptics’ views that these announcements were made to enhance businesses’ reputations rather than enact meaningful change. Some skeptics have criticized businesses for simply engaging in a marketing ploy to increase their bottom line rather than investing the time to reflect on how to meaningfully participate in the discourse on racial equity and devise a plan to accomplish these goals. Corporations were accused of trying to profit from the racial equity and justice movement with little intention of actually making a difference. According to a recent Rockefeller Foundation report, companies pledged $50 billion toward racial equity in 2020. One year later, however, only a mere $250 million had been committed to specific initiatives or actually spent.

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

---

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

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

304. Id.


307. Id.

308. See supra section II.B.1.

309. See supra section II.B.1.
This skepticism persists, reasonably enough, among racial equity activists today.310

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

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

---

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

311. Fairfax, supra note 109, at 123.

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

313. See id. at 169.


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

* * * *

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

B. Corporate Racial Responsibility as Market Fundamentalism

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

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

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

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

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

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


\textsuperscript{321} See supra section III.A.2.

\textsuperscript{322} See supra notes 91–103 and accompanying text.

\textsuperscript{323} See supra notes 105–110 and accompanying text.
The current discourse on corporate racial responsibility, arguably, is no more attentive to Black civil rights and dignity than the earlier civil rights-era example. Businesses that embraced racial equity platforms in 2020 are quietly retracting support or simply failing to live up to their prior promises. To the extent that corporate racial responsibility continues to be premised on matters of corporate profits over those of human dignity and Black civil rights, it will continue to fail to achieve meaningful progress on questions of race. And we might question if that is, in fact, the point.

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

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

324. See supra notes 306–309 and accompanying text.
325. See supra sections II.A–.B.
2. **Antiregulatory, Market-Based Approach.** — A key feature of corporate racial responsibility is that it is voluntary. This voluntariness is in keeping with market-fundamentalist roots that hold the belief that markets thrive when regulation is kept to a minimum. The current iteration of corporate racial responsibility, which continues to reject governmental intervention, legitimates only the antiregulatory, market-based approach to racial equity. Time and experience have demonstrated that this approach does not work and, indeed, might damage true progress toward racial equity.

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

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

---

327. See supra section II.B.2.
328. See supra text accompanying notes 198–201.
329. See supra section II.B.2.
330. See supra section II.B.1.
332. See, e.g., Adediran, supra note 36, at 338–47 (describing the multiple steps needed to compare corporate diversity disclosures in the author’s study).
do not require companies to improve their actual diversity, but corporations nevertheless resist the imposition of diversity disclosures, even as they purport to support racial equity. Avoiding racial equity mandates allows corporations to delay progress, thereby leaving Black and Brown people to the whims and preferences of corporations and with little recourse should corporations renege on their promises.

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

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

C. Corporate Racial Responsibility as Value Extraction

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

---

333. Id. at 348 (noting that Nasdaq and SEC diversity disclosures “merely require[] companies to explain why they lack diversity and would not actually increase board diversity per [Nasdaq] Rule 5605(f)’s ‘disclose or explain’ provision”).
334. See Green et al., supra note 43 (noting that Tesla and Berkshire Hathaway have refused to disclose information regarding the racial diversity of their workforces to investors).
335. See, e.g., id. (stating that companies, such as Target, that have previously embraced diversity disclosures are now claiming that data disclosure is an “imperfect tool”).
336. See supra section III.A.3.
a new phenomenon for marginalized people—from the atrocities of slavery, when Black bodies were sold for their labor, to the current practice of exploiting undocumented immigrants for domestic labor, there is no shortage of examples of white people extracting value from Black and Brown people.337

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

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

---

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

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

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

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

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

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

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

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

---

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

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

345. See id. at 2195.

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

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

Lastly, because corporate racial responsibility can facilitate value extraction, racial equity efforts are often deemed nonessential. As Leong aptly puts it: “[W]hite people and predominantly white institutions come to view racial diversity as simply another non-essential item—not unlike catered lunches or technology upgrades . . . .” Viewing corporate racial responsibility as nonessential means that in times of economic hardship, racial equity initiatives will be among the first to be eliminated. Examples abound today. Continued inflation and fears of a recession caused many companies, particularly technology companies, to reduce their workforces in the first quarter of 2023. These layoffs, notably, are decimating diversity and inclusion departments in firms that, back in 2020, had committed to increasing underrepresented groups among their employees and leadership. What’s more, the loss of DEI positions at these firms is expected to result in much of this work being passed on to “employee resource groups, which often don’t get compensated for that work.” It is also significant that firms are scaling back on racial equity commitments even before they have met their goals, which only further

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

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

350. Leong, supra note 337, at 2211.

351. See Ashley Capoot & Sofia Blum, Google, Meta, Amazon and Other Tech Companies Have Laid Off More Than 104,000 Employees in the Last Year, CNBC (Jan. 18, 2023), https://www.cnbc.com/2023/01/18/tech-layoffs-microsoft-amazon-meta-others-have-cut-more-than-60000.html [https://perma.cc/N6EQ-LQ89] (last updated Mar. 20, 2023) (describing vast layoffs among large technology companies in 2022 and 2023).


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

* * * *

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

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

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


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

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

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

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

\textsuperscript{358} See, e.g., Davis & Warren, supra note 119.


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

\textsuperscript{361} See Friedman, supra note 63, at 126 (internal quotation marks omitted) (quoting Milton Friedman, Capitalism and Freedom 133 (1st ed. 1962)). For a modern expression of this idea, see Paul G. Mahoney & Julia D. Mahoney, ‘ESG’ Disclosure and Securities Regulation, Regulation, Fall 2021, at 10, 10–12.
conditions and receive the lowest wages are employees of color. Corporate boards notoriously lack racial diversity, and these boards often design policies that disproportionately affect people of color inside and outside of the corporation. Corporations lobby and support politicians whose legislation and rhetoric influence race relations. It is a question not of whether corporations should be involved in racial justice efforts but of how they will be involved, consciously or not. As long as there are corporations, their daily activities will shape race relations, and conversely, race relations will shape their daily activities.

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

This Part is a first step in a hopefully larger conversation about the future of corporate racial responsibility. It offers three pragmatic principles to guide corporations’ roles in racial justice efforts. Each principle takes seriously conservative and progressive criticisms of corporate racial responsibility but urges critics of all stripes not to: whitewash corporate practices, failure to acknowledge and address historical injustices, and lack of accountability for past and present harms.

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


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

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

366. See, e.g., Laura Morgan Roberts & Megan Grayson, Businesses Must Be Accountable for Their Promises on Racial Justice, Harv. Bus. Rev. (June 1, 2021), https://hbr.org/2021/06/businesses-must-be-accountable-for-their-promises-on-racial-justice (on file with the Columbia Law Review) (“[C]ommunications and statements aren’t enough: Companies need to hold themselves accountable for action so they don’t simply maintain historical structures and cultures of racism.”).
operations; succumb to racial defeatism; or use criticisms of corporate racial responsibility as mere cover for corporate leaders’ weak commitments to racial equality. Corporations have never been on the racial sidelines, and, in fact, corporations make and remake race relations each day. Moreover, these principles look to the past to inform present and future racial justice advocacy. Civil rights history shows that social movements use every tool possible to advance their causes—they understand the deep limitations of a particular tool and know that even good solutions may not be perfect solutions. We must take the world as it is, even as we make it what it might one day become.

A. Change Starts at Home

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

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

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

367. Bus. Roundtable, Principles of Corporate Governance, Harv. L. Sch. F. on Corp. Governance (Sept. 8, 2016), https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance [https://perma.cc/8YG3-GLD2] ("These [corporate governance] systems work because they give public companies not only a framework of laws and regulations that establish minimum requirements but also the flexibility to implement customized practices that suit the companies' needs and to modify those practices in light of changing conditions and standards.")
underrepresented in the legal profession.\textsuperscript{368} Similarly, corporations can influence their suppliers to be diverse.\textsuperscript{369} They can press their peers to adopt new standards and strategies for corporations seeking to reconcile their public statements and internal operations. As one communications executive explained during the 2020 racial justice protests, “Brands are watching other brands and companies are watching other companies to see who’s doing it right, who’s making missteps and how they can avoid it, because everybody wants to be right and nobody wants to step into a minefield.”\textsuperscript{370}

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

B. Support, Not Supplant, Civil Rights Leadership

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

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


\textsuperscript{372} See Jan et al., Corporate America’s $50 Billion Promise, supra note 12 (“[T]op corporations made broad claims about what they would do, pledging to be a force for societal change and to fight racism and injustice, including violence against Black Americans.”).
corporations that now claim to support BLM have undermined and continue to undermine support for the movement.\textsuperscript{373}

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

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

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


\textsuperscript{374} Jan, supra note 347.
C. From Corporate Racial Responsibility to Corporate Legal Responsibility

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

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

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

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

\(^{375}\) See supra section II.B.


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

\(^{378}\) For background on U.S. corporate attitudes toward healthcare access, see generally Phil Galewitz, Why Some CEOs Figure ‘Medicare for All’ Is Good for Business, KFF Health News (June 7, 2019), https://kffhealthnews.org/news/a-large-employer-frames-the-
often chanted, “I can’t breathe,” George Floyd’s last words. But the chant “I can’t breathe” soon took on broader significance. Activists increasingly highlighted how COVID-19 disproportionately infected and killed Black people. The COVID-19 pandemic exposed and exacerbated a much deeper U.S. healthcare crisis. People of color in the United States have lower rates of health insurance and face poorer health outcomes than white people.

In the wake of the racial justice protests, major pharmaceutical companies touted their commitments to health equity. While the depth of these corporate commitments was questionable at that time, these companies’ racial resolve may soon be tested again. In 2023, the U.S. government moved its COVID-19 vaccine distribution efforts from the public sector to the private sector. Leading pharmaceutical companies have announced their plans to astronomically increase the costs of their COVID-19 vaccines in response. This dramatic spike in vaccine costs will almost certainly perpetuate health disparities along race and class lines. The uninsured and underinsured have no promise that they will continue to receive free medicare-for-all-debate/ (describing changing attitudes about single-payer healthcare among U.S. employers); Janet Nguyen, Why Don’t U.S. Businesses Show More Support for Single-Payer Health Care?, Marketplace (June 10, 2021), https://www.marketplace.org/2021/06/10/why-dont-u-s-businesses-show-more-support-for-single-payer-health-care (discussing why U.S. business has traditionally opposed single-payer healthcare).


384. See id. (detailing how “vaccine makers [have] plan[ned] to charge as much as $130 per dose”).
COVID-19 vaccines. And though the Biden Administration has worked with vaccine makers to develop a temporary program to ease the financial transition to the private distribution system for COVID-19 vaccines, Administration officials have conceded the program’s limitations. This new program for the uninsured and underinsured is only temporary, has a limited supply of vaccines available, and relies on manufacturers like Moderna and Pfizer to volunteer their financial assistance to those who need help covering their vaccination costs. Social justice should never be so dependent on corporate largesse.

There are meaningful and tangible ways to transform this issue of corporate racial responsibility into an issue of corporate legal responsibility. One way would be if pharmaceutical companies lobbied for and participated in, if enacted, the proposed Vaccines for Adults (VFA) program. The Biden Administration has requested that Congress create the VFA program to offer vaccines to uninsured adults at no cost. Under the VFA, modeled after the existing Vaccines for Children (VFC) program, the CDC would be authorized to purchase vaccines directly from manufacturers at negotiated prices—significantly lower prices than the vaccines’ list price—and provide them to uninsured adults to expand vaccine access. Publicly purchased vaccines incentivize vaccine manufacturing, but more importantly, the passage of the VFA, like the VFC, would be an equitable structural reform and would radically reduce disparities in the vaccination rates of marginalized groups.

A second, more radical approach to increasing corporate legal responsibility and vaccine equity would be to require that pharmaceutical companies provide a government-designated quantity of free vaccines to the uninsured and underinsured for a stipulated number of years. The U.S. government provided pharmaceutical companies with billions of dollars in research and development funding to help develop COVID-19 vaccines, and vaccine makers are eager to receive new federal funding to create a new generation of COVID-19 vaccines.

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

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

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


389. Id.

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

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

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

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

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

\textsuperscript{393} See supra section II.C.

\textsuperscript{394} See supra section II.C.

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

\textsuperscript{396} See Liz Kennedy, Corporate Capture Threatens Democratic Government, Ctr. for Am. Progress (Mar. 29, 2017), https://www.americanprogress.org/article/corporate-capture-threatens-democratic-government/ ("America faces a crisis of corporate capture of democratic government, where the economic power of corporations has been translated into political power with disastrous effects for people’s lives.").
recede anytime soon, and the costs of nonparticipation are very high. Corporations are well-resourced and uniquely positioned to influence politics, and this pattern will likely continue. Further, corporations often support politicians and public policies that conflict with their stated positions on racial justice. A sincere effort to reconcile corporations’ words and actions would end such corporate hypocrisy and limit the racial tokenism that both conservatives and liberals decry. Such an effort would force corporate leaders to live their politics.

CONCLUSION

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

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

