Session IV, Part II Chief Justice Leo E. Strine, Jr.

[Start of recorded material 00:00:00]

Eric: Mark Roe, take it away.

Mark: Okay, when Jeff – and Jeff suggested that I talk on this panel, it wasn't a paper. And Jeff suggested, look through Leo Strine's work and extrapolate the big themes and talk about the big themes. Which makes complete sense. I teach one of Leo's articles. There are many of them, every semester in a corporate seminar. And so I've got good familiarity with them.

Bringing them down to one slide is difficult. But I think it can bring it down to one slide. Two issues keep coming back in Leo's work, one of which we saw a lot of in Leo's presentation just now, a second which was just alluded to but it's big in the writing. Only mentioned once in the talk. I'd like to think it's because of Leo's and my conversations about the subject over the years but I suspect that's not the answer. So two big themes, that the public corporation for it to work, it just has to be seen as working for the average person and it has to work for the average person.

And the second is that stock market short-ism, a relentless trading, hedge fund interventions, deeply damages the American corporation and deeply damages the American economy and we've got to do something about it. So there are two things I could talk about for 10 minutes or so. One could be the first issue. I'm not going to talk about that because I'm essentially in complete agree with Leo. And Jack raised the possibility of people here running for office. If that was a campaign speech given by somebody else, they would get my vote. Because that's a good vision for – it's a vision of what's wrong and what needs to be fixed.

And some of what's going on in this corporate governance debate, alluded to a little bit by Ron Gilson is kind of a defense against the populism of our time. But structurally for the – the basis for what we should be doing is utilitarian. Greatest good for the greatest number and even Friedman's shareholder primacy view really would need to be justified on that somehow produces the greatest good for the greatest number.

The second big theme is corrosive short termism. And what I'd like to do and the reason I have a slide deck is show some pictures in a moment or two. The theme of the conference is Narratives and Counter-Narratives. I'm not sure what the narrative and what the counter-narrative is here, in that I think the primary narrative is that stock market short termism is a deep problem.

And to the extent I'm going to provide something here, it's going to be a counter narrative that if you look at the economy-wide data, it seems not to point to stock market short termism being a deep problem. So what's kind of the motivation? It has been seen as a deep problem for a long time, to the point that I think there's close to a consensus that stock market driven short termism is one of the major economic problems we face. So here's Marty Lipton's class statement from the 1979 takeover bids article. It would not be unfair to pose the policy question whether the long term interests of the nation's economy should be jeopardized to benefit speculators.

More recently there's Joe Biden's Wall Street Journal op ed on the subject. Short termism is a problem. It's a problem in the way it hurts employees and workers. And then from the business community we've got Warren Buffett and Jamie Diamond saying similar things. And one of the significant themes in a lot of Leo Strine's work has been short termism. So one article title "Can Corporations Be Managed for the Long Term?" Unless their powerful electorates think in the long term.

From another article, directors are increasingly vulnerable to short term objectives, sacrifice long term performance for short term shareholder wealth. Combining all the short term literature into one slide, and not all of this is Leo Strine's, I think you can say there's a set of four main critiques that are interactive, that because of stock market driven short termism, we're getting cutbacks in capital expenditures. Firms are being starved of cash, necessitating a hit to research and development, and that stock markets just don't support longer term innovation.

And the consequence is, we've got a much weaker economy than we would have otherwise. So just let's look at these complaints, one by – they are the four big themes of the short termism literature. Now look at these one by one. Here's – capital spending is declining. It is declining. There's no doubt about it. Why is it declining?

The dominant hypothesis has been stock market trading and activist interventions. A simpler alternative is we've just had a weak economy since the financial crisis and the big dip is after the financial crisis. But there's a third possibility that we've got to look at, is something fundamental is happening in the economy that's leading us to use much less in the way of hard assets than ever before.

Clicker. I hope my clicker isn't stuck. But I'm pressing it and it's not moving.

Male Voice: I can press it for you. Got it?

Mark: Okay. So capital expenditures. Here's a picture that I think is worth looking at again and again. Capital expenditures in the United States, bottom right, declining. This is CapEx scaled to GDP. But then when you look at the rest of the OECD, one of the themes of Leo Strine's talk just before, the slope of the decline in capital expenditures in the OECD is actually sharper than it is in the United States. The United States, the country with – except possibly for

England, the closest ties to the stock market, most dependent on the stock market, capital expenditures are actually declining here less than in the rest of the OECD.

Two examples up on the slides. Capital expenditures to GDP declining more sharply in Germany and Japan. Is the stock market the likely culprit? Maybe. Could be that the post-industrial economy just is different than from a prior economy. It could be we're getting more efficient use of capital equipment. It could be other things. But the comparative data at least should give us pause that the American stock market is causing a decline in stock market – that the stock market is our fundamental cause for declining capital expenditures.

Is cash disappearing? The buy-backs are one of the big bête noires of the current debate. And there's no doubt that there is a significant increase in buy-backs, and it's a big number. And that's the red line up there. But what's that dotted blue line? The dotted blue line is the increase in net borrowings in the same constituency, the S&P 500, over the same period. And what you can see is the lines move approximately in tandem.

It looks like what's been happening particularly since the financial crisis is that the entire corporate sector is recapitalizing, eliminating equity and increasing debt. An easy explanation is with interest rates at near zero from 2009 until now. Debt is relatively cheap to equity and companies are issuing debt, buying back equity. And this seems to support that story. This is not a good news result in my view. This is a very bad news result for the recession of 2021 in that we will have a much more weekly capitalized company with more debt than they would otherwise have.

But it's not a buy back issue. It's – buy backs are not starving the firms of cash. It's that they're recapitalizing. There's more to say about the buy-backs but not here. My colleague Jesse Fried has written a very nice piece showing that a significant portion of the buy-back number is actually, should be reduced by stock issuances largely to employees. The net number is still substantial but much less than is usually thought about.

Is cash disappearing that could have been used in R&D or capital expenditures? Now, the cash balances in the S&P 500 have been rising steadily. Buy backs, maybe it would be higher if we didn't have buy-backs, but the cash balances are there. The firms are not being starved for cash. Third prominent complaint is that the short-termism of the stock market is killing R&D. It doesn't seem to be. So this graphic is R&D scaled to GDP.

Research and development expenditures are going up in the American economy, noticeably more sharply than the GDP is growing. We're spending more on research and development. Now this kind of economy-wide thing can't lead to a solid, irrefutable slam-dunk proof because we don't know whether the counterfactual, maybe we could have had even more R&D. But in terms of the prima facie case, R&D is going up. Hedge fund activism is going up. We don't see a relationship of hedge fund activism and increased trading leading to an economy-wide killing of R&D. More would need to be shown to see that we've got a connection between the two.

And the last is just an intuitive point. If the stock market were really not dealing nicely with future oriented companies, we shouldn't see that the five largest stock market caps in the United States are Apple, Amazon, Microsoft, Google and Facebook. We should see something else. Maybe all 10 of the big top 10 companies by stock market caps should be future oriented companies. But this initially intuitively really doesn't look for bad for the stock market.

So a summary of this. I think it's a counter-narrative since the widespread consensus is that we've got a deep stock market short-termism problem, is that the evidence isn't there that we've got stock market driving short-termism, that is destroying critical aspects of the economy. The evidence isn't there that it's killing capital expenditures or research and development or starving firms of cash. Why is it such a prominent issue?

I suspect it ties into the first aspect. There's a widespread sense that somehow the large corporation is not delivering the goods for the average person, and this is a rhetorical wedge into something's gone wrong with capitalism. But here's the deepest pessimism that I feel about this. And I don't want to bring you all into the same funk that I am in this, but I think we'd be more functional if we got there.

If stock market short-termism isn't the deep problem for the cause of other problems in the economy. But we tend to think that it is. We're going to have seriously misdirected remedies. So from a managerial perspective, Marty Lipton's talk earlier, early in the day, if we deeply believe that stock market financial short-termism is a deep problem, one of the remedies might be to give managers and boards even more discretion than they have now. But if the problems in the economy are being incurred and are results of other difficulties, and I'll give a couple that haven't been mentioned, what if there's just too little competition in the economy right now?

So too little competition will frequently show up in declining investment in assets. An oligopoly tends to invest less than a more competitive industry. If that turns out to be true, I'm not saying it is, but there's some pretty good evidence that we've got significantly increased concentration in the United States over the last 25 years. The corporate governance remedies that we would think about aren't going to get to the problem. If the fundamental problem tied to buy backs is not so much the buy back itself but that we've got this tremendous buildup in debt which will not be stable in the next recession, then we should be focused on the debt and probably on the deductibility of interest or something similar and not a corporate governance solution.

So in some ways, maybe this is a good news and a bad news story, in that the cardiologists of the world come in and look at the patient and say you're really sick. We've diagnosed you as having a significant cardiac problem and we're going to need to operate. And then another doctor comes in, I'll promote to being that doctor, and says you actually don't have much of a cardiology problem. You've got a problem and your life expectancy may not be as deep as you want it to be, but it's not a cardiology problem.

It might be a cancer problem, it might be an Alzheimer's problem, it might be a Parkinson's disease problem; we've got to look more carefully. But I think we can say that based on the economy-wide evidence we probably don't have a very deep stock market driven short termism problem. We've got something else going on and we need to figure out what it is and how to fix it. Thank you.

Eric: Thanks, Mark. Appreciate it. [Applause] Leave it to Mark Roe to be a glass half full person. So I am – before we ask Leo to sort of comment, I think it probably makes sense to go through all of the presentations, and hopefully we can get a discussion going. So I want to move straight to Jill. And can we cue up her slides or are they ready to go? Excellent.

Jill: Okay, so it's a great pleasure to be here. Thank you. And Mark's lead-in is perfect because I'm not sure whether I see the glass half full or half empty. There's certainly something in the glass. But in the theme of counter-narratives, I guess I want to question how much of a problem we have at all. And this is the title of our panel. Obviously we are supposed to think about the role of those who have power in the corporation and their capacity to affect corporate purpose. But let me start with asking the question that Colin teed up this morning.

Is there some urgent need to rethink corporate purpose. And there are a lot of really smart people who have had a lot of different things to say. I think rethinking is great, but in terms of an urgent need to change, I guess I'm kind of one of those people who doesn't necessarily see an emergency. And you know, I might draw an emergency in other contexts. Right? Why don't I think that?

Oh yes, there we go. I've got it here, yeah. Sorry. There we go. Right? So first of all, what exactly is our data set when we say there's a problem? So Josephine talked about [Bosch 0:17:19] and Volkswagen this morning and suggested, you know, we've got an issue with respect to ESG. And you know, I think we tend to see in many situations the outliers with respect to corporate issues. Right? Volkswagen was a tremendous environmental problem made worse by the green washing that went on.

But if you look at corporate efforts to identify and deal with environmental risk, we've seen tremendous progress. We've seen corporations that are paying serious attention to these issues and are changing or modifying the ways in which they operate. You know, could they do more? I mean you know, there's obviously a question with respect to benchmarks. They're paying attention. And it's not just corporations that are paying attention. It's corporate executives, it's corporate directors, it's big corporate shareholders. And the question, Cindy raised the question about our petition to the SEC to compel sustainability disclosure.

I see the petition as an effort not to get corporations necessarily to be more sustainable but to be more transparent about what they're doing, to pay attention to what they're doing, and a way for the SEC to set norms and expectations in this area in the way that the SEC has done that in so many other areas. Another example. Leo's comments referred to minimum wage, right? And you know, we've got big issues in this country with respect to wealth and income inequality. But what have we seen since the election?

We've seen an awful lot of companies privately taking the initiative to raise the minimum wage that they pay their workers, right? Without a national minimum wage requirement. They're doing it voluntarily. And you know what? Shareholders aren't hauling them into court in Delaware and saying this is a breech of their fiduciary duty to their shareholders. So you know, I think this is an issue that requires attention. I think an ongoing dialogue on what's important and what responsibility corporations have is great.

But I don't see it as crisis. Right? Why is there then all of this hype? Well, I think our expectations for what business is supposed to do and for what business can do are changing. And there are a number of factors that lead to that, right? Businesses today are bigger. Right? And if you're bigger, you have got more impact, right? We see what you do in a way that matters and we tend to think, okay, you have more resources, therefore you can do more, right? When it's the, you know, grocery store on the corner, you know, we might say, you know, there are supply chain issues and how much can we really hold you accountable for?

When it's Amazon that's running the grocery store, it's a different story. Businesses are global, right? And so they make choices about how to balance the different cultures, the different norms, the compelling needs in a variety of jurisdictions. That makes these questions of responsibility a lot harder. Corporations are political actors. And Leo's latest article talks a lot about corporate political activity. Leo and I differ to a pretty big degree. I think about the legitimacy of corporate political activity.

But you know, the fact that they're big, that they're global, also means they have more political influence, and it's something we need to pay attention to. Corporations are subject to the demands of an increasing number of stakeholders, which raises the question, well, okay, how do you balance those different stakeholder interests? And you know, my view, and I think, you know, Marty and I share this view, is that corporations, corporate actors, try to do the right thing. I've had any number of corporate executives and general counsels and directors come to me and say, you know, we have this pressure to consider this societal objective or this interest. But we've got these other concerns. How do we strike a reasonable balance and where do we look to to get guidance on those points?

Corporations are interconnected. What one corporate does affects what other corporations do, affect other jobs, affect prices. And finally, in this Internet era, corporations have access to so much more information. Right? And we have this idea, if you can know it, if you can find it out, you've got some responsibility to do something about that.

Now this presents a lot of challenges. Right? And so our intuition is okay, you got all of this stuff going on, right? Balance that stuff in a way that doesn't take this narrow shareholder economy perspective as your sole guideline. Be focused on social purpose. All right? What I put up on the last slide is meant to suggest I don’t really think this common social purpose is a concept that makes sense. Right? All of these different stakeholders, all of these different businesses, drawing upon different products and cultures and so forth, I think there are a variety of corporate purposes.

And if the idea of harnessing the power of corporate decision makers is to change and to implement some kind of common purpose, I think that's misguided. Right? And I think it's misguided in part because think about, okay, who's going to decide? Right? So I had, the first slide had the title of this panel, corporate power, right? These are all people who have power. They have power in different ways. One of the things that we've seen involving over time, these shifts in the balance of power.

We might be very worried about these shifts. Right? But what they essentially do is allow people to have different amounts of say into what the corporate purpose is. But how do we reconcile differences among the different stakeholders? How do we deal with questions of competence and expertise? A debate that I continue to have with Rob Jackson is, okay, let's assume that we somehow could finesse all of the technical issues that Ron Gilson is rightly worried about. And we could find out what the workplace-only investors who have their money in Fidelity and BlackRock and Vanguard mutual funds, how they would vote on some of these shareholder proposals.

Do we necessarily want those votes to guide the decisions that corporate executives and directors make? I'm not so sure. In separate work I've paid a lot of attention to financial literacy of those retail investors. And number one, it's not very good, and number two, with respect to the workplace only investors who actually could be responsible for a lot of the votes in these mutual funds, it's actually worse than the average person who doesn't own any equity at all. So you know, kind of shocking. And you might say, okay, financial literacy is different from knowing how you feel about, you know, important political issues like, I don't know, executive compensation and ESG. Those decisions have business ramifications, important business ramifications. And if you read some of these shareholder proposals, you know, psyching out what the average investor would want if they understood the proposal is a lot harder than you might think.

Then there's the issue of agency costs. And I'll talk a little bit more about agency cost, because intermediated investment I think really flags the problem of agency cost. But before I do, you know, one I think common theme that you've heard throughout the day is these problems about wealth and income inequality. It's easy to place the buck in the hands of corporate decision makers and say, okay, it's big business that's responsible for wealth and income inequality.

I think that's not really fair, and I don't think corporate governance is a very rational solution. And I think what Rob Jackson said about incentives and people responding to incentives is an absolutely fair point. But okay. So let's talk a little bit more about agency costs. Right? If we have intermediaries, if we have asset managers, mutual funds, pension funds, big institutional investors, another theme from Colin's book, and a theme from the UK experience, is that these big owners should be engaged in more active stewardship.

What do we mean by stewardship? Does that mean they're not supposed to focus on the economic bottom line? Does it mean that they are somehow responsible for compelling corporations to consider non-shareholder value? Here the Department of Labor says absolutely not. And the Department of Labor has been criticized for taking that position. But to the extent that stewardship means things that are orthogonal to economic value, where are do asset managers get the insight into which of those things are important?

Which non-shareholder values count? Is shareholder value itself purely an economic concept? Can shareholders say, look, we care about the environment? Right? And we want the balance, we want some sort of trade off. Putting aside the long term, short term debate, which I think Mark has done excellent work on. And if shareholders value itself includes non-economic considerations, who makes that choice? Do we go to the people whose money is in the retirement funds and say, okay, how much of a hit on the return, on the size of your pot of gold for retirement are you willing to take in favor of X value or Y value?

And who even gets to choose what those values are? Right? So this is a picture of the Big Three. We can talk about whether we should add Fidelity to that. But you know, when we talk about power today, the new players, the big players are these big asset managers. I didn't click, sorry. Now I'm way behind. All right, there. Sorry. [Unintelligible 0:28:38] my slides. Right, so there's the big asset managers, right? What are they supposed to do? Asset managers aren't shareholders, right? They're intermediaries. Right? How does an intermediary decide what to do? Asset managers, I've written about this, have their own incentives, their own objectives. I don't think we can reasonably expect them to operate their for-profit businesses with the goal of maximizing society value, right?

And even if we're talking not about the asset management companies and their owners, the stock holders or the private companies that own them or in Vanguard's case the funds themselves; are we talking about their objectives or the objectives of their own beneficiaries? Right? So here's my sort of concluding thought, right? Larry Fink obviously has gotten a lot of attention for addressing some of the topics that are at the heart of this conference, for pushing, I think, corporate management to consider a counter-narrative in which corporate purpose is defined more broadly.

When Larry Fink writes his letter to the executives, to the CEOs of the big public companies, who is he speaking for? Is he speaking for himself? Is he speaking for BlackRock? Is he speaking for the shareholders in BlackRock's mutual funds? And how do we decide what any of those constituencies who all have some degree of power in this counter-narrative story, how do we actually find out what they value and therefore how they should hold corporate, corporations and corporate purpose accountable? All right, that's it.

Eric: Thanks, Jill. [Applause] And Bruce is going to seize the power chair. Sorry, Leo. Yeah.

[Off mike]

Bruce: So thanks so much to the Law School, to Eric, kind words; to Jeff, the Millstein Center; Ray Cameron, who was in my class not to long ago and talked about stewardship and gave the students some insight in how that works. And other friends here as well. I did take Ned Phelps' class when I was at CEPA on inequality. And I'm not sure exactly which equation solved this problem, but there was – it is interesting that inequality is back in fashion today, and it's probably at the heart of what we're talking about.

I was given a package by Jeff Gordon of, I don't know, seven or eight more articles by Judge Strine, a few weeks ago, amidst a busy teaching period, and I read most of them. I had read the other ones by Judge Strine and I like to kind of come back to you, because I did the work, Jeff. You know, I'll tell you what I learned a little bit from this particular reading. And it has to do a little bit with a personal reading as well because the judge is clearly a good man in the sense he'd attached to a normative vision of the world.

And he's also got a judicial pragmatism. He sees the law largely in conflict with these norms. And that's a terrible situation to be in unless I guess you're made of strong stuff and I suspect he actually is. But you know, he also writes with humor. Humor always helps. Occasionally audacity. But he's got me nervous because even in the business school, ever since Bruce Greenwald started teaching less, students have been sliding more and more off to the direction of socialism, Bruce. And I'm concerned that eventually we're all going to end up on that, underneath that Jacques Lipchitz statue on that plaza with a guillotine there, walking one after another to – no matter how good our hearts are, for all the sins which our writings have evidenced.

So I'm not going to go over the evidence for whether or not capitalism, corporate capitalism is bad. I'm sure Colin did that already in a very, in a very good way. I'm not going to be worried too much by the arguments about shareholder capitalism. I think that's a healthy debate which will continue for a long, a long time. I'd rather pick up what I understand is the underlying current here, that there is something terribly wrong about these, about the wealth distribution in this county and other countries.

And even if the capital investments market are going up, the other data [unintelligible 0:34:10] raised earlier by the judge and that is the share of labor in the economy. Share. Not the overall, is decreasing. And those are the things which have moved students. Even our business students agree as well. So let's turn to the yin and yang of Judge Strine's position between these two extremes and see what, you know, what his readings actually look like.

Now one of the things which I saw is that he does not believe that directors – I think this is probably clear by now, should be pursuing non-pecuniary objectives outside of the shareholders' interest. Okay, that makes sense to me. And I think there's a also a lot of emphasis on boards, how corporate law may limit what boards can do by these statements. But I also want to say that probably we haven't spent enough time, although I hear a little bit, about the power which investors have and what investors may want.

And I think that is increasingly an interesting territory, that investors themselves are – have a gap between what the boards have an objective and what investors actually are looking for. And I know Ron Gilsen is skeptical in ESG. That's because maybe it doesn't fit tightly into the issue of board governance, but I think certainly there is a wider pressure on intermediary fiduciaries like BlackRock or other ones, to respond to this changes concern among population on environment, on equality, on gender fairness. Which we see hitting the boards and hitting governance.

So I like to walk at times away from this board-centric view of governance, and place it more broadly, which I think is the only way to get out of this problem, is to move away from the boards and think about what the overall situation actually looks like. There was an interesting discussion in one of the papers about DuPont. And the activist [Trion 0:36:13], which I liked very much. And in thinking about that, I believe I understood correctly that he may have felt that DuPont ended up getting too good of a deal, that it fought Trion and its demands. But at the end of the day turn to the state, instead subsidize me. Because otherwise I will leave and wasn't that odd in some sense that all this governance ends up that corporation's now going to ask for a subsidy from the state estate itself.

I thought that maybe that was too narrow a framing of the problem, though I sympathize with it. And if you read his other article on inversions you can understand where he might get a little bit, you know, angry if in fact corporations do get a lot of subsidies; because then they also want to run, to run away. But it's a little bit unfair because there's a lot of evidence, you know, mixed evidence and geography that there's complementarities between the public sector, what Mark here referred to as well between infrastructure education, etc. and so on, and what firms do.

And there's a set of mutual investments in both of these things. And therefore there's a kind of public Coasean bargain. We always talk about Coasean bargains between private parties, but there's a public Coasean bargain between the public sector and business as well about what should be a pragmatic sort of sharing of the costs of the benefits of these things. Because after all these are not negative externalities, which are often here referred to, but these are positive externalities.

So this really should be an easy win-win in this sort of environment. It is an issue here in this debate of the is and ought, Leo Strine talks about, that in these areas we don't have a good theory I think anywhere, on a positive theory where the state does. This is why we have such an impoverished discussion of this issue in the US and elsewhere.

But it seems to me when you look at Amazon and Mr. Cuomo this morning making his case, that one of the things which government does do is in fact try to strike a bargain between what corporations are going to do and what the states want to do and find a win around that. And a lot of it happens at the community level, which I think is extremely important to think through. Now in this area there's also going to be non-state actors. There's going to be civil society. And we can look at Amazon and say where the hell were the civil society in this particular discussion?

But they're also present in this debate. So if you look at the wider issues, you know, I often call the, you know, the first level of governance in terms of the ultimate charter which is written rather than in terms of what the board itself is deciding, there is a sort of decisions about what these obligations are on both parties' part. Now I want to switch into something on campaign contributions which Jeff correctly warned me not to go too deeply in because they are so fascinating, Jeff, and they are so, you know, uplifting as well. We see how much effort goes into being able to pay more and more money.

Although the Supreme Court's made that easier in the past few years. And I like very much, you know, Judge Strine's article, I got without your help on this one, the Harvard Law Forum on corporate governance where he says Scalia's argument on originalism in the Citizens United case is more original than originalists. So I like that. I thought that was very witty, and you should praise such much. But you know, I read that through and, you know, I tell my students, we talked about Citizens United, that personhood is not a really weird concept. There's a reason why corporations are people because contracts have to be signed and corporations get sued and you need that concept.

The debate really is about quid pro quo, if I understand this, as well as the issue of First Amendment rights. And then eventually this bit about corporate governance. Now what really surprises me on all these things is I don't know how much really this has to do with the actual question about corporate PACs and about giving, about giving. It is certainly true that corporations give money to corporate PACs. In 2016 it was about 6 percent of the overall giving to – in the US. That's probably because Citizens United kept it kept. You don't have the same liberty to give a lot to – corporations don't have the same liberty as us, and you can't personally give that much money to corporate, the corporate PACs.

But there's an issue here in terms of the where the money is really coming from. And the money is really coming from individuals. Now this is an amazing statement. It always surprises my students. Let me just flip to the next – is it possible?

Eric: Yeah. Who's got the clicker?

Bruce: Jill [unintelligible 0:41:10] right? I only have one more.

Jill: One more?

Bruce: No, no. Go back one. So this is actually – Angela [Rue] is in the back row there. Bring up this data. Left hand side one, we have red, which mean Republican. Blue, which is Democrat. And this is the amount of money which they've been giving. And what you say is that corporations generally give their money between the two. The more bipartisan – because they give their money to incumbents. That may be a quid pro quo argument. They're buying incumbents. That's possible.

It certainly is a pragmatic view on the, on what they actually are doing. This is – on the left are individuals who are either directors or CEOs. Okay, this is corporate elite, if you wish, population. And you can see here that the giving is very extreme. Now these are the same who sit on the boards of corporations and the corporations are giving them money in the middle. When you come to their own giving, it's quite extreme. They go either to the left or the right and there's something much less in between the two of them. It's not bipartisan. So individuals are different in the way the corporations themselves are looking. It already tell us that maybe it's so much a corporate governance issue as it is something dealing about who these, who the corporate elite themselves, what motivates them and who they actually are.

Now I want to flip to the next one if I can, it's the last one, Jill, I'm so sorry. This is just an estimation which we did, and the top one actually shows that if you're a director or a CEO and after Citizens United, you are most likely, if you are rich and ideological, the two of them together, to be giving a lot of money. That's the top one. So it's just rich, knowledgeable people who really get involved. And the good news is, is that you can name them. There's only a few hundred people who fall in this category, and they're giving a huge percentage of campaign donations to the country, which is outside of the original debate, as you read in either the support or the dissent for the Citizens United case.

So I find this to be interesting. I find the courts to have misfocussed on what they were doing and in fact it's not a corporate governance issue so much. It's not even a quid pro quo one so much. The main effect of these decisions has been just to increase the amount of money which a few rich people and ideological ones can give. That's why I'm saying it is an issue about income inequality ultimately and power, which is really driving this particular issue. Now I guess wanted me to be a bit more in trouble on this.

And I don’t think this actually this is a lot of trouble yet. He said would you say a few words about, I think he said Liz Warren. So I guess in this room you guys know her, right? I don't know her. So I called her Elizabeth Warren. And I always admired her work on bankruptcy and elsewhere and I admired her personal work as well. But it interesting thinking about issues of labor on boards, which I know, Colin, you have thought about a lot at one point of your career, and other folks around here have done so as well.

And this also is back to a comment which was made by Judge Strine. He said, unlike in Europe, where labor law and corporate governance law are closer together than you would think, in this country they tend to be separate. I find that interesting. And I want to bring you back to the case of when the – there's a vote in Tennessee to unionize an auto plant which is owned by VW. Volkswagen. Extremely interesting case.

Because Volkswagen, partly owned by a German state, anyhow was not opposed to unions. I don’t think it was fanatically happy with the US unions but really wanted work councils to be put into that plant. And the big difference between American auto plants and European and Japanese plants is that they have work councils and the US plants do not. And there is a belief that makes a productivity difference in terms of what can actually be discussed.

The problem is that labor law, and correct me if I'm wrong in this, I always get things third or fourth hand on this, is that you cannot put in a work council into a plant as management. That can only be done by the union itself. You have to have the union in order to have the work councils, in the German sense of what these things actually mean. I talked to Tom [Coken 0:45:46] about this, MIT. Tom's an amazing fellow. And he said – I thought he would be entire for unions and say, no, this doesn't work without. He says that's a great idea, but that's something else which is going to be very difficult to actually pass, which is interesting.

We turn to the case of Germany. You know, the German experience of labor, from what I understood and had to live there for a few years, is that unions – the work councils work well. I don’t think the research shows at all that co-determination works. I don’t think it says it. I don’t think you look at overall it says that – it's like a lot of the academic work. Some say it works, some say it doesn't work. Are you on the left, are you on the right? I can tell you which way your paper is actually going to turn out on this particular issue.

I have evidence to show you that's how it often, that's how it actually often works. So the case of [Manis Mann 0:46:39], which was written by your colleagues Milhaupt and Katharina Pistor, great, great book which they did, showed quite clearly that labor, or at least on their board, case of one, non-empirical study, a large, large number, labor didn't know what was going on. It's just beyond them to be facing that time, given their life experiences.

This was the expertise issue you raised earlier. Because beyond them [unintelligible 0:47:02] thoughtfully come to a recommendation, whether or not Vodafone, which already 34 percent of the company, should that be, their big of 125 billion euros, which was huge by European standards, should be accepted or not. Unfortunately, they were caught up in the suits, and their tiny little payment, which they had to give over to their union, was part of the complaint in the suit, themselves.

So just being on the board, no matter what your expertise is, still makes you liable for the usual things. I don't think codetermination is the issue which Elizabeth Warren talks about. In fact as we all know, after so many years, you cannot cherry pick, you cannot pick off the menu what institutions you want and think they're going to work somewhere else. I think she's great. I think that's not a very strong argument on this. But it represents, again, this background times we're living in and what people actually want to, want to hear.

One last comment and then I'll close. Schizophrenia, not unique to Judge Strine. We all have it. Between the is and the ought. The is and the ought. Came up interestingly in the case of possible remedies, reactions, to innovations which might be helpful. So we had a, here in the law school, a seminar on block chain. It was a great seminar. I thought the paper was an amazing paper. Quite informative. And what the SEC should do. But in the context they forgot why it was people were talking about block chain in the first place. And let me just remind everyone why block chain looks interesting to a lot of people. Because a decade ago, 10 years ago, we had a nuclear meltdown of the financial system in this city, with lots of people put out of jobs.

And there's, among some populations here, it may amaze us, who are still pissed off about that particular event and what they actually had to go through. And these are both people on the left and the right which are involved in this. Up comes block chain, this so-called autonomous, decentralized – distributor is not the word. Decentralized technology. Which allows people to bypass the government in order to do these transactions. A lot of these transactions are illegal. A lot of the initial coin, offerings are soft junk.

But over the time, you know, you do find some tremendous successes here, which are offering people a way to bypass the government as well as the SEC. As well as the SEC. And yet the only thing discussed in the room was how much good the SEC could bring to this problem of regulation of black chain, you know, because there's so much fraud going on, rather than saying SEC, what did you do during the financial crisis, this period of time, except put so many finds on the banking industry of America and elsewhere that now every banker in the world thinks that doing something which is against the interests of the public and illegal is simply a cost of business.

It's simply a cost of business. There is no ethical clout attached to this whatsoever. I'm not saying the block chain is a great thing to do. I'm saying it's an expression of where we are right now in our economy, in regulation, on the left and the right, this deep, deep distrust over the competence of the state. And we're being hurt by that because the state is so often a necessary partner to what we actually are interested in. And there are other things we could add to this which are interesting. Fintec, ESG, I think actually is an interesting thing to look at.

More business school positive, friendly, happy, delirious sort of conversations. And sort of the ways of being worried about the fraudulent behavior which lawyers make their living and have to stop us from, from actually doing. I don't know if I saved you from the guillotine. I'll be there with you, so don't worry. In case you were a wild student and law student, I brought you, by the way, Leo, I brought you a bandana, which I understood is what you wore in your college days.

So you'll be prepared for the upcoming revolution on that, on [unintelligible 0:51:34] Plaza. Thanks very much. [Applause]

Eric: So yeah, I want to –

Jill: For his rebuttal?

Eric: Yeah, I'm going to invite Chief Justice Strine back up to the power seat. A few minutes by way of defending yourself and then I think we should open it up to questions and also the panelists should feel free to chime.

Leo: Yeah, I don't feel any – that I've been attacked or anything. I just have a couple responses. I mean I think Mark's not wrong that I have mentioned the word short term in terms of thinking. I think he fetishized R&D. I think his chart is really interesting for this point. He says there's plenty of cash. Why hasn't it gone to the workers? Why haven't they been paid some of that cash? And one of the things we haven't talked about, and I do have a paper, I'm very proud of the title simply because it sounds like it should be a mystery, an Agatha Christie mystery.

But I'm not actually against activism, by the way, and I think, if you read my writings, I talk about some rebalancing. But I point out the basic facts about wealth. It's only when you get to the top 1 percent that it's even close to true that most of people's wealth is not connected to labor. The reality is, for most people, basically 99 percent of people, what you get to live on is attributable to your job.

In fact, what you get to invest is attributable to your job. How much you get to invest is related to the quality of your jobs. When you look at that cash chart, Mark, why didn't that go into wages? If that went into wages – and we haven't though – you know, one of the things, there is some good work going on. The Coalition for Inclusive Capitalism is actually working with leading accounting firms to try to look at accounting, ways that investments in human capital can be rebalanced. There are incremental things.

I am not a revolutionary. But part of what we remember is how we didn't have a revolution, is that we evolved, that we were adaptable in different dimensions. And that's why I think it's important to not like say – my thing is, I do, so I think that mainstream investment funds should do better in – I think it was Ron and Jeff had a good paper about the center that played investors, sort of refereeing the activists. That was something, I've been talking about this for 15 years, as Jill knows. I'm glad that the Big Four, and they are four, because I think Fidelity just passed State Street in indexing. That the start using their vote better.

But there are transfers, there's literature, Mark, that the gains of activism also involve transfers from workers and from debt holders to equity. By the way, we have a real diminution in the voice of debt except when it's in distress, and many, most people who have balanced portfolios are in debt. So we, you know, there are things to think about. On the political side, of course I agree with you that it's not all corporate. The bipartisan thing should not hearten you for this reason. The fact that they give to people who influence their businesses should not – Democrats are beholden to people – the Democrats are beholden to interests to give them money, and on regulatory policy that's important to people, they will go with the people that give them money.

That's also affected the corporate governance debates. Democrats get money from lawyers and hedge funds to [unintelligible 0:55:19] same things. The Mississippi senator, I don't want to comment or anything, but she wore a Confederate uniform. The companies who asked for their money back, think about some of their stated public policies. Then ask why they were giving to this person. It's because they were on the Committee of Jurisdiction. We also don't know a lot about corporate money.

We do know this. Even before Citizens United, labor was far outgunned. Environment groups were far outgunned by business. The reason why labor is – if labor had more money, they would be what, class? They would be capital. The increase in the titling playing field about the rules of the game has gotten worse, and by the way, some of those individuals, it looks individual. But the guy out in Nevada –

Bruce: [Ansem 0:56:04]

Leo: He gives through corporations. And the US Chamber and other spending that has gone up that you see, you don't know all the sources of it, but a lot of it has actually come from corporations and it's not disclosed. So I'm just saying on these dimensions, I think there's just some things to think about. I think, and I just want to say about schizophrenia, I've never understood psychiatrically whether that's the same as a different identity and whether we just use it in an imprecise way.

My exact point is, I actually don't have a confusion between is and ought. I have a very strong view of what ought ought to be. My strong view, consistent with Berle, Orwell, Roosevelt, other people who are clear eyed, is that if you want to get to ought, you have to understand is and how is has to be changed to get there. If wishes were horses, I could ride away to Penn Station and Delaware without, you know, anybody getting in my way. That's not the way it worked for my friend [Stuart Grant], he actually can ride away on his horses.

But for most of us, we live in the real world. And I think that's what we all have to talk about, and I think some of us have to say, what are the dimensions of our differences? For example, Mark, might it make sense if we want say on pay votes, that we have them every four years, that they actually be thoughtful? Isn't it important if hedge run things – one of things I've said is simply can't we know their economic interests? If someone's running a hedge fund campaign and they're saying they're going to act on a business, it has a 10 or 20 year consequence for the business, if their fund has to wrap up in three years, and they actually can't stay invested more than three years, shouldn't you at least – I wouldn't bar them from running the campaign.

But couldn't the voters knows that when we know all things about insiders? So I think there are a lot of sort of incremental things that we can do. I think one of the most important things about the ESG and everything we have to do, I think we ought to be very careful as we do these things not to confuse what the securities acts were about and what corporations do on society that everyone should know about, and it doesn't matter whether you have publically listed securities.

And on the Warren bill, I think one of the things Senator Warren did that was absolutely right was to the extent we're going to do something like ESG disclosure or we're going to do something like that, is why does it necessarily vary by public or private. But what I worry about is if we make all the public companies disclose in ESG, that will have the perverse effect of actually narrowing our prism on the economy because more companies will simply go private. The size of the economy that we don't have any window will increase, and will have a perverse effect. I'll stop at that.

Eric: Great. So we have a little less than 10 minutes, and would be happy to take questions from the floor, if people have that. Yes, in the back.

Jesse: Oh, that one. Okay. Jesse Greene from Columbia Business School. And I have a view about what's been going on in our society. I spent almost 20 years in the C-Suite of a Dow 30 level company and seven years on the board of a Dow 30 company. And in my history, and I started out as an engineer and ended up in finance, through the law school as well, and when I started out, the industry – industry was, had premium technologies, companies were in very powerful positions.

Technology did not move that fast. Today move are moving very rapidly, is changing supply chains, it's changing products, products are changing very rapidly. In addition to that, when I started out, you worked in different regions of the world. The world was not viewed as a global world. There were countries, regional. Today it's global. You're competing against Asia, you're competing against Europe, you're competing against ultimately Africa we'll be competing against.

It seems to me, and as a corporation, as you lose the technology edge, as technology moves rapidly, you look around and you say, who are my competitors? Right? And the competitors include the foreign operators as well. And so what you do is you go into your cost, all costs, including your employee costs and you start working on those costs to get them in line with the next major competitor you think you're dealing with. What's your view about the impact of this on income inequality and on the risk shifting that we saw, or talked about earlier today?

Leo: Yeah. I mean I think that's – I mean my view is that's why I don't think that we should single out corporate governance to blame or anything. What I was exactly saying is that, is when you think about how across the OECD we've sort of responded to globalization, because we didn't have the fabric of economic security protection for workers and for the environment and everything, if we didn't have that firmly in the law – like you know, when we went from GATT to the WTO, right, we really biased that.

And then if you think about the emergence of the intermediaries, the reaggregation of capital's power, the regulatory arbitrage, where people can engage in, you know, frankly diminution, right, of the ability of the social safety net because we've got to become competitive. So I think what you're – when I say, the [unintelligible 1:01:48] for business is, the easiest way is what constituency doesn't really have a great deal of power over us if the cost of adaptation and being competitive can come out of them rather than the folks who elect us or the things like that? That's where it's going to happen.

And so I don't think it's actually coincidental that it actually has been a kind of OECD like erosion of this. I will say, though, I think it's been less of an erosion in the other nations where workers were protected. On workers council point, his circle point, Bruce is not wrong that under the NLRA there are impediments to workers council. There's a good reason for that in the American context. Stooge employee unions as a substitute for real unions. So if we could get to a point where they're trustworthy, but that's the historical reason for it, is that there were things that were substitutes.

But I do not disagree with you. And part of my view is, if we do not match the scope of regulatory authority, of the law, to the extent of the real economy, over all the dimensions that matter to us as people, that it's going to be very difficult to deal with these things in isolation. And that that's why it's dismaying, and that's where I don't, I'm not as sanguine as Jill. I don't look at Brexit or the election in 2016 in this country as – or the emergence of strong, so-called strong people who are not strong at all in others nations as something to be sanguine about.

I'm not saying that there aren't corporations doing better, but I'm saying the overall results of the system, the decline in economic security, for many people in our societies can either give rise to us coming up with an elevated, enlightened solution, or frankly it's always good to blame the other and to have the strong person blame the other. And if you're only – if the only person who's speaking to that economic security is actually doing it negatively, they're likely to win. What we have to have is how can we frankly, the times that we all thought of as being the achievement of what we did, how can we not trivialize it by calling it socialism? How can we embrace it and understand that no one in the enlightened world thinks that children should work. No one thinks that you shouldn't have days off and vacation. No one thinks that there shouldn't be security when you're elderly. No one thinks that the disabled should be housed away and that we shouldn't do things like that.

No thinks that labor shouldn't be respected. Well, if we all agreed on all those things, how do we work together to share those values and extend them to the developing world? One of the things I've talked about, for example, is I am not ashamed of saying that I don't think that ordinary working people should go backwards. And I've heard some of these things. Oh, do you want China to not develop? No.

But frankly, who's the most – who has the most economy security in the world? Can all of you raise your hands who are here who have it?

Male Voice: The tenured people you want?

Leo: Yeah. There's nothing like it. Nothing like a person who – there's virtually nothing you can do to get fired who then says that when somebody, you know, that frankly a middle class person is holding back China and Pakistan and Bangladesh because they want, they – it's just gross. We can have – for example, one of the things, I wrote a paper about Berle and also – why not have as part of trade agreements the idea of a regionally appropriate minimum wage?

There are ways to do minimum wages. Like throughout the OECD, I would say 15 dollars, there's nothing wrong with at all. But there could be parts of the world where, okay, that's way out of sync. But there ought to be something. There ought to be the ability to organize, there ought to be something that's appropriate, right? And so I think you're on to – I don't that corporations, and that' my point about blaming – and I agree with everybody today who said we want to just bang on the executives and all that kind of stuff.

But then that it's a bigger problem. But we have to have solutions to it, and it cant be US-specific, it can't be EU-specific or it's not going to work. And by the way, Berle was pretty perceptive. He wrote about 40 years ago that countries, that most, many big corporations no longer had anything like a national identity.

Eric: One more? [Unintelligible 1:06:36]

Female Voice: [Unintelligible]

Leo: Why is there no evidence that there's harm if the comparative gain sharing for the people who work for corporations has gone down?

Female Voice: [Unintelligible]

Leo: But there's also, isn't there also over-confidence in this? Like one of the things, and I love that people ignore us, is what has – what have hedge funds done to, no, to retail? And what has private equity done to supermarkets? And you know, you can have all kinds of long terms things like, you're confidence that you can lard debt onto a business and take costs out and continue to survive is also a sort of thing.

I heard a really enlightened CEO the other day, and it was interesting, and he did a really good thing about what he's doing for the workers in sustainability. The company he's run went through bankruptcy, and it occurred he never addressed what happened to the other constituencies in bankruptcy. And what – and it was great to all be all progressive going forward and all that kind of stuff, but you wondered what happened to the pension fund, whether the government was now taking of that.

Female Voice: No, no. I completely agree with you that hedge funds are not necessarily the best actors to do that. But having said that, it could be, you know, that the fact that the managers now have to go to the market to raise capital for the project, and this is what they do, that provides some discipline or some selection of the projects. The ones that were really –

Leo: I think one of the things – I just want to be clear about it. I think that's what I think we've got to be – avoid, in terms of the cartoonish discussions. I haven't heard anybody's – I certainly have never suggested that we don't want market solutions. Nobody's suggesting about running industries. Frankly, pricing externalities, there's a guy, I believe is – I don't know how to pronounce it, Colin. It's your guy. Pego? Pegovian? Taxes? Pegovian taxes. That is not like some hipster thing. That's a conservative approach, right, taxing externalities, letting the market decide.

Female Voice: I grew up in Israel. There were lots of taxes and regulation.

Leo: Yeah, but what I mean is, part of it is, for example, if you put every Republican economist in a room, secretly, with every Democratic legislator, around the world, and the equivalent across the OECD, and said how should we – one of the first things we should do is address carbon, the carbon problem, would be to adapt, to price it. Why can't that happen? Speculation that destabilizes the economy?

Why can't we raise money in a smart way? Part of it is the distortions that come from [Rency]. I'm all with Van-, I've got Vanguard's tail on my money [unintelligible 1:10:43] how woke are they on the regulatory policies that affect their own share of the pie? Where are they on things like that? Because part of how woke you are is whether you're willing to actually bear some of the cost that – your own Rency. And that's where I'm a little dubious about this. And everybody – and nobody made this about you couldn't invest in Apple. I mean I understand it. It's more about the immediate – there's a lot of immediate pressures.

And part of why I want to see buy-backs. What you're telling me is there's an awful lot of cash, where a lot of people work for these corporations probably could have had a raise that may have kept pace with inflation. And apparently for some reason nobody's giving it to them and they're not actually deploying it. It's just sitting there on balance sheets.

Mark: Can I say something on that?

Leo: Yeah.

Mark: One thing we've got to be careful about in this long term, short term debate is not to conflate bad corporate behavior with short-termism and not to conflate the problems of shareholder primacy with short-termism. So I don't think that you would say that a company that persistently underpays its employees over the long term, over a 20 year period, is okay because it's long term oriented. And I don't think we would say – environmental is often brought up, that firms that are short-term oriented and pollute more, I don't think we would say that a firm that leaks oil into the aquifer over a 20 year timeframe is better because it's long term than the firm that has one leak.

So a big problem in this debate is we conflate all kinds of bad things that corporations do and call it a time horizon short-termism problem. It's a corporate problem but it's not a time horizon problem. Employees are badly treated in the short term, and the long term. Companies pollute in the short term and the long term. And the fundamental problem is the pollution and the bad treatment of the employees – and not really the time horizon of the corporation. And we're not – this is the source of my great pessimism here – I don't think we're likely to solve the problem if we hyper-focus on time horizon as the source of the problem. It's something else.

[End of recorded material 01:12:57]