Session IV, Part 1 Chief Justice Leo E. Strine, Jr. Opening Remarks (audio portion)

[Start of recorded material 00:00:00]

Eric: We are going to get this panel rolling, two minutes behind schedule. So please take your seats. I'm Eric Talley, I'm one of the co-directors of the Millstein Center. And I teach and do research in corporate law, M&A, corporate finance, contracts, business-y stuff. And it is a great pleasure to have this panel here this afternoon. We decided to switch it up a little bit and actually have panelists up here to just try to kind of start off the panel. But – and we're going to be sort of going one at a time through the other panelists.

But under the theory that we would also have a little bit more of inter-panelist exchange we thought we would put everyone up here. So let me, you probably know all of these characters up here. But let me run through a brief set of introductions. In the power stool here is Chief Justice Leo Strine from the Delaware Supreme Court. He's a good friend, but more important than that, he's a leading light of corporate law, both to practitioners, academics, other judges, regulators, legislators. And he also enabled the entire panel, should we have chosen to do so, to ditch the business attire for the panel.

Honestly, Mark didn't get the memo. But going down to the far end of the table, Mark Roe, who is the David Berg Professor of Law at Harvard Law School. His teaching and research are centered in corporate law, governance, bankruptcy. Many of you know Mark because he cut his teeth and his checks here in Morningside Heights for many years as a member of the Columbia Law School faculty and notwithstanding that improvident move north. Mark, welcome back to the fold. It's great to have you here.

To Mark's left is Jill Fisch, the Saul Fox Distinguished Professor of Business Law, co-director of the Institute for Law and Economics at the University of Pennsylvania. Jill does extensive work in corporate law and governance as well as securities regulation, and Jill and I have known each other for over 25 years, having first met one another when we were green, young professors.

Jill: You were green, I wasn't.

Eric: Well, I guess so. We were both 10 years old at the time. And then to my left is Bruce Kogut, the Sanford C. Bernstein and Company Professor of Leadership and Ethics at Columbia Business School. Bruce is a leading national expert on corporate governance and ethics from the business side. He teaches a course in governance at CBS, as well as a new class in business strategies for solving social problems. I've got to go to that class.

Bruce: It's done. You've already done it.

Eric: Man, that's a social problem. So on a personal note, I didn't know Bruce before I walked through the door of Columbia Law School, and in the three years I've been here, he's become one of my favorite colleagues, independent of unit. So it's terrific to have him here. That's an informative sign that I like you. I don't know if it's a good sign or a bad sign. But all right, good.

So we're going to start, we're going to kick off the panel with Chief Justice Strine. And I want to try to be a little bit of a provocateur before I get you rolling, Leo, because I know I won't have much of an entrée afterwards. So the panels this morning have very much discussed in a significant way this sort of emerging with air quotes move towards and embracing of a stakeholder governance sort of tick.

And look, this is hardly a new debate. And even the Milton Friedman contribution in 1970 was really just a weigh point along the road. You can trace this debate back to the 1930s, though neither of you and I personally can do so; for me the debate take me at least back to a Law Review symposium in 2001, where I was a panelist along side some dude by the name of Vice Chancellor Leo Strine and it was on exactly the same topic.

And let me just quote from the article you published in 2000 – I guess it came out in 2002. And this will just be 20 seconds. It might be 30 seconds. So the predominant academic approach for the purpose of the corporation holds that it exists primarily to generate stockholder wealth and that the interests of other constituencies are incidental and subordinate to that primary concern. The school is dubious of allowing corporate boards of directors to consider values other than the best interest of their current stockholders. Another string of thought, however, has deep roots as well and sees the corporation as a societal institution with responsibilities larger than the provision of returns to current stockholder base, a base that is often comprised largely of transient equity holder with no long term stake in the fate of any particular corporation.

In this conception the corporate board of directors owes [unintelligible 0:04:55] corporation itself rather than the shareholders, and in weighing any appropriate course of actions, the board is entitled to think about the well being of other constituencies. These competing – I'm almost done – these competing arguments are appealing because they make us feel better about whichever the two models we tend to favor. Best of all, they provide courts and other decision makers with a way out of a basic conflict.

If a board of directors can plausibly claim that the decision to reward employees with a pay raise now will pay off in the long term, a return for shareholders, the need to side with one of the two approaches magically disappear. So what's changed? Why is this debate coming up again and is it different than the way it's come up before in the time that you've been on the bench and in practice ?

Leo: I don't think – I think it's never gone away and I'm not sure it's different. I think that the scope of the issue is just larger. In fact, I want to say a couple of things. I want to talk about, I want to mention words. The New Deal. And I don't mean the Green New Deal, although I support aspects of that. I mean the New Deal. I want to mention the word, two words. Citizens United. Don't let me forget them. Haven't heard those words mentioned. A little surprising, at almost 2:00 and we've been here a long time.

Let's talk about exactly what you get, and I'm going to talk about, and it's fitting that we're at a Columbia, the good Adolf, as I like to call him.

Eric: Now you make sure you get this right.

Leo: Trust me, I know exactly – although I have a friend who is, you know, who started the sentence, for 20 years we'd say, say what you will about Hitler, and we never actually understood what came after the comma because we call pretty much spit up laughing. He's passionately anti-Hitler, but he did start a sentence that way. But I want to go back a little bit in corporate law, history, not nearly as far as my learned friend Colin can go back.

But I want to go back to in this country. We, many of you, some of you are students, many people don't even actually, I think if you were quizzed, immediately know what the word general means in Delaware General Corporation. Right? When corporations were started, don't tell the late Justice Scalia, but – or Chief Justice Roberts, but when they were started in this country, there were no general corporation statutes. All the corporations were specifically chartered by government for a particular purpose.

They were very long charters. And the ultra vires doctrine was in effect. General corporation statutes then emerged where you could do a template, right? And even in the first phases of that, frankly there was a lot more particulars in the statute. That's why we had things like, if you want to do a merger, you had to get a unanimous vote. The ultra vires doctrine stayed in effect. When the general corporation law statutes emerged, one of the first that emerged was the regulation of the ability of these corporations to act on society.

Really anti-business people like the New York business people who supported Teddy Roosevelt, they were among the first to actually support political regulation. We then, I'll accelerate the thing to the great debate between Dodd and Berle, often misunderstood. It was a gotcha game. You guys are familiar with it in academic. Nice to take a part of someone's thinking and try to score a point.

By the time of this debate, Adolf Berle wrote an article saying the following. We have not yet had a New Deal. There's a group of people down in Delaware working with New York lawyers on corporate law. Our general corporation statutes are getting more and more general and less particular. We have had this phenomenon while corporations are less closely held, the people who own their equity have less of a stake in a particular corporation. This could free up a managerial class to act in a way that's adverse to investors and to other people. And he writes an articles basically saying that, honestly, we better keep corporate law, it better stick to its knitting, because if we allow these people to do, to justify their actions by anything that they wish to do, they'll be accountable to no one.

So here comes Merrick Dodd, steps in. He looks kind of like a lib, right? Like Mr. Whoa, he comes in and says, oh no, I'm quoting the head of GE. We're not simply about our stockholders. We're about society and everybody else, and why don't – we should be able to balance all these interests. Well, that kind of, you know, it sounds kind of [woke 0:10:14], to use the word of the moment. But really what was he arguing for?

Well, this is in early days of the – this is the early '30s. He's really arguing, we learned our lessons. The things that brought you this Depression, the things you brought, the height of inequality, and we'll come back to this, because we're at levels of inequality we have not seen since that era. Trust us, we learned our lessons. We are the business elites. We will fix the problem. Adolf Berle, brain truster, wrote the key campaign speech about the economy for Roosevelt and I'm not going to pretend that Roosevelt was an experimentalist, that the New Deal knew exactly what direction was going on.

But Berle, it's like, you know, bullshit on you, Dodd. You know, don't make fun of me. I'm a supporter of this. Corporation should operate within a structure. That structure is coming. But we can't trust economically powerful people to do what's woke for everyone else; everybody who has economic power should act within an economic, with economic accountability. With power comes responsibility.

And power drives purpose, which is another thing that I am very focused on. So when we get the story, what happens? Well, in the US we adopt the New Deal. For all its imperfections, it got us through at a time of rising authoritarianism, a time when Communism had an appeal. It had an appeal within our borders. We had people like Father Coughlin, we had people like Huey Long. People forget this.

I got quoted, I used the term, there's two words I hate about excrement the most. One is the P-word that little kids use, the other is the C word I used the other day. But I want to say, like very obvious, like I can't be political because I'm a judge. But if someone runs it's pretty obvious who I'm going to support, and it's not Bernie. It's the person that I've supported since I was nine years old. And that ain't Bernie.

But what I was saying about Bernie is, when say to Bernie Sanders, because Bernie Sanders will embrace the term socialist, Bernie Sanders has never called for the control of the means of production. What Bernie Sanders has said is there are places in the world like in Scandinavia, Germany, other places, where an approach to market economy was taken that took into accounts the needs of the many.

European social democracy is the descendant of the New Deal. There's a great biography out about Clement Attlee was a huge admirer of the New Deal and his Labor government – and by the way, no government was more anti-Communist, more anti-fascist, than Clement Attlee's government. They put in place many of the element of the economic security things that were adopted by the New Deal. It then becomes adopted by the EU. There's something called the Trente Glorieuses; I'm not good at French except menu French. But they're the 30 glorious years.

What were they about? Well, think about what the New Deal was. The scope of the American economy had become nationwide. The scope of the regulatory state to address the economic realities that came with that economy had not been extended. The New Deal did that across that scope. Franklin Roosevelt and others, including Adolf Berle, who was involved in the State Department when he was there, the vision was for that New Deal to go worldwide.

What happened was a period of American and European and OECD hegemony where it was thought that you didn't actually need binding protections, that we could get through. Because, and so you had this period of economic security in Europe through I think, well, I mention, I said I was so glad to have somebody from the OECD here, because we have to really think about Australia, Canada, Japan. Businesses were operating within a structure and Adolf Berle himself actually said, you know, honestly, my arguments about, within corporate law, focusing so much on stockholders, I can actually relax them a little bit because I feel more comfortable now because businesses are operating within constraints.

When Marty wrote his 1978 article, he refers to the fact that it's got to be passé to think that businesses will focus only on profit, because they can't. They have to focus on the safety of consumers. They have to focus on the environment. I was saying to Colin, we no longer – you know why we no longer have foggy London? Because of government regulation. Foggy London was pollution. Marty cites all these things. I want to give some credit to Milton Friedman. I don't really agree with anything pretty much that man said. But within the context within which he wrote that, it's not as extreme or stark as it's now taken students.

And here's the reason. He wrote that in 1970, when there were very strong regulatory protections for workers. Not just in the EU and other things but even in the United States. To be honest, if a union got elected and you didn't recognize them, the NRLB would actually do its job and kick your butt and make you bargain with them. So when he wrote that, and he was saying business should stick to your knitting, within the rules of the game, the rules of the game were actually quite vibrant.

So what's happened since? Well, in international trade we do want to open borders. That was part of the vision, right? What did we globalize? We globalized the power of mobilized capital. We made people open up markets. Did we global protections for working people? No, we did not. Did we globalize the other sorts of things? No, we did not. Did we expose workers in our communities therefore to competition from other places that where frankly workers treated less? Yes, we did. Where people could externalize environmental costs in a way that you couldn't in the USA? Sure we did.

Did we allow ourselves to get played off against each other and shift the revenue bases of our society away from businesses towards ordinary people? Look at the share of school taxes and other things paid in the United States. Did we allow hypocrisy? Who's the world's most famous Dutch rock band? U2. U2. Bono. Bono tells everybody what to do. You know what he did? To avoid paying his taxes he's a Dutch Stichting, I believe. So part of where we came to, right, and then we get to the inequality of workers, is when you increase – what's happening?

Re-aggregation of capital. Those separate things become together. But whose money do they hold? I talk about the separation of ownership from ownership. That's something I've written about for a long time. Whose money, who is the biggest federal library subsidized industry in the United States? Money managers. Why? Because those of us who work, some of our money is going to them every week. They hold it till we're 60. If we save for retirement, because our kids want to go to schools like Columbia – I'd love my kid to go to Columbia, didn't have the SATs to get there, but going to a plenty expensive school.

My money's going into something similar. I don't control how this stuff get voted. Intermediaries do. So over time externality regulation, the rules of the game, have gotten weaker. The things that protect workers have gotten weaker. Particularly in the United States, the bargaining power of worker have gone down. To be honest, when you've seen moderately less inequality in other OECD nations, it's because even at companies that don't have unions, they have mandatory work councils, there are other things that give labor power in those societies that we don't do.

Therefore, one of the bigger things that you see is when you increase the power of capital over corporations and they demands things for themselves, that the gain sharing between workers and the equity holders has shifted profoundly. I heard some big billionaire hedge fund guy say the real problem since the financial crisis is the pie hasn't grown fast enough. Well, sure, I'd more pie. But if they shared the frickin same amount of the pie that usually went to the people who sweat, there'd be a lot less inequality. The fat cats at the top are taking more pie, and the representatives of ordinary people, the people who hold our equity capital, are actually, have been in some ways part of the problem.

We've had corporate California. What I mean by that, and I love California, but California started to have a problem with social investment, uninvestment, other things over the years when they went to referenda to do anything. When you subject the boards of directors to the immediate whims of the marketplace, without hold votes and increase proxy things, votes on everything, and the market puts pressures on them, that's going to have an intended effect.

And perhaps the biggest intended effect is to be honest, in the game sharing between the people employed by, who sweat on behalf of corporations, and the other constituency that puts in input. So I think we have to talk about it then, this power and purpose. The only thing I disagree with Colin is, do I think there's an insight into design in corporate law about the purpose of it? Sure I do. But I didn't mention another thing called geography. When we went through this history, when corporations were founded, they weren't all over the globe, necessarily.

When the corporation expanded, it tended to create jobs in the community in which it operated. The people who were affiliated with the corporation tended to live in it. There's obviously dysfunctions that can occur in that thing. But there was more of a connection to a particular society, more of gain sharing naturally. A lot of that has eroded. The institutional investor community, their answer has been the thermometer. The thermometer is called the Independent Director. The Independent Director acts as a thermometer of the market.

The Independent Directors are defined by people as people who have absolutely no connection to the corporate that would give them any reason to care about its future. No, I mean that's also because they're resolutely impartial in that sense. But they act as an instrument in the market. And so my only point about purpose is, only within – Eddie Cochran wrote the great song "Summertime Blues." I believe I even quoted it back in the [unintelligible 0:21:49] and there's a guy, alienated teenager, and he says the following. He's complaining he can't get the car to go out with his girlfriend, he has to work on stuff, and he goes, I called my Congressman and he said, quote, I'd like to help you, son, but you're too young to vote.

But within the corporate polity, and I've said in the UK, the UK is doing all these kind of high minded, so the constituency, they have the UK takeover code. In the American polity, in corporate law, the only constituency with the right to vote or do things is the stockholders. And like in our policy, we, our polity, we the people, can we the people give priority to environment, social responsibility, other kinds of cultural arts and stuff in what comes out of our Congress? Sure. That's because we think it's in our best interest. But within the corporate polity, the people who are these citizens are the stockholders.

There is no Delaware case that says that a board of directors in the last 20 years, when the corporation's doing better, can't have allocated the same share of that prosperity to the workers as would have been the case in 1975, 1965 or 1985. That's all been done by these board of directors and their management. Do I think that's because they're evil? No, they operate within a power accountability structure and they're answerable to one constituency.

In fairness to Milton Friedman, the rules of the game, right, and this is the thing that we have to think about as corporate law people, the answer that we should keep corporate law to its knitting, it's not as credible. And this is where Citizens United comes in. And Jeff, you missed one thing that the asset, I love when they call it the asset owner. They're not the asset owners. They are most Americans' direct fiduciaries. They always, because they're like what Americans companies are most people's stockholders up and they say Google.

They're not Google, it's not Apple. It's Vanguard Fidelity [unintelligible] 0:23:50]. By the way, start talking about the Big Four, and we need to get Fidelity in the tank. They have a lot of my money. They're now the third biggest indexer. They're not asset owners. They're just as much an intermediate as anyone else. The asset owners are the actual working people whose money go into the system and everything .

And in terms of political spending, and I'll finish with this about rules of the game, and there's a great book. I wrote a thing about Hobby Lobby. And I said the following about Hobby Lobby. Because remember you used to pay company script, we had this stuff where we were paying company script. We have a case called Hobby Lobby, where the government pays something so that you can have health insurance for you.

And we have a corporation that actually provided four of these contraceptoins. But then when it was our president and our Congress pass a bill, they say it's a religious thing. A woman, you know, we can't be having a healthcare plan where one of our employees wants to use a form of contraception that we consider against our religious beliefs. Well, whose pay was it? Can they keep you from paying the thing? But we had a court system that put the rights of the few above the many.

Now some, I've had a little argument with some of my friends who cited that case to say, oh, see, corporations can be more than about stockholders. And I said that's a weird case to cite for anything good, because it's a bad case. But here's why it's bad. Why could they do that? Because they're the stockholders. It wasn't about a larger purpose. It's because some particular people control that corporation. Then you talk about Citizens United. And this gets back to the, Jeff, the third thing you didn't mention about the asset owners; what they can do and what everybody knows is that no one invests in the index fund, so that the ultimate companies can spend your money for political purposes. Whether you're a conservative who doesn't want some of those Silicon Valley folks talking their good game about all their, you know, whatever they think is the pour over coffee cool social issue of the day, to somebody who doesn't want the people who brought us carbon and who suppressed the research about it, spending – there's pretty much a consensus that we give the money over because we have to to save for retirement, and we don't want them all doing that.

But what have we done? We've freed our creation to actually act on the rules of the game. And the people in the middle who are talking a good game, they abstain. They won't even vote – State Street will give them a pass. They'll vote on disclosure. But they all know that no one authorized it. They also know the better CEOs don't want to even be able to give because it allows them to stay out of business; when you can give, you can get [mow-mowed 0:26:50] into doing it. But we now can't even trust the rules of the game to be set because if the Leviathan that we've created can actually take our money without accountability and use it, and guess what they use it on, to influence the very rules of the game that the other constituencies are supposed to rely upon.

So I'll finish with this and I'll give a shout out to my friend Judy at Aspen. There's a lot of us who've been working on things that are not one dimensional. I do not disagree at all from the notion that corporate governance alone is not a solution. But is it important? Is the way in which people vote, is the way, is the space that the investors give to the people on the corporations to operate in a sustainable, responsible way important? Sure it is. Is there something actually true about the longer term reconciliation of the interests of worker investors, with returns to stockholders come together with the interests of workers in society? There actually is.

Because shortcuts get cut out over time. Externality costs are borne by all universal owners, as Colin talks about. I agree with him fully on that. If you can operate in a sustainable way, you can actually treat your workforce better. If we've got to compete with WorldCom, which is engaging in fraud, or an energy company like Massey, which is, has less cost and people in the industry and the punk ass analysts are calling you up and asking why you can't replicate the performance of scum, but you don't have a credible answer; or you get beat up for giving your workers a 4 percent raise, which we've seen these analysts do; or we applaud as innovative, you know, Mother Jones's boarding house; or the fact that people ought to have a third job because their first job and their second job don't pay enough.

You know, then we get what we get. But we have, there are things that we need to do on the government investment side. People like Aspen are working on it. How do we tax? Can we tax in a smart way? Should we reduce speculation? Can we actually give some breathing room to the asset managers to think long term? Maybe a graduated capital gains. Maybe a fractional trading tax to stop fund hopping. How about investments in infrastructure?

But I'll finish with this about the globe. We will not stop this problem within the domestic US. We will not stop this problem within the EU alone. We cannot shut our eyes and our hearts and our souls to the need for the developing world to move forward. But we don't have the time to learn the history lessons as slowly as we learned it before. If we allow the kind of environmental impact that we had in the 19th century, if we allow 10 years of that to go, we won't have a planet.

We shouldn't be debating minimum wages. We know they make sense. We should not be debating child labor. We know they make sense. We know that working people need economic security. All the OECD nations agree. What we actually need to do then is to come up with rules of the game, come up with policies that make sense across boarder, across boarders, not allow the kind of arbitrage that we have, not compete with our basic values, and not pretend that any of the prosperity we have was the sole solution of markets.

That experiment was done. That's when you had child labor, that's when you had pollution. That's what caused the rise of fascism and communism to address the failure of a system that's solely focused on lucre. You would not have the Internet in fact if it were not for Al Gore. Because the government invented the Internet. You know what Al Gore did? He passed a bill to give it to the private sector. The industry in California could not make chips if they can't wash it with water, and they wouldn't have had water if it weren't for government.

The drugs that save people, most of the research is [unintelligible 0:31:11]. Our biggest form of philanthropy is when we pay our taxes. A billionaire who pays an effective tax rate of less than 10 percent but then takes 1 percent and gives it to charity and get feted is socially irresponsible compared to a working person who pays an effective tax rate of 20 percent. So I think we need to talk on all these dimensions, but we cannot talk about the purpose of corporations without considering the power structures within which they operate.

Adolf Berle was a realist, my hero. He's one of my heroes, as is George Orwell. And if we want to do good things, we have to be clear eyed. And that's a tradition, actually at Columbia Law School. And I'm proud to be here and I probably took too much time. But I gave you, that's my counter-narrative. And I'm wearing Levi jeans made I believe still in the United States of America.

Eric: Thanks so much. [Applause] In fact, that was so powerful that Leo broke our livecast, and so we have to re-initialize. I'll just take a couple seconds here.

Leo: Was it any – did I say a profane word that broke it something?

Eric: I don't know. I don't know if the censors got at you or not.

Leo: It was the jeans.

Eric: It was probably the jeans. So we're just going to restart this really quickly and then we're going to –

[End of recorded material 00:32:37]