THE HUMANITIES STRIKE BACK: (E)ESG AND JUSTICE STRINE CHALLENGE GAMER SHAREHOLDER PRIMACY

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Imagine if we stopped deciding basketball games by baskets alone. Instead, victory would be determined by a combination of baskets, rebounds, steals, and fouls. Each of these is universally acknowledged as a critical component of the game. Why not reward them directly instead of indirectly, by their connection to baskets alone? Don't we track steals and award rebounding titles? As to fouls, we use foul shots to convert their value into the only outcome of interest. But don't fouls also have an ethical dimension, one concealed by basket-scoring primacy? And speaking of ethics, should scoring be limited to on-court behavior? For example, in the recent Netflix documentary, *The Last Dance*, about Michael Jordan's final championship year with the Chicago Bulls, the Detroit Pistons served as a convenient foil to the Second City's heroic team. Detroit's "Bad Boys" played dirty, fouled frequently, and famously walked off the court before the end of the game, and without shaking hands, after losing to the Bulls in the 1991 Eastern Conference Finals.[1] Why let teams like that even get so far? Why not directly factor their behavior into the score, forcing the team to internalize the full cost of its conduct?

The response to my hypothetical basketball reform is straightforward. Even if these alternative metrics have some merit, even if scoring all would provide a richer picture of what occurred on (and off) the court, their inclusion would destroy the game. Almost any single, simple metric would be preferable to more than one. Multiple metrics would undermine consensus about who won, and even a combined weighted metric might trigger endless debates not about the outcome but about the weights. The latter would let fans leave the arena or shut off their televisions either unsure

* Professor of Law and Paul M. Siskind Scholar, Boston University School of Law. This paper was presented at the 2022 University of Pennsylvania Carey Law School Journal of Business Law *Festschrift* for the Hon. Leo E. Strine, Jr. Thanks to Scott Hirst, Stephen Marks, and David I. Walker for comments, and to Anna Yarbrough for excellent research assistance.

1. THE LAST DANCE (Netflix 2020).

of who won or agreeing to disagree about who did. No more last-second buzzer beaters, no more highs and lows of decisive victory, just endless disputes. Playoffs would become debate tournaments, a prospect that appeals to no one except lawyers. There could never be an undisputed scoring champion like a Michael Jordan, or at least not one without an asterisk, "*baskets only."[2] The joy of the game is increased, its energy concentrated and intensified by its ability to produce these winners and losers, to create an absolute and universally agreed hierarchy—league tables—to do so within fixed timeframes—quarters—that have a clear beginning and end, enabling victors to be declared and the season to restart, a fresh chance for losers to become winners and vice versa. To give up all that, even in exchange for greater fairness or accuracy, would not be worth the sacrifice.

Leo E. Strine, Jr. is closing in on Blair and Stout for the undisputed title of all-time top-scoring stakeholderist.[3] I don't intend to squander this opportunity to roast and toast him by weighing the pros and cons of basket-scoring primacy. Instead, my aim is to surface an overlooked argument in the debate over shareholder primacy and stakeholderism, the case for which has been recently reinvigorated by Strine's work. My argument is this: one underappreciated aspect of shareholder primacy's appeal is that it creates a competition with a single endpoint, basically a game, and that the exhilarating tournament that results, separate and apart from any ethical or instrumental justification, is an underestimated aspect of shareholder primacy's appeal. I want to be clear that this is not intended as any glib insult hurled at the doctrine. Quite the contrary, its advocates root their claims in wholly legitimate philosophical foundations, in libertarian ideas about freedom and private property, in notions of the common good best advanced

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2. This requires no citation, but just in case: NBC Sports Bay Area Staff, *Steph Curry Joins Exclusive List of Scoring Champions*, NBC SPORTS (May 16, 2021), https://www.nbcsports.com/bayarea/warriors/steph-curry-joins-exclusive-list-scoring-champ-legends [https://perma.cc/7XE8-MMYC] ("The GOAT [Michael Jordan] led the league in scoring 10 times, a record that will not be broken for a long time, if ever . . . . If making a list of the NBA's all-time scoring king based on points per game, Jordan would be at the very top with a career average of 30.12 PPG.").

3. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 U. VA. L. REV. 247 (1999) (often cited as among the most prominent articulations of stakeholderism). Stout also noted the advantage of shareholder primacy's explanatory simplicity, though I argue here that its simplicity also creates a better, more appealing game. *See, e.g.*, Lynn A. Stout, *The Problem of Corporate Purpose*, ISSUES IN GOVERNANCE STUDIES, June 2012, at 3, https://www.brookings.edu/wp-content/uploads/2016/06/Stout_Corporate-Issues.pdf [https://perma.cc/XP2Y-3DHR] ("To the popular press and the business media, shareholder primacy provided an easy sound-bite explanation of the firm . . . .").

by each person pursuing his or her own lawful self-interest, in empirical claims about what best stimulates economic growth, in pragmatic claims that stakeholder interests are best addressed by governments, not corporations.[4] I disagree with some of these claims, but accept the good faith nature of the arguments made in their favor.

Still, I think it remains the case that shareholder primacy creates a better game than stakeholderism, and that this preference explains some of the doctrine's attractiveness, and even some of its overlooked explanatory power. I recognize that there can be something trivializing about this argument, even if it's true. In an era afflicted by existential crises like global warming, economic inequality, and racial inequity, the idea of defending (or attacking) shareholder primacy on the grounds that it creates a more exciting game sounds disrespectful coming from a critic, or shameful from an advocate. Aesthetic arguments seem misplaced and trivial relative to the future of the planet. It's like discussing the gamelike aspects of war, though I believe that anyone who fails to acknowledge such aspects is missing an important explanatory variable.

There is also an element to the debate between shareholder primacy and stakeholderism that's analogous to the contest between STEM and the humanities, pitting the scientist or engineer against the philosopher or English major. It reminds me of the familiar complaint about the MBAs who took over the publishing industry. From one perspective, they ruined it by applying market metrics to the unquantifiable question of what makes a good novel. From another perspective, they used objective metrics to reduce agency costs by eliminating the three-hour martini lunch and the publication of a bunch of dull highbrow writing no one actually wanted to read. Conversely, something about stakeholderism smacks of the philosopher or English major's revenge on the technocrat and the MBA, sullying the purity and elegance of math by dragging us back down into the eternal irresolvable muck of competing narratives and contested values, the muck of politics, the muck of making unfalsifiable claims. Both sides think their own worldview is more appealing and more real.

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4. *See* Judd F. Sneirson, *The History of Shareholder Primacy, from Adam Smith Through the Rise of Financialism*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY (Beate Sjåfjell & Christopher M. Bruner eds., 2019) (discussing the development of shareholder primacy, including, for example, the property comparisons made by Berle and Means and the law and economics argument that shareholder primacy is rooted in economic efficiency); s*ee also* Lucian A. Bebchuk and Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 170–71 (2020) ("However, given our conclusion that stakeholderism should not be expected to deliver the hoped-for stakeholder protections, external adoption of laws, rules and policies remains the main avenue through which real protections could be achieved.").

Starting within academia, consider the way that shareholder primacy has enthroned regression analysis in corporate law. The most under-examined relationship in corporate law academia is the strong correlation between professors who love shareholder primacy and professors who love regression analysis. I hypothesize a coefficient approaching one. In a regression, there is one outcome of interest, the dependent variable. There are an infinite variety of possible inputs, independent variables. Shareholder primacy tells us what the singular dependent variable is: share price, or maybe Tobin's Q.[5] Properly trained academics can then deploy their skills to explore the infinite possibilities of what creates or destroys shareholder value. It's no exaggeration to suggest that the dominant strain of corporate law and finance in recent decades has been the hunt for statistically significant independent variables that positively or negatively correlate with share price. How many papers have been published, PhDs granted, tenured positions conferred for papers fitting this mold?

Since the publication of Gompers, Ishii, and Metrick in 2003, this effort has zeroed in on what governance or legal factors maximize share price.[6] Virtually no aspect of law and corporate governance has been left unexamined. We now have more than twenty years chasing high R-squareds and previously unappreciated (or overappreciated) independent variables.[7] How much consensus this research has actually generated about optimal legal or governance arrangements is an open question, even within an exclusively shareholder primacy framework. But no one can dispute it has prompted a profitable gold rush for data and the academics who can analyze it.[8]

5. *See* RICHARD A. BOOTH, FINANCING THE CORPORATION § 2:30 (2020–2021 ed. 2020) ("Tobin's Q . . . is the ratio of market value to book value. As originally formulated, the ratio was based on the notion that market price should exceed replacement costs if assets are generally devoted to their highest and best use (as they should be). Thus, Tobin's Q should ordinarily be greater than one."); *see also* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 639 (2006) (noting that empirical scholars often formulate shareholder primacy by incorporating measures of shareholder value like stock price and Tobin's Q into calculations).

6. Paul A. Gompers, Joy L. Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q.J. ECON. 107 (2003).

7. *See* Joanna M. Shepherd et al., *What Else Matters for Corporate Governance?: The Case of Bank Monitoring*, 88 B.U. L. REV. 991, 998–1000 (2008) (offering an overview of the empirical corporate governance literature legal and finance scholars have authored; examples of variables corporate scholars have studied to try to track the impact of corporate governance on firm value include staggered boards, golden parachutes, various takeover defenses, and provisions on shareholder voting, to name a few).

8. An April 15, 2022 Google search of "corporate governance" and "sample" and "coefficient" yielded 141,000 results.

Shareholder primacy pulls corporate law away from the humanities and towards STEM. It transforms the academic study of corporate law from *what* to *how*. It turns corporate law into a regression. We know what the goal is, the hard part is how to reach it. It makes corporate law a more technical and mathematical field, with falsifiable claims and problems that can be solved by access to and analysis of data, a field resembling technology or engineering, in which we can strive to tell not just what's different, but what's better. Within this framework, intellectual attainment in the field begins to feel like technological advance. With a single output of interest, we set ourselves up to make measurable progress, even if that progress remains contested. It's as if, with additional research, more data, better computing power, more advanced techniques, one decade from now we should be able to implement evidence-based governance structures more capable of maximizing returns than the ones we have now. A new and improved product, like the latest iPhone. We can aim to create the right compensation structure, capital structure, legal structure, or at least we can create a menu of evidence-based options from which different companies might choose depending upon a relatively narrow set of preferences, again with the singular goal in mind. (And what we do to data in the name of this progress makes us sound like nineteenth century industrialists: we exploit it, we mine it, we scrape it).

This is a heady project, facilitated by single endpoint corporate law, and it is understandable that those who thrive in it might be skeptical of claims that would undermine it.

Outside academia, in corporate boardrooms and on Wall Street, shareholder primacy also creates a game in which everyone knows what the goal is. Just like sports. The singular goal of basket scoring gives meaning to every aspect of the game, such that every action, counteraction, or inaction has consequences. Ditto for the corporation operating under shareholder primacy. Every single action either advances or undermines the goal, and can be assessed accordingly. It creates winning and losing strategies, winning and losing people, indisputable hierarchy. The same is true for investors. If we don't factor in questions like environmental or jobs impact, then we have a straightforward way of knowing who had the best year or decade as an investor. We can rank everyone by performance, CEOs, companies, equity analysts, underwriters. We have league tables, quarters, comparables. We know pretty clearly who was underpaid and who was overpaid and why. Team strategy itself can be reduced to a small set of variations. We can hire accordingly. In this world, the rules of the game are clear and the empiricist reigns, in both industry and academia.

The connection between a single endpoint game like shareholder primacy and sports is everywhere to be seen, and deeply embedded in the current culture. Think of a writer like Michael Lewis publishing *The Big Short* and *Moneyball*.[9] *The Big Short* was about geeky, numbers-driven Wall Street traders who made a fortune betting against the market consensus on home prices. *Moneyball*—the title itself is revealing—was about a geeky numbers-driven baseball manager who bet against the consensus on baseball talent and whose method eventually led to the Boston Red Sox to win the World Series for the first time in eighty-six years. Same author, same audience, same interests, same game, same story. The heroes of *The Big Short* and *Moneyball* are interchangeable and could have easily swapped careers. It would be unsporting to point out that the heroes of *The Big Short* made their money on the eventual collapse of the housing market that wiped out enormous household wealth. Shareholder primacy tells us what parts of the story matter, and do not matter. These investors were just doing their job. We know what to not pay attention to, to not write about, to maintain the good story. Think also of Elon Musk's October 2021 tweet at Jeff Bezos containing nothing but a silver medal.[10] The Bloomberg Billionaires Index had just reported that Musk's combined Tesla and SpaceX stakes surpassed Bezos's Amazon stake.[11] If we were instead thinking about workers or environmental impact, neither of these guys would be on the podium. There would be multiple podiums, or none at all.

The production and reproduction of hierarchy created by any closed-universe, single-endpoint game has inherent appeal separate and apart from theoretical or empirical justifications. Part of it is surely entertainment value. Look at Cramer's Mad Money or the twenty-four-hour business news channels. But that's not all I mean. Clear hierarchy provides a sense of order and place, a sense of quantifiable impact, a sense of certainty. Some people choose careers in corporate law over constitutional law, in markets over other fields, precisely because of this quality. At least part of my own attraction to corporate law was the sense that its impact was more measurable than, say, constitutional law, and, therefore, one wasn't always left with the sneaking suspicion that everything you were talking about might be

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9. MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2011); MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2004).

10. Grace Kay, *Elon Musk Pokes Fun at Jeff Bezos with a Silver-Medal Emoji as the Gap Between the Wealthiest Men in the World Widens*, BUS. INSIDER (Oct. 11, 2021, 11:29 AM), https://www.businessinsider.com/elon-musk-tweets-silver-medal-emoji-jeff-bezos-2021-10 [https://perma.cc/HZ2N-LCAK].

11. Tim Levin, *Elon Musk Is Once Again the World's Richest Person as Tesla's Upward Tear Continues*, BUS. INSIDER (Mar. 16, 2021, 12:29 PM), https://www.businessinsider.com/elon-musk-jeff-bezos-net-worth-worlds-richest-tesla-amazon-stock-2021-1 [https://perma.cc/M7CK-3CE4].

inconsequential. Likewise, not everyone goes to Wall Street for the money alone, but also for the game it creates, and for the sense of certainty that comes with measuring the impact of one's thoughts and actions, even when that impact may be negative. At least it feels consequential, at least you can think precisely about how to change the outcome, in contrast to so many fields that we might think of as being more in the realm of liberal arts, in which it is very often difficult to prove or know anything with much certainty. Undermining this quality undermines what drew many people to the field in the first place.

Stakeholderism threatens to ruin this game in much the same way that the basketball reformer ruins basketball. It doesn't negate it entirely, but it opens the door to debates over the merits not unlike the debates of whether the higher-rebounding team was better than the one that scored more baskets. Even the mere fact of these debates is a loss from the perspective of the single endpoint advocate, as it detracts from and devalues the *how* questions in favor of a return to *what*. Five years ago, if some governance arrangement was revealed to maximize share price or Tobin's Q, that would have looked like an unalloyed win. But in a stakeholderist world, such a finding is diminished if we know nothing about what it does to workers, to the company's propensity to pollute, to the hiring pool. Asking about these at a faculty workshop would have invited a sneer. Asking about it at a pension trustees meeting would have triggered a legal warning about breaching one's fiduciary duty. People who want to exclude these concerns from the corporate conversation do so because they believe corporate law isn't the place for it. No doubt because of traditional reasons for defending shareholder primacy, reducing agency costs, stopping executives from playing politics with other people's money. But the fact that it undermines the game is at least part of the reason why. Their objection is like the objection all might have if a star basketball team visited an ailing city and decided to throw the game to give the fans something to cheer.

Similarly, the CEO or investor who makes huge profits for shareholders was once almost completely immunized from the consequences of even quite appalling personal misconduct on account of extraordinary performance, not unlike athletes. Much in the way that many sports fans would be quite happy to see an athlete's personal misconduct punished by almost anything other than in-game punishment, so the idea of firing a top performer for personal misconduct was once unthinkable. From the perspective of maintaining the integrity of the single endpoint game, many do not want an all-star left off the court for off-court behavior, they do not want in-game punishment for out-of-game behavior. Almost any departure from the single endpoint opens the door to an unraveling of the consensus that propels the game itself.

That leads me to Leo Strine's *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy*. This paper is about as elegant and devastating a critique of shareholder primacy as we will get in this generation. A couple of aspects of it were particularly noteworthy. His dissection of what he calls the "moral balm" of residual claimant theory is particularly memorable for both substantive and stylistic reasons, as usual.[12] Looking past formal options of who is the residual claimant in bankruptcy, he points out that stockholders "take all the time," in dividends, buybacks, M&A and activist events, and that diversified investors are better protected than virtually all other stakeholders from firm-specific risk.[13] He refers to the "blinkered" way academics study corporate law, and the academy's lateness to the social, economic, and political problems wrought by shareholder primacy.[14] He rebukes that study, suggesting that it is time to "better align our corporate governance system with the interests of humanity in ensuring that in trying to build wealth, we do not destroy the planet, injure consumers, or otherwise cause more harm than good."[15] He bemoans the baleful influence of the academy, referring to "just how influential academic framing can be in *skewing* not only academic thought itself, but public policy."[16] And he attacks shareholder primacy as a "narrow measure [that] has no compelling relationship to the overall value that a corporation provides to society."[17] He spells it out in making the following point:

> A company that provides a 6 percent return to equity, but that employs 10,000 workers at fair wages and in safe conditions in all its global operations, uses only contractors who do the same, and creates no externalities may well provide more value to society than an industry competitor that provides a 9 percent return to equity, but employs far fewer workers directly and at much lower wages, that relies on even lower paid contracted labor, takes few safety protections, and generates externalities such as consumer and environmental harm.[18]

Why has this point been ignored for so long? Strine doesn't offer explanations here, but I think it is at least in part because of the reasons

12. Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397, 408 (2021).
13. *Id.* at 409.
14. *Id.* at 412.
15. *Id.* at 401.
16. *Id.* at 406 (emphasis added).
17. *Id.* at 410.
18. *Id.*

outlined above. Because if we open the door to standards like Strine's to "provide more value to society"—and I believe we must open that door—we also open it to debate over which values and why, and that's a big change to the game as it has been played for the last few decades.

I largely align myself with Strine's side of the argument. I applaud his coining of the term "EESG"[19] to prioritize employees who, as Strine himself has put it, "are always getting stuck in the S." Still, there is something disheartening about trying to nudge corporate law discourse out of its specialized, narrow corner and into the larger political conversation, because that broader political conversation feels so toxic and pointless right now. But I don't think we have a choice. In my view, the market is the unmoved mover of our day, it is the most powerful human institution, and if it doesn't deal in some direct way with the world's greatest challenges, then they won't get dealt with at all. Stakeholderism enables the corporate sector to deal with these pressing problems, not exclusively, but working with society more broadly, in ways that, in Strine's words, "better align our corporate governance system with the interests of humanity."[20]

19. *See* Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism* 6 (Roosevelt Inst., Working Paper No. 202008, 2020), https://rooseveltinstitute.org/wp-content/uploads//08/RI_TowardFairandSustainableCapitalism_WorkingPaper_202008.pdf [https://perma.cc/69BL-P6MD] (coining term EESG).

20. *Id.* at 401.