The Strine Model and Contemporary Corporate Law

In the introduction to his book entitled ***On The Rule of Law,*** the author Brian Z. Tamanaha wrote that "[m]y conviction is that theory is relevant to everyday life, and therefore it should be available to everyone." Directors and managers today operate on various business and financial theories of the most efficient and effective way to run their companies. So just as it is important to have several key business theories to operate a company, it is just as important to understand some key legal theories and models as well. In this article I will discuss the recent Strine model, by explaining what it is and how it fits into the broader context of corporate theory.

In the most recent **ABA Business Lawyer** (Spring 2023/volume 78/Issue 2), the former Supreme Court Delaware Chief Justice Leo Strine, Jr. wrote an article entitled "Good Corporate Citizenship We Can All Get Behind" Toward a Principled Non-Ideological Approach to making Money the Right Way". His intent is to map out a "non-partisan, principled conception of good corporate citizenship drawing on shared assumptions of the right and the left about the place of corporations in our society and the realities of corporate governance." [Id. at 329] As he simply states, you must address how the conduct of corporations affects the interests of both the stockholders and its stakeholders (i.e. "workers, communities where it operates, customers, taxpayers, and the environment.") So the days of corporate "externalities" may be winding down, but what will be the new scope of "internalities"? Strine's baseline is that corporations should support "the basic institutions of the society upon which the corporation depends", but leave behind "debatable issues of politics and faith largely to human investors, workers and consumers to decide for themselves." [Id. at 329] It's a straight-forward two-part concept. But is his proposed model an improvement to past corporate models? Let's take a look.

First, what is a good model? In her seminal book "Thinking in Systems", the author Donella H. Meadows said this about our models; "Everything we think we know about the world is a model. Every word and every language is a model. All maps and statistics, books and databases, equations and computer programs are models. So are the ways I picture the world in my head – my mental models. None of this is or ever will be the real world. [B]ut our models usually have a strong congruence with the world. [H]owever, and conversely, our models fall far short of representing the world fully." Donella Meadows, **Thinking in Systems** (2008) at 86. So her warning list, as she calls it, for using models, is that "[y]ou can't navigate well in an interconnected, feedback-dominated world unless you take your eyes off short-term behavior and structure; unless you are aware of false boundaries and bounded rationality; unless you take into account limiting factors, nonlinearities and delays. You are likely to mistreat, misdesign, or misread systems if you don't respect their priorities, their priorities of resilience, self organization, and hierarchy. (Id. at 87) She concludes by saying, "[t]he right boundary for thinking about a problem rarely coincides with the boundary of an academic discipline, or with a political boundary." (Id. at 98) So given the Meadows warning list above, would the Strine model be considered a good model? Let's see.

In **Section I:** Introduction, Strine simply states that his central goal is to "identify some methods by which corporations and institutional investors might improve the ability of the corporate sector to make money the right

way". [Strine at 331] The law confers on corporations certain rights and powers apart from human beings, but the law also has concomitant limitations on its conduct and behavior. Both must be understood to address their positive contribution to corporate stakeholders. Strine believes that the combination of such powers and limitations are amenable to his "good corporate citizenship model", and then describes and defends his model in Section II through VI of his article. So what is the historical context of corporate rights? With respect to corporate rights, the legal construct of corporate "personhood" has resulted in both property rights being constitutionally accepted, beginning around the early 1900s, with the Lochner case, and later on constitutionally accepted liberty rights, recently culminating in the Citizens United and the Hobby Lobby case that expanded corporate rights as we know them today. (See Section IV below for more details). Regarding corporate limitations, we will discuss same in the next section below.

So what are directors and officers rights and duties regarding a corporation? Over the course of more than 100 years, there has always been much debate, and thus much ink spilled, on the duties and rights of its directors and officers in the corporation. With respect to directors and officers' duties, a directors fiduciary duty of care and the duty of loyalty have played a preeminent role in shaping their relationship between the company. Furthermore, the requirement of their "good faith" has always been a key component to show compliance therewith. So I will discuss both the individual level, and the corporate level, of corporate operations in relation to the Strine model.

In **Section II** of his article, Strine writes a brief summary of where corporate law is today. He does so by asking two simple questions, viz;

"(1) Who gets to determine corporate policy, and
(2) What are the typical statutory boundaries on the ends of corporate governance?" [Id. at 335]

Strine submits that the answer to both of these questions is actually uncontroversial. For the **first** question, Strine states, "the board of directors set corporate policy and oversees management's implementation of it", within the limits of corporate statutes and common law, of course. The answer to the **second** question he states is also uncontroversial because it is well known that a corporation can pursue a lawful business, by any lawful means, and through any lawful activities. State statutes that enable corporate activity also restrict them (e.g. by requiring such measures as statutory stockholder approvals on certain key matters). Regarding directors and officers, the courts equitable review of corporate fiduciary duties (i.e. the duty of loyalty and the duty of care) is the general standard for substantive judicial review of same. So what is the judicial review process of the lawfulness of corporate activities? Strine briefly mentions here what is called the Business Judgment Rule ("BJR"), used by courts as a gate-keeping rule to avoid second-guessing corporate decisions. So what is the BJR?

Briefly, Section 4.01 [a] of the Principles of Corporate Governance [ALI, Vol. 1 - 1994] states that a Directors or Officers' duty of care is "to perform [their] functions in good faith in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care of an ordinarily prudent person . . . in a like

position and under similar circumstances . . . subject to . . . the Business Judgment Rule where applicable". Subpart [c] of same states that "[a] director or officer who makes a business judgment fulfills the duty under this Section if [he/she]; (1) is not interested in the subject of the business judgment; (2) is informed with respect to the subject of the business judgment . . . and (3) rationally believes that the business judgment is in the best interests of the corporation." The BJR rule is considered to be generally consistent with most state laws, so it is considered "black letter" law. Simply put, directors and officers have very broad power to make business judgments on behalf of their company, without being second-guessed by the courts.

So what about shareholders? Basically, their rights are limited to their voting authority, per statute and their corporate charter, <u>subject to the authority of the board's primacy over policy</u>. The corporate board, and selected management, decide the policies of the corporation, subject to various legal rules. So because it is the board's decision how to conduct their business affairs by any lawful means, and by any lawful activities, Strine concludes that "there is <u>no</u> "right – left" divide (i.e. among corporate law scholars at least) that statutory corporate law, ***per se***, was designed to constrain corporate boards from using their power to cause corporations to embrace certain values with corporate funds. So given this broad <u>CAN</u> do discretionary corporate power, the real question is, what <u>OUGHT</u> corporations do with their broad power?

In **<u>Section III,</u>** Strine steps back to fill the reader in with a brief overview of the two prevailing views (i.e. "schools") of corporations, and how they have evolved over time. Basically, one school espouses the narrower "shareholder primacy" view of a corporation, while the other school espouses the broader "stakeholder" view. More specifically;

(a) The shareholder primacy school asserts that corporations are simply the tool of the stockholders, a quasi-agency theory of the firm, so to speak. The measure of choice for this shareholder centric school of thought is their focus on increasing corporate profits as the only efficient way to determine how well the corporation is doing. Simplistic stuff, based on the old legal construct of *principle–agent*. (The economist Milton Friedman was its primary proponent.)

(b) The second school is basically a more recent stakeholder governance model. It takes into consideration workers, communities where it operates, customers, taxpayers, and the environment beyond just the shareholders.

So basically the shareholder primacy school is very narrow, whereas the stakeholder school is broad. So where does the Strine model fit in? Strine submits that the difference between these two schools of thought is remarkably small. Albeit the left–right political machine wants us to believe that a broader political view of corporate powers will cause such unacceptable theories as socialism etc., on one side, the other side fears a "privileged elite class of CEOs" as he calls it. So let's see how Strine derived his good corporate citizenship model as his solution to allay both sides fears.

In the ABA Business Lawyer (Spring 2021/volume 76/Issue 2) titled "**The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy**", regarding the narrow shareholder primacy school, Strine wrote that "[t]he single-minded focus on company specific equity value obscures the question of whether the sum total of company's rent-seeking is a gain or drag on overall economic growth and social welfare. The sum total of stockholder gains resulting from corporate externalities is not a gain in societal wealth; it is a shift of ill-gotten gains to stockholders." [emphasis added] In sum, any model of the narrow shareholder primacy, or broader stakeholder interests [whether financial or academic] must take into account how the real world operates. [emphasis added] [Id. at 410-411] . . . [Employees need the company to be profitable to have the chance to keep a job and get raises and promotions. Creditors need to be repaid. Thus, corporate governance focused on stakeholders is not an authorization for management to do what it wants, it is a mandate for management to run a profitable company in a way that respects all stakeholders and benefits, not harms, society." [Id. at 430]

So if corporate theory is heading towards the more recent stakeholder school, what are the past economic models that the stakeholder school will be replacing? For that question, let's look back to another article written by Strine and Kovvali titled, "The Win-Win That Wasn't: Managing to the Stock Markets' Negative Effects on American Workers and Other Corporate Stakeholders". Aneil Kovvali and Leo Strine Jr., the University of Chicago Business Law Review, Volume I: 307 (2022). In the introduction to this article, the authors state that their focus is on the generation of influence in the 1990s to today that permeated the corporate legal field based on the book **The Economic Structure of Corporate Law**, Frank Easterbrook and Dan Fishel ("E&F"), (1991). As the Strine and Kovvali simply state, the claims in the E&F book turned out to be false, viz.; that "if corporations were run to maximize the profits of stockholders, and be highly responsive to their demands, that would benefit all of society". [Id. at 308] The E&F book based their conclusions on the simplistic "residual claimant theory" which basically rests on the notion that "unless other stakeholders receive their full returns, then stakeholders cannot gain." [Id. at 334] But the problem is that "stakeholders take–claim [their returns] all the time, and often in advance of other stakeholders". [Id. at 334] So the premise of E&F's theory is simply false according to Strine and Kovvali, because "[t]he rules against distributions without adequate capital are far too lax to protect stakeholders from this risk, and there is no serious argument that stockholders are really residual claimants except insofar as in occasional cases . . . [e.g. bankruptcy], and when risk-taking led by investors goes wrong, the investor class has been a beneficiary of huge government subsidies." [Id. at 335]. This cycle is now referred to in the press as "bail-out financial capitalism", and it has been costly both financially, environmentally, and socially. The E&F assumptions were flawed, and so the predictions were flawed, that a win-win economy, where maximizing shareholders profits automatically creates a win for all workers, consumers, and communities. It just did not happen. The reason is because the E&F theory "ignores a possibility of maneuvers that increased shareholder profits by squeezing other constituents more effectively: win-lose changes that are negative on net." It then becomes a "cycle of extraction" [by stockholders] to squeeze out more and more gains for the stockholders". [Id. at 314]

The ultimate paradox that Strine and Kovvali point out is that "[a] system of corporate governance that focuses each company on maximizing the immediate wealth of the company specific stockholders does not even maximize the overall economic welfare of equity investors." [Id. at 322] Why? It basically pushes companies to the "edge of irresponsibility" to shortcuts that harm all stakeholders to satisfy the shareholders demands. So how can such a run-away corporate shareholder primacy theory be controlled? E&F disingenuously assert that "stakeholders should rely on external legal protections outside of corporate law, without [them] favoring those protections and while generally supporting their erosion or repeal". [Id. at 323] The predictable result? "If the government fails to impose "new costs" on firms to force them to internalize the consequences of their conduct, firms will engage with socially destructive behavior." So, like the famous economist Milton Friedman did, who opposed unions, civil rights and environmental laws, E&F point towards the law to solve things, then opposes the law when it is time to do so. [Id. at 324-325] And the final laughable conclusion is that we see that E&F supported their theory by their outlandish conclusion that "corporations do not hold political power in America: they are too large and their investors, too many." [Id. at 327]

But wait, Kovvali and Strine write further that "these problems are not limited to the political branches . . . Conservative judicial decisions have exasperated defects in the political process by systematically strengthening the political power of corporations while systematically weakening the political power of organized labor and racial minorities. These designs have frequently involved the invalidation of legislation approved overwhelmingly by Congress, and the use of Lochner era reasoning that is selectively applied". [Id. at 328]. Even when the legislation does get enacted, it is thwarted by an "activist right wing judiciary with an arid approach to statutes, and a desire to repeal the New Deal and return to Lochner." [Id. at 328] So there you have it! A generation of corporate law theory, espoused by E&F and premised on Friedman-Reagan economic views, was based on a **false premise and made false predictions**. Sadly, this is where we are today, a loss of a whole generation of realistic corporate practices, and the damages therefrom. So what does Strine and Kovvali consider the antidote to this problem? The last paragraph of their article states as follows: "Although government regulation is an essential part of the solution, giving corporate boards room to tend to groups other than shareholders can also play a useful role. Given the failings of regulation, labor markets, product markets, and capital markets, corporations that strive only to maximize their stock price will predictably engage in socially destructive behavior. It is only by considering the needs of other constituents that corporate boards can fund and help implement true win-win for our nation and the world. [Id. at 338]

Fast forward to today, Strine puts forth his new "good corporate citizenship" model for corporations to exercise their power and solve the past errant theories. Basically, he writes that we need to move in a direction supported by what he calls "principles" that constitute best corporate practices widely shared by our society. So what are Strine's corporate "principles" as he calls them?

In Section IV, Strine sets forth some general contours of the political debate, including policing, abortion, political spending, woke capitalism, religious beliefs, boycotts, etc. What is important here is that all the above may

be legitimate discourse on what corporations ought to do, but what is not legitimate is saying corporations do not have such powers. They do so let's take a look at one historic case, and two more recent Supreme Court cases, that made broad corporate powers possible today.

In his book entitled "We The Corporations", the author Adam Winkler writes that "philosophers, both at home and abroad, engaged in a lively debate about the nature of the corporation around the turn of the 20th century. [Adam Winkler, **We The Corporations,** (2018)] Was the corporation a state created fiction, or was it a real entity with a will of its own? (American pragmatist, John Dewey, dismissed the various "theories" as inherently indeterminate. [Id. at 179]) Then in 1905 the Lochner case was decided. In the Lochner case, the Supreme Court of the United States overturned the maximum hours restrictions for workers under the theory that people have what was referred to back then as the doctrine of "liberty of contract" (i.e. a/k/a "freedom of contract" today). Let's first look at the facts of this historic case.

The basic facts are as follows: the defendant, Joseph Lochner, owned a small bakeshop. He hired a new employee to work for more than 60 hours a week. Lochner was charged with a misdemeanor because the New York Bakeshop Act prohibited such long weekly hours. Lochner appealed. The basis for overturning the verdict was the 14th amendment which forbids states from depriving "any person of life, liberty or property" without due process of law. This case, and the many that followed in the Lochner era, attacked multiple state powers to regulate labor, public health, and safety. When Justice Oliver Wendell Holmes wrote his famous dissent in this case, he noted that the constitution "is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state, or of laissez faire." He further wrote in his dissent that this case was based "upon an economic theory which a large part of the country does not entertain". Lochner v. New York, 198 U.S. 45 (1905) (In fact, corporations are not even mentioned in the due process clause.) This resulted in a period known as the Lochner Era, from roughly 1897 to 1936, where many business regulations were struck down by the Supreme Court based on Lochner. (The author also mentions that "[t]he Lochner court did grant corporations some new constitutional protections . . . [y]et it also articulated new limits on the scope of corporate rights.") The Lochner court basically held that a corporation had property rights, but not liberty rights. [Id. at 183] Winkler goes on to write that the Lochner court never did offer a justification for the distinction between property rights and liberty rights. And as Holmes simply concluded in his famous dissent, "[g]eneral propositions do not decide concrete cases." Holmes dissent was right as has been shown over time.

So summarizing the Lochner era, the Supreme Court imbued corporations with property rights, but not liberty rights at that time. Put another way, "[c]orporations had constitutional rights, but not the same constitutional rights as individuals". [Id. at 185] Many cases followed to attempt to define what "liberty" meant viz-à-viz a corporation, and what were the rights and limitations of same for corporate entities. But eventually freedom of speech and religion became the lightning rod to clarify how far the court will go in furthering corporate rights. So let's take a look now briefly at two more current Supreme Court cases on the subject of corporate rights.

In 2010, the Supreme Court decided the case of Citizens United v. Federal Election Committee, 508 U. S. 310 (2010). In that case, the Supreme Court held that corporations have a First Amendment right to spend their revenue on influencing elections for public office. Basically, this case has since then been branded as the "money is speech" case. The so-called libertarian theory of campaign finance law was promoted by those who opposed government regulation so they were happy to get behind it. (Likewise, attorneys who were staunch advocates for the free market concept of economics, that had previously influenced the legal system since the 1970s, were also in favor of it.) The economist Milton Friedman expoused same, when the University of Chicago was the epicenter of the law and economics movement. He basically blamed government regulations as an inefficient allocation of resources. For Friedman, government regulations were simply contrary to his free market ideology. Thereafter, in the 1990s, Easterbrook and Fischel wrote the seminal book "The Economic Structure of Corporate Law", which further espoused the economic theory of law. Over the decades, it gained traction, culminating in the two cases regarding corporate liberty rights. Citizens United was one of them, and the other was the Hobby Lobby case. So let's briefly review these two cases in greater detail.

In the first case of Citizens United, the Supreme Court held that, even though the appealed issue was strictly about whether the Bipartisan Campaign Reform Act did not apply to Citizens United, Inc. at all, because it was not "electioneering communication", the court instead decided on the broader question of the entire constitutionality of campaign finance restrictions. Far from being a narrow ruling, the court essentially held that money is speech, so corporations are entitled to spend their revenue on political party financing. So what happened? From a corporate law perspective, the author points out that Citizens United was fatally flawed because it obscured the corporation as an entity, and instead focused on the rights of some of its constituents (i.e., the shareholders) under the theory that a corporation is a mere "association" of individuals, a theory expoused about 200 years prior thereto. (So again, even though the United States Constitution does not even mention the term "corporation", the court had written it into the constitution. It then provided corporations with multiple property and liberty rights of a natural person, far beyond the original "personhood" construct.) Winkler concluded that the Citizens United case opened the flood gates of dark money in the political field, and thereby changed the system to what we sadly see play out today.

Second, in the case of Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), the Supreme Court addressed the issue of a national chain of craft stores that was required by federal law to include birth control in their employee's health insurance policies. The owners, David and Barbara Green, were Evangelical Christians, so they opposed same as a violation on a freedom of religion, first amendment basis. In rendering its decision, the Supreme Court essentially held again that, because they believed that corporations were merely an association of people, the government could not substantially burden a "persons" exercise of religion. Once again, like the Citizens United case, the court pierced the corporate veil, and basically focused on the individual shareholders without any consideration of the protection of the entity itself as provided by law.

So what does Strine say about these two major recent Supreme Court cases regarding the status of corporate law today? In the book **We The Corporations**, the author cited Strine as saying that the court has a fundamental misunderstanding of corporate law. Strine primarily focuses primarily on the corporate law construct known as "piercing the corporate veil". More specifically, Strine states "what [the justices] did was conflate the family which controlled Hobby Lobby with the corporation [itself]." The court looked right past the distinct legal status of the corporation and based its decision on the religious beliefs of the of the Green family itself. By allowing the company to claim the religious rights of its shareholders, the Hobby Lobby decision abandoned the principle of corporate "personhood". Put another way, the court should have addressed whether the corporation itself, as a legal entity, should be granted the right to have religious beliefs over and above the shareholders of same. As the author writes, "the members of the Green family were wholly distinct legal persons, whose rights were not an issue. The Green family depended on that separation to protect their personal assets; they would have insisted on a strict boundary between them and the corporate entity if a customer had fallen in a Hobby Lobby store and sued the Greens personally for damages". [Winkler at 387] Summarizing Strine's remarks, corporations are considered legal persons, not human persons. The basic principle of corporate law is that distinction, and in both cases Strine states the court got it wrong.

Winkler concludes his discussion by stating that the "Supreme Court has contributed to the cloaking of the corporation by looking right through the corporate form, and basing rights of the corporation on the rights of people associated together within it. While calling corporations an association of "people", the justices have rejected the core principle of corporate "personhood"; the independent standing of the corporation with powers and limitations separate and distinct from those of its members. [Id. at 395]

So here we are today with corporations having major powers. Two hundred years of constitutional cases has created the extremely broad reach of what corporations can do, that now sets the stage for Strine to assert a more narrow question of what corporations ought to do. Given all the factors above, Strine writes that we need to move in a direction supported by what he calls "principles" that constitute best corporate practices widely shared by our society. So what are Strine's corporate principles?

In **Section V**, Strine sets forth his vision of what he calls his "good corporate citizenship" model. For Strine, the solution can't rely on just regulatory structures (i.e. rules and standards), but rather creating corporate policies that take into consideration the corporate rights concomitant with corporate limitations. (Parenthetically speaking, Strine muses briefly here about Elizabeth Anderson's book on how unfettered corporate power is tantamount to private government, and perhaps how Rawls would simply ask is the system fair?) As Strine asks "are we stuck with corporations that callously seek profit in a manner wholly abstracted from social context, and with none of the real world heart and soul concerns that animate sole proprietors and ordinary workers in their conduct? [Id. at 358] His answer is no because By-Laws and policies are private law, so their elasticity enables them to be more company specific solutions, within the broader rules of public law as hard stops to errant policies. His

two-tier approach to corporate governance (at its floor level) basically embraces the Hippocratic construct of "first do no harm". So where is the Strine policy direction headed? For starters, his opening policy statement says, in pertinent part, as follows: "[m]ake no mistake about it, we know our job is to deliver solid profits for our investors in a sustainable way, but also recognizing that by sustainable we mean sustainable. We are not going to seek profit the wrong way. Our shareholders don't just invest in us, they invest in the entire economy, and they pay taxes and need jobs. They live in the real world . . . [so] we will pay a living wage and benefits . . . and do so in all nations and regions where we operate. We will focus on safety and quality. . . We will try not to harm the environment or contribute to climate change that endangers our economy and well-being." [Id at 358] Strine concludes by saying that "neither of the two major strands in American law . . . can really take issue with this corporations' policy." [Id at 359]

In **<u>Section VI</u>**, Strine sets forth several board approved sample model policies to address corporations rights and duties. He divides them into direct interest vs. indirect interest policies. His draft <u>direct interests</u>, Tier 1 model policies take into consideration such matters as (1) ethical profits, (2) sustainability, (3) respect for stakeholders, (4) employee living wages and benefits, (5) safety and quality of its products, and (6) fair taxes, etc. for approval by the board. For Tier 2, so-called <u>indirect interests</u>, he proposes a unanimous vote, such as "the entire board will approve any corporate policies in political and social issues, and will only address those more important to the company." [Id. at 363 - 368] So Strine basically sets up two tracts of corporate interests.

So how should Strine's non-ideological model realistically work? Metaphorically speaking, for the first tier of corporate **direct** interests, directors should put their foot on the gas. For the second tier corporate **indirect** interests, directors should put their foot on the brakes. He argues that respected scholars in the legal field would agree that his model has, in legal parlance, a "rational basis" with appropriate "guard-rails" as he calls it. Strine calls it a <u>principled approach based on shared values</u>. He then lists a dozen or so sample policies that fit his definitions and goals above. For example, one sample policy states; "[The company should avoid] environmental harm or any other harm that might unfairly shift cost from the company to its stakeholders or society". Another policy states that "[i]f the company purports to take positions on external public policy, its positions should result from a deliberative process of the Board of Directors based on the direct relevance of the policy question to the company, and not just reflect the personal view of the CEO without board backing." [Id. at 365, 366] Strine's list of director policies basically reflects the principles the specific corporation espouses (within the limits of corporate law) again on a two-tier basis, of whether the interest is direct or indirect to the overall company interests. (By analogy, corporate lawyers who represent companies doing business in multiple states, know the legal rule of "nexus". Generally speaking, it is the threshold of contact that must exist between a company doing business, outside the state it was formed in, which would require it to pay taxes and qualify to do business in said foreign state.) It would appear that Strine has premised his two-tier approach, on a sliding scale nexus-like basis, as to whether a company should, or should not, address and approve various suggested company policies.

So what about institutional investors? Strine asserts that there should be a "corresponding framework to guide the stewardship role" of the investors. He then lists sample policies, such as to "identify reasonable expectations for portfolio companies to create sustainable value the right way". For example, one investor policy is to "[d]emand corporations use the suggested guard rails [for corporations themselves] over political and social involvement." Another Strine investor's policy sample is "[c]hanneling engagement efforts toward those inward-facing issues – how is the corporation treating the people its conduct affects? . . ." [Id. at 369, 370]. So basically investor policy should track corporate policy.

So what does contemporary corporate theory say with regard to Strine's sample principled policies and the current framework of corporate governance. There are many experts weighing in on the "new normal" of corporate governance practices. One such organization is the American Bar Association. It recently published the ***Corporate Directors' Guidebook* – 7th Edition** (ABA, The Business Lawyer, (Fall 2020, Vol. 75, Issue 4). In the Foreword, it states, in pertinent part, that its primary purpose is to provide practical guidance to corporate directors in meeting their responsibilities. The ABA Guidebook focuses on the role of the individual director, in the context of their duties and functions as the board, and its key committees (e.g. audit, nominating and governance, and compensation). As such, the 7th Edition also explores the role of a director's engagement between a corporation and its shareholders. Regarding investors, in Chapter 10: The Relationship between the Board of Directors and Shareholders, the ABA makes clear that the "responsibility for managing the business and affairs of the corporation is vested in the board of directors. Shareholders do not have direct management rights or responsibilities under state law." [emphasis added] [Id. At 2820] Simply put, the ABA makes it clear that there is no "agency" relationship between the two corporate bodies. The "engagement" of shareholders with management and directors is set forth in this chapter and depends on many factors, as well as preferences between the parties, so there is no "one size fits all". For example, §3, *Environmental and Social Issues,* states in pertinent part, that investors are focusing on how companies in which they invest in, address these issues (i.e., ESG), including shareholders submittal of proposals at annual shareholder meetings. We all know the growing "ESG" trend in corporate environmental, social and governance responsibilities, where past "externalities" are now becoming more "internalities". As more metrics become normalized, viz.; Environmental (such as biodiversity, climate change, water resources, etc.), Social (such as human rights, labor and health standards, customer responsibility, etc.) and Governance (anti-corruption, risk management, transparency, etc.), the more qualitative matters are now being measured. As we all know, ESG governance is now on its way to being accepted as a major factor in long-term value creation and risk management. A key role of a company's directors is to exercise oversight (i.e. assess, address and monitor) over ESG risks and opportunities. Lastly, regarding activist investors, directors must deal with investors involved in short-term value extraction as well. In sum, ABA practical guidance points to board policies that create sustainable solutions, and likewise takes into consideration the relationship of the shareholders and stakeholders, in the overall company eco-system. I believe that Strine's model takes these ABA corporate guideline relationships into consideration with its principled policies.

In the end, Strine's proverbial bottom line goal is that he wants both left and right sides to focus on encouraging corporations and institutional investors to "respect all corporate stakeholders in the pursuit of sustainable profit". Simply stated, it's about "making money the right way" so that "all Americans can get behind it, so it leaves no one out, and does not divide us." [Id. at 370]

So could Strine's model perhaps become a new corporate norm? The famous author Joseph S. Nye Jr., in a recent Foreign Affairs magazine article, stated that "[n]orms are not effective until they become common state practice, and that can take time. . . Some scholars have argued that norms have a natural life cycle. They often begin with norm-entrepreneurs, individuals, organization social groups and official commissions that enjoy an outsize influence on public opinion. After a certain gestation period, some norms reach a tipping point, when cascades of acceptance translate into a widespread belief and leaders feel that they would pay a steep price for rejecting it. . . . Economic change can also foster a demand for new norms that might promote efficiency and growth." [Joseph Nye, Jr. The End of Cyber-security?, Foreign Affairs, 32 Jan/Feb. 2022] I believe that the time has come for a new model in corporate practice, and Strine just may have a good enough model to foster a new norm on corporate behavior that is way overdue. Bail-out capitalism needs a better solution. The Strine "good corporate citizenship model" may just be such a good start for a new corporate norm.

So what about one example? Let's look at the issue of what is perhaps one global social problem that companies can help ameliorate with their broad corporate powers? Let's take, for example, the problem Thomas Picketty raised regarding to the rise of income inequality and ask how the Strine model can be useful?

In the seminal book **Capital in the 21st Century**, the author Thomas Picketty addresses an important economic issue, viz.; income inequality. He writes; "since the 1920s, income inequality has increased significantly in the rich countries, especially the United States, when the concentration of income in the first decade of the 21st century regained – indeed, slightly exceeded – the level attained in the second decade of the previous century. It is therefore crucial to understand clearly why and how inequality decreased in the interim . . . The economists of the 19th century deserve immense credit for placing the distributional question at the heart of economic analysis if you're seeking to study long-term trends. Their answers were not always satisfactory, but at least they were asking the right questions. There is no fundamental reason why we should believe that growth is automatically balanced. For far too long, economists have neglected the distribution of wealth, partly because of Kuznet's optimistic conclusions and partly because of the professions undue enthusiasm for simplistic mathematical models based on so-called representative agents." Thomas Picketty, **Capital in the Twenty-First Century** (2014) at 19, 20]

So given the above issue, Picketty writes that the purpose of his book is to ". . . focus not only on the level of inequality as such, but to an even greater extent on the structure of inequality, that is, on the origins of the disparities in income and wealth between social groups and on the various systems of economic, social, moral, and political justification that have been invoked to defend or condemn these disparities. Inequality is not necessarily

bad in itself. The key question is to decide whether it is justified, whether there are reasons for it." [Id. at 25] . . . Further, the "spectacular increase in inequality largely reflects an unprecedented explosion of very elevated income for labor, the veritable separation of the top managers of large firms from the rest of the population. One possible explanation of this is that the skills and productivity of these top managers rose suddenly in relation to those of other workers. Another explanation, which to me seems more plausible, and turns out to be much more consistent with the evidence, is that the top managers by and large have the power to set their own remuneration in some cases without limit and in many cases, without any clear relation to the their individual productivity, which is any case is very difficult to estimate in a large corporation. [Id. at 32, 33] Once this corporate activity occurs, it has a major outsized influence on what happens next, and Picketty puts that into a simple equation he calls the inequalities divergence. The author characterizes the inequalities divergence as **r>g** (where "**r**" stands for the average rate of return on capital (i.e. profits, dividends, interest, rents and other capital), and "**g**" stands for the rate of growth of the economy, that is, the annual increase in income or output.) Simply put, "when the rate of return in capital significantly exceeds the growth rate of the economy, then it logically follows that inherited wealth grows faster than output and income. Under such conditions . . . the concentration of capital will attain extremely high levels - potentially incomparable with the meritocratic values and principles of social justice fundamental to modern democratic societies". [Id. at 34] To sum up, Picketty writes that "the process by which wealth is accumulated and distributed contains powerful forces pushing towards divergence, or at any rate toward an extremely high level of inequality . . . [T]he fundamental **r>g** inequality, the main force of divergence in any theory, has nothing to do with market imperfection. Quite the contrary; the more perfect the capital market, the more likely **r** is to be greater than **g**." It is possible to imagine public institutions and policies that would counter the effects of this implacable logic . . ." However, he believes that responses to this issue may be "far more modest and less effective." (Id. at 35, 36)

Given Picketty's conclusion, the question is can a new model of how corporation's operate help address the current income inequality social problem? If so, is the Strine model useful? I think so. The past few years has highlighted what the term "essential employee" means, and the disparity of pay for same, and all other employees in need of a living wage. It's time for a new corporate model that can address this problem as just one example. And creating a better eco-system for a company to operate in is a good start, albeit by no means a comprehensive finish. Time will tell, but only if the Strine model becomes the new corporate norm.

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