DOCTOR LEO AND JUSTICE STRINE

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I. INTRODUCTION

I am an American corporate law scholar, and I champion worker involvement in corporate governance.[1] It's a lonely life. I ponder whether workers should throw in their lot behind managers or shareholders, the Great Powers of American corporate governance,[2] while dreaming enviously of German codetermination. The growth of stakeholderism has made it easier to find some partial allies, both in the movement towards shareholder environmental, social, and governance (ESG) activism in public companies (where I have considered how corporate and securities law can be used to address climate change)[3] and in the growth of social enterprise in closely

1. Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 334 (2008) [hereinafter *Employee Primacy*]; Brett H. McDonnell, *Strategies for an Employee Role in Corporate Governance*, 46 WAKE FOREST L. REV. 429, 430 (2011); Brett H. McDonnell & Matthew D. Bodie, *From Mandates to Governance: Restructuring the Employment Relationship*, 81 MD. L. REV. 887, 916 (2022) [hereinafter *Mandates to Governance*].

2. I generally side with shareholders. Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205, 249–50 (2005) [hereinafter *Shareholder Bylaws*]; Claire Hill & Brett McDonnell, *Executive Compensation and the Optimal Penumbra of Delaware Corporate Law*, 4 VA. L. & BUS. REV. 333 (2009) [hereinafter *Penumbra*].

3. Brett H. McDonnell et al., *Green Boardrooms?*, 53 CONN. L. REV. 335, 335 (2021)

held companies.[4] But these partial allies only endorse having managers or shareholders look out for the interest of workers and other stakeholders; precious few advocate more active empowerment.

So, what am I to make of Leo Strine? Friend or foe? While he was Chief Justice of the Delaware Supreme Court, he wrote two of the most powerful defenses of the proposition that corporations must ultimately be run in the interest of their shareholders, and their shareholders alone.[5] And yet, for years he has shown some affinity for the interests of workers[6] and other ESG matters,[7] and recently he has co-written an article making a (guarded) case for worker representation on corporate boards, along with increased support of unions and German-style works councils.[8]

Can these two Strines be reconciled? That is the question I ask in this essay. Part II explores the arguments of Justice Strine, defender of Delaware's emphasis on the interest of shareholders. I believe that Strine provides the best argument for focusing the fiduciary duty of directors and

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[hereinafter *Green Boards*].

4. Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 19 (2014) [hereinafter *Committing*]; Brett H. McDonnell, *From Duty and Disclosure to Power and Participation in Social Enterprise*, 70 ALA. L. REV. 77, 78 (2018) [hereinafter *Duty to Power*]; Brett McDonnell, *The Corrosion Critique of Benefit Corporations*, 101 B.U. L. REV. 1421, 1426 (2021).

5. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 136 (2012) [hereinafter *Our Continuing Struggle*]; Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 767 (2015) [hereinafter *Dangers of Denial*].

6. Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 5 (2007) [hereinafter *Common Ground*]; Leo E. Strine, Jr. & Kirby M. Smith, *Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism*, 76 BUS. LAW. 31, 31 (2020) [hereinafter *Fair Gainsharing*]; Leo E. Strine, Jr., Toward Fair and Sustainable Capitalism 3 (Aug. 13, 2020) (unpublished manuscript) (on file with the Roosevelt Institute) [hereinafter Fair and Sustainable].

7. Leo E. Strine, Jr. et al., Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1885 (2021) [hereinafter Caremark *& ESG*]; Chris Brummer & Leo E. Strine, Jr., Duty and Diversity 1 (Feb. 19, 2021) (unpublished manuscript) (on file with the Penn Law Legal Scholarship Repository) [hereinafter Duty and Diversity].

8. Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, 106 Minn. L. Rev. 1325, 1325 (2022) [hereinafter *Labor's Voice*].

officers on the interest of shareholders. Corporate law empowers shareholders, and only shareholders, in electing the board and voting along with the board on certain fundamental matters as well as granting shareholders alone the right to sue for fiduciary duty violations. A duty to shareholders alone reflects the reality of this distribution of power. Even if the law were to instruct directors to consider the interests of other stakeholders, the reality of shareholder voting power would cause them to focus on shareholders.[9]

Part III considers various arguments Dr. Leo the academic[10] makes for ways in which the law can protect workers and other stakeholder interests while duty and power remain tied to shareholders alone. He repeats arguments that already exist in the corporate law literature, but with useful elaborations. Other areas of regulation outside of corporate law, such as labor, employment, and environmental law, should be used to address worker protection and climate change.[11] Board oversight spurred by the *Caremark* duty to monitor legal compliance[12] can improve ESG performance.[13] Regulation of shareholder activism can encourage shareholders to focus on long-term interests congruent with ESG goals.[14] I find much merit in these arguments. I also find significant limitations—even collectively, these measures are likely to fall far short of adequately protecting workers or addressing climate change.[15]

It may be that Strine realizes this as well. Part IV explores one of his most recent articles,[16] where Strine advocates worker representation on boards, works councils, and stronger unions. This strikes right at the heart of the exclusive enfranchisement of shareholders which underlies Justice Strine's argument for understanding fiduciary duty as focused on the interests of shareholders. I argue that this Strine is right.[17] American law should do more to empower workers, putting them at the center of corporate governance along with shareholders, directors, and officers.

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9. *See infra* Part II.

10. The conceit of this article's title would appear to grant Strine a phantom Ph.D.; surely his encyclopedic knowledge and extreme productivity in producing academic articles justifies that honor.

11. *See infra* Section III.A.

12. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968–69 (Del. Ch. 1996).

13. *See infra* Section III.B.

14. *See infra* Section III.C.

15. *See infra* Part III.

16. *Labor's Voice*, *supra* note 8.

17. *See infra* Part IV.

II. JUSTICE STRINE AND SHAREHOLDER PRIMACY

A long-standing debate in corporate law concerns to whom the fiduciary duty of corporate directors and officers runs.[18] Is it only to the shareholders of a corporation, or does it extend to promoting the interests of other corporate stakeholders (such as employees, creditors, customers, the community, and the environment), even where doing so does not advance the interests of shareholders? Most practitioners and scholars believe the standard answer is that the duty requires maximizing shareholder wealth (in the long run), but only a few prominent cases explicitly state that position: *Dodge v. Ford Motor Co.*;[19] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*;[20] and *eBay Domestic Holdings, Inc. v. Newmark*,[21] most importantly.

While he was Chief Justice, Strine wrote two articles setting out and defending the shareholder wealth maximization understanding.[22] He analyzes the cases just noted for doctrinal support. More interestingly, he develops an argument for why this is the right position for the courts to take. He roots that argument in the statutory grant of power to shareholders under statutory corporate law:

> The DGCL's design is intensely and intentionally stockholder focused. For example, the statute makes clear that only stockholders can bring derivative actions. In addition, only stockholders have the right to vote for directors, to approve certificate amendments, to amend the bylaws, and to vote on important transactions such as mergers. In sum, under Delaware corporation law, no constituency other than stockholders is given any power.[23]

Authority over most matters is granted to the board of directors.[24] But the members of that board in turn are chosen by the shareholders, and only the shareholders. Those shareholders must approve the fundamental actions listed in the above quote. Those shareholders are the only stakeholders with the power to bring derivative suits on behalf of the corporation enforcing

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18. Harwell Wells, *The Cycles of Corporate Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002).

19. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

20. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

21. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

22. *Our Continuing Struggle*, *supra* note 5, at 155; *Dangers of Denial*, *supra* note 5, at 767–68.

23. *Dangers of Denial*, *supra* note 5, at 784.

24. DEL. CODE ANN. tit. 8, § 141(a) (2020).

fiduciary duties.[25] Given all this, of course we should expect directors to focus on the interests of those who chose them, can remove them, and can sue them. What else could we expect? Advocates of understanding duty as extending to the interests of other stakeholders ignore the reality created by this power structure:

> Instead of recognizing that for-profit corporations will seek profit for their stockholders using all legal means available, we imbue these corporations with a personality and assume they are moral beings capable of being "better" in the long-run than the lowest common denominator. We act as if entities in which only capital has a vote will somehow be able to deny the stockholders their desires, when a choice has to be made between profit for those who control the board's reelection prospects and positive outcomes for the employees and communities who do not.[26]

I think this is the best argument in favor of shareholder wealth maximization. It points us to the core features of the corporate authority structure. It forces us to think realistically about the likely ineffectiveness of interpreting fiduciary duty as protecting stakeholders with no power over directors and officers. Indeed, legal reformers attempting to devise new forms for social enterprises intended to pursue social missions in addition to generating profits for their investors would have done well to deeply consider Strine's argument before legislating. The leading new statutory form for social enterprise, the benefit corporation, imposes a duty to consider the interest of many stakeholders, but it gives those stakeholders (other than shareholders) no power to either elect or remove directors or to sue to enforce the duty to them.[27] How much effect will such a duty with no corresponding power have on directors when push comes to shove in prioritizing the interests of different parties? Most scholars, including myself, think the answer is not much effect.[28] Strine pointed out the problem while making his argument about duty in Delaware corporations.[29] As it becomes increasingly clear that benefit corporations provide a weak solution to the needs of social enterprises, future reformers should consider ways to give

25. *Dangers of Denial*, *supra* note 5, at 748.
26. *Our Continuing Struggle*, *supra* note 5, at 136.
27. *Committing*, *supra* note 4, at 47–48.
28. *Id.* at 49.
29. *Our Continuing Struggle*, *supra* note 5, at 150–51. More recently, Strine has suggested making it easier to become a benefit corporation, by requiring a simple majority shareholder vote. Fair and Sustainable, *supra* note 6, at 12–13. I think his earlier skepticism may be the stronger position. I myself have evolved from less to more skepticism. *Compare Committing*, *supra* note 4, *with Duty to Power*, *supra* note 4.

stakeholders more power.[30]

But Strine does not only care about protecting shareholders. He clearly cares deeply about better protecting workers than we currently do and about other ESG matters as well, including addressing climate change. Won't corporations run by directors understanding their function in light of the shareholder wealth maximization duty take advantage of their workers and pollute the environment where doing so increases profits, even in the long-run (after taking into account things like reputational effects)? Strine highlights this risk in his articles advocating shareholder primacy. How does he think we should respond to such corporate irresponsibility?

III. AMELIORATING CORPORATE IRRESPONSIBILITY

Strine addressed this dilemma of corporate irresponsibility in his original two articles advocating shareholder wealth maximization, as well as in subsequent and prior work. One of the two shareholder primacy articles has the following passage:

> If we wish to make the corporation more socially responsible, we must do it the proper way. If we believe that other constituencies should be given more protection within corporation law itself, then statutes should be adopted giving those constituencies enforceable rights that they can wield. But a more effective and direct way to protect interests such as the environment, workers, and consumers would be to revive externality regulation. We must also address the incentives and duties of institutional investors—who act as the direct stockholders of most public companies—so that these investors behave in a manner more consistent with the longer-term investment horizon of the human beings whose capital they control.[31]

This passage points in several ways. The second sentence points to a fundamental change in the power relationships that dictate the shareholder-only duty. We shall see Strine pursuing this possibility further in the next Part. But the final two sentences go in a different direction. These take shareholder power and consequent duty to them as given and suggest ways to constrain the resulting single-minded focus on profits for shareholders. The first way looks to other forms of external regulation, and is explored here in Section III.A. The second way looks to shaping the behavior of

30. *Duty to Power*, *supra* note 4, at 112.
31. *Dangers of Denial*, *supra* note 5, at 768.

shareholders themselves to be more pro-social, and is explored here in Section III.C. Other papers have suggested commandeering the *Caremark* duty to monitor legal compliance, and that way is explored in Section III.B.

A. External Regulation

One of the leading themes of Strine's shareholder primacy articles is that the reality of corporations' focus on shareholders makes it extremely important to constrain behavior through external regulation.[32] If corporations are emitting too much in greenhouse gases, then impose a carbon tax, emissions trading, or other regulatory scheme. If they are mistreating their employees, then improve employment regulation or make it easier to unionize. The latter decades of the twentieth century saw a trend towards deregulation in many areas of the law.[33] Strine's message is that deregulation needs to be reversed in a number of fields.

This is a common argument in corporate law, and one I have made myself. The argument for contractual freedom and flexibility in corporate law clearly needs to face the question of external effects on groups that are not party to the corporate contract, and a standard answer is that where external effects are a real problem, regulation through other areas of substantive law is the answer. Even libertarians like Milton Friedman[34] and Frank Easterbrook[35] make this argument. Given their general hostility to legal regulation interfering with market relations, the argument rings rather hollow coming from Friedman and Easterbrook, but it seems much more genuine in the case of Strine.

This argument for regulation in other fields has much going for it, more for some types of problems than others. Addressing climate change is an area where the argument is especially strong. In my own co-authored article on how corporate governance can be used to address climate change, our leading conclusion was that corporate governance is quite limited in what it can do, and aggressive environmental regulation must be the main response

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32. *See, e.g.*, *Dangers of Denial*, *supra* note 5, at 768, 786–88 (discussing the importance of external regulation).

33. *Our Continuing Struggle*, *supra* note 5, at 169.

34. Milton Friday, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/LS5C-G3PU].

35. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 37–39 (1991)

to climate change.[36] Climate change is a massive, global problem over a long time period. The incentives of even large organizations that significantly emit greenhouse gases to take big, costly actions right now are weak relative to the action needed. Finding a constituency group with the incentives and information to empower within a business to address climate change is quite tricky.

The argument for external regulation is less strong in other areas. As I have argued elsewhere,[37] worker protection is such an area. The externalities outside of a company's own workers are much less pervasive. And there is a constituency group with the incentive and information to act effectively that can be empowered to protect a company's workers, namely, those workers themselves.[38]

However, relying on other areas of regulation has significant limitations, even in fields like climate change where the argument for doing so is strongest. For one, the American political system has become increasingly dysfunctional, so strong climate change legislation now seems very hard to achieve. Indeed, my co-authors on the subject[39] were three environmental law scholars (one American, two Australian) driven to look to corporate governance for answers out of desperation surrounding the weak prospect of political solutions.

This dysfunction has many sources. Of particular note for students of corporate governance is that corporations themselves are major political players. Even companies that publicly proclaim dedication to addressing climate change may fund lobbying organizations and political candidates who oppose legal reforms.[40] This has led ESG activists to focus on proposals to limit or at least disclose corporate spending on lobbying and political campaigns. To his credit, Strine has addressed this question, and he quite vigorously objects to corporate political spending.[41] Strine stresses that political spending will often go against the preferences of many shareholders, and that there is a serious agency problem with CEOs choosing to spend shareholder money on their own preferred candidates and causes. He suggests a variety of solutions, from companies committing to no

36. *Green Boards*, *supra* note 3, at 399.
37. *Mandates to Governance*, *supra* note 1, at 887.
38. *Employee Primacy*, *supra* note 1, at 336.
39. *Green Boards*, *supra* note 3, at 337.
40. Dorothy S. Lund & Leo E. Strine, *Corporate Political Spending Is Bad Business*, HARV. BUS. REV. (2022), https://hbr.org/2022/01/corporate-political-spending-is-bad-business [https://perma.cc/BGP6-E3L5].
41. *Id.*

political spending at all to requiring shareholder approval for such spending, among other ideas.[42]

Although I am sympathetic to these arguments and suggestions, I wonder if Strine has over-emphasized the problems associated with political spending and under-estimated the legitimate reasons (from a profit maximization perspective) managers might want to spend to affect regulation. Regulations presumably do frequently reduce profitability, and relatively small amounts of spending on lobbying and elections can have big payoffs. The fact that corporate spending skews heavily Republican may not just reflect the personal biases of top managers, as Strine argues,[43] but may instead reflect the fact that Republicans general support lower levels of regulation.

Even when external regulation does get done, under-enforcement can be a big problem. Agencies that administer rules may be under-funded or captured by the industry. Here again, Strine recognizes the issue and has a response: the internal compliance function within corporations. We will consider that in the next Section.

Finally, despite my somewhat snarky treatment of the attitude of libertarians like Friedman and Easterbrook to regulatory responses,[44] we should remember the force of arguments against imposing regulatory mandates. Extensive regulation can create all sorts of problems.[45] For instance, our system of employment regulation is extensive and complex.[46] It may at least sometimes impose costs that exceeds its benefits.[47] It sometimes imposes one-size-fits-all rules that are not tailored to the needs and preferences of all workers.[48] Contrast this with the flexibility of our system of corporate governance, which mostly imposes default rules that individual companies may vary. Choosing to protect workers via mandatory employment regulation rather than through internal governance loses the benefits of that system of corporate governance.[49]

42. *Id.*
43. *Id.*
44. *See supra* notes 34–35 and accompanying text (discussing libertarians).
45. *See generally* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE (1980).
46. *See Mandates to Governance*, *supra* note 1 (discussing the unemployment system).
47. *Id.*
48. *Id.*
49. *Id.*

B. Compliance

The under-enforcement objection to external regulation brings us to another method by which Strine proposes to ameliorate corporate irresponsibility. Directors and officers have a duty to follow the law. Under the famous *Caremark* case,[50] they also have a duty to monitor whether corporate employees are complying with the law. For several decades *Caremark* was famously seen as perhaps the hardest legal theory under which plaintiffs could prevail. But several recent cases have survived motions to dismiss,[51] leading to a growing sense that perhaps this is not such treacherous grounds for plaintiffs after all.

In several recent articles,[52] Strine argues that *Caremark* and ESG are two great tastes that go great together. The argument is pretty straightforward. Most ESG topics have related external legal rules associated with them. Climate change has various associated environmental laws; worker protection has employment and labor regulation. Insofar as companies work assiduously to comply with regulations, they will also be promoting related ESG goals. Well-run companies should choose to go well beyond the bare minimum required to comply with the law, in order to reduce the chance of legal violations. Such enhanced compliance will simultaneously lead to improved ESG performance. In Strine's words, "[i]f a company decides to do more than the legal minimum, it will simultaneously satisfy legitimate demands for strong EESG programs and promote compliance with the law."[53] In a bit more detail, he says:

> If directors are seeking to go beyond the legal minimum and to treat all the corporation's stakeholders and communities of impact in an ethical and considerate manner, the corporation is by definition minimizing the risk of breaking the law. By trying to engage in EESG best practices, the corporation will have a margin of error that keeps it largely out of the legal grey and create a reputation that will serve the company well with its stakeholders and regulators when there is a situational lapse.[54]

Strine and his co-authors helpfully go deeper into the weeds of compliance and corporate structure to provide insights into what effective

50. *In re* Caremark, 698 A.2d 959.
51. Marchand v. Barnhill*,* 212 A.3d 805 (Del. 2019); *In re* Clovis Oncology Inc., No. 2017-0222, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).
52. Caremark *& ESG*, *supra* note 7; Duty and Diversity, *supra* note 7.
53. Caremark *& ESG*, *supra* note 7, 1885.
54. *Id.* at 1909.

programs look like. They argue that the board should think carefully about compliance and ESG together, and plan how to structure both officer- and board-level management to achieve effective oversight.[55] They caution against piling all ESG oversight into one committee, either the audit committee or the nomination and governance committee (the two most common options).[56]

For the specific area of worker protection, Strine suggests board-level oversight in an expanded version of the standard compensation committee.[57] That committee typically focuses on the compensation of top executives. Strine suggests the committee should oversee compensation and employment practices for the entire workforce, "including not only worker pay and benefits but also safety, racial and gender equality, sexual harassment and inclusion, and training and promotion policies."[58]

Here again, Strine's strategy has much to commend it. He is clearly right that leaving plenty of room to spare in avoiding legal violations will also advance ESG goals. His thoughts on board committee oversight also make a good deal of sense, and show an admirable attention to the details of corporate governance and how those details affect behavior and policy.[59]

But inevitably there are also limits and concerns with this *Caremark* strategy. In an area of ESG like climate change, where the impetus for a corporate governance-driven strategy comes from the lack of effective regulation and the difficulty of changing that, a legal compliance strategy has a significant limit. Even going well above the legal minimum to ensure compliance may not be good enough where the legal minimum is very low indeed and where the need for changed behavior is very high. That describes the current situation for climate change and corporate policy.[60]

In addition, does *Caremark* do enough to encourage the kind of attention to best ESG practices that Strine recommends? The law clearly *allows* such behavior (the business judgment rule sees to that). It doesn't *require* such behavior; even with the new *Caremark* cases, boards can escape liability with less stringent oversight than Strine advocates. How much does it *encourage* such behavior? The combination of risk aversion and a small chance of liability, along with concerns about reputation and a norm favoring

55. Caremark *& ESG*, *supra* note 7, at 1910–11.
56. *Id.* at 1916–17.
57. *See Fair Gainsharing*, *supra* note 6 (discussing board-level oversight).
58. *Id.* at 32.
59. We shall see this attention to detail again. *See supra* text accompanying notes 94–98.
60. *See Green Boards*, *supra* note 3 (discussing climate change and corporate policy).

compliance goes some way to encouraging compliance beyond the legal minimum,[61] but just how far does it go? Good boards should do as Strine suggests, but plenty of boards are not good.[62]

As for Strine's suggestions on the compensation committee and worker protection, just how far should we trust a group of directors to identify and aggressively pursue the best interests of workers? As Strine himself emphasizes, directors are elected by and beholden to shareholders.[63] Most directors in public companies are high-level officers at other companies. Their positions and backgrounds align them with management, not workers.[64] It takes a high level of empathy and imagination to overcome that gap and truly understand and act on the best interests of a company's employees. Some directors may achieve that level of empathy and imagination. Most won't.

C. Reforming Shareholder Activism

If we want to ameliorate corporate irresponsibility within a system where the board answers ultimately to shareholders, then one approach is to focus on the behavior of those shareholders. Discouraging shareholder behavior that pushes companies to be more irresponsible, and encouraging shareholder behavior that pushes in the opposite direction, should lead to better outcomes. This involves distinguishing two kinds of shareholder activism, and figuring out how to discourage the bad kind while encouraging the good kind. Traditional activism focuses on ways to generate more profit and distribute it to shareholders, with strategies that are often (though controversially) characterized as generating short-term profits through strategies that may endanger the long-term health of a company.[65] More recent ESG activism focuses on issues like climate change and workforce diversity. Though generally justified as promoting higher profits in the long-run, it does so in ways that focus on other stakeholder interests in the short-run.

Strine has repeatedly expressed skepticism about traditional activism,

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61. *See Penumbra*, *supra* note 2 (discussing compliance).
62. *See Green Boards*, *supra* note 3 (discussing good boards).
63. *See supra* notes 23–26 and accompanying text (discussing beholdenness).
64. *Penumbra*, *supra* note 2; *see also* Claire Hill & Brett McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833 (2007) (discussing directors).
65. Claire A. Hill & Brett H. McDonnell, *Short- and Long-Term Investors (and Other Stakeholders Too): Must (and Do) Their Interests Conflict?*, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 396 (Claire A. Hill & Steven Davidoff Solomon eds., 2016).

arguing that institutional investors need to be encouraged to focus more on value in the long run. In one noteworthy article he tied this skepticism to the interests of workers, suggesting a shared agenda for labor and management.[66] In that article, he makes a number of specific suggestions:

- Eliminate classified boards while accepting traditional poison pills;[67]
- Every three years allow shareholders who have held their shares for at least a year to be compensated for solicitation costs if they nominate board candidates who receive a specified percentage of the vote;[68]
- Eliminate advisory shareholder proposals, focusing on bylaw proposals that would have real effect;[69]
- Adopt bylaws that require shareholders to approve the pay of top executives[70] (events have overtaken this proposal, with say on pay now required for reporting companies);[71]
- Discourage activism by shareholders with short positions;[72]
- Discourage quarterly earnings estimates;[73]
- Various measures intended to align the incentives of fund managers with the interests of their investors;[74]
- Higher taxes on short term capital gains;[75]
- A small financial transaction tax;[76] and
- Eliminating the tie between health insurance and employment.[77]

In a more recent article, he repeats some of these and also suggests allowing institutional investors to consider the human, not merely financial, interests of their beneficiaries.[78]

66. *Common Ground*, *supra* note 6.

67. *Id.* at 29

68. *Id.* at 30

69. *Id.* at 31

70. *Id.* at 33

71. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1899 (2010). In a more recent article, Strine suggests revising say on pay to require votes only every four years, with companies required to disclose four-year plans before those votes. *Fair and Sustainable*, *supra* note 6, at 14–15.

72. *Common Ground*, *supra* note 6, at 38.

73. *Id.* at 38–40.

74. *Id.* at 44.

75. *Id.* at 45. More recently, he suggests extending the period for long-term capital gains from one to five years. *Fair and Sustainable*, *supra* note 66, at 18.

76. *Common Ground*, *supra* note 6, at 45.

77. *Id.* at 46–48.

78. *Fair and Sustainable*, *supra* note 6, at 9; *see also* Michal Barzuza, Quinn Curtis &

That is a lot of worthy suggestions. And recent developments in shareholder ESG activism suggest things are moving in a direction that Strine prefers.[79] I disagree with a few of his specific suggestions. On shareholder proposals, although I agree that bylaw proposals with real authority should get more use,[80] my discussions with participants in the shareholder engagement process and comparison with Australia, which lacks such a process, has convinced me that precatory proposals also play a useful role.[81] On proxy access for shareholders nominating directors, I think that, particularly with the growth of ESG activism using this tool,[82] it should be more encouraged than Strine suggests. I wouldn't limit shareholder proxy access to every third year and, although I would allow for reimbursement of expenses for solicitations that receive a certain percentage of the vote, I would also provide for access to the company proxy, as has become common through shareholder pressure in recent years.[83] The problem with relying on expense reimbursement is it creates uncertainty for shareholders contemplating proposing a slate of director nominees.

More fundamentally, I think this bundle of proposals, while mostly worthy, has serious limits to how much it can achieve in promoting the interests of workers or addressing climate change. I have two main concerns. First, there are severe built-in limits as to how much the biggest institutional investors[84] can do to effectively engage on ESG matters, even with well thought out legal rules that make their tasks less hard. These investors have increasingly large clout through how much of most public companies they own, but their task in monitoring those companies is enormous. They must vote in many thousands of annual shareholder meetings, with a number of proposals to consider in many of those meetings, and director elections in all of them. Effectively monitoring and engaging with all of those companies would be enormously expensive.[85] Although funds can justify some of those

David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020) (providing more on this topic).

79. *Green Boards*, *supra* note 3, at Part III.

80. *Shareholder Bylaws*, *supra* note 2, at 205.

81. *Green Boards*, *supra* note 3, at 355.

82. Matt Phillips, *Exxon's Board Defeat Signals the Rise of Social-Good Activists*, N.Y. TIMES (June 9, 2021), https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html [https://perma.cc/43W8-9TEX].

83. Bernard S. Sharfman, *What Theory and the Empirical Evidence Tell Us About Proxy Access*, 13 J.L. ECON. & POL'Y 1, 1–2 (2017).

84. In particular, the Big Three (Vanguard, BlackRock, and State Street Bank).

85. Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 515–16 (2018).

expenses as a way of advertising to many investors (especially younger ones) interested in ESG matters,[86] heavy competition resulting in low fees seriously limits how much they can do.[87]

Second, I think there remains a major gap between the interests of even long-term and diversified shareholders on the one hand, and employees or future humans who will be most affected by climate change on the other hand. The move from a short to a long run shareholder value focus goes some way to reducing the gap, but far from all of the way.

IV. DR. LEO AND WORKER POWER

At the beginning of the previous Part, I give a quote from Strine laying out several paths to protecting the interests of workers and other stakeholders other than shareholders.[88] Part III explores what that quote calls "a more effective and direct way,"[89] namely, externality regulation and addressing the incentives and duties of institutional investors, along with invoking the *Caremark* duty to oversee legal compliance. But that quote leads with another option, namely, directly empowering non-shareholder constituencies within corporate law itself. Particularly, if one thinks of empowering workers, this path would follow my own preferred strategy for corporate law reform.[90]

In a recent co-authored work in progress, Strine has started to explore that path, suggesting ways to empower workers directly.[91] In *Lifting Labor's Voice*, Strine gives a qualified endorsement of a codetermination system where employees are able to elect representatives to the board of directors. That strikes directly at the heart of the exclusive enfranchisement of shareholders within corporate law, which in turn is central to Strine's argument in favor of the shareholder wealth maximization norm as the appropriate understanding of fiduciary duty.[92] Thus, with this proposal, Strine moves from working within the established structure of corporate law, as he does with the proposals discussed above,[93] and instead contemplates

86. Barzuza, Curtis & Webber., *supra* note 78, at 1300.

87. *Green Boards*, *supra* note 3.

88. *See Dangers of Denial*, *supra* note 5 and accompanying text (listing other ways to protect additional stakeholders).

89. *Dangers of Denial*, *supra* note 5, at 768.

90. *See* McDonnell, *supra* note 11 and accompanying text (discussing directly empowering non-shareholder constituencies).

91. *See Labor's Voice*, *supra* note 8 (discussing ways to empower workers directly).

92. *See supra* Part II.

93. *Id.*

critical revisions of the American system of corporate governance.

Several elements of *Lifting Labor's Voice* are worth emphasizing and discussing. Strine has an extremely thoughtful and detailed discussion of some of the design issues involved in implementing board representation for workers.[94] He and his co-authors discuss a variety of questions. Who would get to vote?[95] That includes issues such as whether the law would apply only to workers within the U.S. or worldwide for American companies, the vexing question of who counts as an employee, and who counts as managers who would not be given a vote. How much would worker directors get paid and how would their regular work and board duties be balanced?[96] What would be the rules for conducting campaigns for worker directors and how would those elections be administered?[97] How would the board operate, and in particular, how would one understand the fiduciary duty of worker directors?[98] Strine and his co-authors have useful ideas on each of these questions. More basically, they provide an important service in stressing the importance of thinking about them.

More fundamentally, and in some cases more problematically, the authors argue that board-level codetermination will only work effectively if combined with a number of other reforms.[99] These include requiring that all large corporations be required to consider the interests of major corporate stakeholders,[100] requiring EESG disclosure,[101] focusing the compensation committee on broader workforce issues rather than just executive compensation,[102] using that committee to experiment with more worker voice a la the German works council model,[103] implementing a variety of labor law reforms to strengthen unions,[104] and revising the duties of institutional investors.[105] The argument that board-level codetermination

94. *Labor's Voice*, *supra* note 8, at 1362–80.

95. *See supra* Section III.A.

96. *See supra* Section III.B.

97. *See supra* Sections III.C, III.D.

98. *See supra* Section III.E.

99. *See supra* Part IV.

100. *See supra* Section IV.A (explaining the benefit corporation model, which mirrors one of the main elements of Senator Warren's Accountable Capitalism Act, S. 3348, 115th Congress (2018); it goes against the approach to fiduciary duty advocated by Justice Strine as discussed *supra* Part II).

101. *See supra* Section IV.B (explaining that the extra "E" is for employees).

102. A reform Strine discussed before. *See supra* Section IV.C; *supra* notes 57–58 and accompanying text.

103. *Supra* Section IV.D.

104. *Supra* Section IV.E.

105. *Supra* Section IV.F; *see also supra* Section III.C.

will work only if combined with these other measures is based largely on observing other countries that have adopted codetermination, especially Germany, and noting that those countries do not require board representation in isolation, but have many other worker protections in place as well.

I certainly agree that these various reforms complement each other, and that board representation would work better with these other measures in place. A harder question concerns whether effective board representation *requires* all of these other measures to be in place, and if not, which measures matter most and how practically and politically one should best stage various reforms.

It certainly is possible that widespread adoption of worker board representation will be effective only in the presence of various other complementary mechanisms. I have made such arguments myself, focusing on a rather different set of complementary mechanisms, such as financial and educational institutions.[106] Even to the extent that one accepts the importance of complementary institutions, one may disagree as to what are the most important complements. I am less inclined than Strine to think that EESG disclosure and the fiduciary duty of managers matters that much, and more inclined to stress the importance of educational institutions, at various levels. We agree on the importance of financial institutions, although I would look to a wider range of possibilities,[107] rather than a sole focus on reforming current institutional investors.

A key question is how important unions are to the prospects for worker board representation. I am more inclined than Strine to see board representation as an alternative to unions, rather than as requiring effective unions as a prerequisite.[108] In part this reflects a political judgment. Unions have been declining in the U.S. for many decades, and employers have been very effective at blocking attempts to revise labor law rules and enforcement in ways that might reverse that decline. I see no good reason to be optimistic about that changing any time soon. Measures encouraging board representation (or similarly, works councils) are more novel, and might have more of a chance at success.

Success at encouraging board representation or works councils (or for that matter, more unionization) might be more likely if pursued not through mandatory measures, as Strine mostly seems to contemplate, but rather

106. *Employee Primacy*, *supra* note 1, at 376–78; Brett H. McDonnell, Labor-Managed Firms and Banks (1995) (unpublished Ph.D. dissertation, Stanford University) (on file with author).

107. *Id.*

108. *Mandates to Governance*, *supra* note 1.

through offering carrots to employers that adopt one of these forms of worker empowerment. The carrots could be tax breaks, or as Matt Bodie and I have suggested, they could be loosening of various employment law rules.[109] I would suggest working at encouraging, not requiring, all three forms of worker empowerment mentioned here, and seeing what (if anything) companies choose to adopt. Perhaps board representation will indeed only follow unionization and works councils, but perhaps it could be the reverse. Adoption would presumably vary among companies, giving more information on what works best.

Strine focuses on how codetermination would help protect workers. A complete analysis needs to consider how it would affect corporate governance more generally, including its impact on other stakeholders, including shareholders. I and others have argued that employee involvement in corporate governance, more so than the involvement of other stakeholders, would be highly appropriate and effective. Employees have much valuable information about how a business functions, and incentive to use that information to improve the business. Governance could also reduce worker agency problems.[110]

Though I have questions on some details in *Lifting Labor's Voice*, that should not divert attention from my strong support and admiration for the direction this paper takes. A former Chief Justice of the Delaware Supreme Court, one of the leading voices in contemporary corporate governance, is favorably exploring many forms of worker empowerment, including board representation as well as works councils and expanded unionization. It is a bold move away from the current American system, coming from someone who until very recently was right at the heart of that system. Kudos.

V. CONCLUSION

We have seen quite a progression from Justice Strine to Dr. Leo. Less than a decade ago, the Chief Justice was defending Delaware's focus on shareholders. Corporate law statutes confer power on shareholders alone to elect directors and sue them for fiduciary duty violations; fiduciaries should therefore focus on how decisions affect the long-term interests of shareholders; and Strine did not seem to question whether that was how the

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109. *Mandates to Governance, supra* note 1.

110. *Employee Primacy*, *supra* note 1; *Mandates to Governance*, *supra* note 1; *see generally* GRANT M. HAYDEN & MATTHEW BODIE, RECONSTRUCTING THE CORPORATION (2021).

law should be.[111] But that didn't mean Strine even then did not care about other stakeholders, especially workers. Indeed, from the focus of corporate law on shareholders, he inferred that other areas of the law needed to be strengthened to support workers and other constituencies.[112] Within corporate law, he analyzed how the *Caremark* duty[113] and rules governing institutional shareholders[114] could also help.

But now Dr. Leo may be admitting that these are not enough to do justice to American workers. Maybe we need to admit workers into the inner sanctum of corporate governance, along with shareholders, directors, and officers. His voice, like that of workers, is worth listening to.

111. *See supra* Part II.
112. *See supra* Section III.A.
113. *See supra* Section III.B.
114. *See supra* Section III.C.