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INTRODUCTION

In recent years, the law has concentrated further economic and political power within the publicly traded corporation.[1] Even before these legal renovations, expert observers suggested that the legal frameworks governing the public firm[2] permitted management sufficient legal autonomy to overcompensate themselves and to create governance structures more conducive to crony capitalism than any kind of true performance-based meritocracy.[3] Further, the publicly traded corporation plays a larger role in the United States economy today than ever before.[4] In a society as racially riven as the United States, this tremendous concentration of economic and political power invariably operates to reflect and propagate racial disparities in political and economic power.[5]

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1. For example, in 2010, the United States Supreme Court greatly expanded the publicly traded corporation's ability to participate in politics. Citizens United v. Federal Election Commission, 558 U.S. 310, 318-19 (2010) (holding that corporations may engage in electioneering without limitation and overturning two precedents).

2. This article uses the terms publicly traded company, public company, public corporation, publicly traded firm, and public firm, interchangeably, to denote a company required to register equity securities under section 12(g) of the Securities Exchange Act of 1934. Securities Exchange Act of 1934 § 12, 15 U.S.C.A. § 78l (2020). This includes all firms with equity shares that trade on a national securities exchange, as well as firms with over $10 million in assets and more than 2000 shareholders or more than 500 unaccredited shareholders. Securities Exchange Act of 1934 § 12(a) and (g)(1), 15 U.S.C.A. §§ 78l(a), (g)(1) (2022). Such firms must file periodic reports to disclose all material facts to the investing public. Securities Exchange Act of 1934 § 13, 15 U.S.C.A. § 78m (2022).

3. Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978*, ECON. POL'Y INST. (Aug. 19, 2019), https://www.epi.org/publication/ceo-compensation-2018/ ("Importantly, rising CEO pay does not reflect rising value of skills, but rather CEOs' use of their power to set their own pay."); Marianne Bertrand & Sendhil Mullainathan, *Are CEOs Rewarded for Luck? The Ones Without Principals Are,* 116 Q. J. ECON. 901, 925 (2001) (linking CEO pay to CEO power).

4. Jens Dammann & Horst Eidenmüller, *Corporate Law and the Democratic State*, 2022 U. ILL. L. REV. 963, 980-81 (2022) (showing historic growth of large publicly traded firms since 1929 relative to GDP); Theron Mohamed, *Warren Buffett's Go-To Market Gauge Hits 211%, Signaling Stocks Are Hugely Overvalued and a Crash May Be Coming*, BUS. INSIDER (Jan 5, 2022), https://markets.businessinsider.com/news/stocks/warren-buffett-indicator-211-percent-stock-market-bubble-asset-crash-2022-1 ("The Wilshire 5000 Total Market Index hit a new intraday high of $48.99 trillion on Tuesday, following record closes for the Dow Jones and S&P 500 indexes on Monday. Meanwhile, the latest estimate for third-quarter GDP is $23.20 trillion, putting the [market capitalization/GDP ratio] indicator at 211%.").

5. Scholars previously addressed how diversity, equity and inclusion (DEI) can disrupt groupthink, homosocial reproduction (and other biases) and enhance corporate financial performance and compliance. Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 92 (2022).

> [F]iduciary duty pushes corporate managers legally, financially, and reputationally to focus on [DEI] as part of their duty to promote the best interests of the corporation, increase its sustainable

In other words, the publicly traded corporation replicates the racial hierarchy in the U.S. indefinitely.[6] This article spotlights that dynamic,[7] assesses its costs in terms of inequality-adjusted human development,[8] and proposes mechanisms to relieve the systemic injustice the publicly traded corporation reproduces.[9]

> profitability for the benefits of its stockholders, and ensure that the corporation honors the laws of the society that chartered it.

Id.; Joan MacLeod Heminway, *Corporate Management Should All Be Feminists*, 40 MINN. J. L. & INEQ. 409, 410 (2022) ("This essay is less about feminism (although it is about feminism) than it is about effective, efficient corporate management in the United States."); Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211, 214 (2019) ("Groups without diversity consistently make weaker decisions than those made by groups with experiential diversity. Diverse boards may also more effectively avoid or manage scandalous governance failures. . . . Firms increasingly allocate substantial resources to diversify their leadership as they face pressure from investors and governments."). Others have contexualized the corporation as an engine of racial inequality. Steven A. Ramirez, *Rethinking the Corporation (and Race) in America: Can Law (and Professionalization) Fix "Minor" Problems of Externalization, Internalization, and Governance?*, 79 ST. JOHN'S L. REV. 977, 982 n.24 (2005) ("The CEO typically holds ultimate control over management and decisive control over the selection of directors."); andré douglas pond cummings, Steven A. Ramirez & Cheryl L. Wade, *Toward A Critical Corporate Law Pedagogy and Scholarship*, 92 WASH. U. L. REV. 397, 401 (2014) (noting how a "[W]hite male supremacy" dictates the economy, emphasizing the gendered dimensions of White supremacy). This article looks at the corporation as a source of institutionalized racial hierarchy and seeks to elucidate ways the public corporation can be enlisted to resolve the racial hierarchy.

6. *See* Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RSRV. L. REV. 299, 307-24 (2018) (summarizing the key components of our racial hierarchy and concluding that "the U.S. faces an enormous challenge that promises to steadily worsen: the corrosive influence of a socially constructed racial hierarchy that leaves millions of young Americans stranded at the margins of our economy and deprives our economy of a rationalized human capital formation function"); Rep. of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America, ¶ 54, U.N. Doc. A/HRC/38/33 (May 4, 2018) [hereinafter 2018 Report of Special Rapporteur] ("The United States remains a chronically segregated society. Blacks are 2.5 times more likely than Whites to be living in poverty, their infant mortality rate is 2.3 times that of Whites . . . and their incarceration rates are 6.4 times higher than those of Whites.")

7. Other commentators similarly hold the public firm at least partially responsible for inequitable social conditions. *See* Brummer & Strine, *supra* note 5, at 3.

> The inequality gap between Black and white Americans grew in the period in which [shareholder primacy] became influential with directors and policymakers, while the COVID-19. . . impact on minorities has underscored the persistence of inequality. So have horrific instances of violence against Black people. . . . Likewise, inequality in wages and opportunity continues to adversely affect women.

Id.

8. The public corporation fundamentally serves macroeconomic goals as demonstrated by the need for federal interventions in response to macroeconomic disturbances since 1933. *See generally* Steven A. Ramirez, *The Emergence of Law and Macroeconomics: From Stability to Growth to Human Development*, 83 L. & CONTEMP. PROBS. 219, 232 (2020).

> [M]acroeconomic considerations are inherently at play whenever laws or policies implicate economic stability, economic growth, efficiency, or human development. . . .[T]hese legal and policy goals need to go further to explicitly and directly target human welfare" or "risk creating a legal and regulatory system that spawns environmental misery and mass extinction.

Id.

9. Scholars in the past considered the relationship between the corporation and the American

The power of the public corporation in contemporary U.S. society suggests that it constitutes the key economic and political institution shaping our nation and the lives of its citizens – with decisive influence across a range of issues, from the location of manufacturing plants to climate change.[10] According to the Business Roundtable, a lobbying group representing CEOs of the nation's largest publicly traded corporations, public corporations produce $9 trillion in annual revenues, employ twenty million Americans, invest $226 billion annually in research and development, and make $9 billion annually in charitable contributions.[11] Since 2010, corporate America doubled and redoubled their political contributions, giving $238 million to the GOP, and a relatively paltry $38 million to the Democrats.[12] All these expenditures of shareholder wealth (under the shareholder primacy myth) occur without even the pretense of shareholder disclosure and approval.[13] Essentially, CEOs exercise their power to spend shareholder wealth on their own political agenda.[14] Indeed, CEOs will spout support for racial equity or

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racial hierarchy. *See generally* Cummings, Ramirez & Wade, *supra* note 5, at 407-424.

10. *See* Sheldon Whitehouse, *Republicans Want to Fight Climate Change, but Fossil-Fuel Bullies Won't Let Them,* WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/opinions/republicans-want-to-fight-climate-change-but-fossil-fuel-bullies-wont-let-them/2017/01/10/177dbd4e-cc82-11e6-b8a2-8c2a61b0436f_story.html ("Climate change became partisan in 2010, shortly after the five Republican-appointed justices of the Supreme Court upended a century of law and precedent to issue the *Citizens United* decision, which rejected limits on corporate spending on political campaigns. The timing is not a coincidence.").

11. *About Us*, BUS. ROUNDTABLE, https://www.businessroundtable.org/about-us (last visited Aug. 31, 2022).

12. Dorothy S. Lund & Leo E. Strine *Corporate Political Spending Is Bad Business*, HARVARD BUS. REV. (Jan.-Feb. 2022), https://hbr.org/2022/01/corporate-political-spending-is-bad-business ("[C]ompanies now donate to help elect candidates they hope will do their industry's bidding or support a specific cause, even as they publicly advocate for the opposite stance.") (citing Alma Cohen et al., *The Politics of CEOs*, 11 J. LEGAL ANALYSIS 1, 1 (2019)).

> We use Federal Election Commission records to compile a comprehensive database of the political contributions made by more than 3800 individuals who served as CEOs of Standard & Poor's 1500 companies between 2000 and 2017. We find a substantial preference for Republican candidates. . . . In addition, we show that companies led by Republican CEOs tend to be less transparent to investors with respect to their political spending.

Id.

13. *Id.*

> [E]ven as corporate political spending has soared since *Citizens United,* shareholders have had no real say in the matter. Corporate leaders have not chosen to seek their approval for political donations, and most have not even disclosed their contributions—despite the fact that shareholders are paying for them with their entrusted capital. Shareholders, employees, creditors, and society as a whole remain largely in the dark about this spending.

Id.

14. *Id.* ("CEOs are also much wealthier than most other citizens, and wealthy people are more likely to vote Republican. Obviously, if executives direct political contributions according to their personal preferences, they will donate to candidates and committees with views contrary to those of many of their shareholders.").

diversity while monetarily supporting those directly opposed to such values.[15] Thus, as an institution, the modern public firm holds tremendous economic and political power, and this power continues to grow.[16]

Given this degree of power and influence, the public corporation, as an institution, holds significant influence over the contours of the U.S. racial hierarchy.[17] That hierarchy operates from cradle to grave and manifests

15. *Id.* ("corporations that have publicly demanded racial equality [make] contributions to groups and candidates that promote racial gerrymandering . . . and corporations that claim to protect LGBTQ rights while funding groups that helped elect supporters of the 2016 'bathroom bill,' which abolished certain antidiscrimination protections for gender identity.") (citing CENTER FOR POLITICAL ACCOUNTABILITY, CONFLICTED CONSEQUENCES 2 (2020)).

> [W]hile big corporations and trade associations use 527s to channel resources to both major parties, they give the bulk of such spending to the Republican Party. And the intermediate organizations that these companies finance often direct that money in ways that belie companies' stated commitments to environmental sustainability, racial justice, and the dignity and safety of workers.

Center for Political Accountability, Conflicted Consequences 2 (2020).

16. *Id.* ("Before *Citizens United*, the law reflected a general societal consensus that keeping corporate money out of elections was a good thing. Direct contributions to candidates and independent expenditures (such as advertising) to promote the election or defeat of candidates were prohibited."). *Citizens United* opened the floodgates. *Id.* ("*Citizens United* upset that settled approach. It gave corporate managers the freedom to spend unlimited sums of shareholder money to influence political activity. With that decision, the Supreme Court exposed corporations and our political process to a new and unhealthy dynamic of interactive influence seeking."). This new-found political power ultimately acted to enhance the economic power of the corporation through dramatic cuts in the corporate tax rate. Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (2017). Studies of the impact of this Act find it did not increase either employment or investment through the cut in corporate tax rates from thirty-five percent to twenty-one percent, although it did increase CEO compensation and stock buybacks. Nicholas H. Cohen & Manoj Viswanathan, *An Updated Analysis of Corporate Behavior and the Tax Cuts and Jobs Act*, UNIV. CHI. L. REV. ONLINE (Aug. 1, 2020), https://lawreviewblog.uchicago.edu/2020/08/01/an-updated-analysis-of-corporate-behavior-and-the-tax-cuts-and-jobs-act/.

> Our analysis revealed that few corporate behaviors were affected by change in effective tax rate to a statistically significant degree. This includes two specific corporate behaviors, number of employees and capital expenditure ratio, which TCJA proponents indicated would change due to decreased corporate tax rates. The only dependent variables showing any statistical significance are CEO compensation, using the single base year of 2017, and total value of shares repurchased, using the 2015-2017 average.

Id.

17. Recognition of the continuing operation of the American racial hierarchy elicits more wide scholarly support than in the past. *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW xvii (2017) ("We have created a caste system in this country, with African Americans kept exploited and geographically separate by racially explicit government policies."); Eric J. Miller, *Knowing Your Place: The Police Role in the Reproduction of Racial Hierarchy*, 89 GEO. WASH. L. REV. 1607, 1644 (2021).

> Police violence against Black people is thus not an accidental part of policing or a misperception of the reasonable amount of force to be used in the United States, but a core feature of social norms of public order--who belongs where and the consequences for being out of place.

Id.; Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L.J. 2388, 2393 (2018) (reviewing JAMES FORMAN, JR., LOCKING UP OUR OWN (2017)) ("Today, the contention that criminal law and enforcement subordinate people of color and reinforce racial hierarchy is widely accepted in the academic literature. . . . [R]esearch links contemporary racial hierarchies seen in U.S. crime policy with historical practices that emerged during slavery, Reconstruction, and the Jim Crow era."); Barbara J. Flagg, *''And Grace Will Lead Me Home'': The Case* itself in disturbing disparities from infant mortality[18] and childhood poverty[19] to mass incarceration[20] and life expectancy.[21] In economic terms, the racial hierarchy leads to disparities in employment, income, wealth, residential housing, and business formation.[22] The public corporation may well operate as the greatest engine of wealth generation in human history and its ability to fund innovation and human ingenuity may perhaps define American economic exceptionalism.[23] As such, it not only plays a key role in the propagation of the U.S. racial hierarchy across generations, it likely can also operate to break down the economic oppression inherent in the U.S. in that hierarchy – by rationally investing in communities and people that the racial hierarchy marginalizes.[24] Simply put, this article explores the extent to which the manifest pro-social elements of the public firm can address and mitigate the U.S.'s continuing racial nightmare along with its multi-trillion-dollar costs.[25]

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for Judicial Race Activism, 4 ALA. C.R. & C.L. L. REV. 103, 107-08 (2013) (stating that "racial hierarchy clearly persists").

18. African Americans suffer more than twice the rate of infant mortality as Hispanics which suffer significantly more infant mortality than non-Hispanic Whites. *Infant Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm (last updated June 22, 2022).

19. African American children suffer a poverty rate of 34 percent, Hispanic children suffer a rate of 28 percent, while only 11 percent of White children live in poverty.. *Indicator 4 Snapshot: Children Living in Poverty for Racial/Ethnic Subgroups*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/raceindicators/indicator_rads.asp (last updated February 2019).

20. Although Whites in America use illicit drugs at rates equaling or exceeding that of people of color, African Americans suffer 5 times the rate of incarceration of Whites while Hispanics suffer 3 times the rate of incarceration. Steven A. Ramirez, *Race in America 2021: A Time to Embrace* Beauharnais v. Illinois?, 52 LOY. U. CHI. L.J. 1001, 1022 (2021).

21. Ramirez & Williams, *supra* note 6, at 335.

22. *See* MCKINSEY & CO., THE ECONOMIC STATE OF BLACK AMERICA: WHAT IS AND WHAT COULD BE vii (2021), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/the-economic-state-of-black-america-what-is-and-what-could-be ("Disparities exist in every dimension of Black economic life in the United States.").

23. The public corporation is a candidate for the "greatest single discovery of modern times." *See* WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS 43 (1917) (quoting Nicholas Murray Butler, President, Colum. Univ., Address at the 143rd Annual Banquet of the Chamber of Commerce of the State of New York (Nov. 16, 1911)) ("[T]he limited liability corporation is the greatest single discovery of modern times."); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA xv (2003) ("[The corporation is] the basis of the prosperity of the West and the best hope for the future of the rest of the world.").

24. MCKINSEY & CO., *supra* note 22, at vi ("Companies can confront and fix wage gaps, root out bias in the workplace, and invest in neglected communities. . . . These initiatives [would operate to realize] a more dynamic future and . . . the full potential of a massively underutilized source of talent, to the benefit of all Americans.").

25. Shelby R. Buckman et al., *The Economic Gains from Equity*, BROOKINGS PAPERS ECON. ACTIVITY (Fall 2021), 71, 71. Buckman and colleagues estimate that:

> the improvements in labor contribution to aggregate output associated with making the outcomes for Black, Hispanic, and other minority groups at least as favorable as those for non-Hispanic white individuals in employment, hours worked, educational attainment, educational utilization,

After all, science now teaches that race is socially constructed[26] with no significant genetic reality.[27] "It is an unequivocal scientific fact that race is a social construct, not a biological one. The implicit prejudices and biases we carry against those unlike us are real, but society instills them in our subconscious mind, and they are therefore malleable."[28] Consequently, all material disparities in social wellbeing, nearly six decades after the passage of the Civil Rights Act of 1964,[29] seven decades after the end of de jure segregation under *Brown v. Board of Education*,[30] and 57 years after the Voting Rights Act of 1965,[31] bespeak a nation still enthralled to racial mythology.[32] The racial hierarchy embedded and

> and earnings [supports]significant economic gains, measured in trillions of dollars of GDP [and]ensuring all Americans have an equitable opportunity to participate in the economy is an economically significant way to increase aggregate prosperity.

Id.

26. Law invariably plays a key role in the social construction of race. *See, e.g.*, Rice v. Cayatano, 528 U.S. 495, 513 (2000) (holding that classification benefiting those Hawaiians with ancestors dating before 1778 on Hawaiian islands was a racial classification because ancestry was used as a proxy for race); Ozawa v. United States, 260 U.S. 178, 198 (1922) (holding that a member "of the Japanese race" could not qualify as white for purposes of naturalization and relying in part on science, regardless of skin color); United States v. Thind, 261 U.S. 204, 214-15 (1923) (ruling that the question of who was white enough to become a naturalized citizen turned on the "understanding of the common man" and not on science, despite Aryan identity).

27. The American Society of Human Genetics, *ASHG Denounces Attempts to Link Genetics and Racial Supremacy*, 103 AM. J. HUM. GEN. 636 (2018) ("Although a person's genetics influences their phenotypic characteristics, and self-identified race, and race might be influenced by physical appearance, race itself is a social construct. Any attempt to use genetics to rank populations demonstrates a fundamental misunderstanding of genetics."); Kelly Owens & Mary-Claire King, *Genomic Views of Human History*, 286 SCIENCE 451, 453 (1999) (stating that genetics shows that "stereotypic" racial features are "quite literally superficial, in that they affect exposed surfaces of the body" and "involv[e] limited numbers of genes with very specific physiological effects").

28. Andrea Gawrylewski, *The Case for Antiracism*, SCI. AM. (July 21, 2021), https://www.scientificamerican.com/article/the-case-for-antiracism/.

29. Pub. L. No. 88-352, 78 Stat. 241 (1964) (outlawing racial discrimination in employment and public accommodations); *see also* Paulette Brown, *The Civil Rights Act of 1964*, 92 WASH. U. L. REV. 527, (2014) ("At the same time, efforts to bring about racial equality through such means as affirmative action have been curtailed, and in many ways the reach of the Civil Rights Act of 1964 has been slow with respect to its original promise of racial equality.").

30. 347 U.S. 483, 495 (1954).

> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs [have been], by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Id.

31. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10303, 10306, 10503); *see also* Brendan Williams, *Blocking the Ballot Box: The Republican War on Voting Rights*, 28 WM. & MARY J. WOMEN & L. 389, 392 (2022) (tracing the nullification of the Voting Rights Act and efforts to disenfranchise African American voters in the wake of this nullification).

32. In fact, there is far more genetic variation within so-called racial groups than between racial groups., *AAA Statement on Race*, AM. ANTHROPOL. ASS'N (May 17, 1998), https://www.americananthro.org/ConnectWithAAA/Content.aspx?ItemNumber=2583.

reflected in those disparities testifies to the power of governing elites to divide the masses strategically and instrumentally.[33]

These persistent racial disparities impede human development[34] for the entire U.S. population, and the destruction of human capital implicit in race ultimately harms the entire population as well.[35] Racial advantages and disadvantages must give way to true meritocratic competition in accordance with essential capitalistic theory.[36] Today, race in the U.S. limits consumption, investment, innovation, business formation, and capabilities of the labor force.[37] Race operates to destroy human capital at the behest of elites who benefit from social division.[38] In 2022,

> [I]t has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups. Evidence from the analysis of genetics (e.g., DNA) indicates that most physical variation, about 94%, lies within so-called racial groups. Conventional geographic "racial" groupings differ from one another only in about 6% of their genes.

Id. Due to the lack of any genetic or biological basis to race, differences in social well-being must also be socially constructed:

> The tragedy in the United States has been that the policies and practices stemming from [the racial] worldview succeeded all too well in constructing unequal populations among Europeans, Native Americans, and peoples of African descent. Given what we know about the capacity of normal humans to achieve and function within any culture, we conclude that present-day inequalities between so-called "racial" groups are not consequences of their biological inheritance but products of historical and contemporary social, economic, educational, and political circumstances.

Id.

33. IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 32 (2014) (noting "the Southern strategy represents first and foremost the strategic manipulation of racism; indeed, its purposeful reinvention"); *see also* ROTHSTEIN, *supra* note 17, at 195 (bemoaning "racial polarization" and the manipulation of race by governing elites to advocate policies that "perpetuate the inferior economic opportunities that some [W]hites may face").

34. I previously argued that legal systems should strive to achieve maximum inequality-adjusted human development in a sustainable manner. Ramirez, *supra* note 8, at 231 ("Both the history of the United States and its core values, as well as the needs of the future, demand that the legal system function to expand [the Inequality-adjusted Human Development Index].").

35. MCKINSEY & CO., *supra* note 22, at 115 (concluding that eliminating racial disadvantages not only serves social justice but "can also make the economy more robust for everyone").

36. THOMAS MULLIGAN, JUSTICE AND THE MERITOCRATIC STATE 130-34 (2018) (arguing in favor of meritocratic competition based upon economic contributions in a context based upon equality of opportunity).

37. MCKINSEY & CO., *supra* note 22, at vii.

38. *See* Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 301 n.10 (2018) (quoting Martin Luther King, Jr.).

> [W]henever Pharaoh wanted to prolong the period of slavery in Egypt, he had a favorite . . . formula for doing it. . . . He kept the slaves fighting among themselves. But whenever the slaves get together, something happens in Pharaoh's court, and he cannot hold the slaves in slavery.

Id.; Sally Davies, *How to See Race*, AEON (Mar. 26, 2018), https://aeon.co/essays/race-is-not-real-what-you-see-is-a-power-relationship-made-flesh ("Race is a power relationship; racial categories are not about interesting cultural or physical differences, but about putting other people into groups in order to dominate, exploit and attack them.").

corporate elites form the basic power foundation in the nation.[39] Race facilitates the inequality that such elites leverage into power but at great cost to society as a whole.

This article argues that this fact arises largely from the current flawed legal design of the publicly traded corporation. Section I of this article highlights the key elements of the racial hierarchy in the U.S. and demonstrates how it continues to plague the nation and inflict trillions in macroeconomic costs. Section I also argues that a full societal-wide embrace of diversity would lead to massive economic gains that would enhance corporate earnings. Section II summarizes the power of the public corporation and its infirmities with a view towards understanding the key role of the public firm in perpetuating and enabling the U.S. racial hierarchy. Section III applies the learning from the first two parts to suggest mechanisms by which the institutional design of the publicly traded corporation can facilitate the dismantlement of the racial hierarchy while serving to maximize shareholder wealth and enlist its prodigious wealth generation capabilities to the battle to mitigate the impact of race in America. In particular, the article calls for improving corporate performance through a comprehensive embrace of diversity and integrating public corporations more comprehensively into communities most damaged by race through profitable corporate investments. The article concludes that the publicly traded corporation can transform itself from engine of propagation of racial hierarchy to key element of antiracist policy to deracialize our economy and society with relatively minor legal adjustments pertaining to diversity management and the funding of corporate community investments.[40]

I. AMERICA'S RACIAL HIERARCHY AND ITS MACROECONOIC COSTS

Over the past few decades, economists addressed the costs of the American racial hierarchy – often with the sanguine, but erroneous, assumption that market competition would limit discrimination.[41] On the

39. G. WILLIAM DOMHOFF, THE CORPORATE RICH AND THE POWER ELITE IN THE TWENTIETH CENTURY 1 (2020) (showing how corporate elites used their economic and political power to dominate the American legal system); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 302 (Arthur Goldhammer trans., 2014) (estimating that up to seventy percent of the top 0.1 percent of the U.S. income distribution consists of corporate elites).

40. I use the term antiracist policy and deracialization to mean efforts to rid our nation of the pernicious influence of race as rapidly as possible. *See* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 18 (1st ed. 2019).

41. Steven A. Ramirez, What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics, 54 J. LEGAL EDUC. 365, 372 (2004) (citing Andrew F. Brimmer, The Economic Cost of Discrimination Against Black Americans, in ECONOMIC PERSPECTIVES ON AFFIRMATIVE ACTION 11, 11 (Margaret C. Simms ed., 1995)) (terming market-based theories of discrimination "law and pseudo-economics" and decrying the lack of acknowledgement of the trillions of dollars in costs that the racial

other hand, other high-profile economists, such as the Nobel laurate in Economics Kenneth Arrow, stated that race is pervasive in societies where it has taken hold, as a function of profound social attitudes and conditioning.[42] It affects wealth, housing, income, wages, the flow of capital, and the life chances of individuals.[43] Each of these elements implicates economic well-being.[44] Arrow, as an economist, naturally focused primarily on economic manifestations of a racialized society, but also argued that market-based models of discrimination failed to account for the underlying social dynamics driving racial discrimination.[45] Nevertheless, the perverseness of race transcends mere economics – it is manifested in incarceration rates, educational funding, life expectancy, medical care, standardized test scores, and even infant mortality.[46] Elements of the racial hierarchy such as these entail human suffering, stunted life choices, and soul crushing pain that can span a lifetime.[47]

Take infant mortality. As of 2019, African Americans suffer an infant mortality rate of 10.6 per 1,000 live births, Native Americans suffer a rate of around 8 per 1,000 live births, Hispanics suffer a rate of 5 per 1,000 live births and non-Hispanic whites suffer a rate of 4.5 per 1,000 live births.[48] Puerto Rico stands at 7 deaths per 1,000 births.[49] The U.S., as a whole, suffers an infant mortality rate that puts it close to last in the developed world, behind Cuba and just ahead of Russia.[50] "Social inequalities in US [sic] infant mortality rates have persisted and remained marked, with the disadvantaged racial/ethnic and socioeconomic groups and geographic areas experiencing substantially increased risks of mortality despite the declining trend in mortality over time."[51] Simply

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hierarchy inflicts on society).

42. *See* Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination*? 12 J. ECON. PERSP. 91, 99 (1998) (arguing against market-based models of limiting discrimination and stating: "Models of racial discrimination in which all racial attitudes are expressed through the market will get at only part of the story. At each stage, direct social transactions unmediated by a market play a role. Even the market manifestations will be altered by these direct social influences.").

43. *Id.* at 91.

44. *Id.* ("There are many modern varieties of liberalism, which draw the boundaries between social and individual action in different places, but all agree in rejecting racial discrimination, by which is meant allowing racial identification to have a place in an individual's life chances.").

45. *Id.*

46. Ramirez & Williams, *supra* note 38, at 307-22 (summarizing racial hierarchy in United States through a review of evidence demonstrating substantial and enduring disparities across a range of indicia of social well-being).

47. *Id.*

48. Infant Mortality, *supra* note 18.

49. Gopal K. Singh & Stella M. Yu, *Infant Mortality in the United States, 1915-2017: Large Social Inequalities have Persisted for Over a Century,* 8 INT'L J. MATERNAL & CHILD HEALTH & AIDS 19, 21 (2019).

50. *Id.*

51. *Id.* at 29.

stated, the U.S. has seen expanding disparities in infant mortality since 1916.[52]

Each infant death means a lifetime of lost labor, wages, consumption, and innovation, and therefore limits macroeconomic growth and opportunities for all.[53] Only a society plagued by racial mythology[54] and ignorance of the value of human potential would wantonly destroy human capital in such a way.[55] Add in the pain of a lost child and missing grandchildren and siblings and the loss quickly mounts to catastrophic, but unquantifiable, levels.[56] For the public corporation, lost economic opportunity becomes obvious.[57] Yet, in the United States, infant mortality only forms the beginning of lifetimes ensnared in our racial hierarchy.[58]

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52. *Id.* at 22 ("The racial disparity in neonatal mortality increased between 1916 and 2017, as white infants experienced faster declines (2.9% per year) in neonatal mortality than black infants (2.2% per year).").

53. As I wrote elsewhere, a larger market increases the opportunities for the expanded division of labor, opens up opportunities for greater innovations in terms of product differentiation, and supports new product development innovations that may not achieve profitable scale in a smaller market. In addition, every human being can innovate in new and unpredictable ways that can benefit humanity. STEVEN A. RAMIREZ, LAWLESS CAPITALISM 21-33 (2013).

54. Jordan R. Axt et al., *The Rules of Implicit Evaluation by Race, Religion, and Age*, 25 PSYCH. SCI. 1804, 1804 (2014) (using psychological testing to reveal a festering racial hierarchy in the psyche of the U.S. public in which whites reign supreme).

55. According to the MIT economist Peter Temin:

> The desire to preserve the inferior status of [B]lacks has motivated policies against all members of the low-wage sector [and] [w]e are not getting the benefits of all the people who could contribute to the growth of the economy, to advances in medicine or science which could improve the quality of life for everyone--including some of the rich people.

Chloe Farand, *US Has Regressed to Developing Nation Status, MIT Economist Warns*, INDEPENDENT (Apr. 21, 2017), https://www.independent.co.uk/news/world/americas/us-developing-nation-regressing-economy-poverty-donald-trump-mit-economist-peter-temin-a7694726.html [https://perma.cc/V753-RANY].

56. Corporations need healthy communities from which they can draw workers, investors and consumers. *See* Emma Grande & Deborah H. Bae, *Four Ways Companies Can Transform the Health of Communities*, BUS. FOR SOC. RESP. (Apr. 1, 2019), https://www.bsr.org/en/our-insights/blog-view/four-ways-companies-can-transform-the-health-of-communities ("Leading companies both invest in employee health and well-being and go beyond their four walls to make an impact in local communities. By doing so, they are creating business value and a competitive advantage.").

57. *Id.*; Alexander Zimmermann, *Creating Societal Benefits and Corporate Profits*, MITSLOAN MGMT. REV. (Spring 2014), https://sloanreview.mit.edu/article/creating-societal-benefits-and-corporate-profits/.

> However good a company's intentions, many CSR programs ultimately depend on the commitment of current management and the profitability of the core business. Fortunately, some smart companies have found a way out of this trap by designing ventures to not only yield important public benefits but also make money. Our in-depth analysis of how four companies created for-profit initiatives that also have high societal value suggests that each followed a similar step-by-step process to achieve what we call synergistic value creation.

Id.

58. Unfortunately, health disparities only begin with infant mortality, and the COVID pandemic only exacerbated such disparities. Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaiijah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and*

Additionally, the United States tops virtually the entire developed world in childhood poverty.[59] In a recent ranking of advanced nations, the United States ranked 38 of 41 in childhood poverty, just behind Mexico. In a broader measure of child well-being, the U.S. ranked 38 out of 39.[60] African American and Hispanic children face about three times the likelihood of living in poverty compared to white children.[61] While childhood poverty may rise and fall in response to macroeconomic performance, the racial gaps are persistent.[62] Like infant mortality, children caught in poverty, and the adults bearing its scars, bear no culpability for their plight.[63] Childhood poverty is morally indefensible.[64] The disproportionate impact of childhood poverty on children of color operates to narrow the path to higher education.[65] In terms of the effects

Health Disparities During and After COVID-19, 19 YALE J. HEALTH POL'Y, L., & ETHICS 122, 171 (2020) ("The COVID-19 pandemic magnified and accelerated the impact of longstanding discrimination, poverty, and health inequities among low-income communities and historically marginalized groups.").

59. *See* Valerie Strauss, *U.S. Ranks Near Bottom of Advanced Nations in Child Wellness, New Report Finds,* WASH. POST (Oct. 6, 2022), https://www.washingtonpost.com/education/2020/10/06/us-ranks-near-bottom-advanced-nations-child-wellness-new-report/.

60. *Id.*

61. *See supra* note 18.

62. More recent statistics suggest a decline in childhood poverty, but racial disparities remain virtually unchanged. *See Child Poverty Still Falling—and Close to Pre-Recession Rate*, ANNIE E. CASEY FOUND. (Sept. 21, 2017), http://www.aecf.org/blog/child-poverty-still-falling-and-close-to-pre-recession-rate/ [https://perma.cc/WM6B-6KLN].

63. UNICEF, INNOCENTI REPORT CARD 13: CHILDREN IN THE DEVELOPED WORLD 2 (2016), https://www.unicef-irc.org/publications/pdf/RC13_eng.pdf [https://perma.cc/2S63-4ZXB].

> [F]ew dispute that childhood experiences have a profound effect not only on children's current lives, but also on their future opportunities and prospects. Likewise, social and economic disadvantages in early life increase the risk of having lower earnings, lower standards of health and lower skills in adulthood. This in turn can perpetuate disadvantage across generations. None of this is the fault of the child.

Id.

64. As stated by commentator Charles Blow:

> [T]here is one area above all others where we should feel a moral obligation to reduce poverty as much as possible and to soften its bite: poverty among children. People may disagree about the choices parents make-- including premarital sex and out-of-wedlock births. People may disagree about access to methods of family planning--including contraception and abortion. People may disagree about the size and role of government--including the role of safety-net programs. But surely we can all agree that no child, once born, should suffer through poverty. Surely we can all agree that working to end child poverty—or at least severely reduce it—is a moral obligation of a civilized society.

Charles M. Blow, *Reducing Our Obscene Level of Child Poverty*, N.Y. TIMES (Jan. 28, 2015), https://www.nytimes.com/2015/01/28/opinion/charles-blow-reducing-our-obscene-level-of-child-poverty.html [https://perma.cc/4XZY-VA7E].

65. *See* JESSICA SEMEGA, MELISSA KOLLAR, JOHN CREAMER & ABINASH MOHANTY, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2018 17 (2020) ("Among people with at least a bachelor's degree, 4.4 percent were in poverty in 2018, not statistically different from 2017."); Abbye Atkinson, *Race, Educational Loans, & Bankruptcy,* 16 MICH. J. RACE & L. 1, 29-30 (2010) ("African Americans are more likely to come from lower income households in which financial resources that might be used to subsidize higher education are likely to be slim, which makes them more likely to

of excessive childhood poverty on the macroeconomy, it leads to stunted human capital, lost productivity, and corrosive economic inequality.[66]

Differences in educational opportunity are the next step in the nightmarish racial hierarchy. Until at least 1954, Hispanics[67] and African Americans[68] generally suffered relegation to inferior and segregated educational facilities.[69] Even today, students of color face separate and unequal primary and secondary educational experiences.[70] The number of intensely segregated schools tripled in recent decades.[71] A recent study found that non-white schools get $23 billion less in funding compared to white schools despite serving the same number of students.[72] Students of color also suffer from the curse of low expectations[73] and stereotype

require outside financing to pay for college costs.").

66. IMF, UNITED STATES: STAFF REPORT FOR 2017 ARTICLE IV CONSULTATION ¶¶ 17-18 (2017), https://www.imf.org/en/Publications/CR/Issues/2017/07/27/United-States-2017-Article-IV-Consultation-Press-Release-Staff-Report-45142. Excessive economic inequality leads to subverted law and regulation as elites use greater economic resources to distort law in their favor. RAMIREZ, *supra* note 53, at 31-40. Elites will seek to curtail investment in the children of others and will pursue crony capitalism over meritocratic competition. *Id.* Ultimately, aggregate demand falters as the legal props to a robust middle class atrophy and elites divert too much national income to wealth accumulation. *Id.* at 28-30.

67. Mendez v. Westminister Sch. Dist., 64 F. Supp. 544 (D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (striking down segregation of Mexican students in California).

68. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding racially segregated education violative of Equal Protection).

69. *See* Phyllis C. Smith, *The Elusive Cap and Gown: The Impact of Tax Policy on Access to Higher Education for Low-Income Individuals and Families*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 181, 183-189 (2008) (showing history of deprivation of education even after Brown through artifices such as wealth or test scores).

70. Beverly Daniel Tatum, *America Is More Diverse Than Ever Before, but Its Schools Are Growing More Segregated,* L.A. TIMES (Sept. 12, 2017), http://www.latimes.com/opinion/op-ed/la-oe-tatum-school-segregation-20170912-story.html [https://perma.cc/7H6T-H9J7] ("Separate remains unequal as schools with concentrated poverty and racial segregation are more likely to have less-experienced teachers, high levels of teacher turnover, inadequate facilities and fewer classroom resources.").

71. BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA 4 (3d ed. 2017).

72. Lauren Camera, *White Students Get More K-12 Funding Than Students of Color: Report,* U.S. NEWS (Feb. 26, 2019), https://www.usnews.com/news/education-news/articles/2019-02-26/white-students-get-more-k-12-funding-than-students-of-color-report (citing EDBUILD, $23 BILLION (2019), https://edbuild.org/content/23-billion/full-report.pdf) ("School districts where the majority of students enrolled are students of color receive $23 billion less in education funding than predominantly white school districts, despite serving the same number of students – a dramatic discrepancy that underscores the depth of K-12 funding inequities in the U.S.") .

73. *E.g.*, Gershenson et al., *Who Believes in Me? The Effect of Student-Teacher Demographic Match on Teacher Expectations,* 52 ECON. EDUC. REV. 209, 209 (2016) ("[W]e find that non-black teachers of black students have significantly lower expectations than do black teachers. These effects are larger for black male students and math teachers. Our findings add to a growing literature on the role of limited information in perpetuating educational attainment gaps.").

threat,[74] which are well-documented barriers to academic success.[75]

While, even before college, our racial hierarchy systematically provides an inferior and segregated education to children of color, higher education amplifies these disparities.[76] The above factors, parental educational attainment, and poverty combine to impact higher educational attainment today in the U.S. – whites have over fifty percent more college degrees than African Americans and over a hundred percent more than Hispanics.[77] Differences in educational attainment also account for negative health consequences across life spans for people of color.[78] The internationally renowned consultancy firm of McKinsey & Company found that GDP in 2008 was $525 billion lower than it would have been if there were no education gap between whites and minorities.[79] Other estimates based upon wage differentials mount to over $1 trillion per annum.[80] Perhaps most costly, however, is the school to prison pipeline – too often, schools divert students of color from academics into the criminal system for conduct that white students commit with impunity.[81]

74. Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, ATLANTIC (Aug. 1999), https://www.theatlantic.com/magazine/archive/1999/08/thin-ice-stereotype-threat-and-black-college-students/304663/ [https://perma.cc/R7NL-L5DL] (defining stereotype threat as: "the threat of being viewed through the lens of a negative stereotype, or the fear of doing something that would inadvertently confirm that stereotype"); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERS. & SOC. PSYCH. 797, 808 (1995).

> [T]he present experiments show that making African American participants vulnerable to judgment by negative stereotypes about their group's intellectual ability depressed their standardized test performance relative to White participants, while conditions designed to alleviate this threat, improved their performance, equating the two groups once their differences in SATs were controlled.

Id.

75. Valerie Taylor & Gregory Walton, *Stereotype Threat Undermines Academic Learning*, 37 PERSONALITY & SOC. PSYCH. BULL. 1055 (2011) (finding that stereotype threat impedes learning in addition to performance on high-stakes test scores).

76. Ramirez & Williams, *supra* note 6, at 314-16.

77. Camille L. Ryan & Kurt Bauman, U.S. Census Bureau, Current Population Reports, Educational Attainment in the United States: 2015 5 (2016) ("In 2015, a majority of Asians 25 years and older had a bachelor's degree or higher (54 percent). More than one-third of non-Hispanic Whites had a bachelor's degree or higher (36 percent), 22 percent of Blacks had this level of education, as did 15 percent of Hispanics.").

78. Yang Claire Yang et al., *Life-Course Trajectories of Body Mass Index from Adolescence to Old Age: Racial and Educational Disparities*, 118 PROC. NAT. ACAD. SCI. 1, 8 (2021) ("These cohort increases in the prevalence and rate of increase in obesity has alarming consequences for contemporary epidemiologic conditions such as the COVID-19 pandemic and US population health and life expectancy in years to come.").

79. Byron G. Auguste et al., *The Economic Cost of the US Education Gap*, MCKINSEY & COMPANY (June 2009), http://www.mckinsey.com/industries/social-sector/our-insights/the-economic-cost-of-the-us-education-gap [https://perma.cc/3QVF-2SWT]

80. *See* Ramirez, *supra* note 41, at 375.

81. Ramirez & Williams, *supra* note 6, at 316.

> African Americans suffer 3.8 times as many suspensions and expulsions than young whites. . . despite studies that show that white students engage in discipline-generating conduct on par with

Suspensions and expulsions too often lead to referrals to law enforcement.[82] As such, education in the U.S. too often serves as a gateway to prison for students of color.

Once in the criminal injustice system, the disparities deepen and become more pernicious. According to Professor Paul Butler:

> In 1960, the U.S. imprisonment rate was approximately 126 per 100,000 population. By[] 2008, the rate had quadrupled, to 504 per 100,000. African-American defendants are even worse off. In 1960, . . . the black incarceration rate was approximately 660 per 100,000. By 1970, it had fallen some, to slightly under 600 per 100,000. In 2010, the rate of incarceration among black males was an astronomical 3,074 per 100,000.[83]

Much of this mass incarceration of people of color arises from the War on Drugs.[84] Even though whites use drugs at the same or greater rates of people of color,[85] African Americans and Latinos bore the brunt of the War on Drugs.[86]

> African Americans [and] this disparity in punishment contributes to gaps in academic achievement because school discipline directly reduces instructional time and creates social stigma.

Id.

82. According to the National Education Association:

> In 2010, more than 3 million students were suspended from school, or double the level of suspensions in the 1970s. Meanwhile, more than a quarter-million were "referred" to police officers for misdemeanor tickets, very often for offenses that once would have elicited a stern talking-to. . . . [T]hese excessive practices have resulted in the suspensions, expulsions, and arrests of tens of millions of public school students, especially students of color and those with disabilities or who identify as LGBT.

Mary Ellen Flannery, *The School-to-Prison Pipeline: Time to Shut It Down*, NAT'L EDUC. ASS'N (Jan. 5, 2015), https://www.nea.org/advocating-for-change/new-from-nea/school-prison-pipeline-time-shut-it-down.

83. Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2179-80 (2013); *see also* Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration,* 104 GEO. L.J. 1531, 1537-38 (2016) (arguing that governing elites deploy incarceration as well as deportation as tools to control and marginalize minority populations including Latinos and African Americans). Mass incarceration combines with educational disparities to create severe injustice. Butler, *supra*, at 2180 ("For men hoping to avoid prison, being both poor and black is a lethal combination. More than two-thirds of black males who do not have college degrees will be incarcerated at some point in their lives. Black male high school dropouts are more likely to be imprisoned than employed.").

84. *See, e.g.*, Michelle Alexander, The New Jim Crow 59 (2010).

85. *See, e.g.*, Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Hum. Servs., 2019 National Survey of Drug Use and Health, tbl.1.22B (2019), https://www.samhsa.gov/data/sites/default/files/reports/rpt29394/NSDUHDetailedTabs2019/NSDUHDetTabsSect1pe2019.htm [https://perma.cc/JRP2-XC5X] (showing that whites use drugs at greater rate than African Americans and Latinos in virtually all age groups).

86. PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 121-22 (2017) ("Today most people know that 'the war on drugs' has been selectively waged against African Americans. . . . For drug crimes, African Americans are about 13 percent of people who do the crime, but about 60 percent of people who do the time."); PATRISSE KHAN-CULLORS & ASHA BANDELE, WHEN THEY CALL YOU A TERRORIST: A BLACK LIVES MATTER MEMOIR 133-34, 144 (2018) (describing "[t]he drug war as ethnic cleansing"); IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN

The economic costs of these disparities staggers communities of color. "As a perpetual drag on the earning potential of tens of millions of Americans, these costs are not only borne by individuals, their families, and their communities. They are also system-wide drivers of inequality and . . . have macroeconomic consequences."[87] The Brennan Center for Justice released a report in 2020, *Conviction, Imprisonment, and Lost Earnings*, that placed the lifetime earnings hit suffered by each "formerly incarcerated" individual at $484,400.[88] Given that the United States currently incarcerates three million citizens, and Latinos and African Americans constitute fifty-six percent of the prison population, the nation faces $1.453 trillion in lost wages, and communities of color will bear $813 billion dollars in lost income.[89] These losses also translate to impaired consumption and human capital in communities of color.

All these disparities lead to grossly disproportionate outcomes across economic indicia. For example, in 2020, the first year of the COVID pandemic, the mean household income for whites totaled just under $105,000,[90] while African American households averaged about $67,000 and Hispanic households averaged just over $75,000.[91] This translates into a poverty rate in communities of color that exceeded twice the poverty rate in white communities.[92] Since 1970, the income gap among whites, Blacks, and Hispanics has budged very little.[93] Amazingly, even when comparing professionals in the same job category, the racial wage gap still holds – white family physicians reported earnings of $97.25 per hour, Latinos reported $92.99 per hour, and African Americans reported $82.46 per hour. Female African Americans earned $79.16 and Latinas earned $84.04 per hour.[94] This all demonstrates that race continues to play

AMERICA 433-36 (paperback ed. 2017) (describing how the WOD disproportionately targeted Black youth and reporting that "[i]n 1996, when two-thirds of the crack users were [w]hite or Latin[x], 84.5 percent of the defendants convicted of crack possession were Black").

87. Joseph E. Stiglitz, *Foreword*, *in* TERRY-ANN CRAIGIE ET AL., BRENNAN CTR. FOR JUST., CONVICTION, IMPRISONMENT, AND LOST EARNINGS 4, 5 (2020).

> There is much that has to be done if our society is to fully come to terms with our long history of racial injustice. Stopping mass incarceration is an easy place to begin. This report makes a compelling case for the enormous economic benefits to be derived from doing so.

Id.

88. *Id.* at 7.

89. *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet (last visited Sept. 19, 2022).

90. EMILY A. SHRIDER ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2020 tbl.A-2 (2021), https://www.census.gov/library/publications/2021/demo/p60-273.html.

91. *Id.*

92. *Id.* ("Among non-Hispanic Whites, 8.2 percent were in poverty in 2020, while Hispanics had a poverty rate of 17.0 percent. Among the major racial groups examined in this report, Blacks had the highest poverty rate (19.5 percent), but did not experience a significant change from 2019.").

93. *Id.* at fig. 2.

94. Andrea Anderson et al., *Family Physician Income Disparities by Race and Gender*, 35 J. AM.

a profound role in the income opportunities available in America.

The wealth gap in the United States may operate as the key propagator of the racial hierarchy into the future. "Income is unequal, but wealth is even more unequal."[95] According to the most recent data from the Federal Reserve Board of Governors, white families hold about five to eight times the wealth of families of color.[96] "The historical data also reveal that no progress has been made in reducing income and wealth inequalities between black and white households over the past 70 years . . . ."[97] This wealth gap can persist across generations because greater wealth translates into superior childhood environments, better schools, greater gifts, larger bequests, helpful financing for homes, and help with financial emergencies.[98] The federal tax system operates to perpetuate this racial wealth gap.[99] Due to this wealth gap, children of white families take on far less debt assuring transgenerational effects.

A key element of the wealth gap relates to home ownership. Traditionally, home ownership, along with associated tax benefits,

BD. FAM. MED. 859, 860 (2022) ("[T]he data suggest the need to explore the contributions of more insidious factors like race and gender discrimination in contract negotiations or salary offers.").

95. Liz Mineo, *Racial Wealth Gap May Be a Key to Other Inequities*, HARV. GAZETTE (June 3, 2021), https://news.harvard.edu/gazette/story/2021/06/racial-wealth-gap-may-be-a-key-to-other-inequities/ (quoting Professor Alexandra Killewald).

96. Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RSRV. BD.: FEDS NOTES (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html.

> White families have the highest level of both median and mean family wealth: $188,200 and $983,400, respectively. . . . Black families' median and mean wealth is less than 15 percent that of White families, at $24,100 and $142,500, respectively. Hispanic families' median and mean wealth is $36,100 and $165,500, respectively.

Id. "In fact, over the preceding 32 years, the wealth gap between White and non-White families stayed relatively constant, with Black families holding on average 24 cents and Hispanic families 22 cents for every dollar held by White families." Ana H. Kent et al, Examining Racial Wealth, Page One Economics, Inequality, Mar. 2022, https://research.stlouisfed.org/publications/page1-econ/2022/03/01/examining-racial-wealth-inequality.

97. Moritz Kuhn et al., *Income and Wealth Inequality in America, 1949-2016* 1 (Fed. Rsrv. Bank of Minneapolis, Working Paper No. 9, 2018), https://www.minneapolisfed.org/research/institute-working-papers/income-and-wealth-inequality-in-america-1949-2016.

98. Bhutta et al., *supra* note 96.

99. *See* Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation,* 15 NW. J. L. & SOC. POL'Y. 265, 283-86 (2020) (detailing beneficial tax expenditures that exacerbate the wealth gap including beneficial rates on capital gains, exclusions on residential and unrealized gains, step-up in basis of capital assets at death, and preferential rates for dividends, among others).

yielded strong financial returns and served as a key channel of wealth generation.[100] Nevertheless:

> Racial and ethnic disparities in home ownership remain pronounced. Homeownership rates for [B]lack households have fallen every decade for the last 30 years, both unconditionally and after controlling for income and demographics. Even in 2015, [B]lack households with a college education are less likely to own a home than white households whose head did not graduate from high school.[101]

Further:

> In addition to gaps in homeownership, there are also significant gaps in home values among homeowners by race and ethnicity. For homeowners, the typical [w]hite families' home value is $230,000 and . . . [t]he typical Black and Hispanic families' home values are lower, at $150,000 and $200,000, respectively. Gaps in home values are caused both by gaps in purchase prices and housing appreciation, which are a reflection of a combination of factors including resource gaps (e.g., income and down payments), residential segregation, and age of entry into homeownership.[102]

Thus, whites own homes more frequently, enjoy more valuable homes, and have greater rates of home appreciation.

Arguably, however, the most significant element of the wealth gap arises from ownership of shares in publicly traded companies:

> Some 61% of white, non-Hispanic families owned stocks in 2019, [but] only 34% of Blacks and 24% of Hispanics did. Measured by value, 24% of white, non-Hispanic family assets were in stocks, compared to 13% for Blacks and 10% for Hispanics.[103]

More specifically, "[t]he average value of stocks Black Americans owned amounted only to $14,400, nearly a quarter of what their white peers held, the data said."[104] Further, stock ownership in the U.S. is

100. Laurie S. Goodman & Christopher Mayer, *Homeownership and the American Dream*, 32 J. ECON. PERSP. 31, 32 (2018).

> The internal rate of return to homeownership is quite favorable compared to alternative investments, even during a period where home prices suffered the worst shock since the Great Depression. While this result does not depend only on favorable tax treatment, tax subsidies certainly help increase the financial benefits of homeownership.

Id.

101. *Id.*

102. Bhutta et al., *supra* note 96.

103. Tim Smart, *Who Owns Stocks in America? Mostly, It's the Wealthy and White,* U.S. NEWS & WORLD REP. (Mar. 15, 2021), https://www.usnews.com/news/national-news/articles/2021-03-15/who-owns-stocks-in-america-mostly-its-the-wealthy-and-white (based upon data from the Federal Reserve's Survey of Consumer Finances conducted in 2019).

104. Yun Li, *Black Americans' Lack of Participation in the Stock Market Likely to Widen Post-Pandemic Wealth Gap*, CNBC (Feb. 2, 2022), https://www.cnbc.com/2022/02/02/black-americans-lack-

concentrated among the top one percent of income earners.[105] According to recent Federal Reserve data, the top one percent owns 53 percent of all publicly traded shares[106] – and the top one percent consists of over 96 percent whites.[107] Consequently, it seems reasonable to conclude that the overwhelming weight of publicly traded shares are owned by whites.

Voters of color also face diminished political power due to flaws in our democracy and recent judicial decisions limiting the protection of minority voting rights. Some flaws date to the founding of the republic, such as the operation of provisions in the U.S. Constitution originally intended to protect slavery.[108] Other flaws include the electoral college's dilution of the voting power of urban people of color relative to rural whites[109] and the felony disenfranchisement, which disproportionately precludes people of color from voting.[110] Since the Supreme Court struck down the pre-clearance provisions of the Voting Rights Act of 1965[111] and followed-up with a major limitation on the reach of that act,[112] the

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of-participation-in-the-stock-market-likely-to-widen-post-pandemic-wealth-gap.html.

105. *Id.*

106. Robert Frank, *Soaring Markets Helped the Richest 1% Gain $6.5 Trillion in Wealth Last Year, According to the Fed,* CNBC (Apr. 1, 2022), https://www.cnbc.com/2022/04/01/richest-one-percent-gained-trillions-in-wealth-2021.html.

107. WILLIAM DARITY JR. ET AL., WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP 2 (2018), http://narrowthegap.org/images/documents/Wealth-Gap---FINAL-COMPLETE-REPORT.pdf.

108. *E.g.*, Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1083 (2018) ("One of the proslavery features of the Constitution is the electoral college, enacted as a way to protect the interests of slave owners."); Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1148 (2012) ("If we ignore the evidence of a proslavery Constitution, we are not likely to inquire into the important present ramifications of the proslavery Constitution.").

109. Patrick Thornton, *Trump Is President Because White People's Votes Count More in America*, WASHINGTONIAN (Dec. 8, 2016), https://www.washingtonian.com/2016/12/08/white-peoples-votes-are-worth-more-electoral-college-donald-trump-hillary-clinton-popular-vote-alt-right/ [https://perma.cc/FC8E-5WDR].

> The states with the highest relative weighting in the Electoral College are generally less diverse than the country as a whole. Wyoming is 92 percent white, while California is 42 percent white. A vote in Wyoming is worth almost four times more than a vote in California because of the Electoral College.

Id.; Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 16, 2016), https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html [https://perma.cc/GL72-8K6N] ("Rural America, even as it laments its economic weakness, retains vastly disproportionate electoral strength.").

110. Perea, *Echoes of Slavery II, supra* note 108, at 1091-92 ("Felon disenfranchisement, which expanded after Reconstruction to eliminate black voting, today operates in much the same way. Six million otherwise eligible voters were denied the vote in the 2016 presidential election because they were deemed felons.").

111. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) (holding formula for federal pre-clearance of state law changes in voting laws unconstitutional).

112. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (holding that state interest in preventing fraud outweighed disparate impact of state voting limits).

Republican Party moved aggressively, and openly, to stem minority voting power.[113] These realities all operate to dilute the voting power of those ensnared in the seemingly perpetual racial hierarchy in the United States today.

All of these disparities arise from the fruit of a poisonous tree – the American racial history of burdening "others" with immense racial suffering. The racial hierarchy stands as tribute to the power of an illusion, of a social construct.[114] Today's innocent children suffer from the racial sins of yesteryear and today's cold obstinacy to allow the indefinite replication of that hierarchy.[115] Indeed, the careless permission to allow the perpetuation of this continued oppression under law becomes more sinful as the costs to society soar in tandem with a more diverse U.S. population.

The costs further soar when society includes the tally of the forgone benefits of diversity as highlighted in a burgeoning body of empirical studies. Diversity enhances group cognition, creativity, and innovation.[116] For example, a recent study found that gender diversity among scientific co-authors produced more novel and impactful works than non-diverse teams.[117] Researchers similarly found that papers boasting greater ethnic diversity among authors enjoyed superior scientific impact than those produced by more homogenous groups.[118] In finance, scholars constructed a series of diverse and homogenous markets and found that markets with ethnic and racial diversity priced assets more accurately and averted herd behavior associated with pricing "bubbles."[119] In business,

113. Williams, *supra* note 31, at 392 (stating that Supreme Court rulings led to actions and rhetoric which have had the effect of "supersizing Republican voter suppression efforts" as well as "unprecedented state actions" that blocked ballot access).

114. Race - The Power of an Illusion: Episode 3:"The House We Live In" (PBS broadcast 2003).

115. *See supra* notes 18-20 and accompanying text.

116. Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/ ("[I]if you want to build teams or organizations capable of innovating, you need diversity. Diversity enhances creativity. It encourages the search for novel information and perspectives, leading to better decision-making and problem-solving. Diversity can improve the bottom line of companies and lead to unfettered discoveries and breakthrough innovations.").

117. Yang Yang et al., *Gender-Diverse Teams Produce More Novel and Higher-Impact Scientific Ideas*, 119 PROC. NAT'L ACAD. SCI. 1, 5 (2022) ("Conducting an analysis of 6.6 million published papers from more than 15,000 different medical journals worldwide, we find that mixed-gender teams—teams combining women and men scientists—produce more novel and more highly cited papers than all-women or all-men teams.").

118. Bedoor K. AlShebli, Talal Rahwan & Wei Lee Woon, *The Preeminence of Ethnic Diversity in Scientific Collaboration*, 9 NAT. COMMS. 5163 (2018) ("Inspired by the social and economic benefits of diversity, we analyze over 9 million papers and 6 million scientists to study the relationship between research impact and five classes of diversity: ethnicity, discipline, gender, affiliation, and academic age. [E]thnic diversity had the strongest correlation with scientific impact."), https://pubmed.ncbi.nlm.nih.gov/30514841/.

119. *See* Sheen S. Levine et al., *Ethnic Diversity Deflates Price Bubbles*, 111 PROC. NAT'L ACAD.

gender and ethnic diversity at all levels of management exhibited a robust positive association with superior innovation.[120]

Cultural diversity also implicates potential conflict and hostility.[121] Thus, scholars long called for the use of best practices to fully unlock the benefits of diversity and to avoid the pitfalls of diversity mismanagement.[122] Mere tokenism does not operate to unlock diversity's benefits.[123] Instead, in order to achieve the benefits of diversity, organizations, nations, municipalities, and other institutions must embrace diversity by empowering diverse voices, achieving a critical mass of diverse voices, and giving diverse voices enough space to speak freely and comfortably.[124] Further, this embrace of diversity must not exclude more traditional voices or inspire organizational hostility.[125]

In the end, in order to understand the costs of the continuing racial hierarchy, one must also consider the benefits of a full and comprehensive embrace of diversity. The gap between our collective maximum potential and the current state of American output as constrained by the reality of the racial hierarchy certainly amounts to many trillions of dollars per

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SCI. 18524, 18524 (2014) ("Our results suggest that bubbles are affected by a property of the collectivity of market traders—ethnic homogeneity.").

120. Cristina Quintana-García et al., *Boosting Innovation Through Gender and Ethnic Diversity in Management Teams*, 35 J. ORGAN. CHANGE MGMT. 54, 62 (2022) (exploring "the effect that women and ethnic minorities in management and at the CEO level have on the ability to develop outstanding innovation performance" and finding "that gender and ethnic diversity in management positions produce net positive effects on innovation").

121. As Katherine Phillips stated:

> The first thing to acknowledge about diversity is that it can be difficult. In the U.S., where the dialogue of inclusion is relatively advanced, even the mention of the word "diversity" can lead to anxiety and conflict. Supreme Court justices disagree on the virtues of diversity and the means for achieving it. Corporations spend billions of dollars to attract and manage diversity both internally and externally, yet they still face discrimination lawsuits, and the leadership ranks of the business world remain predominantly white and male.

Phillips, *supra* note 116.

122. Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J. L. BUS. & FIN. 85, 99, 108-24 (2000) (explaining that diversifying boards may prevent groupthink, mitigate a board's tendency to conform, and promote board scrutiny of decision-making but that "[t]he evidence thus far strongly suggests that [only] companies adept at managing diversity can do so in a manner that achieves greater profitability").

123. Of course, diversity must be well-managed and tokenism must be avoided or diverse perspectives will be squelched. *See, e.g.*, Kimberly M. Ellis & Phyllis Y. Keys, *Workforce Diversity and Shareholder Value: A Multi-Level Perspective*, 44 REV. QUANTITATIVE FIN. & ACCT. 191, 209-10 (2015) (finding enhanced firm value for diverse workforces in firms that garner Fortune "Diversity Elite" recognition).

124. *See, e.g.*, Adam D. Galinsky et al., *Maximizing the Gains and Minimizing the Pains of Diversity*, 10 PERSP. ON PSYCH. SCI. 742, 745 (2015) ("The practices of inclusive multiculturalism and perspective taking also help catalyze the innovation and decision-making benefits of diversity. For example, organizational climates that value diversity increase information processing and exchange and thus produce better decisions. Similarly, when team members consider one another's perspectives, diverse teams are more creative.").

125. *See Id.*

year – and that directly translates to trillions in forgone profits for corporate America.

II. THE FLAWED LEGAL STRUCTURE OF THE PUBLIC CORPORATION

The publicly traded corporation operates both as a key engine of progress and as a key component of the ever-replicating U.S. racial hierarchy. Shareholder primacy forms a key foundation of the publicly traded corporation;[126] nevertheless, there is little law backing that premise and the law long permitted power concentration in the hands of the CEO.[127] In terms of actual power, the CEO generally wields the greatest influence over the operations of the corporation, including the distribution of revenues and appointment of other powerful actors. Most importantly, today CEOs monopolize the political power of the corporation and wield this power to opportunistically reduce accountability and to dilute legal mandates militating for shareholder protection.[128] This Section seeks to vindicate shareholder primacy as an end goal of the publicly traded corporation despite recognition of the power of the CEO and illustrates that shareholders of corporations can benefit mightily from maximum deracialization of our society – both inside and outside of the public firm.

A. The Corporation: Flawed Engine of Human Development

The publicly traded corporation operates as a near perfect capital aggregator under law, while also being subject to diversion of wealth through uncontrolled agency costs inherent in the separation of ownership from control as well as the expanding political power of corporate elites – especially CEOs.[129] The fundamental insight that the publicly

126. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32; *see also* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (stating that there is "no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value").

127. *See, e.g.*, Alfred F. Conard, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REFORM. 117, 117 (1988) ("Capitalism, in most large public corporations, has been subtly transformed from a system of dominance by the suppliers of capital to a system of dominance by the managers, dubbed 'managerialism.").

128. Cohen et al., *supra* note 12, at 1. CEOs:

> preside over a significant fraction of the American economy and wield substantial power over . . . the assets held by business firms. Their power over corporate resources, as well as their significant stature and prestige in the economic system, enables public-company CEOs to have significant influence over policy and political decisions.

Id.

129. STEVEN A. RAMIREZ, LAWLESS CAPITALISM 49-51 (2013) ("Increasingly, [public] corporations exist to serve the interests of managers instead of shareholders. One study found, for example, that between 1993 and 2003 the compensation paid to senior executives doubled as a percentage of profits.") (citing Lucian A. Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 OXFORD

traded corporation implies agency costs arising from a separation of ownership and control, arose shortly after the Great Depression set in and revelations of wrongdoing within the public firm became manifest.[130] Today, the consensus from corporate and economics scholars suggests that unbridled managerial power takes a steady toll on the ability of the public corporation to perform financially and economically in the interest of shareholders and society generally.[131] Thus, while theory suggests shareholder primacy may form an appropriate objective of the public corporation, in practice, CEO primacy explains the key center of power in the public corporation and the focus of its operations of the public firm, resulting in ever greater enrichment of management.[132]

REV. ECON. POL'Y 282 (2005)).

130. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 9, 78-85, 308 (rev. ed. 1991) (1932). Several decades later financial economists formalized a model of the impact of agency costs. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305, 308 (1976) ("It is generally impossible for the principal or the agent at zero cost to ensure that the agent to make optimal decisions from the principal's viewpoint."); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 288-89 (1980) (highlighting agency costs created by organization of corporate firm). Optimal minimization of agency costs permits maximum economic activity and transactions.

131. *E.g.*, Usha Rodrigues, *A Conflict Primacy Model of the Public Board*, 2013 U. ILL. L. REV. 1051, 1051 (2013) ("CEOs and other executives [rather than boards] came to dominate the real-world control of the corporation."); Paul S. Miller, *Shareholder Rights: Citizens United and Delaware Corporate Governance Law*, 28 J.L. & POL. 53, 91 (2012) (arguing that shareholders must submit to coerced speech directed by managers under current Delaware law and *Citizens United*); George W. Dent, Jr., *Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance,* 44 HOUS. L. REV. 1213, 1215 (2008) ("[T]he status quo is not director primacy, shareholder primacy, or team production, but CEO primacy--governance by managers largely for their own benefit."); Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues,* 30 J. CORP. L. 647 (2005).

> [M]anagerial power has played a key role in shaping executive pay. The pervasive role of managerial power can explain much of the contemporary landscape of executive compensation [and] managerial influence over the design of pay arrangements has produced considerable distortions in these arrangements, resulting in costs to investors and the economy.

Id.; Federal Reserve's Second Monetary Policy Report for 2002: Hearing Before the Comm. on Banking, Housing, & Urban Affairs, 107th Cong. 11 (2002), http://www.federalreserve.gov/boarddocs/hh/2002/july/testimony.htm (testimony of Alan Greenspan, chairman, Board of Governors of the Federal Reserve System) (stating that lax boards had contributed to a CEO-centric corporate power structure that permitted senior executives to "harvest" gains through manipulation of share prices). According to economist and Nobel laureate Joseph Stiglitz, American CEOs manage corporations as a "personal fiefdom, not for the shareholders, but for their own benefit." In particular, immediately preceding the Great Financial Crisis of 2007-2009 firms "reported high profits, gave big bonuses, big stock options, but in fact there were huge risks buried off-balance sheet and those chickens have now come home to roost." *Talk of the Nation: Economists Explain 'How to Save Capitalism'*, NPR (Oct. 20, 2008), http://www.npr.org/templates/story/story.php?storyId=95906243.

132. In fact, management itself, within the largest public firms, recently cast aside shareholder primacy and claimed CEO autonomy over the objective of the publicly traded corporation. *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans. The Business Roundtable is a lobbying association of chief executive officers of America's leading companies that

The publicly traded corporation creates great incentives for the commercial exploitation of new technology and ideas. For example, giving shareholders the benefits of limited liability in exchange for relinquishing control of operations lowers the cost of capital because shareholders value the protection from potential lawsuits.[133] Further, transferring ownership claims against the corporation to freely transferable shares gives the corporation a stable capital foundation that cannot be reached either by shareholders or their creditors.[134] Centralized management in the board of directors assures that shareholders cannot improvidently bind the firm and opens up the possibility of professional business management.[135] Because the corporation legally can exist in perpetuity, it acts as the ideal vehicle for holding long-

lived assets.[136] Finally, the rhetorical if not actual legal reality of shareholder primacy assures investors the firm will operate for their economic benefit.[137] The publicly traded corporation extends to shareholders the liquidity of selling and buying shares in well-developed financial markets.[138] Every society with elevated human development features publicly traded firms and accompanying development of financial markets as a key foundation to their economy.[139] The innovation of publicly traded corporations funds human ingenuity.

This does not mean the publicly traded corporation enjoys an optimal legal structure. The legal structure of the public firm suffers from a

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claims to working for a "thriving U.S. economy and expanded opportunity for all Americans through sound public policy." *About Us*, *supra* note 11.

> Business Roundtable exclusively represents chief executive officers (CEOs) of America's leading companies. These CEO members lead companies with 20 million employees and more than $9 trillion in annual revenues. . . .Through research and advocacy, Business Roundtable advocates policies to spur job creation, improve U.S. competitiveness and strengthen the economy.

Id.

133. RAMIREZ, *supra* note 53, at 49-50 (and authorities cited therein).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *See* Biplab Kumar Guru & Inder Sekhar Yadav, *Financial development and economic growth: panel evidence from BRICS*, 24 J. ECON. FIN. ADMIN. SCI. 113, 113 ("Overall, the evidence suggests that banking sector development and stock market development indicators are complementary to each other in stimulating economic growth."). According to the former Managing Director of the International Monetary Fund:

> [T]he advantages of sound financial markets are well known. These markets play a critical role in mobilizing savings and in allocating them to productive investment. Moreover, strong local markets can also provide a more stable source of financing for the public and the private sectors, insulating them to some extent against volatile global capital flows.

Rodrigo de Rato, *Economic Growth and Financial Market Development: A Strengthening Integration*, IMF (Aug. 22, 2007), https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp082207.

systemic inability to control agency costs that inhere to the separation of ownership from control.[140] Executive compensation generally escapes judicial review.[141] The successful efforts of corporate elites to free themselves from legal accountability through increasing political power exacerbated this reality. The most notable successes in this campaign include: (i) the essential abolition of the duty of care;[142] (ii) the defeat of initiatives to undo the managerial stranglehold on board nominations and hence directorships;[143] (iii) the dramatic contraction of accountability under the federal securities laws;[144] and (iv) the expansion of CEO power over the electioneering activities of the public firm.[145] These changes endowed CEOs with great autonomy over the public corporation and impeded the ability of the public corporation to achieve its legal purposes.[146] Predictably, CEOs used this expanded power to entrench

140. *E.g.*, Steven A. Ramirez, *Lessons from the Subprime Debacle: Stress Testing CEO Autonomy*, 54 ST. LOUIS U.L. J. 1 (2009).

> Excessive CEO autonomy played a central role in the subprime mortgage crisis that continues to grip the U.S. economy" because "corporate governance law in the United States permits CEOs of public firms to generate current income to enhance their own compensation without regard to risk. The cost of this excessive autonomy reaches into the tens of trillions of dollars, across the globe.

Id.

141. Mark J. Loewenstein, *Reflections on Executive Compensation and Modest Proposal for (Further) Reform,* 50 SMU L. REV. 201, 214 (1996) (stating that while some law suggests courts will enforce outer limits regarding compensation "in publicly-held corporations, in fact the courts just do not reach the merits of a claim of excessive compensation" because of difficult procedural hurdles).

142. DEL. CODE ANN., tit. 8, § 102(b)(7) (2009). Due to management's control over the proxy machinery of publicly traded firms they eagerly took advantage of the opportunity to insulate themselves from liability through an amendment of the articles of incorporation governing their firms. *See* Marc I. Steinberg, *The Evisceration of the Duty of Care*, 42 SW. L.J. 919, 927-28 (1988) ("An eradication of fiduciary duties ... would likely occur, however, if Delaware elects to amend its statute in order to incorporate the more lax provisions enacted by some states."). Thus, the vast majority of publicly traded firms used their domination of the proxy machinery to amend their articles of incorporation to eliminate liability for the breach of the duty of care.

143. *See* Bus. Roundtable v. Sec. & Exch. Comm'n, 647 F.3d 1144, 1146 (D.C. Cir. 2011) (holding 17 C.F.R. § 240.14a-11 invalid because allowing shareholders to nominate directors might distract management).

144. Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1084 (1999) ("The. . . 'reforms' of private securities litigation are a betrayal of. . .the federal securities laws and expose our financial system to risks that are not fully appreciated. A more reactionary cycle could hardly have been imagined by the promulgators of the federal securities laws in the early1930s."); Douglas M. Branson, *Running the Gauntlet: A Description of the Arduous, and Now Often Fatal, Journey for Plaintiffs in Federal Securities Law Actions*, 65 U. CIN. L. REV. 3, 6 (1996) ("In forty federal securities law decisions, the Court decided thirty-two cases for defendants and, in almost every one, significantly narrowed the reach of federal securities laws.").

145. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010). Not only do CEOs exercise near total control over political expenditures, firms need not disclose the use of shareholder wealth to their shareholders. Lucian A. Bebchuk, Robert J. Jackson, Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1, 2 (2020).

146. Prominent investors and economic experts concurred. *See, e.g.*, ALAN GREENSPAN, THE AGE OF TURBULENCE: ADVENTURES IN A NEW WORLD 424 (2007) ("[C]orporate governance moved from

themselves and to reap outsize compensation payments.[147]

One mechanism used to achieve these goals involved the exploitation of commonly known biases, such as affinity bias and homosocial reproduction.[148] By stacking the board of directors with their cultural and demographic clones, CEOs could garner greater compensation through the operation of these biases.[149] Implicit, and too often explicit, bias plays into the hands of CEOs playing the homosocial reproduction game.[150] However, these efforts robbed the public firm of the benefits of cultural diversity.[151] As such, the corporate sector suffered a plague of groupthink,

shareholder control to control by the CEO."); JOHN C. BOGLE, THE BATTLE FOR THE SOUL OF CAPITALISM 28 (2005) (positing that a "pathological mutation" occurred whereby managerial capitalism displaced shareholder capitalism).

147. Marc I. Steinberg & Matthew D. Bivona, *Disney Goes Goofy: Agency, Delegation, and Corporate Governance,* 60 HASTINGS L.J. 201, 231 (2008) (arguing that Delaware gives CEOs too much autonomy that is likely to diminish the effectiveness of independent directors, and suggesting that Delaware .will only jawbone directors rather than impose liability) Lisa M.Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors' Fiduciary Duty Through Legal Liability,* 42 HOUS. L. REV. 393, 451 (2005) ("Enron suggests that the costs of eliminating [directors'] liability completely and thereby allowing corporate malfeasance to go unchecked are simply unacceptable."); Joel Seligman, *Rethinking Private Securities Litigation*, 73 U. CIN. L. REV. 95, 114 (2004) (stating that lax state fiduciary duties contributed to a "dramatic increase in the ratio of the compensation of the corporate CEO to that of the average corporate blue collar employee" from 42 to 1 in 1980 to an estimated 475 to 1 in 2000).

148. Affinity bias involves the need to belong to a group or team and has been shown to be triggered by even trivial commonality, which then operates to accord more favorable treatment to those sharing some commonality. Homosocial reproduction refers to our inclination to favor those like ourselves. *See* RAMIREZ, *supra* note 53, at 60; Michael E. Murphy, *The Nominating Process for Corporate Boards of Directors: A Decision-Making Analysis,* 5 BERKELEY BUS. L.J. 131, 160 (2008) (demonstrating that membership in a group creates preference for that group and against other groups, even when groups are defined based upon arbitrary and trivial factors).

149. As I wrote in 2004:

> [I]n corporate America director elections resemble elections in Soviet Russia—there is only one candidate to vote for because generally only management solicits proxies and SEC rules do not require the inclusion of candidates running against management's nominees. Given this power, it would be natural for a CEO to select a board of directors comprised of the CEO's clones. Certainly this would be a formula that would encourage maximum, even excessive, pay and benefits for the CEO. Instead, CEOs do the next best thing—they select their cultural and demographic clones.

Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1591-92 (2004).

150. Commentators state:

> Humans perceive other people's behavior through filters that are socially conditioned. None of us sees the world through neutral, objective lenses. Instead, our minds classify individuals according to race, gender, age, and other socially salient categories with dizzying speed. . . .The Implicit Association Test (IAT) is one of the more well-known implicit measures found in social psychology and is designed to assess implicit bias, which refers to a preference for or against something that is outside of awareness. The IAT measures the association between categories such as old and young, black and white, female and male, and value attributes such as pleasant and unpleasant or good and bad.

Roger W. Reinsch, *Student Evaluations and Implicit Bias,* 45 J. COLL. & UNIV. L. 114, 117-18 (2020).

151. Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink,* 71 U. CIN. L. REV. 1233, 1306 (2003) ("[S]cholarship suggests that reform proposals should discourage groupthink by promoting more diversity on boards in terms of gender, race, class, ethnicity, age, national origin, sexual orientation,

herd behavior, unethical business practices, and manipulation of the audit and risk management functions.[152] Certainly, cultural diversity could create more shareholder value through enhanced creativity and innovation and the ability to achieve superior acclimation to key constituencies, including workers, consumers, regulators, and shareholders.[153] A further source of enhanced shareholder value would arise from superior ethicality and compliance which influence shareholder investment decisions.[154] The next section builds upon these key points to show how publicly traded firms, as presently structured under law, operate as an engine that propagates our racial hierarchy while delivering suboptimal financial performance and catastrophic losses arising from corporate governance failures.[155]

B. The Corporation: Engine of Racial Inequality

This Part illustrates that simple demographic facts will turn the public corporation into a powerful engine of racial inequality . In a nation where the most recent data shows that the Hispanic or Latino population is 18.7 percent of the total population, Asian Americans are six percent, African Americans are 12.4 percent, and multiracial persons are 10.2 percent, whites still disproportionately dominate the publicly traded corporation at all levels of leadership — CEOs, other C-Suite executives, and board directorships.[156] These positions represent the most powerful and lucrative positions within the publicly traded corporation.

and socio-economic background, as well as expertise and temperament.").

152. See Steven A. Ramirez, *Diversity and Ethics: Toward an Objective Business Compliance Functio*n, 49 LOY. U. CHI. L.J. 581, 602-609 (2018)

153. *Id.* at 609 ("Businesses that use cultural diversity to screen their business conduct within the framework of shareholder primacy will better acclimate themselves to all key constituencies and achieve objective ethical and compliance results.").

154. *Id.* ("Given the increased diversity of consumer, labor, and investor pools, this approach to encouraging extra-legal standards of conduct draws upon differences in ethical sensitivities to drive more rigorous ethical screening of business conduct.").

155. The Great Financial Crisis is only the most recent failure of corporate governance to shake the foundations of our economic system. Douglas Guerrero, *The Root of Corporate Evil*, 61 INTERNAL AUDITOR 37, 37 (2004) (stating that with regard to the corporate failures of 2001-2002 including the bankruptcy of Enron and WorldCom, "highly placed executives used their power. . , to achieve financial targets fraudulently, boost the stock price, and further enrich themselves via compensation schemes that rewarded those achievements"); M.P. Narayanan et al., *The Economic Impact of Backdating of Executive Stock Options*, 105 MICH. L. REV. 1597, 1601 (2007) (finding that backdated options involving managerial theft at forty-eight sampled companies resulted in approximately $500,000 in extra compensation for executives while costing shareholders at each company $389 million in market capitalization).

156. Nicholas Jones et al., *Improved Race and Ethnicity Measures Reveal U.S. Population Is Much More Multiracial*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html.

Take the most powerful figure within the public firm – the CEO.[157] Recently, an African American CEO stepped down from Merck, bringing the number of African American CEOs in the S&P 500 down to five – or one percent of all the S&P 500 CEOs.[158] "Among CEOs of S&P 500 companies, 11% are ethnic minorities. Of the total, 3% are Latino, 3% are Indian, 2% are Asian, 1% are Middle Eastern and 1% are multiracial."[159] Data from the Fortune 500 supports the data from the S&P 500: "almost 90% of the *Fortune* 500 CEOs are white males[,] . . . who make up about 35% of the population . . . ."[160] Moreover, progress in diversifying the corps of CEOs in America, in terms of race or ethnicity, has been close to zero since 2000.[161] Furthermore, CEOs are not just the most powerful figure within the public firm, they are also the most highly compensated.

The highest compensation among Fortune 500 CEOs amounted to $296.3 million.[162] In 2021, the Equilar/Associated Press study of total CEO compensation found that the "median pay for S&P 500 CEOs was $14.5 million in 2021—a 17.1% increase from the previous year."[163] The 2021 compensation numbers exceeded the 2020 record, which itself increased by five percent from the previous year, notwithstanding the business stress caused by the COVID pandemic.[164] In comparison, workers saw a pay increase of only 4.8 percent in 2021[165] and two percent

157. Brummer & Strine, *supra* note 5, at 15 ("CEOs are the most important single officers of corporations, and, in their management capacities, they are tasked with ensuring that the goals of the corporate board are pursued at lower levels of the firm.").

158. Jeff Green, *Black CEO Ranks Dwindle with Ken Frazier's Exit*, BLOOMBERG (Feb. 5, 2021), https://www.bloomberg.com/news/articles/2021-02-04/black-ceo-ranks-dwindle-with-ken-frazier-s-exit-from-merck ("The number of Black CEOs in the S&P 500 will rise to six when Roz Brewer takes over as Walgreens Boots Alliance Inc. on March 15 but then fall again to five, assuming no other changes, when Frazier steps down after a decade in the job.").

159. Te-Ping Chen, *Why Are There Still So Few Black CEOs?*, WALL ST. J. (Sept. 28, 2020), https://www.wsj.com/articles/why-are-there-still-so-few-black-ceos-11601302601.

160. Richard L. Zweigenhaft, Diversity Among Fortune 500 CEOs from 2000 to 2020: White Women, Hi-Tech South Asians, and Economically Privileged Multilingual Immigrants from Around the World, WHO RULES AMERICA? (Jan. 2021), https://whorulesamerica.ucsc.edu/power/diversity_update_2020.html.

161. *Id.* "White men. . . held 96.4% of the Fortune 500 CEO positions in 2000, and they held 85.8% in 2020"; however, "since most of the seats lost by white men were lost to white women, and white women make up 6.8% of those who are now CEOs, whites still make up 92.6% of the Fortune 500 CEOs." *Id.*

162. *Id.*

163. Amit Batish, *Associated Press CEO Pay Study: S&P 500 CEOs Saw Record-High Compensation in 2021*, EQUILAR (May 26, 2022), https://www.equilar.com/reports/92-equilar-associated-press-ceo-pay-study-2022.

164. Dan Marcec, *Associated Press CEO Pay Study: Record Year for S&P 500 Leads to Record Pay for Top Executives*, EQUILAR (May 28, 2021), https://www.equilar.com/reports/83-equilar-associated-press-ceo-pay-study-2021. CEO compensation also soared unabated during the financial crisis. Gretchen Morgenson, *That Unstoppable Climb in C.E.O. Pay,* N.Y. TIMES, June 30, 2013, at BU1; Gary Strauss et al., *$100 Million Club*, USA TODAY, Apr. 4, 2014, at 1A ("Median CEO compensation . . . surged 13% to $10.5 million in 2013.").

165. Batish, *supra* note 163.

in 2020.[166] This drove the ratio of CEO compensation to average worker compensation in the same firms to surge to 186 to one.[167] Economists take a different road to the same conclusion: combing through tax returns, they find soaring income for the top 0.01 percent of the income distribution.[168] Further, they determined that corporate elites comprise a disproportionate degree of that rarified group.[169] Ever increasing CEO compensation reflects CEO power,[170] as well as the principle that courts simply will not interfere with the board business judgment when it comes to compensation.[171]

Of course, CEO pay must be approved by the board of directors. But the board of directors similarly operates to entrench whites over people of color at the legal apex of the corporation. Incumbent managers largely select members of the board of the public corporation under the federal proxy rules because it generally is cost-prohibitive for a shareholder to challenge management through a proxy contest.[172] The advent of independent nominating committees has failed to curtail CEO domination of the director nomination process.[173] Not surprisingly, this renders the

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166. Marcec, *supra* note 164.

167. Batish, *supra* note 163.

168. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 302 (Arthur Goldhammer trans., 2014) ("Recent research, based on matching declared income on tax returns with corporate compensation records, allows me to state that the vast majority (60 to 70 percent, depending on what definitions one chooses) of the top 0.1 percent of the income hierarchy in 2000-2010 consist[ed] of top managers.").

169. *Id.*

170. "Excessive levels of CEO compensation and, until recently, the role of the CEO as the chairman of the board, reflect the significant control this one officer has over corporate decision-making." Megan Wischmeier Shaner, *Officer Accountability*, 32 GA. ST. L. REV. 357, 367-68 (2016) CEO pay only goes up. *See* Lucian A. Taylor, *CEO Wage Dynamics: Estimates from a Learning Model*, 108 J. FIN. ECON. 79, 96 (2013) (showing that CEO compensation is "downwardly rigid"); *see also* Marc van Essen et al., *Assessing Managerial Power Theory: A Meta-Analytic Approach to Understanding the Determinants of CEO Compensation*, 41 J. MGMT. 164 (2015) (finding that executives with influence over their pay receive higher compensation than those whose boards exert more power over the pay process).

171. *See* AM. L. INST., PRINCIPLES OF CORPORATE GOVERNANCE § 5.03 (1994) (requiring a violation of the business judgement rule by directors approving compensation). Immunity shields, such as those authorized under DEL. CODE tit. 8, § 102(b)(7), which limit liability of directors to bad faith, render challenges to compensation decisions in public firms virtually impossible. *See* James D. Cox & Randall S. Thomas, *Corporate Darwinism: Disciplining Managers in a World with Weak Shareholder Litigation*, 95 N.C. L. REV. 19, 27 (2016) ("It unimaginable that such a claim can be successful [regarding] executive compensation packages [that] arise from a multistep process [guided by counsel] that involves external consultants, human resource professionals, and a deliberative process of at least a committee of the board.").

172. *See* Ramirez, *supra* note 149, at 1591-92 ("[I]n corporate America director elections resemble elections in Soviet Russia—there is only one candidate to vote for because generally only management solicits proxies and SEC rules do not require the inclusion of candidates running against management's nominees.") (citing 17 C.F.R. § 240.14a-8(i)(8) (2021) (excluding shareholder proposals relating to board elections)).

173. Danielle M. Kinchen, *Look to Your Left, Look to Your Right: Why the SEC Should Reserve Seats at the Boardroom Table for Shareholder Nominees*, 20 U.C. DAVIS BUS. L.J. 1, 15-19 (2019) (citing George W. Dent, Jr., *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35

boardroom a key locus of crony capitalism.[174] Naturally, CEOs want to stack the board with their clones (i.e. other CEOs)[175] and those with similar demographic backgrounds to them.[176] Such homosocial reproduction empowers CEOs to extract suboptimal and excessive compensation as a result of affinity bias.[177] Thus, CEOs continue to hold the power and face incentives to stack the board of directors with their cultural and demographic clones.[178]

As such, it should come as no surprise that the demographic characteristics of the board mirror the demographic characteristics of the CEOs. Specifically, white males control eighty-five percent of all public firm directorships while Latinos hold 2.7 percent and African Americans held 6.2 percent.[179] In larger firms, the share of directorships held by whites drops to seventy-eight.[180] This demographic similarity did not happen coincidentally – the outcome arose from flawed laws and regulations.

The final power center of the publicly traded corporation is the C-suite. However, the influence of the CEO once again looms large:

> CEOs hire other executives and staff, implement corporate policy and board instructions, and serve as the primary interface between the broader

DEL. J. CORP. L. 97, 143-44 (2010)); Murphy, *supra* note 148, at 148-50 (collecting authorities suggesting essential role of CEO in director selection even with independent nominating committee).

174. Ivan E. Brick, Oded Palmon & John K. Wald, *CEO Compensation, Director Compensation, and Firm Performance: Evidence of Cronyism?,* 12 J. CORP. FIN. 403, 421-22 (2006) (finding a positive relationship between CEO and director compensation, consistent with cronyism or mutual back scratching between the CEO and the directors)

175. Longstanding practice insists that board members hold CEO experience. Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 875 (1991) (finding that "[sixty-three] percent of outside directors of public companies are chief executive officers of other public companies").

176. *See* Davina Zietsman & Kurt April, *Homosocial Reproduction: The Lived Workplace Experiences of Diverse Millennial Women – Part II*, 24 EFFECTIVE EXEC. 39, 39 (2021) (finding that in South Africa many women resigned due to the frustrations of homosocial reproduction); Kathryn J. Evans & Jayne F. Maley, *Barriers to Women in Senior Leadership: How Unconscious Bias Is Holding Back Australia's Economy*, 59 ASIA PAC. J. HUM. RES. 204 (2020) (examining the reasons that Australian corporations are not progressing towards gender parity in senior leadership, despite abundant evidence regarding economic benefits, and finding that unconscious bias impedes women ascending to leadership); Antonio L. García-Izquierdo et al., *Gender Diversity on Boards of Directors and Remuneration Committees: The Influence on Listed Companies in Spain,* 9 FRONT. PSYCH. 1351 (2018) ("Using a large sample of Spanish firms listed between 2011 and 2015, our study reveals that firms with female representation on their remuneration committee, display lower levels of CEO pay and CEO pay growth. We also obtain evidence that this effect is attributable to the proprietary female directors.").

177. LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 46 (2005) (stating that "almost all cases since 1900 have refused to overturn compensation decisions made by the boards of publicly traded firms.").

178. Ramirez, *supra* note 149, at 1592.

179. Amber Gauthier, *Tracking Ethnicity on U.S. Boards*, EQUILAR (May 5, 2022), https://www.equilar.com/reports/91-equilar-ethnicity-tracker-2022.

180. *Id.*

> public and the corporation. CEOs are also primarily responsible for identifying how resources of the company are directed and for what purpose. They may also be responsible for implementing recruiting, retention, and promotion strategies at the firm and ensuring a workplace culture commensurate with the objectives of the company.[181]

Hence, the control of the CEO is less constrained than director selection. Latinos make-up only 4.3 percent of this "rarified" group and African Americans make-up only 3.2 percent – significantly lower than the board seats held by individuals from such backgrounds.[182] Shareholders typically hold little power in the public firm unless they can exercise sufficient voting power to place representatives on the Board of Directors or also serve as CEOs.[183]

By 2023, the public corporation clearly claimed a central role in America's inequality crisis and reproduction of its racial hierarchy. The most lucrative and powerful players in corporate America constitute the last bastion of white supremacy in corporate America. The next part of this article proposes important changes.

III. A VISION OF THE ANTIRACIST PUBLIC CORPORATION

Americans want action to relieve the oppression inherent in the racial hierarchy discussed above.[184] The number of white Americans who think more needs to be done to secure equal rights for non-white Americans seems destined to increase in light of demographic trends that presage a more diverse America in future years.[185] Younger Americans in particular

181. Brummer & Strine, *supra* note 5, at 15.

182. *Id.* at 16.

183. DEL. GEN. CORP. L. § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors.").

184. Recent polls demonstrate emerging political pressure for reform:

> A majority of Americans believe more needs to be done to eliminate racism. In a poll last year, 53 percent of whites said more changes needed to be made to give blacks equal rights with whites. That was up from just 39 percent a year earlier. Among Hispanics, 70 percent say more change is needed up from 54 percent a year earlier. Eighty-six percent of blacks agreed with that assessment.

Meta-Analysis of Recent Polling Data on the Impact of Racism on American Society Today, W.K. KELLOGG FOUND. 2-3 (2016), https://search.issuelab.org/resource/meta-analysis-of-recent-polling-data-on-the-impact-of-racism-on-american-society-today.html [https://perma.cc/2EFS-4FMD]. A more recent survey found that 61 percent of all Americans believe more is needed to achieve racial equality. *The Partisan Divide on Political Values Grows Even Stronger*, PEW RSCH. CTR. (Oct. 5, 2017), http://www.people-press.org/2017/10/05/4-race-immigration-and-discrimination/ [https://perma.cc/MCK2-G3GH].

185. William H. Frey, All Recent US Population Growth Comes from People of Color, New Census Estimates Show,

BROOKINGS INST. (June 23, 2021), https://www.brookings.edu/research/all-recent-us-population-growth-comes-from-people-of-color-new-census-estimates-show/ ("These new estimates show annual population changes by race and ethnicity between July 2010 and July 2020. They indicate that, for each year since appear likely to support more aggressive action to relieve the national pain of racism in the U.S.[186] Increasing racial diversity in the U.S. will militate in favor of corporate efforts to assure diversity, equity and inclusion within corporations despite some resistance and setbacks in the past.[187] These fundamental facts will challenge all public firms (and beyond) to manage diversity as proactively and professionally as possible.

The fundamental duality of the corporation as a key economic and political institution means it poses great threats and great promise in advancing human development.[188] The creation, operation, and success of the public corporation to achieve its putative purpose of shareholder wealth maximization involves an extensive and complex legal infrastructure – all undertaken as a matter of public law.[189] Furthermore, the publicly traded corporation generally receives vast public subsidies in a myriad of ways, ranging from monetary policy and bailouts to stabilize the economy and capital flows to government spending to countless incentives to engage in specific economic activities.[190] In fact, while the public firm plays a key role in the exploitation and commercialization of new technologies and innovations, government funded research and development plays a foundational role in virtually all breakthrough technologies.[191] Government provides the legal and technological

2016, the nation's white population dropped in size. Thus, all of U.S. population growth from 2016 to 2020 comes from gains in people of color.").

186. Nick Davis, *Millennials Are More Likely To Oppose Racism*, DATA FOR PROGRESS (Jan. 29, 2019), https://www.dataforprogress.org/blog/2019/1/29/unpacking-millennials-racial-attitudes (concluding that white Millennials "are uniformly more open to the realities of institutional discrimination than their older peers" and "such opinions could portend a nontrivial pivot among Millennials leftward on matters related to [racial] justice").

187. *See* Anselm A. Beach & Albert H. Segars, *How a Values-Based Approach Advances DEI*, MITSLOAN MGMT. REV. (June 22, 2022), https://sloanreview.mit.edu/article/how-a-values-based-approach-advances-dei/.

> [B]usiness leaders see diversity, equity, and inclusion as a way to revitalize their organizations. They understand that diversity drives innovation, and they see the potential for engaging the entire workforce in transforming their companies. But they also find that the results of their DEI efforts sometimes fall short of expectations.

Id.; Dagny Dukach, *DEI Gets Real*, HARV. BUS. REV. (Jan.-Feb. 2022), https://hbr.org/2022/01/dei-gets-real (noting that while cynicism about commitment to corporate DEI initiatives may be justified genuine pressure for more equitable workplaces is not likely to fade).

188. "If concentrated economic power spawns distorted [law and] stunted human development, then the largely unencumbered power of a small number of CEOs. . . at the apex of the greatest aggregations of capital in history (U.S. public corporations) constitutes a potentially lethal threat to the continued viability of capitalism." RAMIREZ, *supra* note 53, at 73.

189. "Legal infrastructure created the corporation and it qualifies as one of the most economically powerful legal innovations in history." RAMIREZ, *supra* note 53, at 47.

190. *Id.* at xi-xvii (recounting the massive bailouts of financial markets and the economy in 2008-2009).

191. MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE 1-2 (2015) ("From the internet to biotech and even shale gas, the U.S. state has been the key driver of innovation-led growth--willing to invest in the most uncertain phase of the innovation cycle and let business hop on for the easier ride down

platform that allows business to internalize new sources of profit.

As such, scholars increasingly recognize that publicly traded corporations should include a public purpose for all their publicly granted powers and privileges.[192] Others suggest an inevitability to corporate social responsibility.[193] Enlisting the corporation in the battle to disrupt the propagation of our nation's racial hierarchy within limits of long-term shareholder interests would vindicate shareholder primacy, limit CEO autonomy, and serve an important social purpose.[194] Indeed, given the history of race in the U.S., all key institutions must play an antiracist role and assist in leading the nation to a post-racial reality that would imply a more prosperous and socially cohesive country.[195] This part of the article articulates two mechanisms by which this goal can be accomplished.[196] Certainly, other scholars may develop other ways to pave a path toward business success by unlocking the potential of disadvantaged communities.

A. The Mandatory Chief Diversity Officer & Diversity Committee

After the accounting scandals of 2001-2002 (beginning with the bankruptcy of Enron and ending with the bankruptcy of WorldCom), the

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the way.").

192. *See* Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137, 139-41 (2011) (broadening meaning of "public" in connection with corporate governance and social responsibility).

193. Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, (2018).

> The emergence and evolution of contemporary corporate social activism is one of the most consequential developments for businesses, law, and society, and will remain so for years to come. The conflicts and collaborations between and amongst businesses and activists will present some of the most fruitful opportunities and dangerous obstacles for meaningful social progress in our time.

Id. My goal is to channel corporate social activism under law.

194. This approach squares a long running corporate-purpose debate. *See* Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) ("It is the thesis of this essay that all powers granted to a corporation or to the management of a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears."); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1365 (1932) (arguing that "corporations exist for the sole purpose of making profits for their stockholders"); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (arguing that the corporation "has a social service as well as a profit-making function"). More specifically, I envision a series of mechanisms that profitably channel corporate businesses into social service--the mitigation of the costs of race in America.

195. *See* KENDI, *supra* note 40, at 237-38 ("Saturate the body politic with . . . antiracist policies that shrink the tumors of racial inequity.").

196. Of course, corporations hold longstanding power to make charitable contributions within reason, and nothing in this article addresses this power insofar as racial injustice and oppression are concerned. *See, e.g.*, A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953) (holding charitable contributions within the powers of management).

Sarbanes-Oxley Act[197] mandated that every public firm empower an independent audit committee to supervise the firm's auditors.[198] Shortly thereafter, in the wake of the Great Financial Crisis of 2008, the Dodd-Frank Act[199] required certain large financial institutions to create an independent risk committee to supervise a Chief Risk Officer.[200] In both instances, Congress deemed CEO autonomy inappropriate for that relevant task in light of manifest manipulation of the audit[201] and risk management function.[202] Moreover, the CEO boasted no inherent advantage in terms of expertise over those functions.[203] Thus, Congress curtailed CEO autonomy over such critical but non-operational functions.

Here, with respect to the ability of the publicly traded corporation to help break down the nation's racial hierarchy while serving shareholder primacy, the advent of the Chief Diversity Officer ("CDO") can prove highly beneficial to all public firms and their investors.[204] The CDO emerged at around the turn of the millennium most markedly in the higher education sector as institutions began to seek greater legitimacy in the eyes of key constituents, such as typically younger and more diverse students.[205] Most C-suite occupants simply do not hold specialized knowledge on issues relating to diversity management and typically hail from non-diverse backgrounds;[206] hence, the need for a specialized officer to focus on how diversity management can further the firm's institutional mission.[207] Diversity management certainly lies outside of

197. *See* Sarbanes-Oxley Act, Pub. L. No. 107-204, §§ 802-07, 116 Stat. 745 (2002).

198. 15 U.S.C. § 78j-1.

199. *See* Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

200. 12 U.S.C. § 5365(h); 12 CFR § 252.22 (implementing Dodd-Frank as amended).

201. *See generally* Steven A. Ramirez, *Fear and Social Capitalism: The Law and Macroeconomics of Investor Confidence*, 42 WASHBURN L.J. 31 (2003) (tracing the audit manipulation leading up to the Sarbanes-Oxley Act).

202. *See generally* Betty Simkins & Steven A. Ramirez, *Enterprise-Wide Risk Management and Corporate Governance*, 39 LOY. U. CHI. L.J. 571, 577 (2008) (tracing risk management manipulation leading up to Great Financial Crisis).

203. Steven A. Ramirez, *Diversity and Ethics: Toward an Objective Business Compliance Function*, 49 LOY. U. CHI. L.J. 581, 589 (2018) (arguing in favor of independence of functions where CEOs lack specific expertise and institutional incentives to maximize short term compensation at the expense of long term financial soundness and performance, such as legal, compliance, and ethics functions) (citing Steven A. Ramirez, *Legal Risk Post-SOX and the Subprime Fiasco: Back to the Drawing Board*, *in* ENTERPRISE RISK MANAGEMENT 351-67 (John Fraser & Betty J. Simkins eds., 2010) (same with respect to legal and compliance)).

204. Kate Marquess Swift, *Captains of Diversity: Officers at Kodak, Xerox Take on the Needs of Clients and Workers from Different Cultures,* AM. BAR ASS'N J., 76 (July 2003) (noting that a key role of the CDO involves recruiting and retaining employees and "[t]he CDO's job is also to send a message to customers that the company is responsive to the needs of the community at large").

205. *See* DAMON A. WILLIAMS & KATRINA WADE GOLDEN, THE CHIEF DIVERSITY OFFICER: STRATEGY STRUCTURE, AND CHANGE MANAGEMENT 29 (2013).

206. *See supra* notes 181-183.

207. *Id.*

any special expertise of the CEO.[208] Ultimately, it took the murder of George Floyd murder and its aftermath throughout the summer of 2020 for many firms to see the wisdom in appointing a CDO.[209]

According to the *Harvard Business Review*, firms that take diversity seriously give the CDO sufficient institutional support to assure the holder of that office can get the job done.[210] Furthermore, many aspects of diversity management — building pipelines of talent, targeted community investment, ethics and compliance management — do not appeal to short-term minded managers focusing on their own compensation gains.[211] As such, the CEO holds no institutional advantage on the issue of diversity management.[212] Indeed, given the demographic realities of the C-suite, it is obvious that diversity management within public firms could use more diversity.[213] Diversity management is becoming a science, in that more

208. In fact, senior executives' lack of support for the Chief Diversity Officer is frequently cited as a reason for high turnover in that position. Chip Cutter & Lauren Weber, *Demand for Chief Diversity Officers Is High. So Is Turnover.*, WALL ST. J. (July 13, 2020), https://www.wsj.com/articles/demand-for-chief-diversity-officers-is-high-so-is-turnover-11594638000 ("The role has long been marked by high turnover, with many in the position, known as CDO, leaving over a lack of resources, unrealistic expectations and inadequate support from senior executives, according to current and former CDOs."). CEOs do not face any particular qualification for service, such as those needed to practice law, auditing, medicine, or taxi drivers.

209. Mita Mallick, *Do You Know Why Your Company Needs a Chief Diversity Officer?*, HARV. BUS. REV. (Sept. 11, 2020), https://hbr.org/2020/09/do-you-know-why-your-company-needs-a-chief-diversity-officer.

> With the murder of George Floyd on May 25, 2020 . . . leaders in the United States and around the world have finally begun to recognize the racial inequities embedded deep in the systems in which we operate each day: neighborhoods, schools, stores, banks, courts, housing markets — and workplaces.

Id.

210. According to the Harvard Business Review:

> The CDO should report directly to the CEO or to the head of HR with a dotted line to the CEO. Either way, a close partnership with HR, legal, and corporate communications, with full access to and support from the entire C-Suite, will be critical. Your new hire must have a seat at the senior leadership table if you want to see meaningful change. You can obtain buy-in by asking those executives to be part of the interview and selection process.

Id.

211. Diversity on the board does not enhance CEO pay. *See, e.g.*, Ramzi Benkraiem, *Board Independence, Gender Diversity and CEO Compensation*, 17 CORP. GOV. 845 (2017) (finding that independent female directors led to lower CEO pay); Martin Bugeja et al., *The Association Between Gender-Diverse Compensation Committees and CEO Compensation*, 139 J. BUS. ETHICS 375 (2016) (finding diverse compensation committees led to lower CEO pay and enhanced financial performance).

212. Delaware allows anyone to serve as a director or officer of a publicly traded corporation, as do virtually all jurisdictions. *See* DEL. GEN. CORP. L. § 141 ("The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person.").

213. Currently, about 52 percent of S&P 500 companies have CDOs. Tina Shah Paikeday, *Positioning Your Chief Diversity Officer For Top Performance*, RUSSELLREYNOLDS.COM (June 01, 2021), https://www.russellreynolds.com/en/insights/articles/positioning-chief-diversity-officer-top-performance, ("Our recent analysis of the S&P 500 finds that the overall proportion of companies with a chief diversity officer has grown only slightly from 47% to 52% since our 2018 analysis, in part because turnover remains high.").

and more empirical learning about diversity management emerges daily.[214] There is a compelling need now to customize diversity management plans on a firm-by-firm basis.[215] Each firm will rationally seek to use diversity to acclimate itself optimally to all of its key constituencies – labor pools, consumers, regulators and capital providers.[216] Those constituencies differ within firm locales as well as between firms.

Diversity enhances cognition, performance, and innovation, as discussed above. Each firm, however, presents unique cultural and demographic realities.[217] Diversity recently emerged as a professional competency.[218] A succinct job description of a Chief Diversity Officer reads like this:

> The primary role of the Chief Diversity Officer (CDO) is to ensure that the

214. *E.g.*, Pochara Arayakarnkul et al., *Board Gender Diversity, Corporate Social Commitment and Sustainability*, 29 CORP. SOC. RESP. ENV'T MGMT. 1706, 1716 (2022) (analyzing board characteristics of US public firms and finding board gender diversity positively associated with firm social commitment to human rights, product responsibility, and their community and workforce, showing female directors' contribution to firm sustainability); Miao-Yu Hsu, *Board Diversity, Firm Performance, Dividend Payout and Corporate Social Responsibility*, 14 INTER. REV. ACCT. BANKING & FIN. 1 (2022) (assessing listed non-financial companies in Taiwan and finding that higher diversity on board—including gender and ethnic diversity—led to superior financial performance and firm value); Roberta Provasi & Murad Harasheh, *Gender Diversity and Corporate Performance: Emphasis on Sustainability Performance*, 28 CORP. SOC. RESP. ENV'T MGMT. 127 (2021) (finding that empirically more females on corporate boards after Italy imposed gender quotas in 2011 had no significant effect on the financial performance but enhanced corporate sustainability and ethicality); Ahmed A. Sarhan et al., *Board Diversity, Corporate Governance, Corporate Performance, and Executive Pay*, 24 INT. J. FIN. ECON. 761 (2019) (assessing 600 firm-year observations five Middle Eastern countries over the 2009-2014 period and finding that board diversity—defined by gender and nationality—positively affected financial performance, particularly in better governed firms, and enhanced pay-for-performance sensitivity but not executive pay).

215. *See* Lin, *supra* note 191, at 1601 (noting complexity facing each business regarding its social activism profile).

216. In the past, I wrote that diversity within the ethics and compliance function operated to acclimate the firm to its key constituencies to the extent of differential cultural perspectives regarding the substantive content of ethicality. This article extends this point to all functions of the firm including marketing, management, investor relations, government relations and community relations. *See* Ramirez, *supra* note 201, at 588.

217. *See* David Pedulla, *Diversity and Inclusion Efforts that Really Work*, HARV. BUS. REV. (Mar. 12, 2020), https://hbr.org/2020/05/diversity-and-inclusion-efforts-that-really-work (articulating best practices that my differ from organization to organization).

218. According to Academy to Innovate HR (AIHR):

> [C]ompanies with higher workforce diversity tend to financially outperform less diverse competitors. To reap these benefits, organizations need qualified D&I professionals to help them advance their D&I initiatives and apply timely interventions. So it's no wonder that D&I roles have become highly in demand in the past few years. D&I jobs in EMEA have grown 1.65 times faster than any other HR jobs recently. Global LinkedIn Data shows that the number of people globally with the Head of Diversity titles has increased by 107% between 2015 and 2020.

Simona Iancu, *8 Best Diversity & Inclusion Certifications of 2022,* ACAD. TO INNOVATE HUM. RES., https://www.aihr.com/blog/best-diversity-and-inclusion-certifications/ (last visited Sept. 22, 2022) (rating professional certifications available in DEI).

> organization's culture values DEI. The CDO is tasked with being accountable for compliance, advocacy, and education of the company. [They use] interpersonal skills to promote collaboration among multiple business units. . . . The CDO guarantees that strategic goals, company policies, and laws surrounding DEI are indeed being followed and carried out. If they are not being carried out, then [they] create[] an action plan to change it. Along with these tasks, the CDO serves as a resource for leadership, employees, and representative for the community. [Additionally], the CDO must provide evidence-based insights into social issues and communicate the impact of those issues to a broad audience in a language that is understood while inspiring a vision for others to act upon.[219]

In the words of McKinsey & Co.: "Companies can [also] confront and fix wage gaps, root out bias in the workplace, . . . and invest in neglected communities. These initiatives [would operate to realize] . . . a more dynamic future and . . . the full potential of a massively underutilized hey]source of talent, to the benefit of all Americans."[220] Obviously, this set of tasks involves complexity and professionalism.

A CDO cannot succeed without manifest organizational support. Moreover, CEOs will not always provide support for long-term initiatives due to the institutional arrangements now in place to bolster CEO autonomy and compensation, as discussed above. CEOs may even succumb to temptation to give only lip service to diversity issues.[221] All of this suggests some level of independence for the diversity management function, akin to that enjoyed by Chief Risk Officers under Dodd-Frank, above. An objective balance of all of the above considerations militates in favor of a disclose or explain approach, at least as an initial step.

More specifically, the SEC or Congress should require all public companies to disclose whether they created an independent diversity management function whereby a CDO reports, dually, to a CEO and an independent Diversity Committee of the Board, or explain why not to their shareholders and the public.[222] The independent Diversity Committee of the Board can also operate to monitor board nominations and suggest diverse candidates, assure that the CEO's statements on diversity align with corporate political activities, and auditall senior executive officers to assure incentives to exploit diversity opportunities and disincentives to refrain from conduct contrary to the firm's publicly

219. Maria Minor, *Here's The Bottom Line Reason Why Companies Need A Chief Diversity Officer*, FORBES (May 3, 2021), https://www.forbes.com/sites/mariaminor/2021/05/03/heres-the-bottom-line-reason-why-companies-need-a-chief-diversity-officer/?sh=3cfc50987bc3.

220. *Supra* note 24.

221. *Supra* note 15.

222. This mimics the approach of the Sarbanes-Oxley Act with respect to the audit function. *Supra* notes 197-199

stated diversity policies are clearly articulated and enforced. This proposal should assure that the publicly traded corporation can fully exploit all the opportunities implicit in well-managed diversity while avoiding all the financial hazards of mismanaging diversity.[223]

B. Tax Credits for Building Talent Pipelines, New Markets, Capitalists & Goodwill

Race operated for decades to impoverish the nation's most disadvantaged communities. At the same time, the publicly traded corporation accessed some of the lowest cost capital in the world. Thus, the publicly traded corporation represents the logical source for the recapitalization of America's most disadvantaged communities. These communities hold powerful perspectives outside of the usual channels for homosocial reproduction.[224] Further, the most disadvantaged communities axiomatically offer the greatest potential payoff from recapitalization.[225] The details of such an arrangement could easily result in a separate law review article beyond this, or even a full book; nevertheless, this article offers broad features that would enlist the corporation through tax benefits resulting in near-zero government expenditure while crowding-in private capital[226] and expertise--essentially using a public-private partnership to recapitalize the most diverse and impoverished zip codes in America.[227]

Firms featuring an independent CDO and an independent Diversity Committee of the Board would enjoy enhanced governance capabilities to acclimate the public firm to their specific labor, consumer and investor constituencies to optimize the firm's operating environment for profits.[228]

223. The financial hazards include litigation and public relations catastrophes. Ramirez, *supra* note 122, at 108-10 (recounting the plight of Texaco arising from diversity mismanagement).

224. *Supra* notes 117-126.

225. Steven A. Ramirez, *Social Justice and Capitalism: An Assessment of the Teachings of Pope Francis from a Law and Macroeconomics Perspective*, 40 SEATTLE U. L. REV. 1229, 1234 (2017).

226. The community investment program proposed herein would overlap with other federal, state and local programs, such as the recently created Qualified Opportunity Zones program created under the Tax Cuts and Jobs Act. *See generally* Hale E. Sheppard, *Opportunity Zones: Tax Benefits, Criticisms, and Early IRS Enforcement*, CORP. TAX'N (Sept./Oct. 2022), https://www.chamberlainlaw.com/assets/htmldocuments/Opportunity%20Zones%20-%20tax%20benefits%20criticisms%20early%20IRS%20enforcement.pdf.

227. There are nearly 42,000 Zip Codes in the USA and their creation focused on mail delivery not any political gerrymandering. It would not pose much challenge to locate the most disadvantaged Zip Codes based upon an index of disadvantages, backed by empirical evidence as to weighting, that included infant mortality, childhood poverty, incarceration rates, and educational funding deficits. *Postal Facts, 41,683 ZIP Codes*, U.S. POSTAL SERV., https://facts.usps.com/42000-zip-codes/ (last visited Feb. 28, 2023). The definition of Qualified Opportunity Zones proved controversial. *See* Sheppard, *supra* note 224, at 12.

228. *See* Ramirez, *supra* note 152, at 609.

As such, they should qualify for targeted tax credits for investments undertaken for specified projects in specified geographic zones.[229] These funds could come from a partial rollback of the corporate tax cut in the Tax Cuts and Jobs Act of 2017, which failed to produce the macroeconomic benefits promised.[230] Instead, firms used the tax cuts for share buybacks, which fueled higher CEO pay.[231] In other words, the Act cost $1.5 trillion and produced none of the promised benefits.[232] Consequently, this effort would not lead to additional federal expense in the short term nor materially hinder corporate performance, although it would produce benefits in the long term.

Prior efforts to enlist the public firm into prosocial economic activity– such as job creation and investment–failed to account for corporate governance flaws and realities and relied too much on failed "trickle down" propaganda. For example, the Tax Cuts and Jobs Act of 2017 greatly and predictably[233] exacerbated economic inequality in the United States.[234] The putative policy goal of the Act deluded the body politic into thinking it would spur jobs and investment.[235] Instead, the Act led to

229. The Tax Cuts and Jobs Act included a similar program, creating Qualified Opportunity Zones. *See generally* Sheppard, *supra* note 224.

230. According to commentators:

> TCJA proponents, generally Republicans, claimed that its $1.5 trillion of tax cuts would result in significant economic benefits. In particular, TCJA supporters believed that the tax benefits afforded U.S. corporations, most notably the reduction in rate from 35 percent to 21 percent, would incentivize corporations to use their additional after-tax cash in ways generally beneficial to the U.S. economy. Predicted indicia of these salutary effects included increases in the rate growth of gross domestic product, increased national capital stock, and significant increases to workers' wages.

Cohen & Viswanathan, *supra* note 16, at 2.

231. *Id.* at 2 ("[T]he anticipated economic benefits of the TCJA due to its changes to effective corporate tax rate have yet to be observed. Indeed, the reduced effective corporate tax rates might promote certain less desirable corporate behaviors, such as increased CEO compensation and increased numbers of stock shares repurchased.").

232. *Id.*

233. Rupert Neate, *Trump's Tax Plan: Massive Cuts for the 1% Will Usher 'Era of Dynastic Wealth'*, GUARDIAN (Nov. 16, 2016), https://www.theguardian.com/us-news/2016/nov/23/trump-tax-plan-cuts-wealthy-low-income-inequality (quoting tax experts for the proposition that "America's millionaire and billionaire class will win big at the expense of struggling low- and middle-income people, who turned out in large numbers to help the real estate billionaire win the election.") (citing LILY L. BATCHELDER, TAX POL'Y CTR., FAMILIES FACING TAX INCREASES UNDER TRUMP'S TAX PLAN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842802).

234. Phyllis Taite, *May the Odds Be Ever in Your Favor: How the Tax Cuts and Jobs Act Fortified the Great Wealth Divide*, 48 PEPP. L. REV. 1023, (2021) ("America's growing inequalities were further facilitated through the Tax Cuts and Jobs Act (TCJA). The TCJA has contributed to disparities, and America's version of dystopia, by disproportionally benefitting the wealthy.").

235. According to one think tank specializing in economic justice:

> In selling the large corporate tax cut to Congress and a skeptical American public, the Trump administration claimed that corporate tax cuts would ultimately translate into higher wages for workers. The tax cuts would trickle down to workers through a multistep process. First, slashing

massive stock buybacks[236] and accompanying gains in CEO compensation.[237] The Act cut the corporate tax rate from thirty-five percent to twenty-one percent, causing a massive increase in the U.S. government debt; that debt directly funded stock buybacks to enhance CEO compensation.[238] This all adds up to the Tax Cut and Jobs Act benefitting white people over people of color.[239]

In contrast, the disadvantaged community investment program proposed herein uses a relatively well-tested model of corporate governance reform – the use of independent experts to manage non-core functions – to assure that government funding only subsidizes investments and job creation as advertised.[240] Indeed, tax credits would only become available upon proof of approved expenditures in approved locales.[241] Moreover, the governance reforms and associated investments

> the corporate tax rate would increase corporations' after-tax returns on investment, inducing them to massively boost spending on investments such as factories, equipment, and research and development. This investment boom would give the average worker more and better capital to work with, substantially increasing the overall productivity of U.S. workers. In other words, they would be able to produce more goods and services with every hour worked. And finally, U.S. workers would capture the benefits of their increased productivity by successfully bargaining for higher wages.

Galen Hendricks et al., *Trump's Corporate Tax Cut Is Not Trickling Down*, CTR. FOR AM. PROGRESS (Sept. 26, 2019), https://www.americanprogress.org/article/trumps-corporate-tax-cut-not-trickling/.

236. William Lazonick et al., *Why Stock Buybacks Are Dangerous for the Economy*, HARV. BUS. REV. (Jan. 2020), https://hbr.org/2020/01/why-stock-buybacks-are-dangerous-for-the-economy ("In 2018 alone, with corporate profits bolstered by the Tax Cuts and Jobs Act of 2017, companies in the S&P 500 Index did a combined $806 billion in buybacks, about $200 billion more than the previous record set in 2007.").

237. *Id.* ("With the majority of their compensation coming from stock options and stock awards, senior corporate executives have used open-market repurchases to manipulate their companies' stock prices to their own benefit and that of others who are in the business of timing the buying and selling of publicly listed shares.").

238. *Id.* The buybacks also constrict corporate liquidity and could expose firms in times of distress or crisis. *Id.*

239. Alexis Gravely, *How Trump's Tax Cuts Favor Whites over Minorities*, CTR. FOR PUB. INTEGRITY (Aug. 21, 2018), https://publicintegrity.org/inequality-poverty-opportunity/how-trumps-tax-cuts-favor-whites-over-minorities/ (detailing the disproportionate benefits to white taxpayers and tax increases for most people of color).

240. Professor Lin suggests caution in enlisting the corporation to do public service:

> While cautiously optimistic about the long term prospects of contemporary corporate social activism, this Article appreciates the potential corrosive effects that such activism can have on our politics, our markets, and our society. Throughout its analysis, this Article is mindful that corporations are not selfless entities that cause no social harm, but it also recognizes that corporate power, expertise, and resources can help lighten the heavy burdens confronting society. Many of the social challenges of our time are simply too important, too large, and too complex to be left to governments and nonprofits to face alone.

Lin, *supra* note 191, at 1605. This article urges caution, too: the legal and regulatory infrastructure to implement the proposals of this article would need to be robust to assure the programs' success. This article only begins the task of controlling a public firm with access to direct government funding.

241. *Id.* This distinguishes the proposals of this article from the TCJA which released funds to public firms and *hoped* they would expend the windfall to create jobs.

proposed herein would use government subsidies and corporate backing to directly reduce macroeconomically corrosive inequality while helping to breakdown the nation's costly racial hierarchy. Any increase in CEO compensation resulting from this initiative would rest on real long-term shareholder gains from helping to economically develop communities of color. This could create a powerful public-private partnership for social justice.

Financial patronage for disadvantaged schools, mentorships and sponsorships, scholarships for disadvantaged youths, internships for young, disadvantaged teens, park-district programs in disadvantaged neighborhoods, and job offers to disadvantaged youths completing such programs could redirect lives from the current dire reality discussed above to a pipeline of valuable workers for qualifying public corporations.[242] Similarly, corporations could help disadvantaged communities develop economically by sponsoring community improvement teams, sponsoring commercial and residential development projects, and expending efforts for the improvement of infrastructure.[243] Public firms could benefit from enhanced consumer loyalty, a talent pipeline of loyal specially trained workers, profitable investments into communities that will grow into new markets, and more employee loyalty for actual job creation and community development rather than mere lip service.[244] This all suggests shareholder wealth gains over the long term. In fact, many firms already engage in such activities.[245] The proposals herein simply seek to amplify, channel, and target expenditures and investments already made in the name of shareholder wealth maximization.[246]

242. There is a long history of corporate sponsorship of schools and education. *See generally* CATHERINE GIDNEY, CAPTIVE AUDIENCE: HOW CORPORATIONS INVADED OUR SCHOOLS (2019). This history would help inform the structure of the programs discussed herein, rather than leave poorly governed corporations to do as they wish. Bruce Watson, *10 Companies Spending Millions on Education*, GUARDIAN (Jan. 14, 2015), https://www.theguardian.com/sustainable-business/2015/jan/14/10-companies-business-school-education-philanthropy-inequality (itemizing investments by large transnational firms such as Target, IBM, and Wells Fargo in education around the world to the tune of hundreds of millions of dollars).

243. Many banks and other financial institutions already face community reinvestment obligations. This article provides another channel for capitalizing the development of disadvantaged communities, while recognizing that the Community Reinvestment Act long operated to facilitate community development. *See* Andrew Nold, *CRA: An Examiner's Perspective: A Rundown of Community Development Investments*, FED. RSRV. BANK OF ST. LOUIS: BRIDGES (Sept. 19, 2019), https://www.stlouisfed.org/publications/bridges/summer-2019/cra-rundown-of-community-development-investments.

244. *6 Companies Making a Big Investment in Their Communities*, JUST CAP. (Sept. 24, 2019), https://justcapital.com/news/companies-making-a-big-investment-in-their-communities/ (reporting that public firms like JPMorgan Chase, Microsoft, Google and Prudential Financial are investing hundreds of millions, even billions, in key communities to help build better schools, better housing and health capital to secure superior employees and to help those from disadvantaged backgrounds).

245. *Id.*

246. According to the McKinsey Institute for Black Economic Mobility: "20 percent of Fortune 100

In fact, these efforts could even encourage wider stock ownership and financial education for youth in disadvantaged communities. Currently disparities in financial asset ownership operates as a key source of wealth disparities.[247] Encouraging firms to issue shares to children in disadvantaged communities, along with financial education programs, could be a mutually beneficial means of disrupting this self-replicating source of wealth inequality.[248] This would simultaneously build goodwill and expanded share ownership for the firm as well as expand capitalism itself in a pro-social manner.

CONCLUSION

The power of the public corporation can help reduce racial inequity with relatively minor adjustments to the legal infrastructure that birthed it. Instead of dragging down economic growth and exacerbating inequality while propagating the nation's racial hierarchy, a superior institutional design can unleash its economic power to open the public corporation to the entire spectrum of the U.S. population. The key to the reforms proposed herein involves recognition of the obvious power CEOs hold today to enhance their compensation at the expense of both shareholders and the macroeconomy and repairing incentives to focus on optimizing the operating environment of the public corporation. Positive outcomes for shareholders, the nation as a whole, and CEOs will follow.

The corporate governance innovation proposed herein, the Chief Diversity Officer reporting to an independent Diversity Committee, rests on the manifest costliness of our racial hierarchy and the manifest materiality of diversity management practices and strategy to investors. The disadvantaged community investment program proposed herein rests upon the manifest abuse of government benefits as proven in the Tax Cuts and Jobs Act, as well as the idea that the greatest economic potential lies

companies have a K–12 STEM partnership focused on students in underserved communities." McKinsey Institute for Black Economic Mobility, How to close the Black tech talent gap, Feb. 3, 2023, https://www.mckinsey.com/bem/our-insights/how-to-close-the-black-tech-talent-gap#/. Essentially, this article just argues in favor of additional government nudges to increase the frequency and efficacy of these efforts.

247. According to the U.S. Treasury Department:

> Non-retirement financial investments, such as stocks, bonds, and mutual funds, have historically been an effective way to build wealth over the long run given the high returns on these assets that increase substantially over time due to the power of compounding. However, ownership rates of financial investments are significantly lower for Black and Hispanic households than for white households, even within the same income quartile.

U.S. Dept. of Treasury, Racial Differences in Economic Security: Non-Housing Assets, Jan. 10, 2023, https://home.treasury.gov/news/featured-stories/racial-differences-in-economic-security-non-housing-assets.

248. *Id.*

in those most disadvantaged. The cradle-to-grave operation of the racial hierarchy leads to the mass destruction of human capital without any rational basis at all and should face relegation to the ash bin of history at once.

The publicly traded corporation rightly exemplifies the great potential of legal infrastructure to advance macroeconomic growth and human development. Left to its current legal and regulatory frameworks, however, it will fuel inequality and the replication of our racial hierarchy indefinitely. Taking affirmative action to broaden participation of our population at all levels of the public firm will open its ability to fund human ingenuity to all. This would vindicate the essential public purpose of the legal infrastructure governing the public corporation. It would also place capitalism itself on a firmer social foundation through the creation of a more cohesive and productive population.