

## NASCAR GREEN: THE PROBLEM OF SUSTAINABILITY IN CORPORATIONS AND CORPORATE LAW

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### INTRODUCTION

Slowing down and ultimately reversing global warming is the preeminent global challenge of our time.<sup>1</sup> The evidence seems clear: the climate is gradually but undeniably heating up, leading to the melting of polar ice caps, rising sea levels, and dramatic changes in global climate patterns.<sup>2</sup> The global reforms necessary to reduce greenhouse emissions and ameliorate the detrimental effects of rising global temperatures are staggering in scope.<sup>3</sup> As described by one commentator, preventing disastrous climate change requires us

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1. See, e.g., Jonathan H. Adler, *Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization*, 35 HARV. ENVTL. L. REV. 1, 2 (2011) (“Global climate change is a terribly vexing environmental problem.”); Jeffrey Rachlinski, *The Psychology of Global Climate Change*, 2000 U. ILL. L. REV. 299, 300 (“The worst-case scenarios projected by the scientific community are biblical in proportion.”); *Prospect of Limiting the Global Increase in Temperature to 2° C Is Getting Bleaker*, INT’L ENERGY AGENCY (May 30, 2011), [http://www.iea.org/index\\_info.asp?id=1959](http://www.iea.org/index_info.asp?id=1959) (“The challenge of improving and maintaining quality of life for people in all countries while limiting CO2 emissions has never been greater.”).

2. See Rachlinski, *supra* note 1 (“If the planet’s climate shifts as abruptly in the next century as some scientists believe, the first few decades of the new millennium will witness massive shifts in rainfall patterns, a rising sea level that threatens to inundate coastal communities, and a dramatic increase in the frequency and severity of storms. These horrors could make many heavily populated regions virtually uninhabitable and turn valuable farmland into deserts.”).

3. See Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1155–56 (2009) (“To reduce the nation’s greenhouse gas emissions from 1990 levels by as much as 60 percent to 80 percent by 2050 and then maintain that emissions level throughout the twenty-first century will require Congress to craft an ambitious mix of regulatory programs and economic incentives.”).

to “fundamentally change business operations in virtually every economic sector as well as individual behavior in many aspects of daily life.”<sup>4</sup> Given the challenges inherent in such a task, it would seem prudent to follow an “all hands on deck” approach.<sup>5</sup> Changes in environmental regulations would be the first priority. But can other areas of law have an impact as well?

The “sustainability” movement looks to incorporate norms of intergenerational equity and balance into our everyday behavior.<sup>6</sup> On the most basic level, sustainability merely means the capacity to endure. The sustainability movement seeks to evaluate our capacity to endure as a species and a planet, both now and into the future. The United Nations report, *Our Common Future* (commonly called the Brundtland Report<sup>7</sup>), offered the first synopsis of sustainability as follows: “meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>8</sup> Sustainability is usually thought to focus on environmental issues, and sustainability advocates seek to intertwine environmental concerns with agricultural, land development, and industrial practices.<sup>9</sup> But there is also some element of social justice to sustainability, as sustainability efforts have focused on developing local agriculture in third-world communities as well as giving workers more of a voice in their employment.

Sustainability proponents argue that corporations should be tasked with integrating these principles into their organizational ethos.<sup>10</sup> It is not enough that corporations follow the letter of environmental regulations; they must be more proactive in seeking to effectuate beneficial environmental change. The role of the law is

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4. *Id.* at 1156.

5. John C. Dernbach, *The Essential and Growing Role of Legal Education in Achieving Sustainability*, 60 J. LEGAL EDUC. 489, 503 (2011) (quoting AM. BAR ASS'N, Resolution and Report on Sustainable Development 2 (Aug. 11–12, 2003), available at <http://apps.americanbar.org/intlaw/policy/environment/sustainabledevelopment.pdf>) (“[A]ll law should have sustainable development principles integrated into it.”).

6. See, e.g., Beate Sjøfjell, *Internalizing Externalities in E.U. Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers*, 40 GEO. WASH. INT'L L. REV. 977, 977 n.2 (2009) (defining sustainable development as “development where economic, social, and environmental aspects are integrated”).

7. See *Brundtland Report: Our Common Future*, Sustainable Cities, <http://sustainablecities.dk/en/actions/a-paradigm-in-progress/brundtland-report-our-common-future> (last visited Aug. 28, 2011).

8. Rep. of World Comm'n on Env't & Dev., 14th Session, June 8–19, 1987, *Our Common Future*, Ch. 2, ¶ 1, U.N. Doc. A/43/427 (1987). The Commission was led by Norwegian Prime Minister Gro Harlem Brundtland.

9. See Dernbach, *supra* note 5, at 512–13.

10. See, e.g., Judd F. Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1022 (2009) (“If we are to achieve sustainability as a society, corporations must be part of the solution.”).

to require, facilitate, or, at the very least, not hamper efforts to develop sustainability practices within corporations. Rather than requiring strict obeisance to the shareholder primacy norm, corporate law should permit corporations to devote themselves to sustainability in ways large and small. By encouraging change at the individual corporation level, proponents argue, sustainability is much more likely to grow organically and take root over the longer term.

The purpose of this Symposium contribution is to use an example of one company's sustainability efforts to fill out the promise and puzzles of bringing sustainability not just to corporations, but to corporate law as well. The company in question is the National Association for Stock Car Auto Racing, or NASCAR. NASCAR operates perhaps the most theoretically unsustainable sport in the country: high-performance automobiles racing around a track burning gasoline, oil, and rubber.<sup>11</sup> But NASCAR has embraced a series of initiatives devoted to sustainability efforts, including using ethanol fuel, planting acres of trees, and implementing a new recycling program.<sup>12</sup> The company and the sport seem invested in making their collective image more "green."<sup>13</sup>

NASCAR's sustainability efforts raise immediate questions about their depth and efficacy. This Article cannot and will not resolve them. But the questions are useful in pointing out the difficulties that sustainability proponents will have when it comes to implementing a sustainable corporate law. Is it enough that a company says it wants to have a focus on sustainability? If not, how are we to judge the company's efforts? If sustainability is to be a component of our corporate law, we need legal standards for sustainability. One of the features of shareholder primacy that has contributed to its success is its measurability, at least in the short term: the share price shows how the corporation's agents are doing at returning value to the core constituency. If sustainability is to replace shareholder primacy, some measure of success (and failure) will be necessary to provide an assessment. Otherwise, there will be no grounds for legally challenging a company's rhetoric.

This Article also seeks to press a little harder on the scope of sustainability beyond environmental matters. As someone who is relatively new to the literature, I see sustainability as a way of

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11. See Susan DeFreitas, *NASCAR Race Track Gets Solar Power*, EARTH TECHLING (Aug. 9, 2010), <http://www.earthtechling.com/2010/08/nascar-race-track-gets-solar-power/> ("When you think 'green,' chances are NASCAR is not the next word that comes to mind.").

12. *Lynch: Ethanol Mix Continues Greening of NASCAR*, NASCAR (Oct. 16, 2010), <http://www.nascar.com/2010/news/business/10/16/mlynch-ethanol-qanda/index.html>.

13. See *NASCAR Hires Lynch to Head "Green" Initiative*, NASCAR, (Nov. 14, 2008), <http://www.nascar.com/2008/news/headlines/official/11/11/mlynch.q.a/>

conceiving our obligations to the planet and to future generations. This conception is most meaningfully promoted through efforts aimed at reducing pollution and greenhouse gases, improving recycling, and conserving resources. However, the sustainability literature also purports to include social justice components beyond environmentalism, such as caring for other stakeholders in the corporation.<sup>14</sup> The focus on “future generations” is read to imply an obligation to create a better world—not just environmentally, but socially as well. In the corporate law context, sustainability advocates have thus far linked up with the “stakeholder theory” of corporate governance to argue against shareholder primacy.<sup>15</sup>

The example of NASCAR points to some of the tensions in this marriage of theories. NASCAR is a closely held corporation. It is well known for the lack of participation in its internal governance.<sup>16</sup> On the other hand, NASCAR is incredibly participatory when it comes to working with its external corporate partners.<sup>17</sup> The success (however defined) of its green initiatives has come from its ability to leverage its position in the sport to bring in other participants, such as tracks, teams, and particularly sponsors. The upshot is that perhaps sustainability advocates should be less concerned about sustainability efforts within a firm and more concerned with sustainability efforts across industries. By making sustainability an interfirm endeavor, rather than an intrafirm endeavor, sustainability is more likely to sustain itself over the long term.

### I. SUSTAINABILITY AND STRUCTURE

At its core, sustainability seems to be simply about the ability to sustain—or, perhaps, survive. It is about taking a long-term approach to culture and economics. It calls upon the present generation to consider the next generation, as well as the one after that, and after that.<sup>18</sup> The concept of sustainability is most

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14. See Sneirson, *supra* note 10, at 991.

15. See *id.* at 1013–17 (contrasting shareholder wealth maximization with stakeholder theory).

16. MARK D. HOWELL, FROM MOONSHINE TO MADISON AVENUE: A CULTURAL HISTORY OF THE NASCAR WINSTON CUP SERIES 18 (1997).

17. See MARK YOST, THE 200-MPH BILLBOARD: THE INSIDE STORY OF HOW BIG MONEY CHANGED NASCAR 41–52 (2007).

18. Joagguisho (Oren Lyons), *Scanno*, 28 PACE ENVTL. L. REV. 334, 334–35 (2010) (“Over a thousand years ago, a peacemaker came along to our people . . . . He said, when you sit and you council for the welfare of the people, think not of yourself, or of your family, or even your generation. He said, make your decisions on behalf of the seventh generation coming, those faces looking up from the earth, each generation waiting its time. Defend them; protect them, so that they may enjoy what you enjoy today.”). The name of Seventh Generation, Inc., a maker of environmentally-friendly cleaning products, is based on this idea. SEVENTH GENERATION, <http://www.seventhgeneration.com/about> (last

naturally applicable to environmental issues. Environmental regulations seek to protect and preserve natural resources for our own use as well as the use of future generations.<sup>19</sup> There are, to some extent, varying goals within the environmentally “friendly” community: some environmentalists seek to preserve vast tracts of land for their natural beauty, while others may seek to preserve natural resources for future consumption. When we speak about environmental law, however, we generally mean those legal regimes that concern the state of the air, land, and water.<sup>20</sup> Environmentalists seek to preserve these natural places and resources so that they may be enjoyed now and on into the future. This orientation toward the future is at the heart of sustainability.

The extent to which sustainability goes beyond environmental issues is unclear. Some descriptions of sustainability sound very much like simply a “green” or environmental program.<sup>21</sup> Most conceptions of sustainability, however, go beyond that. The “triple bottom line” approach to business asks companies to look at three ways of calculating their success: traditional financial performance, social responsibility, and environmental responsibility,<sup>22</sup> or “profit, people, and planet.”<sup>23</sup> The inclusion of social responsibility fosters a sense that sustainability is also about sustaining a vibrant human community. Thus, organizations like the Fair Trade movement seek to support not only organic and environmentally friendly farming but also farmers in third-world countries who engage in sustainable farming practices.<sup>24</sup> Poverty wages, child labor, and the prohibition

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visited Sept. 1, 2011).

19. For a discussion of the difficulties of creating an environmental “baseline,” see Todd S. Aagaard, *Environmental Harms, Use Conflicts, and Neutral Baselines in Environmental Law*, 60 DUKE L.J. 1505 (2011).

20. Cf. Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 225 (2010) (arguing that “environmental problems—the factual context of environmental lawmaking—involve two core factual characteristics that are, in combination, both common and distinct to environmental law: physical public resources and pervasive interrelatedness”).

21. For example, one sustainability proponent describes the “three conditions” of sustainability as: “[a society’s] rates of use of renewable resources should not exceed their rates of regeneration; its rates of use of non-renewable resources should not exceed the rate at which sustainable renewable substitutes are developed; and its rate of pollution should not exceed the assimilative capacity of the environment.” JOHN ELKINGTON, *CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21<sup>ST</sup> CENTURY BUSINESS* 55–56 (1998); see also Sneirson, *supra* note 10, at 993–95 (describing the “gearing up” framework for sustainability and using Nike’s design and recycling programs as an example).

22. Dernbach, *supra* note 5, at 498.

23. *Triple Bottom Line*, *ECONOMIST* (Nov. 17, 2009), [http://www.economist.com/node/14301663?story\\_id=14301663](http://www.economist.com/node/14301663?story_id=14301663).

24. Grant E. Helms, Note, *Fair Trade Coffee Practices: Approaches for Future Sustainability of the Movement*, 21 IND. INT’L & COMP. L. REV. 79, 82–83

of unions are seen as “unsustainable” because they do not contribute to long-term human flourishing.<sup>25</sup> People must not only have a safe and healthy environment; they must also be able to provide for themselves and their families within that environment.

In the context of corporate law, sustainability has to this point been closely associated with the ideas of corporate social responsibility (“CSR”) and stakeholder governance.<sup>26</sup> Both CSR and stakeholder governance are oppositional concepts to shareholder primacy, which asserts that the only purpose of the corporation is to return profits to its shareholders. CSR looks more naturally to the world outside the corporation, particularly the community and environs.<sup>27</sup> The treatment of the environment would generally be included within any definition of social responsibility.<sup>28</sup> While the CSR movement asks the corporation to look outside of itself, stakeholder governance looks to bring these outside concerns into the organization.<sup>29</sup> The stakeholder approach asserts that the corporation must allocate its governance among those groups with a stake in the corporate proceedings. But both CSR and stakeholder governance theorists assert that the corporation must look beyond the return to shareholders in judging its success.<sup>30</sup> And both groups

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(2011); *ECONOMIST*, *supra* note 23.

25. Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 WM. & MARY ENVTL. L. & POL’Y REV. 291, 293 (2007) (including child labor in a list of unsustainable practices); Vanessa R. Waldref, *The Alien Tort Statute After Sosa: A Viable Tool in the Campaign to End Child Labor?*, 31 BERKELEY J. EMP. & LAB. L. 160, 189 (2010) (“Indeed, regulations that prohibit child labor and increase overall wages may best advance sustainable growth to benefit all workers and society.”).

26. To be completely inclusive, the Venn diagram of corporate law theories outside of shareholder primacy would also include progressive corporate law as well as the social enterprise movement. See Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1352–53 (2011). However, these labels are not sufficiently distinct, in my view, to warrant separate treatment. *But see id.* at 1353 (distinguishing social enterprise from corporate social responsibility).

27. See Sjäfjell, *supra* note 6, at 982–83 (“The corporate social responsibility debate typically stands on the outside of the corporation, however, and is concerned with the corporation’s responsibility toward those parties and interests which seem to be implicitly defined as being external to the corporation, even including the corporation’s own employees.”).

28. See, e.g., Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 735–36 (2005) (beginning the discussion of social responsibility with the example of clear-cutting practices).

29. R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* 44–45 (1984) (“By using ‘stakeholder,’ managers and theorists alike will come to see these groups as having a ‘stake.’ ‘Stakeholder’ connotes ‘legitimacy,’ and while managers may not think that certain groups are ‘legitimate’ in the sense that their demands on the firm are inappropriate, they had better give ‘legitimacy’ to these groups in terms of their ability to affect the direction of the firm.”).

30. In some circumstances, the stakeholders are defined broadly enough

have more structural concerns about how corporations and other business entities should be managed and run.

The “weak” end of the CSR and stakeholder governance spectrum simply asserts that shareholder primacy is not required under corporate law. Although acknowledging the noise generated by Milton Friedman<sup>31</sup> and *Dodge v. Ford Motor Co.*,<sup>32</sup> there is relatively little corporate law substance that can be said to require a shareholder primacy approach.<sup>33</sup> CSR and stakeholder theorists wish only to amplify this notion and to ensure that the corporation and its board govern with the various constituencies in mind. The primary legal instantiation of the constituency model has been the state corporate constituency statute. These statutes, adopted in over half of the jurisdictions, expressly allow boards to consider the needs of constituencies other than shareholders in making corporate decisions.<sup>34</sup> However, these statutes do not require that boards take these other groups into account; there is no legal accountability for failing to do so.<sup>35</sup> From a legal perspective, these statutes simply insulate boards from derivative actions claiming the boards have

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that they overlap with traditional “societal” concerns. See, e.g., Gerald P. Neugebauer III, Note, *Indigenous Peoples as Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America*, 78 N.Y.U. L. REV. 1227 (2003) (including indigenous peoples in areas affected by corporate oil drilling or other development as stakeholders of the firm).

31. See Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 33.

32. 170 N.W. 668 (Mich. 1919).

33. See, e.g., D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 279 (1998) (“The shareholder primacy norm is nearly irrelevant to the ordinary business decisions of modern corporations.”); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1208–09 (2002) (“Corporate law, in fact, does allow directors to pursue strategies that reduce share price whenever this can be rationalized as somehow serving the often-intangible interests of other constituencies.”); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 176 (2008) (“Corporations seek profits for shareholders, but they seek others [sic] things, as well, including specific investment, stakeholder benefits, and their own continued existence. Teaching *Dodge v. Ford* as anything but an example of judicial mistake obstructs understanding of this reality.”). Interestingly, after much scholarship debunking the notion that shareholder primacy is required under corporate law, the Delaware Court of Chancery recently issued an opinion explicitly upholding the shareholder primacy principle. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010) (“Promoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders.”).

34. See Sneirson, *supra* note 10, at 998 (finding that thirty-three states have such statutes). Several of these statutes expressly permit consideration of nonshareholder constituencies only in the takeover context. See *id.* at 998 & n.52.

35. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 631 (1992).

failed to account for shareholder interests.<sup>36</sup> As a result, even progressive scholars have expressed doubt about their efficacy.<sup>37</sup> Other than constituency statutes, there has been little in the positive corporate law that directly seeks to advance the cause of CSR or constituency theory.<sup>38</sup>

When it comes to defining their purposes, corporations are largely allowed to conduct their own internal affairs without oversight or second-guessing in the form of a lawsuit.<sup>39</sup> There are important but limited exceptions—for example, when the board has committed to the sale of the company and entered “Revlonland.”<sup>40</sup>

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36. For example, New York’s statute states: “Nothing in this paragraph shall create any duties owed by any director to any person or entity to consider or afford any particular weight to any of the foregoing or abrogate any duty of the directors, either statutory or recognized by common law or court decisions.” N.Y. BUS. CORP. LAW § 717(b) (McKinney 2006). As a result, constituency statutes may be most useful to boards simply in giving them the freedom to act for any reason whatsoever (absent blatant loyalty violations). See Matthew T. Bodie, *Workers, Information, and Corporate Combinations: The Case for Nonbinding Employee Referenda in Transformative Transactions*, 85 WASH. U. L. REV. 871, 906–07 (2007); Mitchell, *supra* note 35, at 579–80.

37. See David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW 1, 30 (Lawrence E. Mitchell ed., 1995) (“However attractive [the constituency] model might be in theory, communitarian scholars have yet to show persuasively that it could function effectively in practice.”).

38. Although a variety of proposals have been made, they have thus far had little actual traction. See, e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 182 (2006) (advocating for worker representation on corporate boards); LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY* 118–19 (2001) (arguing that boards of directors should be self-perpetuating); Bodie, *supra* note 36, at 875–79 (advocating for a nonbinding employee referendum whenever shareholders are to vote upon a transformative transaction); Lawrence E. Mitchell, *On the Direct Election of CEOs*, 32 OHIO N.U. L. REV. 261, 263 (2006) (arguing for direct election of chief executive officers by shareholders, creditors, and employees, each voting as a class); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (advocating for the U.S. Securities and Exchange Commission (“SEC”) to expand disclosure requirements regarding a company’s products, where it does business, and the labor and environmental effects of its operations). Arguably, Professor Williams’ suggestion was taken up in part in the Dodd-Frank Act, which requires public issuers to calculate the ratio comparing the annual total income of the CEO and the median annual total income for all employees other than the CEO. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(b), 124 Stat. 1376, 1904 (2010).

39. See, e.g., *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010) (“When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value.”).

40. Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588, 631 (2003) (“And once managers decided to sell the firm, *Revlon* said that the firm had



By and large the battlefield is not in the courts, but in the boardrooms. And shareholder primacy had been making gains there since the 1980s.<sup>41</sup> It may have been accurate in the 1980s to claim that the shareholder primacy norm “often means little in the complex reality of governance.”<sup>42</sup> Recent studies of director behavior, however, have found that most directors now see enhancing shareholder value as their primary role at the company.<sup>43</sup> This research echoes the academic and popular conception that shareholder primacy is now the dominant mindset of the boardroom.<sup>44</sup>

And of course, shareholders have several important structural features to their advantage. Even if directors need not—as a legal matter—pursue the best interests of the shareholders above all else, they are elected by those shareholders. Although much of twentieth century corporate law was spent lamenting the separation of ownership and control, that separation has narrowed. It is still exceedingly difficult for disgruntled shareholders to mount an election campaign, but there has been considerable movement on efforts to make this easier.<sup>45</sup> In addition, shareholders can signal

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entered, as lawyers thereafter dubbed it, ‘Revlonland,’ where its managers had the fiduciary duty to sell the firm to the highest bidder. But by the end of the decade, the takeover machine hit *Time-Warner*, and Revlonland became a very, very small place.” (referring to *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986)).

41. See JAY A. CONGER, EDWARD E. LAWLER III & DAVID L. FINEGOLD, CORPORATE BOARDS: STRATEGIES FOR ADDING VALUE AT THE TOP 146–48 (2001).

42. JAY W. LORSCH & ELIZABETH MACIVER, PAWNS OR POTENTATES: THE REALITY OF AMERICA’S CORPORATE BOARDS 50 (1989). Lorsch and MacIver claimed that only a minority of directors adhered to a strict belief in shareholder primacy. *Id.* at 39.

43. See CONGER ET AL., *supra* note 41, at 151 (“[I]n the boardrooms of large U.S. corporations, two decades of governance reforms had firmly entrenched the concept of ‘shareholder value,’ increased the independence of the board from management, and more closely aligned the interests of the board and the owners of the corporation.”); TERRENCE E. DEAL & ALLAN A. KENNEDY, THE NEW CORPORATE CULTURES: REVITALIZING THE WORKPLACE AFTER DOWNSIZING, MERGERS, AND REENGINEERING 43–62 (1999) (discussing the rise of shareholder value as the primary corporate philosophy); ALLAN A. KENNEDY, THE END OF SHAREHOLDER VALUE: CORPORATIONS AT THE CROSSROADS (2000). For a more equivocal perspective on the presence of shareholder primacy in the boardroom, see Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 654–55 (2006) (comparing studies and finding little consensus).

44. See, e.g., MITCHELL, *supra* note 38, at 4–8; Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1526–35 (2007) (discussing the “triumph” of shareholder value as the dominant paradigm in the 1990s).

45. The SEC (after many false starts) recently provided a proxy nomination process through which established shareholders can earn a place on the company’s proxy ballot. The Dodd-Frank Act gave the Securities and Exchange Commission direct authority to allow shareholders to nominate directors for

their displeasure with a vote to “withhold.”<sup>46</sup> Although bereft of legal effect, a substantial vote to withhold can achieve its intended results through shame.<sup>47</sup> Shareholders are also the only parties with standing to bring derivative actions against the board or officers.<sup>48</sup> Fiduciary duties may extend to the corporation as a whole, but only shareholders can sue to enforce those duties. Finally, shareholders can sell their voting rights en masse in the market for corporate control. Although many states, including Delaware, have given the board the ability to erect defenses against hostile takeovers, the ultimate voting control of the shareholders will push many companies into sales even with an initially reluctant board.<sup>49</sup>

Thus, the CSR and stakeholder rights advocates are currently

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placement on the company’s own proxy ballot. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971, 124 Stat. 1376, 1915 (2010) (“The Commission may issue rules permitting the use by a shareholder of proxy solicitation materials supplied by an issuer of securities for the purpose of nominating individuals to membership on the board of directors of the issuer . . .”). The SEC used this authority to pass regulations allowing proxy access for certain large, long-term shareholders. See *Facilitating Shareholder Director Nominations*, 75 Fed. Reg. 56,668 (Sept. 16, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240 & 249). However, the U.S. Court of Appeals for the D.C. Circuit has vacated these regulations, finding their promulgation to be in violation of the Administrative Procedure Act. *Business Roundtable v. S.E.C.*, No. 10-1305, 2011 WL 2936808 (D.C. Cir. July 22, 2011); see also Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 487–89 (2008) (arguing that the SEC’s e-proxy rules significantly reduce the costs of waging a proxy contest).

46. 2 JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 13:23 (3d ed. 2011).

47. For example, in the 2004 election of Disney directors, forty-three percent of shareholders withheld their votes from Michael Eisner, who at the time was CEO and chairman of the board. The next day, the Board removed Eisner as Chairman. JAMES B. STEWART, *DISNEY WAR* 510–12 (2005).

48. 3 COX & HAZEN, *supra* note 46, at § 15:9 (“In order to maintain a derivative suit to redress or prevent injuries to the corporation, the plaintiff must be either an owner of shares or have some beneficial interest therein when the suit is brought. As a general rule, the plaintiff must continue to be a stockholder throughout the life of the suit . . .”).

49. A good recent example is the sale of Anheuser-Busch, Inc. to international beverage conglomerate InBev. The Anheuser-Busch board initially resisted efforts to sell the company to InBev; it contemplated a poison pill as well as a purchase of another brewer. JULIE MACINTOSH, *DETHRONING THE KING: THE HOSTILE TAKEOVER OF ANHEUSER-BUSCH, AN AMERICAN ICON* 236, 259–73 (2011). However, the board eventually agreed to the buyout when InBev raised its offer. *Id.* at 283–89. And even a stubborn board will eventually reach the limit on takeover defenses. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (“I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . .”).

at a crossroads. They must choose between a weak but easier-to-swallow agenda that corporate law does not meaningfully constrain corporate actors to maximize share value or a more radical approach that would provide actual legal powers to nonshareholder constituents.<sup>50</sup> This weaker agenda appears to be a correct assessment of current corporate law: the rational apathy of shareholders, combined with the business judgment rule, allows directors and officers to manage the corporation within a wide range of permitted activity. However, even if shareholder primacy is not required, corporate permissiveness is a rather thin gruel as a program for changing the world. Even so, the alternative—enacting substantive changes to corporate law that favor corporate stakeholders other than shareholders—seems daunting. There have been recent examples of stakeholder successes: the adoption of constituency statutes in new states,<sup>51</sup> as well as the creation of the B Corporation.<sup>52</sup> But these approaches are largely toothless, while the major reform statutes such as Sarbanes-Oxley and the Dodd-Frank Act have provided for greater substantive shareholder power.<sup>53</sup>

Looking at the muddled state of the CSR movement, sustainability advocates have a dilemma as well. Do they link up with the CSR and stakeholder rights theorists and push for the inclusion of environmental and social concerns as part of the stakeholder agenda? Or do they carve out their own path and establish a new “brand” within corporate law?

## II. NASCAR AND SUSTAINABILITY

Some corporations have sustainability in their DNA: Whole Foods, Patagonia, Green Mountain Coffee Roasters.<sup>54</sup> NASCAR would not be one of those. But if sustainability is to become important in our economy and society, it must move beyond the niche businesses and into the mainstream. The example of NASCAR shows not only the potential for sustainability successes but also the challenge for sustainability moving forward.

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50. See, e.g., Elhauge, *supra* note 28, at 743 (“To avoid possible misunderstanding, let me make clear what I am not saying. I am not saying that managers have a legally enforceable duty to sacrifice corporate profits in the public interest; I am saying that they have discretion to do so.”).

51. See Sneirson, *supra* note 10, at 997–1000, 1019–20.

52. See *id.* at 1017–19.

53. See Heidi N. Moore, *Does Financial Reform Give Shareholders Too Much Power or Not Enough?*, CNNMONEY (July 9, 2010), <http://finance.fortune.cnn.com/2010/07/09/does-financial-reform-give-shareholders-too-much-power-or-not-enough>.

54. See Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 1008 n.135, 1013 n.160 (2011).

A. *NASCAR History and Structure*

NASCAR can trace its roots to moonshine.<sup>55</sup> In the early twentieth century, moonshine runners began using modified stock cars to transport their illegally-produced whiskey and outrun government agents in hot pursuit.<sup>56</sup> These moonshine runners were skilled drivers, and they became interested in competing with each other; soon, stock car races began popping up around the South.<sup>57</sup> These high-speed races began to draw significant crowds, and promoters offered purses to get the drivers to race at their tracks.<sup>58</sup> However, the sport was extremely disorganized, with different rules at each track and shady promoters left to their own devices.<sup>59</sup> “Big” Bill France Sr., a Daytona Beach service station operator and track promoter, changed all that. France wanted to create a national sanctioning body to oversee the sport, create uniformity between the tracks, and look out for the interests of the participants as well as the spectators.<sup>60</sup> In December 1947, France organized a meeting of thirty-six race promoters in Daytona Beach,<sup>61</sup> and after three days of meetings, the National Association for Stock Car Automobile Racing was born.<sup>62</sup> NASCAR held its first race on the hard-packed sands of Daytona Beach two months later.<sup>63</sup> Within a week NASCAR became officially incorporated, with Big Bill serving as both President and majority stockholder.<sup>64</sup>

In the beginning, similar to other sanctioning bodies of the day, NASCAR allowed races that included “modified” cars, or older model cars that had been fitted with newer and better parts for racing.<sup>65</sup> However, France wanted to set NASCAR apart from the competition by sanctioning stock car races which featured production models that any fan could buy at a local dealer.<sup>66</sup> With modifications to the cars no longer allowed, the NASCAR stock races would emphasize

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55. NEAL THOMPSON, *DRIVING WITH THE DEVIL: SOUTHERN MOONSHINE, DETROIT WHEELS, AND THE BIRTH OF NASCAR* 30–35 (2006).

56. HOWELL, *supra* note 16, at 8; TIMOTHY MILLER & STEVE MILTON, *NASCAR NOW!* 11 (3d ed. 2008).

57. BRIAN TARCY, *THE COMPLETE IDIOT’S GUIDE TO NASCAR* 13 (2008).

58. MILLER & MILTON, *supra* note 56; TARCY, *supra* note 57, at 15.

59. *See* MILLER & MILTON, *supra* note 56; TARCY, *supra* note 57, at 15–18; *History of NASCAR*, NASCAR (March 8, 2010), <http://www.nascar.com/news/features/history>.

60. *See* MILLER & MILTON, *supra* note 56; HOWELL, *supra* note 15, at 16.

61. TARCY, *supra* note 57, at 18; *History of NASCAR*, *supra* note 59.

62. TARCY, *supra* note 57, at 18.

63. *History of NASCAR*, *supra* note 59.

64. TARCY, *supra* note 57, at 18.

65. *Id.*; S. Joseph Modric, *The Good Ole’ Boys: Antitrust Issues in America’s Largest Spectator Sport*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 159, 161 (2003).

66. Modric, *supra* note 65, at 161. France believed that “if fans could identify with the cars on the tracks, they would bond with the sport.” MILLER & MILTON, *supra* note 55, at 11.

driver skill instead of better machinery.<sup>67</sup> In 1949, NASCAR's first race dedicated solely to stock cars took place on a dirt track in Charlotte, North Carolina, at what would become Charlotte Motor Speedway.<sup>68</sup> In an early show of organizational muscle, the first driver to cross the finish line was disqualified for modifying his car with illegal rear springs.<sup>69</sup>

NASCAR continued to grow in the 1950s and 1960s, with the opening of the first paved speedway in Darlington, South Carolina,<sup>70</sup> as well as the expansion of its races north into Michigan and west to Arizona and California.<sup>71</sup> The major automobile manufacturers began pumping money into the sport in what would become known as the "factory wars."<sup>72</sup> Ford, GM, and Chrysler thought having successful NASCAR entrants would help sales, and they spent millions trying to make sure their cars were the best.<sup>73</sup> Detroit's support helped legitimize the sport in the eyes of major corporate sponsors.<sup>74</sup> Although the factory wars had grown more peaceable by the end of the decade, in 1971 the tobacco company R.J. Reynolds sponsored NASCAR's premier division, and the name was changed to the Winston Cup.<sup>75</sup> The title sponsorship was worth \$100,000, and R.J. Reynolds spent another \$150,000 on the race at Talladega, which became the Winston 500.<sup>76</sup> R.J. Reynolds's involvement ushered in the strong corporate presence in NASCAR that remains today.<sup>77</sup>

NASCAR has grown into one of America's most popular sports. Its fan base is estimated to be seventy-five million strong, placing it second only to the NFL.<sup>78</sup> Six million people attend NASCAR races each year with another 275 million watching on television.<sup>79</sup> In 2005, NASCAR signed an eight year, \$4.8 billion TV deal with Fox/SPEED Channel, ABC/ESPN, and TNT.<sup>80</sup> And Nextel recently paid \$750 million for the naming rights to NASCAR's premier division,<sup>81</sup> now called the Sprint Cup.<sup>82</sup>

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67. HOWELL, *supra* note 15, at 21.

68. MILLER & MILTON, *supra* note 56; TARCY, *supra* note 57, at 19.

69. THOMPSON, *supra* note 55, at 290–92; Michael A. Cokley, *In the Fast Lane to Big Bucks: The Growth of NASCAR*, 8 SPORTS LAW. J. 67, 71 (2001).

70. TARCY, *supra* note 57, at 20; *History of NASCAR*, *supra* note 59.

71. MILLER & MILTON, *supra* note 56.

72. YOST, *supra* note 17, at 62.

73. *Id.*

74. *Id.* at 64.

75. *Id.* at 77–78. The name would stay with NASCAR's premier series for the next thirty-three years. See *History of NASCAR*, *supra* note 59.

76. *Id.*

77. *Id.* at 79.

78. *Id.* at 28.

79. MILLER & MILTON, *supra* note 56, at 8–9.

80. YOST, *supra* note 17, at 36.

81. MILLER & MILTON, *supra* note 56, at 45.

82. *Officials to Announce Series Name Change to Sprint Cup*,

Although “NASCAR” is often used as a term to describe the sport of U.S. stock car racing, it is actually a privately held company that serves as the sport’s sanctioning body. In this capacity, NASCAR sanctions the races that make up the stock car season and sets the rules and regulations of the sport.<sup>83</sup> NASCAR’s governance of the sport is characterized by absolute control, which has drawn comparisons to a dictatorship.<sup>84</sup> This tight control of the sport comes from the limited control and participation in the NASCAR decision-making process.<sup>85</sup> Participants in NASCAR’s stock car racing series must pay a membership fee to NASCAR; however, membership does not give them any share in control of NASCAR or participation in decision-making processes.<sup>86</sup> Instead, NASCAR—which is still owned and controlled by the France family—has the final and exclusive say over every aspect of the sport.<sup>87</sup> The company controls the schedule of sanctioned races;<sup>88</sup> the rules, including not only the rules for races but also exact specifications for car design and equipment;<sup>89</sup> sponsorship for the sport as a whole, including certain exclusive sponsors;<sup>90</sup> and broadcasting and licensing rights.<sup>91</sup> This combination of a very small ownership group (essentially, the France family) and a very big scope of authority is unprecedented in major U.S. sports.<sup>92</sup>

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NASCAR.COM, <http://www.NASCAR.com/2007/news/headlines/cup/07/06/sprint.nextel.cup.name.change/index.html> (last visited Sept. 1, 2011).

83. Meri J. Van Blarcom-Gupko, *Should NASCAR be Allowed to Choose the Tracks at Which Its Series’ Races are Run?*, 16 SETON HALL J. SPORTS & ENT. L. 193, 210 (2006).

84. HOWELL, *supra* note 16, at 13; Juliet Macur, *Nascar at Crossroads After Years of Growth*, N.Y. TIMES, Apr. 15, 2007, § 8, at 1.

85. See HOWELL, *supra* note 16 (“From the absolute beginning, NASCAR was operated on the basis of control by a limited few.”); Van Blarcom-Gupko, *supra* note 83, at 210.

86. Van Blarcom-Gupko, *supra* note 83, at 210.

87. Macur, *supra* note 84.

88. See Michael D. Tucker, *Exploring the Copperweld Analysis in Kentucky Speedway: Single Entity Treatment for NASCAR and International Speedway Corporation*, 15 SPORTS LAW. J. 99 (2008); Van Blarcom-Gupko, *supra* note 83.

89. HOWELL, *supra* note 16, at 20.

90. NASCAR’s sponsorships are not limited to the title sponsor. There are nearly sixty-eight brands in its “Family of Sponsors” ranging from the Official Frequent Heartburn Remedy (Prilosec OTC) to the Official Cheese Filled Product (Combos). A.J. Perez, *Sponsors of NASCAR, Teams Bang Fenders*, USA TODAY, Mar. 20, 2007, at 1C; *Official Sponsors: 2011 NASCAR Season*, NASCAR, <http://www.nascar.com/guides/sponsors/> (last visited May 31, 2011) (listing all current sponsors).

91. YOST, *supra* note 17, at 130; Cokley, *supra* note 69, at 86.

92. The NFL, NBA, MLB, and NHL are all unincorporated organizations whose membership is made up of participating teams. *Oakland Raiders v. Nat’l Football League*, 113 Cal. Rptr. 2d 255, 260 (Cal. Ct. App. 2001) (describing the NFL as “an unincorporated nonprofit association of 30 [now 32] football clubs”); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 469 (E.D. Pa. 1972) (describing the NHL as “an unincorporated nonprofit

NASCAR sits at the center of a constellation of relationships that make up the sport as a whole. Track owners provide the physical locations for the races, and they manage ticket sales, concessions, racing accommodations, and prize money.<sup>93</sup> There are three major corporations that own tracks that host Sprint Cup races: Dover Motorsports, Speedway Motorsports Inc. (“SMI”), and International Speedway Corp. (“ISC”). ISC is the biggest, owning thirteen major racetracks which hosted twenty-one Sprint Cup races in 2010.<sup>94</sup> It is also controlled by members of the France family; ISC’s president is the sister of Brian France, the current president of NASCAR.<sup>95</sup> In fact, the two companies even share the same office building in Daytona, Florida. These close associations have led to several antitrust suits against NASCAR and ISC.<sup>96</sup>

Although NASCAR races are competitions between individual drivers, the drivers themselves are hired by teams to compete on the teams’ behalf. A NASCAR race has forty-three starting spots and in 2011, those spots were filled by cars coming from thirty-one different team owners.<sup>97</sup> Some owners field only one team or car while others have multiple cars.<sup>98</sup> Unlike many of the major professional sport

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association”); *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1054 (D.C. Cal. 1971) (“NBA is an unincorporated association organized to operate and engage in the business of operating a league of professional basketball teams.”); Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 68–69 (1995) (noting that MLB is actually composed of two independent “unincorporated non-profit associations,” the American League of Professional Baseball Clubs and the National League of Professional Baseball clubs). The PGA and ATP are associations whose members are the individual competitors. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 665 (2001) (describing PGA Tour as “a nonprofit entity formed in 1968”); ATP, *How It All Began*, ATPWORLDTOUR, <http://www.atpworldtour.com/Corporate/History.aspx> (last visited Sept. 1, 2011) (“In 1972, the leading professionals joined forces to create the Association of Tennis Professionals.”).

93. See MILLER & MILTON, *supra* note 56, at 49–52; TARCY, *supra* note 57, at 15.

94. Int’l Speedway Corp., Annual Report (Form 10-K) (Jan. 28, 2011).

95. Macur, *supra* note 84.

96. See, e.g., *Ky. Speedway, LLC v. NASCAR*, 588 F.3d 908, 921 (6th Cir. 2009); *Mayfield v. NASCAR*, 713 F. Supp. 2d 527, 542–43 (W.D.N.C. 2010); *Ferko v. NASCAR*, 216 F.R.D. 392, 393 (E.D. Tex. 2003). In fact, the close association between NASCAR and ISC led one court to conclude that it might be difficult to find that they are in fact separate entities. *Ky. Speedway*, 588 F.3d at 920 (“[Plaintiff] KYS would thus need to show that despite having overlapping ownership, NASCAR (wholly owned by three members of the France family) and ISC (of which the France family owns 65% of the voting stock and for which the family makes all of the major decisions) are not under common ownership or control and do not share a single ‘corporate consciousness.’”).

97. See *Driver Table: 2011 NASCAR Sprint Cup Series*, NASCAR, <http://www.nascar.com/drivers/list/cup/dps/> (last visited May 31, 2011).

98. See *id.*

leagues, there are no franchises in NASCAR; instead, teams compete in races on an independent basis.<sup>99</sup> Similarly, the drivers are considered independent contractors of the teams themselves.<sup>100</sup> Unlike the other major sports leagues, in stock car racing there is no collective bargaining agreement or union for the drivers.<sup>101</sup> NASCAR rebuffed efforts by the drivers to form a union in the 1960s and 1970s; it gave two drivers lifetime bans for unionization efforts<sup>102</sup> and used replacement drivers in the 1969 Talladega 500.<sup>103</sup> NASCAR's free-enterprise system enables drivers to negotiate new contracts with new teams at any time, even while they are still in an existing contract.<sup>104</sup> Their contracts provide for compensation through a base salary, a percentage of their winnings, incentives, and typically a third of the profits from sales of licensed merchandise bearing their identity.<sup>105</sup> On top of their contracts with

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99. See Van Blarcom-Gupko, *supra* note 83, at 214; Marty Smith, *Pointed Discussion: Top 35 in Owners Points Becoming Fertile Ground for Competition*, NASCAR (Feb. 10, 2006), <http://www.nascar.com/2006/news/headlines/cup/02/10/owners.points/index.html>. One of the problems for team owners in this free-enterprise system is that they must assume all financial responsibilities, and if they cannot secure sufficient sponsorship deals they may have to fold. *Id.* Many owners have called for franchising to guarantee them a spot in the races so they have a guaranteed shot at money. Instead of granting franchises, NASCAR has come up with the "Top-35 Rule" to help guarantee a racing spot. The "Top-35 Rule" works by giving the top thirty-five teams in owners points at the end of the previous season (points are earned by place finished in the races over the course of the season) a guaranteed spot in the top thirty-five spots for all the races. *Id.* The top thirty-five are guaranteed the first thirty-five spots but the actual starting position is determined by the qualifying speeds before the race. *Id.* Not only does this rule guarantee a shot at the money for team owners but it helps ensure that sponsors who spend big bucks to be on the top-owners' cars will be in each race and have a chance for their logos to be exposed. TARCY, *supra* note 57, at 45.

100. Jenna Fryer, *Without Pension, NASCAR Stars Forgotten*, USA TODAY (Feb. 6, 2007), [http://www.usatoday.com/sports/motor/nascar/2007-02-06-ard\\_x.htm](http://www.usatoday.com/sports/motor/nascar/2007-02-06-ard_x.htm).

101. David Newton, *NASCAR's Free-Market System Unlike Any Other*, ESPN (June 23, 2007), [http://sports.espn.go.com/rpm/columns/story?seriesId=2&columnist=newton\\_david&id=2912665](http://sports.espn.go.com/rpm/columns/story?seriesId=2&columnist=newton_david&id=2912665).

102. HOWELL, *supra* note 16, at 32. The bans were later lifted in 1965 when NASCAR needed the once-popular racers to return to the tracks to boost excitement for the sport. *Id.* at 34.

103. *Id.* at 42. The nascent drivers' union, known as the Professional Drivers' Association ("PDA"), had organized a boycott of Talladega over concerns about the bumpy track surface. To dispel these concerns, Bill France Sr. himself hopped in a car and ran fifty laps on the track. However, the PDA was unmoved. France was able to round up enough replacement drivers to run the race without further incident, and soon thereafter the PDA dissolved. See Mark Aumann, *Boycotted Race in '69 Led to Surprise Winner, Changes*, NASCAR (Apr. 23, 2009), <http://www.nascar.com/2009/news/opinion/04/23/retro.racing.maumann.rbrickhouse.talladega.1969/index.html>.

104. Newton, *supra* note 101.

105. Peter J. Schwartz, *NASCAR's Highest-Earning Drivers*, FORBES (Feb. 9,



the team owners, drivers can stand to make substantial sums of money from endorsements.<sup>106</sup> Top drivers Dale Earnhardt, Jr. and Jeff Gordon earned \$23 million and \$16 million respectively in 2009, just in endorsements.<sup>107</sup>

Sponsorship drives NASCAR more than any other professional sport.<sup>108</sup> Sponsorships alone generate over \$1 billion in revenue for NASCAR.<sup>109</sup> There are three levels of sponsorship in the sport: NASCAR as a licensing body (e.g., “the official beverage of NASCAR”), the sponsorships at the tracks, and the sponsors of the cars themselves.<sup>110</sup> However, sponsorships are probably most critical for the individual teams, which require roughly \$20 million to operate.<sup>111</sup> NASCAR fans have a strong reputation for brand loyalty: a recent study indicated NASCAR fans are 76 percent more likely to buy the product of a NASCAR sponsor than from a non-sponsor.<sup>112</sup> NASCAR sponsorship is also attractive for its corporate hospitality events, as the sport provides unique access for its sponsors.<sup>113</sup>

Stock car racing is considered to be a free-wheeling exercise in individual competition. As Geoff Smith, president of the Roush Racing team, said, “The whole NASCAR business environment is characterized by unrestricted free agency and free enterprise and rampant capitalism in every aspect of this sport.”<sup>114</sup> Robert

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2009), [http://www.forbes.com/2009/02/09/highest-paid-drivers-business-sports-nascar09\\_0209\\_drivers.html](http://www.forbes.com/2009/02/09/highest-paid-drivers-business-sports-nascar09_0209_drivers.html); *With Jr. Leaving DEI, Merchandise Sales Booming*, ESPN (May 17, 2007), <http://sports.espn.go.com/rpm/news/story?seriesId=2&id=2872882>.

106. See Jonah Freedman, *The Fortunate 50*, SPORTS ILLUSTRATED, <http://sportsillustrated.cnn.com/specials/fortunate50-2011/index.html> (last visited Sept. 1, 2011) (listing Dale Earnhardt Jr. and Jeff Gordon among the top-nineteen in earnings by American athletes).

107. Schwartz, *supra* note 105.

108. HOWELL, *supra* note 16, at 27.

109. Susanna Hamner, *NASCAR's Sponsors, Hit by Sticker Shock*, N.Y. TIMES, Dec. 13, 2008, at BU1 (“In the 2008 racing season, 400 companies put up more than \$1.5 billion to sponsor races, cars and drivers.”).

110. TARCY, *supra* note 56, at 137; YOST, *supra* note 16, at 35–36; Kevin McKeough, *Where Sponsors Are King; Why Pay \$5 Million to Back a NASCAR Race? 75 Million Hardworking, Beer-Drinking Fans*, CRAIN'S CHI. BUS., July 31, 2006, at 26.

111. See *Lack of Sponsorship Forces Ganassi to Shut Down Franchitti's Team*, ESPN (July 2, 2008), <http://sports.espn.go.com/rpm/nascar/cup/news/story?id=3469675>.

112. McKeough, *supra* note 110. One older example of the power of the NASCAR brand is Folgers coffee. In 1986, when Folgers signed on as a sponsor with Hendrick Motorsports, it was the fourth-best-selling coffee in America. By the end of the year, Folgers had become number one. YOST, *supra* note 17, at 109.

113. *Id.* at 47–48 (discussing how corporate sponsors have access to garage and pit areas and often have drivers and team members speak to their guests before races).

114. Newton, *supra* note 101.

Hagstrom, manager of the Legg Mason Focus Trust Fund, echoed the sentiment: “In racing, each person works like an entrepreneur. They succeed or fail on their own ability. The capitalist model will always beat the socialist model.”<sup>115</sup> However, this openness contrasts with the extremely tight control exercised by the France family. Jack Roush, the owner of Roush Racing, has said of the Frances: “If you want to be a part of their circus . . . you have to play by their rules.”<sup>116</sup>

### B. NASCAR’s Green Initiatives

Since 2008, NASCAR has unveiled a series of programs to promote a “greener” or more environmentally friendly approach to the sport. It began with the hiring of Mike Lynch as its new managing director of “NASCAR Green Innovation.”<sup>117</sup> NASCAR’s goal for its Green Innovation program was to “lay out a comprehensive green strategy across all the activities of the sport” and “to have substantial and meaningful reduction in the environmental impact of the sport, while also being initiatives that our fans would resonate to in the right way.”<sup>118</sup> These goals provide the framework for NASCAR’s green program: help the environment but also keep fans (and sponsors) happy.

Perhaps the most significant green initiative is the sport’s use of a new, more environmentally friendly fuel. In 2011 NASCAR began using Sunoco GreenE15, a 15% ethanol blend made with American-grown corn.<sup>119</sup> The fuel blend is touted by NASCAR as fostering U.S. energy independence while at the same time not diminishing performance.<sup>120</sup> Thus far, the use of the ethanol fuel has generated few waves in competition.<sup>121</sup> Although Sunoco GreenE-15 comes in part from NASCAR’s longstanding partnership with Sunoco as the official fuel of NASCAR,<sup>122</sup> the move to ethanol fuel coincided with a

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115. Roy S. Johnson, *Speed Sells*, FORTUNE (Apr. 12, 1999), [http://money.cnn.com/magazines/fortune/fortune\\_archive/1999/04/12/258135/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1999/04/12/258135/index.htm).

116. Macur, *supra* note 84 (internal quotation marks omitted).

117. NASCAR Hires Lynch to Head “Green” Initiative, *supra* note 12.

118. Scott Wright, *Q&A: Mike Lynch, Managing Director of NASCAR Green Innovation*, OKLAHOMAN, Apr. 7, 2011, § C, at 2.

119. Eric Loveday, *Sunoco Green E15 to Become Official Fuel of NASCAR for 2011 Season*, AUTOBLOG GREEN (Oct. 18, 2010, 11:04 AM), <http://green.autoblog.com/2010/10/18/sunoco-green-e15-to-become-official-fuel-of-nascar-for-2011-seas>.

120. Lynch: Ethanol Mix Continues Greening of NASCAR, *supra* note 11.

121. Dave Rodman, *Fill ‘Er Up: Teams Off and Running with E15 Fuel*, NASCAR (Jan. 22, 2011), <http://www.nascar.com/news/110122/ethanol-details-thunder/>.

122. NASCAR, SUNOCO, <http://www.sunocoinc.com/site/Consumer/NASCAR/> (last visited May 31, 2011). The partnership dates back to 2003. Lee Montgomery, *Sunoco to Become Official Fuel of NASCAR*, NASCAR (Aug. 15, 2003), [http://www.nascar.com/2003/news/headlines/wc/08/15/sunoco\\_deal/](http://www.nascar.com/2003/news/headlines/wc/08/15/sunoco_deal/);

new partnership with U.S. ethanol producers as a whole.<sup>123</sup> NASCAR CEO Brian France said of the partnership:

American Ethanol's new partnership with NASCAR is much larger and more ambitious than a typical sports sponsorship. Here we have an entire industry looking to NASCAR to communicate its message that America is capable of producing its own renewable, greener fuel. The entire NASCAR industry will benefit from American Ethanol's multi-faceted support of NASCAR, as well as from thousands of farmers and members of the ethanol supply chain now serving as new ambassadors for the sport.<sup>124</sup>

Right around the same time as NASCAR's announcements, the Environmental Protection Agency announced that it would waive its restrictions on the use of E15 fuels.<sup>125</sup> Although several more regulatory steps are necessary for E15 to be used by consumers, the EPA's decision paves the way for E15's introduction to the general public.<sup>126</sup>

In 2009, NASCAR announced a new program entitled "NASCAR Green Clean Air." In an attempt to reduce the environmental footprint of the sport and raise awareness of conservation among its fans, NASCAR pledged to plant ten trees for every green flag dropped during participating Sprint Cup Series events.<sup>127</sup> The number of trees was calibrated to mitigate 100% of the carbon emissions produced by the race cars competing in each race.<sup>128</sup> The program is expected to run for five years, during which time twenty acres of new trees will be planted each year.<sup>129</sup> Officials from NASCAR, ISC, and the Daytona International Speedway helped plant 110 trees in April 2011 at the Daytona Beach International Airport.<sup>130</sup> The Volusia County Chairman, Frank Bruno, stated:

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*Report: NASCAR Near Deal with Ethanol Group*, NASCAR (Oct. 4, 2010), <http://www.nascar.com/2010/news/business/10/04/nascar-growth-energy/index.html>.

123. NASCAR officially partnered with Growth Energy, a coalition of U.S. farmers and other members of the ethanol supply chain, under the name American Ethanol. *American Ethanol Becomes an Official Partner*, NASCAR (Dec. 2, 2010), <http://www.nascar.com/news/101202/american-ethanol-growth-energy-official-partner/index.html>.

124. *Id.*

125. Sebastian Blanco, *EPA Says E15 is Ready for Prime Time—and Your New-ish Car*, AUTOBLOG GREEN (Oct. 13, 2010, 3:56 PM), <http://green.autoblog.com/2010/10/13/epa-says-e15-is-ready-for-prime-time-and-your-new-ish-car/>.

126. *Id.*

127. *NASCAR Announces Tree Planting Program at Tracks*, NASCAR (June 12, 2009), <http://www.nascar.com/2009/news/headlines/official/06/12/tree-planting-program/index.html>.

128. *Id.*

129. *Id.*

130. Press Release, Daytona International Speedway, NASCAR Green Clean

“This event is a great showcase of community involvement in being green. I applaud NASCAR and [Daytona International Speedway] for their substantial green efforts.”<sup>131</sup>

Recycling is also a big part of NASCAR’s sustainability efforts. The company has partnered with its tracks as well as with Coca-Cola Recycling to process over eighty tons of waste and 2.5 million containers in 2009.<sup>132</sup> In 2010, Coors Light, Office Depot, and UPS joined in to expand the program to include grandstands, concourses, suites, garages, and campgrounds.<sup>133</sup> Office Depot was the lead partner in overall race-weekend efforts, while Coors Light focused on the speedway campgrounds, and UPS headed up the cardboard recycling initiative.<sup>134</sup> NASCAR’s Lynch stated:

Each of these Fortune 500 companies are coming together to take on components of the recycling process relevant to their businesses. We want to thank Office Depot, Coors Light and UPS for joining this unique and impactful consortium that broadens an event recycling program which is already the biggest in sports.<sup>135</sup>

These recent efforts join longstanding recycling programs for tires (with Goodyear), as well as oil, brake fluid, and other solvents (as managed by Safety-Kleen).<sup>136</sup> In addition, NASCAR has a recycling effort underway at its offices, and two newly constructed buildings in Charlotte and Daytona Beach are LEED certified.<sup>137</sup>

One of the biggest sustainable stock car efforts comes not from NASCAR itself, but from one of its partners in the sport. Pocono Raceway, an independently owned track, has installed a twenty-five-acre, three-megawatt solar farm.<sup>138</sup> The power generated by the

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Air Tree Planting Project Plants 110 Trees at Daytona Beach International Airport (Apr. 20, 2011), *available at* <http://www.catchfence.com/2011/otherseries/04/20/nascar-green-clean-air-tree-planting-project-plants-110-trees-at-daytona-beach-international-airport>.

131. *Id.*

132. *NASCAR Sponsors Join Forces in Recycling Project*, NASCAR (Apr. 15, 2010), <http://www.nascar.com/2010/news/business/04/15/earth.day.recycling>.

133. *Id.*

134. *Id.* At the Earth Day celebration at Texas Motor Speedway, Office Depot and Coca-Cola Recycling had cobranding on all of the recycling elements at the track, including ink cartridge recycling containers. *Id.*

135. *Id.*

136. Bob Pockrass, *Increased Recycling Should Only be the Start of NASCAR’s Green Effort*, SCENEDAILY (Apr. 29, 2010), [http://www.senedaily.com/news/articles/sprintcupseries/Bob\\_Pockrass\\_Increased\\_recycling\\_should\\_only\\_be\\_the\\_start\\_of\\_NASCARs\\_green\\_effort.html](http://www.senedaily.com/news/articles/sprintcupseries/Bob_Pockrass_Increased_recycling_should_only_be_the_start_of_NASCARs_green_effort.html).

137. *NASCAR Announces Tree Planting Program at Tracks*, *supra* note 125.

138. *Owners Install Solar Farm on Parking Lot*, ESPN (Aug. 4, 2010), <http://sports.espn.go.com/rpm/nascar/news/story?id=5437660>. The solar farm was installed on a converted parking lot across the street from the 2.5-mile tri-oval track. The 40,000 solar panels are arranged in groups in parallel rows, mostly hidden from view. *Id.*

farm is sufficient not only for the track itself but also for one-thousand nearby homes.<sup>139</sup> By December 2010 the farm had generated over one million kilowatt hours of electricity.<sup>140</sup> Although not a project of NASCAR itself, current NASCAR CEO Brian France praised the solar installation:

This meaningful green project reflects the NASCAR industry's collaborative approach to preserving the environment and highlights Pocono Raceway's significant contribution as the first major U.S. sports venue to go green with 100% renewable energy. We encourage other tracks and sponsors to follow this lead in making sustainable programs and renewable energy a continued priority for the sport.<sup>141</sup>

One NASCAR team has also taken up the sustainability mantle. In 2009, the Hall of Fame Racing team joined up with JuicedHybrid.com, a supplier of accessories for hybrid cars and trucks, to offset the carbon footprint for the No. 96 car.<sup>142</sup> Both JuicedHybrid.com and Ask.com, the car's primary sponsor, were to purchase carbon credits sufficient to offset the carbon emissions for the year.<sup>143</sup> JuicedHybrid.com CEO Paul Goldman stated:

As a hybrid automotive accessories business that really cares about the environment, we are excited to expand our green initiative into NASCAR with the support of Ask.com, Hall of Fame Racing and Ford. . . . Not only does this initiative allow us to offset the carbon emissions of the No. 96 team, but it provides us a platform to bring this vital message to the attention of NASCAR's 75 million fans.<sup>144</sup>

Overall, NASCAR has been praised for its sustainability efforts.

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139. *Id.* The website for Pocono Speedway states:

Consisting of nearly 40,000 American made photovoltaic modules covering 25 acres, the Project will produce more than 72 million kilowatt hours (kWh) of energy over the next 20 years. The environmental attributes associated with the system will offset more than 3,100 Metric Tons of carbon dioxide annually, Carbon Dioxide emissions from 106,529 propane BBQ grills and it will generate enough power to provide the electricity needs for close to 1,000 homes beyond the power needs of the Raceway.

*Go Green Solar Project*, POCONO RACEWAY <http://www.poconoraceway.com/pocono-raceway-solar-energy.html> (last visited Sept. 1, 2011).

140. *NASCAR Pocono Raceway Solar Hits One Million kWh Mark*, LIME LIGHT TIMES (Dec. 13, 2010), <http://limelighttimes.com/nascar-pocono-raceway-solar-hits-one-million-kwh-mark>. The power output from the farm is monitored live online at [http://live.deckmonitoring.com/?id=pocono\\_raceway](http://live.deckmonitoring.com/?id=pocono_raceway).

141. DeFreitas, *supra* note 11.

142. *No. 96 Team Goes Green by Offsetting Carbon Footprint*, NASCAR (Feb. 20, 2009), <http://www.nascar.com/2009/news/business/02/20/blabonte.green.initiative/index.html>.

143. *Id.*

144. *Id.*

Because it is a privately held company, it is not eligible for listing on the Dow Jones Sustainability Index or other green- or CSR-related investment sites.<sup>145</sup> However, as reflected in its initiatives as well as its rhetoric, NASCAR wants to be seen as a green company and a green industry.<sup>146</sup> This concern for sustainability is reflected in its fans. A recent survey found that 77 percent of NASCAR fans believe in a personal obligation to be environmentally responsible; 65 percent agree that companies should help consumers become more environmentally responsible; more than eighty percent of NASCAR households recycle; and approximately forty percent use energy efficient light bulbs (more than double the amount just five years earlier).<sup>147</sup> Whether a cause or an effect of NASCAR's green efforts, the fans' interest in sustainable practices shows the importance of those practices to the sport.<sup>148</sup>

### III. NASCAR, THE FIRM, AND THE PROBLEM OF SUSTAINABILITY

The hope for the sustainability movement is that it will cajole, nudge, or push firms into more sustainable practices without cumbersome or loophole-riddled environmental legislation. The example of NASCAR provides some hope that firms will voluntarily adopt significant sustainable practices. However, it also points up some of the difficulties in staking out the boundaries of sustainability when it comes to corporations themselves as well as the corporate law that creates them.

#### A. *Judging Corporate Sustainability*

How do we judge the success of NASCAR's sustainability efforts? As a matter of first impression, NASCAR's "Green Innovation" program has notched some notable successes. Its change to E15 ethanol fuel will save on petroleum consumption and may make the fuel more palatable to consumers. Its tree-planting program endeavors to offset the carbon emissions for the entire sport, and its recycling program reaches into every aspect of the racing experience. NASCAR partners have also joined in the effort; most notably, the Pocono Speedway created a huge solar farm that powers the entire facility along with one-thousand nearby homes.<sup>149</sup> Although praise has been somewhat muted, NASCAR's efforts have

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145. See THOMPSON, *supra* note 55, at 241–42.

146. See Wright, *supra* note 118.

147. DeFreitas, *supra* note 11 (citing an Experian Simmons National Consumer Survey).

148. Paul Thomasch, *Stock Car Racing Going Green—At Own Pace*, ENVTL. NEWS NETWORK (Nov. 27, 2007), [http://www.enn.com/top\\_stories/article/25982](http://www.enn.com/top_stories/article/25982) ("I haven't met anybody in the last couple years who doesn't think it's a good idea to be as efficient and be as environmentally friendly as you can.") (quoting NASCAR CEO Brian France).

149. See *Owners Install Solar Farm on Parking Lot*, *supra* note 138.

been recognized as important steps toward greater sustainability.<sup>150</sup>

The mere recognition of sustainability as an important goal might be considered a significant victory in itself. The sustainability movement is, at least in part, about changing mindsets to recognize the fragility of the environment and to consider future generations. And indeed, given NASCAR's modus operandi, it is somewhat surprising to see the company embrace green efforts at all.<sup>151</sup>

But it is unlikely that sustainability advocates believe it is enough to simply espouse the rhetoric. After all, BP invested significant sums in its environmentally friendly image, only to see it clouded over with the oil spilling out of its well.<sup>152</sup> The resulting disconnect between BP's green image and its spotty safety and environmental record has prompted calls to make BP (and companies like it) liable for misrepresentation when its rhetoric does not match reality.<sup>153</sup> But moving beyond rhetoric into substantive standards raises a host of difficulties. The first, and most obvious, set of standards would be whether the company obeys the existing laws.<sup>154</sup> But "sustainability" is about more than simple compliance. It is about an ethos of going beyond what is legally required. The movement should endeavor to reward those firms with stronger sustainability efforts and punish those with weaker ones. To do this, some sort of baseline, some manner of measuring stick, is necessary to judge sustainability efforts.

NASCAR illustrates the problem of establishing a baseline. First off, do we judge NASCAR the company or NASCAR the industry? The company has an extremely important role to play in the industry as a whole. But its efforts all involve some degree of cooperation or even delegation to its partners. The rules requiring

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150. DeFreitas, *supra* note 10 ("[T]his fuel-guzzling motorsport circuit has initiated a major campaign to green its operations."); David A. Gabel, *The Greening of NASCAR*, ENVTL. NEWS NETWORK (Oct. 18, 2010), <http://www.enn.com/business/article/41894> ("NASCAR is not exactly a model for environmental friendliness, but the new fuel is a significant step in the right direction. . . . Hopefully they will continually adopt new fuel-efficiency technologies as they emerge. In the grand scheme of things, it is interesting to know that even a sport as gas-guzzling as NASCAR is trying to green their image.").

151. *Cf.* Cokley, *supra* note 69, at 67 ("What do you get when you inject 700 to 750 horsepower into 3400 pounds of metal capable of achieving speeds in excess of 200 m.p.h. and then add in 100,000 to 200,000 rabid fans and a mix of young, good-looking, hotshot drivers, along with established veterans?").

152. Cherry & Sneirson, *supra* note 54, at 1002 ("During the past decade, BP made a series of strategic branding decisions designed to green the company's image.").

153. *Id.* at 1025–38.

154. *Id.* at 995–99 (criticizing BP for its environmental and safety violations); Sneirson, *supra* note 10, at 993 (noting that the first level of the "gearing up" sustainability strategy is compliance with applicable labor and environmental standards).

E15 fuel impose sustainability on the NASCAR teams that enter the race.<sup>155</sup> Recycling programs are partnerships with local tracks and race teams, as are the tree-planting efforts.<sup>156</sup> The solar-powered farm is owned by the Pocono Raceway, which has no ownership ties to NASCAR itself.<sup>157</sup> The sustainability efforts that involve NASCAR the company, and only NASCAR, are limited to LEED certification for NASCAR buildings and the NASCAR offices' recycling program.<sup>158</sup> To the extent NASCAR's efforts are remarkable, they involve the industry as a whole, rather than just the company.

Next, to whom or what do we compare NASCAR's sustainability efforts? The most obvious comparison would be to other motor sports industries, such as IndyCar<sup>159</sup> and FIA.<sup>160</sup> In 2007, IndyCar (known at the time as the Indy Racing League, or IRL) transitioned its racers to 100% ethanol fuel.<sup>161</sup> In contrast, the FIA requires that at least 5.75% of its fuel must be made of biocomponents, such as cellulosic ethanol or biogasoline.<sup>162</sup> NASCAR's ethanol initiatives seem to pale in comparison to IndyCar, and in fact IndyCar's change may have prompted NASCAR's move.<sup>163</sup> Prior to the change,

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155. Loveday, *supra* note 119.

156. See *NASCAR Announces Tree Planting Program at Tracks*, *supra* note 127.

157. See *Owners Install Solar Farm on Parking Lot*, *supra* note 138.

158. *NASCAR Announces Tree Planting Program at Tracks*, *supra* note 127.

159. IndyCar is the latest instantiation of the sanctioning body for "indy car," or single-seat, open-wheel racing in the United States. Prior to 2011 it was known as the Indy Racing League, or IRL.

160. FIA, or Fédération Internationale de l'Automobile, is the nonprofit association that operates as the primary governing organization for international Formula One racing. See *About FIA*, FÉDÉRATION INTERNATIONALE DE L'AUTOMOBILE, <http://www.fia.com/en-GB/the-fia/about-fia/Pages/AboutFIA.aspx> (last visited Sept. 1, 2011).

161. Liz Clarke, *IndyCar Makes Switch to Ethanol*, WASH. POST, Mar. 21, 2007, § E, at 3; *IndyCar Goes 100% Ethanol, EPIC Plans National Marketing Campaign*, ENVTL. LEADER (Mar. 19, 2007), <http://www.environmentalleader.com/2007/03/19/indycar-goes-100-ethanol-epic-plans-national-marketing-campaign>; *IndyCar Series Switching to Ethanol in '06*, ESPN (Mar. 2, 2005), <http://sports.espn.go.com/rpm/news/story?id=2003457>.

162. SHELL CORP., POWERED BY V-POWER, PROTECTED BY HELIX: FIA RULES & REGULATIONS FUEL & LUBRICANTS 6 (Dec. 24, 2010), available at [http://www-static.shell.com/static/motorsport/downloads/ferrari/2011\\_rules\\_regulations.pdf](http://www-static.shell.com/static/motorsport/downloads/ferrari/2011_rules_regulations.pdf) ("A minimum of 5.75% (m/m) of the fuel must comprise biocomponents. Shell V-Power race fuel contains two advanced biofuels: [c]ellulosic ethanol, an advanced biofuel made from straw and 'biogasoline', a biofuel converted directly from plant sugars."); *Fuel*, FORMULA 1, [http://www.formula1.com/inside\\_f1/rules\\_and\\_regulations/technical\\_regulations/6852/default.html](http://www.formula1.com/inside_f1/rules_and_regulations/technical_regulations/6852/default.html) (last visited Sept. 1, 2011) ("Formula One cars run on petrol, the specification of which is not that far removed from that used in regular road cars.").

163. See Clarke, *supra* note 161 (noting in 2007 that "NASCAR, the country's most popular form of auto racing, has no plans to explore renewable



however, IndyCar racing had been using methanol, an alcohol-based fuel that is made from natural gas.<sup>164</sup> Since open-wheel cars had been using methanol in the U.S. since the 1970s,<sup>165</sup> the transition to ethanol was much easier. Stock cars are designed to be much closer to the automobiles driven by consumers, making an entirely ethanol-based product less saleable.<sup>166</sup> One could argue that NASCAR's endorsement of E15 will be better for the environment, since it is much more likely to be used by consumers in the short term.<sup>167</sup> So while 100 percent seems to beat 15 percent, NASCAR's program seems designed to have a broader effect than IndyCar's.

The other major sports leagues have sustainability programs similar to NASCAR's. Several stadiums have installed solar panels, including the Staples Center in Los Angeles (home to professional basketball and hockey teams) and AT&T Park in San Francisco (baseball). But these efforts are dwarfed by the Pocono Speedway installation; the Staples Center has 1700 solar panels, compared to Pocono's 40,000, and Pocono puts out three megawatts of electricity, while AT&T Park only creates 120 kilowatts.<sup>168</sup> The NFL has sought to offset the carbon created by the Super Bowl by planting trees and buying carbon credits.<sup>169</sup> But NASCAR has sought to

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fuels at the moment").

164. *IndyCar Series Switching to Ethanol in '06*, *supra* note 161.

165. *Id.*

166. See HOWELL, *supra* note 16, at 21 ("[Bill] France and his associates figured that people would like to see American-built, production-based cars in racing competition, especially since the cars being used were ones that the fans could actually purchase from a dealership."); THOMPSON, *supra* note 55, at 227 ("By definition, a stock car was a pure, unalloyed passenger vehicle without any alterations or modifications.").

167. And this is leaving aside the scientific debate about the extent to which ethanol or ethanol-gasoline blends are better for the environment than gasoline. Ethanol promotes energy independence, as it replaces fossil fuels, and it burns cleaner than pure gasoline. However, most ethanol is produced from corn, which requires significant resources to grow, and ethanol production increases the price of corn on the international market, making it more expensive for third-world communities. See Roberta F. Mann, *Back to the Future: Recommendations and Predictions for Greener Tax Policy*, 88 OR. L. REV. 355, 373-75 (2009); Tudor van Hampton, *Collectors Go Looking for Nonalcoholic Blends*, N.Y. TIMES, Mar. 18, 2011, at AU1 ("Still, many consumers would rather not have any alcohol in their gasoline. Their reasons include reductions in fuel economy—a gallon of ethanol contains about one-third less energy than a gallon of gasoline—and alcohol's affinity for moisture, which can cause a multitude of engine problems.").

168. *Owners Install Solar Farm on Parking Lot*, *supra* note 138.

169. Alex Davidson, *Greening the Super Bowl*, FORBES (Jan. 19, 2007), [http://www.forbes.com/2007/01/19/super-bowl-green-sports-biz-cz\\_ad\\_0119green.html](http://www.forbes.com/2007/01/19/super-bowl-green-sports-biz-cz_ad_0119green.html); Amanda Lee Myers, *NFL Using Clean Energy to Offset Super Bowl's Impact*, USA TODAY (Feb. 3, 2008), [http://www.usatoday.com/weather/environment/2008-02-03-green-nfl\\_N.htm](http://www.usatoday.com/weather/environment/2008-02-03-green-nfl_N.htm); Susan Thurston, *How This Year's Super Bowl is Going Green*, ST. PETERSBURG TIMES (Dec. 22, 2008), <http://www.tampabay.com/news/environment/article942275.ece>.

plant enough trees to offset the entire season. The NBA celebrates a special “green week,” but the biggest aspect of the promotion seems to be the wearing of green uniforms.<sup>170</sup> Again, however, it is hard to tell whether the concrete steps are more or less important than the cultural and ideological change these initiatives are trying to initiate. To that extent, a program like the NBA’s may have less tangible effect on the environment but may be more effective in getting people to take green issues to heart.<sup>171</sup>

As mentioned earlier, NASCAR is not a publicly traded company, so it cannot be listed on one of the “green” or CSR indexes for public investors.<sup>172</sup> Moreover, even if it were eligible, it is not clear that NASCAR would have earned a place there. One example of such a list is the Corporate Knights Top 100 Most Sustainable Companies.<sup>173</sup> The Corporate Knights, a Toronto-based media company, took 3000 publicly-traded companies, narrowed them down to 300 “based on financial performance and other criteria,” and then ranked those 300 “based on 10 environmental, social and governance performance metrics, including energy productivity, waste productivity and CEO-to-average-worker pay ratio.”<sup>174</sup> The list was topped by Statoil, the Norwegian oil and gas producer, which performed well on water productivity and board diversity metrics.<sup>175</sup> Last year’s number one company, General Electric, dropped to eleventh because other companies outstripped its carbon and energy productivity.<sup>176</sup> And PG&E dropped forty-eight places because it scored lower on board diversity and taxes.<sup>177</sup>

CSR or sustainability lists like the Corporate Knights 100 show some of the perils of judging sustainability across industries. The companies listed have wildly different metrics for leadership diversity, carbon productivity, and percentage of taxes paid, but somehow these factors are assigned different weights and collated into a top-100 list. When it comes to cars or universities, slight changes in the weights given to various factors produce very different rankings.<sup>178</sup> The inclusion of BP in many of these CSR

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170. See *NBA Green*, NBA, <http://www.nba.com/green/> (last visited May 26, 2011).

171. Davidson, *supra* note 169 (“Sporting events are thus becoming fertile testing grounds for new environmental practices, and the events leave lasting examples of how events can change their practices for the better.”).

172. See THOMPSON, *supra* note 54, at 241–42.

173. Helen Coster, *Ranking the World’s Most Sustainable Companies*, FORBES (Jan. 29, 2011), <http://www.forbes.com/2011/01/28/most-sustainable-companies-leadrship-citizenship-100.html>.

174. *Id.* The metrics went to eleven with an overall “transparency” factor. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* Its board diversity dropped from 30% of its directors being women last year to 18% this year. *Id.*

178. Malcolm Gladwell, *The Order of Things*, NEW YORKER, Feb. 14, 2011, at

lists (as well as law review articles on CSR) makes one even more skeptical about their categorical wisdom.<sup>179</sup> Moreover, these lists tend to lump a variety of different factors into their calculations, such as corporate governance metrics, philanthropy, and even financial performance.<sup>180</sup> Transparency is a “prerequisite” to being on the list, as the numbers cannot be crunched without it.<sup>181</sup>

NASCAR in its current form would have very low transparency and corporate governance factors. It is closely held, privately owned, family run, and lacking in transparency. It would surely score low on most corporate-governance metrics. But those characteristics are separate and apart from its ability to adopt environmentally supportive practices and leverage those practices across the stock-car racing industry. In fact, it is NASCAR’s “dictatorial” structure that gives it the immense power it has—for good or ill. To the extent NASCAR seeks to promote green efforts, its structure will allow those efforts to be more quickly and efficiently adopted. It is hard to know how much weight the non-environmental factors would be assigned in contrast to its environmental programs. Indeed, it is hard to know how NASCAR’s environmental programs would be assessed as well. Would they be measured in contrast to prior NASCAR practices? In contrast to IndyCar or the NBA? Or would they be measured against some average across all corporations? And raising these questions provides no easy answers. Is it enough that NASCAR has made racing more “green” when there is more that can be done? Can NASCAR—a sport that is based on burning fuel at high speed, risking human lives merely for entertainment—ever really be considered sustainable?

And that brings me to my final challenge to sustainability

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179. Cherry & Sneirson, *supra* note 54, at 1007–08 (discussing investment fund managers as well as academics who praised BP for its corporate social responsibility); Telis Demos, *Beyond the Bottom Line: Our Second Annual Ranking of Global 500 Companies*, FORTUNE (Oct. 23, 2006), [http://money.cnn.com/magazines/fortune/fortune\\_archive/2006/10/30/8391850/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2006/10/30/8391850/index.htm) (ranking BP second on a list of socially responsible companies).

180. See *Corporate Sustainability*, DOW JONES SUSTAINABILITY INDEXES, [http://www.sustainability-index.com/07\\_html/sustainability/corpsustainability.html](http://www.sustainability-index.com/07_html/sustainability/corpsustainability.html) (last visited Sept. 1, 2011) (defining sustainability in terms of “meeting shareholders’ demands for sound financial returns,” “[f]ostering loyalty by investing in customer relationship management and product and service innovation,” and “[s]etting the highest standards of corporate governance and stakeholder engagement, including corporate codes of conduct and public reporting”); Coster, *supra* note 173 (discussing various factors such as leadership diversity and financial performance). Corporate Knights was proud to report that its list had posted a total return of 54.95%, outperforming the MSCI AWCI [Morgan Stanley Capital International All-World Company Index] by more than sixteen points. *Id.*

181. Coster, *supra* note 173.

advocates when it comes to a definition of the term in the corporate context. The term “sustainability” most directly means the ability to survive.<sup>182</sup> NASCAR has demonstrated terrific sustainability, if that means the ability of the corporation (and the industry) to survive and thrive over time.<sup>183</sup> In the context of the corporate sustainability movement, however, sustainability more likely means the ability of humanity to survive and thrive over time. Should a corporation disregard the first meaning and adopt only the second? After all, a corporation is merely a tool—a legal instrument enabling a group of people to cooperate over time. It makes sense that some corporations should see their own demise as a means of carrying out greater sustainability for humanity.<sup>184</sup> But then how do we judge those corporations? And is NASCAR one of them? Should NASCAR be looking for a way to put itself out of business?

### B. *Judging Corporate Law Sustainability*

The problem of defining and then measuring sustainability is not a new one, and NASCAR is only one example of the difficulties in judging the sustainability of a particular company.<sup>185</sup> This Article’s primary concern, however, is with the role of sustainability in corporate law. NASCAR’s sustainability efforts point up some of the problems, not only with defining sustainability at the corporate level, but also with incorporating sustainability into corporate law.

To the extent NASCAR has been a sustainability success story, it is due not to its own solitary, internal efforts, but rather its ability to partner with other corporations. Its ethanol program comes from partnering not only with an ethanol producer (Sunoco), but also a

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182. See, e.g., AMERICAN HERITAGE DICTIONARY 1225 (2d College ed. 1982) (defining “sustain” as “[t]o keep in existence; maintain”); Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 87, 92 (2005) (defining sustainability as “the ability of businesses to survive over time”).

183. W. Duane Cox (as Crabber 1967), *NASCAR and Fuel Injection: “Sustainability” or Survival?*, BLEACHER REP. (Dec. 3, 2009), <http://bleacherreport.com/articles/301903-nascar-and-fuel-injection-sustainability-or-survival> (“NASCAR will do whatever it will take, not to be sustainable, but to survive.”).

184. Sjøfjell, *supra* note 6, at 999 (“Finally, and most dramatically, the sustainable-development guideline may require a corporation to close down its business if it is not possible to adopt alternative ways of doing business that do not cause irreparable damage to the interests of the global community.”).

185. For efforts to address the market for CSR, see Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 831 (2008) (discussing definitional problems for CSR and proposing the “creative capital spectrum” to measure a corporation’s degree of social responsibility); Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115 (2009) (pointing out the excess of unreliable CSR information and proposing a fiduciary duty approach to corporate disclosures); Williams, *supra* note 38, at 1293–1306 (proposing a system of disclosure for environmental information).

multi-year partnership with the ethanol industry's trade group.<sup>186</sup> NASCAR works with local tracks in carrying out its tree-planting program, and it has a variety of corporate sponsors with whom it shares recycling responsibilities.<sup>187</sup> Stock car racing's most prominent green initiative is the solar farm of Pocono Raceway.<sup>188</sup> NASCAR's green efforts are partnerships between entities, rather than the internal workings of one.

Corporate law theorists have largely worked with the corporation as the unit of analysis and measurement. This focus makes sense, as corporate law is primarily about the internal structure of an individual corporation. Certain "sustainability" factors have a lot to do with the internal structure of the corporation, such as its approach to corporate governance and the diversity of its leadership. Other factors do not have much to do with corporate law, as currently constituted, but could be seen as matters of internal governance that corporate law could incorporate. I am thinking here primarily of those efforts to change corporate law's structure to accommodate employees and, to a lesser extent, other firm stakeholders.<sup>189</sup> However, still other sustainability factors deal primarily with a firm's business, rather than its corporate structure. These matters—such as taxes, workplace safety, and environmental concerns—apply across corporations as well as other business law structures (such as LLCs and partnerships). They are not really matters for corporate law.

Sustainability advocates may resist this characterization. After all, the very core of the sustainability norm is to build those principles into the corporate DNA. But any effort to put sustainability into corporate law must attempt to define sustainability and then impose it across all corporations. It is easy enough to make clear that shareholder primacy is itself a rather weak and unenforceable norm, and leave corporations to their own devices. But I do not think much more than that could be done. At most, perhaps, states could add a new form of organization that would be purportedly limited to sustainable corporations<sup>190</sup> or allow existing shareholders to incorporate a sustainability norm into the corporation's charter.<sup>191</sup> While these reforms would help change existing norms about the corporate purpose, they do not seem too likely to create actual legal incentives for companies to act more

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186. See *supra* Part II.B.

187. See *supra* Part II.B.

188. See *supra* Part II.B.

189. See, e.g., Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334 (2008).

190. See, e.g., Sneirson, *supra* note 10, at 1017–19 (discussing B corporations).

191. *Id.* at 1019–21. These charter provisions do not appear to have any enforcement mechanisms. *Id.*

sustainably. They would likely either reinforce a norm that already exists or be neglected and forgotten. Other efforts at corporate reform, such as providing voting rights to employees, might be characterized as “sustainable.” But such a characterization would only illustrate (in my view) the fungibility of the term.

NASCAR is a privately held, family owned company. It is utterly not transparent. It is viewed within its sport as a “dictatorship.”<sup>192</sup> In the past, it has taken steps to make sure that its drivers could not organize or join a union.<sup>193</sup> It has been accused of using monopoly power to direct races to another corporation owned and controlled by the same family.<sup>194</sup> But it has taken steps toward making its sport more environmentally friendly and sustainable as a matter of planetary survival. These steps illustrate the types of voluntary corporate activities that sustainability advocates support.

With this in mind, this Essay makes two suggestions to corporate law sustainability advocates. First, define sustainability in a way that focuses on environmental concerns. My sense of the literature is that “sustainability” falls somewhere between “green,” which is purely environmental, and “CSR,” which includes environmental concerns as one of many “social responsibilities.” Arguably, there is no need to add sustainability to our linguistic mix if it simply means one of these two things. When it comes to the need to “sustain,” the life of humanity on the planet trumps all other sustainability concerns. When using the term, sustainability advocates should focus on efforts to sustain the planet through environmentally friendly practices that can serve humanity over the longer term.<sup>195</sup> Concerns about board composition, taxes paid, or even worker empowerment should not dilute the “sustainability” brand.<sup>196</sup>

Second, I would encourage sustainability advocates to focus their efforts on environmental regulations and tax policies that encourage green practices, rather than focusing on corporate law. Corporate law structures the corporation; it establishes voting rights, power structures, fiduciary duties, and derivative actions.<sup>197</sup>

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192. HOWELL, *supra* note 16, at 13.

193. *Id.* at 37–48.

194. *See, e.g.*, Ky. Speedway, LLC v. NASCAR, 588 F.3d 908, 921 (6th Cir. 2009).

195. *But see* Sneirson, *supra* note 10, at 989 (using “green” and “sustainable” interchangeably).

196. I do not mean to denigrate these concerns; in fact, most of my work relates to worker empowerment. *See, e.g.*, Bodie, *supra* note 36. I only mean to suggest how “sustainability” should be used in the corporate law literature.

197. Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 948, 950 (2008) (“Corporate law determines the rules governing the organization, purposes, and limitations of some of the largest and most powerful institutions in the world.”); D. Gordon Smith, *Response: The Dystopian*

It generally has little to say about the actual business of the corporation.<sup>198</sup> Sustainability, on the other hand, is all about encouraging sustainable business practices. These practices can be mandated by environmental laws or encouraged through tax laws. At most, corporate law can allow for such practices to be adopted. And—for the most part—it already does.

I do not mean to downplay the importance of norms. In fact, I mean to assert the opposite: the changing social norms about the importance of sustainability are far more important to the environment than corporate law ever could be.<sup>199</sup> It is those changing norms that drive companies to act sustainably in the first place. NASCAR is a great example. It is the importance of sustainability as a social norm that is driving NASCAR to act more sustainably.<sup>200</sup> And NASCAR is not acting on its own; it is joining hands with its many corporate partners to leverage sustainable practices across as wide a swath as possible. Certainly, the temptation is to get more publicity than the underlying practices warrant. But sustainability is not something that these corporations are pursuing individually; they are practices that reach across corporate boundaries and change entire industries. Tax breaks and environmental regulations are ways to encourage or push for these changes more directly. Corporate law is peripheral.<sup>201</sup>

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*Potential of Corporate Law*, 57 EMORY L.J. 985, 990 (2008) (“Pared to its core, ‘corporate law’ is the set of rules that defines the decision-making structure of corporations.”).

198. Indeed, as discussed earlier, sustainability advocates have sought to establish this when it comes to dispelling the shareholder primacy norm.

199. Cf. Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 544 (1990) (“Thus, it is no small matter to disprove even the extreme hypothesis that *all* of state corporate law is trivial.”).

200. Eddie Gossage, president of the Texas Motor Speedway, describes the importance of green initiatives to companies whose businesses are not focused on eco-friendly, sustainable products:

There are some companies that aren't going to get involved with you if you don't have a green initiative. They want to be environmentally conscious and sound. If you make a presentation to sponsor your car or race, it's, 'Well, tell us what you're doing about green concerns.' If you don't have an answer, that may shut the door for you. They might not have an interest. There are some companies that are going to have budgets set aside exclusively for people that are actively green. There is a smart economical benefit to this.

Nate Ryan, *NASCAR Going Green, Moving to Ethanol Blend Fuel in 2011*, USA TODAY (Oct. 16, 2010), [http://www.usatoday.com/sports/motor/nascar/2010-10-16-ethanol-blend-fuel-2011\\_N.htm](http://www.usatoday.com/sports/motor/nascar/2010-10-16-ethanol-blend-fuel-2011_N.htm).

201. Again, I do not mean to suggest that corporate law is peripheral to all matters—only to sustainability issues (as I've defined them). Matters relating to the corporation's internal power structure should be the stuff and substance of corporate law. As to issues like board governance and worker empowerment, I agree that “[c]orporate law is a big deal.” Greenfield, *supra* note 197, at 950.

Corporate law commentators tend to think of the corporation as an individual silo of activity, with shareholders, directors, officers, and other stakeholders interacting within the firm to create economic activity. The example of NASCAR shows that the corporation may not be the appropriate level of granularity when it comes to sustainability efforts—or perhaps economic regulation more broadly. NASCAR is an example of the “imbedded corporation”—a firm working within a complex set of partnerships, contracts, and other economic arrangements. Sustainability makes sense within this framework. Perhaps ultimately we will decide that rather than importing sustainability into the closed world of corporate law, we need to look beyond the corporation in regulating the basic structures of our economy.

#### CONCLUSION

Global climate change is a massive problem, and it calls for massive efforts to combat it. In looking to make our world and our economy more sustainable, we may need to rethink some of our basic institutions, structures, and norms. However, we also must not overlook that the problem is, at root, a straightforward one: we need to reduce our carbon emissions. NASCAR has taken some important steps to bring down its overall carbon footprint and make its sport more sustainable. These efforts are of the type—if not the extent—of reforms that sustainability advocates would like to see across the economy. But they are the result not of one firm acting on its own, but rather collaborative efforts between NASCAR and its many partners. Corporate law dictates the structure and allocation of power and profits within the corporation; it has little to say about interfirm dynamics. At least for the near future, sustainability will likely have much more to do with corporations than it does with corporate law.