

Corporate Short-Termism - In the Boardroom and in the Courtroom

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Mark Roe

Harvard University and ECGI

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Keywords: short-termism, financial markets, private equity, venture capital, profit-driven externalities,

Mark Roe

Harvard University and ECGI
David Berg Professor of Law
Harvard University, Harvard Law School
e-mail: mroe@law.harvard.edu

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CHAPTER

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1 Introduction

THE belief that short-term stock market trading undermines corporate decision-making at the top has long been part of corporate governance discourse and policymaking, often endorsed by important judicial adherents and, in recent years, the issue has become a focus of the Securities and Exchange Commission (SEC).¹ In the broad policy-interested sector, stock-market-driven short-termism has also been blamed as one of the principal drivers of climate and environmental degradation. The short-termist issue and related consequences have been important in European Union corporate lawmaking pronouncements.²

A classic and effective attack on financial market short-termism came during the takeover wars of the 1980s, via Martin Lipton's well-known justification to further empower managers to defeat hostile takeovers: "It would not be unfair," he wrote, "to pose the policy issue as: Whether the long-term interests of the nation's corporate system and economy should be jeopardized in order to benefit speculators interested ... only in a quick profit ... ?"³ Over the years the chairs of the SEC, Congress,⁴ business analysts,⁵ and the business media have regularly excoriated trading markets as perniciously shortening corporate time horizons, justifying corporate law rules that insulate boards from markets. Leading Delaware corporate law judges, as people with deep experience in corporate lawmaking and policy, have indicated in off-the-bench analyses that the short-termist issue is something they take seriously. Short-termism's most prominent appearance in the past decade has come from the belief that corporate short-termism induces large, public companies to be socially irresponsible, particularly when debasing the climate. This all leads us to the questions posed here: Should fear of short-termism weigh heavily, or at all, in corporate lawmaking today? Does the evidence show it is contributing in a major way to corporate misdirection? Is it central to environmental and climate problems?

Management's attention to quarterly earnings is well known, inducing dubious, perhaps misleadingly illegal, shifts in sales and profits.⁶ Profit-focused corporations pollute and overuse hydrocarbons compared to their total social value. The question I pose here, though, is whether such earnings management systemically degrades real investment and real economic activity, and, most pointedly, whether the policy tools available to courts making corporate law are appropriate for remedying the purported problem of quarterly focus and climate degradation.

The short-termist argument is afflicted with six substantial debilities. First, put pollution to the side and focus first on basic economic performance. One must evaluate the American economy from a system-wide perspective. The American economy is replete with venture capital markets, private equity markets, and many privately held firms. As long as venture capital markets, private equity markets, privately held firms, and similar conduits mitigate or reverse enough of any short-term tendencies in the public securities market, then the purported problem is not a systemic economic issue. We would have no corporate law reason to reorient the system to pick up one type of slack.

Second, the evidence that the stock market is, net, short-termist is inconclusive. There is indeed much evidence supporting the conclusion that it overvalues quarterly earnings. But there is also much contrasting evidence that stock market sectors often overvalue the long term, most obviously in the intermittent bubbles in technology and other new industries. The lofty price-earnings multiples long accorded Amazon, Apple, and Google are suggestive of a market that appreciates the long term; the dot.com bubble of a decade ago suggests that the markets can overvalue the long term. Hence, we cannot focus solely on evidence of short-termism in our evaluation but must evaluate excessive long-termism as well. Intermittent overvaluation in the stock market is not a virtue, but its frequent occurrence tells us that the market is not uniformly short term. This over-under problem is what one would expect from an imperfect institution: sometimes it overshoots, sometimes it undershoots, and sometimes it's on target.

Third, mechanisms inside the corporation may well be important sources of short-term distortions and these internal distortions can be, and would be, exacerbated by insulating boards further from (supposedly even

more short-termist) external financial markets. The chief executive officer (CEO) is still the most important decision-maker inside the firm, and human psychology suggests that CEOs will typically want good results to occur on their watch and prefer that poor results be pushed into the future, beyond their tenure. With average overall tenure for CEOs now at seven years, the typical CEO can expect about three more years at the top. Moreover, senior managers not yet at the top but with an eye on their future job prospects in the labor market want strong results before the next headhunter calls them. There is considerable evidence consistent with managerial distortions being a major source of short-term focus. Boards and managers may well have leeway in setting the horizon for compensation and that horizon appears to be shorter than the duration of institutional investor holdings.

Fourth, courts are not well equipped to evaluate this kind of economic policy and should leave this task to other regulatory institutions that have better remedies available than courts do. Some, like the Federal Reserve and the US Treasury, are better positioned than courts to assess the extent, location, and capacity for lawmaking to ameliorate the purported problem. For reasons similar to those that underpin the business judgment rule, courts should be as reluctant to make economic policy decisions as they are to second-guess unconflicted board business decisions.

Fifth, the widely held view that short-term trading has increased dramatically in recent decades is unquestioned but misinterprets the data. The duration for holdings of the country's major stockholders, such as mutual funds at Fidelity and Vanguard, and major pension funds, has not shortened. Rather, a high-velocity trading fringe is moving stock rapidly through their computer systems. But these new high-velocity trading patterns do not affect the major stockholding institutions and, hence, should not yet affect corporate law thinking.

Sixth, bring back climate change degradation and social irresponsibility, which according to many come from stock market and corporate short-termism. If the large corporation's time horizons are not particularly distorted to the short-term—as the first five considerations indicate—then short-termism plays only a limited role in the responsibility problem. And the core problem here for social responsibility and climate change is not time horizon distortion, but the corporation's propensity to maximize profit, even if doing so externalizes costs on the rest of society. The problem is real, but it's an externalization problem, not a short-termism one.

Each of these six weaknesses of the short-termist view is substantial. Each weakness alone means that courts and corporate lawmakers should reduce their fear of stock-market short-termism. Overall, it is no more than a minor and contested consideration in the corporate lawmaking balance.

But what then explains the persistence of the short-term view? Perhaps the persistent view that the public firm's time horizons are too short comes from proponents' preference for the policymaking consequences of that view, even if the time horizon is not too short. After all, if shareholders' horizons are seen to be too short, that would justify lawmakers giving more weight to stakeholders' well-being and less to shareholder profitability. And it would justify managers and boards having more autonomy from those short-term shareholders.

Regardless, the six weaknesses together make the standard, direct case for excessive stock market short-termism untenable.

2 The Influence of the Short-Termist Argument

In this section, I recount the persistent influence of the short-termist argument on corporate law policy thinking, particularly its implication that managers should be isolated from financial markets so that they may be free to pursue longer-term horizons. Of course, the long term is not to be preferred, just for its own sake, since it could yield poorer returns and waste resources by investing in business that will not provide consumer value years down the road. The short-termist view is rather that financial mechanisms induce corporate directors and managers to favor immediate but lower-value results over more profitable long-term results.

2.1 Takeovers in the Boardroom

Rapid trading in stock markets, with a diminishing breed of long-term stockholders, is thought to be the primary culprit in inducing too strong a focus on short-term results inside the corporation. Quarterly results trump long-term investment, particularly long-term technological development.⁷ These pernicious effects of securities markets are then emphasized by those seeking to influence policymaking that would insulate managers and boards from markets. Thus, Martin Lipton, the corporate world's most prominent promoter of board autonomy over the decades, offered short-termism as a primary reason why hostile takeovers needed to be stopped.⁸ Shareholder-induced corporate short-termism, he argued, threatened the overall health of the economy.⁹ Money managers "are wildly skewed to short-term results."¹⁰ This view justifies more board autonomy from market influence via five-year board terms. Overall, it is perhaps corporate law's longest-running modern refrain:¹¹ financial short-termism demands that managers and boards be further insulated from financial markets, from leveraged buyout pressures, from hedge fund activism, and from capital markets generally, and that they be accorded enhanced autonomy to resist market pressure for performance, for fear that the pressure will overemphasize short-term results.

The issue has persisted in media and corporate discourse. Arthur Levitt and William Donaldson, chairs of the SEC, saw the securities markets' propensity to induce corporate short-termism as a problem needing public attention.¹² Prominent executives and corporate analysts have pushed forward parallel points.¹³ Media attention to short-termism has further delegitimized the securities markets' influence on corporate decision-making, with a turn in recent decades to short-termism as inducing corporate social irresponsibility.

2.2 Relevance in Recent SEC Rulemaking

The potential for pernicious stock market short-termism persists on the SEC's agenda. The SEC ran a roundtable on short-termism in 2019 and the issue figured in its justifications for recent rulemaking.¹⁴ When an investor buys a significant block of stock, it must disclose the purchase. The disclosure typically drives up the price of the stock, making it more expensive for the investor to acquire more stock and sometimes dissuading the investor—often an activist—from acquiring a block in the first place. The SEC recently shortened the period for disclosing that a block has been acquired.¹⁵ When justifying the shortening, the SEC noted short-term considerations. It referred to a commenter who inveighed against the potential short-term orientation of the investor, which could make "management ... agree to their short-term demands that may or may not be in the long-term interests of [other] shareholders, employees, and other stakeholders."¹⁶ The SEC also pointed to another commenter who said "that hedge fund activism could be contributing to an emphasis on short-term gains over sustainable, long-term growth that benefits longer-term investors."¹⁷ The degree to which commenters affected the SEC's thinking and the degree to which the commissioners already had these views is a matter of speculation.

2.3 Views from the Delaware Judiciary

Today, the state corporate judiciary decides corporate election rules, the ease of insurgent proxy contests, much of shareholder activists' freedom to maneuver, and the rules governing the occasional takeover offers. Influential thinkers and decision-makers in the Delaware corporate lawmaking structure have seen the short-termist argument as important to each of these. The judges do not generally articulate this broad view deeply and widely in their decisions and written opinions, but they have offered the power of the short-termist view in off-the-bench writings and have brought the issue into their opinions in recent years.¹⁸ The thesis here is that although the subject is ripe for out-of-court consideration, the short-termist rationale is not one that should influence on-the-bench thinking for election rules, proxy rules, the rules governing takeovers, shareholder activism, and corporate social responsibility.

Thus, Justice Jacobs of the Delaware Supreme Court sought means by which Delaware's corporate law would bolster long-term investment capital,¹⁹ justifying three-year board terms.²⁰ Leo Strine, as vice-chancellor of the Delaware Court of Chancery, viewed the short-termism problem as a "substantial policy dilemma."²¹ "It is jejune," he said, "to demand that CEOs and boards manage for the long term when the stockholders who can replace them buy and sell based on short-term stock price movements, rather than the long-term prospects of firms."²² Important Delaware decisions have assessed the importance of some shareholders' purported short-term orientation.²³

With important judges thinking in their extra-judicial analytics that short-termism is a problem and wondering whether corporate law could help combat the problem, we must consider whether the issue should affect corporate lawmaking more directly. I conclude here that it should not.

3 The Short-Termist View

3.1 The Argument

The core short-termist concept is that because securities traders hold their stock for such a short duration, they look for strong corporate results only during the period they hold the corporation's stock so that they can sell profitably.²⁴ Many institutional investors, such as mutual funds, are afflicted with this short horizon because they seek to show strong short-run results to make their funds attractive to new investors.²⁵ Apart from the investors' holding periods, pension fund managers seek good short-term results to raise the odds that their management contracts will be renewed and to obtain new ones,²⁶ while hedge fund managers are often compensated on immediate results.²⁷ Hedge funds need good results from the current investment pool for new investors who review the funds' track record. And because they cannot evaluate complex, long-term, technologically sophisticated information well, investors often rely on simple signals to evaluate the value of the corporate stock in their portfolio. Quarterly earnings results accordingly loom larger than they would otherwise because of the quarterly numbers' simplicity.²⁸

For the trading argument to have traction, these stock market trading structures need a transmission mechanism into the corporation to affect corporate time horizons. That is, even if the short-term traders furiously moved a company's stock every nanosecond, managers could still be free to decide on corporate investments and time horizons, as the furious traders would typically be incapable of intervening in corporate governance decision-making even if they paid attention to corporate fundamentals. So more is needed—a transmission mechanism from the market to the boardroom.

In an earlier era, the transmission mechanism from short-term holding to corporate action was thought to be the hostile takeover. In the current era it would be shareholder activism and executive compensation, with boards more willing to fire CEOs and more likely to come under activist pressure if short-term financial results

are poor, partly because directors fear for their own jobs or reputations. If senior management is compensated based on stock market returns, then management will tend to replicate the time horizons of the stock market. The end result would then be that boards and senior managers would forgo long-term value maximization for short-term results, all toward the end of pleasing the stock market.

By breaking the transmission mechanism (via longer election periods for directors or via greater managerial and board autonomy from the market), corporate leaders have sought to foster sensible long-term corporate behavior. Is this action wise?

3.2 The Evidence in Favor

There is indeed hard evidence supporting the short-termist argument. Matched samples of privately held and publicly held firms show that the privately held firms invest more in their firm's operations than the publicly held half of the sample.²⁹ Matched samples of firms that went public and similar firms that did not show key personnel leaving the public firm shortly after the offering suggest an inability of the relevant firm to manage and create for the long term.³⁰ Corporate managers attuned to short-term thinking (as evidenced by their persistent reference to the short term in their communications with investors) had a short-term investor base with higher turnover than average. (Whether the first fact is caused by the second is not shown in the research, but the possibility that causation runs from shareholder horizons to managerial orientation cannot be dismissed.³¹) Private equity funds with shorter time horizons invest in firms at a later development stage than those with a longer horizon.³²

In addition, there is evidence that markets underestimate long-term corporate cash flows.³³ And there is evidence that mispriced public firms invest in line with the time horizons of their major investors.³⁴ Earnings management and earnings manipulation are regularly apparent.³⁵ Initial public offers often use dual class stock, with insiders obtaining higher voting rights that insulate them from stock market pressure. More generally, corporate managers regularly bemoan the pressure from shareholders to produce strong quarterly results³⁶ and report in a prominent study that they would give up shareholder value to report better earnings.³⁷

Thus we have the basic corporate argument for pernicious stock market short-termism and see basic evidence that it exists.

4 Difficulties with the Basic Argument: Concept

But the short-termist argument faces counters that largely neutralize the idea that fears of short-termism should bear much weight in corporate lawmaking. One class of counterarguments is primarily theoretical, the other primarily factual. As far as I can tell, several of these theoretical arguments that I presented earlier were then new to the discourse.³⁸

4.1 Market Correctives

If short-term stock market pressures are inducing firms to give up value over the long run, then firms and markets would have incentives to develop institutions and mechanisms to facilitate that long-run profitability. Those that do will over the long run make more money. For example, if short-term trading reduced firms' time horizons perniciously, then some investors could profit by trading for the long term, by placing longer-term bets, and by developing credible mechanisms so that they will hold onto profitable long-term ventures. Such efforts might be incomplete in inducing the system to improve,³⁹ but the market system would have incentives to push in that direction. If small stockholders find it not to be worthwhile to evaluate long-term, complex information, then the market has incentives to produce mechanisms that facilitate larger block holdings for longer time periods. Persistent rules and politics stymieing such efforts are plausible, particularly in the US. After all, the US has had a long history from the early 1800s until recently of the polity seeking to confine financial power, reduce and weaken powerful blockholders and render them smaller, less pervasive, and less effective; I previously analyzed these rules as likely to hinder blockholder efforts to overcome the frequent information transmission breakdowns from inside the firm to stockholders.⁴⁰ But market incentives to counterbalance have arisen in recent decades, even if restrained and insufficient.

Private equity could correct some short-termism. If public markets induce a publicly held firm to be excessively short-term oriented, then private equity holders, often with time horizons of years, sometimes stretching toward a decade, could buy the company, take it off the public market, and reorient its business model toward the longer term. If a firm produced poor profits because it overly focused on quarterly results, the marketplace incentives would be to move the firm into private equity's hands, where the horizons are longer.⁴¹

Aggregate data is consistent with private equity providing a longer-term alternative to public markets, when that alternative is useful. Firms that private equity take private have increased patenting efforts in the target firms' core areas of strength. An older study finds increased spending on research after firms are taken private.⁴² These suggest a shorter-than-optimal public market; but they also point to an existing cure for (or mitigation of) the resulting problem. And other studies find that higher inside block ownership is associated with more long-term investment.⁴³ One study shows that hedge fund ownership is associated with "better quality, higher impact innovations" than those in firms lacking hedge fund ownership.⁴⁴ Shareholder value holds up over the long term after activist hedge fund intervention.⁴⁵

Academic work on stock-market-driven short-termism has about half of the studies finding evidence of short-termism (often associated with quarterly reporting) and half of the studies not finding evidence of short-termism where the short-term theorists would expect it to be (often in relation to shareholder and hedge fund activism).⁴⁶

More generally, product market competition can partially correct short-term financial markets. For some excessive short-termism, the firm will find itself behind the curve technologically at a later date. When it finds itself lagging, it will have the incentive to catch up.

4.2 Trade-Offs

If stock markets are indeed excessively inducing corporate short-termism, and if board and managerial isolation from financial markets is a partial solution, then unintended costs need to be accounted for in any cost-benefit analysis of a policy of insulating boards and managers from stock market influence, as there are obvious costs that come from further insulating them. If managers drift away from efficient, competitive behavior, financial markets can sting them into returning to a better corporate strategy. If boards and managers can freely dismiss market signals as the misguided views of short-term traders, if corporate policymakers bless that view, and if their blessing of that view leads to further isolation of boards and managers from markets, then the corrective could (1) go too far and (2) facilitate managerial drift. These managerial agency costs are well known. The point here is that there is a trade-off of costs and benefits, even if the market turned out to be, net, short-term oriented.

4.3 Short-Termism in the Courtroom: Limits to Judicial Correctives

Is the courtroom an appropriate venue to consider short-termism? Proponents of board autonomy may well wish that short-termism be part of the judicial decision-making mix and could hope that, if the short-termist view proved to be persuasive in the courtroom, it would affect the atmospherics of corporate judicial decision-making. Litigants have pressed that view on the Delaware Chancery Court.⁴⁷ However, although astute judges sympathized with the short-termist view in off-the-bench analyses, the short-termist view was not until recently explicitly weighed in their written opinions.⁴⁸ Still, with the off-the-bench statements common and clear, one has to assess whether off-the-bench thinking affects judicial courtroom perspectives even more deeply and more often than the short-termist view is articulated in the written judicial opinions.

Consider the 2011 Airgas takeover opinion, which was a major decision. It does display courtroom viability for the short-termism argument—rejected at first in the opinion and then reentering as relevant in the decisional mix.

The target firm defendants asserted in Airgas that the target's short-term stockholder base justified strong defensive antitakeover measures. Said Chancellor Chandler:

Defendants' argument ... [is] based on the particular composition of Airgas's stockholders (namely, its large "short-term" base). In essence, Airgas's argument is that "the substantial ownership of Airgas stock by these short-term, deal-driven investors poses a threat to the company and its shareholders."⁴⁹

And

[The defendants assert that the board should have more defensive room because of a] risk ... that a majority of Airgas's [excessively short-term focused] stockholders ... will tender into Air Products' offer despite its inadequate price tag, leaving the [longer-term] minority "coerced" into taking \$70 as well.⁵⁰

At first, the Chancellor rejected this short-termist argument: "The defendants do not appear to have come to grips with the fact that the [short-term] arbs bought their shares from long-term stockholders who viewed the increased market price generated by Air Products' offer as a good time to sell."⁵¹

The Chancellor's strong rejection of the time horizons argument, however, did not persist in the opinion's conclusion. He ultimately ruled for the defendants and, with time horizons in mind, he turned the defendants' assertion into a question: Were enough stockholders "so 'focused on the short-term' that they would 'take a smaller harvest in the swelter of August over a larger one in Indian Summer?'" he asked, quoting the

defendants.⁵² Yes, he concluded: Both sides' experts testified that the short-term arbitrageurs would tender "regardless of whether the price is inadequate," even if it failed to reflect the company's long-term value.⁵³ The rhetoric of short-termism was in play in Airgas, in the context of a takeover.

In 2021, the Chancery Court confronted a short-termist argument again. The court saw "short-termism [to be] conspicuous in the policy debate," but ultimately did not assess its relevance for Delaware corporate law. Yes, it "could rise to the level of a cognizable threat." But the assertions of stockholder short-termism in the case at hand were hypothetical and "raised [only] in the abstract with "no 'specific, immediate' activist play seeking short-term profit or threatening disruption."⁵⁴ Elsewhere, though, the court expressed skepticism, not on whether shareholders are too often short-term focused (the central policy predicate) but on whether that debility should have a major impact on corporate law decision-making. Delaware courts usually, said the court, seek not to assert judicial supremacy over business decision-making, even if that decision-making is mistaken⁵⁵ (as long it is not perniciously conflicted).

And in 2022, the Chancery Court accepted the possibility that a hedge fund is an "archetypal short-term investor" and that consequently it was "reasonably conceivable that [the director, who was associated with a purportedly short-term hedge fund, faced, because of that association a disabling conflict in the ... case." As such, the possibility of a conflict was accepted at the pleading stage and the complaint against the board was not dismissed—and not dismissed because the Delaware court was sympathetic, at least at the pleading stage, with the basic negative short-term viewpoint.

But, returning to the respect for the short-term argument in Airgas, courts are not the right institution to focus on short-termism for general economic policymaking. Consider that the judicial deference embedded in the business judgment rule is based largely on the presumption that judges are poorly positioned to make, or to second-guess, boardroom business decisions. The corporate judiciary ought to be even more reluctant to assess whether the corporate economy is too short-term, too long-term, or just right. Even a state legislature, with its parochial funding concerns, is ill-placed to make such judgments beyond firms operating primarily within the state's own borders. To allow short-termism issues into the courtroom is to facilitate a type of business and economic engineering that the best business judges rightly decline to do in more compelling situations, such as that of a single mistaken business decision for a firm.^{56,57}

Other institutions and other policymakers are better suited to assess how well the economy is handling time horizons. Moreover, other policy avenues beyond corporate lawmaking, such as tax policy or policy on ownership structure, are better suited to handle any short-termism, if policymakers conclude that stunted horizons are real and pernicious.

On ownership structure and short-termism, a long-standing view has seen impediments to large blockholding as inducing more short-termism than is optimal, particularly because some information travels badly from inside the firm to diffuse public markets. Blockholders, I argued, could better handle complex, technological, and subtle information than diffuse stock markets. They could signal to public stock markets the blockholder's view that a managerial long-term decision was good for shareholder value.⁵⁸ Says the global managerial director of McKinsey & Company in discussing the problems of short-termism, "[t]he most effective ownership structure tends to combine some exposure in the public markets (for the discipline and capital access that exposure helps provide) with a significant, committed, long-term owner."⁵⁹

Similar considerations of judicial modesty should induce courts to be wary of on their own handling climate change or promoting stakeholders. The strongest reason here for skepticism on the value of judicial activism here is that climate change, environmental degradation and the like are excessive primarily because they are externalities to the corporation: the polluter profits but bears only some of the cost of that pollution. This mismatch is true in both the short run and in the long run. I analyze this aspect further in *Missing the Target* and in my article in *Business Lawyer*.⁶⁰

4.4 Regulatory Correctives

Consider, moreover, that the other remedy that has often been prominently touted over the years for baseline stock market short-termism has been a Tobin tax on rapid trading. When policy thinkers such as Joseph Stiglitz, Lawrence Summers, or the blue-ribbon Aspen Institute considered short-term stock markets a problem, they turned to a Tobin tax as the appropriate mechanism to reduce short-termism, *not* to using corporate law to increase board and managerial insulation.⁶¹

Thus, three of the most prominent policy measures to reduce unwarranted short-termism have been a Tobin tax on securities trading, a sliding-scale capital gains tax tied to the length of the holding period, and facilitation of more and larger blockholders. The corporate judiciary and state legislatures constructing corporate law cannot implement most such measures and cannot well assess whether such measures are the best means to mitigate any securities market short-termism.

5 Difficulties with the Basic Short-Termist Argument: Facts

The short-termist theory faces offsetting facts, which make it unwise to place much weight on the theory for corporate policymaking. First, even if the stock market is excessively short-run focused and even if there are transmission mechanisms that bring excessively short-term financial markets' time horizons into corporate decision-making, policymakers need to see the American economic system as a whole, where there are countermeasures. Second, there is considerable evidence of a stock market that can be excessively long-term; policies that discourage pernicious short-termism could encourage pernicious long-termism. Third, substantial, albeit unheralded, sources of excessive short-termism come from inside the corporation. The average duration for executive compensation appears to be shorter than the average duration of institutional-investor stock-market holdings, for example. Fourth, the purported shortening of investor holding periods during recent decades may be exaggerated. Fifth, the facts of the firm's basic business environment are changing more quickly than ever—via technological change, globalization, and government policy. With the outside pressures changing more rapidly, the firm's business horizons should indeed change and become shorter.

I take each of these offsetting facts in turn.

5.1 The Economic System

As said, alternatives to public ownership can be structured to plan for the long term: venture capital markets and private equity markets, privately held firms, and government financing of long-term research, to name the basics.⁶² Moreover, securities markets provide substantial other benefits—in diversification, liquidity, and aggregation of capital from disparate investors. These benefits may well exceed any time horizon costs. Lastly, short-termism may be a problem for one firm or another, but still not be a problem for the American economy overall. One firm can be short-term, but that presents a competitive opportunity for another firm to profitably fill the gap.

True, these alternate sectors to public markets may not be big enough. Or they may not be long-term enough—venture capital and private equity often have horizons of five to ten years. Perhaps that is not long enough. Privately held firms may weaken as their founders age. Governments make mistakes. The point is not that these institutions are fail-safe but that they offset any real stock market short-termism, and often they are substantial offsets.

5.2 Stock Market Long-Termism

The substantial evidence of financial market long-termism tends to be ignored in this debate, although public firms are often overinvesting compared to their private counterparts.⁶³ Financial economists return results that are inconsistent with institutional investors causing corporate short-termism. “Indeed,” say two prominent researchers, “we document a positive relation between industry-adjusted expenditures for [property, plant, and equipment] and R&D and the fraction of shares owned by institutional investors.”⁶⁴ After analyzing “corporate expenditures for property, plant and equipment (PP&E) and research and development (R&D) for over 2500 US firms,” they conclude that “[w]e find no support for the contention that institutional investors cause corporate managers to behave myopically.”⁶⁵ In industries dependent on outside capital, public firms “generate patents of higher quantity, quality, and novelty compared to their private counterparts.”⁶⁶ And again, “[c]ontrary to the view that institutional ownership induces a short-term focus in managers, we find that their presence boosts innovation.”⁶⁷ Particularly when managers are less entrenched, the authors find, institutions induce the firm to innovate more effectively.

Companies whose managers’ compensation is tied to volatile stock prices overinvest in R&D, compared to companies whose managers’ compensation is not so closely linked.⁶⁸ The bulk of the studies show institutional ownership to be associated with *higher* R&D intensity.⁶⁹

Consider the regular, but intermittent high valuations accorded to one sector or another of the financial market. At the very beginning of the twenty-first century, there was a boom, many now say bubble, in internet stocks.⁷⁰ New companies arose, went public, and were accorded high—sometimes astronomical—valuations.⁷¹ These high valuations can be, and should be, interpreted as stock market long-termism. The market was valuing firms with no immediate earnings as very good investment prospects. Indeed, analysts concluded that many high-tech, dot-com firms would have needed to grow at unprecedented rates for the high prices of the late 1990s to be accurately predicting long-term prices.⁷² Stock market beneficiaries of the concomitant rising equity prices invested more in capital—i.e., more in the long term—than they otherwise would have.⁷³ The “run-up in equity prices allowed for new projects to be undertaken by these [high-priced] firms—projects that otherwise would likely be underfunded.”⁷⁴

Nor were the dot-com bubble and its concomitant market overvaluation unique. Railroads, automobiles, the telephone, and plastics have at various times been overvalued.⁷⁵ Of course, these bubbles and their manifestation of excessive long-termism are not testimonials to our having an efficacious stock market. They are themselves problems. The point is not that markets are therefore efficient, or even that they are good. The point of overvaluation is that it fits better with a market that is giving excessive weight to the long term. It is not short-term.⁷⁶

More prosaically, analysts sympathetic to the short-termist viewpoint should focus on the planning horizons for firms that focus on returns over decades. Oil production companies, for example, invest in oil fields that will produce for multiple decades, often over a good fraction of a century.⁷⁷ These firms are disproportionately public firms with scattered, trading stockholders. At the same time, the bond market has historically had little problem in making long-term financing commitments to much of the American economy.⁷⁸

5.3 Short-Termism Inside the Corporation

Short-termism can arise inside the corporation and can do so in ways that would be exacerbated if we insulated boards further from markets—the latter being a favorite remedy offered by those fearful of stock market short-termism.

The first intuition is simple: The CEO is still the most influential corporate decision-maker in most large public firms. It is basic human nature that the CEO will want good results during his or her tenure. With the average

CEO's tenure at about seven years,⁷⁹ many CEOs could well think that there are only a few years left to their time as CEO. They have personal reasons to emphasize projects that will have good results during those few years. They want to be proud of the results on their watch.⁸⁰ Older CEOs put their firms on a low-risk path when their firms are insulated from shareholder influence (while younger CEOs do the opposite).⁸¹ Older CEOs reduce research and development as well as their firm's overall riskiness by diversifying more.⁸² While some of these CEOs may worry that they will be replaced by powerful shareholders, an equally logical hypothesis is that they favor short-term results because they want results to be good before they retire. A "one standard deviation increase in CEO age decreases [a measure of R&D intensity] by almost 20%."⁸³

Several empirical studies show entrenched, older CEOs having their firms invest less than younger ones.⁸⁴ These results suggest that enhancing CEO autonomy from financial markets will lead to more short-termism, not less. One study, for example, finds that CEOs increase their firms' research and development spending during their first year as CEO, and reduce it in their final years as CEO.⁸⁵ Managers not at the top of the firm but who are mobile want to show good short-term results to managerial labor markets.⁸⁶ This is short-termism, and potentially pernicious short-termism, but it originates in managerial labor markets, not stock markets. And internal organizational metrics can overemphasize immediate results.⁸⁷ Lastly here, overconfident managers, who abound at the top, suggest several authors, "are likely to delay recognition of losses ... [perceiving] poorly performing negative NPV projects ... as positive NPV projects."⁸⁸

Overall, there is considerable evidence that the internal organizational structure of the large firm is a source of significant short-term impulses. More prosaically, boards and executives do have the capacity to design longer-term compensation contracts to mitigate market features they see as deleteriously short-term, if they wish to.⁸⁹

A commonly cited short-termist mechanism is that corporate managers are unable to communicate complex or technological information to a diffusely held market of nonexperts. But if this is a primary problem, a significant improvement could come from rules that facilitated blockholders in the large American corporation instead of impeding these blocks from forming, persisting, and participating in corporate governance. Such blockholders would have incentives to process the more complex information that distant, smaller stockholders cannot readily process and understand.⁹⁰ Instead, however, the core cure that is often promoted is to insulate boards from stockholders and to diminish the means of block building, to accord boards greater autonomy, and not to facilitate more blockholding⁹¹ or lengthen the duration of executive compensation. That these are the core cures that are promoted makes it plausible that for some adherents the excessive short-termist theory is a world view that is justifying a more general managerialist view of what makes the corporation run well.

5.4 Interpretive Error?

It has been said that the holding duration of equity has dramatically shortened in recent decades. Trading volume is up and traders' average holding periods are down. Those developments make even the limited shareholder attention span of the 1970s flicker as shareholders today buy and sell more rapidly, in the view of some, perhaps of many. Program traders can move much stock through the system in microseconds.

For example, Delaware's judicial leader, Leo Strine, when chief of the chancery court, where the country's major corporate litigation usually transpires, bemoans stock churning and the rapid turnover of a typical public company's stockholder base.⁹² Short-termism and stock turnover are being taken as serious corporate issues by important corporate policymakers.

As we saw above, however, churning would not in itself be dispositive for a short-termist view to justify new corporate lawmaking, if (1) short-term trading did not much affect corporate decision-making because, say, no transmission mechanism brought those trading horizons into the firm's decision-making process, (2) there were sufficient market correctives if it did affect corporate decision-making, or (3) the costs of correction were

too high. The prior three sections discuss these three possibilities. This section discusses a fourth reason for continued reticence in corporate lawmaking on short-termism—that interpreting the market turnover data as showing a shortening duration for America’s core stockholders may well be erroneous. Its duration may not even be shortening.

Consider this possibility: starting in 1985, 100 shareholders each hold 100 shares of the XYZ Corporation for three years. They sell their shares, after holding onto them for three years, to other investors, who in turn hold their shares for three years and then resell them. The average, median holding duration for each 100-share shareholder is three years.

Thereafter, by 2013, 10 of those 100 shareholders become active traders. These active traders sell their shares every four months to a new set of shareholders. For this group we have 10 holders every four months, 30 holders every year, and 90 holders every three years. For 90 holders, the average duration of ownership is four months. For another 90 holders, the average duration is still three years. One might be tempted then to say that for the entire stock of 180 holders of XYZ stock during the past year, the average duration for holding was only 20 months, while in the good old days it was 36 months. Holding duration has nearly halved.

These statements would be accurate counts, but the question is whether they are the best way to interpret the changing holding duration for policymaking purposes. For 90% of the shareholder mass, their turnover period and their holding duration are just as they always have been. For 90% of the shareholders, nothing has changed and their holding period has not shortened.

This analytical problem is hardly unique to short-termism. When a distribution is skewed and not symmetrical, the average—the mean—can fail to describe properly the population and its change over time.

The evidence suggests that this interpretive consideration is in play for the duration of stock ownership in the US. For example, two of America’s primary shareholders—Fidelity and Vanguard—have holding durations that have not budged since 1985.⁹³ The overall holding duration for mutual funds and pension funds—America’s core stockholder class—increased during the quarter century from 1985 to 2010.⁹⁴ These institutional investor holding durations seem to exceed the executives’ duration for their own pay.⁹⁵ The rise of index funds, which do not trade other than to rebalance their portfolio and to accommodate cash inflows and outflows, is consistent with a *lengthening* of stockholder holding periods, not a shortening.

The authors of the stock holding duration study report that they investigated “institutional investors’ holding durations since 1985 and find that holding durations have been stable and, if anything, slightly lengthened over time.” In 1985, the average duration for stockholding in the US was 1.2 years; in 2010 it had increased to 1.5 years.⁹⁶ This data erodes the typical short-termist factual foundation on directionality.

True, even if this reinterpretation of the data trends comes to be seen as accurate, the short-termist view can persist, but it would have to be recast. The typical holding duration has not shortened, short-termists would concede, but they could contend that it is still too short-term now, just as it was too short before. So, as a policy matter, shareholders must be neutered from corporate governance influence. And, even if shareholders’ typical holding duration is somewhat less short-term today than in the 1980s, they might argue, their corporate strength and influence have changed. Proponents of the short-termist view would argue that shareholders have become more powerful—staggered boards are largely gone, many firms have majority voting, SEC rules favor shareholder voice, and hedge fund shareholders have influence that disaggregated stockholders do not. Others would argue the contrary—that the central governance event of the past quarter century was the demise of the hostile takeover, with offsetting shareholder gains in strength being pale, weak substitutes for the lost takeover.⁹⁷

People could disagree here on the overall direction of shareholder power, but the point is that this disagreement is a very different argument from one that says that shareholders have been becoming more

short-term over the past quarter century and that corporate America needs a remedy for the shortening of that duration. The most recent data analysis suggests the contrary.

5.5 More Powerful Core Causes? Speeding Technology, Increasing Globalization, and Unstable Government Policy

Whether or not stock markets are moving faster, the world is moving faster in the twenty-first century than in the twentieth. Technological change is faster, the Internet is destroying old distribution systems, computers are changing how business is done, and modern telecommunications are making global markets local. International trade more quickly hits local businesses that were once isolated from world markets. Government policies—whether it is the American fiscal cliff or the European potential for an imploding euro—make it hard for businesses to plan for the long term.

Keep in mind again that conventional long-term production requiring massive investment does happen in large public firms: shale oil and gas are being produced for the long term,⁹⁸ as are oil and gas from conventional fields that must be developed with infrastructure investment requiring 30- or 40-year horizons. These investments do not support the idea that the stock market cannot handle the very long term.

But other investments do not have the same long-term luxury. Consider the speed of technological change. Earlier we noted that financial markets have not deterred major technological firms from their tasks. Amazon, Apple, and Google come to mind as public companies with a focus on innovation and the long term.

Amazon's CEO is aggressive on the issue. In 1997, the year Amazon.com went public, its chief executive, Jeff Bezos, issued a manifesto: "It's all about the long term," he said. He warned shareholders "we may make decisions and weigh tradeoffs differently than some companies" and urged them to make sure that a long-term approach "is consistent with your investment policy." Amazon's management and employees "are working to build something important, something that matters to our customers, something that we can tell our grandchildren about," he added.⁹⁹

There is also a reverse side to the disruption wrought by rapid technological change, such as that which Amazon has pursued. Critics might look at bricks-and-mortar bookstores that fail to expand, invest, and discover new means to market their business. If the companies are public, critics might blame public markets for that unwillingness to invest. But the underlying problem may well be simpler, in that technological changes are eroding the viability of such firms' business models.

Finally here, consider the reported corporate reaction to the risks emanating from uncertainty about government policy and from the deepening inability of Washington to effectively address economic issues.¹⁰⁰ "At Vanguard, [the large mutual fund complex,] we estimate that policy uncertainty has created a \$261 billion drag on the U.S. economy."¹⁰¹ To observers looking at ownership structure, stock market trading of these firms' equity may seem to be the root cause of the drop-off in investment spending—a basic indicator of a preference for the short term over the long term. But identification of misshapen markets rather than policy as the more fundamental cause may be mistaken here.

Consider former Federal Reserve Chair Ben Bernanke's PhD thesis:

When Ben S. Bernanke wrote his doctoral thesis in 1979, he could have been channeling the quandary that C.E.O.'s face today. "Uncertainty about the long-run environment which is potentially resolvable over time thus exerts a depressing effect on current levels of investment," he wrote at the Massachusetts Institute of Technology. "Uncertainty provides an incentive to defer such investments in order to wait for new information."¹⁰²

The corporation may indeed now need to plan more for the short run than for the long run. But this explanation for the shortened planning horizon lies more in the nature of shortening technological life cycles, globalization, and changing government policy than in the financial markets external to, or the structures internal to, the large public firm.

6 The Short-Termist Argument as Proxy

The short-termist argument is closely associated with two views of corporate governance and may, as proxy, be used to bolster these views. These views, though, must stand on their own. They get no extra weight and no extra persuasive power by using the short-termist argument.

6.1 As Proxy for the Need for Managerial Insulation

Shareholders, it has been said, are best served by managers with enormous discretion and autonomy. It is asserted that shareholders will not be well informed generally, will disagree with one another on corporate strategy, and will disrupt boardroom decision-making if given too much authority to affect corporate decision-making directly.¹⁰³

The short-termist view may well be a proxy here for the managerialist view, in that managerialists see shareholders as afflicted by a wide range of debilities, and see boards as needing to be separated from shareholders' influence in order to coherently lead the corporation and keep it competitive.

Here I make no claim on the appropriateness of this view, positively or negatively. I do assert, however, that this view gains no added persuasive power from the short-termist argument, which is insufficiently strong, empirically and theoretically, to affect corporate rulemaking. Perhaps boards need to be left largely unaffected by shareholders, but the short-termism argument is not one of the reasons to do so. The board insulation view must stand or fall on its own, without reference to short-termism. But one way to see the short-termist argument is that managerialists can offer it to policymakers as "cover" from public criticism. Short-termism justifies protecting managers; it resonates with public and popular prejudices on the functioning of financial markets. Executives will do even better in corporate and securities lawmaking if legislative, administration, and judicial decision-makers with authority over the structure of power in the corporation believe short-termism to be pernicious and needing correction.

6.2 As Proxy for the Need to Attend to Stakeholders

Similarly, the view is widely but not universally held that short-term-oriented shareholders induce firms to be less attentive to the firm's other stakeholders, to government regulation, and to societal values. The firm that is excessively solicitous of short-term shareholders will in this view treat labor badly, will sell defective products, will take excessive risks with public funds in the financial sector, will contribute to climate change, and will degrade the environment, all in ways that make our society worse off.¹⁰⁴ Many think that enhanced shareholder voice degrades each of these stakeholders in the corporation. Short-termism is the catch-all term to embody these negatives.

But this is an incorrect use of the short-termist view. We ought not to conflate corporate bad behavior with short-termism. Bad behavior can be long-term or short-term.¹⁰⁵ And much of what gets classified as climate and stakeholder degradation due to short-termism is actually an externalization of corporate costs and an internalization of profits. This distortion is not aided by making the corporation more long-term, as externalization is a problem in the short-run and in the long-run.¹⁰⁶

Many perceive these negatives as serious faults of the large public corporation, warranting public policy attention. I do not evaluate this view here. But the purported tendency of shareholders to shorten the corporate time horizon must not figure into the balance. The stakeholder view, like the managerialist view, must for the most part stand or fall on its own.

7 Conclusion: No More than Watchful Waiting

We have here evaluated the long-standing short-termist argument in corporate law, using modern thinking and data on markets and the economy, and have found it wanting. It should be given no weight in corporate lawmaking. The short-termist argument suffers from six substantial weaknesses.

First, policymakers must evaluate the American economy from a system-wide perspective. System-wide, the American economy is replete with venture capital markets, private equity markets, and many privately held firms, all of which are capable of the longer-term planning that the public firm is thought in some circles to be incapable of. As long as venture capital markets, private equity markets, and other conduits mitigate or reverse enough of any short-term tendencies in the public securities market, then the purported problem is less systemic. While these institutions are themselves imperfect, they still must be considered when evaluating whether stock market short-termism, if it is excessive, is a system-wide problem.

Second, the evidence that financial markets are excessively short-term is widely believed but not proven, and there is much evidence pointing in the other direction. We have seen bubbles and overvalued companies with little more than a business plan, strongly suggestive that financial markets can be excessively long-term. Markets undershoot and overshoot, as one should expect. We see technology companies and prosaic natural resources companies making major long-term investments that far exceed stock market holding periods and CEO job tenure.

Third, mechanisms inside the corporation may well be important sources of short-term distortions and these internal distortions can be, and would be, exacerbated by further insulation of boards from external financial markets. It seems obvious (but underexamined) that CEOs will prefer that good results occur on their watch, and that poor results be pushed off into the future, beyond their tenure. There is considerable evidence consistent with this likelihood that a major source of short-term focus originates inside the corporation and not outside in financial markets. Senior managers with an eye on a new position want good results and they want them soon.

Perhaps the short-termist view seeks to capture a rhetorical high ground in the case for board autonomy by contrasting the positive connotation of *patient* long-term capital with *frenzied* short-term capital. Those who seek more board autonomy could believe, and persuade others, that autonomous boards are more likely to seek the first and avoid the latter.¹⁰⁷ But perhaps the short-termist rhetoric could readily be hiding less desirable board features: by justifying board sluggishness as being acceptable long-termism, the rhetoric thereby gives cover to firms and boards that fail to adapt to new conditions. Short-termism could be confused with dynamism and quick adaptation to changing markets and technologies.

Fourth, if proponents of the short-termist view are seeking to influence courts and state legislatures that make corporate law, their view should be rejected. Courts are poor places to make this kind of basic economic policy. They may even find it difficult to assess accurately whether the economy is too short-term, too long-term, or just right. They are poorly equipped to induce large public corporations to internalize their climate externalities. If such considerations are to make their way into economic policy, these should be national policies, coordinated with tax policy, and perhaps implemented via the tax code, securities laws, and the rules that influence the size of stockholdings, not via parochial corporate law.

Fifth, the widely held view that short-term trading has increased dramatically in recent decades is unquestioned but should be examined, as that view may misinterpret the data. The best recent evidence indicates that the holding duration of the country's major stockholders, such as mutual funds at Fidelity and Vanguard, and major pension funds, has not shortened. Instead, a high-velocity trading fringe is moving stock rapidly through their computer systems. Their holdings, when averaged into market-wide data, make the duration appear to be shortening across the entire financial market. But these new trading patterns do not affect the major stockholding institutions and, hence, should not affect corporate law thinking.

Sixth, the widely stated view that short-termism induces environmental degradation and excessive corporate burning of hydrocarbons is misconceived. The dominant motivation is externalization. The polluting corporation that pays little for its pollution reaps profits, while outsiders reap most of the costs. It's the profit motive coupled with externalization that drive corporate contributions to climate and environmental degradation, not misshapen time preferences inside the corporation.

Any one of these features should induce substantial caution among corporate law policymakers before using the short-termist view to buttress law that would further insulate managers from markets. It is at least possible that the short-termist arguments provide proxy for and represent a view that stakeholders should be better attended to, or that managers should have more autonomy generally. Regardless, in combination, the analysis here is that corporate law courts and corporate lawmaking legislators should view the short-termist argument for further board and CEO insulation as one that should be accorded no weight today.

Acknowledgments

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Notes

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- 7 See John R. Graham, Campbell R. Harvey & Shiva Rajgopal, The Economic Implications of Corporate Financial Reporting, 40 J. ACCT. & ECON. 3, 5 (2005) (78% of CFOs state in a survey that they would sacrifice some real value for smoother reported earnings); Kevin J. Laverly, *Economic 'Short-Termism': The Debate, the Unresolved Issues, and the Implications for Management Practice and Research*, 21 ACAD. MGMT. REV. 825, 831 (1996); James M. Poterba & Lawrence H. Summers, *A CEO Survey of U.S. Companies' Time Horizons and Hurdle Rates*, MIT SLOAN MGMT. REV., Fall 1995, at 43, available at <http://sloanreview.mit.edu/article/a-ceo-survey-of-us-companies-time-horizons-and-hurdle-rates/>.
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- 9 *Id.*
- 10 Martin Lipton et al., *Some Thoughts for Boards of Directors in 2013* (Dec. 31, 2012), available at <https://corpgov.law.harvard.edu/2012/12/31/some-thoughts-for-boards-of-directors-in-2013/>.¹
- 11 For full citations, see Mark J. Roe, *Corporate Short-Termism—In the Boardroom and in the Courtroom*, 68 BUS. LAW. 977, 981–83 nn.9–11 (2013).
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- 14 SEC Roundtable on Short-Term/Long-Term Management of Public Companies, July 18, 2019, <https://www.sec.gov/spotlight/short-and-long-term-management-public-companies-roundtable>.
- 15 Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. 76896 (Nov. 7, 2023) (to be codified at 17 C.F.R. pts. 232, 240).
- 16 *Id.* at 76902.
- 17 *Id.* at 76902.
- 18 See the discussion of Airgas and Williams, *infra* notes 47–54 and accompanying text.
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- 21 Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 1–2 (2010) (Strine thereafter became Delaware’s chief justice; his article was written while he was a vice chancellor). “Many activist investors hold their stock for a very short period of time and may have the potential to reap profits based on short-term trading strategies that arbitrage corporate policies [T]here is a danger that activist stockholders will make proposals motivated by interests other than maximizing the long-term, sustainable profitability of the corporation.” *Id.* at 8.
- 22 *Id.* at 17. Cf. J. Travis Laster & John M. Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, 70 BUS. LAW. 33, 50 (2015) (“[T]he blockholder director’s duties to the corporation require that the director manage for the long term, while the blockholder director’s duties to the investor require that the director manage for an exit”) (emphasis supplied). See also *In re Trados Inc. S’holder Litig.*, 73 A.3d 17 (Del. Ch. 2013); Jack Bodner, Leonard Chazen & Donald Ross, *Vice Chancellor Laster and the Long-Term Rule* (Mar. 11, 2015), <http://corpgov.law.harvard.edu/2015/03/11/vice-chancellor-laster-and-the-long-term-rule/>.² As we see below in sections 4 and 5, the vice chancellor’s conclusions here, like the other Delaware conclusions, do not comport with the overall evidence, which does not point to detrimental short-termism as on average afflicting blockholders and investors.
- 23 *In re Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 108–09 (Del. Ch. 2011); *In re Williams Cos. Stockholder Litig.*, 2021 Del. Ch. LEXIS 34 (Del. C. Feb. 26, 2021) (“there is room to disagree as to whether short-termism ... could be deemed [a]

- cognizable threat under Delaware law”), discussed *infra* notes 47–54.
- 24 Rappaport, *supra* note 6, at 66 (“Today, the average holding period in professionally managed funds is less than a year and annual portfolio turnover is greater than 100%.”).
 - 25 See Aspen Institute, Business & Society Program, *Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management*, Sept. 9, 2009, at 2, available at <https://www.aspeninstitute.org/publications/overcoming-short-termism-call-more-responsible-approach-investment-business-management/>.
 - 26 See *id.*; Jenny Anderson, *Pension Funds Still Waiting for Big Payoff from Private Equity*, N.Y. TIMES, Apr. 10, 2010, at B1.
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 - 30 Shai Bernstein, *Does Going Public Affect Innovation?* 70 J. FIN. 1365 (2015).
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 - 37 Graham et al., *supra* note 6, at 31.
 - 38 See Roe, *Corporate Short-Termism*, *supra* note 11.
 - 39 Andrei Shleifer & Robert W. Vishny, *The Limits of Arbitrage*, 52 J. FIN. 35 (1997).
 - 40 See Mark J. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* 19–49 (1994).
 - 41 Josh Lerner, Morten Sorensen & Per Strömberg, *Private Equity and Long-Run Investment: The Case of Innovation*, 66 J. FIN. 445, 455–56 (2011).
 - 42 Frank R. Lichtenberg & Donald Siegel, *The Effects of Leveraged Buyouts on Productivity and Related Aspects of Firm Behavior*, 27 J. FIN. ECON. 165 (1990).
 - 43 Jennifer Francis & Abbie Smith, *Agency Costs and Innovation: Some Empirical Evidence*, 19 J. ACCT. & ECON. 383 (1995) (management and block ownership associated with more indicators of innovation); James Mahoney, Chamu

- Sundaramurthy & Joseph Mahoney, *The Effects of Corporate Antitakeover Provisions on Long-Term Investment: Empirical Evidence*, 18 *MANAGERIAL & DECISION ECON.* 349 (1997).
- 44 Ying Wang & Jing Zhao, *Hedge Funds and Corporate Innovations*, 44 *FIN. MGMT.* 353 (2015). See also Alon Brav, Wei Jian, Song Ma & Xuan Tian, *How Does Hedge Fund Activism Reshape Corporate Innovation?*, 130 *J. FIN. ECON.* 237 (2018) (activist-targeted firms increase innovation output).
- 45 Shane Goodwin, *Corporate Governance and Hedge Fund Activism*, (SSRN working paper, Feb. 2024), available at www.ssrn.com/abstract=4694699; Lucian Bebchuk, Alon P. Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 *COLUM. L. REV.* 1085 (2015); Lucian A. Bebchuk, *The Myth that Insulating Boards Serves Long-Term Value*, 113 *COLUM. L. REV.* 1637 (2013).
- 46 See Mark J. Roe, *Stock Market Short-Termism: What the Empirical Evidence Tells Legal Policymakers*, 11 *J. L. ACCT. FIN.* 1 (2022); Mark J. Roe, *MISSING THE TARGET: WHY STOCK MARKET SHORT-TERMISM IS NOT THE PROBLEM* ch. 7 (2022).
- 47 See *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 108–09 (Del. Ch. 2011).
- 48 With some Delaware opinions bringing in academic work on the subject, including one of the works on which this review and summary piece is based. See *Frederick Hsu Living Tr. v. ODN Holding Corp.*, 2017 Del. Ch. LEXIS 67, at *49, *105 (Del. Ch. Apr. 14, 2017); *Lavin v. W. Corp.*, 2017 Del. Ch. LEXIS 866, at *25 (Del. Ch. Dec. 29, 2017), both pointing to Roe, *Corporate Short-Termism*, *supra* note 11.
- 49 *Id.* at 108.
- 50 *Id.* at 109.
- 51 *Id.* at 108–09 (footnotes omitted).
- 52 *Id.* at 111.
- 53 *Id.* at 111–12.
- 54 *In re Williams Cos. Stockholder Litig.*, 2021 Del. Ch. LEXIS 34 (Del. Ch. Feb. 26, 2021), *aff'd sub nom. The Williams Cos., Inc. v. Wolosky*, 264 A.3d 641 (Del. 2021).
- 55 *In re Williams Cos. Stockholder Litig.*, *supra* note 54 at 72–73.
- 56 *Goldstein v. Denner*, 2022 Del. Ch. LEXIS 117, at *89–91, *94 (Del. Ch. May 26, 2022). Similarly, see *In re PLX Tech. Stockholders Litig.*, 2018 Del. Ch. LEXIS 336, at *93–94 (Del. Ch. Oct. 16, 2018) (“particular types of investors may espouse short-term investment strategies ..., thereby creating a divergent interest in pursuing short-term performance at the expense of long-term wealth...”).
- 57 Even favored corporate structural solutions, like giving long-term shareholders greater voice in the corporation, see ; Colin Mayer, *Firm Commitment* (2013); Julia Werdigier, *A Call for Corporations to Focus on the Long Term*, *N.Y. TIMES DEALBOOK*, May 14, 2012, available at <http://dealbook.nytimes.com/2012/05/14/group-calls-on-companies-to-focus-on-long-term-goals/>, can readily backfire. Jesse M. Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 *YALE L.J.* 1554 (2015).
- 58 For blockholder suppression as increasing the short-term problem, see ROE, *STRONG MANAGERS, WEAK OWNERS*, *supra* note 40, at 240–47. For the concept that diffusion erodes complex information flow, see Stein, *supra* note 28. For evidence associating blockholders with more long-term innovation, see Julian Atanassov, *Do Hostile Takeovers Stifle Innovation? Evidence from Antitakeover Legislation and Corporate Patenting*, 68 *J. FIN.* 1097 (2013). For the idea that even blockholders who trade can encourage long-term investments by processing information more effectively than small shareholders, see Alex Edmans, *Blockholder Trading, Market Efficiency, and Managerial Myopia*, 64 *J. FIN.* 2481 (2009).
- 59 Dominic Barton, *Capitalism for the Long Term*, *HARV. BUS. REV.*, Mar. 2011, at 85, 90.
- 60 ROE, *MISSING THE TARGET*, *supra* note 46 (ch. 3); Mark J. Roe, *What Is Stock Market Short-Termism?* 77 *BUS. LAW.* 1039 (2022). Moreover, if stock markets are not particularly strong short-term influences—the academic work is, as mentioned above, evenly divided—then the pollution consequences of weak short-termism should also be weak. And the internal structure

of the corporation now generally rewards profits, despite stakeholder pressure of recent years. See Lucian A Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020); Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563 (2021); Holger Spamann, *Indirect Investor Protection: The Investment Ecosystem and Its Legal Underpinnings*, 14 J. L. ANALYSIS 17 (2022).

- 61 See Aspen Inst., *supra* note 25; Joseph E. Stiglitz, *Using Tax Policy to Curb Short-Term Trading*, 3 J. FIN. SERVICES RES. 101, 109 (1989); Lawrence H. Summers & Victoria P. Summers, *When Financial Markets Work Too Well: A Cautious Case for a Securities Transactions Tax*, 3 J. FIN. SERVICES RES. 261, 272 (1989). A simple Tobin tax adds a tax cost to every trade, thereby making trading more costly.
- 62 On government research funding, see Mariana Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (2013).
- 63 Sreedhar T. Bharath, Amy K. Dittmar & Jagadeesh Sivadasan, *Do Going-Private Transactions Affect Plan Efficiency and Investment?* 27 REV. FIN. STUD. 1929 (2014). Overinvestment would map to a long-standing critique of managerial incentives in public firms, evidencing not pernicious short-termism but empire-building, excessive continuance in dying industries, and excessive long-termism.
- 64 Sunil Wahal & John J. McConnell, *Do Institutional Investors Exacerbate Managerial Myopia?*, 6 J. CORP. FIN. 307, 307 (2000).
- 65 *Id.*
- 66 Viral V. Acharya & Zhaoxia Xu, *Financial Dependence and Innovation: The Case of Public Versus Private Firms*, 124 J. FIN. ECON. 223 (2017). For industries that do not depend on outside capital, the private firms do no better than the public ones.
- 67 Philippe Aghion, John Van Reenen & Luigi Zingales, *Innovation and Institutional Ownership*, 103 AM. ECON. REV. 277, 302 (2013).
- 68 Carl Hsin-Han Shen & Hao Zhang, *CEO Risk Incentives and Firm Performance Following R&D Increases*, 37 J. BANKING & FIN. 1176 (2013). The influence of the stock market here may well be pernicious, by inducing managers to overinvest in less-than-profitable R&D, so as to falsely signal good corporate prospects. But the point is that the stock market is not facilitating R&D cuts—the usual short-termist *bête noir*—but inducing greater R&D, contrary to the short-termist prediction.
- 69 I examine the breadth of academic work on these issues in ROE, *MISSING THE TARGET*, *supra* note 46 (chs 5, 6, and 7). See also, for example, Gary S. Hansen & Charles W. Hill, *Are Institutional Investors Myopic? A Time-Series Study of Four Technology-Driven Industries*, 12 STRATEGIC MGMT J. 1 (1991). To the same effect: Yixing Tong & Feida Zhang, *Do Capital Markets Punish Managerial Myopia? Evidence from Myopic Research and Development Cuts*, 59 J. FIN. & QUANTITATIVE ANAL. 596 (2023); Barry D. Baysinger, Rita D. Kosnick & Thomas A. Turk, *Effects of Board and Ownership Structure on Corporate R&D Strategy*, 34 ACAD. MGMT J. 205, 205–14 (1991); Li Eng & Margaret Shackell, *The Implications of Long-Term Performance Plans and Institutional Ownership for Firms' Research and Development (R&D) Investments*, 16 J. ACCT., AUDIT. & FIN. 117 (2001); Jennifer Francis & Abbie Smith, *Agency Costs and Innovation: Some Empirical Evidence*, 19 J. ACCT. & ECON. 383 (1995); Peggy M. Lee & Hugh M. O'Neill, *Ownership Structures and R&D Investments of U.S. and Japanese Firms: Agency and Stewardship Perspectives*, 46 ACAD. MGMT J. 212, 212–25 (2003).
- 70 John M. Griffin, Jeffrey H. Harris, Tao Shu & Selim Topaloglu, *Who Drove and Burst the Tech Bubble?*, 66 J. FIN. 1251, 1284 (2001).
- 71 See Robert J. Hendershott, *Net Value: Wealth Creation (and Destruction) During the Internet Boom*, 10 J. CORP. FIN. 281, 282 (2004); Alexander Ljungqvist & William J. Wilhelm, Jr., *IPO Pricing in the Dot-Com Bubble*, 58 J. FIN. 723, 723 (2003).
- 72 Eli Ofek & Matthew Richardson, *DotCom Mania: The Rise and Fall of Internet Stock Prices*, 58 J. FIN. 1113 (2003); Eli Ofek & Matthew Richardson, *The Valuation and Market Rationality of Internet Stock Prices*, 18 OXFORD REV. ECON. POL'Y 265 (2002). But cf. Lubos Pastor & Petro Veronesi, *Was There a Nasdaq Bubble in the Late 1990s?*, 81 J. FIN. ECON. 61 (2006).
- 73 Murillo Campello & John R. Graham, *Do Stock Prices Influence Corporate Decisions? Evidence from the Technology Bubble*, 107 J. FIN. ECON. 89 (2013); Michael Jensen, *Agency Costs of Overvalued Equity*, 34 FIN. MGMT 5 (2005).
- 74 Campello & Graham, *supra* note 73.

- 75 Jensen, *supra* note 73, at 6 n.5.
- 76 The end-of-bubble psychology might be interpreted as short-termist. If the investor expects the bubble to burst shortly, with prices dropping precipitously, the short-term trader wants to be out of the stock before that bubble bursts. Long-term lofty price-earnings ratios for Amazon and other companies cannot be so easily reinterpreted.
- 77 Brian Hicks & Chris Nelder, *Profit from the Peak: The End of Oil and the Greatest Investment Event of the Century* 23 (2008).
- 78 Cláudia Custódio, Miguel A. Ferreira & Luís Laureano, *Why Are US Firms Using More Short-Term Debt?*, 108 J. FIN. ECON. 182, 182, 211 (2013). They find that debt markets have become less willing to finance long-term operations than previously. They link the shortening debt maturity largely to the increasing number of new, smaller, riskier firms accessing the bond market. This suggests an issue that is not one for corporate law courts but one that arises from the changing nature of the economy.
- 79 Steven N. Kaplan & Bernadette A. Minton, *How Has CEO Turnover Changed?*, 12 INT'L. REV. FIN. 57, 58 (2012) (seven years in the 1992 to 2007 period; six from 2000 to 2007).
- 80 *Id.* at 67. The problem is more complex and causation need not be one way. Financial markets could press firms to produce results, which in turn could press boards to fire CEOs more frequently, which in turn could press CEOs to emphasize immediate firm performance. But the fact that older CEOs seem more susceptible to underinvestment suggests that some of the cause emanates from the CEO, in that older CEOs are more likely to expect their current position to be their last.
- 81 Jon A. Garfinkel, Jaewoo Kim & Kyeong Hun Lee, *The Interactive Influence of External and Internal Governance on Risk Taking and Outcomes: The Importance of CEO Career Concerns* (Aug. 2013) (unpublished manuscript) (available at <http://ssrn.com/abstract=2171005>).
- 82 Matthew A. Serfling, *CEO Age and the Riskiness of Corporate Policies*, 25 J. CORP. FIN. 251 (2014).
- 83 Jaideep Chowdhury, *Managerial Myopia: A New Look* 6 (Jan. 24, 2012) (available at https://www.researchgate.net/publication/228196670_Managerial_Myopia_A_New_Look) (“[F]aced with [a] one unit increase in growth opportunities[,] there is a 35.29% drop in the increase in investments when there is [a] one standard deviation increase in CEO age. My results point ... to significant deviations from optimal investments as CEO[s] age.”). For theory consistent with the idea that younger CEOs will invest more than older ones, see Canice Prendergast & Lars Stole, *Impetuous Youngsters and Jaded Old-Timers: Acquiring a Reputation for Learning*, 104 J. POL. ECON. 1105, 1126 (1996); Xiaoyang Li, Angie Low & Anil Makhija, *Career Concerns and the Busy Life of the Young CEO*, 47 J. CORP. FIN. 88 (2017). For theory that younger CEOs will invest less, see Bengt Holmström, *Managerial Incentive Problems: A Dynamic Perspective*, 66 REV. ECON. STUD. 169, 179 (1999); David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment*, 80 AM. ECON. REV. 465, 476 (1990).
- 84 Yakov Amihud & Baruch Lev, *Risk Reduction as a Managerial Motive for Conglomerate Mergers*, 12 BELL J. ECON. 605, 609 (1981); Marianne Bertrand & Sendhil Mullainathan, *Enjoying the Quiet Life? Corporate Governance and Managerial Preferences*, 111 J. POL. ECON. 1043, 1072 (2003); Paul A. Gompers, Joy L. Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107, 133 (2003); Li, Low & Makhija, *supra* note 83; Andrei Shleifer & Robert W. Vishny, *Management Entrenchment: The Case of Manager-Specific Investments*, 25 J. FIN. ECON. 123, 125 (1989).
- 85 Patricia Dechow & Richard Sloan, *Executive Incentives and the Horizon Problem: An Empirical Investigation*, 14 J. ACCT. & ECON. 51, 52 (1991).
- 86 Tim S. Campbell & Anthony M. Marino, *Myopic Investment Decisions and Competitive Labor Markets*, 35 INT'L ECON. REV. 855, 858 (1994); Bengt Holmström & Joan Ricart i Costa, *Managerial Incentives and Capital Management*, 101 Q. J. ECON. 835, 841 (1986); M.P. Naryanan, *Managerial Incentives for Short-Term Results*, 40 J. FIN. 1469, 1470 (1985); Richard P. Rumelt, *Theory, Strategy and Entrepreneurship*, in *The Competitive Challenge* 137 (David J. Teece ed., 1987).
- 87 Lavery, *supra* note 7, at 831–32, 840–47; Kevin J. Lavery, *Managerial Myopia or Systemic Short-Termism? The Importance of Managerial Systems in Valuing the Long Term*, 42 MGMT DECISION 949 (2004).
- 88 Anwer S. Ahmed & Scott Duellman, *Managerial Overconfidence and Accounting Conservatism*, 51 J. ACCT. RES. 1, 2 (2013).

- 89 Cf. Brian D. Cadman, Tjomme O. Rusticus & Jayanthi Sunder, *Stock Option Grant Vesting Terms: Economic and Financial Reporting Determinants*, 18 REV. ACCT. STUD. 1159 (“Vesting schedules are longer in growth firms where lengthening the executive’s investment horizon is more important and ... firms with more powerful CEOs and weaker governance grant options with shorter vesting periods.”).
- 90 This is the view I offered in ROE, STRONG MANAGERS, WEAK OWNERS, *supra* note 40, at 240–47.
- 91 See Lipton, *supra* note 3.
- 92 Strine, *supra* note 21, at 10, 11, 17. Strine later became chief justice of the state’s supreme court.
- 93 Martijn Cremers, Ankur Pareek & Zacharias Sautner, *Stock Duration and Misvaluation*, at 11 (Feb. 14, 2013) (unpublished manuscript) (“While [s]tock [d]uration lengthened [from 1985 to 2010], share turnover has substantially increased from 72% per year ... to 276% per year.”).
- 94 *Id.* at 44. From less than a year for pension funds to over two years, and from just over a year for mutual funds to just under 1.5 years.
- 95 Compare Radhakrishnan Gopalan, Todd Milbourn, Fenghua Song & Anjan V. Thakar, *Duration of Executive Compensation*, 69 J. FIN. 2777, 2793–95 (2014) (“[T]he average total compensation for an executive in our sample is \$2,214,425, which comprises \$447,365 of salary, \$143,252 of bonus, \$908,969 of stock options, and \$711,228 of restricted stock The average executive pay duration in our sample is 1.218 years. Thus, executive pay vests on average about one year after it is granted.”) With Cremers et al., *supra* note 93 (duration of stock holding increased somewhat from 1985 to 2010).
- 96 *Id.* at 3. The study, however, would not pick up intra-quarterly trading, as it tracks the persistence of holdings, quarter to quarter (as the holding data is available only for end-of-quarter reports). Round-trip trading inside a quarter would not diminish the measured duration number.
- 97 One might logically critique the text’s distinction if the program traders were the marginal corporate governance players, so that shareholders had become more powerful and the program traders were the new powers in corporate governance. But this is not so. Program traders do not participate in governance. Short-term theorists might counter that executive compensation is tied to stock price and short-term traders set the stock’s price. But, if this is so, then the short-term problems lie inside the firm, as compensation could be tied to other measures or to longer-term stock price averages.
- 98 World Energy Council, 2010 Survey of Energy Resources 92 (2010), available at https://www.worldenergy.org/assets/downloads/ser_2010_report_1.pdf.¹
- 99 James B. Stewart, Amazon Says Long Term and Means It, N.Y. TIMES, Dec. 17, 2011, at B1. Cf. Amar Bhidé, *Efficient Markets, Deficient Governance*, HARV. BUS. REV., Nov.–Dec. 1994, at 128, 135.
- 100 Scott R. Baker, Nicholas Bloom & Steven J. Davis, *Measuring Economic Policy Uncertainty*, 131 Q. J. ECON. 1593 (2016).
- 101 Bill McNabb, *Uncertainty Is the Enemy of Recovery*, WALL ST. J., Apr. 29, 2013, at A17.
- 102 Andrew Ross Sorkin, “Shareholder Democracy” Can Mask Abuses, N.Y. TIMES DEALBOOK, Feb. 25, 2013, available at <http://nyti.ms/15Lvwoh>.²
- 103 Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).
- 104 Cf. Christophe Moussu & Steve Ohana, *Do Leveraged Firms Underinvest in Corporate Social Responsibility? Evidence from Health and Safety Programs in U.S. Firms*, 135 J. BUS. ETHICS, 715 (2016).
- 105 Cf. Fried, *supra* note 57, at 20 (long-term shareholders’ interests are not necessarily more aligned with stakeholders than short-term shareholders).
- 106 One short- vs. long-horizon issue could, however, be relevant. Consider the possibility that the corporation itself will be made less profitable in the long run because of some feature associated with stakeholders. E.g., climate change will make the firm’s current capital investment much less valuable. But that loss of value will come decades down the road, if the firm does not adjust. If it were longer-term focused (perhaps due to a very low cost of capital), it would take that later capital equipment degradation into account and be more climate friendly today. This long-term impact is possible, but its

strength seems uncertain. It's also not a direct policy concern but a proxy for most policymakers' concerns. Most policymaking discussion is not solicitous of the firm's long-term profit but seeks that the corporation pollute less. The long-term problem is not that climate change will eventually degrade the capital equipment but that in the interim, the firm will degrade the climate and the environment.

- 107 See Mark J. Roe & Roy Shapira, *The Power of the Narrative in Corporate Lawmaking*, 11 HARV. BUS. L. REV. 233 (2021); ROE, MISSING THE TARGET, *supra* note 46 (ch. 11).

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