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## Racial Capitalism: Complexities With Enforcing Corporate Commitments to End Racial Injustice, 55 UIC L. Rev. 519 (2022)

Natè Simmons

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# RACIAL CAPITALISM: COMPLEXITIES WITH ENFORCING CORPORATE COMMITMENTS TO END RACIAL INJUSTICE

NATÈ SIMMONS\*

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## I. INTRODUCTION

Since May 2020, various corporations vowed to commit over \$1.7 billion to racial and social justice causes in response to worldwide protests over the death of George Floyd.<sup>1</sup> There is “nothing inherently problematic in encouraging racial diversity within” businesses, as this type of “diversity is a necessary prerequisite to improving racial relations in America.”<sup>2</sup> The efforts of employers “to promote racial diversity should be celebrated, not disparaged.”<sup>3</sup> However, concerns with “racial capitalism” are presented when corporations comprised of predominately white employees generate substantial profits based on diversity initiatives rooted in racial equality without an obligation for

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\*Natè Simmons, Juris Doctor Candidate 2022, UIC School of Law. My intention for this article is to create conversations on the importance of successful execution and ongoing maintenance of corporate diversity initiatives. Racial equality cannot be resolved through a corporation’s diversity initiative. However, these programs move America closer to the goal because of the economic and social value afforded to diverse communities.

1. Ralinda Harvey Smith, *Op-Ed: A year ago, U.S. businesses pledged to change in support of Black Lives Matter. How have they done?*, L.A. TIMES (June 24, 2013), [www.latimes.com/opinion/story/2021-06-24/black-lives-matter-one-year-later-amazon-equity-diversity-inclusion](http://www.latimes.com/opinion/story/2021-06-24/black-lives-matter-one-year-later-amazon-equity-diversity-inclusion) [perma.cc/84XG-AJFY].

2. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2155 (2013).

3. *Id.*

execution.<sup>4</sup>

The term “racial capitalism” has been defined as “the process of deriving economic and social value from the racial identity of another person.”<sup>5</sup> An example of racial capitalism would be a white politician with a predominately white campaign staff who recruits Blacks to place in visible positions after the release of a public opinion poll indicating the politician’s lack of concern for the Black community.<sup>6</sup>

In the wake of the death of George Floyd, an abundant number of companies pronounced their commitment to diversity, equity, and inclusion initiatives.<sup>7</sup> However, it can be argued that it is unjust enrichment<sup>8</sup> for companies to profit from campaigns geared toward Black people without fulfilling their promises to consumers. Legislators in California noticed that companies were falling short of their promises.<sup>9</sup> As a result, California was the first state to seek accountability by enacting a law that regulates racial capitalism.<sup>10</sup> The California law, Assembly Bill 979 (“AB 979”), found footing in its 2018 diversity legislation, Senate Bill 826 (“SB 826”), which

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4. *Id.*

5. *Id.* at 2156.

6. *Id.* at 2153. Another example of racial capitalism would be a real estate company comprised of predominately white employees aggressively recruiting and hiring Blacks to demonstrate minority representation in response to numerous lawsuits alleging race discrimination, or the same real estate company purposely placing Blacks in their advertisement after being accused of discriminating against these individuals. *Id.*

7. *Factbox*, *supra* note 1.

8. BRIAN A. BLUM, CONTRACTS EXAMPLES & EXPLANATIONS 271 (Vicki Been et al., 7th ed. 2017). Blum provides:

Unjust enrichment serves as an independent theory of liability in cases when no contract has come into existence, either because something went wrong or failed to happen in the process of formation, or because the parties simply did not attempt to make a contract. Yet they had some interaction that resulted in one party obtaining a gain from the other. In situations like this, there is no basis for contractual relief, but unjust enrichment permits restitutionary recovery.

*Id.*

9. *See Governor Newsom Signs Corporate Boardroom Diversity Law*, FOX40 NEWS (Sept. 30, 2020), [www.fox40.com/news/california-connection/governor-newsom-signs-corporate-boardroom-diversity-law/](http://www.fox40.com/news/california-connection/governor-newsom-signs-corporate-boardroom-diversity-law/) [perma.cc/C4NH-W336] [hereinafter *Governor Newsom Signs*] (stating “[a]fter [George] Floyd’s death, many corporations issued statements of support for diversity, but many haven’t followed through.”).

10. Michael D. Thomas & Amy P. Frenzen, *AB 979 Requires California-Based Publicly Held Corporations to Diversify Their Boards of Directors*, *The Nat. L. Rev.* (Oct. 1, 2020), [www.natlawreview.com/article/ab-979-requires-california-based-publicly-held-corporations-to-diversify-their](http://www.natlawreview.com/article/ab-979-requires-california-based-publicly-held-corporations-to-diversify-their) [perma.cc/7H8L-Q4VH] (providing that “Assembly Bill [] 979 . . . requires publicly held corporations headquartered in California to diversify their boards of directors with directors from ‘underrepresented communities’”).

required corporations incorporated in the state to “have at least one female director by 2019.”<sup>11</sup>

This Comment brings to light the importance of the execution of initiatives pronounced by corporations committing to diversity, equity, and inclusion. Part II of this Comment will first examine events that led to corporate pronouncements committing to diversity, equity, and inclusion initiatives, discuss laws governing gifts, and introduce the concept of racial capitalism. Part III will analyze racial capitalism. Part III will demonstrate issues created by racial capitalism and the complexities involved in regulating racial capitalism. Finally, Part IV of this Comment will propose a tax credit as an incentive for businesses to fulfill their promise.

## II. BACKGROUND

Sudden corporate pronouncements committing to diversity, equity, and inclusion were exacerbated primarily by the death of George Floyd in the summer of 2020. First, this section will describe the death of George Floyd, the main event that led to corporate pronouncements. Next, this section will analyze Nike, PepsiCo, and the NFL’s corporate pronouncements committing to diversity, equity, and inclusion. Specifically, this section will discuss Colin Kaepernick’s protest for racial equality and his affiliation with the NFL and Nike. Corporate gift legislation and legislation on diversity will also be examined. Finally, racial capitalism will be introduced and defined.

### *A. Corporate Pronouncements Committing to Diversity, Equity and Inclusion*

On May 25, 2020, George Floyd, a forty-six-year old Black man was killed by three Minneapolis police officers who, after arresting him for purchasing cigarettes with a counterfeit twenty-dollar bill, pinned him down until he was unconscious.<sup>12</sup> One of the officers, Derek Chauvin, held his knee to Mr. Floyd’s neck for, as initially reported, eight minutes and forty-six seconds.<sup>13</sup> George Floyd’s murder ignited global protests against racial injustice that endured months after his death.<sup>14</sup> Within weeks of these protests, over a

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11. *Governor Newsom Signs*, *supra* note 9.

12. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), [www.nytimes.com/2020/05/31/us/george-floyd-investigation.html](http://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html) [perma.cc/Y3FZ-N4ED].

13. *Id.*

14. Elliot C. McLaughlin, *How George Floyd’s Death Ignited Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020), [www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html](http://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html)

hundred companies took to social media, with each posting statements “denouncing discrimination and professing their commitment to racial justice.”<sup>15</sup>

Among the companies making pronouncements were Nike, PepsiCo, and the NFL. Nike initially announced a four-year plan committing \$40 million to support Black communities by “invest[ing] in and support[ing] organizations focused on social justice, education and economic empowerment to address racial inequality.”<sup>16</sup> Nike committed to providing a \$1 million grant to the National Association for the Advancement of Colored People (“NAACP”) Empowerment Programs, NAACP Legal Defense and Education Fund, Inc. (“LDF”) and Black Girls CODE.<sup>17</sup> These are all “national organizations dedicated to ending systemic racism.”<sup>18</sup> Nike later increased its commitment to provide \$1 billion to diverse suppliers, \$125 million to organizations that address racial inequality, and \$10 million to Historically Black Colleges and Universities and Hispanic-Serving Institutions.<sup>19</sup> Craig Williams, the current Black president of the Jordan brand, was designated to execute this initiative.<sup>20</sup>

PepsiCo announced a commitment of more than “\$400 million over the next five years to address issues of inequality and create opportunity,” which includes increasing its Black managerial population to ten percent, expanding recruitment efforts with Historically Black Universities, scholarship support, as well as

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[perma.cc/TBS6-KQ4H].

15. Tracy Jan et al., *As Big Corporations Say ‘Black Lives Matter,’ Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020), [www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/](http://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/) [perma.cc/G8U7-Q97V].

16. *Nike, Inc. Announces Initial Partners for \$40 Million, Four-Year Commitment to Fight Systemic Racism*, NIKE NEWS (July 29, 2020), [www.news.nike.com/news/nike-inc-announces-initial-partners-for-40-million-four-year-commitment-to-fight-systemic-racism](http://www.news.nike.com/news/nike-inc-announces-initial-partners-for-40-million-four-year-commitment-to-fight-systemic-racism) [perma.cc/S67S-X2KH] [hereinafter *Nike, Inc. Announces*]; see *NIKE, Inc. Statement on Commitment to the Black Community*, NIKE NEWS, [news.nike.com/news/nike-commitment-to-black-community](http://news.nike.com/news/nike-commitment-to-black-community) [perma.cc/N5RL-H5HJ] [hereinafter *NIKE, Inc. Statement on Commitment*] (stating Nike’s commitment to “investing in and supporting organizations that put social justice, education and addressing racial inequality in America at the center of their work”).

17. *Nike, Inc. Announces*, *supra* note 16.

18. *Id.*

19. *Breaking Barriers: FY21 Nike, Inc. Impact Report Executive Summary*, NIKE 1, 9, 11, [www.purpose-cms-preprod01.s3.amazonaws.com/wp-content/uploads/2022/03/10052454/FY21-NIKE-Impact-Report\\_Executive-Summary-3.pdf](http://www.purpose-cms-preprod01.s3.amazonaws.com/wp-content/uploads/2022/03/10052454/FY21-NIKE-Impact-Report_Executive-Summary-3.pdf) [perma.cc/9UHU-B796] (last visited Apr. 6, 2022).

20. Lauren Thomas, *Read Nike CEO John Donahoe’s Note to Employees on Racism: We Must ‘Get Our Own House in Order’*, CNBC (June 5, 2020), [www.cnbc.com/2020/06/05/nike-ceo-note-to-workers-on-racism-must-get-our-own-house-in-order.html](http://www.cnbc.com/2020/06/05/nike-ceo-note-to-workers-on-racism-must-get-our-own-house-in-order.html) [perma.cc/YWX9-8D6A].

focusing on internal mentoring and unconscious bias training.<sup>21</sup> PepsiCo has also pledged \$50 million towards supporting Black-owned businesses and doubling its spending with Black-owned suppliers as well as \$20 million towards community programs addressing systemic racism.<sup>22</sup> In addition, PepsiCo's brand Gatorade pledged "\$500,000 to four organizations, including Black Lives Matter, NAACP, American Civil Liberties Union [(“ACLU”)] and Know Your Rights Camp,”<sup>23</sup> an organization formed by Colin

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21. *Pepsico's Racial Equality Journey Black Initiative*, PEPSICO, [www.pepsico.com/racial-equality-journey](http://www.pepsico.com/racial-equality-journey) [hereinafter *Pepsico's Racial Equality Journey*](last visited Apr. 15, 2020). With a total investment of “more than \$400 million over [five] years,” PepsiCo committed to (1) expanding its Black managerial population “to [ten percent] of our workforce by 2025 . . . through internal development and recruitment.” *Id.* PepsiCo promised to “add more than 250 Black associates to managerial roles by 2025, including adding a minimum of [one hundred] Black associates to our executive ranks;” (2) accelerate “recruitment efforts with Historically Black Colleges and Universities and increas[e] partnerships with diverse organizations at our core schools;” (3) “activat[e] associates to help drive ongoing change in our organization, with a focus on internal mentoring, coaching, and continuous development;” (4) “mandat[e] company-wide unconscious bias training, followed by continued training aimed at reducing biases in the workplaces.” *Id.* Specifically in the business context, PepsiCo pledged to (5) “more than doubl[e] our spending with Black-owned suppliers” by “expanding the supplier pipeline through advocacy and outreach; and building supplier capability targeting growth access services, agriculture, sustainable packaging and operations;” (6) use its “buying power to create more jobs for Black creators at our marketing agencies and make them part of our content development – we will implement a Creative Agency Diversity Policy modeled on our existing policy for the selection of legal services, including an annual audit;”(7) support “Black-Owned restaurants as part of our Small Business Program, including mentoring, management training and helping obtain financing;” (8) invest “\$50 million over five years to strengthen local Black-owned businesses.” *Id.* PepsiCo additionally promised an incremental investment of \$20 million over five years to communities by (9) “establishing scholarship support for students transitioning from [two]-year to [four]-year programs and scaling our existing efforts to support trade/certificate and academic [two]-year degrees through community colleges for 400 Black students per year – these funds will also provide wrap-around support, including money for books, transportation, housing and more;” (10) “accelerating our support for social programs that impact Black communities” by “delivering \$6.5 million in community impact grants . . . investing \$1 million to replicate our holistic community support program . . . expanding our Food for Good initiative providing jobs and access to nutrition to more Black communities . . . increasing our contribution to the NAACP [LDF] to support . . . social justice;” and (11) invest “\$5 million to launch a Community Leader Fellowship program for Black non-profit CEOs” and “provide grants to participants’ organizations, executive education, and connections to PepsiCo leaders and partners.” *Id.*

22. *Id.*

23. Doug Stanglin, *Fact check: PepsiCo Pledges \$400M to Supporting Social Programs in Black Communities*, USA TODAY (Aug. 28, 2020), [www.usatoday.com/story/news/factcheck/2020/08/28/fact-check-pepsico-pledges-400-m-black-communities-programs/5633745002/](http://www.usatoday.com/story/news/factcheck/2020/08/28/fact-check-pepsico-pledges-400-m-black-communities-programs/5633745002/) [perma.cc/Y64B-

Kaepernick, a former NFL “quarterback-turned-social justice activist”<sup>24</sup> who was blacklisted from the NFL after peaceful protests against racial injustice.<sup>25</sup>

The NFL pledged \$250 million to fight racism over the next ten years, including \$44 million donated to social justice programs in 2019<sup>26</sup> after Colin Kaepernick lost his NFL career as a result of his public support for the protests.<sup>27</sup> In an effort to broaden the social justice efforts of its Inspire Change organization, the NFL partnered with Shawn “Jay-Z” Carter, a well-known rapper and businessman.<sup>28</sup> The organizations the NFL has already donated to

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CMZ7].

24. Gary Peterson, *Nike Rakes in \$3 Billion After Colin Kaepernick Calls Foul on Shoe*, DENVER POST (July 6, 2019), [www.denverpost.com/2019/07/06/nike-3-billion-colin-kaepernick-shoe/](http://www.denverpost.com/2019/07/06/nike-3-billion-colin-kaepernick-shoe/).

25. See Juan Carlos Guerrero, *TIMELINE: Colin Kaepernick’s Journey From San Francisco 49ers Star to Kneeling to Protest Racial Injustice*, ABC NEWS (Aug. 29, 2020), [www.abc7news.com/colin-kaepernick-kneeling-when-did-first-kneel-date-what-does-do-now/4147237/](http://www.abc7news.com/colin-kaepernick-kneeling-when-did-first-kneel-date-what-does-do-now/4147237/) (explaining that in March 2017, “[e]ven though he is a free agent, Kaepernick is not signed by any NFL team during the off-season”).

26. See Judy Battista, *NFL Commits \$250M Over 10-Year Period to Combat Systemic Racism*, NFL NEWS (June 11, 2020), [www.nfl.com/news/nfl-commits-250m-over-10-year-period-to-combat-systemic-racism](http://www.nfl.com/news/nfl-commits-250m-over-10-year-period-to-combat-systemic-racism) [perma.cc/U2UL-RHTH] (providing that

[t]he NFL, which first began a social justice program after players protested police brutality and racial injustice several years ago, announced . . . it will commit a quarter of a billion dollars over [ten] years . . . to combat systemic racism and support the battle against injustices faced by African Americans).

27. See Guerrero, *supra* note 25 (stating Kaepernick played his last game on January 1, 2017, just a few months after he protested by kneeling during the national anthem).

28. *Jay-Z’s Roc Nation Entering Partnership with NFL*, NFL (Aug. 13, 2019), [www.nfl.com/news/jay-z-s-roc-nation-entering-partnership-with-nfl-0ap3000001041162](http://www.nfl.com/news/jay-z-s-roc-nation-entering-partnership-with-nfl-0ap3000001041162) [perma.cc/9BDW-62WW]. The NFL’s news outlet provided:

As a part of the agreement, Roc Nation will advise on the selection of artist for major NFL performances like the Super Bowl. A major component of the partnership will be to nurture and strengthen community through football and music, including through the NFL’s Inspire Change initiative.

The NFL formally launched the Inspire Change initiative in early 2019, after more than two years of work with NFL players, with the goal of creating positive change in communities across the country. Through this initiative, the NFL teams and the league office work with the Players Coalition and other NFL players to support programs and initiatives that reduce barriers to opportunity, with a focus on three priority areas: education and economic advancement; police and community relations; and criminal justice reform.

*Id.*

are the Alabama Appleseed Center for Law and Justice, the Anti-Recidivism Coalition, the National Urban League, Big Brothers Big Sisters of America, and the United Negro College Fund.<sup>29</sup> These organizations are dedicated to criminal justice reform and ending systemic racism.<sup>30</sup> Despite Kaepernick not being offered a position with an NFL team, the NFL praised Kaepernick within its pronouncement indicating “[w]e wouldn’t be where we are today without the work of Colin” and offered to collaborate with Kaepernick on his social justice initiatives.<sup>31</sup> Though once ostracized for his protest on racial inequality, the NFL welcomed Kaepernick back into the spotlight only after the death of George Floyd and the popularization of corporate diversity initiatives.

### *B. Colin Kaepernick’s Protest for Racial Equality*

Colin Kaepernick played as a quarterback for the San Francisco 49ers’ at the time he began his peaceful protests against police brutality and racial inequality in America by refusing to stand up during the national anthem at the start of each game.<sup>32</sup> Rather, he chose to kneel in an effort to support his cause while still displaying respect.<sup>33</sup> He began his protests during the 2016 preseason and continued<sup>34</sup> until he opted out of his contract with the San Francisco 49ers’ in March 2017 and became a free agent.<sup>35</sup> Kaepernick’s protests were in response to the unjust deaths of Blacks by police officers and systemic racial oppression in the United States.<sup>36</sup> Kaepernick explained, “I am not going to stand up to show pride in a flag for a country that oppresses Black people and people of color.”<sup>37</sup>

Kaepernick is one of the most influential social activists and civil rights entrepreneurs in sports history.<sup>38</sup> He was the most

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29. Battista, *supra* note 26.

30. *Id.*

31. *Id.*

32. Analis Bailey, *On This Day Four Years Ago, Colin Kaepernick Began His Peaceful Protests During the National Anthem*, USA TODAY (Aug. 26, 2020), [www.usatoday.com/story/sports/nfl/2020/08/26/colin-kaepernick-started-protesting-day-2016/3440690001/](http://www.usatoday.com/story/sports/nfl/2020/08/26/colin-kaepernick-started-protesting-day-2016/3440690001/) [perma.cc/9ZH7-B7SW].

33. *Id.*

34. *Id.*

35. Will Brinson, *The 49ers Would’ve Cut Colin Kaepernick if He Hadn’t Opted Out of His Contract*, CBS SPORTS (May 31, 2017), [www.cbssports.com/nfl/news/the-49ers-wouldve-cut-colin-kaepernick-if-he-hadnt-opted-out-of-his-contract/](http://www.cbssports.com/nfl/news/the-49ers-wouldve-cut-colin-kaepernick-if-he-hadnt-opted-out-of-his-contract/) [perma.cc/TNX3-YACD].

36. Bailey, *supra* note 32.

37. *Id.*

38. See Julie Creswell et al., *Nike Nearly Dropped Colin Kaepernick Before Embracing Him*, N.Y. TIMES (Sept. 26, 2018), [www.nytimes.com/2018/09/26/sports/nike-colin-kaepernick.html](http://www.nytimes.com/2018/09/26/sports/nike-colin-kaepernick.html)

befitting to date to receive the Sport's Illustrated Muhammad Ali Legacy Award ("Muhammad Ali Award") in 2017 for his commitment against racial inequality, police brutality, high incarceration rates among Blacks and people of color, and social injustice in America.<sup>39</sup> Kaepernick approached this cause with such dedication that he sacrificed his career fighting for the greater good of Blacks and people of color.<sup>40</sup> The Muhammed Ali Award is reserved only for those who "embod[y] the ideals of sportsmanship, leadership and philanthropy and have used sports as a platform for changing the world."<sup>41</sup> Kaepernick was also honored by the ACLU of Southern California with the Eason Monroe Courageous Advocate Award for his dedication to racial equality.<sup>42</sup>

Kaepernick's protests captured the attention of "former President Barack Obama, NFL Commissioner Roger Goodell and [former] President Donald Trump."<sup>43</sup> In September 2017, former President Trump called for Kaepernick's resignation claiming that his kneeling in protest of racial inequality during the national anthem disrespected the American flag.<sup>44</sup> Though Kaepernick is talented and was "fifth in NFL history in touchdown-to-interception ratio,"<sup>45</sup> he was not resigned to the league because it was predicted that his signing team would lose "[twenty percent] of their season tickets holders" as a result of his activism on the field.<sup>46</sup>

In October 2017, Kaepernick "filed a grievance against the NFL," alleging that team owners were plotting to prevent him from playing in the NFL.<sup>47</sup> The NFL's request to dismiss the allegations

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[perma.cc/NN5L-936B] (explaining that the Nike's advertising campaign "sent Kaepernick into a new realm of celebrity").

39. See Michael Rosenberg, *Colin Kaepernick Is Recipient of 2017 Sports Illustrated Muhammad Ali Legacy Award*, SPORTS ILLUSTRATED (Nov. 30, 2017), [www.si.com/sportsperson/2017/11/30/colin-kaepernick-muhammad-ali-legacy-award](http://www.si.com/sportsperson/2017/11/30/colin-kaepernick-muhammad-ali-legacy-award) [perma.cc/L2MP-6RNK] (explaining Muhammad Ali and Kaepernick "both sacrificed for the greater good at a time when many Americans could not see it was greater good").

40. See *id.* (stating Kaepernick's protests "cost him at least a year of his NFL career").

41. *Id.*

42. Jill Martin, *Colin Kaepernick Honored with ACLU Award*, CNN (Dec. 4, 2017), [www.cnn.com/2017/12/04/sport/colin-kaepernick-honored-with-aclu-award/index.html](http://www.cnn.com/2017/12/04/sport/colin-kaepernick-honored-with-aclu-award/index.html) [perma.cc/7E65-KKM9].

43. Bailey, *supra* note 32.

44. *Trump Says NFL Should Fire Players Who Kneel During Anthem*, NBC SPORTS (Sept. 22, 2017), [www.nbcsports.com/boston/new-england-patriots/trump-says-nfl-should-fire-players-who-kneel-during-anthem](http://www.nbcsports.com/boston/new-england-patriots/trump-says-nfl-should-fire-players-who-kneel-during-anthem) [perma.cc/S7HE-7VWQ].

45. Rosenberg, *supra* note 39.

46. Joe Lockhart, *Now is the Moment to Sign Colin Kaepernick*, CNN (May 30, 2020), [www.cnn.com/2020/05/29/opinions/now-is-the-moment-to-sign-colin-kaepernick-lockhart/index.html](http://www.cnn.com/2020/05/29/opinions/now-is-the-moment-to-sign-colin-kaepernick-lockhart/index.html) [perma.cc/CL2U-F248].

47. Guerrero, *supra* note 25.

was denied by the arbitrator,<sup>48</sup> and in early 2019 the NFL settled with Kaepernick.<sup>49</sup> Though the amount of his settlement with the NFL was not disclosed, it is believed to be “roughly \$6 million.”<sup>50</sup> Despite the NFL’s newfound public commitment to fighting racial inequality and Kaepernick’s outstanding abilities as an athlete, Colin Kaepernick was never resigned to an NFL team.<sup>51</sup>

In the summer of 2017, Nike was on the verge of terminating its sponsorship with Kaepernick in fear of disrupting its partnership with the NFL.<sup>52</sup> However, after conducting research and persuasion from its trusted advertising firm, Nike decided it “made good business sense” to use Kaepernick as the face of its “Just Do It” thirtieth anniversary campaign.<sup>53</sup> The 2018 campaign launched with an ad featuring a close-up of Kaepernick’s face, the Nike swoosh logo, and the words “Believe in something. Even if it means sacrificing everything.”<sup>54</sup> Nike’s decision to feature Kaepernick for this campaign turned out to be extremely profitable – it created about \$163 million in media exposure and Nike’s market value increased by \$6 billion shortly after the Kaepernick ad aired.<sup>55</sup>

Though Nike profited significantly from its affiliation with Kaepernick’s protest for racial injustice,<sup>56</sup> this collaboration gave Kaepernick a bigger platform and raised his profile as an advocate for civil rights.<sup>57</sup> The protests for racial justice, which prompted the corporate pronouncements, highlighted the need for racial equality in America during a time when President Trump was promoting division among races.<sup>58</sup> Nike took a courageous step on the outside

48. *Id.*

49. Kurt Streeter, *Kneeling, Fiercely Debated in the N.F.L., Resonates in Protests*, N.Y. TIMES (June 5, 2020), [www.nytimes.com/2020/06/05/sports/football/george-floyd-kaepernick-kneeling-nfl-protests.html](http://www.nytimes.com/2020/06/05/sports/football/george-floyd-kaepernick-kneeling-nfl-protests.html) [perma.cc/ZJ38-FH58].

50. *Id.*

51. Lockhart, *supra* note 46.

52. Creswell, *supra* note 38.

53. *Id.*

54. *Id.*

55. Angelica LaVito, *Nike’s Colin Kaepernick Ads Created \$163.5 Million in Buzz Since it Began – and it’s Not All Bad*, CNBC (Sept. 6, 2018), [www.cnbc.com/2018/09/06/nikes-colin-kaepernick-ad-created-163point5-million-in-media-exposure.html](http://www.cnbc.com/2018/09/06/nikes-colin-kaepernick-ad-created-163point5-million-in-media-exposure.html). [perma.cc/M3LY-8CQN]; Renae Reints, *Colin Kaepernick Pushes Nike’s Market Value Up \$6 Billion, to an All-Time High*, FORTUNE (Sept. 23, 2018), [www.fortune.com/2018/09/23/nike-market-value-colin-kaepernick-ad/](http://www.fortune.com/2018/09/23/nike-market-value-colin-kaepernick-ad/) [perma.cc/TSM7-FP98].

56. LaVito, *supra* note 55.

57. Creswell, *supra* note 38 (explaining Nike is a “vehicle for Kaepernick to raise his own profile as a sort of civil rights entrepreneur unlike anyone before has, certainly in sports”).

58. Maeve Reston, *While America Mourns John Lewis, Trump Continues to Divide the Nation*, CNN (July 19, 2020), [www.cnn.com/2020/07/19/politics/us-](http://www.cnn.com/2020/07/19/politics/us-)

of its organization by taking the opposite stance of its NFL partner and Nike's consumer base followed in stride understanding the importance of the fight for oppressed Blacks and people of color in America.

Nike's 2020 pronouncement for diversity, equity, and inclusion is aligned with Colin Kaepernick's fight for racial equality. Now Nike has the opportunity to take another spirited step within its organization to successfully execute a diversity, equity, and inclusion initiative.<sup>59</sup> The NFL<sup>60</sup> and PepsiCo<sup>61</sup> put their organizations in a position to follow by making, and hopefully sticking to, their pronouncements.

### C. Corporate Gift Regulation

Nike, PepsiCo, and the NFL's financial donations to organizations targeted at fighting systemic racism are examples of corporate gifts.<sup>62</sup> In *Dodge v. Ford Motor Company*, Henry Ford, the primary shareholder of Ford Motor Company, expressed the mindset that a portion of a company's profits should be distributed among the community.<sup>63</sup> Mr. Ford wanted to ensure stable employment for his employees and improve their ways of living.<sup>64</sup> This mindset is essential for the execution of the diversity, equity, and inclusion plans of the corporations that denounced discrimination and professed their commitment to combat racial injustice.

The *Dodge* court held that the distribution of a corporation's excess profits to shareholders took precedence over devoting excess profits to other purposes such as donations for the public welfare.<sup>65</sup>

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[election-donald-trump-john-lewis-death/index.html](#) [perma.cc/JYZ7-BDJS].

59. See Thomas, *supra* note 20 (stating Nike promised to commit "\$40 million over four years to support [B]lack communities").

60. Battista, *supra* note 26.

61. See *Pepsico's Racial Equality Journey*, *supra* text accompanying note 21 (describing PepsiCo's public commitments to diversity, equity, and inclusion).

62. See *Seidman v. Clifton Sav. Bank*, 14 A.3d 36, 43 (N.J. 2011) (explaining corporate gifts are a "transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received").

63. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). In *Dodge*, Henry Ford issued over tens of millions of dollars in special dividends over a two year period from 1913 to 1915. *Id.* at 670. Ford discontinued the special dividends to donate a portion of future profits to society to provide the community a better quality of life. *Id.* at 670-71. The Dodge brothers, minority shareholders, sued. *Id.* at 668. The court ruled the board of directors is not allowed to "arbitrarily withhold profits earned by the company" and allowed the special dividends to be issued. *Id.* at 682.

64. *Id.* at 671. Mr. Ford declared, "My ambition . . . is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes." *Id.*

65. *Id.* at 685.

However, corporations are permitted to gift to various organizations of their preference.<sup>66</sup> This is evidenced by the Model Business Corporation Act, which empowers corporations “to make donations for the public welfare or for charitable, scientific, or educational purposes.”<sup>67</sup> Many states, including Illinois,<sup>68</sup> California<sup>69</sup> and New York,<sup>70</sup> have similar legislation that authorizes corporations to make charitable gifts for the public welfare.

#### *D. Legislation on Diversifying Corporate Boards of Directors*

Numerous corporations issued statements promising to make charitable gifts and commit to diversity, equity, and inclusion, in the wake of George Floyd’s death.<sup>71</sup> In an effort to encourage corporations in California to fulfill promises made<sup>72</sup> California enacted AB 979 in September 2020.<sup>73</sup> The bill requires corporations incorporated in the state to “have a minimum of one director from an underrepresented community” by the end of 2021, boards with four to eight directors to “have a minimum of two directors from underrepresented communities,” and those with nine or more directors to “have a minimum of three directors from underrepresented communities.”<sup>74</sup> Failure to comply with the California law results in a fine of \$100,000 for the first violation and \$300,000 for the second or subsequent violations.<sup>75</sup> The term “director from an underrepresented community” is defined as “an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.”<sup>76</sup>

Another federal diversity legislation, the Diversity in Corporate Leadership Act of 2020 (“Corporate Diversity Act”), was proposed to Congress “to ensure transparency and encourage

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66. MODEL BUS. CORP. ACT § 3.02(m) (AM. BAR ASS’N, 2021).

67. *Id.*

68. 805 ILL. COMP. STAT. 5/3.10(m) (1983).

69. CAL. CORP. CODE § 207(e) (West 2022).

70. N.Y. BUS. CORP. LAW § 202(12) (Consol. 2022).

71. *Governor Newsom Signs*, *supra* note 9.

72. *Governor Newsom Signs*, *supra* note 9 (stating “[a]fter [George] Floyd’s death, many corporations issued statements of support for diversity, but many haven’t followed through. The new law represents a big step forward for racial equity.”).

73. Assemb. B. 979, Reg. Sess. (Ca. 2020).

74. CAL CORP. CODE § 301.4(a) – (b)(3) (West 2020), *invalidated by* *Crest v. Padilla*, No. 20 STCV 37513, 2022 WL 1073294 (Cal. Super. Apr. 1, 2022).

75. CAL CORP. CODE § 301.4(d)(1).

76. *Id.* at § 301.4(e)(1).

corporate leadership so that corporate boards would reflect our nation's diversity."<sup>77</sup> The Corporate Diversity Act requires public companies to "disclose the gender, racial, and ethnic composition of their boards and board nominees to the public."<sup>78</sup> In addition, the Corporate Diversity Act would establish a Diversity Advisory Group who would "study corporate board diversity, report on study findings, and make recommendations to the [Securities Exchange Commission] SEC and Senate Banking and House Financial Services Committees."<sup>79</sup> The SEC then allows the public to view the reports on its website.<sup>80</sup> The Diversity Advisory Group would be "composed of representatives from the federal government, academia, and the private sector."<sup>81</sup> The Corporate Diversity Act of 2020 was introduced to the Senate in 2020.<sup>82</sup> However, the Act has not been passed to date.<sup>83</sup>

### *E. Tax Credits*

The government has previously used tax credits<sup>84</sup> to influence behavior.<sup>85</sup> Business tax credits are used to lessen the tax obligation that a business may incur<sup>86</sup> by "allowing [the business] to deduct all or part of certain expenses . . . on a dollar-for-dollar basis."<sup>87</sup> Tax

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77. Press Release, Sen. Catherine Cortez Masto, Cortez Masto Introduces Legislation to Increase Diversity in Corporate Leadership (Mar. 5, 2020) [www.cortezmasto.senate.gov/news/press-releases/cortez-masto-introduces-legislation-to-increase-diversity-in-corporate-leadership](http://www.cortezmasto.senate.gov/news/press-releases/cortez-masto-introduces-legislation-to-increase-diversity-in-corporate-leadership) [perma.cc/LPY8-HL64] [hereinafter Cortez Masto Press Release]; Diversity in Corporate Leadership Act, S. 3367, 116th Cong. (2020).

78. Cortez Masto Press Release, *supra* note 77.

79. *Id.*

80. *Id.*

81. *Id.*

82. Diversity in Corporate Leadership Act of 2020, S. 3367, 116th Cong. (2020).

83. *Id.*

84. See Troy Segel, *Tax Credit*, INVESTOPEDIA (Jan. 27, 2022), [www.investopedia.com/terms/t/taxcredit.asp](http://www.investopedia.com/terms/t/taxcredit.asp) [perma.cc/RPB5-M97B] (last visited Apr. 2, 2022) (defining tax credits as "an amount of money that taxpayers can subtract directly from the taxes they owe").

85. See *generally Work Opportunity Tax Credit*, INTERNAL REVENUE SERV., [www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit](http://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit) [perma.cc/ZA7A-ZRNQ] (last updated Sep. 22, 2020) (explaining that companies are eligible for the federal Work Opportunity Tax Credit when they hire individuals who experience challenges seeking employment including ex-felons, qualified veterans and recent government aid recipients).

86. Julia Kagan, *Business Tax Credits*, INVESTOPEDIA (Jan. 21, 2021), [www.investopedia.com/terms/b/business-tax-credits.asp](http://www.investopedia.com/terms/b/business-tax-credits.asp) [perma.cc/7ESR-2UP7] (last visited Apr. 2, 2022) (defining business tax credits as "an amount that companies can subtract from the taxes owed to a government").

87. *Corporate Income Tax Credits*, GOOD JOBS FIRST, [www.goodjobsfirst.org/accountable-development/corporate-income-tax-credits](http://www.goodjobsfirst.org/accountable-development/corporate-income-tax-credits) [perma.cc/SK2R-M7Y5] (last visited Dec. 24, 2020).

credits are designed to encourage businesses “to engage in behavior that is socially responsible and/or benefits the community.”<sup>88</sup> Moreover, tax credits could be influential in encouraging the corporations to fulfill the promises made committing to racial justice.

### F. Racial Capitalism

Racial capitalism begins with the racial value derived from human interaction through “social capital,” which is defined as “an ‘investment in social relations with expected returns’ in the economic, labor, or community marketplace.”<sup>89</sup> Similar to the value placed on diversity in cases such as *Regents of the University of California v. Bakke*<sup>90</sup> and *Grutter v. Bollinger*,<sup>91</sup> a company captures racial value through its “[a]ffiliation with non[-]white individuals.”<sup>92</sup>

Further, companies implement diversity programs to demonstrate to its business networks and society that it is “willing to act to ‘sustain the well-being of another actor in the community.’”<sup>93</sup> This exchange results in a “status leak,” a signal of affiliation.<sup>94</sup> This Comment focuses on “nonracism” and Black cultural competence “status markets” because these markets<sup>95</sup> are

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88. Section 3. *Using Tax Incentives to Support Community Health and Development*, CMTY. TOOL BOX, [www.ctb.ku.edu/en/table-of-contents/implement/changing-policies/tax-incentives/main](http://www.ctb.ku.edu/en/table-of-contents/implement/changing-policies/tax-incentives/main) [perma.cc/KR3U-4AYR] (last visited Dec. 23, 2020).

89. Leong, *supra* note 2, at 2175.

90. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277-318 (1978). After being rejected admission twice, Bakke, a white male, sued the school on the basis that his admission score was higher than students who were admitted through the school’s special admissions program for minority students. *Id.* at 277-78. The court found the special admissions program was unconstitutional, reasoning that race could be a “plus” in the school’s evaluation of an applicant but should not be the sole admission decision. *Id.* at 318.

91. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) (holding “[t]he Law School has a compelling interest in attaining a diverse student body”). In addition to other factors, the school is allowed to use race as one factor to enhance diversity, which, in turn, would help the school in obtaining educational benefits that flow from diversity. *Id.* at 309.

92. Leong, *supra* note 2, at 2155; see Christine Comaford, *Diversity: Is Your Company Failing? Here Are 5 Tools To Help*, FORBES (Aug. 11, 2018), [www.forbes.com/sites/christinecomaford/2018/08/11/5-ways-to-bring-more-diversity-into-your-organization/?sh=42a02fc53c7c](http://www.forbes.com/sites/christinecomaford/2018/08/11/5-ways-to-bring-more-diversity-into-your-organization/?sh=42a02fc53c7c) [perma.cc/Q6BF-MRZD] (stating companies that are more diverse have “more creativity, stronger innovation, and increased market share”).

93. Leong, *supra* note 2, at 2176.

94. *Id.* at 2177.

95. Tracy Jan et al, *Corporate America’s \$50 Billion Promise*, WASH. POST (Aug. 24, 2021) [www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/](http://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/) [perma.cc/R8HV-2H6B] (stating that

sought by pronouncements to support Blacks and organizations fighting systemic racism.<sup>96</sup>

When companies with predominately white employees partake in an exchange with a Black person, a status leak occurs in both “non[-]racism” and Black cultural competence markets.<sup>97</sup> The company’s status within the “nonracism” market increases by “demonstrating the ability to engage in a relationship with a nonwhite individual,” and the Black cultural competence market increases by acquiring a perception of greater cultural understanding.<sup>98</sup> Thus, the company gains status as a nonracist and Black-culturally competent actor, which signals to society that the company does not engage in racist behavior.<sup>99</sup> This allows individuals outside of the company to perceive the company as non-discriminatory.<sup>100</sup>

### III. ANALYSIS

This section will analyze the pronouncements of Nike and the NFL to demonstrate how their public commitment to fight racial inequality is a form of racial capitalism. Given that this form of capitalism has not been regulated, this section will illustrate the complexities of legal enforcement.

#### A. *Pronouncements for Profit are a Form of Racial Capitalism*

Nike and the NFL’s public commitment to supporting Blacks and organizations that fight racial injustice is a form of racial capitalism.<sup>101</sup> Nike and the NFL purposely<sup>102</sup> made their

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analysis of corporate pronouncements made in the wake of the death of George Floyd “shows that public companies are devoting the most resources to promoting upward economic mobility for Black people, through increased opportunities for homeownership, entrepreneurship and education”).

96. See Milton C. Regan & Palmer T. Heenan, *Symposium: The Economic Downturn And The Legal Profession: Supply Chains And Porous Boundaries: The Disaggregation Of Legal Services*, 78 *FORDHAM. L. REV.* 2137, 2157-59 (2013) (explaining that a company’s affiliation with another entity sends a signal to the consumer that company’s value is the same or similar to that entity).

97. Leong, *supra* note 2, at 2178.

98. *Id.* at 2178-79.

99. *Id.*

100. *Id.*

101. *Id.* at 2153; see discussion *supra* Part (II)(E) (discussing racial capitalism).

102. See Erika K. Wilson, *Why Diversity Fails: Social Dominance Theory and the Entrenchment of Racial Inequality*, 26 *NAT’L BLACK L.J.* 129, 135 (2017) (explaining “[c]orporations . . . often advertise themselves as diverse entities; purposely position[ing] themselves as embracing of diversity and move to

pronouncements and affiliations with social activists, such as Colin Kaepernick and Jay-Z, for public visibility and the perception within society that they are corporations willing to perform to sustain the well-being of Blacks.<sup>103</sup> Publicly asserting racial injustice will no longer be tolerated signals that Nike and the NFL are corporations that do not encourage racism.<sup>104</sup> The nonracist signal was further substantiated when Nike and the NFL committed to providing significant financial contributions to organizations targeted at fighting systemic racism.<sup>105</sup>

Nike committed to donating a \$1 million grant each to the NAACP Empowerment Programs, NAACP Legal Defense Fund (“LDF”), and Black Girls CODE.<sup>106</sup> The NAACP is the oldest running organization concentrated on eradicating racial inequality in America.<sup>107</sup> The organization was formed in response to relentless violence against Black people throughout the country.<sup>108</sup> The NAACP aims to ensure Black people receive civil rights guaranteed through the Constitution by striving to eliminate racial discrimination by breaking down racial division employed through the government, politics, and the legal system.<sup>109</sup>

The NAACP LDF was founded by Thurgood Marshall, the first Black person to be appointed as a United States Supreme Court Justice.<sup>110</sup> The NAACP LDF was introduced during a time when state sponsored racial inequality deprived Blacks in America of opportunity for equality and due process.<sup>111</sup> Since then, the LDF’s purpose is “to achieve racial justice, equality, and an inclusive society.”<sup>112</sup>

Black Girls CODE is a nonprofit organization formed to reduce barriers of entry into the tech sector for “Black women and girls” by providing them with necessary computer and technology skills.<sup>113</sup>

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distance themselves from any innuendo that would suggest that they do not embrace diversity”).

103. Leong, *supra* note 2, at 2176.

104. *Id.* at 2179.

105. *NIKE, Inc. Statement on Commitment*, *supra* note 16; see Battista, *supra* note 26 (explaining the NFL “announced [] it will commit a quarter of a billion dollars over 10 years to a fund to combat systemic racism and support the battle against injustices faced by African Americans”).

106. *NIKE, Inc. Statement on Commitment*, *supra* note 16.

107. *Our History*, NAACP, [www.naacp.org/about/our-history](http://www.naacp.org/about/our-history) [perma.cc/CZM4-Z3CW] (last visited Apr. 2, 2022).

108. *Id.*

109. *Id.*

110. *History*, NAACP LEG. DEFENSE FUND, [www.naacpldf.org/about-us/history/](http://www.naacpldf.org/about-us/history/) [perma.cc/E85M-8WZ2] (last visited Oct. 31, 2020).

111. *Id.*

112. *Id.*

113. *About Us*, BLACK GIRLS CODE, [www.blackgirlscodes.com/about-us/](http://www.blackgirlscodes.com/about-us/) [perma.cc/8GA7-2JL2] (last visited Apr. 6, 2022).

Nike's partnership and significant financial support to such historical and profound Black organizations, like Black Girls CODE, signals to the public that Nike is a corporation that does not tolerate racism and is competent with Black culture. By supporting Black organizations, Nike is also portraying that its corporation is one that is willing to act for the well-being of Blacks.

Nike and the NFL's support of Kaepernick as the social justice activist at the forefront of 2020's most pressing racial issues create the public perception that these corporations have nonracist Black cultural competence.<sup>114</sup> Furthermore, the NFL's partnership with Jay-Z for its Inspire Change initiative also sends both a non-racist and Black cultural competence signal.<sup>115</sup>

Jay-Z actively advocates for criminal justice reform through his organization REFORM Alliance.<sup>116</sup> In September 2020, REFORM Alliance was instrumental in lobbying for the enactment of a California law directed at limiting probation sentences with the expectation of putting "hundreds of thousands of Californians on probation in positions to succeed and exit the criminal justice system for good."<sup>117</sup> In addition, Jay-Z is "working to end cash bail."<sup>118</sup>

Nike's deliberate decision to feature Colin Kaepernick in its thirtieth anniversary of "Just Do It" campaign<sup>119</sup> demonstrates the expected economic return sought from applying the nonracist and Black cultural competence signal. After featuring the Kaepernick advertisement Nike's overall sales increased contributing to "a [ten] percent jump in income to \$847 million."<sup>120</sup> Further, the Kaepernick advertisement campaign created \$163.5 million in media exposure for Nike, "adding nearly \$6 billion to the company's market value."<sup>121</sup> Millennials and Generation Z are demanding brands take

114. See Leong, *supra* note 2, at 2179 (explaining that "[a] white . . . institution who engages in an exchange with a nonwhite person . . . gains status as a nonracist and cross-culturally competent actor by *signaling* those attributes through affiliation" (emphasis in original)).

115. *Id.*

116. Melissa Roberto, *Jay-Z, Meek Mill's REFORM Alliance Celebrate 'Major Victory' with Calif. Gov. Newsom Passing Probation Bill*, FOX NEWS (Oct. 1, 2020), [www.foxnews.com/entertainment/jay-z-meek-mill-reform-alliance-major-victory-california-governor-newsom-pass-probation-bill](http://www.foxnews.com/entertainment/jay-z-meek-mill-reform-alliance-major-victory-california-governor-newsom-pass-probation-bill) [perma.cc/Z4R6-VNN2].

117. *Id.*

118. Kerry Coddett, *Jay-Z's Deal With The NFL Sets Back the Kaepernick Cause*, WASH. POST (Aug. 16, 2019), [www.washingtonpost.com/outlook/2019/08/17/jay-zs-deal-with-nfl-sets-back-kaepernick-cause/](http://www.washingtonpost.com/outlook/2019/08/17/jay-zs-deal-with-nfl-sets-back-kaepernick-cause/) [perma.cc/7PX9-LAHE].

119. Creswell, *supra* note 38.

120. Soo Youn, *Nike Sales Booming After Colin Kaepernick Ad, Invalidating Critics*, ABC NEWS (Dec. 21, 2018), [www.abcnews.go.com/Business/nike-sales-booming-kaepernick-ad-invalidating-critics/story?id=59957137](http://www.abcnews.go.com/Business/nike-sales-booming-kaepernick-ad-invalidating-critics/story?id=59957137) [perma.cc/B6JB-H4ZX].

121. Kate Gibson, *Colin Kaepernick is Nike's \$6 Billion Man*, CBS NEWS

a stand on social issues.<sup>122</sup> As a result of Nike taking its political stance on racial justice, its brand is stronger.<sup>123</sup>

Based on the nonracist and Black cultural competence signals sent by Nike and the NFL, the average consumer may think the employment demographics of such companies are diverse. However, this is quite the contrary. Looking at NFL players alone, the athletic labor force is comprised of more than seventy percent Black players,<sup>124</sup> which is significant. But diversity starts to dwindle when you look at head coaches and owners.<sup>125</sup> While the labor force of the NFL's thirty-two teams is predominately Black, only two of the teams are owned by people of color.<sup>126</sup> Notably, none of the owners are Black.<sup>127</sup> Out of the thirty-two teams, there are twenty-eight white head coaches and "three Black head coaches."<sup>128</sup> The lack of Black head coaches is not due to the shortage of qualified applicants.<sup>129</sup> Rather, this appears to be related to disparate hiring practices, as NFL owners have sole discretion to decide which head coach is hired.<sup>130</sup> In addition, head coaches have not promoted "Black coaches to high-level assistant jobs that could position them to one day be head coaches."<sup>131</sup> As such, there may not be an increase in Black head coaches unless there are more Black team owners.

The barrier to entry for NFL team ownership is substantial –

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(Sep. 21, 2018), [www.cbsnews.com/news/colin-kaepernick-nike-6-billion-man/](http://www.cbsnews.com/news/colin-kaepernick-nike-6-billion-man/) [perma.cc/7DHG-26HT]; LaVito, *supra* note 55.

122. *For Millennials And Gen Zs, Social Issues Are Top Of Mind – Here's How Organizations Can Drive Meaningful Change*, FORBES (July 22, 2021), [www.forbes.com/sites/deloitte/2021/07/22/for-millennials-and-gen-zs-social-issues-are-top-of-mind-heres-how-organizations-can-drive-meaningful-change/?sh=5088bdb450c6](http://www.forbes.com/sites/deloitte/2021/07/22/for-millennials-and-gen-zs-social-issues-are-top-of-mind-heres-how-organizations-can-drive-meaningful-change/?sh=5088bdb450c6) [perma.cc/9HER-CRAK].

123. Andy Uhler, *Nike's Brand Burnished By its Affiliation with Colin Kaepernick*, MARKET PLACE (June 25, 2020), [www.marketplace.org/2020/06/25/nike-colin-kaepernick-brand-advertising-racial-justice/](http://www.marketplace.org/2020/06/25/nike-colin-kaepernick-brand-advertising-racial-justice/) [perma.cc/JV6T-CMY5].

124. Katherine Rosman, *Jay-Z Takes On the Super Bowl*, N.Y. TIMES (Feb. 1, 2020), [www.nytimes.com/2020/02/01/style/jay-z-super-bowl-roc-nation.html](http://www.nytimes.com/2020/02/01/style/jay-z-super-bowl-roc-nation.html) [perma.cc/ZX98-GTX8].

125. *Id.*

126. *Id.*

127. Kori Hale, *Sorry Kaep: Jay-Z's Commerce & Culture NFL Partnership Failure*, FORBES (Aug. 19, 2019), [www.forbes.com/sites/korihale/2019/08/19/sorry-kaep-jay-zs-commerce-culture-nfl-partnership-failure/#53a254b395f9](http://www.forbes.com/sites/korihale/2019/08/19/sorry-kaep-jay-zs-commerce-culture-nfl-partnership-failure/#53a254b395f9) [perma.cc/V8NG-JWTF].

128. Scott Stump, *Most NFL Players are Black. So Why Aren't There More Black Head Coaches*, ABC NEWS (Sept. 15, 2020), [www.nbcnews.com/news/nbcblk/most-nfl-players-are-black-so-why-aren-t-there-n1240131](http://www.nbcnews.com/news/nbcblk/most-nfl-players-are-black-so-why-aren-t-there-n1240131) [perma.cc/NSN7-PEV2]; Rosman, *supra* note 124.

129. Stump, *supra* note 128.

130. *Id.*

131. *Id.*

the least expensive team cost the owner \$1.6 billion.<sup>132</sup> With historical disproportion in the generational wealth gap among Blacks in America,<sup>133</sup> Black ownership in the NFL is far-reaching. Wealth is calculated by including more than just wages earned from working.<sup>134</sup> In addition to wages, “[w]ealth takes into account . . . homes, stock-market investments, and other assets” owned.<sup>135</sup> Even Jay-Z, with a billion-dollar net worth, would have to acquire additional funds to purchase an NFL team.<sup>136</sup>

The number of Nike’s Black employees decreased between 2017 and 2019.<sup>137</sup> There was a slight improvement in 2020.<sup>138</sup> In addition, Black employees have not accounted for a significant portion<sup>139</sup> of upper management employees,<sup>140</sup> but progress was made in 2020.<sup>141</sup> Along with its pronouncement, Nike admitted it has “a long way to go” with internal diversity and inclusion efforts.<sup>142</sup> Despite this acknowledgment, a few months later the company released an ad promoting diversity against the advice of its task force formed to resolve internal diversity issues.<sup>143</sup> The ad, named “You Can’t Stop Us,” unites a host of celebrity athletes including tennis superstar Serena Williams, NBA great LeBron

132. Zack O’Malley Greenburg, *Jay-Z, The NFL, Rucker Park and a Billionaire’s Endgame*, FORBES (Aug. 23, 2019) [www.forbes.com/sites/zackomalleygreenburg/2019/08/23/jay-z-the-nfl-rucker-park-and-a-billionaires-possible-endgame/#6e26b0ba7e74](http://www.forbes.com/sites/zackomalleygreenburg/2019/08/23/jay-z-the-nfl-rucker-park-and-a-billionaires-possible-endgame/#6e26b0ba7e74).

133. Heather Long & Andrew Van Dam, *The Black-White Economic Divide is as Wide as it Was in 1968*, WASH. POST (June 4, 2020), [www.washingtonpost.com/business/2020/06/04/economic-divide-black-households/](http://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households/) [perma.cc/D4SR-EFEW].

134. *Id.*

135. *Id.*

136. Greenburg, *supra* note 132.

137. *See* Thomas, *supra* note 20 (stating that in 2018 and 2019, Blacks accounted for 21.6 percent of Nike’s total employees, “slightly down from 23.5 [percent] in 2017”).

138. *Diversity, Equity & Inclusion*, NIKE, [www.purpose.nike.com/diversity-equity-inclusion](http://www.purpose.nike.com/diversity-equity-inclusion) [perma.cc/2GUH-PLMB] (showing that Nike voluntarily discloses its Diversity, Equity & Inclusion initiatives and reporting that Blacks account for 24.3 percent of total employees) (last visited Apr. 7, 2022).

139. *See* Thomas, *supra* note 20 (explaining that “[i]n 2019, just 4.8 [percent] of Nike’s directors were Black or African American, and 9.9 [percent] of VPs identified as that race”).

140. Adam Hayes, *Upper Management*, INVESTOPEDIA (Aug. 27, 2021), [www.investopedia.com/terms/u/upper-management.asp](http://www.investopedia.com/terms/u/upper-management.asp) [perma.cc/CGP9-GR46] (defining upper management as “including individuals and teams that are responsible for making the primary decisions within a company”).

141. *See* *Diversity, Equity & Inclusion*, *supra* note 138 (disclosing Nike’s Diversity, Equity & Inclusion initiatives and reporting that Blacks account for 5.7 percent of directors and 14.2 percent of VPs).

142. Thomas, *supra* note 20.

143. Julia Musto, *Black Staffers Urged Nike to Own Up to Equality Issues Before Diversity-Themed Ad Campaign*, FOX BUS. (Aug. 5, 2020), [www.foxbusiness.com/economy/workday-during-covid-19-pandemic-is-48-minutes-longer-has-more-meetings-and-emails](http://www.foxbusiness.com/economy/workday-during-covid-19-pandemic-is-48-minutes-longer-has-more-meetings-and-emails) [perma.cc/EX8G-JHJQ].

James, and Colin Kaepernick.<sup>144</sup>

The task force objected, indicating the ad was contradictory since Nike had internal diversity concerns that remained to be addressed.<sup>145</sup> Nike has a track record of “progressive, socially-conscious marketing,” yet has recently struggled with providing a “more diverse and equitable working environment.”<sup>146</sup> Aligned with Nike’s concern for its public perception,<sup>147</sup> the company listened to Colin Kaepernick when he advised the company to pull its 2019 Fourth of July shoe, referred to as the Betsy Ross edition, because of its inclusion of an old version of the American flag that “carried a ‘connection to an era of slavery.’”<sup>148</sup>

Also clashing with the NFL’s pronouncements is the fact that it now wants to collaborate with Colin Kaepernick on social injustice initiatives.<sup>149</sup> These are the same social injustice issues Kaepernick protested prior to the start of each 2016 preseason NFL game.<sup>150</sup> These are the same social injustice issues that constrain an NFL team from signing him to date.<sup>151</sup> In addition to supporting Kaepernick in his capacity as a social activist, the NFL would significantly increase its nonracist and Black cultural competence<sup>152</sup> if they would sign Colin Kaepernick as a player to one of its teams.

### *B. Complexities with Legal Solutions for these Pronouncements*

Racial capitalism is a driving force behind the pronouncements

144. *Id.*

145. *See id.* (stating the “Nike employees repeatedly objected to a new diversity-themed ad campaign, urging the \$15 billion sportswear company to acknowledge its own equality issues before promoting an ideal on TV”).

146. Sara Germano, *Black Employees at Nike Object to Company’s New Ad*, FIN. TIMES (Aug. 4, 2020), [www.ft.com/content/e8b4a2e3-e0cf-467a-890b-b64db664778a](http://www.ft.com/content/e8b4a2e3-e0cf-467a-890b-b64db664778a).

147. Youn, *supra* note 120. A senior sports industry advisor for market research explained that “the consumer wants brands to take a stand on social issues . . . . The core consumer for Nike is a teen male, it’s likely going to respond positively. As opposed to a decade ago, a brand has to be transparent.” *Id.*

148. *See* Will Brinson, *Colin Kaepernick Input Reportedly Influences Nike to Cancel Sale of Betsy Ross American Flag Shoes*, CBS SPORTS (July 2, 2019), [www.cbssports.com/nfl/news/colin-kaepernick-input-reportedly-influences-nike-to-cancel-sale-of-betsy-ross-american-flag-shoes/](http://www.cbssports.com/nfl/news/colin-kaepernick-input-reportedly-influences-nike-to-cancel-sale-of-betsy-ross-american-flag-shoes/) [perma.cc/7P9V-TNRK] (describing the flag on the shoe as having “[thirteen] stars in a circle and [thirteen] alternating red and white stripes, designed to represent the [thirteen] original American colonies.”).

149. Battista, *supra* note 26.

150. Bailey, *supra* note 32.

151. Lockhart, *supra* note 46.

152. *See* Leong, *supra* note 2, at 2178 (using the phrase “non[-]white cultural competence”).

made by Nike and the NFL committing to support Blacks and organizations targeted at fighting racial injustice.<sup>153</sup> Through their pronouncements, Nike and the NFL committed to diversity, equity and inclusion.<sup>154</sup> However, an argument can be made that these companies are unjustly enriched through racial capitalism.

Unjust enrichment is an equitable remedy that occurs when “(1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without first paying the value thereof to the plaintiff.”<sup>155</sup> The equitable doctrine of unjust enrichment is available when the parties do not have an implied nor express contract,<sup>156</sup> one party “obtain[s] a benefit from another by fraud, duress, or the taking of an undue advantage,”<sup>157</sup> and it “would be unconscionable for him to retain” it.<sup>158</sup> The argument here is that the consumer was induced to purchase Nike’s product based on Nike’s public commitment to diversity, equity, and inclusion and it would be unconscionable for Nike to retain the profits from this purchase and not fulfill its commitment.

By purchasing Nike’s product based on its pronouncement against racial inequality, the consumer conferred a financial benefit on Nike.<sup>159</sup> Further, Nike voluntarily accepted the proceeds from this purchase.<sup>160</sup> Here, Nike gains an undue advantage when it simultaneously profits from this sale and fails to keep its promise to donate to organizations targeted at fighting systemic racism and struggles to diversify its own employee demographics.<sup>161</sup> Damages for unjust enrichment are granted in the form of restitution.<sup>162</sup>

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153. *Id.* at 2153; *see* discussion *supra* Part(II)(F) (discussing racial capitalism).

154. *See* discussion *supra* Part(II)(A) (discussing Nike and the NFL’s commitments to diversity, equity, and inclusion).

155. *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 253 So. 3d 689, 693 (Fla. Dist. Ct. App. 2018) (citing *Agritrade, LP v. Quercia*, 253 So. 3d 28, 33 (Fla. Dist. Ct. App. 2017)).

156. *Matter of Estate of Moore*, 918 N.W.2d 69, 73 (N.D. 2018).

157. *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992).

158. *See Turner v. Shared Towers VA, LLC.*, 107 A.3d 1236, 1242-43 (N.H. 2014) (explaining “unjust enrichment is an equitable remedy that is available when an individual receives ‘a benefit which would be *unconscionable* for him to retain” (emphasis in original)).

159. *See Duty Free World, Inc.*, 253 So. 3d at 693 (satisfying the first element of unjust enrichment).

160. *Id.* (satisfying the second element of unjust enrichment).

161. *Heldenfels Bros., Inc.*, 832 S.W.2d at 41.

162. *See Wright v. Genesee County*, 934 N.W.2d 805, 809 (Mich. 2019) (citing *Kammer Asphalt Paving Co., Inc. v. East China Twp. Sch.*, 504 N.W.2d 635, 640 (Mich. 1993)) (explaining that a “person who has been unjustly enriched at the expense of another is required to make restitution to the other”

There is no formula for determining restitution, but the amount must be reasonable and must be based upon the consumer's pecuniary loss and the financial condition and obligations of Nike.<sup>163</sup>

However, proving damages<sup>164</sup> is problematic for the consumer. When a consumer purchases a product, the transaction does not entail disclosure<sup>165</sup> of his rationale for choosing the particular product. As a result, it would be difficult for Nike to determine which portion of its profits were generated from consumers purchasing products based on Nike's commitment to racial equality. Therefore, unjust enrichment is not a viable legal solution.

Further, according to the business judgment rule,<sup>166</sup> courts typically do not disturb business decisions unless there is evidence of fraud, illegality, or self-interest.<sup>167</sup> This is because courts view the business as being the expert in that matter and not the court.<sup>168</sup> As a result, legislation is an ideal solution to hold companies accountable for acts of racial capitalism. For example, California's legislation provides a good starting point because it attempts to regulate racial capitalism.<sup>169</sup> However, the legislative route has its own drawbacks.

Opponents of the California legislation argue that the statute is unconstitutional because it requires corporations to appoint directors based on racial or sexual preference, which the opponents argue is "immediately suspect," "presumptively invalid," and

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person who was deprived).

163. TENN. CODE ANN § 40-35-304(b), (d)-(e) (West 2022).

164. See *Hamilton Sec. Advisory Servs., Inc. v. United States*, 60 Fed. Cl. 144, 160 (Fed. Cl. 2004) (citing *Texas Am. Oil Corp. v. United States*, 44 F.3d 1557, 1570 (Fed. Cir. 1995) (quoting *Kelly v. Robinson*, 479 U.S. 36, 52 (1986))) (explaining restitution damages "may be calculated by reference to the amount of harm the offender has caused" the other party).

165. Cf. CAL. CIV. CODE § 1747.08(a) (West 2011) (explaining corporations accepting credit cards as a method of payment for goods purchased are prohibited from requiring the consumer to supply personal information as a condition of acceptance).

166. *Davis v. Louisville Gas & Electric Co.*, 142 A. 654, 659 (Del. Ch. 1928). The business judgment rule sets out that it is not the court's "function to resolve for corporations questions of policy and business management . . . The judgment of the directors of corporations enjoys the benefit of a presumption that it was formed in good faith and was designed to promote the best interests of the corporation they serve." *Id.*

167. See *Shlensky v. Wrigley*, 237 N.E.2d 776, 779 (Ill. App. Ct. 1968) (stating that "[i]n a purely business corporation . . . the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors").

168. *Id.*

169. See discussion *supra* Part (II)(D) (discussing California's legislation on diversifying corporate boards of directors).

“triggers strict scrutiny review by the court.”<sup>170</sup> There have already been legal suits filed<sup>171</sup> against both California’s law to diversify boards based on unrepresented communities (AB 979) and the law to diversify boards based on gender (SB 826).<sup>172</sup>

An example of such opposition is demonstrated in *Meland v. Padilla*.<sup>173</sup> In *Meland*, the court initially dismissed a legal action filed by a shareholder seeking a declaratory judgment that California SB 826, which requires female directors on a corporation’s board, violated the Fourteenth Amendment.<sup>174</sup> The court reasoned that the shareholder did not have standing since as a shareholder, the plaintiff was not directly injured.<sup>175</sup> However, this was later reversed by the Ninth Circuit, and the court held the shareholder ultimately did have standing to sue.<sup>176</sup>

The statements made by corporations committing to diversity, equity, and inclusion suggest corporations are inclined to make a change. In doing so, accountability is a crucial aspect. The federal Diversity in Corporation Leadership Act of 2020 seeks to accomplish accountability for diversifying boards of directors for publicly traded corporations<sup>177</sup> without potential violations of the Constitution, as seen with California’s law for diversifying boards with individuals from underrepresented communities. The federal Corporate Diversity Act does not provoke the same Constitutional arguments because it is premised on disclosure<sup>178</sup> of the gender, racial, and ethnic composition of its board of directors and nominees for board membership as opposed to requiring the board to have a

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170. Brian Melley, *Group Sues to Block California Boardroom Diversity Law*, AP NEWS (Oct. 5, 2020), [www.apnews.com/article/race-and-ethnicity-los-angeles-legislation-california-gavin-newsom](http://www.apnews.com/article/race-and-ethnicity-los-angeles-legislation-california-gavin-newsom) [perma.cc/7QB6-K8Z2]. The article explains that conservative legal group, Judicial Watch, filed a suit in the Los Angeles Superior Court arguing that California’s boardroom diversity law is unconstitutional. *Id.* Judicial Watch argued “[t]he legislation’s requirement that certain corporations appoint a specific number of directors based upon race, ethnicity, sexual preference, and transgender status is immediately suspect and presumptively invalid and triggers strict scrutiny review by the court.” *Id.*

171. *Id.*

172. Cooley LLP, *Another Complaint Filed Against California Board Diversity Statutes*, JDSUPRA (Nov. 24, 2021), [www.jdsupra.com/legalnews/another-complaint-filed-against-5919670/](http://www.jdsupra.com/legalnews/another-complaint-filed-against-5919670/) [perma.cc/6SFX-JB8C](explaining that complaints have been filed in federal court alleging SB 826 and AB 979 violate the equal protection provision of the 14<sup>th</sup> Amendment of the United States Constitution).

173. *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC, 2020 WL 1911545, at \*1 (E.D. Cal. Apr. 20, 2020), *rev’d* 2 F.4th 838 (9th Cir. 2021).

174. *Id.*

175. *Padilla*, 2020 WL 1911545, at \*5.

176. *Meland v. Weber*, 2 F.4th 838 (9th Cir. 2021).

177. See Diversity in Corporate Leadership Act of 2020, S. 3367, 116th Cong. (2020) (the Diversity in Corporate Leadership Act of 2020 was introduced to the Senate on March 2, 2020, who referred it to Committee).

178. *Id.*

minimum number of directors from underrepresented communities.<sup>179</sup>

Though the federal Corporate Diversity Act is based on disclosure of gender, racial, and ethnic composition of the board of directors, it does not capture accountability for companies like PepsiCo. PepsiCo seeks to diversify its employee demographics by increasing its Black managerial population to ten percent.<sup>180</sup> In doing so, PepsiCo plans to add 250 Black associates to managerial roles,<sup>181</sup> including a minimum of 100 Black associates to its executive ranks.<sup>182</sup> Though PepsiCo volunteered transparency with the progress of its diversity initiatives,<sup>183</sup> disclosure is not required through the Corporate Diversity Act.<sup>184</sup>

In addition, the federal Corporate Diversity Act does not allow for accountability for donations companies have committed to organizations targeted at fighting systemic racism. Both Nike<sup>185</sup> and the NFL<sup>186</sup> have committed to making donations to these types of organizations over the next four to ten years, but the Corporate Diversity Act would not track this progress. Though the Corporate Diversity Act would establish a Diversity Advisory Group, this group will focus on strategies for increasing gender, racial and ethnic diversity among board members, not staff members among corporations.<sup>187</sup>

The federal Corporate Diversity Leadership Act provides another basis for addressing the problems of racial capitalism. However, it does not allow for the level of transparency and

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179. *Compare* S. 3367, 116th Cong. (2020) with CAL CORP. CODE § 301.4 (West 2020). Section 301.4 of the California code was recently held unconstitutional by the Superior Court of California. *Padilla*, 2022 WL 1073294, at \*19.

180. *Pepsico's Racial Equality Journey*, *supra* note 21.

181. *PepsiCo Pledges \$437.5 Million for Racial Equality Initiatives*, CANDID (June 22, 2020), [www.philanthropynewsdigest.org/news/pepsico-pledges-437.5-million-for-racial-equality-initiatives](http://www.philanthropynewsdigest.org/news/pepsico-pledges-437.5-million-for-racial-equality-initiatives) [perma.cc/5UWR-9CKJ].

182. *Pepsico's Racial Equality Journey*, *supra* note 21.

183. *PepsiCo's Workforce Demographics*, PEPSICO, [www.pepsico.com/about/diversity-equity-and-inclusion/progress-at-pepsico](http://www.pepsico.com/about/diversity-equity-and-inclusion/progress-at-pepsico) (last visited Apr. 15, 2022). Though PepsiCo is not required to disclose the progress of its diversity initiative, the company has full transparency and provided progress of its workforce representation as of 2021 and board of directors as of 2022. *Id.*

184. Diversity in Corporate Leadership Act of 2020, *supra* note 83; S. 3367, 116th Cong. (2020) (explaining that the Corporate Leadership Act of 2020 requires the Diversity Advisory Group, established by the Securities and Exchange Commission, to study and make strategic recommendations on how corporations can improve “gender, racial, and ethnic diversity among the members of the board of directors.”).

185. *Nike, Inc. Announces*, *supra* note 16.

186. *Battista*, *supra* note 27.

187. H.R. 5084, 116th Cong. § 2(a) (1st Sess. 2019).

accountability needed to monitor actual commitment to diversity initiatives in companies like Nike, PepsiCo, and the NFL.

#### IV. PROPOSAL

This section will discuss a proposal for the creation of federal legislation that requires full disclosure of public corporations' diversity initiatives. Next, a financial incentive through tax credits will be recommended. Finally, this section will conclude that federal legislation with a financial incentive should be enacted to hold companies accountable for their open commitment to diversity, equity, and inclusion during a public outcry for racial justice in America.

The Black community is looking for corporations to be accountable for their pronouncements to fight against racial inequality because corporations have a track record for falling short during "opportunities for change."<sup>188</sup> The enactment of adequately structured legislation has been proven to encourage wanted behavior.<sup>189</sup> Corporations are in business to make a profit and that is the goal of the board of directors and management.<sup>190</sup> Therefore, it follows that a federal legislation should be enacted to induce<sup>191</sup> cooperation from a monetary perspective.

In addition, the federal legislation should include disclosure of

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188. See Jan, *supra* note 14 (stating corporate America pledged "to play a bigger role in combating systemic racism across the United States, but an examination of companies' track records shows that they have repeatedly stopped short of major overhauls during prior opportunities for change").

189. KENWORTHY BILZ & JANICE NADLER: LAW, MORAL ATTITUDES, AND BEHAVIORAL CHANGE, OXFORD HANDBOOK OF BEHAV. ECON. L. chap. 10, 241 (Eyal Zamir & Doron Teichman eds., 2014). The authors explain:

Classically, the ambition of legal regulation is to change behaviors. Laws might aim to increase or decrease various activities, such as owning a gun, or taking a work leave to care for a sick family member, or polluting, or hiring a minority job candidate. They might aim to get people or institutions to substitute one activity for another, such as buying diet soda instead of sugared, or using chewing tobacco instead of smoking, or using solar energy instead of conventional sources. Legal regulation can accomplish its goals directly, through fear of sanctions or desire for rewards.

*Id.*

190. *Dodge*, 170 N.W. 668 (Mich. 1919); *Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968).

191. See BILZ & NADLER, *supra* note 189 (stating "[l]egal regulation can [also] accomplish its goals . . . indirectly, by changing *attitudes* about the regulated behaviors" (emphasis in original)). Further, "[i]ronically, this indirect path can be the most efficient one, particularly if the regulation changes attitudes about the underlying *morality* of the behaviors." *Id.* (emphasis in original)).

the company's status on its diversity initiative.<sup>192</sup> When companies are required to formulate disclosure on certain topics, the act of disclosure can influence the companies' treatment of those disclosed topics.<sup>193</sup> This is known as the "what gets measured, gets managed" phenomenon – "when companies have to be transparent, it creates external pressure from investors and others who can draw comparisons company to company."<sup>194</sup>

The proposed legislation will require full disclosure of the progression of the company's diversity initiative. This can be accomplished through financial statements that are currently required from publicly traded entities by the Securities and Exchange Commission ("SEC").<sup>195</sup> The SEC requires publicly traded companies to provide an unaudited quarterly financial statement of their financial position on form 10-Q,<sup>196</sup> and comprehensive detail of the company's financial position on an annual basis.<sup>197</sup> The SEC requires the annual statements to be audited and submitted on form 10-K.<sup>198</sup>

As a part of their quarterly 10-Q form, the proposed legislation will include a diversity disclosure statement where the company will provide key performance indicators showing the progress of their diversity initiative. On the annual 10-K form the companies can provide comprehensive detail of their progress, including explanations for any significant obstacles and details on management's strategy. Currently, both 10-Q and 10-K forms are available to the public through SEC's Edgar database.<sup>199</sup> The diversity disclosure statements would also be accessible to the public through this database.

Each company's diversity initiative would be examined by the

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192. See Allison Herren Lee, Commissioner, Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference, U.S. SEC. & EXCHANGE COMM'N (Sept. 22, 2020), [www.sec.gov/news/speech/lee-cii-2020-conference-20200922](http://www.sec.gov/news/speech/lee-cii-2020-conference-20200922) [perma.cc/TFU7-8NW8] (stating "[t]he most obvious tool in the SEC's toolkit is disclosure . . . it can [] drive corporate behavior").

193. *Id.*

194. *Id.*

195. *Exchange Act Reporting and Registration*, U.S. SEC. & EXCHANGE COMM'N, [www.sec.gov/education/smallbusiness/goingpublic/exchangeactreporting](http://www.sec.gov/education/smallbusiness/goingpublic/exchangeactreporting) [perma.cc/Q7JG-HD8M] (last visited Apr. 15, 2022).

196. Form 10-Q, INVESTOR.GOV, [www.investor.gov/introduction-investing/investing-basics/glossary/form-10-q](http://www.investor.gov/introduction-investing/investing-basics/glossary/form-10-q) [perma.cc/54BC-U2NW] (last visited Nov. 13, 2020).

197. Form 10-K, INVESTOR.GOV, [www.investor.gov/introduction-investing/investing-basics/glossary/form-10-k](http://www.investor.gov/introduction-investing/investing-basics/glossary/form-10-k) [perma.cc/V4MW-TGGE] (last visited (Nov. 13, 2020).

198. *Id.*

199. *Id.*

SEC under three tests<sup>200</sup> and an overall rating will be assigned based on progress revealed through these examinations. The ratings are outstanding, satisfactory, or needs improvement.<sup>201</sup> The overall rating will be determined based on points received for each test. These ratings will be taken into account when corporations apply for actions that require regulatory approval<sup>202</sup> and eligibility for the diversity tax credit discussed later in this section.

The three tests would consist of (1) inclusion of director from underrepresented communities on the board of directors, (2) donations to organizations targeted at fighting systemic racism, and (3) employment of individuals from underrepresented communities. Directors and individuals from underrepresented communities can be defined according to the California legislation's definition, which defines the term as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native America, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender."<sup>203</sup>

### A. Test One – Inclusion

The test for inclusion of individuals from underrepresented

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200. Cf. CONG. RSCH. SERV., R43661, THE EFFECTIVENESS OF THE COMMUNITY REINVESTMENT ACT, 5 (Jan. 16 2020). The report provides:

Regulators apply up to three tests, which are known as the *lending*, *investment*, and *service* tests, respectively, to determine whether a bank is meeting local credit need in designated assessment areas. The *lending* test evaluates the number, amount, and distribution across income and geographic classifications of a bank's retail banking activities, which include residential mortgage loans, small business loans, small farm loans, and consumer loans. The *investment* test grades a bank's community development investments . . . in the assessment area. The *service* test examines a bank's retail service delivery, such as the availability of branches and low-cost checking in the assessment area.

*Id.* (emphasis in original).

201. Cf. *Fact Sheet: Community Reinvestment Act*, OFF. COMPTROLLER CURRENCY 1, 2 (Mar. 2014), [www.occ.gov/publications-and-resources/publications/community-affairs/community-developments-fact-sheets/pub-fact-sheet-cra-reinvestment-act-mar-2014.pdf](http://www.occ.gov/publications-and-resources/publications/community-affairs/community-developments-fact-sheets/pub-fact-sheet-cra-reinvestment-act-mar-2014.pdf) [perma.cc/24CA-Y2HW] (last visited Nov. 13, 2020) (providing "[t]he OCC assigns one of four CRA ratings to a bank: Outstanding[,] Satisfactory[,] Needs to Improve[,] or Substantial Noncompliance.").

202. CONG. RSCH. SERV., *supra* note 197, at 9. The CRS report provides that "[r]egulators include CRA ratings as a factor when lenders request permission to engage in certain activities, such as moving offices or buying another institution. Denying requests, particularly applications for mergers and acquisitions, is a mechanism that may be applied against banking organizations with ratings below *Satisfactory*." *Id.* (emphasis in original).

203. CAL CORP. CODE § 301.4(e)(1) (West 2020).

communities on the board of directors can be measured by the number of members on the board from this group. The company would receive points positioning it in the outstanding range if it has more than two directors from underrepresented groups on boards with less than four directors.<sup>204</sup> The company would receive points placing it in the satisfactory range if there is one director<sup>205</sup> from underrepresented communities. If there are no directors from underrepresented communities, the company would receive minimal points, placing it in the need improvement range.

The company would receive points positioning it in the outstanding range if it has three or more directors from underrepresented communities on boards with four to eight directors.<sup>206</sup> The company would receive points placing it in the satisfactory range if there are two directors from underrepresented communities.<sup>207</sup> If there are no directors from underrepresented communities the company would receive minimal points, placing it in the needs improvement category.

### *B. Test Two - Donations*

The proposed legislation will continue to allow corporations to make their own decision as to whether they will donate to organizations targeted at fighting systemic racism. Companies that choose to donate will gain points that will allow eligibility for the diversity tax credit discussed later in this section. Given that companies vary in size, sales, and revenue, the test for donations to organizations targeted at fighting systemic racism would be customized accordingly for each company.

For instance, donations from Fortune 500 companies such as Nike<sup>208</sup> and Pepsi<sup>209</sup> would be based on a percentage of the company's annual sales or revenue. For smaller companies, financial stability would be a significant factor in assigning ratings for this test. A company should not be penalized with a lower rating if it does not have the financial capacity. However, the financial stability at the time the diversity initiative is pronounced would be assessed as well. This is to ensure companies do not fraudulently

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204. *Id.* at § 301.4(b)(3).

205. *Id.*

206. *Id.* at § 301.4(b)(2).

207. *Id.*

208. *See Fortune 500*, FORTUNE, [www.fortune.com/fortune500/2020/search/?f500\\_industry=Apparel&hqstate=OR&sector=Apparel](http://www.fortune.com/fortune500/2020/search/?f500_industry=Apparel&hqstate=OR&sector=Apparel) [perma.cc/H24X-ZLLX] (last visited Apr. 15, 2022) (ranking Nike as eighty-five out of the top 500 companies).

209. *See Fortune 500: PepsiCo*, FORTUNE, [www.fortune.com/company/pepsico/fortune500/](http://www.fortune.com/company/pepsico/fortune500/) [perma.cc/D7G7-EKHA] (ranking PepsiCo as forty-four out of the top 500 companies).

benefit from the diversity tax credit in the proposed legislation.

Ratings for this test will be based on the company meeting the specified threshold assigned to it. For instance, Nike earned annual revenue totaling \$39 million in 2019.<sup>210</sup> It may be assigned a donation percentage of ten percent of revenue. Nike publicly committed to donate a total of \$3 million to three named organizations targeted at fighting systemic racism.<sup>211</sup> However, \$3 million is below the assigned ten percent threshold and would result in the company receiving minimal points, placing it in the need improvement category for this test. If Nike were to donating \$3.9 million, it would receive points placing it in the satisfactory category. Nike would continue to have the choice to choose the amount it would donate. The effect of the needs improvement rating would only impact Nike's ability to utilize the diversity tax credit. If Nike donated over the ten percent threshold, it would receive points placing it in the outstanding category.

### *C. Test Three - Diversity of Employment*

The test for employment of individuals from underrepresented communities would also be customized accordingly for each company primarily based on its number of employees. However, if a company specifically commits to a specified number like PepsiCo, which committed to increasing its Black managerial population by ten percent,<sup>212</sup> that target goal will be utilized. However, if research determined during the customization approach indicates this is below or above the threshold, PepsiCo would receive points placing it in the needs improvement or outstanding category for full execution.

### *D. Tax Credits as an Incentive*

Tax credits are designed to encourage behavior.<sup>213</sup> For instance, the Internal Revenue Service has the federal Work Opportunity Tax Credit ("WOTC"), which is designed to encourage companies to hire individuals who experience challenges during the hiring process.<sup>214</sup> These individuals include ex-felons, qualified

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210. *2019 Annual Report and Notice of Annual Meeting*, NIKE 1, 7 (July 23, 2019), [www.s1.q4cdn.com/806093406/files/doc\\_financials/2019/ar/354352\(1\)\\_76\\_Nike-Inc\\_COMBO\\_WR\\_R1.pdf](http://www.s1.q4cdn.com/806093406/files/doc_financials/2019/ar/354352(1)_76_Nike-Inc_COMBO_WR_R1.pdf) [perma.cc/P9JR-EBK9] (last visited Nov. 13, 2020).

211. See discussion *supra* Part(II)(A) (discussing Nike's corporate pronouncements committing to diversity, equity, and inclusion).

212. See discussion *supra* Part(II)(E) (discussing the role tax credits play in changing behavior).

213. See *Work Opportunity Tax Credit*, *supra* note 85.

214. See *id.* (explaining that "[t]he Work Opportunity Tax Credit (WOTC)

veterans, and recent government aid recipients.<sup>215</sup> This credit is designed to encourage employers to hire individuals from these groups by receiving a one-time tax credit per employee.<sup>216</sup>

Similar to the WOTC, a tax credit should be included in the proposed legislation to encourage companies to diversify their board of directors and employment workforce with individuals from underrepresented communities. Based on the company's overall examination score of outstanding or satisfactory, a tax credit would be available for directors and employees from underrepresented communities receiving salaries. Unlike the WOTC, the tax credit would be available on an annual basis to encourage the companies to maintain their diversity initiatives once they have been executed.

## V. CONCLUSION

Corporate pronouncements committing to diversity, equity, and inclusion during a public outcry for racial justice is a form of racial capitalism because companies are deriving social and economic value from their broadcasted commitment to support ending systemic racism towards Blacks. Nike's collaboration with Colin Kaepernick demonstrates just how substantial the profits are that corporations generate through racial capitalism. Notably, it is justifiable for the Black Community to expect each corporation that made a pronouncement to deliver on its promise.

It is complex to legally force corporations to fulfill their public commitments because no laws have been violated. However, a company should be encouraged to successfully execute its diversity initiatives because these initiatives are necessary to address racial disparities within corporate America. Therefore, federal legislation with a financial incentive should be enacted to influence these companies to fulfill the promises they made to their customer base, who in return, support them based on these promises.

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is a Federal tax available to employers for hiring individuals from certain targeted groups who have consistently faced significant barriers to employment").

<sup>215</sup> *Id.*

<sup>216</sup> *See id.* (explaining that "WOTC joins other workforce programs that incentivize workplace diversity and facilitate access to good jobs for American workers").