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## Corporate ESG Falls Short: Systemic Anti-Black Racism and Inequality Should be Addressed Through a Cumulative Integrated Approach

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# **CORPORATE ESG FALLS SHORT: SYSTEMIC ANTI-BLACK RACISM AND INEQUALITY SHOULD BE ADDRESSED THROUGH A CUMULATIVE INTEGRATED APPROACH**

*Ferrell L. Littlejohn\**

## **ABSTRACT**

In the 1896 case *Plessy v. Ferguson*, the Supreme Court endorsed the “separate but equal” doctrine, essentially codifying racial segregation. This decision guaranteed that systemic racism would permeate every fabric of society despite the abolition of slavery. Recently, many corporate institutions have pledged to actively support the fight against systemic racism through their environmental, social, and governance (“ESG”) initiatives. Corporate stakeholders have actively advocated for these initiatives, particularly in response to recent scholarship revealing the significant involvement of capitalist institutions in historical slavery, and the continued perpetuation of anti-Black racism. Nevertheless, such initiatives, for example, internal diversity, equity, and inclusion (“DEI”) programs, are falling short in addressing systemic racism and promoting a genuinely equitable and anti-racist society.

This Note first discusses the historical connections between slavery, capitalism, and anti-Black racism to provide a backdrop for understanding today’s prominent corporate ESG initiatives. This Note then assesses those ESG initiatives and argues that corporate ESG is insufficient to combat anti-Black racism and inequality when time after time, capitalistic institutions have prioritized profits over Black lives. Ultimately, this Note

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\* J.D. Candidate, Fordham University School of Law, 2024; B.B.A., University of Oklahoma, 2014. I am incredibly grateful to Professor Aysha Ames, who has consistently supported me throughout law school and inspired me to write this Note. In addition, I give my sincerest gratitude to Professor William Jannace, whose thoughtful expertise and support has served as a guiding force since this Note’s inception. I would also like to thank the editors and staff of the *Fordham Journal of Corporate and Financial Law* for supporting this Note and for their assistance during the editing process. Finally, I thank my family and friends whose love, support and encouragement have made my academic and professional journey possible.

proposes a comprehensive approach that combines government-backed reparations; federal legislation reform; Black Americans' stock market participation; and shifts in buying and capital power to address anti-Black racism and inequality. When employed collectively, these tools offer a more effective approach to tackling the complexities inherent in anti-Black racism and inequality.

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#### AUTHOR'S NOTE:

*Reigning out of Tulsa, Oklahoma, the Gap band is an R&B and funk group well-known for hits such as “Outstanding” and “Yearning for Your Love.”<sup>1</sup> Little do most people know, the name “Gap” was the band’s way of paying homage to the streets—and the surrounding community—which raised the band members and allowed their talents to flourish and grow. “Gap” refers to Greenwood Avenue, Archer Street, and Pine Street – three streets at the very heart and center of Tulsa’s historic Black business district. These very streets and the surrounding community also helped raise me. I spent summers and most holidays with my grandparents, one who lived off Pine Street, just a couple blocks from what remains of today’s Greenwood District.<sup>2</sup> From those times, I recall Juneteenth celebrations with my family at Greenwood, Sunday mornings at Morning Star Baptist Church,<sup>3</sup> and swimming trips to Ben Hill Park<sup>4</sup>*

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1. See *The Gap Band*, P MUSIC GROUP INC., <https://www.pmusicgroup.com/client/the-gap-band/> [<https://perma.cc/3PQ4-RM64>] (last visited Mar. 28, 2024).

2. See *infra* Section I for a detailed discussion of Tulsa’s Greenwood District.

3. See *Our History*, MORNING STAR BAPTIST CHURCH, <http://www.morningstarbaptistchurchtulsa.com/Our-History> [<https://perma.cc/X7US-KN98>] (last visited May 22, 2023). My grandmother has been a member of Tulsa’s Historic Morning Star Baptist Church for over 60 years.

4. See *Benjamin Harrison Hill*, TULSA HISTORICAL SOC’Y & MUSEUM, <https://www.tulsaohistory.org/halloffame/benjamin-harrison-hill/> [<https://perma.cc/TMU2-HYTD>] (last visited May 23, 2023). Located in North Tulsa, Ben Hill Park is named after Benjamin Harrison Hill who was a prominent black legislator, activist, and religious leader in Oklahoma during the 20<sup>th</sup> century.

*with my grandmother. Most of all, I remember what my late grandfather, Robert Littlejohn—a geologist and former President of the North Tulsa Historical Society—taught me: when it comes to our history, we must always seek to set the record straight; it is the starting point from which we may advance as a people. He, like most of my family, was a native Oklahoman who witnessed first-hand the transformation of Black communities in and around Oklahoma. He spent most of his life trying to uncover Oklahoma’s secrets and teach others about the Black history not taught in standard American history books. Long before the City of Tulsa erected a museum memorializing the Tulsa Race Massacre—then referred to as the Tulsa Race Riot—and when the topic was “taboo,” my grandfather was a harsh and outspoken critic of “official” accounts of the event. For decades, he argued that the catalyst for the tragedy was not the result of words exchanged between a black man and a white woman in an elevator; rather, it was the result of a greedy, sinister plot to steal valuable, money-making land from an economically prosperous Black community. In sharing her wisdom, my grandmother likes to use religious references. One which has resonated with me over the years is, “for the love of money is the root of all evil.” –a quote from 1 Timothy 6:10 in the Bible. This Note is dedicated to my beloved family, and to all those who have suffered from the continued effects of the Tulsa Race Massacre.*

## INTRODUCTION

In the years since George Floyd’s murder at the hands of Minneapolis police,<sup>5</sup> an intense assessment has followed concerning race relations in America and globally, sending ripples through every fabric of society.<sup>6</sup> Although the world’s past of anti-black racism and state-

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5. See Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://archive.ph/MoNzg>]. On May 25, 2020, Minneapolis police officers arrested 46-year-old George Floyd after he reportedly bought cigarettes with a counterfeit \$20 bill at a convenience store. Mr. Floyd was killed in police custody while an officer knelt on his neck for over nine minutes while he repeatedly told officers he could not breathe. See *id.*

6. See *What George Floyd Changed*, POLITICO (May 23, 2021, 7:00 AM), <https://www.politico.com/news/magazine/2021/05/23/what-george-floyd-changed-490199> [<https://archive.is/kw4sA>]. George Floyd’s murder reawakened discussions

sanctioned violence was never truly the past, George Floyd's murder and other police murders of innocent black men, women, and children<sup>7</sup> seemed to reintroduce the term "systemic racism"<sup>8</sup> into the global mainstream.<sup>9</sup> Now more than ever, academics, corporate board members, and average citizens alike have begun to reflect on the factors that have created the environment we live in today.<sup>10</sup> Indeed, activists and leaders around the world are calling for structural and institutional reform to eliminate anti-Black racism and racial inequality.<sup>11</sup>

Considering the past tragedies and enduring anti-Black violence,<sup>12</sup> advocates for racial justice have started to scrutinize the policies and

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about race relations everywhere, from classrooms and the workplace to the legislature and overseas. *See id.*

7. *See* Lydia Saad, *Concern About Race Relations Persists After Floyd's Death*, GALLUP (May 19, 2022), <https://news.gallup.com/poll/392705/concern-race-relations-persists-floyd-death.aspx> [<https://perma.cc/Y3TK-LKYZ>]:

All aspects of race relations have received significant public attention in the years since Black adults like Eric Garner (killed in 2014), Michael Brown (2014), Tamir Rice (2014), Freddie Gray (2015), Philando Castile (2016) and Breonna Taylor (2020) became household names over their deaths at the hands of police. Video footage of the excessive force used against George Floyd in 2020 sparked global protests and discussion that only sharpened the focus.

8. *See Systemic Racism*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/systemic-racism> [<https://perma.cc/UX6D-UA7P>] (last visited Dec. 14, 2022) (defining systemic racism as "policies and practices that exist throughout a whole society or organization, and that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race").

9. *See* Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME MAG. (June. 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/> [<https://perma.cc/E3HV-PDDR>].

10. *See What George Floyd Changed*, *supra* note 6.

11. *See id.*

12. *See* Janvieve Williams Comrie, Antoinette M. Landor, Kwyn Townsend Riley & Jason D. Williamson, *Moving Toward Antibigotry* 80 (2022); Peggy C. Davis, *Law As Microaggression*, 98 YALE L.J. 1559, 1565 n.30 (1989) (noting that racism is "like a virus that mutates into new forms, old-fashioned prejudice seems to have evolved into a new type that is, at least temporarily, resistant to traditional . . . remedies"). When anti-Black violence is referred to throughout this Note, it can mean violence in any and all forms, whether physical or emotional, direct or indirect, illegal or legal, intentional or unintentional, and so on. Comrie et al., *supra* note 12. These different expressions of anti-Black violence support the notion that racism is a disease that effects all of society. *See* Davis, *supra* note 12, at 1565.

practices of large commercial institutions.<sup>13</sup> In recent years, scholars have argued these policies and practices helped to develop—and continue to perpetuate—anti-black racism.<sup>14</sup> In fact, recent scholarship on finance, accounting, management and technology have allowed academics to understand how American and global economic development is inextricably tied to “slavery’s capitalism.”<sup>15</sup> Historically, scholarship has reflected capitalism’s “concurrent and mutually reinforcing” relationship with abolitionism.<sup>16</sup> However, newer studies highlight “the material and ideological convergence of capitalism and slavery in the dynamic emergence of long-distance markets for financial securities, agricultural commodities, and labor power.”<sup>17</sup> Many are carefully examining America’s post-Civil War choices: after Congress passed the Thirteenth Amendment which purportedly freed enslaved people, it declined to move forward with any other form of atonement for the hundreds of years of torture and free labor that helped make the nation what it is today.<sup>18</sup> America—realizing the vitality of southern agriculture and the Black labor force to the post-Civil War economy—chose instead the economic oppression, disenfranchisement, and racial segregation of Black people.<sup>19</sup>

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13. See *What George Floyd Changed*, *supra* note 6.

14. See André Douglas Pond Cummings & Calvin Graham, *Racial Capitalism and Race Massacres: Tulsa’s Black Wall Street and Elaine’s Sharecroppers*, 57 TULSA L. REV. 39, 41 (2022).

15. SVEN BECKERT & SETH ROCKMAN, *SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* 1 (2016).

16. *Id.* at 10.

17. *Id.*

18. See *id.*; William A. Gladstone *Afro-American Military Collection: Special Field Orders, No. 15, Headquarters, Military Division of the Mississippi*, by Major General W. T. Sherman, re “young and able-bodied negroes must be encouraged to enlist,” mentions bounties paid and locations for settlement of freed Negr., LIBRARY OF CONG. (1865), <https://www.loc.gov/item/mss83434256/> [<https://perma.cc/N5G7-6N42>]; Joseph E. Inikori, *Atlantic Slavery and the Rise of the Capitalist Global Economy*, 61 CURRENT ANTHROPOLOGY 159, 167–70 (2020); Nadra Kareem Nittle, *The Short-Lived Promise of ‘40 Acres and a Mule’*, HISTORY (Nov. 9, 2022), <https://www.history.com/news/40-acres-mule-promise> [<https://perma.cc/ZX4R-E2B7>]. During the Civil War, President Lincoln approved the issuance of SPECIAL FIELD ORDER NO. 15, which would have redistributed roughly 400,000 acres of land—and legal title—from Confederate planters to formerly enslaved Black Americans. See *id.* However, after President Lincoln’s assassination in 1865, President Andrew Johnson—a known segregationist—rescinded the Order and returned the land to Confederate hands. See *id.* This turn of events was devastating for the economic and social trajectory of Black Americans. See *id.*

19. See generally Davis, *supra* note 12.

As a result, slavery's institutions continue to reverberate throughout modern society.<sup>20</sup> Today the collective wealth gap among Black and White Americans is said to be "at least \$14 trillion" because of slavery and the exclusionary capitalist wealth-building opportunities that survived its formal demise.<sup>21</sup>

Many are coming to understand that racial equality does not begin and end with criminal justice reform and the eradication of police brutality; instead, *economic justice* for Black people is an essential part of the formula for leveling the playing field.<sup>22</sup> Black people currently face discriminatory hiring and lending practices, wage inequality, and microaggressions in the workplace, to list a handful of concerns.<sup>23</sup> In America's post-Trump era, blatant White supremacy is on the rise, and racial tensions are mounting.<sup>24</sup> It seems, as one scholar remarked, capitalism is operating comfortably—or supplying the kindling—in a "world on fire."<sup>25</sup>

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20. See Hal Clay, *Forty Acres and a Mule: America's Bill for Reparations Is Long Past Overdue.*, 24 ST. MARY'S L. REV. ON RACE & SOC. JUST. 505, 511–12 (2022),

21. Frank Holland, *JPMorgan Chase Uses Advancing Black Wealth Tour to Boost Financial Literacy, Address Racial Wealth Gap*, CNBC (Oct. 24, 2022), <https://www.cnbc.com/2022/10/24/jpmorgan-chase-uses-advancing-black-wealth-tour-to-boost-financial-literacy.html> [https://perma.cc/D954-KSZB].

22. See Rakim Brooks, *The Racial Wealth Gap Is a Civil Liberties Issue*, AM. C.L. UNION, <https://www.aclu.org/news/racial-justice/the-racial-wealth-gap-is-a-civil-liberties-issue> [https://perma.cc/7VES-Q8HM] (last visited Dec. 19, 2023).

23. See Dina Gerdeman, *Minorities Who 'Whiten' Job Resumes Get More Interviews*, HARV. BUS. WKLY. (May 17, 2017), <https://hbswk.hbs.edu/item/minorities-who-whiten-job-resumes-get-more-interviews> [https://perma.cc/645C-Q6LU]; Aaron Glantz & Emmanuel Martinez, *For People of Color, Banks Are Shutting the Door to Homeownership*, REVEAL NEWS (Feb. 15, 2018); Ella F. Washington, *Recognizing and Responding to Microaggressions in the Workplace*, HARV. BUS. WKLY. (May 10, 2022); see also Valerie Wilson, *Racism and the Economy*, ECON. POL'Y INST. (Nov. 21, 2020), <https://www.epi.org/blog/racism-and-the-economy-fed/> [https://perma.cc/576E-K3D7]; see *infra* app. E.

24. See Ashley Jardina & Spencer Piston, *Trickle-Down Racism: Trump's Effect on Whites' Racist Dehumanizing Attitudes*, 5 CURRENT RSCH. IN ECOLOGICAL & SOC. PSYCH. 1, 6 (2023).

25. REBECCA HENDERSON, REIMAGINING CAPITALISM IN A WORLD ON FIRE 8–9 (2020).



As such, global corporations have been encouraged, if not forced,<sup>26</sup> to address anti-black racism and injustice at domestic and global levels.<sup>27</sup> Many of these corporations have relied on environmental, social and corporate governance (“ESG”)—which addresses costs to stakeholders in doing business—to combat the above-mentioned issues.<sup>28</sup> Moreover, corporations have centered these ESG efforts on policies like customer-facing corporate philanthropy and internal diversity, equity and inclusion (DEI).<sup>29</sup> Still, at least two \$50 billion<sup>30</sup> questions remain: how far are corporations willing to go to eradicate anti-black racism, and is it enough?

Many academics believe reliance on this type of corporate self-policing is at best idealist, and in reality, naive and uninformed.<sup>31</sup> These individuals largely emphasize issues stemming from corporations’ ultimate accountability to its shareholders, among other things.<sup>32</sup> This view persists although large corporations are overwhelmingly owned by investment funds, which have stewardship/proxy voting guidelines addressing DEI issues including board diversity.<sup>33</sup> The academics rightly

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26. See Aaron Lui, Catherine L Mann, Raymond J. McGuire, Lara Ouvaroff, & Dana M Peterson, *Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.*, CITI GPS: GLOB. PERSPS. & SOLS. (Sept. 2020), [https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1\\_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D](https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D) [<https://perma.cc/ND2M-C76E>]. According to a 2020 study by Citigroup, the US economy lost \$16 trillion in GDP over the period of 20 years since 2000 because of discrimination against Black Americans. See *id.* The study noted four key racial gaps among Black and White Americans accounting for the potential lost GDP revenue: 1) discriminatory lending practices toward Black American entrepreneurs; 2) wage disparities; 3) discrimination in providing housing credit; and 4) discrimination in access to higher education. See *id.*

27. See Meghan Hoyer, Tracy Jan & Jena McGregor, *Corporate America’s \$50 Billion Promise*, WASH. POST (Aug. 23, 2021), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> [<https://perma.cc/5UPG-PRW8>].

28. See Alicia E. Plerhoples, *ESG & Anti-Black Racism*, 24 UNIV. PA. J. BUS. L. 909, 910 (2022).

29. *Id.*

30. Hoyer, Jan & McGregor, *supra* note 27. Within seven months after George Floyd’s death, America’s largest public corporations and their foundations had pledged to commit \$49.5 billion to address racial inequality. See *id.*

31. See *id.*

32. Plerhoples, *supra* 28, at 911.

33. See *BlackRock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities*, BLACKROCK (Jan. 2024), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf> [<https://perma.cc/G5LP->

approach corporate self-policing with skepticism.<sup>34</sup> This Note posits that reliance on internal corporate initiatives is insufficient when, time and time again, capitalistic institutions have opted to prioritize power and profit over Black lives.<sup>35</sup>

In addition to promoting ESG to combat anti-Black racism and racial inequality, activists should focus on four areas, the first two of which

EYVR]. These groups, and many others have voting guidelines that call for board gender and racial/ethnic diversity and voting consequences for those in the S&P 500, Russell 3000, and other entities who fail to meet the guidelines. *See id.*

34. *See* Courtney Connley, *How Corporate America's Diversity Initiatives Continue to Fail Black Women*, CNBC (July 1, 2020, 2:11 PM), <https://www.cnbc.com/2020/07/01/how-corporate-americas-diversity-initiatives-continue-to-fail-black-women.html> [<https://perma.cc/9UZNF4GW>]; Letter from Congressman Steven Horsford, Congressional Black Caucus to Corporate Leaders (Dec. 15, 2023), [https://cbc.house.gov/uploadedfiles/congressional\\_black\\_caucus\\_letter\\_re\\_corporate\\_a\\_ccountability.pdf](https://cbc.house.gov/uploadedfiles/congressional_black_caucus_letter_re_corporate_a_ccountability.pdf) [<https://perma.cc/P4QP-63EN>]; Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As Big Corporations Say 'Black Lives Matter,' Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020, 6:21 PM), <https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/> [<https://archive.ph/D493i>].

35. *See* Whitney N. Laster Pirtle, *Racial Capitalism: A Fundamental Cause of Novel Coronavirus (COVID-19) Pandemic Inequities in the United States*, 47(4) HEALTH EDUC. & BEHAV. 2, 2 (2020) (“Racially and economically deprived groups face capitalist and racist systems that continue to devalue and harm their lives, even within newer, supposedly deracialized neoliberal agendas.”); Laura Pulido, *Flint, Environmental Racism, and Racial Capitalism*, 27(3) CAPITALISM NATURE SOCIALISM 1, 1 (2016):

[T]he people of Flint are so devalued that their lives are subordinated to the goals of municipal fiscal solvency. This constitutes racial capitalism because this devaluation is based on both their blackness and their surplus status, with the two being mutually constituted. It is no accident that US surplus populations are disproportionately nonwhite. The devaluation of Black (and other nonwhite) bodies has been a central feature of global capitalism for centuries and creates a landscape of differential value which can be harnessed in diverse ways to facilitate the accumulation of more power and profit than would otherwise be possible.

*See also* Cara Nguyen, *The Relationship Between White Supremacy and Capitalism: A Socioeconomic Study on Embeddedness in the Market and Society*, 4 SEATTLE UNIV. UNDERGRADUATE RSCH. J. 6, 8 (2020). (“[T]he racial contract in the United States contextualizes the capitalist free market system as a system that normalizes, empowers, and encourages the exploitation and abuse of Nonwhite people, specifically Black and Indigenous folks.”).

place onus on local, state, and national governments:(1) government-sponsored reparations programs;<sup>36</sup> (2) legislation to overhaul systems that reinforce racial inequalities;<sup>37</sup> (3) Black Americans' participation in the stock market;<sup>38</sup> and (4) a redirection of buying power and capital to Black entrepreneurs to accelerate racial equity.<sup>39</sup> As this Note reveals, racism is not confined to social issues or exceptionally bad actors;<sup>40</sup> it permeates every facet of American society,<sup>41</sup> and addressing it demands multiple approaches beyond corporate pledges and DEI initiatives.<sup>42</sup> The proper approach should acknowledge the necessity for social, policy, and economic reform to address anti-Black racism and inequity.<sup>43</sup> Not only could such an approach help combat racism and level the playing field for Black people, but it could also improve conditions for all people living below the margins, regardless of race.<sup>44</sup>

Part I of this Note explores the links between slavery and capitalism—a historical backdrop necessary to help the reader develop a sense of the complexities underlying anti-black racism, as well as understand how ESG fits within the context.<sup>45</sup> Part II examines ESG in its present state, attempting to explain why it is ultimately insufficient to

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36. See *infra* Section III for a detailed discussion on government-sponsored reparations.

37. See *infra* Section III for a detailed discussion about legislation that reinforces racial inequalities.

38. See *infra* Section III for a detailed discussion about Black Americans' participation in the stock market.

39. See *infra* Section III (discussing various ways in which activists can redirect buying power).

40. See André Douglas Pond Cummings, *Critical Race Theory and the Hip Hop Nation*, 48 UNIV. OF LOUISVILLE L. REV. 499, 506 (2010), reprinted in *CRITICAL RACE THEORY, THE CUTTING EDGE* 108 (Richard Delgado & Jean Stefancic eds., 3d ed. 2013); Janel George, *A Lesson on Critical Race Theory*, A.B.A. (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/) [<https://archive.is/rRVVs>]. A popular understanding of racism suggests that racist incidents are aberrations, and that racism is confined to a few “bad apples.” See *id.*

41. Mahzarin R. Banaji et al., *Systemic Racism: Individuals and Interactions, Institutions and Society*, 6 COGNITIVE RSCH., PRINCIPLES & IMPLICATIONS 1, 1–2 (2021).

42. Plerhoples, *supra* 28, at 911.

43. See *id.*

44. See Wally Adeyemo, *Racial Equity Benefits All Americans*, U.S. DEP'T OF TREASURY (June 7, 2023), <https://home.treasury.gov/news/featured-stories/racial-equity-benefits-all-americans> [<https://perma.cc/R6EY-DPQM>].

45. See *infra* Section I.

address anti-black racism and inequality in a sustainable way.<sup>46</sup> Finally, Part III advocates for a cumulative approach to address anti-black racism and inequality.<sup>47</sup>

## I. ANTI-BLACKNESS IN GLOBAL CAPITAL

### A. SLAVERY'S CAPITALISM: THE EVOLUTION

In his 2019 New York Times article, Matthew Desmond argues that America can be described as a “low-road”<sup>48</sup> capitalist society: one in which “wages are depressed as businesses compete over the price, not the quality, of goods; so-called unskilled workers are typically incentivized through punishments, not promotions; inequality reigns and poverty spreads.”<sup>49</sup> Still, when people challenge consumer-worker exploitation and racial economic inequality in America and around the world, they are often met with the mantra, “this is a capitalist society.”<sup>50</sup> But how did such a brutal ideology and the resulting conditions become so generally accepted? Professors Sven Beckert and Seth Rockman posit that this present reality is directly informed by the dehumanizing institution that was chattel slavery.<sup>51</sup> They assert that during the eighty-year time span between the American Revolution and the Civil War, slavery was essential to America’s economic development and the “dynamic emergence of long-distance markets for financial securities, agricultural commodities, and labor power.”<sup>52</sup> The New York Times paints a vivid illustration of how this was possible:

Slavery was undeniably a font of phenomenal wealth. By the eve of the Civil War, the Mississippi Valley was home to more millionaires per capita than anywhere else in the United States. Cotton grown and picked by enslaved workers was the nation’s most valuable export.

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46. See *infra* Section II.

47. See *infra* Section III.

48. Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html?mtrref=undefined&assetType=PAYWALL> [https://archive.is/ZzVcr]. According to Desmond, the term “low-road capitalism” was originally introduced by University of Wisconsin-Madison sociologist Joel Rogers.

49. *Id.*

50. *Id.*

51. See BECKERT & ROCKMAN, *supra* note 15.

52. *Id.* at 1, 11.

The combined value of enslaved people exceeded that of all the railroads and factories in the nation. New Orleans boasted a denser concentration of banking capital than New York City. What made the cotton economy boom in the United States, and not in all the other far-flung parts of the world with climates and soil suitable to the crop, was our nation's unflinching willingness to use violence on nonwhite people and to exert its will on seemingly endless supplies of land and labor. Given the choice between modernity and barbarism, prosperity and poverty, lawfulness and cruelty, democracy and totalitarianism, America chose all of the above.<sup>53</sup>

Professor and historian Joseph E. Inikori further articulates how enslaved Africans contributed to the development of the major economies of the Atlantic world, which led to the creation of today's globally integrated capitalist economy.<sup>54</sup> His analysis postulates a two-phase evolution.<sup>55</sup> First, the forced labor of enslaved Africans in large-scale commodity production for the Americas<sup>56</sup> enabled the establishment of an "integrated nineteenth-century Atlantic economy," led by the US and Western Europe—namely Great Britain.<sup>57</sup> Second, this new, sophisticated economy paved the way—economically and politically—for the total structural transformation of the West, including the great industrial revolutions and their new technologies.<sup>58</sup> This allowed the West to extend its "Atlantic capitalist order" to Asia and remaining regions of the world, constituting a "hierarchically structured capitalist global economic order."<sup>59</sup>

Indeed, the system-wide brutality of today's global capitalist market<sup>60</sup> and its disparate impacts on Black people—and other marginalized groups<sup>61</sup>—are a manifestation of the slave-based capitalism

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53. Desmond, *supra* note 48.

54. See Inikori, *supra* note 18, at 159.

55. See *id.*

56. See *infra* app. A.

57. Inikori, *supra* note 18, at 167–70.

58. See *id.*

59. *Id.* at 10.

60. See Desmond, *supra* note 47.

61. See Valerie Wilson & William Darity Jr., *Understanding Black-White Disparities in Labor Market Outcomes Requires Models that Account for Persistent Discrimination and Unequal Bargaining Power*, ECON. POL'Y INST. (Mar. 25, 2022), <https://www.epi.org/unequalpower/publications/understanding-black-white-disparities-in-labor-market-outcomes/> [<https://perma.cc/3ZTZ-TT52>].

that Beckert & Rockman and Inikori illustrate.<sup>62</sup> Capitalism’s élite—grossly lacking in non-White institutions and non-White individuals—<sup>63</sup>never came down from the “high”<sup>64</sup> of wealth, prosperity, and power born from slavery’s racial subjugation.<sup>65</sup> The Thirteenth Amendment freed *many* Black people from chains and forced labor.<sup>66</sup> However, as Fountain Hughes, a former enslaved person, recounted in 1949, newly freed African Americans entered a new struggle after emancipation:

When they told me we were free we didn’t have nowhere to go. We didn’t have no property; we didn’t have no home. We was like the

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62. See BECKERT and ROCKMAN, *supra* note 15, at 1, 11; Inikori, *supra* note 18, at 167–70.

63. See Matt Bruenig, *Wealth Inequality Across Class and Race in 5 Graphs*, PEOPLE’S POL’Y PROJECT (Mar. 5, 2019), <https://www.peoplespolicyproject.org/2019/03/05/wealth-inequality-across-class-and-race-in-5-graphs/> [<https://perma.cc/XX6W-J8V6>]; Kori Green & Sarah Stephen, *New Data from Deloitte and the Alliance for Board Diversity (ABD) Reveals Continued Focus Is Necessary for Fortune 500 Boards to be More Representative of the US Population*, DELOITTE (June 5, 2023), <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/press-releases/new-data-reveals-opportunity-for-growth-on-fortune-500-boards-to-be-more-representative-of-the-us-population.html> [<https://perma.cc/3AUQ-YXRU>]; *Large Ethnic Differences in Wealth at All Levels of Net Worth Shows New LSE Report*, LONDON SCH. OF ECON. (Aug. 1, 2023), <https://www.lse.ac.uk/News/Latest-news-from-LSE/2023/h-August-2023/Large-ethnic-differences-in-wealth-at-all-levels-of-net-worth-shows-new-report> [<https://perma.cc/E8M6-XRM8>].

64. The colloquial term “high” is used in a metaphorical sense, not a literal one.

65. See Elizabeth Kennedy, *Racism and Capitalism* in SUSTAINABLE CAPITALISM: CONTRADICTION IN TERMS OR ESSENTIAL WORK FOR THE ANTHROPOCENE (Inara Scott ed., forthcoming) (manuscript at 3–4):

Abolishing slavery was an opportunity to acknowledge America’s “original sin” and repair its harms. If capitalism did not depend on racial subjugation, we would expect to see a reorganization of American society and the era of slavery regarded as a holocaust, never to be repeated. We would anticipate the deployment of federal power to create an equitable economy supported by a just system of law. We would presume reparations would be made to the formerly enslaved and their descendants. Instead, what proceeded in the years after the Civil War was merely an extension of the economic, social, physical, and emotional harms that slavery had wrought. Racial terror, disenfranchisement, and exclusion continued to ensure that American capitalism, which had critically depended on the labor of enslaved people, would survive their emancipation.

66. See U.S. CONST. amend. XIII, § 1.

cattle; we was just turned out. We had been slaves all of our lives. My mother was a slave, my sisters was slaves, father was a slave. But after freedom you know colored people didn't have nothing.<sup>67</sup>

And emancipation didn't stop that abovementioned élite from recalibrating the same racist and oppressive tools<sup>68</sup> to reinforce and institutionalize the élite's high.<sup>69</sup> In turn, society remained a racialized socioeconomic hierarchy following the Civil War and remains so today.<sup>70</sup>

Not surprisingly, this account of history is highly contentious.<sup>71</sup> Some critics label it as an extremist attack on a system they consider

67. Public Broadcasting Service, *Driving While Black: Race, Space and Mobility in America*, PBS (Oct. 13, 2020), <https://www.pbs.org/video/driving-while-black-race-space-and-mobility-in-america-achvfr/> [<https://archive.is/YuHKq>].

68. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2* (2012). In her book, Alexander asserts that the racial caste system in America was merely redesigned in the form of mass incarceration which systematically targets and imprisons disproportionate numbers of black and brown people, permanently disenfranchising them from social and economic activities. See *id.* See also CAITLIN ROSENTHAL, *ACCOUNTING FOR SLAVERY, MASTERS AND MANAGEMENT 127* (2018). According to Rosenthal, slavery helped develop the sophisticated human resource management systems we see today. For example, today's mark-to-market accounting, record keeping, depreciation algorithms, scientific production quotas, and other quantitative management practices can be traced back to planters who used the advanced tools to "accelerate the pace of daily labor through calculation and comparison, bonuses and incentives, and, of course, punishment." *Id.* at 86.

69. See KENNEDY, *supra* note 65, at 3–7.

70. See Manning Marable, *Beyond Racial Identity Politics: Toward a Liberation Theory for Multicultural Democracy*, in *CRITICAL RACE THEORY, THE CUTTING EDGE 590* (Richard Delgado & Jean Stefancic eds., 3d ed. 2013):

While African Americans, Latinos, and Asian Americans scramble over which group should control the mom-and-pop-grocery store in their neighborhood, almost no one questions the racist redlining policies of large banks, which restrict access to capital for nearly all people of color . . . [t]o be truly liberating, any social theory must reflect the actual problems of a historical conjecture with a commitment to rigor and scholastic truth . . . [i]t must begin by critiquing the vast structure of power and privilege that characterizes the political economy of postindustrial, capitalist America.

71. See Gerald F. Seib, *The Debate over Systemic Racism: Why It Divides and Why It Provides Hope*, WALL ST. J. (July 27, 2020, 8:53 AM), <https://www.wsj.com/articles/the-debate-over-systemic-racism-why-it-divides-and-why-it-provides-hope-11595852987> [<https://archive.ph/wZDqB>].

purely economic—nothing more and nothing less.<sup>72</sup> This view, however, either oversimplifies<sup>73</sup> or completely ignores overwhelming statistics which show how Black people are persistently at the bottom of the economic barrel.<sup>74</sup> Many others believe that analyzing history and current society through a racial (or critical race theory)<sup>75</sup> perspective is “rooted in Marxism.”<sup>76</sup> Therefore, as they assert, it is counter-productive to

72. See Sven R. Lawson, *The Myth of Capitalist Exploitation*, THE EUR. CONSERVATIVE (Sept. 14, 2023), <https://europeanconservative.com/articles/analysis/the-myth-of-capitalist-exploitation/> [<https://perma.cc/VK5U-N9JE>]. In his article, Larson explains that the idea of capitalism as inherently exploitative is “deployed by socialists in the public discourse to force conservatives into renouncing capitalism all together.” *Id.*

73. See Mike Collins, *The Winners and Losers of Free Market Capitalism*, FORBES (Aug. 4, 2015, 4:28 PM), <https://www.forbes.com/sites/mikecollins/2015/08/04/the-winners-and-losers-of-free-market-capitalism/?sh=7e6fbcea7f75> [<https://perma.cc/9G5H-LBPR>] (pointing out a common misconception still held today among what he calls “capitalist hardliners”: “Capitalism rewards winners and punishes losers”); C. Bradley Thompson, *Socialism VS. Capitalism: Which Is the Moral System*, ASHBROOK (Oct. 1, 1993), <https://ashbrook.org/viewpoint/onprin-v1n3-thompson/#:~:text=Yes%2C%20there%20are%20winners%20and,negligent%2C%20impractical%2C%20and%20inefficient> [<https://perma.cc/HXU3-P554>]:

Yes, there are winners and losers in capitalism. The winners are those who are honest, industrious, thoughtful, prudent, frugal, responsible, disciplined, and efficient. The losers are those who are shiftless, lazy, imprudent, extravagant, negligent, impractical, and inefficient. Capitalism is the only social system that rewards virtue and punishes vice. This applies to both the business executive and the carpenter, the lawyer and the factory worker.

74. See *supra* note 63 and accompanying text.

75. See generally Legal Defense Fund, *Critical Race Theory*, <https://www.naacpldf.org/critical-race-theory-faq/> [<https://perma.cc/Y4Q3-MHG6>] (last visited Nov. 18, 2023):

Critical Race Theory is an academic and legal framework that denotes that systemic racism is part of American society . . . [it] recognizes that racism is more than the result of individual bias and prejudice . . . [it] [is] embedded in laws, policies and institutions that uphold and reproduce racial inequalities.

76. See Ellie Kranse, *How Leftists’ Critical Race Theory Poisons our Discussion of Race*, THE HERITAGE FOUND. (July 29, 2020), <https://www.heritage.org/civil-society/commentary/how-leftists-critical-race-theory-poisons-our-discussion-racism> [<https://perma.cc/Z8DA-9PPG>]:



America's basic democratic principles of equality and justice.<sup>77</sup> But as author and attorney Shannon Price points out, the term "Marxism" has been deployed by conservatives as a scare tactic to build negative misconceptions about critical race theory and ultimately silence discussions regarding systemic racism.<sup>78</sup> Accordingly, the following section expounds upon the counter-narrative, with an introduction to the notion of the "deterritorialization of Black space" and case studies which help illustrate the concept.<sup>79</sup>

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Critical race theory does not seek equality or justice. Instead, it categorizes people. One's gender, race, or sexual orientation posits you as the oppressed or an oppressor—a status from which you are freed only when all existing societal structures, which are inherently racist, are overthrown . . . Leftism does not seek enduring notions of truth, the good, or justice. It seeks only to subjugate the other as a means of overthrowing an existing structure. Once that structure is overthrown, the leaders of the revolution will find someone new to subjugate.

*See also Marxism*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/marxism.asp> [<https://perma.cc/HC2K-CCCQ>] (last visited Nov. 18, 2023). An exploration of Marxism would be out of the scope of this Note, but for context, Marxism can be understood as "a social, political, and economic philosophy named after the 19th-century German philosopher and economist Karl Marx [which] examines the effect of capitalism on labor, productivity, and economic development." *Id.* The philosophy places persons in two distinct categories—the capitalist oppressor and the oppressed worker—and calls for a "worker revolution . . . to replace capitalism with communism." *Id.*

77. *See* Kransé, *supra* note 76.

78. *See* Shannon Price, *Marxism Is the New False Flag to Plant upon Critical Race Theory*, THE HILL (Nov. 4, 2021, 2:31 PM), <https://thehill.com/opinion/education/580081-marxism-is-the-new-false-flag-to-plant-upon-critical-race-theory/> [<https://perma.cc/7T5N-T3TZ>]. In her article, Price explains that Critical Race Theory is a tool which "offers a framework for making sense of society's injustices . . . it doesn't prescribe a partisan way of fixing them." *Id.* Similarly, this Note's analysis of the historical links between slavery and capitalism by no means suggests a communist overthrow of capitalism as a solution to Anti-Black racism.

79. Adam Bledsoe & Willie Jamaal Wright, *The Anti-Blackness of Global Capital*, 37(1), ENV'T & PLANNING: SOC'Y & SPACE 8 (2019). According to Bledsoe and Wright, the deterritorialization of Black space involves "capitalism's logic of perpetual expansion, and the acceptable subordination of Black physical presence." *Id.*

B. SLAVERY'S CAPITALISM AND THE DETERRITORIALIZATION OF BLACK SPACE

As scholars have suggested for decades, the logics which underpin the current expressions of anti-Black racism, violence and inequality are inheritances of chattel slavery.<sup>80</sup> In *The Anti-Blackness of Global Capital*, Professors Adam Bledsoe and Willie Jamaal Wright argue that the various forms of anti-blackness around the world are all “necessary for the perpetuation of global capitalism.”<sup>81</sup> They enhance the original theory of anti-Blackness, as cultivated by Afro-Pessimists like Saidiya Hartman, Jared Sexton, Christina Sharpe, and Frank Wilderson, by expounding upon the concept of deterritorialization (or “a-spatiality”) of Black spaces for capitalist exploitation:

We draw on the concept of “anti-Blackness” as it is defined by scholars who engage with Afro-Pessimism. These scholars argue that civil society as we understand and live it is (in)formed by the dehumanizing condition of chattel slavery. They claim that civil society, therefore, is inherently antithetical to all manifestations of Black social life, yet requires Blackness for its political, economic, ontological, epistemological, and—as we aim to show—spatial coherence.<sup>82</sup>

To be clear, “spatial coherence” is, according to Bledsoe and Wright, a legitimate claim to geographic space.<sup>83</sup> Conversely, the deterritorialization (or “a-spatiality”) of Black space deems geographic locations associated with Black populations as spaces unworthy of being recognized as legitimately occupied, and therefore as spaces ripe for state-legitimized capitalist exploitation.<sup>84</sup> This phenomenon facilitates the

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80. See *id.* at 11.

81. *Id.* at 9.

82. Bledsoe & Wright, *supra* note 79, at 9; see also Matthew Kenny, *Civil Society*, ENCYC. BRITANNICA <https://www.britannica.com/topic/civil-society/Contemporary-political-discourse> [<https://perma.cc/7N3F-WXTQ>]. George Yancy, *Afropessimism Forces Us to Rethink Our Most Basic Assumptions About Society*, TRUTHOUT (Sep. 14, 2022), <https://truthout.org/articles/afropessimism-forces-us-to-rethink-our-most-basic-assumptions-about-society/> [<https://perma.cc/P5AX-H38Q>]. The term “civil society” is somewhat ambiguous, both within and outside of this context, but this Note presumes, based on similar works and materials of the Afro-Pessimists that “civil society” can be understood as the “dense network of groups, communities, networks, and ties that stand between the individual and the modern state.” Kenny, *supra* note 82.

83. See *id.*

84. See *id.*

spatial coherence of non-Black spaces.<sup>85</sup> Furthermore, it is rooted in specific power structures originating from slavery, which reduced the social, political, and legal status of Africans to that of nonhuman.<sup>86</sup> Bledsoe and Wright elucidate how capitalism comfortably situates itself within Black a-spatiality:

The assumed a-spatiality of Black populations often leads to purveyors of capitalism treating locations inhabited by Black people as available for emerging modes of accumulation. Put another way, spaces that were once marginal or peripheral to the perpetuation of capital accumulation become sites of appropriation precisely because the (Black) populations occupying them receive no recognition as viable spatial actors. The spaces necessary for new forms of accumulation are thus conceptually open because of this assumed a-spatiality and subsequently physically opened via the spatial removal and dispersal of Black residents.<sup>87</sup>

### C. DETERRITORIALIZATION OF BLACK SPACE: FROM THE GLOBAL NORTH TO THE GLOBAL SOUTH

The cycle of capitalist exploitation that is perpetuated by Black a-spatiality began with Africans' enslavement.<sup>88</sup> Contemporarily, it has manifested itself<sup>89</sup> through gentrification, modern Black suburbanization,<sup>90</sup> and in too many cases, the outright destruction of

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85. *See id.*

86. *Id.* at 12.

87. *Id.* at 13.

88. *See id.*

89. *Id.* at 10. According to Bledsoe and Wright, state-sanctioned capitalist control has taken on many forms throughout history in order to adjust to changing political and cultural landscapes. *Id.*

[For example,] [a]s a result of the organizing capabilities and political demands made by those in labor movements, the Civil Rights movement, the Black Power movement, and land reform activists, new manifestations of capitalism emerged that worked to reverse and appropriate the gains made by these movements and reify the influence of capitalist actors.

90. *See* Kimberly S. Johnson, 'Black' Suburbanization: American Dream or the New Banlieue?, SOC. SCI. RSCH. COUNCIL (June 24, 2014), <https://items.ssrc.org/the-cities-papers/black-suburbanization-american-dream-or-the-new-banlieue/> [<https://perma.cc/MSY6-3KL2>]; National Geographic, *Gentrification*, <https://education>.

Black communities while governments remain idle.<sup>91</sup> The following selection of case studies—two of which draw from Bledsoe and Wright—will illustrate how these manifestations apply under the theory of Black a-spatiality.<sup>92</sup> Taken together, Tulsa, Ferguson, and Ilha de Maré will also show that like capitalist exploitation, anti-Blackness extends globally.<sup>93</sup> Finally, these cases attempt to show that the anti-Black violence linked to capitalist exploitation manifests itself in various ways.<sup>94</sup>

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nationalgeographic.org/resource/gentrification/ [https://perma.cc/AU2Q-VUQT] (last visited Nov. 21, 2023). According to National Geographic, “[g]entrification is a demographic and economic shift that displaces established working-class communities and communities of color in favor of wealthier newcomers and real estate development companies.” *Id.* It can also be described as “a clash between the power of private capital and government policy and the power of people in targeted communities to preserve their homes and heritage.” *Id.* Political scientist Kimberly S. Johnson illustrates today’s Black suburbanization, pointing out that historically, “[c]ities were places of economic stagnation, racial tension, and societal dysfunction, while suburbs were the spaces of economic growth and social harmony” that were “purged of the poor and working class.” Johnson, *supra* note 90. But after many large cities like Chicago, New York City, and Los Angeles rebounded from social and economic challenges of the 1980’s, so-called “creative class cities like Portland, San Francisco, and Seattle became the “objects of policy emulation.” *Id.* What resulted was an influx of White upper-income residents returning to cities, while former Black populations were—and are still being driven out by pricing—to formerly White suburbs. *Id.*

91. See Daniel R. Biddle, *The Wilmington Massacre of 1898: A Shocking Episode of Racist Violence*, THE GUARDIAN (Nov. 10, 2023), <https://www.theguardian.com/us-news/2023/nov/10/wilmington-massacre-white-supremacist-north-carolina> [https://perma.cc/95JD-NSMG]; Equal Justice Initiative, *White Mob Destroys Black Community of Rosewood, Florida*, <https://calendar.eji.org/racial-injustice/jan/05> [https://archive.ph/rYdsO] [ (last visited Nov. 21, 2023)]; *Tulsa Race Massacre*, HIST. (Mar. 18, 2018), <https://www.history.com/topics/roaring-twenties/tulsa-race-massacre> [https://perma.cc/G5E2-DGFV]. Economically prosperous Black communities in Wilmington North Carolina, Rosewood, Florida, and Tulsa, Oklahoma were all but destroyed—and their citizens murdered and displaced—by racist White mobs in the late 19<sup>th</sup> and early 20<sup>th</sup> century. These racist White mobs were intimidated by these communities’ increasing economic and political prosperity. See Bledsoe & Wright, *supra* note 79, at 10. Following Bledsoe and Wright’s theory, Wilmington, Rosewood, and Tulsa represent some of the earlier and most direct, aggressive forms of Black a-spatiality and capitalist exploitation that occurred post slavery. *Id.* Gentrification and the suburbanization of displaced black communities are merely operating in accordance with the current times (see note 57), seeing as one could hardly justify a state-sanctioned race massacre in 2024.

92. See *id.* at 14–20.

93. See *id.*

94. See Davis, *supra* note 12, at 1565; Comrie et al., *supra* note 12, at 80.

1. *Tulsa*

On the early morning of June 1, 1921, a White mob descended on the 35 blocks that made up Tulsa's Greenwood District with the intention to kill and destroy, and they did just that.<sup>95</sup> Before that day, Greenwood was a bustling all-Black community in North Tulsa on the edge of downtown, nicknamed "Black Wall Street" for its robust economy of over 240 businesses and cumulative Black wealth.<sup>96</sup> Thousands of White citizens poured into Greenwood, killing Black citizens and looting and burning businesses and homes.<sup>97</sup> By June 2, the Red Cross estimated approximately 1,256 houses were completely burned and destroyed, with 256 looted and torched.<sup>98</sup> The entire business district was destroyed, and nearly all 10,000 residents belonging to the community were left homeless.<sup>99</sup> Though the Oklahoma Bureau of Vital Statistics reported the official death toll to be 36, historians estimate the death toll was likely between 150 and 300 people—the majority of whom were Black.<sup>100</sup>

No White Tulsan has ever been prosecuted for these crimes, nor has any Black Tulsan been compensated.<sup>101</sup> In fact, the decades following the massacre saw a deliberate attempt by local, state and national officials to cover up the event.<sup>102</sup> Tulsa's displacement of Black People from the Greenwood District never ceased.<sup>103</sup> Though Greenwood tried to rebuild, federally funded "urban renewal" projects<sup>104</sup> in the 1960s and 70s cleared

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95. *Tulsa Race Massacre*, *supra* note 91.

96. *See id.*; Keiko Morris, *Black Land Ownership Primed Greenwood's Rebound After Massacre*, THE WALL ST. J. (May 29, 2021), <https://www.wsj.com/articles/black-land-ownership-primed-greenwoods-rebound-after-massacre-11622293201> [<https://archive.is/9C8JX>].

97. *Tulsa Race Massacre*, *supra* note 91.

98. *See id.*

99. *See id.* *See also infra* App. B.

100. *See id.*

101. *See* Audra D.S. Birch, *Nearing Her 109th Birthday, and Still Waiting for Her Day in Court*, N.Y. TIMES (Nov. 7, 2023), <https://www.nytimes.com/2023/11/07/us/tulsa-race-massacre-lawsuit-oklahoma-supreme-court.html> [<https://archive.is/UbyDR>].

102. *See Tulsa Race Massacre*, *supra* note 91.

103. *See* Tracy Jan, *The 'Whitewashing of Black Wall Street'*, WASH. POST (Jan. 17, 2021), <https://www.washingtonpost.com/business/2021/01/17/tulsa-massacre-greenwood-black-wall-street-gentrification/> [<https://archive.is/owbLe>].

104. WGBH Interview with James Baldwin (Jun. 24, 1963) (transcript on file with American Archive of Public Broadcasting) [hereinafter Baldwin]. *See* Mindy Thompson

out many homes and businesses to make way for an interstate, which cut off Greenwood's rebuilt business district from its residential neighborhoods.<sup>105</sup> In a statement to the Washington Post, Mr. Bobby Eaton, an 85-year-old entrepreneur with substantial ties to Greenwood, noted that "what most folks know as urban renewal, I call Negro removal. The only thing is now, people are not being killed, but economically, they are being assassinated."<sup>106</sup>

Tulsa's history post-race massacre is an example of what is happening in many Black communities today: "in the midst of efforts to accumulate surplus value through real estate development via the gentrification of Black communities, municipalities attempt to appease Black communities and capitalize on Black cultural/spatial expressions by hemming Black histories into museums as they eradicate the makers of Black history."<sup>107</sup> In 2021, while the City of Tulsa was providing millions to revitalize the Greenwood District, in anticipation of influx tourism for the Massacre's centennial, Black entrepreneurs were being "shut out of Greenwood's most prestigious development projects and priced out of prime retail."<sup>108</sup> Tulsa's \$42 million in "race-blind" tax and loan incentives helped make this possible, with the majority of beneficiaries have been large, White-owned firms which won nearly all the contracts to develop Greenwood's lucrative parcels located so near to

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Fullilove, PERSPECTIVES ON EMINENT DOMAIN ABUSE: EMINENT DOMAIN & AFRICAN AMERICANS 4–5 (INST. FOR JUST., Feb. 14, 2007). According to Dr. Fullilove, urban renewal projects began with the passage of the Federal Housing Act In 1949. *Id.* The Act, which was in effect from 1949-1973 enabled the use of eminent domain, in which cities were authorized to clear "blighted neighborhoods" for higher purposes. *Id.* at 3. In her report, Fullilove showed that during the 24 years in which the Act was active, "2,532 projects were carried out in 992 cities that displaced one million people, two-thirds of them African American." *Id.* In a 1963 interview with WGBH Broadcasting Educational foundation, late author and political activist James Baldwin famously said, "urban renewal means Negro removal." Baldwin, *supra* note 103.

105. See Jan, *supra* note 103.

106. *Id.*

107. Bledsoe & Wright, *supra* note 79, at 16.

108. Jan, *supra* note 103; see also Congressman Don Beyer, *The Economic Legacy of the 1921 Tulsa Race Massacre: Today's Racial Wealth Gap*, U.S. CONG. JOINT ECON. COMM. (2021), [https://www.jec.senate.gov/public/\\_cache/files/3847c763-bd17-45c4-be82-ba38a2d1f94e/racial-wealth-gap-and-tulsa---final2.pdf](https://www.jec.senate.gov/public/_cache/files/3847c763-bd17-45c4-be82-ba38a2d1f94e/racial-wealth-gap-and-tulsa---final2.pdf) [<https://perma.cc/WF4L-2XHR>]. According to the Joint Economic Committee, for every dollar of wealth held by White families in the Tulsa Metropolitan Area, Black households hold 6 cents. *Id.* This wealth disparity is largely if not entirely attributed to the Tulsa Race Massacre of 1921. See also Appendix C.

downtown.<sup>109</sup> Today, only one single block—comprised of “ma and pa” shops remains Black-owned in Greenwood.<sup>110</sup> Meanwhile, new businesses continue to emerge, including a bank’s headquarters, luxury apartments, rooftop bars, and a \$20-million museum dedicated to Black Wall Street—and the violence that completely obliterated it.<sup>111</sup>

## 2. *Ferguson*

History, in all its ugly expressions, has a way of repeating itself.<sup>112</sup> On August 14, 2014, a Ferguson, Missouri police officer shot and killed Michael Brown, a young, unarmed Black male.<sup>113</sup> Amid the televised local and national outrage that followed, many were surprised to see the precarious conditions of the Ferguson community in which Michael Brown was born and raised.<sup>114</sup> Ferguson, formerly a predominately White middle-class St. Louis suburb, had become a modern day ghetto over a few decades.<sup>115</sup> Author and scholar Richard Rothstein described it as rife with “racially segregated neighborhoods with high poverty and unemployment, poor student achievement in overwhelmingly black schools, oppressive policing, abandoned homes, and community powerlessness.”<sup>116</sup> Many mainstream accounts attribute these conditions to “white flight”—a phenomenon triggered by the migration of Black people into the suburbs.<sup>117</sup> However, this explanation is too simplistic, and it conveniently fails to address the deliberate policies also responsible for it.<sup>118</sup> Instead, a more acute cause of St. Louis’ metropolitan segregation—and the brutal over-policing which led to Michael Brown’s plight—were “the explicit intents of federal, state, and local governments to create racially segregated metropolises.”<sup>119</sup>

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109. *Id.*

110. *See id.*

111. *See id.*

112. *See* Emily A. Vogels et al., *It’s All Just History Repeating Itself*, PEW RSCH. CTR. (June 30, 2020), <https://www.pewresearch.org/internet/2020/06/30/its-all-just-history-repeating-itself/> [<https://perma.cc/SW94-9YDB>].

113. *See* Richard Rothstein, *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES 1* (ECON. POL’Y INST. Oct. 15, 2014).

114. *See id.*

115. *See id.*

116. *Id.*

117. *Id.*

118. *See id.*

119. *Id.*

In the 1950's White residents in Ferguson and across America tended to flee large inner cities for "presumably safer, whiter suburbs" like Ferguson.<sup>120</sup> However, in the 1990s, when St. Louis saw trends in gentrification and de-industrialization, many Black inner-city residents were forced to relocate from cities to then-cheaper suburbs like Ferguson.<sup>121</sup> By 2014, the suburb's population had gone from 73% White to nearly 70% Black, while inner-city St. Louis saw a steady climb in White residents.<sup>122</sup> The displacement of Black residents from inner-city St. Louis conveniently corresponded with "a late 20th-century explosion" of urban renewal projects,<sup>123</sup> allowing community leaders to declare Black communities "blighted."<sup>124</sup> Meanwhile, the city of St. Louis made way for large corporate developers to build profitable sites such as luxury apartments, hotels, banks, restaurants, and more.<sup>125</sup> Michael Brown's murder cannot be explained in a vacuum of police brutality. Instead, we must consider the conditions which made *Ferguson* possible: it was "induced resettlement,<sup>126</sup> structural poverty, unequal distributions of political influence and police power, and a fundamental understanding that Black populations lack "spatial agency."<sup>127</sup> Such conditions are made possible to support capitalism's need for new spaces of profit accumulation—and "the insistence that Black populations cannot occupy space legitimately."<sup>128</sup>

### 3. *Brazil's Quilombos: Ilha de Maré*

While this Note predominately questions features of Western capitalism, Brazil's extensive experience with chattel slavery<sup>129</sup> makes

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120. Bledsoe & Wright, *supra* note 79, at 14.

121. *See id.*

122. *See id.*

123. *See supra* note 103 and accompanying text.

124. Bledsoe & Wright, *supra* note 79, at 15.

125. *See id.*

126. *See id.*; *see also* Rothstein, *supra* note 113, at 1 (noting that federal, state, and local policies intended to create "racially segregated metropolises").

127. Bledsoe & Wright, *supra* note 79, at 13.

128. *Id.* at 15.

129. *See* Brazil LAB, *Racialized Frontiers: Slaves and Settlers in Modernizing Brazil*, PRINCETON UNIV., [https://brazillab.princeton.edu/research/racialized\\_frontiers#:~:text=Brazil%20was%20built%20on%20the,1540%20and%20until%20the%201860s](https://brazillab.princeton.edu/research/racialized_frontiers#:~:text=Brazil%20was%20built%20on%20the,1540%20and%20until%20the%201860s) [https://perma.cc/SM9U-DDPM] (last visited Nov. 21, 2023). According to Brazil LAB, Brazil didn't formally abolish slavery until 1888, making it the last nation in the Americas to do so. *Id.* Furthermore, of the 12 million enslaved Africans brought to the Americas



Ilha de Maré a perfect fit for the paradigm of Black a-spatiality and capitalist exploitation.<sup>130</sup> Furthermore, it demonstrates capitalism's global reach.

After over a century of being neglected in their home nation's history, the Black residents of Brazil's "quilombo" communities were officially counted in Brazil's national census that began in August of 2022.<sup>131</sup> Brazil's quilombo communities were established in the 16th century by groups of Africans and Afro-descendants who escaped slavery and banded together to form their own close-knit, self-sustaining communities.<sup>132</sup> Today, official statistics show there are around 1.1 million people living in nearly 6,000 quilombos<sup>133</sup> spread across Brazil.<sup>134</sup> Although these communities have long been recognized as symbols of resistance and resilience, people of the quilombos have been plagued by perpetual inequalities and stigmatization by the Brazilian government.<sup>135</sup> Equally troubling, many of these communities lack government support in the form of basic social services and environmental protection from capitalist institutions seeking to exploit their lands.<sup>136</sup>

In Ilha de Maré—a centuries-old self-sustained fishing quilombo located off Brazil's northeast coast—the environment is increasingly being threatened by the oil and gas industry.<sup>137</sup> Beginning in the 1940s,

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during the transatlantic slave trade, approximately 5.5 million people—or nearly 50 percent—were forcibly taken to Brazil. *Id.*

130. See Bledsoe & Wright, *supra* note 79, at 18.

131. Jimin Kang, *Black Brazilians in Remote 'Quilombo' Hamlets Stand up to be Counted*, REUTERS (Sept. 20, 2022), <https://www.reuters.com/investigates/special-report/brazil-elections-race/> [<https://archive.is/4dRmu>].

132. See Paula Ramón, *Their Identity Was Forged Through Resistance: Inside the Lives of Brazil's Quilombos*, NAT'L GEOGRAPHIC (Mar. 14, 2022), <https://www.nationalgeographic.com/history/article/their-identity-was-forged-through-resistance-inside-the-lives-of-brazils-quilombos> [<https://perma.cc/79WV-NJWN>].

133. See *Quilombo*, ENCYC. BRITANNICA (Apr. 6, 2016), <https://www.britannica.com/topic/quilombo> [<https://perma.cc/K9HH-3VLH>] (defining Quilombos as autonomous communities, usually located in remote areas around Brazil, which were organized by escaped enslaved people in the 1600s).

134. See Ramón, *supra* note 132.

135. See *id.*

136. See *id.* (finding that the Brazilian government has granted less than 10% of quilombo communities a special protected status which would shield them from development).

137. See Daniel Milroy Maher, *A Story on Oil, Pollution and Racism: Tommaso Rada Explores the Environmental Woes of Brazil's Quilombola*, BRITISH J. PHOTOGRAPHY, (Nov. 3, 2021), <https://www.1854.photography/2021/11/a-story-on-oil-pollution-and->

oil deposits were found in the area, which sparked the continuous expansion of oil extraction in the region.<sup>138</sup> Over the next few decades, residents of Ilha de Maré started to see toxic chemicals seep up through their lands and into the water from oil wells and gas deposits.<sup>139</sup> In 2013, an international freighter from Singapore carrying propane gas exploded in the local bay, causing an enormous oil and chemical spill; this spill has had devastating effects on Ilha de Maré and the surrounding Afro-descendant fishing communities.<sup>140</sup> According to locals, the waters where they once swam and caught their livelihood are now filled with petrochemical residue, and marine life has declined rapidly, threatening their way of life and existence on the island.<sup>141</sup> The government has remained passive in addressing the issue.<sup>142</sup> This environmental degradation—and the government’s refusal to address it in any meaningful way—is “a clear example of one way in which mechanisms of capital accumulation continue to treat Black peoples as inhuman and spaces inhabited by Black populations as lifeless locations.”<sup>143</sup>

## II. ANTI-BLACKNESS IN CAPITALISM? ESG TO THE RESCUE

Beckert, Rockman, and Inikori show that the development and growth of global capital markets is inextricably linked to the enslavement of Africans.<sup>144</sup> Furthermore, Bledsoe and Wright demonstrate that anti-Blackness is at least a tool—if not a necessary one—for capitalist accumulation and surplus.<sup>145</sup> Tulsa, Ferguson, and Ilha de Maré help place this theory into perspective.<sup>146</sup> Taken together, these analyses support the long-contemplated idea that anti-Blackness and capitalism began, and remain, as mutually reinforcing of one another.<sup>147</sup> As more and more

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racism-tommaso-rada-explores-the-environmental-woes-of-brazils-quilombola/  
[<https://perma.cc/QHT8-2MCU>].

138. *See id.*

139. *See id.*

140. Bledsoe & Wright, *supra* note 79, at 19.

141. *See* Maher, *supra* note 137.

142. *See id.*

143. Bledsoe & Wright, *supra* note 79, at 129.

144. *See* BECKERT & ROCKMAN, *supra* note 15, at 1, 11; *see also* Inikori, *supra* note 18, at 167–70.

145. *See* Bledsoe & Wright, *supra* note 79, at 16.

146. *See supra* Part I.C.

147. *See* BECKERT & ROCKMAN, *supra* note 15, at 1, 11; Bledsoe & Wright, *supra* note 79, at 16; Carmen Gonzalez & Athena Matua, *Mapping Racial Capitalism: Implications for Law*, 2 U.C. BERKELEY J.L. & POL. ECON. 127, 138(2022); Inikori, *supra*

capitalist stakeholders have begun to accept—or at least grapple with—this idea, so too has the landscape begun to change regarding corporate responsibility efforts.<sup>148</sup>

Amid the changing landscape and renewed calls for corporate accountability, companies have implemented various ESG tools to engage in the battle against anti-Black racism and inequality.<sup>149</sup> Some business experts feel that corporations have a moral and business obligation to engage with ESG.<sup>150</sup> A 2023 survey by Edelman Trust Institute found that roughly 80% of respondents expected CEOs to “take a public stand” on ESG issues like discrimination and the wealth gap.<sup>151</sup> But many are calling for tangible actions beyond apologies and scholarship funds to address the inequalities rooted in history.<sup>152</sup> Others are calling for reparations from corporations like Aetna Inc., which amassed enormous amounts of wealth by issuing insurance policies for enslaved persons to plantation owners.<sup>153</sup>

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note 18, at 167–70; *see also* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2190 (2013); C. Robinson, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 4–5 (Univ. 3d ed., 1983). Scholars believe that C. Robinson first developed the theory of racial capitalism and the mutually reinforcing relationship between anti-blackness and capitalism in 1983. *See* Robinson, *supra* note 147.

148. *See* Blair Johnson, *How the Black Lives Matter Movement Enhanced Corporate Governance in 2020*, 8 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 99, 100 (2021).

149. Plerhoples, *supra* note 28, at 910.

150. *See* Sharon G. Dayoan, *ESG Is Ethical and Profitable for Business*, KPMG INT’L (Jan. 30, 2023), <https://kpmg.com/ph/en/home/insights/2023/01/esg-is-ethical-and-profitable-for-business.html> [<https://perma.cc/PGN3-7QN7>].

151. *See* 2023 Edelman Trust Barometer: Global Report 32, EDELMAN, <https://www.edelman.com/sites/g/files/aatuss191/files/2023-03/2023%20Edelman%20Trust%20Barometer%20Global%20Report%20FINAL.pdf> [<https://perma.cc/4JZM-MKGC>].

152. *See* Darryl Fears, *Seeking More Than Apologies for Slavery*, WASH. POST (June 20, 2005), <https://www.washingtonpost.com/archive/politics/2005/06/20/seeking-more-than-apologies-for-slavery/cff95386-8fbf-417b-aae0-bdb85f1f1a97/> [<https://archive.is/B3lKF>].

153. *See* Hannah Gold, *Why Aetna Should Pay Reparations*, THE BAFFLER (July 24, 2014), <https://thebaffler.com/latest/why-aetna-should-pay-reparations> [<https://perma.cc/J63S-W8EV>].

## A. ESG EXPLAINED

The term ESG first gained recognition in 2004, in the United Nations' "Who Cares Who Wins" Report.<sup>154</sup> According to Forbes, this was "the first policy urging corporations to include ESG considerations in their financial evaluations."<sup>155</sup> With its three pillars—environmental, social, and governance—ESG provides that companies "capture all the non-financial risks and opportunities inherent to a company's day to day activities."<sup>156</sup> In other words, ESG policies seek to hold fiduciaries accountable not only for cash capital, but also for the "natural and social" capital intertwined in running their businesses.<sup>157</sup> The environmental pillar is concerned with environmental sustainability.<sup>158</sup> It encourages companies to report their impacts on the environment concerning emissions<sup>159</sup> and responsible, sustainable use of energy sources.<sup>160</sup> The social pillar emerged with a focus how companies treat their labor force and their impacts within the supply chain,<sup>161</sup> such as product sourcing and product quality and safety.<sup>162</sup> Finally, governance refers to the rules, practices and procedures companies have in place to protect shareholders'

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154. See GLOBAL IMPACT, UNITED NATIONS, WHO CARES WINS (2004); see Betsy Atkins, *Demystifying ESG: Its History and Current Status*, FORBES (June 8, 2020), <https://www.forbes.com/sites/betsyatkins/2020/06/08/demystifying-esgits-history--current-status/?sh=4c6a5842cdd3> [<https://archive.is/Cc5Pi>].

155. *Id.*

156. *ESG Explained*, DELOITTE (May 22, 2023), <https://www2.deloitte.com/hu/en/blog/esg-explained/2021/esg-explained-1-what-is-esg.html>.

157. *Id.*

158. *Id.*

159. See *id.* Emissions include release of greenhouse gases into the atmosphere, water pollution, and air pollution. See *id.*; see also *Disparities in the Impact of Air Pollution*, AM. LUNG ASS'N (Apr. 17, 2023), <https://www.lung.org/clean-air/outdoors/who-is-at-risk/disparities#:~:text=Recent%20studies%20have%20looked%20at,communities%20that%20are%20predominately%20white> [<https://perma.cc/9A28-XM39>]. According to the American Lung Association, many studies show an alarmingly disproportionate exposure and resulting effects of pollution on poor people and certain racial and ethnic groups. *Id.* In fact, studies found that "that those who live in predominately black or African American communities suffered greater risk of premature death from particle pollution than those who live in communities that are predominately white." *Id.* Scientists have speculated many reasons for the disparities, racism and classism being among them. *Id.*

160. Deloitte, *supra* note 156.

161. *Id.*

162. *Id.*

rights and manage the company.<sup>163</sup> According to attorneys Ross A. Clements and Lawrence A. Cunningham, the UN convinced many stakeholders to incorporate ESG models within their business frameworks.<sup>164</sup> The ESG movement started with European investors and managers, and eventually reached American investors and managers.<sup>165</sup> It became more popular among American corporations when “massive index funds . . . found ESG to be a useful way to compete in markets where it’s not possible to compete on customer pricing or on investment returns.”<sup>166</sup>

Traditionally, global corporations and financial institutions used ESG tools and metrics to address labor, environmental, and human rights issues.<sup>167</sup> However, the “social” prong has become more broad, with stakeholders, including some shareholders, pressuring companies to address systemic inequalities regarding gender and race.<sup>168</sup> According to Professor Blair Johnson, racial inequality issues received little corporate attention before the racialized killings of innocent Black people and the rise of the Black Lives Matter movement.<sup>169</sup> For Black Lives Matter participants, ESG seemed to address the same type of grievances for

163. *Id.*

164. See Ross S. Clements & Lawrence A. Cunningham, *The Rise and Stall of ESG: A Brief History and A (Hopeful) Look Ahead*, MAYER BROWN (Apr. 25, 2023), <https://www.mayerbrown.com/en/perspectives-events/publications/2023/04/the-rise-and-stall-of-esg-a-brief-history-and-a-hopeful-look-ahead> [https://perma.cc/Q8RA-GM7C].

165. *See id.*

166. *Id.*

167. *See* Atkins, *supra* note 154.

168. Chris Ogletree, *A Deep Dive into the Social Aspect of ESG*, CONSERVICE (May 13, 2022), <https://esg.conservice.com/the-social-aspect-of-esg/> [https://perma.cc/C9HY-5G86].

169. *See* Johnson, *supra* note 148, at 110; *see also* About, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [https://archive.is/79HwP] (last visited Nov. 24, 2023). Black Lives Matter is a

global organization . . . founded in 2013 in response to the acquittal of George Zimmerman, the defendant in Trayvon Martin’s murder case . . . whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes.

which they sought remedies.<sup>170</sup> The push toward ESG was intensified in 2020 by “eroding trust in the American government, worsened by the pandemic, [which] led Americans to look to the private sector for solutions to economic and social problems.”<sup>171</sup>

During the COVID pandemic, investment dollars began to be allocated to companies ranking high for ESG consciousness, starting in the first quarter of 2020. Investment inflows to ESG funds was greatest among European investors but included a large segment in the US, according to Morningstar data. Those in the ESG ecosystem responded to the demand by increasingly stating specific expectations and priorities and many companies stepped up.<sup>172</sup>

### B.ESG IMPLEMENTATION MEASURES

This section describes ESG measures which firms and institutions have taken to address anti-Black racism and inequality, with a particular focus on American governmental and corporate efforts.

In the United States, two groups of actors fall centerstage when it comes to setting ESG standards to combat Anti-Black racism and inequality: the federal government<sup>173</sup> and the private sector.<sup>174</sup>

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170. See Clements & Cunningham, *supra* note 164.

171. *Id.*

172. *Id.*

173. See John P. Pelissero, *Trends in the Implementation of ESG Policies in State and Local Governments*, MARKKULA CTR. FOR APPLIED ETHICS AT SANTA CLARA UNIV. (Feb. 8, 2022), <https://www.scu.edu/ethics/all-about-ethics/trends-in-the-implementation-of-esg-policies-in-state-and-local-governments/> [<https://perma.cc/M6SN-F3K3>]; see also Lance C. Dial et al., *2023 ESG State Legislation Wrap Up*, K&L GATES (July 25, 2023), <https://www.klgates.com/2023-ESG-State-Legislation-Wrap-Up-7-19-2023> [<https://perma.cc/LK27-WPMN>]. This Note does not consider state and local government legislation as relevant regarding anti-racism related ESG concerns. According to a report by K&L Gates, “[t]he vast majority of the ‘pro-ESG’ bills to date have been directives to state pension plans or other state investment bodies to divest of holdings in certain industries (e.g., fossil fuels or firearms) or with relatively high carbon emission profiles”—all of which focus on the environmental aspect of ESG. *Id.* Some exceptions include cities like Chicago and Boston—who include diversity and anti-bias as considerations in city investment policies—local governments have trended towards similar ESG measures. See CHICAGO TREASURER’S OFFICE, CITY OF CHICAGO INVESTMENT POLICY, 13 (2024); CITY OF BOSTON, CASH INVESTMENT POLICY 8 (2019).

174. Plerhopes, *supra* note 28, at 911.

1. *ESG at the Federal Level*

At the federal level, the American government has tended to focus on preventative rather than progressive regulation.<sup>175</sup> Such regulations are aimed at barring racial discrimination practices in private sector hiring and pay.<sup>176</sup> However, in a more assertive attempt to combat anti-black racism and the resulting racial inequalities, the Chair of the Federal Reserve Bank, Jerome Powell, expanded the Federal Reserve's historical mandate.<sup>177</sup> In 2020, Powell made the following statement: "The maximum level of employment is a broad-based and inclusive goal that is not directly measurable and changes over time owing largely to nonmonetary factors that affect the structure and dynamics of the labor market."<sup>178</sup> This meant that the infamously "color blind" Federal Reserve would vow to start paying more attention to the glaring disparities in unemployment rates<sup>179</sup> among Black people and other minorities when it comes to market control.<sup>180</sup> In application, this would mean maintaining low interest rates as inflation would rise.<sup>181</sup> In turn, underrepresented minorities would have a chance to catch up with their White counterparts and find employment in a strong job market.<sup>182</sup> The policy would be critical for Black people who, due to racism in America, are usually the

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175. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (West).

176. *Id.*

177. See Matthew Johnston, *Breaking Down the Federal Reserve's Dual Mandate*, INVESTOPEDIA (Apr. 8, 2023), <https://www.investopedia.com/articles/investing/100715/breaking-down-federal-reserves-dual-mandate.asp#:~:text=Congress%20explicitly%20stated%20the%20Fed's,dual%20mandate%22%20and%20remain%20today> [<https://perma.cc/95V4-W9AW>]. The dual congressional mandates for the Federal Reserve are to 1) maximum employment and 2) stable prices and moderate long-term interest rates. *Id.*

178. Board of Governors of the Federal Reserve System, *2020 Statement on Longer-Run Goals and Monetary Policy Strategy*, U.S. FED. RSVR. (Aug. 27, 2020), <https://www.federalreserve.gov/monetarypolicy/guide-to-changes-in-statement-on-longer-run-goals-monetary-policy-strategy.htm> [<https://perma.cc/M6LC-7T34>].

179. See *infra* App. F.

180. See Matthew Boesler, Steve Matthews & Catarina Saraiva, *The Fed Wakes up to Race*, BLOOMBERG (Jan. 15, 2021), <https://www.bloomberg.com/features/2021-federal-reserve-race-inequality/?leadSource=uverify%20wall> [<https://archive.is/kF2VT>]. This Note supports such a course of action.

181. See *id.*

182. See *id.*

“last hired and first fired.”<sup>183</sup> However, some critics argue this agenda conflates politics with economics and could compromise the Federal Reserve’s independence.<sup>184</sup> Now, as the national labor market thrives amid one of America’s worst inflation outbreaks, the question of the Federal Reserve’s responsibility to marginalized people hangs in delicate balance.<sup>185</sup>

Other federal agencies have instituted disclosure regimes which request or require certain companies to disclose information about their workforce demographics and racial work environment.<sup>186</sup> These regimes, including the Equal Employment Opportunity Commission’s (“EEOC”) Employment Information Report Component 1 (“EEO-1”), the SEC’s Diversity Assessment Report, and the Office of Federal Contract Compliance Programs (“OFCCP”) are aimed at steering managers to mitigate racial inequality within their company’s workforce.<sup>187</sup> Under the EEO-1, companies with 100 employees or more are required to disclose requested demographic data on categories such as “sex, race, ethnicity, and job categories of all employees.”<sup>188</sup> Notably, while the EEOC is free to share this data with other authorized federal agencies, “neither shareholders nor the public can access companies’ EEO-1 data . . . unless a company chooses to release it.”<sup>189</sup> In 2015 the SEC created the Diversity Assessment Report pursuant to section 342 of the Dodd-Frank Wall Street

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183. Aquil Jones & Joseph Tracy, *Black Workers at Risk for ‘Last Hired, First Fired’*, <https://www.dallasfed.org/research/swe/2020/swe2002/swe2002e> [https://perma.cc/H4ZP-8V8T] (last visited May 23, 2023). Since the Great Depression when Black people in “low-skilled” jobs were replaced by White employees—which dropped Blacks’ unemployment rate to 50 percent—Black people have always suffered more adverse labor outcomes (usually twice as bad) than their White counterparts. *Id.* This is true despite the passage of the Civil Rights Act of 1964. *Id.*

184. Boesler et al., *supra* note 180.

185. Howard Schneider, *Fed’s ‘Inclusive’ Jobs Promise Hits Inflation Control Reality*, REUTERS (Jan. 6, 2023), <https://www.reuters.com/markets/us/feds-inclusive-jobs-promise-hits-reality-inflation-control-2023-01-06/> [https://archive.is/Dcyj1].

186. Plerhoples, *supra* note 28, at 916.

187. *See id.*

188. *Id.*

189. *Id.* at 916–17; see Meredith Benton & Jalyn Spann, *Increase in EEO-1 Data Reporting Shows Positive Link Between Diversity and Financial Performance*, PROXY PREVIEW (Mar. 21, 2023), <https://www.proxypreview.org/all-contributor-articles/increase-in-eeo-1-data-reporting-shows-positive-link-between-diversity-and-financial-performance> [https://perma.cc/7XAR-HBGF].



Reform and Consumer Protection Act (“Dodd-Frank”).<sup>190</sup> This Report is a voluntary disclosure form which allows Dodd-Frank-regulated entities to conduct internal self-assessments with regard to diversity practices, policies, and the overall profile of participating companies.<sup>191</sup> Much like the EEOC, this voluntary disclosure is only meant to guide directors in their diversity efforts, rather than enforce diversity measures.<sup>192</sup>

Last, the OFCCP was created to evaluate and enforce compliance with statutory anti-discrimination and affirmative action policies of those companies who conduct business with the Federal Government.<sup>193</sup> Many government contractors who are subject to the rule-making power of the OFCCP are also publicly-traded corporations.<sup>194</sup> So, this instrument does have the potential to “influence market behavior beyond corporations who directly contract with the federal government.”<sup>195</sup> However, these tools lack efficacy because they are primarily directive and non-enforcing in nature.<sup>196</sup> Simultaneously, setting interest rates under an agenda for racial equality might pose considerable challenges for the Federal Reserve.<sup>197</sup> According to Boesler, Matthews, and Saraiva, some critics, like Charles Plosser, former president of the Philadelphia Federal Reserve, argue such an agenda conflates politics with economics and could compromise the Federal Reserve’s independence.<sup>198</sup> They feel the market would become a discretionary one in which politicians could influence rate decisions.<sup>199</sup> Furthermore, such a policy seems to contradict western attitudes about economics, which embrace the concept of a “free market” with minimal government regulation.<sup>200</sup> Taken together, these

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190. See Section 342 *Dodd-Frank Wall Street Reform and Consumer Protection Act Report to Congress 2020*, FED. DEPOSIT INS. CORP. (Mar. 31, 2021), <https://www.fdic.gov/about/diversity/pdf/rte-3-31-21.pdf> [<https://perma.cc/3SGG-VP7Z>]. Section 342 requires financial regulators, such as the Federal Deposit Insurance Corporation (FDIC) to create diversity standards for entities they regulate which is then compiled in an annual report to Congress. *Id.*

191. Plerhoples, *supra* note 28, at 917–18.

192. See *supra* note 174.

193. Plerhoples, *supra* note 28, at 918.

194. *Id.* at 918–19.

195. *Id.*

196. See *id.*

197. See Boesler et al., *supra* note 180.

198. See *id.*

199. See *id.*

200. See Abe Webb, *Western vs. Eastern Economics: The Grand Chessboard of Global Finance*, MEDIUM (Sept. 15, 2023), <https://medium.com/@abey702/western-vs->

dominant federal ESG measures fail to adequately address racial inequality.<sup>201</sup>

## 2. *ESG in the Private Sector*

Private firms, institutional investors, ESG reporting agencies, stock exchanges, indices, proxy advisory firms, advocacy groups, and global working groups have all taken the lead among private entities in implementing ESG tools to combat racial inequality.<sup>202</sup> The following sections will highlight several of these actors and provide an overview of their specific ESG implementation tools.

### a. Private Firms

In a 2021 study for the Harvard Law School Forum on Corporate Governance, partners at Wachtell, Lipton, Rosen & Katz, LLP found that, recently, commercial companies<sup>203</sup> had implemented various ESG tools for racial equity in response to pressure from investors and proxy advisors.<sup>204</sup> These tools include: (1) improving and expanding internal diversity, equity and inclusion (“DEI”) initiatives and targets; (2) expansion of the internal DEI function within organizations; (3) anti-bias training across the workforce; (4) regular audits to track effectiveness and progress of DEI initiatives; (5) public disclosure of DEI goals to include EEO-1 reports; and (6) executive compensation tied to performance.<sup>205</sup> According to the editors, DEI was a department that was once siloed in many corporations.<sup>206</sup>

However, DEI is now being integrated with every aspect of these organizations, from human capital management and supply chain

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[<https://perma.cc/X3ZE-TTVM>].

201. Plerhoples, *supra* note 28, at 916.

202. *Id.* at 919.

203. These companies include those operating on a global scale. See Adam O. Emmerich et al., *Using ESG Tools to Help Combat Racial Inequality*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 21, 2021), <https://corpgov.law.harvard.edu/2021/07/21/using-esg-tools-to-help-combat-racial-inequity/#more-139303> [https://perma.cc/NN68-Z5VC].

204. See *id.*

205. See *id.*

206. See *id.*

management, to brand strategy, reputation and management.<sup>207</sup> Additionally, the Business Roundtable (“BRT”)<sup>208</sup> and its association of over 230 of America’s largest employers and business leaders have made several commitments toward the elimination of racial inequality, including commitments to establish a special committee to advance racial equity and justice, and to develop a six-pillar program to address the racial wealth gap.<sup>209</sup>

#### b. Stock Exchanges and Indices

In August 2021, following SEC approval, the Nasdaq Stock Market (“Nasdaq”) imposed a landmark mandatory diversity rule, requiring all companies listed under Nasdaq’s U.S. exchange to “publicly disclose board-level diversity statistics using a standardized template; and have, or explain why they do not have, at least two diverse directors.”<sup>210</sup> The rule creates exceptions for listed companies with smaller boards, as well as some flexibility for companies to come into compliance with the new rule.<sup>211</sup>

While the SEC’s reception of Nasdaq’s diversity rule opens the doors for other exchanges to follow suit, other exchanges have not indicated any plans to adopt a similar rule.<sup>212</sup> When asked about such a rule, Stacy Cunningham, president of the New York Stock Exchange (“NYSE”)

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207. *See id.*

208. BUS. ROUNDTABLE, <https://www.businessroundtable.org/about-us> [<https://perma.cc/G7HY-ARPG>] (last visited Dec. 12, 2023) (noting the BRT is “an association of chief executive officers (CEOs) of America’s leading companies who are working to promote a thriving U.S. economy and expanded opportunity for all Americans through sound public policy”).

209. Rhett Buttle, *Race, Equity, and the Purpose of the Corporation: A Conversation with Jonay Holkins of the Business Roundtable*, FORBES (Sept. 12, 2022), <https://www.forbes.com/sites/rhettbuttle/2022/09/12/bridging-the-racial-wealth-gap-through-equitable-opportunity-a-conversation-with-jonay-foster-holkins-senior-director-of-policy-for-business-roundtable/?sh=3f9317607e25> [<https://archive.is/4shD5>]. The six pillars are education, employment, finance, health, housing, and the justice system. *Id.*

210. Brian V. Brehney et al., *SEC Approves Nasdaq Board Diversity Listing Standards*, SKADDEN (Sept. 2021), <https://www.skadden.com/-/media/files/publications/2021/08/sec-approves-nasdaq-board-diversity-listing/nasdaq-board-diversity-rule.pdf> [<https://perma.cc/N4L7-WYDC>].

211. *Id.*

212. *See* Plerhoples, *supra* note 28, at 921.

predicted that companies—by demand from their investors—would act on their own to implement diversity standards.<sup>213</sup> She felt that NYSE should not be “defining the investable universe.”<sup>214</sup> Even more, the rule has unfortunately come under legal scrutiny.<sup>215</sup>

Currently, the Alliance for Fair Board Recruitment and the National Chair for Public Policy Research are challenging the rule, asserting that it violates the Constitution’s Fourteenth Amendment Equal Protection Clause and the First Amendment Freedom of Speech Clause.<sup>216</sup> The two groups believe the rule encourages “self-condemnation” and reverse discrimination.<sup>217</sup> If the lawsuit succeeds, the challenge will “significantly curtail the SEC’s administrative powers and the powers of private actors.”<sup>218</sup> Moreover, it would be yet another blow to anti-racism and equality efforts from resisters who seem to be comfortable in today’s slavery-remnant society.<sup>219</sup>

### c. Proxy Firms and Asset Management Firms

Banking and investment firms like Blackrock, Goldman Sachs, and Institutional Shareholder Services (“ISS”) have implemented new guidelines and initiatives in the fight for racial equity.<sup>220</sup> ISS, one of the leading proxy advisory firms, has trended its shareholder votes in favor

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213. See NYSE President on IPOs, Diversity, Chinese Company Listings, BLOOMBERG (Dec. 9, 2020), <https://www.bloomberg.com/news/videos/2020-12-09/nyse-president-on-ipos-diversity-chinese-company-listings-video> [https://archive.is/K7xAL].

214. *Id.*

215. See *All. for Fair Bd. Recruitment v. SEC*, 85 F.4th 226, 227 (5th Cir. 2023) (finding that Nasdaq’s diversity rule did not constitute state action subject to constitutional scrutiny); but see *All. for Fair Bd. Recruitment v. SEC*, No. 21-60626, 2024 WL 670403, at \*1 (5th Cir. 2024) (vacating Oct. 18, 2023 ruling).

216. See Rosenblum et al., *The Attack on Nasdaq’s Board Diversity Rule*, COLUM. L. SCH. BLUE SKY BLOG (Sept. 13, 2022), <https://clsbluesky.law.columbia.edu/2022/09/13/the-attack-on-nasdaqs-board-diversity-rule/#:~:text=Beginning> [https://perma.cc/XD5A-NQKT].

217. See *id.* This note posits that the concept of “reverse discrimination” is arguably racist in itself, and all-too-often asserted by privileged groups. See *id.*

218. *Id.*

219. HENDERSON, *supra* note 25.

220. See Sarah Dong, *The History and Growth of the Diversity, Equity, and Inclusion Profession*, BERKELEY GLOB. RSCH. & CONSULTING (June 2, 2021), <https://insights.grcglobalgroup.com/the-history-and-growth-of-the-diversity-equity-and-inclusion-profession/> [https://perma.cc/T7P2-ARDV].

of DEI policies.<sup>221</sup> For example, they will “vote against or withhold votes from chairs of nominating committees with no racially or ethnically diverse board members.”<sup>222</sup> Additionally, ISS will vote in favor of shareholder proposals calling for company disclosures of DEI data.<sup>223</sup> In fall 2021, investment giants Blackrock, Goldman Sachs, Morgan Stanley, and Lord Abnett & Co. partnered with Loop Capital Markets and Siebert Williams Shank & Co. to develop the Municipal Issuer Racial Equity & Inclusion Engagement Framework, a questionnaire which asks governments about their anti-racism and racial equality efforts.<sup>224</sup> The questionnaire is designed to help investors who are interested in learning how cities are addressing systemic racism to make more informed investment decisions.<sup>225</sup> Additionally, in its 2023 proxy voting guidelines, Blackrock encourages companies to have at least one diverse board member, and takes a case-by-case approach in voting against companies who lack board diversity.<sup>226</sup> Other firms have followed suit with similar proxy guidelines.<sup>227</sup>

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221. See *id.* Though public and private institutions have utilized DEI policies as a primary ESG tool for combating racism and inequality, DEI is really not a manifestation of ESG. *Id.* It is a related, but distinct tool which has its roots in the Civil Rights Movement, when activists sought to promote tolerance in schools, workplaces, and communities. *Id.*; Nicquel Terry Ellis, *What Is DEI and Why Is It Dividing America*, CNN (Mar. 11, 2024), <https://www.cnn.com/2024/03/09/us/what-is-dei-and-why-its-dividing-america/index.html> [<https://perma.cc/J73S-YL46>].

222. Plerhoples, *supra* note 28, at 922.

223. See *id.*

224. See Danielle Moran, *Blackrock, Goldman Join Racial-Justice Push in Muni-Bond Market*, BLOOMBERG (Sept. 24, 2021), <https://www.bloomberg.com/news/articles/2021-09-24/blackrock-goldman-join-racial-justice-push-in-muni-bond-market#xj4y7vzkg> [<https://archive.ph/uQfQb>].

225. See *id.*

226. See *Investment Stewardship Annual Report*, BLACKROCK (2022), <https://www.blackrock.com/corporate/literature/publication/annual-stewardship-report-2022.pdf> [<https://perma.cc/7Z6M-BWAK>].

227. See *supra* note 33 and accompanying text; see, e.g., Tanya Faransso et al., *Proxy Advisory Firm Policy Updates for the 2023 Proxy Season*, WILMERHALE (Feb. 6, 2023), <https://www.wilmerhale.com/en/insights/blogs/esg-epicenter/20230206-proxy-advisory-firm-policy-updates-for-the-2023-proxy-season> [<https://perma.cc/C4LE-CHMD>].

#### d. Shareholder Proposals for Racial Equity Audits

In accordance with the increasing focus on ESG, shareholders are calling on companies to conduct racial equity audits (“REAs”) where independent third-party entities perform an “objective and holistic analysis of a company’s policies, practices, products, services, and efforts to combat systemic racism, in order to end discrimination within or exhibited by the company with respect to its customers, suppliers, or other stakeholders.”<sup>228</sup> According to attorneys Ron S. Berenblat and Elizabeth Gonzalez-Sussman, the 2021 proxy season saw a rise in Rule 14a-8 shareholder proposals calling for companies to conduct REAs.<sup>229</sup> REAs go a step further than typical ESG reporting standards by attempting to determine what “changes to existing programs or new measures or initiatives would help a company become more equitable and inclusive.”<sup>230</sup>

Even more, REAs help managers and investors better understand the negative implications of racial bias within their companies, as well as external impacts, so that they may mitigate or eliminate practices or policies that promote it.<sup>231</sup> Sadly, out of the eight shareholder proposals which asked companies to conduct REAs in 2021, none were successful.<sup>232</sup> Though support for such proposals has declined since 2021,<sup>233</sup> some experts predict they are “poised to stage a comeback.”<sup>234</sup> According to recent data, shareholders of at least 19 companies, including

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228. Ron S. Berenblat & Elizabeth R. Gonzalez-Sussman, *Racial Equity Audits: A New ESG Initiative*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 30, 2021), <https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative/> [<https://perma.cc/23UN-QMLK>].

229. See 17 C.F.R. § 240.14a-8 (West) (issuing a framework in which shareholders of public companies may request inclusion of proposals in companies’ proxy statements to be voted on at shareholder meetings); Berenblat & Gonzalez-Sussman, *supra* note 228.

230. *Id.*

231. See *id.*

232. See Shirley Wescott, *2021 Proxy Season Review*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 5, 2021), <https://corpgov.law.harvard.edu/2021/08/05/2021-proxy-season-review/> [<https://perma.cc/X3TR-N9TD>].

233. Berenblat & Gonzalez-Sussman, *supra* note 228.

234. THE CONFERENCE BOARD, PREPARING FOR SHAREHOLDER PROPOSALS ON DIVERSITY IN 2024 1 (2023).

AT&T, Coca Cola, Comcast, and Walmart were expected to introduce proposals for REAs during the 2023 proxy season.<sup>235</sup>

### C. ESG IMPLEMENTATION CONCERNS

The crucial issue regarding ESG implementation measures is whether these efforts—especially in the private sector—will stand the test of time to meaningfully support racial justice and combat racial inequality. Many experts don’t think they will.<sup>236</sup> While there are several implementation concerns at Federal, state, and local levels—such as the ongoing political fights over ESG and the regulatory landscape<sup>237</sup>—this section will focus on concerns at the private level.

ESG, in substantial part, is concerned with *stakeholders*, which include all non-shareholder constituencies, such as “customers, suppliers, employees, communities, and the environment.”<sup>238</sup> According to Professors Lucian Bebchuk and Roberto Tallarita, “stakeholderism” is the new social and political phenomenon which calls for a corporate governance model that implores corporate leaders to serve the needs and interests of stakeholders.<sup>239</sup> This term typically arises in discussions related to ESG.<sup>240</sup> Stakeholderism is popular among many because it relies on “private ordering” rather than external, government intervention.<sup>241</sup>

However, Bebchuk and Tallarita warn not only that corporate stakeholderism would fail to produce material benefits for stakeholders in

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235. See *Racial Justice Audits Set to Rise in 2023*, MINERVA ANALYTICS (Mar. 17, 2023), <https://www.manifest.co.uk/racial-justice-audits-set-to-rise-in-2023/> [<https://perma.cc/Q2AG-TTP6>].

236. See e.g., Charles Henderson, *7 Months After George Floyd’s Death, Corporations Are Still ‘Diversity Washing’ Instead of Making Actual Changes*, BUS. INSIDER (Jan. 9, 2021, 09:36 AM), <https://www.businessinsider.com/diversity-washing-greenwashing-george-floyd-corporations-black-lives-matter-2021-1> [<https://perma.cc/22DV-U3XG>].

237. Leah Malone et al., *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 9, 2023), <https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/> [<https://perma.cc/B78Y-MJ8P>].

238. Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 91 (2022).

239. See *id.*

240. *Id.*

241. *Id.* at 94.

the long run, but that it would “introduce illusory hopes, misperceptions, and distractions that could have significant adverse effects on stakeholders.”<sup>242</sup> For the reasons set forth below, this Note concludes that alone, the concept of stakeholderism—and the current ESG implementation measures such as disclosure regimes and diversity requirements—are insufficient as tools to combatting anti-black racism and inequality.

### 1. *Shareholder Wealth Maximization Legally Trumps Stakeholder Welfare*

The laws and policies governing corporations present perhaps the most salient barrier for ESG.<sup>243</sup> Corporate governance guidelines are voted on by a company’s board of directors and normally contain provisions regarding the goals directors must pursue in every business move they make.<sup>244</sup> These provisions, which are binding pursuant to corporate law, “provide a natural place to look for the company’s official position on corporate purpose.”<sup>245</sup> Thus, it would have been appropriate for companies leading the way in campaigns to combat anti-racism, such as those companies whose CEOs signed off on the BRT initiatives,<sup>246</sup> to amend existing corporate governance guidelines which expressly reflect shareholder value as their primary goal.<sup>247</sup>

Still, many boards of directors, fearing shareholder litigation that might follow, seem unwilling to stray from the traditional corporate law doctrine of shareholder primacy (also referred to as shareholder wealth maximization (“SWM”)), which provides that corporations must operate with the *sole* purpose of protecting shareholders’ economic interests.<sup>248</sup> In a sample of twenty corporations whose CEOs signed off on the BRT initiatives, Bebchuk and Tallarita found that only ten of the organizations

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242. See *id.* at 96 (arguing that reliance on stakeholderism distracts from promoting more effective modes of change, such as adaptation of government laws and policies that protect stakeholder groups).

243. See Saul Levmore, *Not-for-Profits, ESGs, and the Economic Structure of Corporate Law*, 1 UNIV. CHI. BUS. L. REV. 339, 342 (2022).

244. Bebchuk & Tallarita, *supra* note 238, at 133.

245. *Id.*

246. See BUS. ROUNDTABLE, *supra* note 208.

247. Bebchuk & Tallarita, *supra* note 238, at 134.

248. See Lynn M. LoPucki, *The End of Shareholder Wealth Maximization*, 56 U.C. DAVIS L. REV. 2017, 2017 (2023); Dalia Tsuk Mitchell, *Shareholder Wealth Maximization: Variations on a Theme*, 24 UNIV. PA. J. BUS. L. 700, 704–05 (2022).



amended their corporate governance guidelines.<sup>249</sup> Out of the ten, only one company (S&P Global) mentioned stakeholder welfare as it relates to company purpose.<sup>250</sup> The nine remaining companies refrained from changing texts which explicitly reflect the shareholder primacy principle.<sup>251</sup> Many companies share the same governance policies, and corporate behavior has shown that companies consistently prioritize shareholder value over stakeholder interests, such as Black lives and Black space.<sup>252</sup>

## 2. *DEI Initiatives Merely Scratch the Surface in Creating Substantial Change*

With the ongoing pushback against REAs, companies continue to utilize internal DEI initiatives as the primary ESG tool for combating racism and inequality in the workplace and elsewhere.<sup>253</sup> However, many corporate DEI initiatives are missing the mark in terms of achieving their goal: a diverse, equitable, and inclusive workplace for all employees, regardless of race, ethnic background, gender, religion, or sexual orientation.<sup>254</sup> Inclusion, which, according to DEI experts, concerns “whether people feel like they belong, and whether they feel heard in an organization,” seems to be the largest obstacle for DEI.<sup>255</sup> Despite (slowly) improving diversity across varied industries, Black people, as

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249. Bebchuk & Tallarita, *supra* note 238, at 134.

250. *See id.*

251. *See id.*; *see also* CFI Team, *Shareholder Primacy: Who Do Corporations Really Serve?*, CORP. FIN. INST. (June 16, 2020), <https://corporatefinanceinstitute.com/resources/equities/what-is-shareholder-primacy/> [<https://perma.cc/6CKH-W4J3>].

252. *See* Bebchuk & Tallarita, *supra* note 238, at 156; *see also* Bledsoe & Wright, *supra* note 79, at 19.

253. *See* Emmerich et al., *supra* note 203.

254. *See* Jennifer Miller, *Why Some Companies Are Saying ‘Diversity and Belonging’ Instead of ‘Diversity and Inclusion’*, N.Y. TIMES (May 13, 2023), <https://www.nytimes.com/2023/05/13/business/diversity-equity-inclusion-belonging.html> [<https://archive.is/pB6kU>].

255. Kiara Alfonseca, *DEI: What Does It Mean and What Is Its Purpose?*, ABC NEWS (Feb. 10, 2023), <https://abcnews.go.com/US/dei-programs/story?id=97004455> [<https://perma.cc/5H95-LZU6>].

well as other ethnic minorities,<sup>256</sup> still feel isolated and excluded in the workplace.<sup>257</sup>

In a 2021 study, Coqual revealed the following statistics about Black people in corporate America: “65% of Black professionals feel they have to work harder than their counterparts to advance in their careers; only 31% of Black professionals felt they had access to senior leaders in their workplace; and Black people were more likely to encounter racial prejudice in the workplace than any other ethnic group in America.”<sup>258</sup> According to many DEI professionals, the top factors contributing to the problem include but are not limited to, failure to link DEI with business outcomes, lack of substantive action plans with measurable outcomes, lack of disaggregated data,<sup>259</sup> burnout among DEI supporters, denial of inequality, and backlash from privileged groups.<sup>260</sup> Arguably, backlash from privileged groups is the strongest obstacle.<sup>261</sup>

Stakeholders are working to improve DEI, and could make meaningful contributions toward DEI’s mission.<sup>262</sup> For example, there has

256. See Lisa Rabasca Roepe, *Barriers for Black Professionals*, SOC’Y FOR HUM. RES. MGMT. (Feb. 6, 2021), <https://www.shrm.org/topics-tools/news/all-things-work/barriers-black-professionals> [<https://perma.cc/K2AH-7SB4>]. Black individuals make up 13% of the U.S. population but account for only 8% of employees in professional roles. *Id.* Black professionals hold only 3.2% of all executive or senior leadership roles and less than 1% of all Fortune 500 CEO positions. *Id.*

257. See *id.*

258. See Emily Gawlak, *Being Black in Corporate America: An Intersectional Exploration*, CTR. FOR TALENT & INNOVATION (2021), [https://www.talentinnovation.org/\\_private/assets/BeingBlack-KeyFindings-CTI.pdf](https://www.talentinnovation.org/_private/assets/BeingBlack-KeyFindings-CTI.pdf) [<https://perma.cc/2QXN-J7FU>].

259. Roepe, *supra* note 256:

In DEI reporting, it is inapt to group Black individuals with White women, LGBTQIA+ White men, and other people of color because studies indicate that the latter groups often face less discrimination and inequality in the workplace. By assuming these diverse groups encounter identical challenges, reports misrepresent the effectiveness of DEI efforts. This is particularly disadvantageous for Black individuals, who cannot separate themselves from their skin color and its associated experiences.

260. See *id.*

261. See *id.*

262. See Allison Hendricks, *The Role of Stakeholder Engagement in DEI Programs*, Simply Stakeholders, <https://simplystakeholders.com/dei-program-stakeholder-engagement/> [<https://perma.cc/L2TE-S744>] (last visited Mar. 29, 2024).

been a recent shift toward “Diversity, Equity, Inclusion and Belonging” (“DEIB”), which focuses on making *everyone* feel like they play a meaningful role in the DEI conversation, including privileged groups such as cisgender White males.<sup>263</sup> However, the biases and negative attitudes toward Black people have proven extremely hard to change.<sup>264</sup> These biases and negative attitudes are attributed to the nation’s legacy of slavery<sup>265</sup> and are among the leading causes of DEI backlash.<sup>266</sup>

### 3. “Diversity Washing” is the New “Greenwashing”

The newer phenomenon, “woke washing” or “diversity washing,” is akin to the older concept “greenwashing” in that both involve leveraging social or environmental consciousness as a marketing tactic.<sup>267</sup> “Environmentalist Jay Westerveld first coined the term greenwashing in the 1980’s.”<sup>268</sup> Now a familiar term among stakeholders and climate activists, “greenwashing is when an organization spends more time and money on marketing itself as environmentally friendly than on actually minimizing its environmental impact.”<sup>269</sup> Companies have engaged in greenwashing for years in order to pacify stakeholders and investors whose capital is essential for their profit.<sup>270</sup> For example in the 1980s, Chevron launched a massive ad campaign promoting its dedication to

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263. See Miller, *supra* note 254.

264. See Cheryl Ingram, *The Hardest Part of DEI Engagement: Biased and Unwilling Leaders*, MEDIUM (Aug. 11, 2023), <https://medium.com/fourth-wave/the-hardest-part-of-a-dei-engagement-biased-and-unwilling-leaders-5b9da659b9d5#:~:text=The%20majority%20of%20people%20are,this%20is%20definitely%20not%20comfortable> [https://perma.cc/V3CJ-JYDG].

265. See NIKOLE HANNAH-JONES, *THE 1619 PROJECT* 17–20 (2021).

266. Ingram, *supra* note 264.

267. See Erin Dowell & Marlette Jackson, “Woke-Washing” Your Company Won’t Cut It, HARV. BUS. REV. (July 27, 2020), <https://hbr.org/2020/07/woke-washing-your-company-wont-cut-it> [https://perma.cc/FU6J-CKPG].

268. Andrew Nakamura, *The History of Greenwashing and Its Modern Evolution*, THE CLIMATE HUB (Sept. 25, 2023), <https://www.theclimateclub.co/sustainability-blog/the-history-of-greenwashing-and-its-modern-evolution#:~:text=Greenwashing%20was%20first%20coined%20in,sensibilities%20to%20reduce%20laundry%20costs> [https://perma.cc/28XM-J7B5].

269. Carlyann Edwards, *What Is Greenwashing, and How Do You Spot It?*, BUS. NEWS DAILY (Jan. 12, 2024), <https://www.businessnewsdaily.com/10946-greenwashing.html> [https://perma.cc/F4A2-J545].

270. See *id.*

environmental concerns, all while knowingly causing environmental harm.<sup>271</sup> Similarly, companies today are launching multi-million dollar diversity campaigns in the name of equality and anti-racism, while demonstrating minimal tangible action to support these initiatives.<sup>272</sup>

Astonishingly, the companies—including Walmart, Apple, Amazon, and JP Morgan Chase—who signed off on the BRT initiatives mentioned above make up an aggregate market capitalization totaling over \$13 trillion.<sup>273</sup> Thus, a *true* commitment to combating racism and inequality should have naturally been followed by a considerable impact on society.<sup>274</sup> However, with lagging nominal improvements in corporate diversity, it is hard to see where progress has been made.<sup>275</sup> Yet, when companies like PepsiCo and Facebook are asked about progress on commitments they have made to increase diversity, they do not want to be pushed.<sup>276</sup> For example, in 2021 Citigroup, Wells Fargo, Bank of America, Goldman Sachs, and JP Morgan—among the many large U.S. companies to make public support statements in light of the police killings of Breonna Taylor and George Floyd—officially opposed REAs.<sup>277</sup> The general justification was that “they are already doing enough to address equity issues” and REAs are “unnecessary because [the banks] are juggling different, related initiatives and/or have committed money to such issues internally and externally.”<sup>278</sup>

Similarly, the Harvard Business Review reports that many corporations, such as Adidas, Pinterest, and Whole Foods have all been

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271. *See id.*

272. *See* Emily Nonko, *One Year Later: Is Corporate America Anti-Racist Yet?*, FROM DAY ONE (May 13, 2021), <https://www.fromdayone.co/2021/05/13/one-year-later-is-corporate-america-anti-racist-yet> [<https://perma.cc/3FC5-TRSG>].

273. Bebhuk & Tallarita, *supra* note 238, at 126.

274. *See id.*

275. *See* Rachael Levy & Ross Kerber, *CEO Diversity Slow to Change Even as U.S. Boards Hire More Women and Minorities*, REUTERS (Nov. 17, 2022, 9:21 AM), <https://www.reuters.com/business/ceo-diversity-slow-change-even-us-boards-hire-more-women-minorities-2022-11-17/> [<https://archive.is/QSqiT>].

276. *See* Nonko, *supra* note 272.

277. *See* Levi Sumagaysay, *Citigroup, Wells Fargo, Bank of America, Goldman Sachs, JP Morgan Urge Shareholders to Vote Against Racial-Equity Audits*, MKT. WATCH (Mar. 17, 2021, 8:21 PM), <https://www.marketwatch.com/story/citigroup-wells-fargo-bank-of-america-urge-shareholders-to-vote-against-racial-equity-audits-11616026865> [<https://web.archive.org/web/20210423155544/https://www.marketwatch.com/story/citigroup-wells-fargo-bank-of-america-urge-shareholders-to-vote-against-racial-equity-audits-11616026865>].

278. *Id.*

subject to public complaints from current and former employees who allege that internal inequities are often glossed over by corporate statements of solidarity.<sup>279</sup> As such, skeptics believe some corporations' commitments may just be empty rhetoric to keep up with trends and pacify activists, customers, and employees—or, worse, “cynical marketing opportunities, or much-needed PR for Wall Street.”<sup>280</sup> Because implementation measures and commitments “stand against tough realities and deep-rooted inequalities embedded into the capitalist system,”<sup>281</sup> effective measures require a substantial amount of time, money, and *true commitment*. These accounts—and others too numerous to be covered—suggest that Black lives only matter to big businesses when they stand to profit.<sup>282</sup>

#### 4. Other Concerns

Other concerns stem from conservative think tanks who feel that the push for racial equity is unfounded, and in some cases, even racist.<sup>283</sup> Many posit that *ex post facto* justice for the atrocities of slavery is unreasonable and unlawful.<sup>284</sup> Similarly, critics feel as though individuals are being unfairly “punished” for the actions of their predecessors.<sup>285</sup> Some even assert that because everyone in America has benefited from slavery's institution, no one should have to pay.<sup>286</sup> Consequently, firms

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279. Erin Dowell and Marlette Jackson, “Woke-washing” Your Company Won’t Cut it, HARV. BUS. REV. (July 27, 2020), <https://hbr.org/2020/07/woke-washing-your-company-wont-cut-it> [<https://archive.ph/B67Ay>].

280. Henderson, *supra* note 236.

281. Nonko, *supra* note 272.

282. See Leong, *supra* note 147, at 2154.

283. See *The DEI Industry Really Isn’t About Diversity, Equity or Inclusion*, N.Y. POST (May 20, 2023, 4:55 PM), <https://nypost.com/2023/05/20/the-dei-industry-really-isnt-about-diversity-equity-or-inclusion/> [<https://archive.is/hg1VF>].

284. See Armstrong Williams, *Slavery Reparations Are a Divisive Waste of Time*, THE HILL (Mar. 3, 2021, 3:00 PM), <https://thehill.com/opinion/civil-rights/540812-slavery-reparations-are-a-divisive-waste-of-time/> [<https://archive.is/0f1Rh>].

285. See *id.*

286. Kevin Sullivan & Lori Rozsa, *DeSantis Doubles Down on Claim that some Blacks Benefited from Slavery*, WASH. POST (July 22, 2023, 5:32 PM), <https://www.washingtonpost.com/politics/2023/07/22/desantis-slavery-curriculum/> [<https://archive.is/WjpT7>].

and institutions like Starbucks and the SEC have been sued—though unsuccessfully—over their diversity efforts.<sup>287</sup>

#### D. ENVIRONMENTAL, SOCIAL AND CORPORATE GOVERNANCE IS NOT SUSTAINABLE

The above concerns allow readers to infer with more certainty that, in a capitalist society which owes its development to the exploitation and dehumanization of Black people, profits will—in the minds of corporate leadership—naturally outweigh Black lives. As Plerhoples puts it, “[c]ompanies, not just individuals, benefit from a racially inequitable sociopolitical and legal framework, including, for example, the racial wealth gap, which affects everything from who the company’s founders and investors are to who its employees, customers, and suppliers are.”<sup>288</sup> Furthermore, it is challenging to predict the future of ESG in the current political landscape, particularly with certain actors working to dismantle progressive policies and undermine the institutions that support ESG initiatives.<sup>289</sup> Therefore, we cannot rely solely on corporate ESG to combat anti-Black racism and inequality.

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287. See Nat’l Ctr. for Pub. Pol’y Rsch. v. Schultz, No. 2:22-CV-00267-SAB, 2023 WL 5945958, at \*2 (E.D. Wash. Sept. 11, 2023):

Plaintiff has a clear goal of dismantling what it sees as destructive DEI and ESG initiatives in corporate America. Contempt for DEI and ESG programming and practices is clear in Plaintiff’s publications and literature. In fact, Plaintiff specifically calls for voting against every current member of Starbucks Board based primarily on support for these DEI Initiatives. Based on the briefing and nature of Plaintiff’s self-described political interests, it is clear to the Court that Plaintiff did not file this action to enforce the interests of Starbucks, but to advance its own political and public policy agenda.

See also All. for Fair Bd. Recruitment v. SEC, 85 F.4th 226, 226–27 (5th Cir. 2023) (holding the SEC was within its authority to approve Nasdaq’s Board Diversity Rule). But see Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 230 (2023) (severely limiting Affirmative Action policies in college admissions and establishing a potential pathway for challenges to private-sector DEI initiatives).

288. Plerhoples, *supra* note 28, at 914.

289. See Andrew Atterbury, *DeSantis Defends Banning African American Studies Course as Black Leaders Call for Action*, POLITICO (Jan. 24, 2023, 2:46 PM), <https://www.politico.com/news/2023/01/23/desantis-banning-african-american-studies-00079027> [<https://archive.is/6Qj7D>].

### III. ALTERNATIVE SOLUTIONS: A CUMULATIVE APPROACH

A cumulative, integrated approach which calls on state and private institutions, as well as individuals and communities, is needed in order to combat the complexities of anti-Black racism and inequality. Individuals and entities cannot place all their hope in corporate institutions—many of which perpetuate the exploitation and dehumanization of Black people—when it comes to fighting anti-Black racism and inequality.<sup>290</sup> Instead, advocates against anti-Black racism and inequality must focus on an approach from multiple angles as mentioned above. Together, the following alternative solutions, as well as enhanced ESG efforts, could affect real change in America and around the world.

#### A. GOVERNMENT-BACKED REPARATIONS COULD MITIGATE RACIAL INEQUALITY

##### 1. *The Case for Reparations*

“One of the most persistent and pervasive beliefs in the United States is that slavery ended in America in 1865.”<sup>291</sup> As discussed above,<sup>292</sup> slavery simply took on a new form after abolition, via the economic oppression, disenfranchisement, and racial segregation of Black people which persists today in new forms.<sup>293</sup> This was made possible through Jim Crow legislation<sup>294</sup> which “codified” the attitudes of “moral superiority of the white race . . . and the belief that the antebellum social structure

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290. See Bledsoe & Wright, *supra* note 79, at 10; Leong, *supra* note 147, at 2154.

291. Clay, *supra* note 20, at 544.

292. See *infra* Section I.

293. *Id.* at 511–12.

294. *Jim Crow Laws*, HIST. (Feb. 28, 2018), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> [<https://archive.ph/bqMt3>]:

Jim Crow laws were a collection of state and local statutes that legalized racial segregation. Named after a Black minstrel show character, the laws—which existed for about 100 years, from the post-Civil War era until 1968—were meant to marginalize African Americans by denying them the right to vote, hold jobs, get an education or other opportunities. Those who attempted to defy Jim Crow laws often faced arrest, fines, jail sentences, violence and death.

should continue past Reconstruction.”<sup>295</sup> As a result of this legacy, generations of Black Americans have lived below the margins of society, both socially and economically.<sup>296</sup>

Today, “Black Americans hold one-sixth of the wealth of White Americans on average.”<sup>297</sup> While economists link more recent failures of wealth equality to the different asset holdings among Black and White Americans,<sup>298</sup> they explain that when Black Americans were freed from 250 years of bondage without receiving reparations, it would have ensured a wealth gap even if Black Americans hadn’t been left out of wealth-building opportunities for the last 160 years.<sup>299</sup> No amount of money can set right the amount of physical and psychological trauma that Black people have endured through and beyond slavery.<sup>300</sup> However, *today*, Black Americans need better access to healthcare, education, housing and economic opportunities.<sup>301</sup> This could all be possible via reparations—and no one has to suffer.<sup>302</sup>

It is important to note that given the global impact of slavery on Black communities, reparations are arguably justified for Black people worldwide.<sup>303</sup> However, a global reparations focus is beyond the scope of this Note. Accordingly, the following sections address reparations specifically within America.

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295. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (holding that state-imposed racial segregation was constitutional); CLAY, *supra* note 20, at 544. The Federal Government gave Jim Crow its “blessing” in *Plessy v. Ferguson*. See *Plessy*, 163 U.S. at 552.

296. See Adewale A. Maye, *Chasing the Dream of Equity: How Policy Has Shaped Racial Economic Disparities* 5–8, ECON. POL’Y INST. (Aug. 1, 2023).

297. Catarina Saraiva, *Black-White Wealth Gap Getting Worse, 160 Years of US Data Show*, BLOOMBERG (June 7, 2022, 7:00 AM), <https://www.bloomberg.com/news/articles/2022-06-07/black-white-wealth-gap-getting-worse-160-years-of-us-data-show?leadSource=verify%20wall> [<https://archive.is/TeVqj>]; see also *infra* app. D.

298. See Saraiva, *supra* note 297. *Id.* (stating that while Black Americans tend to hold most of their wealth in housing, White Americans own shares of publicly traded companies).

299. See *id.*

300. See Michael J. Halloran, *African American Health and Posttraumatic Slave Syndrome: A Terror Management Theory Account*, 50 J. BLACK STUD. 45, 46–47 (2019).

301. See Alicia Garza, *We Asked 30,000 Black Americans What They Need to Survive. Here’s What They Said*, TIME (May 1, 2020, 1:05 PM), <https://time.com/5828803/black-americans-coronavirus-needs/> [<https://archive.ph/qNbVQ>].

302. See Zeba Blay, *4 ‘Reverse Racism’ Myths That Need To Stop*, HUFFINGTON POST (Aug. 26, 2015, 11:38 AM), [https://www.huffpost.com/entry/reverse-racism-isnt-a-thing\\_n\\_55d60a91e4b07addcb45da97](https://www.huffpost.com/entry/reverse-racism-isnt-a-thing_n_55d60a91e4b07addcb45da97) [<https://archive.is/YJQcx>].

303. See Brazil LAB, *supra* note 129.



## 2. How Reparations Could Work

Advocates' first priority when seeking reparations should lie in reshaping the narrative that reparations are solely about addressing the past.<sup>304</sup> Professors Anna Brand, Joshua Inwood, and Elise Quinn argue that too much energy and debate is centered around calculating the cost and weight of slavery itself, when those values can never be fully understood or calculated.<sup>305</sup> They argue instead for a reparations strategy which acknowledges the “historical *and* current conditions that render Black lives . . . disposable.”<sup>306</sup> This means seeking reparations in areas where—through slavery’s legacy—racial disparities remain prevalent, such as housing, healthcare, education, and wealth distribution.<sup>307</sup> And as many advocates point out, the reparations don’t have to be solely in the form of direct individual payments.<sup>308</sup>

According to financial expert and former USA Today columnist Rodney Brooks, reparations could be paid in the form of grants and awards which fund social programs that address racial disparities.<sup>309</sup> Another form of reparations could be land grant opportunities to Black businesses and institutions.<sup>310</sup> The vast disparities in health, wealth, and education between Black and White America provide endless opportunities for projects which could be funded as reparations.<sup>311</sup> For example, reparations could be allotted toward mental health support to help mitigate “years of psychological damage done by racism and discrimination.”<sup>312</sup> Of course, identifying and implementing such programs would require comprehensive research and reporting, and local Black communities and leaders should be involved in determining the best way to administer project funding.<sup>313</sup>

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304. See Anna Brand et al., *Racial Capital, Abolition, and a Geographic Argument for Reparations*, 53 ANTIPODE 1083, 1088–89 (July 2021).

305. See *id.* at 1087.

306. *Id.* at 1100 (emphasis added).

307. See Clay, *supra* note 20, at 588.

308. See *id.*; Rodney Brooks, *How Reparations Would Work Today*, QUARTZ (Oct. 6, 2020), <https://qz.com/1912770/how-would-reparations-work> [<https://perma.cc/H8KS-BQKY>].

309. See Brooks, *supra* note 308.

310. See *id.* Land grants are responsible for a lot of the wealth White people have today. See *id.*

311. See *id.*

312. *Id.*

313. See Clay, *supra* note 20, at 589:

Direct, individual reparations payments are essential in closing the racial wealth gap.<sup>314</sup> And critics' concerns about what recipients do with them is none of the critics' business.<sup>315</sup> Consider the words of Professor William Darity:

The paternalistic complaint that recipients will fritter away the funds on frivolous expenditures is irrelevant. No one said that interned Japanese-Americans or Holocaust victims should be denied reparations because of how they might choose to spend the money, nor should anyone have done so. Evidence frequently invoked to demonstrate that recipients of financial windfalls tend toward profligacy is false. Notwithstanding a few [well-publicized] anecdotes of lottery winners quickly dissipating their winnings, research shows that winners typically [prioritize] creating financial reserves for their children and grandchildren.<sup>316</sup>

Instead of cash windfalls which could trigger substantial inflation, an effective policy might look like cash payments spread out over a set amount of time.<sup>317</sup> With extensive research and planning, managing these funds should not be too difficult.<sup>318</sup> Ideally, the research and planning should be government-sponsored, but people-led. And those "people" would be individuals who are well-respected and trusted within the Black

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The issue with past grants issued by the government is that they were administered and controlled through Washington DC; because grants may work in one community but not another, the best way to administer funds to communities in need is through the local Black leaders who have intimate knowledge of their community and know best where and how the funds should be disbursed.

314. See William Darity & A. Kirsten Mullen, *William Darity and A. Kirsten Mullen on Direct Payments to Close the Racial-Wealth Gap*, *ECONOMIST* (May 18, 2021), <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap> [https://archive.is/QGMqT].

315. See *id.*

316. See Darity & Mullen, *supra* note 314; see also *infra* note 358 and accompanying text; Office of the Special Envoy for Holocaust Issues and Bureau of Eurasian Affairs, Justice for Uncompensated Survivors Today (JUST) Act Report (Mar. 2020). According to the State Department, the German government provided approximately \$86.8 billion in restitution and compensations payments to Holocaust victims and their heirs between 1945 and 2018. *Id.*

317. See Darity & Mullen, *supra* note 314.

318. See Clay, *supra* note 20, at 589.

community.<sup>319</sup> Establishing the federally funded reparations commission which leaders have advocated for tirelessly would be a solid first step.<sup>320</sup>

In terms of eligibility for direct payments, Darity proposes individuals should (1) “self-identify as black, African-American, or Negro on a legal document” at least twelve years preceding a reparations-study commission and (2) be able to “prove their descent from at least one ancestor enslaved in America.”<sup>321</sup> This Note supports the former requirement and would also emphasize that eligibility be limited to legal Black American citizens. However, the latter requirement would disproportionately exclude many Black Americans who continue to suffer from the enduring impact of slavery’s legacy, *regardless* of their ancestry.<sup>322</sup> Furthermore, most Black Americans find it difficult, if not impossible, to trace their lineage prior to 1870.<sup>323</sup> Thus, the enslaved ancestor proof requirement would be ineffective and overburdensome.<sup>324</sup>

Alone, the above-mentioned reparations programs could eliminate racial inequality over time by facilitating access to a better quality of life for Black people.<sup>325</sup> The fundamental question concerning reparations, however, is *who* should pay.<sup>326</sup> Sure, many private institutions and individuals benefited from enslaving people, and many continue to perpetuate racism.<sup>327</sup> However, this Note posits that the federal government which *legally sanctioned* the enslavement and continued oppression of Black people should bear the primary burden of addressing

319. *See id.*

320. *Repair Can’t Wait. Create Reparations Commission Now*, HUM. RTS. WATCH, <https://www.hrw.org/ReparationsNow> [<https://perma.cc/UBD4-Q48J>] (last visited Dec. 28, 2023).

321. Darity & Mullen, *supra* note 314.

322. *See* Clay, *supra* note 20, at 578–79.

323. Kiana Cox & Christine Tamir, *Family History, Slavery, and Knowledge of Black History*, PEW RSCH. CTR. (Apr. 14, 2022), <https://www.pewresearch.org/race-ethnicity/2022/04/14/black-americans-family-history-slavery-and-knowledge-of-black-history/#:~:text=Learning%20about%20family%20history%20can,simply%20lost%20of%20over%20time> [<https://perma.cc/MT7T-8CEN>]. “[R]ecords of the enslaved are often handwritten, poorly maintained, or simply lost over time.” *Id.*

324. *See id.*

325. *See* Darity & Mullen, *supra* note 314.

326. *See* Janet Holtzblatt & Noah Zwiefel, *How Could the United States Pay for Reparations?*, TAX POL’Y CTR. (Feb. 3, 2021), <https://www.taxpolicycenter.org/taxvox/how-could-united-states-pay-reparations> [<https://perma.cc/32MM-K6PT>].

327. *See id.*

reparations.<sup>328</sup> The easiest and least controversial approach to raising the funds would involve borrowing,<sup>329</sup> which is not so uncommon for the U.S.<sup>330</sup> Today, the U.S. has a national debt of \$33.9 trillion.<sup>331</sup> Over the course of the nation’s history, the borrowing debt has been used to fund initiatives it deems important, such as the Afghanistan and Iraq Wars<sup>332</sup> and the 2020 \$4.62 trillion COVID spending program.<sup>333</sup> The U.S. government could use the same familiar framework to fund reparations.<sup>334</sup>

Though a more contentious topic, the Federal government could easily utilize taxpayer dollars to fund reparations.<sup>335</sup> As this Note will discuss in detail, the Federal government loses billions in potential revenue through tax breaks which exclusively benefit a small segment of Americans.<sup>336</sup> Moreover, the Federal government has allocated billions of taxpayer dollars to fund its “necessary” agendas, such as the \$245 billion

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328. See H.R. Res. 414, 118th Cong. (2023) (recognizing that “the United States has a moral and legal obligation to provide reparations for the enslavement of Africans and its lasting harm on the lives of millions of Black people in the United States”). This resolution was sponsored by Representative Cori Bush, Missouri, District 1 117th-118th. *Id.*

329. See *What Is the National Debt?* U.S. TREASURY, <https://fiscaldata.treasury.gov/americas-finance-guide/national-debt/> [<https://perma.cc/UTQ4-DHFZ>] (last visited Dec. 28, 2023):

The national debt is the amount of money the federal government has borrowed to cover the outstanding balance of expenses incurred over time . . . . [W]hen spending exceeds revenues, a budget deficit results. To pay for this deficit, the federal government borrows money by selling marketable securities such as Treasury bonds, bills, notes, floating rate notes, and Treasury inflation-protected securities (TIPS).

330. See Darity & Mullen, *supra* note 314.

331. See U.S. TREASURY, *supra* note 331.

332. See NETA C. CRAWFORD, THE U.S. BUDGETARY COSTS OF THE POST-9/11 WARS (Sept. 1, 2021). According to a Brown University study, the global war on terror has cost the U.S. “about \$8 trillion in current dollars.” *Id.* The late poet and artist Tupac Shakur once said, “They got money for wars, but can’t feed the poor.” TUPAC SHAKUR, KEEP YA HEAD UP (Interscope Records 1993).

333. See U.S. Gov’t Accountability Off., *COVID-19 Relief: Funding and Spending as of Jan. 31, 2023*, GAO.ORG (Feb. 28, 2023), <https://www.gao.gov/products/gao-23-106647> [<https://perma.cc/S8AL-NDBK>]; see also U.S. TREASURY, *supra* note 331.

334. See Crawford, *supra* note 334; SHAKUR, *supra* note 334.

335. See Holtzblatt & Zwiefel, *supra* note 328.

336. Garrett Watson, *County Data Shows Repealing SALT Cap Would Benefit High-Income Earners*, TAXFOUNDATION.ORG, <https://taxfoundation.org/data/all/federal/salt-cap-repeal-data/> [<https://perma.cc/V5KG-5XEM>] (last visited Dec. 6, 2023).

used to bail out banks under the 2008 Troubled Asset Relief Program (“TARP”).<sup>337</sup> When it comes to reparations, the crucial ingredient in implementation is “the political will to do so.”<sup>338</sup>

### 3. *Opponents to Reparations*

Many criticisms against reparations for Black Americans stem from an overall attitude that such compensation is undeserved or unnecessary now.<sup>339</sup> In 2019, former Senate Majority Leader Mitch McConnell said of reparations:

I don’t think reparations for something that happened 150 years ago for [which] none of us currently living are responsible is a good idea . . . . We’ve tried to deal with our original sin of slavery by fighting a civil war, by passing landmark civil rights legislation. We elected an African American president.<sup>340</sup>

Similar arguments are more racist leaning. For example, in a 2022 political rally, Alabama senator Tommy Tuberville criticized Democrats for supporting reparations and purportedly being “soft” on crime.<sup>341</sup> He also likened Black people to those committing the crimes, consequently arguing against reparations for them: “They want crime because they want to take over what you got,” Tuberville said of Democrats.<sup>342</sup> “They want to control what you have. They want reparations because they think the people that do the crime are owed that. Bullshit! They are not owed that.”<sup>343</sup>

Collectively, these arguments either dismiss or lack a full grasp of the ongoing reality that slavery’s legacy persists today and is contributing

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337. See Troubled Asset Relief Program (TARP), U.S. DEP’T OF TREASURY, <https://home.treasury.gov/data/troubled-asset-relief-program> [https://perma.cc/7ZKR-3PC6] (last visited Dec. 28, 2023).

338. Brooks, *supra* note 308.

339. See Ted Barrett, *McConnell Opposes Paying Reparations: ‘None of Us Currently Living Are Responsible’ for Slavery*, CNN (June 19, 2019, 10:39 PM), <https://www.cnn.com/2019/06/18/politics/mitch-mcconnell-opposes-reparations-slavery/index.html> [https://perma.cc/GS3T-QP6E].

340. *Id.*

341. See Tommy Tuberville, U.S. Sen., Full Speech at MAGA Rally, on C-SPAN (Oct. 8, 2022), <https://www.c-span.org/video/?c5067191/user-clip-tuberville-full-speech-maga-rally> [https://archive.is/GExLj].

342. *Id.*

343. *Id.*

to the perpetual marginalization of Black people.<sup>344</sup> Certainly, reparations are not about dealing with slavery itself.<sup>345</sup> Rather, reparations are a tool for acknowledging and addressing the consequences of slavery's legacy.<sup>346</sup>

The stronger argument against reparations often centers on the logistical challenges of implementing such a program.<sup>347</sup> In a 2014 article for *The Atlantic*, David Frum wrote that when it comes to distributing reparations, “the question of who qualifies will become . . . contested and embittered.”<sup>348</sup> Using an analogy to what he believed was common Affirmative Action<sup>349</sup> policy at the time, he posited that “[those who] never experienced slavery or segregation in this country”—such as the children of recently arrived African Immigrants—could potentially receive and benefit from reparations.<sup>350</sup> In the same vein, Mitch McConnell argued it would be impossible to determine who deserved reparations because “waves of immigrants” who have come to America have faced “dramatic discrimination” and could thus in theory claim

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344. See Clay, *supra* note 20, at 544.

345. See Ta-Nehisi Coates, *The Case For Reparations*, *THE ATLANTIC* (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://archive.is/vwPKV>].

346. *Id.*

347. See *The Idea of Reparations for Slavery is Morally Appealing but Flawed: Democrats Should Drop It*, *THE ECONOMIST* (June 19, 2019), [https://www.economist.com/united-states/2019/06/29/the-idea-of-reparations-for-slavery-is-morally-appealing-but-flawed?utm\\_medium=cpc.adword.p](https://www.economist.com/united-states/2019/06/29/the-idea-of-reparations-for-slavery-is-morally-appealing-but-flawed?utm_medium=cpc.adword.p) [<https://archive.is/4SFJf>].

348. David Frum, *The Impossibility of Reparations*, *THE ATLANTIC* (June 3, 2014), <https://www.theatlantic.com/business/archive/2014/06/the-impossibility-of-reparations/372041/> [<https://archive.is/P94C0>].

349. See History.com Editors, *Affirmative Action*, *HISTORY* (June 13, 2023), <https://www.history.com/topics/us-government-and-politics/affirmative-action> [<https://perma.cc/WDF2-BELN>]:

Affirmative action is the name given to efforts at encouraging the participation of women and minorities in education, the workforce, the military and other arenas. Since the 1960s, affirmative action has been an important part of federal and state governments in the United States and other countries to mitigate previous generations of discrimination and segregation.

350. See Frum, *supra* note 348. Under today's racial preference rules, a nephew of the King of Spain or the daughter of the chairman of the biggest bank in Chile would both qualify for Hispanic preferences if they resided in the United States. *Id.*

entitlement to reparations.<sup>351</sup> But this Note posits that slavery’s *legacy*—not slavery itself—necessitates reparations for *all* Black Americans, regardless of whether their ancestors were enslaved:

Slavery’s legacy has affected all Black Americans . . . because they suffered the same legalized discrimination and state-sanctioned brutality, murder, dispossession, and disenfranchisement which continued long after the Civil War ended. That history profoundly handicapped Black Americans’ ability to create and accumulate wealth as well as to gain access to jobs, housing, education, and health care. Reparations as compensation for the legacy of slavery must therefore include all Black Americans.<sup>352</sup>

Frum also expressed fears that calls of entitlement would eventually expand to other groups—say, Native Americans who were also victims of America’s brutality—and that such entitlement could lead to different forms of inequality:

Within the target population, will all receive the same? Same per person, or same per family? Or will there be adjustment for need? How will need be measured? Will convicted criminals be eligible? . . . Simply put, when government spends money on complex programs, the people who provide the service usually end up with much more sway over the spending than the spending’s intended beneficiaries. The poorer the beneficiaries, the more powerfully this rule holds—and it has held strongest of all in programs intended to aid the black poor.<sup>353</sup>

The above arguments share a similar failure: they solely attack without offering any meaningful solutions.<sup>354</sup> In fact, it appears that most arguments against reparations are geared toward stifling any meaningful discourse.<sup>355</sup> Sure, policymakers will have to grapple with implementation logistics, just as they would with any other complex program America has doles out. But reparations are quite possible, and

351. Barrett, *supra* note 341.

352. Clay, *supra* note 20, at 578–79.

353. Frum, *supra* note 350.

354. *See id.*

355. *See, e.g.,* Katherine Fung, *New York’s Slave Reparations Sparks Republican Fury*, NEWSWEEK (Dec. 19, 2023, 2:39 PM), <https://www.newsweek.com/new-york-slave-reparations-commission-backlash-hochul-1853836> [https://archive.is/4tvKx]. Rather than engaging in the discourse around reparations, many critics argue that studies around reparations are divisive, impractical, and unworkable. *Id.*

reparations have been implemented before.<sup>356</sup> The following section addresses some ways in which American governments have implemented reparations.

#### 4. *The U.S. Government Did it Before, and State and Local Governments Are Doing It Again Now*

For some Black Americans, grappling with the resistance<sup>357</sup> toward reparations can be immensely challenging, frustrating, and even humiliating, when the Federal government has done it before.<sup>358</sup> In 1988 Congress passed the Civil Liberties Act, which afforded around \$1.6 billion in reparations to Japanese-Americans and their heirs who suffered the grave injustice of internment during World War II.<sup>359</sup> Thus, the notion that reparations for Black Americans, who continue to endure impacts from slavery's *grave injustice*, are unfeasible—even under today's economic constraints<sup>360</sup>—seem tenuous.

While the fight for reparations has stalled in Congress, some local and state governments have taken the issue into their own hands, providing a model of hope.<sup>361</sup> In May of 2022, the city of Evanston,

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356. See CIVIL LIBERTIES ACT: UNITED STATES HISTORY, ENCYC. BRITANNICA (Jan. 5, 2024), <https://www.britannica.com/topic/Civil-Liberties-Act> [<https://archive.ph/qS2wn>]. Successful government reparations programs, including the Civil Liberties Act, are discussed below. See *infra* p. 73.

357. See Suzzane Blake, *Americans' Support for Reparations Drops*, NEWSWEEK (Oct. 2, 2023), <https://www.newsweek.com/americans-support-reparations-decline-1831416> [<https://perma.cc/XZH2-S2GV>]; Jacquelyne Germain, *The Fight for Reparations Stalled in Congress. Here's What They Look Like in State and Local Governments*, CNN (July 13, 2022, 1:29 PM), <https://www.cnn.com/2022/07/13/us/reparations-state-local-commission-reaj/index.html> [<https://perma.cc/3WYD-RM7S>].

358. See ENCYC. BRITANNICA, *supra* note 358.

359. *Id.* With the passage of the Civil Liberties Act, Congress “awarded more than 80,000 Japanese-Americans \$20,000 each to compensate them for the ordeal they had suffered. Congress also issued a formal apology for the government’s policy toward Japanese-Americans. *Id.*”

360. See Rob Wile, *The U.S. Economy in 2023: Most Have Jobs, but Many Are Unhappy About Their Money*, NBC NEWS (Mar. 8, 2023, 9:18 AM), <https://www.nbcnews.com/business/economy/how-is-the-economy-doing-right-now-inflation-interest-rate-hikes-rcna73613> [<https://perma.cc/NPL2-DUZZ>].

361. See Adrienne Broaddus, *Evanston City Council Votes in Favor of Expanding Its Reparations Program to Repair Housing Discrimination*, CNN (Mar. 28, 2023, 2:38 AM), <https://www.cnn.com/2023/03/27/us/evanston-illinois-reparations-housing-discrimination-expand/index.html> [<https://perma.cc/Z3MY-ZXE9>].



Illinois gave several Black residents reparations of \$25,000 each to make up for discriminatory Illinois housing practices they had to endure between 1919 and 1969.<sup>362</sup> These payments could be allotted to down payments on a house, home repairs, or mortgages.<sup>363</sup> Meanwhile, in Amherst, Massachusetts, the town council approved a \$2 million reparations fund to be distributed over the course of a decade.<sup>364</sup> Notably, the council was able to commit and secure funding through revenue from sales taxes.<sup>365</sup> Federal and State governments could pull from the same funding—especially through taxes.<sup>366</sup>

Providence, Rhode Island has become the newest innovator in reparations programs.<sup>367</sup> Using re-appropriated federal COVID-19 response money, the city approved a \$10 million race-neutral reparations budget aimed at helping economically disadvantaged people—the majority of whom are Black slave descendants—via small-business and program investments, including workforce training, and financial literacy workshops.<sup>368</sup> These instances—which will help to build generational wealth and secure better futures for Black families<sup>369</sup>—should serve as a model for the Federal government and other state and local governments.

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362. *Id.* In 2023, the Evanston City Council also approved a direct payment option in which eligible residents could opt to receive direct cash payments. *Id.*; see also Ryan Solman & Ryan Connelly Holmes, *The Impact of the Nation's First Cash Reparations Program for Black Residents*, PBS (Jun. 22, 2023), <https://www.pbs.org/newshour/show/the-impact-of-the-nations-first-cash-reparations-program-for-black-residents> [<https://archive.is/guH4G>].

363. *Id.*

364. *Id.*; see Michael Casey, *Slavery Reparations in Amherst Massachusetts Could Include Funding for Youth Programs and Housing*, AP NEWS (Oct. 16, 2023), <https://apnews.com/article/amherst-slavery-reparations-black-massachusetts-31f9e6eb90d7236dd6b4a7bcea2fb8e1> [<https://perma.cc/KY23-HKXA>].

365. *Id.*

366. This Note will discuss the tax code in detail in the following section. See *infra* Section III.B.

367. See Gabriella Abdul-Hakim et al., *Providence Establishes Reparations Program to Praise and Criticism*, ABC NEWS (Jan. 31, 2023, 12:33 PM), <https://abcnews.go.com/US/providence-establishes-reparations-program-praise-criticism/story?id=96662287> [<https://perma.cc/XQ4Z-KDCG>].

368. *Id.*

369. See Clay, *supra* note 20, at 579.

## B. LEGISLATION: U.S. TAX CODE REFORM FOR PROMOTING EQUITY

In an ideal world, Black Americans would have received reparations yesterday. Alternatively, perhaps corporate ESG would have solved many of the world's problems and upended racism.<sup>370</sup> But that is not the world we live in today. Reparations are still a highly contentious topic, and corporate ESG alone, as this Note explains, is insufficient when it comes to combating anti-Black racism and inequality.<sup>371</sup> Therefore, advocates must utilize varying tools and call on multiple institutions and actors for change.<sup>372</sup> In the following section, this Note explains how federal legislative reform—specifically within the U.S. Tax Code—could change Black Americans' outcomes for the better.

The federal government must consider legislation to address the institutions that were set up to perpetuate racial economic inequality. Otherwise, Black Americans—and other marginalized groups—will never have equality.<sup>373</sup> The U.S. Tax Code<sup>374</sup> is one system which continues to reinforce wealth gaps in America.<sup>375</sup> Yet, it has the potential to be a great equalizer.<sup>376</sup> According to Emory University Law professor and tax expert Dorothy Brown, the U.S. Tax Code rewards economic decisions in multiple areas that White families are in a better position to make than Black families.<sup>377</sup> One specific example includes the provision for State and Local Tax (“SALT”) deductions.<sup>378</sup>

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370. See Henderson, *supra* note 236.

371. See Pirtle, *supra* note 35, at 504.

372. See CHARMAINE L. WJIEYESINGHE (EDITOR), *THE COMPLEXITIES OF RACE: IDENTITY, POWER, AND JUSTICE IN AN EVOLVING AMERICA 2* (New York University Press, 2021).

373. See Maye, *supra* note 296, at 25.

374. See *Title 26, U.S. Code*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/reference/privacy\\_confidentiality/title\\_26\\_us\\_code\\_1.html#:~:text=The%20Internal%20Revenue%20Code%20\(IRC,%2C%20tobacco%2C%20and%20employment%20taxes](https://www.census.gov/history/www/reference/privacy_confidentiality/title_26_us_code_1.html#:~:text=The%20Internal%20Revenue%20Code%20(IRC,%2C%20tobacco%2C%20and%20employment%20taxes) [https://archive.ph/Lz1tw] (last visited Dec. 7, 2023).

375. Jamie Smith Hopkins, *How Can We Close Our Racial Wealth Gap?*, CTR. FOR PUB. INTEGRITY: HEIST (Mar. 22, 2022), <https://publicintegrity.org/inequality-poverty-opportunity/the-heist/how-can-we-close-racial-wealth-gap/> [https://perma.cc/TGH2-79DH] (noting that other systems that reinforce the racial wealth gap include, but are not limited to, healthcare, higher education, credit scores, and bank lending practices). These topics, while important, are too numerous to discuss and beyond the scope of this Note.

376. Errin Haines, *Tax Expert Dorothy Brown Talks About ‘The Whiteness of Wealth’*, 19TH NEWS: RACE (Apr. 15, 2021), <https://19thnews.org/2021/04/tax-expert-dorothy-brown-talks-about-the-whiteness-of-wealth/> [https://perma.cc/SUB6-26Q7].

377. *Id.*

378. See Watson, *supra* note 338.

### 1. SALT Deduction

The SALT deduction is a federal tax provision which allows taxpayers who itemize their deductions<sup>379</sup> to deduct the costs of state and local taxes for property, real estate, and either general sales taxes or state income taxes.<sup>380</sup> In effect, the federal government subsidizes billions of dollars in state and local taxes, to the near exclusive benefit of wealthy, high-income earners who typically own property.<sup>381</sup>

Prior to the 2017 Tax Cuts and Jobs Act (“TCJA”) the SALT deduction allowed taxpayers to deduct an unlimited amount of state and local taxes from their federal income taxes.<sup>382</sup> However, the TCJA limited the deduction amount to \$10,000 through 2025.<sup>383</sup> Consequently, some taxpayers, mostly high-income earners, will see higher tax bills.<sup>384</sup> For example, in 2024, single taxpayers will need to have another \$4,600 of itemized deductions to benefit from itemization.<sup>385</sup> Those who support the SALT deduction have two primary arguments. First, the SALT deduction

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379. See *Deductions for Individuals: What They Mean and the Difference Between Standard and Itemized Deductions*, IRS (Apr. 2023), <https://www.irs.gov/newsroom/deductions-for-individuals-what-they-mean-and-the-difference-between-standard-and-itemized-deductions> [https://perma.cc/M8TA-GR8Q] (last visited Dec. 7, 2023). Taxpayers have two options in determining their adjusted gross income each year: they can either take a standard deduction, which is an amount predetermined by the Internal Revenue Service, or they can itemize their deductions. *Id.* People who itemize generally have deductible costs that exceed the standard deduction amount. *Id.*

380. See I.R.C. § 164.

381. See Watson, *supra* note 338.

382. See *State and Local Tax (SALT) Deduction*, TAX FOUND., <https://taxfoundation.org/taxedu/glossary/salt-deduction/#:~:text=The%20state%20and%20local%20tax,sales%20taxes%2C%20but%20not%20both> [https://perma.cc/5644-W43L] (last visited Dec. 6, 2023).

383. See *id.*

384. See Amelia Josephson, *Explaining Changes to the State and Local Tax Deduction*, SMARTASSET (Dec. 15, 2023), <https://smartasset.com/taxes/trumps-plan-to-eliminate-the-state-and-local-tax-deduction-explained> [https://perma.cc/E29X-EJU7].

385. See Kelly Phillips Erb, *Your First Look at 2024 Tax Rates: Projected Brackets, Standard Deduction Amounts and More*, FORBES (Sept. 26, 2023, 4:59 PM), <https://www.forbes.com/sites/kellyphillipserb/2023/09/26/your-first-look-at-2024-tax-rates-projected-brackets-standard-deduction-amounts-and-more/?sh=55588a3074bb> [https://archive.is/LP9YS]. The calculation of \$4,600 is based on the standard deduction amount of \$14,600 for single taxpayers, as listed by Erb. *Id.* \$4,600 is the difference between \$14,600 and the \$10,000 SALT cap. *Id.*; Watson, *supra* note 338.

helps reduce the financial burdens of taxpayers living in states with a high cost of living—such as California or New York.<sup>386</sup> And second, the SALT deduction prevents double taxation.<sup>387</sup>

Others have even argued that the SALT tax, in allowing homeowners to deduct property taxes, encourages homeownership and enhances taxpayers' ability to build wealth—a benefit which could support marginalized groups and reduce the racial wealth gap.<sup>388</sup> However, reports consistently show the majority of taxpayers who benefit from the SALT deduction are high-earning taxpayers who tend to have expensive homes in prospering communities.<sup>389</sup> Moreover, low-income earners, who tend to be historically Black, are “more inclined to take the standard deduction regardless of the cap level.”<sup>390</sup>

Perhaps even more alarming, tax experts predict that from 2018 to 2027, the total revenue loss attributable to the SALT deduction will exceed \$1 trillion.<sup>391</sup> In other words, the SALT deduction costs the government billions of dollars in revenue opportunities each year, all while disproportionately benefitting high-income earners in certain regions.<sup>392</sup> This revenue could and should be used elsewhere, and perhaps some of it could go to reparations. Therefore, the SALT deduction should be repealed, and the revenue should be allocated to programs which address societal needs.<sup>393</sup>

### C. STOCK MARKET PARTICIPATION FOR WEALTH BUILDING

In the remaining sections, this Note calls on a different actor to combat anti-Black racism and inequality: the average citizen or consumer. According to a recent 2019 study by the Federal Reserve Board, only 34%

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386. See Josephson, *supra* note 386.

387. See *id.*

388. Bob Menendez, *Menendez Highlights Importance of SALT Deductions in Reducing the Racial Wealth Gap*, BOB MENENDEZ (Jul. 21, 2022), <https://www.menendez.senate.gov/newsroom/press/menendez-highlights-importance-of-salt-deductions-in-reducing-the-racial-wealth-gap> [<https://perma.cc/4XRF-VU49>].

389. Watson, *supra* note 338.

390. *Id.*

391. See LAURIE L. MALMAN ET AL., *THE INDIVIDUAL TAX BASE CASES, PROBLEMS, AND POLICIES IN FEDERAL TAXATION* 311 (3d ed. 2019).

392. See Christopher Pullium & Richard V. Reeves, *The SALT Tax Deduction Is a Handout to the Rich. It Should be Eliminated Not Expanded*, BROOKINGS (Sept. 4, 2020), <https://www.brookings.edu/articles/the-salt-tax-deduction-is-a-handout-to-the-rich-it-should-be-eliminated-not-expanded/> [<https://perma.cc/2HZQ-YB2B>].

393. See *id.*

of Black American households—compared with 61% of White households—owned equity investments.<sup>394</sup> Even more, Black Americans only held about a quarter of the stock value—around \$14,400—of their White peers.<sup>395</sup> These enormously disparate numbers matter because investment is one of the *primary* ways in which Americans build wealth.<sup>396</sup> These numbers pose at least two questions. First, why are Black people missing out on such investment opportunities? And second, how can we better-position ourselves to realize these opportunities?

To address the first question, there are many factors contributing to Black Americans' limited investment behavior.<sup>397</sup> For starters, slavery's looming effects—such as labor discrimination—have created enormous wage and income disparities among Black people and White people.<sup>398</sup> In turn, Black people tend to earn less discretionary income; instead of investing for retirement like many of their White counterparts, Black people end up spending their income to cover basic immediate needs, such as clothing, food, and shelter.<sup>399</sup> Other factors include discriminatory practices that create barriers to homeownership, undermine financial literacy and education, and increase aversion to financial risk.<sup>400</sup>

In answering the second question, the most important tool in our metaphorical toolbox is early financial literacy education.<sup>401</sup> As

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394. See *Survey of Consumer Finances (SCF)*, U.S. BD. OF GOVERNORS OF THE FED. RESRV. SYS. (May 29, 2023), <https://www.federalreserve.gov/econres/scfindex.htm> [<https://perma.cc/4HX9-HB7V>] [hereinafter FEDERAL RESERVE]. See also *infra* App. G.

395. *Id.*

396. See Yun Li, *Black Americans' Lack of Participation in the Stock Market Likely to Widen Post-Pandemic Wealth Gap*, CNBC (Feb. 2, 2022, 7:13 AM), <https://www.cnbc.com/2022/02/02/black-americans-lack-of-participation-in-the-stock-market-likely-to-widen-post-pandemic-wealth-gap.html> [<https://perma.cc/PQU9L7FC>].

397. FEDERAL RESERVE, *supra* note 396.

398. Li, *supra* note 398.

399. Alessandra Malito, *Why It's so Hard for Black Americans to Save for Retirement — and How the Pandemic Escalated the Racial Wealth Gap*, MARKETWATCH (Feb. 4, 2023, 9:34 AM), <https://www.marketwatch.com/story/why-its-so-hard-for-black-americans-to-save-for-retirement-and-how-the-pandemic-escalated-the-racial-wealth-gap-11675348483> [<https://archive.is/Mb7Ue>].

400. See *id.*; see also Michelle Singletary, *The Legacy of Slavery Made My Grandmother Fear Investing*, WASH. POST (Oct. 9, 2020), <https://www.washingtonpost.com/business/2020/10/09/black-slavery-investment-stock-market/> [<https://archive.is/8lxDh>].

401. See *Our Story*, GLOB CHILD. FIN. LITERACY FOUND., <https://www.gcflf.org/about-us> [<https://perma.cc/6UNY-GG6S>] (last visited May 29, 2023).

Investment Advisor and President of the Global Children Financial Literacy Foundation, Prince Dykes importantly points out that financial education beginning at a young age—regardless of race or socioeconomic background—can help facilitate “financially secure lives” for future generations.<sup>402</sup> Within the Black community, we must get comfortable with starting conversations about money and seeking the knowledge which, in the internet age, is increasingly accessible.<sup>403</sup> Furthermore, as we learn, we must teach each other.<sup>404</sup>

#### D. SHIFTING BUYING AND CAPITAL POWER TOWARDS BLACK ENTREPRENEURS AND BUSINESSES

When a reporter asked actress Issa Rae who she was rooting for at the 2017 Emmy Awards, she responded very candidly: “I’m rooting for everybody Black . . . betting on Black tonight.”<sup>405</sup> The above sentiment is what is needed in America and around the globe.<sup>406</sup> We need to start betting on and investing more in Black communities and spaces to curb the racial wealth gap.<sup>407</sup> There are several ways in which we can do this, and this Note will focus on two straight forward methods.

First, Americans—especially Black people—with buying power need to be more intentional about supporting Black businesses over large corporate institutions.<sup>408</sup> This is how Tulsa’s Black Wall Street was such a success, as one Tulsa historian noted in an interview with the History Channel: “People working outside the district, particularly the domestics, the housekeepers, cooks, nannies or the ushers at the magnificent Art Deco theaters or bellhops at the great hotels would get paid and then

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402. *Id.*

403. See Nicquel Terry Ellis, *Lifelong Friends Create Platform to Teach Financial Literacy in the Black Community*, CNN (June 15, 2023, 8:50 AM), <https://www.cnn.com/2023/06/15/us/earn-your-leisure-juneteenth-reaaj/index.html> [<https://perma.cc/C8WW-6PCL>].

404. *See id.*

405. Erin Nyren, *Issa Rae at the Emmys: ‘I’m Rooting for Everybody Black’*, VANITY FAIR (Sept. 17, 2017, 5:04 PM), <https://variety.com/2017/tv/news/issa-rae-at-the-emmys-im-rooting-for-everybody-black-1202561838/> [<https://archive.is/RofEN>].

406. *See id.*

407. See Alex Presha & Haley Yamada, *‘Buy Black’ Movement Helps Black-Owned Businesses Amid COVID-19: It’s ‘More Than a Trend’*, ABC NEWS (Oct. 23, 2020, 7:28 PM), <https://abcnews.go.com/US/buy-black-movement-helps-black-owned-businesses-amid/story?id=73797139> [<https://perma.cc/729P-HX76>].

408. *See id.*

return to Greenwood with their money.”<sup>409</sup> “With segregation, they can’t spend their money anywhere else. They can make their money out of the district, but they can’t spend it there.”<sup>410</sup>

Another way to help close the racial wealth gap is by shifting more capital toward Black entrepreneurs.<sup>411</sup> There are many Black people with potentially lucrative ideas, but due to the existing racial wealth gap and other systemic inequalities, they lack the capital to get their ideas off the ground.<sup>412</sup> In venture capital, for example, “only 1% of [venture capitalist-backed] founders are Black.”<sup>413</sup> These numbers are equally dismal in other areas of investment, where capital often comes from institutional investors.<sup>414</sup> If investors and investor institutions would eliminate inherent biases and change the status quo goal of generating quick returns, we might see a brighter future in terms of bridging the racial wealth gap, ultimately leading to greater equality for Black people.<sup>415</sup>

## CONCLUSION

This Note explored the links between slavery and capitalism, providing the context necessary for understanding the complexities of anti-Black Racism and inequality. In light of that context, this Note examined the different ESG tools that federal and private actors have implemented to combat anti-Black racism and inequality. This Note identified various flaws among those ESG tools, articulating why they fall short in addressing anti-Black racism and inequality.

This Note argues that Americans would be better off addressing anti-Black racism from a cumulative, integrated approach when, time and time

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409. Alexis Clark, *9 Entrepreneurs Who Helped Build Tulsa’s ‘Black Wall Street’*, HISTORY, <https://www.history.com/news/black-wall-street-tulsa-visionaries> [<https://perma.cc/6VDC-KNVH>] (last updated Aug. 11, 2023).

410. *See id.*

411. *See* Ilene H. Lang & Reggie Van Lee, *Institutional Investors Must Help Close the Race and Gender Gaps in Venture Capital*, HARV. BUS. REV. (Aug. 27, 2020), <https://hbr.org/2020/08/institutional-investors-must-help-close-the-race-and-gender-gaps-in-venture-capital> [<https://archive.is/mvhgB>].

412. *See id.*

413. *Id.*

414. *See id.*; *see also* Sarah Lyons-Padilla et al., *Race Influences Professional Investors’ Financial Judgments*, PNAS 5 (May 9, 2019), <https://www.sec.gov/files/amac-background-race-influences.pdf> [<https://archive.is/RbwEV>].

415. *See id.*

again, capitalistic institutions have and will likely continue to prioritize power and profit over Black lives. This Note suggests that instead of relying on corporate ESG to combat anti-Black racism and inequality, activists should focus on promoting (1) government-sponsored reparations programs;(2) legislation to overhaul systems that reinforce racial inequalities;(3) Black Americans' participation in the stock market; and (4) a redirection of buying power and capital to Black entrepreneurs in order to accelerate racial equity.

By employing the above approach, we could leverage a more diverse and comprehensive solution to address anti-Black racism and inequality. Because slavery's legacy and institutions are so deeply entrenched in society, it is hard to see a clear path to an equal, anti-racist society. However, if we remain persistent and consistent in demanding institutional change and continue investing in Black people, we may get somewhere.

## APPENDICES

### Appendix A:<sup>416</sup>

Year	Cotton export (US\$million)	% total export	Population (million)			
			South	West	Northeast	United States
1820	22,308.7	32.0	2,918.2	1,845.9	4,836.7	9,600.8
1830	29,674.9	41.4	3,774.4	2,980.3	6,066.2	12,820.9
1840	63,870.3	51.6	4,749.9	4,960.6	7,309.2	17,019.6
1850	71,984.6	49.9	6,271.2	7,494.6	9,301.4	23,067.3

Source. Compiled and computed from North (1966 [1961], app. I, table A-VIII, p. 233, app. II, table L-IX, p. 257).

Note. California gold production and export expanded from the late 1840s; in 1850 total production was \$41,273,106, of which \$27,676,346 (or 67.1%) was exported (North [1966 (1961), table H-IX, p. 255]). This explains the slight decrease in the percentage contribution of cotton exports in 1850.

416. Cotton export and regional distribution of US population, 1820–1850; Joseph E. Inikori “Atlantic Slavery and the Rise of the Capitalist Global Economy.” *Current Anthropology* 61, no. 22 (Oct. 2020): 9. <https://doi.org/10.1086/709818> [<https://archive.is/ZnYWm>].



**Appendix B:**<sup>417</sup>

*GHI/Universal History Archive/Universal Images Group/Getty Images*

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417. Tulsa Bombing; History.com Editors. "Tulsa Race Massacre," HISTORY.COM (Mar. 8, 2018), <https://www.history.com/topics/roaring-twenties/tulsa-race-massacre> [<https://perma.cc/3FBV-V7MY>].

## Appendix C:<sup>418</sup>

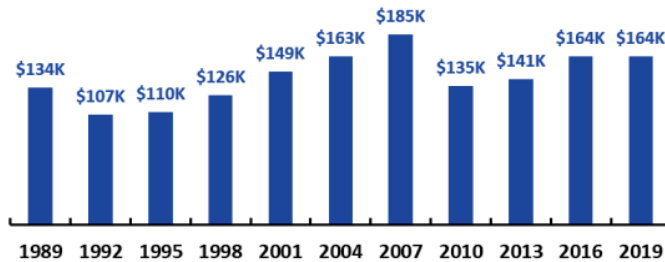
### *The Economic Legacy of the 1921 Tulsa Race Massacre: Today's Racial Wealth Gap*

#### *The racial wealth gap remains persistent*

The white-Black gap in median wealth has remained relatively unchanged for decades, shifting from \$134,000 in 1989 to \$164,000 in 2019. While the gap narrows marginally after economic contractions, the impact on Black wealth lingers. The typical Black family has yet to recover their pre-Great Recession levels of wealth.<sup>9</sup> The disproportionate impact the Great Recession, and previous contractions, had on the economic and wealth status of Black Americans left them much more vulnerable to the adverse effects of the COVID-19 pandemic.<sup>10</sup>

#### White and Black Median Wealth Gap Over Time

Absolute differences in net worth, 2019 USD



Source: 2019 Survey of Consumer Finances

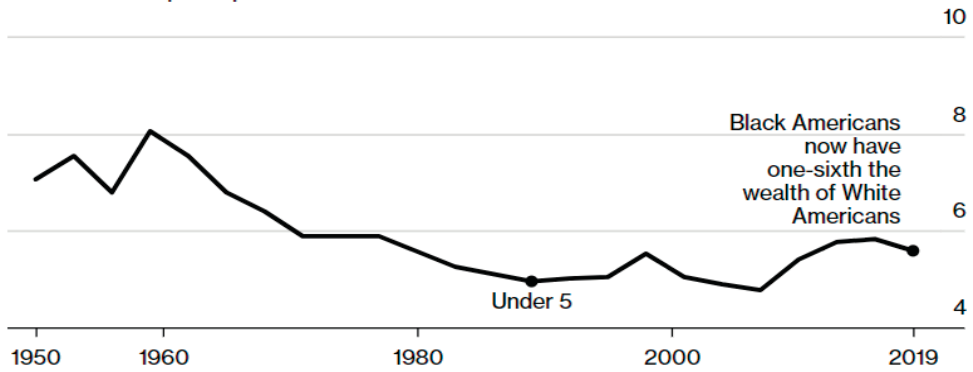
418. Congressman Don Byer, *The Economic Legacy of the 1921 Tulsa Race Massacre: Today's Racial Wealth Gap 2021*, JOINT ECON. COMM. (May 27, 2021), [https://www.jec.senate.gov/public/\\_cache/files/3847c763-bd17-45c4-be82-ba38a2d1f94e/racial-wealth-gap-and-tulsa---final2.pdf](https://www.jec.senate.gov/public/_cache/files/3847c763-bd17-45c4-be82-ba38a2d1f94e/racial-wealth-gap-and-tulsa---final2.pdf) [<https://perma.cc/9WQJ-MWJ7>].

### Appendix D:<sup>419</sup>

#### Wealth Chasm

The gap between Black and White wealth has widened since the 1980s

↙ White-Black per capita wealth ratio



Source: Analysis by Derenoncourt, Kim, Kuhn, Schularick.

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419. Catarina Saraiva, *Black-White Wealth Gap Getting Worse, 160 Years of US Data Show*, BLOOMBERG (June 7, 2022), <https://www.bloomberg.com/news/articles/2022-06-07/black-white-wealth-gap-getting-worse-160-years-of-us-data-show?leadSource=verify%20wall> [<https://archive.is/TeWqj>].

### Appendix E:<sup>420</sup>

## Black–white wage gaps are wider now than 40 years ago and largely unexplained by factors associated with individual productivity

Average and regression-adjusted Black–white wage gaps, 1979–2019

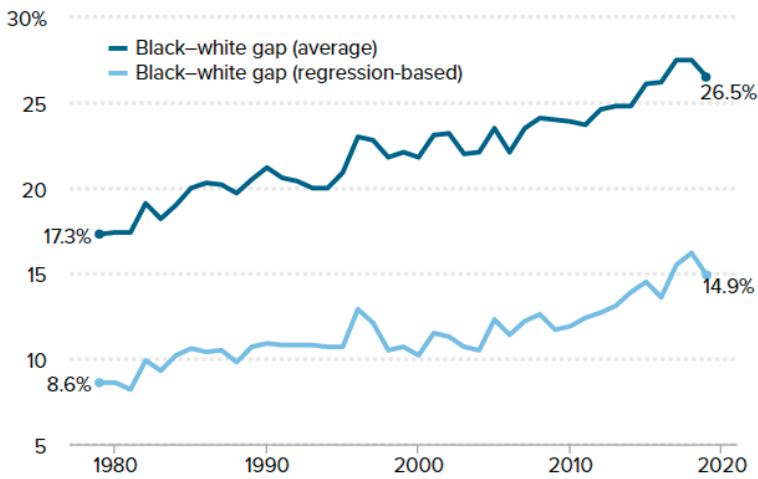


Chart Data

Source: Economic Policy Institute (EPI). 2020. Current Population Survey Extracts, Version 10.4, <https://microdata.epi.org>.

Economic Policy Institute

420. Valerie Wilson, *Racism and the Economy*, ECON. POL'Y INST. (Nov. 21, 2020), <https://www.epi.org/blog/racism-and-the-economy-fed/> [https://perma.cc/H6G8-NDQX].

**Appendix F:**<sup>421</sup>

**Black-white unemployment rate ratios by educational attainment, 1978–2019**

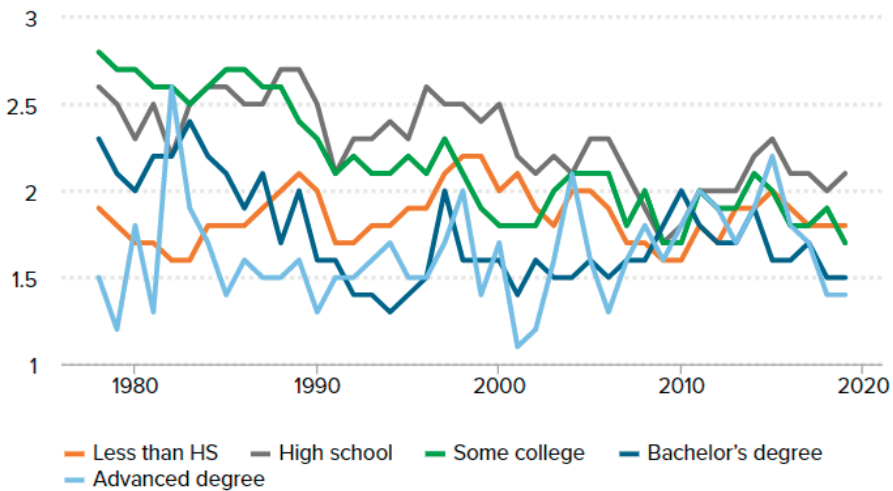


Chart Data

**Source:** 1978–2019 series by race & ethnicity, EPI analysis of monthly CPS microdata, downloaded from EPI SWA Data Library.

Economic Policy Institute

421. Matthew Boesler et al., *The Fed Wakes up to Race*, BLOOMBERG (Jan. 15, 2021), <https://www.bloomberg.com/features/2021-federal-reserve-race-inequality/?leadSource=verify%20wall> [<https://archive.is/kF2VT>].

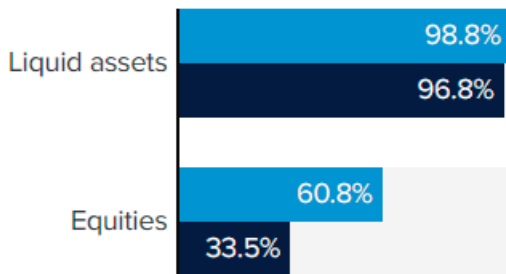
## Appendix G:<sup>422</sup>

### Black Americans being left behind

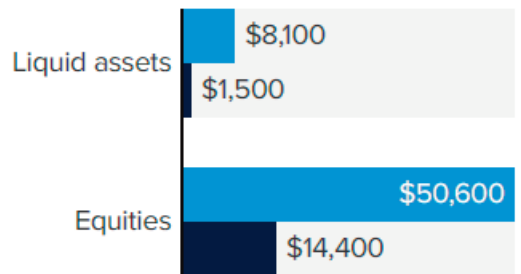
Liquid assets and stock ownership among Black Americans significantly lag their white counterparts

■ White ■ Black

#### Share with asset



#### Average value



Note: Averages are calculated among those who own each type of asset.

Source: Federal Reserve Board, 2019 Survey of Consumer Finances



422. Federal Reserve Board, *Survey of Consumer Finances (SCF)*, FED. RSRV., <https://www.federalreserve.gov/econres/scfindex.htm> [<https://perma.cc/BHA8-8LP3>] (last visited May 29, 2023).