Accountability After Citizens United – Panel One Transcript

Panel 1: Can Shareholders Save Democracy?

Ciara Torres-Spelliscy: Good morning, it is such a pleasure to have you all here today. My name is Ciara Torres-Spelliscy. I'm an attorney at the Brennan Center where I work on the issue of money and politics. And just so that we are all on the same page, I wanted to reiterate the central holding of *Citizens United*. It says that corporations and unions can spend their treasury funds on electioneering communications and independent expenditures. Back in the world of plain English, that means that corporations can buy political ads. And this is a change. This is a change that's takes us back to basically 1947. One of the ways that I explain this-- because I talk about *Citizens United* all over the country-- and sometimes I'm talking to people who are experts in campaign finance law and sometime I'm talking to people who are experts in corporate law. But one metaphor that I find that everyone can wrap their heads around is this one: Before *Citizens United* if a CEO of a publicly traded company wanted to buy a political ad in a federal election, they had to reach into their pocket and pull out their personal checkbook. And then they could write a check as big as they wanted to purchase a political ad in a federal election. And that's the *Buckley* right. But after *Citizens United* you can use the other hand. You can reach into your other pocket if you're a CEO and pull out the corporate checkbook, the one that has the corporate logo, the one where the bill does not go to the CEO's house. And I think this is the paradigm shift for me. And it means that corporate managers can spend what Justice Brandeis used to call "other people's money" in politics. I really fear that this is one of the situations where the incentives run entirely the wrong way. On the one hand it may encourage arms-race spending among corporate competitors because you don't want to be the odd man out who isn't spending and giving. On the other hand, there's an incentive for dark spending, for nontransparent spending, where you spend, but you don't put your name on the advertisement. And for me, this raises a host of corporate governance issues and fortunately for us we have some of the world's corporate and securities experts to help us muddle through this new legal terrain. I'm going to introduce the panel before I hand it over to Professor Jackson. Robert Jackson is a Professor of Corporate Law at Columbia Law School. Chancellor William Allen is Counsel at Wachtell, Lipton, Rosen and Katz. He is the former Chief Judge of the Court of Chancellery of the State of Delaware and the Head of the NYU Center for Law and Business. John Coates is a Professor of Law and Economics at Harvard and Jennifer Taub is currently a professor at the Isenberg School of Management at the University of Massachusetts at Amherst and she is incoming faculty at Vermont Law School in the Fall. Professor Jackson, could you start us off?

Professor Robert Jackson: Thank you and I want to start by saying how delighted I am to be here and how important this conference and this discussion is to this issue that's just emerging for those of us in the corporate and securities law area. One thing that you'll hear from us today is we're going to be corporate law scholars a little bit outside the ambit of our expertise because we're trying to talk a little bit intelligently about election law. But we'll do the best we can and I'll certainly try and offer up some insights about this difficult and important issue.

So I think it's important to start by distinguishing what *Citizens United* says and what it doesn't. What *Citizens United* holds as Ciara just pointed out is that corporations are entitled to spend corporate funds on political speech or if you prefer, limitations on this kind of spending will be afoul of the First Amendment. What it doesn't tell us, what *Citizens United* doesn't say is how corporations decide whether or not to use this power, and how it will be used if they do. And this is the issue I'd like to give some attention to today and I think the panel will talk about.

We have a large body of law in corporate law that tells us generally how corporations make decisions. In general this body of law uses what we call the Business Judgment Rule, which says that directors and executives get to decide how corporations are run. And this is a good rule for decisions that are made on a day-to-day business basis of the corporation. Why? Because in general, we think that directors and executives, the insiders of the corporation have superior information to shareholders and it's a good rule to let them make their decisions more or less not subject to oversight by other entities. But there are many important exceptions to this rule, recognized both by the Delaware courts and by the Congress over the years where we don't allow directors and executives to make these kinds of decisions without some oversight and participation by other constituents. So for example, corporate law gives shareholders the right to vote on certain fundamental transactions, like mergers and acquisitions. The law also requires that independent directors oversee some decisions, like executive pay decisions for example, where the interests of directors and shareholders are not perfectly aligned. And the law also requires special disclosure with some decisions. Corporate officials, directors and executives are allowed to make some decisions but they have to tell shareholders in very express, detailed terms exactly what they've done and those tend to be situations like for example transactions where directors have a personal conflict. These have to be disclosed to shareholders in many cases.

So really we have two sets of corporate law rules for deciding who decides what a corporation does. One set, the Business Judgment Rule generally applies to day to day business decisions. Another set, the kind of exception rules I've described, apply to other kinds of decisions where the interests of directors and executives are not perfectly aligned with those of shareholders. And the question I'd like to focus on today is: What kind of decision is the decision to spend corporate money on politics? And I think it's clear that this is the kind of special decision to which special rules should apply. And I'll give you a number of reasons why I think that's true.

First, there are at least some political spending situations where directors' and executives' interest will not be the same as those of shareholders. There are many to be sure, where the interests of directors and executives will be perfectly aligned with those of shareholders. Here I have in mind decisions like the decision to lobby a federal agency for rules favorable to your industry. There I think there might be some case that directors and shareholders have the same interest in mind. But I can think of lots of situations that don't fit that case and here I have in

mind donations directly to political candidates like the ones that issue in the *Citizens United* case itself. For example, you can imagine a situation where the CEO of a corporation is a Democrat who wants to run some day for the House of Representatives in a liberal district. And you can imagine another corporation where you have a CEO who's a conservative Republican who wants to run some day for the House in a conservative district. And you can imagine that the decisions these CEOs will make about whether and how to give money to political causes will be very, very distant from the interests of shareholders in a case like this. They'll have their own interests in mind. And because we don't think that shareholders choose their investments based on the politics of the CEO, at least I don't, you kind of get the sense that you're not going to have decisions that are completely aligned with the interests of shareholders.

Another reason why the interests might not be aligned in the way you'd expect is that these decisions are actually of considerable financial significance. I mean one argument to use the Business Judgment Rule to defer to directors and executives would be that these are small decisions. This is small potatoes for most public corporations. I guess I have two things to say about that. The first is that on the numbers to the extent that we have any understanding of what corporations are doing in this area, that's actually just not true. Hundreds of millions of dollars are spent each year by corporations on politics, both through intermediaries and through corporate political action committees and I think Professor Coates will give you a better idea of exactly what those numbers look like. But what I'll say for now is that these decisions actually have pretty substantial financial significance. But even if that weren't true, the thing I want you to focus on would be that they have special expressive significance, that shareholders might care about these decisions in a way they don't care about other day-to-day business decisions. And for this reason we think that they're special, different for the ordinary business decisions that we usually in corporate law give deference to directors and executives on. So in a paper that I published with Lucian Bebchuk in the Harvard Law Review in the Fall, I proposed a number of special rules drawn from existing corporate law, all the kinds of special rules that I described to you at the outset, that we could use to help align the decisions that corporations make on political spending with the interests of shareholders. And I'll just summarize them briefly. The first is that shareholders should be given a right to vote on corporate political spending. Now, I'm sort of happy to consider the actual, the precise nature of the rule, but I'd say two things about what I'd want in this respect. First, I'd want shareholders to have some kind of say about the aggregate amount of spending the corporation does, by the way as Ciara has pointed out in her excellent work for the Brennan Center, this is not an unusual rule in the world. The United Kingdom has had a rule like this for some time. But I'd want more than that actually, that wouldn't be enough for me. And the reason is that giving shareholders the right to say yes or no on the aggregate budget, leaves a lot of room for spending under that budget that's totally contrary to shareholder interests. So I'd want to change corporate law to allow shareholders to vote on by-laws that would bind the corporation as to who can receive money that's being spent in politics. So these are the kinds of rules I would offer up for shareholder voting, but in addition to that I'd want to give oversight for these decisions within the corporation to independent directors.

One more thing I want to say about shareholder voting by the way. To the extent that this seems extraordinary, remember that the Congress has just last year passed a new rule in the Dodd-Frank Act that's going to give shareholders a vote on executive compensation. So it's not at all uncommon to take this kind of special decision and give shareholders a say and as corporate law

has been changing over the last few years, it's totally consistent with the direction that corporate law has been moving.

With respect to independence of directors I would give oversight of these decisions not to executives but instead to directors who are independent from them. As I mentioned earlier, we already do this in corporate law with respect to a number of types of decisions, sometimes mergers and acquisitions where there's a conflict at issue, always executive pay, as a matter of federal law. And I would allow independent directors to oversee corporate political spending for exactly the reason you'd expect, again, that the interest of directors and executives are not perfectly aligned with shareholders. Now an answer that you might hear from corporate lawyers about these kinds of proposals is that we don't need to worry about all of this because for two reasons. First, markets will naturally wash out political spending that's not in shareholder interests. And the reason they'll do this is that market prices and market for corporate control keeps close watch over directors who make mistakes with respect to shareholder money and punishes them over time. You should expect over time markets will get rid of this problem.

Another reason is that shareholders have the right to elect directors in Delaware and most corporations have annual elections for directors. For this reason if shareholders don't like what directors are doing they can simply throw them out over time. The reason I think that this doesn't work in this area brings me to my third reform that I would make in this area, which is to add disclosure. To the extent that you don't believe that shareholders and directors need special rules in this area because of markets or directors' elections, at least you'll agree that shareholders have to know what's happening in order to do something about it. They need to actually have a sense for what's happening on political spending in order to change director elections and in order for markets to work with respect to decreasing this kind of spending, or rather cabining it to the interests of shareholders. And so I would say that we need to have much more robust disclosure and I would say that any shareholder voting proposal, including the current Shareholder Protection Act needs to be accompanied by much more extensive disclosure in this area. For the paper that I wrote in the fall and John can say more about this, I tried very hard to come up with information on exactly what corporations are spending in this area and all I can say is that the disclosure regime is astonishingly incomplete. It's true that you can look through Form 990s for example and try and pull out information about what corporations are doing but it's extremely difficult. The data we do have are about corporate PACs which are of course a different question really from the use of the corporate treasury for corporate political speech. And so I'd say that we need a much more robust disclosure regime, in particular with respect to donations to intermediaries that engage in political spending which we show in the paper actually seems to be a very, very large source of corporate political speech.

So I guess I'd summarize just by saying that whatever you think in this area, there's no reason as a matter of corporate law to my mind to think of this as the kind of ordinary day-to-day business decision to which directors should be given business judgment deference. Instead this is the kind of special decision over which we've always given different types of constituencies supervisory power over the Board of Directors and the kinds of changes we should make in this area in the wake of *Citizens United* will focus not on its principle holding as to what corporations will do but this is the question I've raised today which is, who decides how corporations will use this power. Thank you.

Ciara Torres-Spelliscy: Thank you. Chancellor Allen?

Chancellor William T. Allen: Well, I too am delighted to be here and I have to immediately disclaim any expertise on either election law, constitutional law or how to get here. It took me a little while but I'm happy to be here. I'm more skeptical than probably anyone in the room that there's a problem, so I'll be a discordant note, I suppose, in the conversation today. The title for this panel is: Can Shareholders Save Our Democracy? If our democracy is in trouble, shareholders are not the place to go to save it. Modern security markets turn over with very great rapidity, the stocks are owned internationally, they're owned by hedge funds, by large institutions. These are not the institutions that if there is a problem with the democracy that we can reliably depend upon.

Now my big question is, is there a real problem from corporations making political contributions under the change in the law that *Citizens United* brought about. The arguments that [Professor] Robert [Jackson] makes for example, which I don't oppose by the way, normatively I believe business corporations should not be in the business of making political contributions. It's not what the institution is designed for. But I don't think there is a huge problem. The reason I think in the absence of proof otherwise that there's a huge problem is not because of the markets for corporate control which are very imperfect, take a long time to work out; is because business corporations and the corporation that was involved in the *Citizens United* case was not a business corporation it was an expressive organization designed to make political points which seems to me completely different kind of institution than a business corporation. Business corporations operate with a lot of constraints around them. Some of the constraints are the ones that we, were must mentioned, the constraints of shareholder groups monitoring takeover markets and all that. But the most, the primary constraints are product markets. And product markets are not segmented ideologically. So, if a corporation, I agree disclosure is completely significant, if a corporation decides to align itself with a controversial social issue or political party issue, it is going to distance itself from a big part of its product market individuals. This is extremely dangerous in a competitive market. So that when we look at where corporations for example make charitable contributions, who do they make charitable contributions to? This sort of white bread, non-controversial institutions like educational TV stations perhaps or the art museum or early children's education, they don't want controversy because controversy is going to signal to the product market who it is and for this reason alone I don't think you're going to see a corporation wanting to involve themselves very much with corporate funds in political affairs. Now that position is critically related to the fact that markets have to be able to know what in fact corporations are doing and I think that is essential. The notion of a boycott is a perfectly valid thing and it will help keep business corporations working on their business questions, not on their, not on a social agenda.

The notion that this is a serious agency problem however is really I think a silly way to change law to try to imagine that there's a CEO who is going to leave his CEO job and become a congressman and therefore say, well, he could be spending…. I need a lot more in the way of data to change law based upon this notion that this is an agency problem. I don't disagree that if we could have a specials rule for political speech, the problem is what constitutes political speech. If the rule goes to making expenditures directly or indirectly in favor of a particular campaign, then I don't have a problem with it. My problem with changing the law is and John's

going to have a study that gets to lobbying, lobbying Congress to change the law or lobbying a legislature could be regarded as political by somebody and lobbying is actually a very important, I mean it doesn't cost a huge amount for most firms to lobby. But it's very important for business firms to be effective. If a new regulation on clean air is going to come out, and it's going to raise the cost of production a great deal, it's the responsibility of the firm to be there to inform the process at least about the effects this is going to have and maybe to share the technological information it has about different ways to regulate. So we need to have the producers in our economy sharing information with the regulators. And if we make more difficult or impede in any way that lobbying process we're creating a public policy problem for ourselves. I know K Street is not a very popular thing in the American imagination and not with me either. But the fact is that lobbying is an important vital public function and if in our regulation of political speech we somehow get to regulate or impede company's lobbying activities, I think we've done ourselves a disservice.

The third point I would make is I can conclude really, because I made my first point which was the only point worth hearing – I disagree a little bit with some of the things that are in, these are the two papers that are out on this subject. I think what is important is to look at these problems not as legal problems but as social problems that is it evaluate changes in the law in the context of the real markets within which firms operate. And when we look at, for example, the law whether shareholders can enact a bylaw that says no political contributions, I think what we really have to look at is if shareholders adopted even a precatory resolution that said, don't make any direct contributions to political campaigns, narrowly stated, I think boards in this environment, boards of directors would adopt it. There really isn't any leverage on the other side of that issue. If the institutional investors get behind a prohibition of direct contribution it'll happen. I mean staggered boards which are much more vital to corporations than making political contributions, are going the way of there horse and buggy because institutional shareholders are insisting on it. So I don't think we have to look at the technical corporation law very much to know that if the shareholders don't want direct political expenditures they can get it. So I'll conclude my remarks with that. My thought about product markets being important here is hinged upon some disclosure. I mean I think it's essential that there be reasonable disclosure of direct or indirect political spending. And I also think it's essential that we don't' trample on lobbying in the process of regulating.

Ciara Torres-Spelliscy: Thank you. Professor Coates?

Professor Coates: Thank you very much. I'm delighted to be here as well to be able to talk to this issue. Like the others on the panel I also am a total neophyte in the election law area and even constitutional law which I in theory was taught at NYU Law School some time ago but I've forgotten large chunks of it sorry, to confess, but I did go back and look at it in the wake of *Citizens United.* And I think actually the one I've said this joke to some of you, the one good thing to come out of the decision is suddenly everyone on the business side of law schools and in business schools people who have not thought carefully about election law or the relationship between election law and First Amendment jurisprudence suddenly are interested in it for the first time. Because it is going to I think contrary to [Chancellor] Bill [Allen]'s intuition, my intuition is different. I think over time, as was suggested at the outset of the day, that the ability to get directly involved in elections is going to be too great a temptation. In fact, it's going to be

a necessity in some instances for corporations to be able to continue doing what they in principle want to do which is to serve consumers and their shareholders in a sensible way, and then once they're in that environment then much more serious problems can come about of the kind that has already been alluded to today, corruption at the most extreme.

I want to make first a couple observations, just to make sure everybody heard it. Bill [Allen] and Robert [Jackson] are in total agreement that disclosure of corporate political activity would be an important legal reform. And I think it's important that whatever other disagreements we might have about the facts, I'm also in agreement with that. It's something that still isn't the law and doesn't look likely to be the law generally for public companies any time soon. And that's a sad statement, frankly, about our democracy. And so if nothing else, I hope we can all walk away with at least that commitment to the outcome.

The second thing I want to note, and this is just a very general point, but I think it's really important to keep in mind, all the studies that have been done of corporate political activity for many years, by many people in business schools, that long predated interest in this topic, are consistent that different kinds of political activity are complements. So lobbying, I completely agree with Bill, serves very important purposes, a good purpose in many respects, to make sure that legislators are informed about the effects of potential reform, legal change, rule change on various industries and ultimately on consumers and shareholders. So I'm completely in favor of the idea that in that area there ought to be free and open speech. But lobbying becomes far more powerful when it's accompanied by the ability of the person paying the lobbyist to directly threaten a particular legislator's re-election chances. And so in general, across lots of studies over many decades, the companies that are most active in lobbying also are most likely to have set up a corporate PAC. Back when soft dollars were permitted, they were most likely to have used soft dollars to influence election campaigns. And in my estimation, over the next many years if nothing changes, they will be the most likely to get involved directly in election expenditures, or if there's a risk of a boycott to do it without disclosure through longer conduits. So we don't really, in a minute I'm going to present some data on lobbying, but I don't, what I don't want the takeaway to be, as Bill suggested, that lobbying somehow directly should be forbidden. But I do think it's important to bear in mind that if and to the extent you think that lobbying can sometimes play a bad role, which many people do, Bill sort of alluded to this too, K Street. Why has K Street got this double edged quality to it? Because sometimes of course lobbyists are not simply about informing the lawmakers but rather influencing the lawmakers; not simply about making sure they're informed about outcomes but in fact extracting rents, transferring money from taxpayers to corporations. And so lobbying on its own while it has pluses and minuses. When it's coupled with other kinds of political activity, it becomes much more dangerous. And that's why I think it's more important to think about responses to the other more direct kinds of political activity than it would be in some other universe.

So let me give you the punch line of empirical work that I've been doing. I'm going to put up this one first. Within the shareholder corporate governance community outside of election law, that's been going on for decades now. Bill, Rob and others, Jennifer and others have been engaged in lots of debates over how much shareholder power in publicly held corporations would be a good thing. And you can have endless debates over and we have had endless debates over where we should be on the spectrum. I come from a background, I used to work at the law

firm that Bill is still associated with at Wachtell, which traditionally views managerial authority as a good thing and shareholder power often can be quite pernicious. So my priorities in all this are not that more shareholder power is necessarily better. One of my colleagues, Rob's co-author on his *Citizens United* article with Lucian Bebchuk has taken the opposite view. He's very much a pro-shareholder person and one of the important pieces of evidence in that debate that we managerialists in the corporate governance have had to confront, which I don't think we have a good answer for still to this day, is this up on the board which is that G, here, is a measure of shareholder power. And the more shareholder power there is in a publicly held company, basically the better the corporate does. For reasons perverse, whoever came up with this measure did it reverse, so that more shareholder power is a lower number. So that's why this sign is negative. But basically however measured, and the standard measure here is relationship of stock price to the asset value of the company, how effective the managers are in using corporate assets, they do a better job when shareholders have more power. And that's a robust finding, it's been replicated by many, many different people over time.

Now there are lots of debates you can have about whether there's anything we can do to existing corporate structure to actually improve that value. It may be that we've already gotten to the right place for most companies and there's not much more we can do with it but that's just a robust finding that was out there already. So to that I want to add contributions, political contributions through PACs, and lobbying. These two things strongly are correlated with shareholder power in the reverse way which is to say the more shareholder power, the less likely in the past 15 years, pre-*Citizens United*, the publicly held company was to get involved in political activity of any kind, whether lobbying or setting up PACs. For some companies, it seems to me clear that lobbying is so important. Boeing can't do the job for their shareholders without engaging in lobbying of some kind, however you want to define lobbying. So I don't think again to reiterate a ban on Boeing telling putting in bids and then trying to get the contract for their shareholders would be a good thing for their shareholders. But in general, and this is the real punch line. In general, on average for most public companies those that do get involved in political activity, whether PAC contributions or lobbying, this is all pre- *Citizens United*, the worse their shareholders do. The lower the value the market places on the companies, with the same industry, with the same assets, controlling for every factor that you can control for. The punch line is even before *Citizens United*, even with relatively benign in many respects ways that corporations could get involved in the political sphere through setting up PACs and lobbying, the companies that tended to do it tended to do it, I think, the data is most consistent with Rob [Jackson]'s story, which is to say they did it on average in ways that tended to favor managerial interests and harm shareholder interests, not in fact maximize the best value of the corporation. And this is consistent with Adam Smith's observation 250 years ago that companies with disperse shareholders have a hard time controlling managers. It's just a basic common sense point. And I think it's borne out in the political sphere as well.

Now, and just to give you the real picture here, this is true across the board, so if you just take measures of shareholder rights which other people have come up with, I didn't invent these. Take shareholder dispersion, how many shareholders there are, you get the same results. The more powerful the shareholders, the less political activity on the left, the weaker they are the more political activity. And go back to the original point, the second point I made, which was that political activity is a complement. *Citizens United* now means we've got a whole new

avenue to reinforce the power that corporations have had already through lobbying and through PAC activity, to expand the influence of those two others and to have an additional weapon. And so I think this is only going to get worse over time. I think that shareholders are going to find themselves more and more frequently in conflict with management over this. I think well considered, thoughtful managers don't like this. They don't, they didn't' got to business school in order to play dirty politics. They went to business school in order to sell cupcakes or whatever they sell-- to make people happy with Starbucks coffee and Coca Cola and all the other products that we all take for granted. They didn't' go there in order to fight on K Street in order to extract rent from the tax payer. So I think most CEOs who are sitting at large public companies today I hope, exactly as Bill [Allen] suggests, will be receptive to the predictable wave of shareholder activism that's going to come, and my study will have a tiny effect on this but it's going to happy anyway. Because in fact institutional shareholders for good reasons, and this data supports it, shouldn't have their corporations actively involved in politics. Lobbying is a different story. I have no problem with lobbying and I don't think as a general matter the shareholder proposals ought to directly attack lobbying but just remember if you control political activity through PACs and now through independent expenditures, you're going to make whatever influence you can get through lobbying more likely to be the public regarding kind of providing information rather than simply influence.

So I'll stop there with one last thing I'll say about product markets. Bill [Allen]'s point is right for Target and for Home Depot and for consumer companies. But I want to remind everybody that most of the corporate money in the country isn't in a consumer market. It's in a prior market. It's in an upstream market in which consumer pressures and boycotts either are impossible to organize, unlikely to organize and therefore I don't think the product market constraint is quite as broad and general as Bill suggested, but that's my only disagreement with his otherwise sensible as usual remarks.

Ciara Torres-Spelliscy: Thank you. Professor Taub?

Professor Jennifer Taub: So thank you. I'm honored to be here also and to learn today that I am a world expert in corporate and securities law. My mother will be honored, something she probably always knew. So my starting point is not the role shareholders should play regarding corporate political spending, but the role they are currently playing, the role they might play in the future and what the implications of that will be.

So the starting point, two observations regarding the present and the future. Presently, shareholders since roughly 2004 have been participating in the process of initiating resolutions to be voted on in annual meetings, thanks to The Center for Political Accountability, and voting on those. I'm going to call these in my talk today "show me resolutions" because these resolutions are asking corporations to disclose how much they're spending on certain political activities, who's receiving the money and who inside of the firm is making those decisions. And my focus will be on the 2010 resolutions at 28 firms. And these show me resolutions are non-binding. So this is already happening. The second observation is that there may be a shift of decision making authority concerning corporate political spending from managers and directors to shareholders in particular institutional shareholders through something like a Shareholder Protection Act requirement, which if passed, would require a majority of outstanding shareholders to sanction

political spending perhaps over a threshold amount. And I want to draw your attention to one thing, these types of requirements are different in terms of the denominators here. So with the "show me resolutions" in order for one of them to pass, the shareholders only need to receive a majority of the votes cast for and the votes cast against, but if we were looking at a Shareholder Protection Act type requirement, a majority plus one of the outstanding shares would be needed.

So the research questions that arise from these observations are three. First, can we look at the voting records, the most recent and the most successful shareholder resolutions, the "show me resolutions", to predict how a consent-type resolution might bear out. Secondly, there are gaps in disclosure. We've talked about disclosure. I'm talking about disclosure in the other direction, not the disclosure piece of where the money the corporation is committing is going, but the disclosure down the intermediation chain, in that over 70% of the top 1000 firms in the U.S. are, the firms themselves shares, 70% of the shares in those firms are owned by institutional investors that are largely holding those shares on behalf of underlying beneficiaries. Is it easy for those folks, people who own mutual funds for example directly, or folks who are participants in a 401k plan -- can they find out whether some of the money that they have at risk is being dedicated to particular political campaigns? Even given the existing disclosure regimes where mutual funds and certain investment advisors have to disclose, this isn't even enough for those shareholders and it doesn't cover the full landscape. And then finally, are there gaps in consent? -- even given a shareholder protection act model in that if 70% of these firms are institutional shareholders who are largely voting, we have the 30% of the true human beings for whom one would think the First Amendment right mostly attaches, who don't largely vote. Should there be something additional such as a requirement that a majority of those real human beings who invest directly in companies also have to approve such expenditures?

So this next slide is a drawing of actually how firms are organized. It's meant to challenge footnote 7 in Scalia's concurrence where he says the following:

The authorized spokesman of a corporation is a human being who speaks on behalf of the human beings who have formed that association, just as a spokesman of an unincorporated association speaks on behalf of its members.

So I'm not sure if it shows up here, but I try to highlight the human beings in yellow. And so we have the corporate manager or director, he is the human being making the spending decisions and then if you look at the configuration of ownership, 70% of owners of institutions, you can't find the human beings until you go farther down the intermediation chain. And then we have these other individual owners who are humans.

If we go farther down the intermediation chain one example of an institutional investor are mutual funds who hold about 24% of U.S. equities and then you can also see we have some real human beings who hold mutual funds and then we go to the 401k or the other D.C. plans and you get to the plan participants. None of these human beings [down the intermediation chain] obviously cast any votes or have a say in political spending under a proposed shareholder protection act consent regime and even today with whatever disclosure that is happening in terms of a voluntary basis by those firms who are adopting better disclosure standards, who might

under a shareholder resolution, these folks have a very difficult time understanding where their money is going.

So on these slides, what I tried to look at is the 8-Ks for voting at 27 of the 28 firms that had "show me" votes. I dropped out Ford because of its unique ownership structure, and what you see here in that first left column is the number of shares outstanding and then half of that. So in a Shareholder Protection Act regime, that would be the amount of votes that one would need to, if a manager had a proposal for how much money should be spent on political contributions, to get that passed managers would need that green bar right there. In contrast, if you look at the, I think it's the third bar over where you see the total for and against votes cast at AllState in order to, if they wanted to get that passed they would only have needed about half. So you can see that it's a different number and this is representative of the others, this is the average of all the show me resolutions combined. And what this shows you is that it was a high number at AllState received 40% of the vote. And then this is the average for all the fourteen 8-K's at those 27 firms, on average 30%.

So this is I guess the important pie chart. If I'm trying to predict looking at the shareholder votes what a, from the "show me" resolutions, what a consent or sanctioning resolution, how it would play out, we have to make some guesses. And I'm realizing that these, we've got to make some guesses as to how folks voted on "show me how you're spending the money, might vote on "go ahead and spend the money." So I'm making the assumption for the purpose of this talk, that the folks who said, don't show me, I don't want to see how you're spending the money, are likely to be pro-management and just say if that's how you want to spend it, go ahead. Just an assumption I'm making here. What you can see then is that that's not enough, if you imagine the same configuration of voters which we would not necessarily have, but just with this configuration of voters, the folks who said don't show me would not be enough to be able to sanction management's proposals. One would need another number of voters and it turns out that those who abstained which is about 12%, if you had all of those folks who abstained, and decided to be present but voted abstain and not say if they were for or against, I guess we can call them the swing voters, you need all those to pass a resolution. Now of course there are some shareholders who said, I do want to see what the spending is, they may decide to still approve. But in the, if you want to be the most conservative looking at this, you could say it's very close here. So what do we look at, all 27 firms, and it's sort of the same configuration.

Based on this, I would predict that these proposals would pass then. Because I do think having spoken with some institutional investors who are very interested in knowing where the money is going, I'm not sure that they would necessarily feel comfortable saying no to the expenditures.

So what are the conclusions? It's possible that spending decisions may shift from managers and directors to institutional owners, and also that the interests of institutional owners, money managers, might diverge from those of ultimate investors. This is sort of a missing piece today of the argument. Some of the work I've done before is about mutual fund proxy voting and how there may be conflicts of interest that encourage them to favor management's position over their underlying shareholders. And then the third conclusion is that assuming that we end up with a Shareholder Protection Act type requirement, that in addition to supplement that I think that a disclosure of institutional owner's votes would be necessary. So this is akin to what Robert

[Jackson] was saying, under the Dodd-Frank Act, there is now this requirement that votes on executive pay are disclosed and the disclosure expands to all 13-F Filers, which is institutional owners beyond what right now is required [to disclose] proxy votes. Also I think that the format of the disclosure is really difficult to work with. I think institutional investors should have to roll up their voting up to the parent entity. For many people they choose a fund family, whether it's Vanguard or Fidelity or whomever, and they want to know how they're voting and they won't necessarily be able to use the data at the SEC's website and figure out the name of the trust of the mutual fund they're investing in. And I think this should go all the way down the intermediation chain. And then finally I think it makes sense to consider, maybe this is the most radical of the proposals, but to consider that the real human beings who are direct owners in corporations should have to express 50% plus 1 approval of voting.

One last thing I want to say, that I left out. Who are the folks who vote abstain. That 12% I showed you. It turns out that there are a few large fund families that, if you looked at the AllState vote, half of those abstains, or 6% of the outstanding shares, three fund firms [appear to be] voting abstain. And so voting abstain is considered good in the realm of the "show me resolutions", because by dropping out of, moving from an against vote to abstain you've increased the power of the for vote, so that's good in that realm. In this other realm that was not necessarily, it makes it very difficult to predict where they would vote and also gives them sort of swing voting power as these undecided who now have a certain kind of authority – so it's again very important that, in AllState I think the 3 firms, well I don't want to name names, but if you were to, a mutual fund owner I think you would want to know if your fund firm was making that deciding vote on political spending. So thank you very much.

Questions and Answers

Ciara Torres-Spelliscy: Thank you. So now we have time for questions and I'm going to take the moderator's prerogative and ask the first question to the panel. I am wondering when it comes to corporate political expenditures do we have to rethink the idea of materiality. Here's my example. Famously last summer, Target spent $150,000 in the Minnesota governor's race. And from a securities law point of view the expenditure of $150,000 would not be deemed material. But Target got boycotted, got picketed, they are actually still being picketed in California and we know that because there was just a recent court decision allowing the picketers to keep picketing. And they're still losing business deals most notably from Lady Gaga. So do we need a different conception of materiality when it comes to political spending?

Chancellor William T. Allen: The Target situation, you're probably all familiar with was a mistake. Corporations will make mistakes, people make mistakes. If they had any idea that this candidate, the CEO of Target I think said, he was focusing on the tax platform of this candidate that they gave money to but that candidate also had a position on gay marriage I think was the issue.

Ciara Torres-Spelliscy: Yes.

Chancellor William T. Allen: … and he [Target's CEO] says he didn't know. If he did know he made a stupid mistake and they're paying a very high price. I don't think I would, I don't want to

change the law based upon imagined things. You think of one, this Target guy makes a mistake, gets into big trouble, he did something deplorable and so we changed the … I'm not in favor of that. The only way I would change the law is not on SEC disclosure, I would urge institutional investors to get behind a frank prohibition of direct contribution to political candidates or expenditures in support of political candidates. Keep it simple, you will convince the institutions of doing it because there's no real justifiable business interest in doing it systematically and boards will find it very difficult to resist it. That to me is a simple program of reform that gets really what most people want which is to keep them out of electoral politics.

Robert Jackson: First, I want to emphasize a point of agreement between Bill [Allen] and I which is that I'm loath to make law around this example. I think for reasons that John [Coates] gave this example strikes me as the exception not the rule. This is an example where a corporation engages political spending and immediately became subject to a great deal of public attention and as John pointed out this is an area where I like Bill am optimistic that maybe product markets or other types of market discipline do some work and in fact the fact that they're still protesting suggests to me that it's doing some work. And my guess is that the board of Target Corporation is paying a lot more attention to political expenditures today than they were a year ago. So I wouldn't make law around this exception.

But I guess I'd want to add something around where the law stands today because we've talked a lot about the importance of shareholders being able to talk to their companies and the paper just presented provides some evidence that shareholders are bringing these kinds of resolutions. And I guess the point I want to make is that as it stands under SEC rules and Delaware law, it is exceedingly difficult for shareholders to pass a bylaw or to enact a shareholder resolution that actually binds the board of directors with respect to these matters. So as the law stands at this moment, doing the kinds of things. I mean to me, I'm glad to hear there's agreement on the panel about disclosure and that this is an important step forward in terms of helping markets do their work, but I would just emphasize that where the law is today, is that there's very little disclosure and that for shareholders to bind boards of directors in this respect is exceedingly difficult if not impossible under most legal regimes.

Professor John Coates: So I actually would be more reformist than Rob [Jackson] here, on disclosure, because I do think for reasons that you made very well earlier, that political decisions by corporations are different in kind from other kinds of decisions and while they bleed into business strategy in industries that are dependent on government or that are heavily regulated, that's not actually the majority of the economy and I would suggest that even for companies in those industries modest levels of disclosure through an SEC rather FEC regime would be good for those companies. I think it would be good for the company's shareholders and it would be good for the managers in the long run. And so it's not that I think we ought to change the rule because of the Target anecdote. I think for a long time, it would have been better and it would be better in the future if the SEC understood materiality, that's the code word we use in securities law for what's important, to understand what's important to shareholders in some context is different than in others. It's not that the particular amount of money to be spent in politics needs to be that big for there nevertheless for there to be a worry for reasons that Rob made earlier, that political contributions will be more or less ways of managers pursuing their own private ends and there are plenty of examples drawn from charitable contributions. My favorite example is the

Occidental Petroleum example which came up through the Delaware courts where the CEO basically donated a lot of money to create a museum not of the kind Bill suggested earlier, a sort of mainstream art museum, but basically to put his own private art collection in and then to have it basically be his own and all of this was funded by corporate shareholder money. And so both in the charitable area and the political area I think there are obvious reasons to think that CEOs will be tempted often, not good ones, but some, enough of them, to justify a modest mandate of disclosure in these areas.

Ciara Torres-Spelliscy: Professor Taub

Professor Jennifer Taub: So I'm sort of putting my institutional ownership lens and intermediation lens on this thinking that if you look through to a very diversified investor who may own a variety of investments that are managed by intermediaries, they might be surprised to find that they're supporting candidates on opposite sides and so the trouble with materiality is that might not be exactly what's important because to a small well diversified shareholder we're talking about not very much money, but it's really the principle of participation in a system where they're actually ratcheting up spending and finding out that their investments are kind of canceling each other out. So I'm in favor of erring on the side of disclosure and let the investors decide if it's sensible.

Professor Robert Jackson: Interesting, I had one small point which is that you asked whether it's time to redefine materiality, this important standard. And one thing I'd say about this is it wouldn't actually require the SEC to go so far afield from things they already did to consider an expenditure like the one we're talking about to be disclosable. For example, the SEC already has what's called a related-party transaction disclosure which involves disclosure of transactions between people in the corporation who are interested in the other side of the transaction and the threshold for this is $125,000. So this is less than the $150,000 that Target was spending. So it wouldn't be totally crazy as a matter of corporate securities law to lower the materiality threshold to address these matters as John [Coates] suggests we should.

Ciara Torres-Spelliscy: Mr. Kanzar, a question?

Adam Kanzar: Thank you. And the SEC has done that with environmental fines as well. So, quick observation on the Target situation since it's just come up and not something I was going to talk about, and then a more general observation. On the Target situation, I would say that the mistake that Target made was contributing to an organization that was required to disclose its contributors. The Center for Political Accountability's research has demonstrated over the course of 5 or 6 years that it's a common, everyday occurrence for companies to make highly controversial political contributions. The information is not widely known, consumers don't often get it, I think what happened with Target is because there is a concerted effort to think about this stuff now after *Citizens United* and I think it's going to happen more and more. I think it's going to be more and more common. And I would suspect that Target's net contributions will be to different types of organizations that are a little bit quieter.

The general observation I wanted to make when we talk about shareholder interests here is I think it's important to recognize that there are at least two different sets of shareholder interests.

There’s the sort of traditional shareholder interest which I think Justice Kennedy referred to which is their interest in insuring that that the corporation is making money for shareholders, that the contributions that the company makes are in the best interest of the company and the best interest of shareholders. A voting mechanism might be an appropriate way to do that, I still have lots of concerns about it, but it may be appropriate way of addressing that interest. Shareholders also however have a First Amendment interest and that interest is to insure that they’re not underwriting speech that they disagree with, whether they find it objectionable or maybe they don’t want to speak at all in a political forum. In my view, the First Amendment rights of shareholders, unless you’re considering a closely held corporation, cannot be addressed if you permit large publicly traded corporations to make these kinds of contributions, and the primary reason for that is for all of the reasons that Jennifer outlined. Basically the structure of the proxy voting system, and one point that was not made is that it is a one share one vote system. It’s not a one person one vote system. And the one share one vote doesn’t even relate to the amount of money that you have invested. Investors in our mutual fund may have invested a million dollars, we may only hold 10,000 shares in a particular corporation. That’s our call. So when we vote on their behalf we’re not voting their million dollars, we’re voting however many shares we decided to buy. And as fiduciaries we must set aside their political interests, even if we knew what they were, which we can’t. We have to vote in the common interests of the fund. Now we take a very broad view of that, but still, we’re not going to go poll our shareholders and find out who they want elected in Minnesota. That just would be totally inappropriate as a fiduciary. So there’s no way to vindicate that. We just filed as lead amicus in a brief to defend the State of Montana’s campaign finance law, Karl Sandstrom at the firm of Perkins Coie filed on our behalf I think today. I’d be happy to share more information about that. We’ll be putting out some information probably next week or in the coming weeks about that. But we’re really making that argument, that this is a regime of compelled speech and compelled speech violates the First Amendment. So I’m just curious if anybody has comments on that structure, the First Amendment rights of shareholders.

Chancellor William T. Allen: Well from a traditional corporation law point of view, as I said I’m not an expert in constitutional law, so it may be that you can make a constitutional argument that shareholders have a First Amendment right with respect to things that their agents are saying. But as a corporation law point of view, that’s not correct. The shareholders don’t have for example a property right in the property owned by the corporation. The corporation does. What shareholders have are certain governance rights, rights to elect, rights in the event of a dissolution and so forth. So we don't, at least traditional corporation law looks upon the corporation as an entity and the shareholders not as its owners, although we speak that way often, but as interest holders that have certain rights. So there may be a federal case out there that says this but under corporation law I don't think it would…

Chancellor William T. Allen: Yes. Under corporate law they’re wrong but…

Professor Robert Jackson: I think the one thing we can agree on is that the Supreme Court was not well informed about corporate law. The only other thing I would say on this, I actually think this is a hard problem. I’m not sure that I know whether what the answer is because you can think of newspaper companies, you can think of Google, you can think of lots of situations where in fact corporations are speaking and they’re speaking in ways that the shareholders might

violently disagree with but it's not clear to me that should be viewed appropriately as compelled speech by the shareholders.

I will say just as a matter of parity however that the unions in the country do have to live with a stricter rule, which basically in no shop states they have to give their members an opt-out on all political activity and there's at least a good debate we could have about whether another type of reform to add to the ones that have already been presented here would be not only presenting the budget to the shareholders and having them vote on it but then giving them all an opt-out and basically forbidding the company to spend any more than those who don't opt out, permit them to spend and that would be another way to get at this kind of a problem. I only throw it out there just as a thought idea because that Congress will pass anything like that in the next century seems to be very low. So I go back to disclosure and I do agree with Bill [Allen] that here there's a lot of room for self help with appropriate disclosure in place.

Ciara Torres-Spelliscy: Ms. Gilbert.

Lisa Gilbert: This is for Professor Taub or perhaps more broadly from the position of those of us who are advocating right now for the Shareholder Protection Act in D.C. and similar pieces of state legislation, the one thing we have to tackle pretty consistently is making the case that the Shareholder Protection Act is constitutional and practical, it's not tantamount to a ban for corporate interests. So I'm interested in your idea of having a percentage of real persons or retail investors actually take an additional vote and just practically how that would work, if it's doable. Obviously we can still change the legislation.

Professor Jennifer Taub: OK. So what's nice about being an academic is that you can have ideas that people will come listen to. I have not run this by a constitutional law scholar obviously and I've read the *Citizens United* opinion. I don't know the answer to that. I'd be curious what someone who's an expert in constitutional law would say about that idea.

Professor Robert Jackson: We've all disclaimed expertise in constitutional law which is …. So I want to be careful. But when we thought about a few of these proposals we did talk with constitutional law scholars and I just want to make a couple of points. First of all, I think the idea of a majority-of-the-humans condition is a fascinating idea and deserves some attention. It's sort of tricky. I think it would be tricky in implementation, I'm sure you've thought a little bit about that but what I want to say about the constitutional law question is that most of the constitutional law scholars I've spoken to about this feel relatively comfortable that so long as the lines defining the political speaking are clearly drawn and drawn consistently with previous Supreme Court precedents, a Shareholder Protection Act-like statute would very likely survive. And the reason that they give is that in this area in general the Supreme Court has been particularly deferential to federal securities rules that were traditionally raise serious problems under speech type analysis so Fred Schauer at Harvard has a piece from 2004 where he talks about this in the Harvard Law Review. And he explains that you think of all kinds of securities rules we've got that compel speech for example, that require things to be disclosed at certain times, that require companies to say things that they might prefer not to say, that they frequently prefer not to say. And the announcement of these rules in the Supreme Court has been relatively deferential; it's been different as a matter of First Amendment analysis. Now, of course, at the end of the day, the

answer to your question I think you have to ask Justice Kennedy, but I just wanted to point you to those, to that article and those cases because most of the folks I've consulted have pointed to that Schauer article and have come to the conclusion that the statute would likely survive.

Ciara Torres-Spelliscy: Ms. Lerner.

Susan Lerner: Hi, I'm Susan Lerner from Common Cause in New York and I can't resist bragging a little bit that it was Common Cause Minnesota which revealed the Target donations. There's a lot to unpack in this panel. I'd like, and one of the advantages of being an advocate and not a law professor is that we get to challenge law professors with our experience in the real world.

I'd like to commend to everybody if you haven't looked at it already an article with a very illuminated chart which appeared in the L.A. Times I believe last week that looks at the corporate political disclosures of I think it was the 50 largest publicly traded corporations and less than 20% fully disclosed. So we're talking in an interesting theoretical sense, but in the real world, what's happening is that there is a disparity between what I think ordinary people expect and how the corporations actually behave. And I've had some very illuminating discussions with corporate officials and business association heads who have said they absolutely oppose disclosure because the marketplace will respond and therefore they don't want people to know. And that's why we get the layers of different organizations which are conduits for political spending. So one question that I have for Professor Jackson, is when you talk about the existing forms of corporate oversight and the special corporate oversight that is given to compensation for instance, I ask you, is this really your strongest example? Because I think currently, there is a sense among the general public and a sense among the press and perhaps also with shareholders, that we have a great disparity between corporate compensation and the actual performance and the long term of a corporation, where you have seen article after article that shows that corporate management is receiving large bonuses and extremely high corporate compensation when the corporation itself may actually be tanking. And I have a question for Chancellor Allen about lobbying. In about 2 weeks, Common Cause New York is going to release a report where we analyze the grass roots lobbying expenditures, here in New York State. A phenomena which we are seeing in increasing amounts here in New York, which we've seen in other states, and that is a distinction between the two different types of lobbying. You seem to be talking about direct lobbying. I think we can debate whether it's a good thing that we now have $210 million spent on lobbying in New York, where we have an extraordinary number, something like 16 lobbyists for every legislator. The figure, if any, is similar or higher in Congress. But putting that aside, we are now seeing, at least in the state level, an increasing use of exactly the same techniques, which are used for electioneering, being used for lobbying. With the object of the lobbying not being the legislators directly. Not being: "We'll sit down and talk to you and make our case for why we think industry does or doesn't want to see this kind of regulation." But rather, the kind of advertising we saw here in New York, which is very broad and is about, for instance, the public should or should not support the Governor's budget as a whole. And I would suggest to you that we got a difference in lobbying. In this kind of lobbying, where it's tipping over into political money. The techniques are the same, and that we should be looking at the same kind of disclosures, and perhaps, someway in which it should be treated differently. My last comment is, when we talk about Corporate Law, we get into the details. Shouldn't we also be talking about

the role of corporations, in our society? In general, there has been a shift. If you look at how the business council defines its mission, it changed, I believe in the mid 70s, to strip out all mention of the role of corporations and stakeholders other than shareholders, and now concentrate only on shareholders, as stakeholders to corporate action. I would suggest that that is something we as a society should be talking about because it's not immutable. It is within our control. Corporations are artificial constructs that have only the rights we give to them, and we need to be more proactive in defining who they are and how they behave. So those are my two areas of question.

Ciara Torres-Spelliscy: Ok, go ahead.

Chancellor Allen: You have expanded somewhat the question. I mean, the last part you bring up, were really, I mean, I've been to two or three day conferences on that subject. And I can't really say anything intelligent because I haven't thought about it, about the question of corporations expending corporate funds to affect political issues. Now I saw some, I didn't know if they were corporate TV ads or labor union TV ads, I kind of thought they were teacher unions ads. But any case, this is unlikely, I think to be an agency problem, that is, from the internal corporate law perspective. People tend to be concerned about agency problems. This is probably an indication of doing something that the shareholders might like. So it's not a corporate law issue per se. The bigger question: what is the role of the corporation in society and the social role and all that and who should they be responsible for? We can't, if you talk about it, it won't do any good. Because what has happened, this is not our conception of the corporation, it's the fact that capital markets have grown much bigger and much more powerful. Corporate directors would like to say: "We're responsible to everybody. We have an interest in our customers, in our shareholders, etc." Because that, in effect, means, no one interest group has a power over them. They're always balancing. And for fifty years, they tried to get away with that. They couldn't do it. Ideas changed, but more importantly, the capital market changed and now there are very powerful capital market actors, the institutional investors we talked about, and the agents of the institutions that hold them much more accountable than they did. So we can talk about social responsibility, but to the extent, the markets are competitive, and the capital market's competitive. We're talking to ourselves. That's not very responsive, I'm afraid.

Ciara Torres-Spelliscy: Professor Jackson.

Professor Robert Jackson: You asked whether executive pay is my best example given that we've been less than completely successful from some points of view in regulating executive compensation. I think what I'd say about this, I think it's a good example not because of the outcome, but because of the process. So let me tell you why it's an interesting example. I mean, the regulation of executive pay has been debated in corporate law literature for thirty, forty years and it's got a very, very lengthy history. But it sort of came to the public attention more recently as a consequence of a few high profile "scandals", query scandals, but they came to the public attention recently as a result of some outside decisions, some unusual decisions that were revealed by the press, or by folks like you who are staying on top of corporations and watching their conduct carefully. And then we had a period where shareholders attempted to engage in self-help to deal with this problem. They tried governance, they tried, institutional shareholders tried communicating with the corporations. They tried by-laws. We had a whole series of articles

about that. And then finally last year we got very significant federal intervention on the question, where the Congress simply said: "We're just gonna give shareholders a federally mandated right to speak about this and tell corporations what they want." And even having done all that, we're now waiting to see what those reforms will accomplish. And what I'd urge on, I mean, I write about executive compensation a fair amount, I think I'd say, we're not nearly finished, first of all, seeing the results of these regulatory reforms, which will take time, and that's time we should take before we take many further steps. But, also, we won't be finished for a long time because the work that deal owners have been talking about that markets must do takes time. It takes time for corporations to internalize these lessons about what is in shareholders interest and what isn't. Similarly in this area, I would expect we follow a similar course. I mean everyone on this panel has agreed that disclosure is a good idea, but my guess is that you would say even if we get the disclosure, we wouldn't be nearly finished. So what I'd say is that, if we start with a regime where right now, we have very little intervention, and shareholders are attempting self-help, we'll need a federal step, and then we'll need further work by folks like you. And I think, that's why I think of the example as helpful, not because we've had extraordinary success in the regulation in executive compensation.

Audience Member #1: Does it in some way reveal a weakness with our selection of outside directors process?

Professor Robert Jackson: That's a very broad question. Are any of us currently on board? Ok, so there we go. Ok.

Ciara Torres-Spelliscy: Professor Taub, you look like you want to add something.

Professor Jennifer Taub: I just want to add one thing, which is, I'm not here to defend shareholder primacy necessarily or a view, the current Anglo-American view of the corporation being focused on shareholder primacy as opposed to, let's say, some broader stakeholder theory. But, you know, there are other, I was thinking about, there's been recent coverage of John Lewis Partnerships in the UK, which is a large retailer, which is an employee-owned organization. I mean, there are other, you know, there are other forms for organizing businesses. I'm interested in a variety. This is the one we have now, but I'm working with, you know, the constraints of the law as it is now, trying to be inventive about the best way to solve the problems that we have now.

Ciara Torres-Spelliscy: Ok, Mr. Lindblom.

Lance Lindblom: Hi, I'm Lance Lindblom, I'm President and CEO of the Nathan Cummings Foundation and it's a real honor to be able to talk to law professors as a foundation executive about the real world. And we have brought a number of proxy actions, not only on governance issues, and compensation issues, looking very much forward to the Goldman Sachs resolution that we filed on compensation next week. But to talk about the issues of political contributions. And I guess most of my questions are really directed at Chancellor Allen. And they really deal with agency questions. First of all, just under corporate law, my first question is, is we had a discussion at the shareholder meeting with Mr. Murdoch, Chairman of the News Corp, who essentially had made some statements that were quoted in the press that they were making

certain political contributions based on his personal relationships and not with the corporations' interest. He subsequently backed away from those statements because I'm sure he talked to his lawyers. But he also said within that shareholder meeting and the Chair of the Audit Committee also said that the Chair was making those decisions and that the Chair, as one of his considerations, thought that those contributions were in the best interests of the country. Not of the, he didn't necessarily say the corporation. Would you say that passes the business judgment test?

Chancellor Allen: I would say, this is, a lot would depend on the judge you get. This should survive a motion to dismiss if the statement is we spent the money for the public good. Some will depend, it will depend on how much money, because for example, under corporation law, we've got some old cases in which a company gives $10,000 to Princeton University, and simply justifies it on the basis that giving money to the universities are a good thing to the environment and this has been upheld as long as these expenditures are reasonable in amount. So if somebody gives half of the balance sheet to a university, that will not be permitted, and under nothing more precise than unreasonable standard. I don't know how, if I were the corporate lawyer, I would say: "Don't make political contributions on that basis. They must be justified on the basis that this is good for the corporation. Whether or not you would get that enforced in a lawsuit, I'm not sure, but I would say you should at least survive a motion to dismiss, not get thrown out of court on your, you know. But I really think, and I'm just repeating myself, that the institutional investors should begin a campaign just to prohibit political action. And I think that you would, all of them, there's no reason not to get behind it and I don't think boards, I mean, Murdoch's case is special because he's so powerful in that company, but I don't think boards will resist this. And it gets around, you know, the disclosure, and so, I mean you still have questions about what constitutes a direct political expenditure. But I think it's the clear, I mean, in principle you should win this, and I don't think it should be dependent upon John's study that there's some little economic, something or that we need, you know he's a self-taught statistician, and very good. So I can't really understand his study. I tried already. But I just think that this should be opposed in principle and in a not complicated way and I don't think people would resist it, really. In fact…

Lance Lindblom: Well, can I bring you back to the real world on that, because essentially those resolutions have been brought and either they have failed cause there's a resistance against disclosure for all the reasons that have been talked about, or they're accepted, and, but then the money is given to an intermediary, like the National Association for Manufacturing. And the fact of the matter is that the corporation will actually have a statement that they're for a set of principles or they're for a political stand, whether it's environmental or compensation, whatever, why they are feeding millions of dollars to intermediary organizations to undermine exactly what they're talking about, and the issue is that they have a vested interest in not letting that information get public because of the Target-type situations, or because they get caught within that contradiction.

Chancellor Allen: I may be mistaken, but I don't think that this issue has been in the forefront of the big institutional investors, TIAA CREF, for example. I mean it has to be adopted in a serious way by a big piece of the investment market, and people will take it seriously. As long as it's just, you know, a few people making the motion, they'll try to evade it. The other thing is

there's a limit to what you can do, no matter, I mean, I'm saying you should have a prohibition, and you're saying, well, prohibition won't work. It has to be tied with some disclosure…

Lance Lindblom: No, I was just asking how you get the prohibition. I wasn't against the prohibition. You were saying that the institutional investors…

Chancellor Allen: Have to get together.

Lance Lindblom: Yes. But I mean, there are a number of large institutional investors, of which we've been parts of those groups. These are not insignificant investors. They're CalPERS, CalSTERS, the New York Pension Funds, etc. that bring these issues. What I'm talking about is the practical impediments that we're faced with. The issue is, as a mission, for example, some of the mission of our foundation, we try to match our mission with our long-term sustainable profit interest as an institution. And some of the pension funds are finding that the actions of the corporations that are making these political contributions are actually undermining the duty of loyalty to their beneficiaries. Because they are against their interests. So the question is: How do we separate out that agency issues because those issues really aren't recognized. There's no process that has been legally mandated that boards of directors have to go through in order to make these kinds of contributions. Nor a specific regime of accountability for when they make those decisions because of all these layers. When you go to that ultimate individual, the ultimate beneficiary of those pension funds, they're often harmed by the kinds of corporate expenditures that are made within the political area.

Chancellor Allen: Well the problem is from the board's point of view, it's got a whole range of shareholders with individual issues. I mean, you're a shareholder and you have, your foundation has certain goals, and you find them undercut by what the board is doing. On the other hand, there may be other shareholders who have different interests that are being fostered by what the board is doing. So their constituencies don't have a common interest, except in stock price or return. So that's why they should, in my view, be focusing on those things and not on political action. I don't know the answer to how, if you get shareholders to adopt resolutions, maybe they won't be binding yet. Let's say, no direct political contributions to campaigns, for example. I think that will, if directors have that kind of constraint, and the corporate lawyers go to the board and say: "You shouldn't be doing this." And the General Counsel says: "You shouldn't be doing this." You will cut down, if not, eliminate, the amount of the activity that's covered by the…John, I'd like to hear John on this.

Professor John Coates: I'm agreeing mostly with, I think the two of you are in agreement. I think the gap maybe, between the perspectives is reflective in something that Bill, you said earlier, which is, you said: "Staggered boards, it's a type of takeover defense, have been going the way of the Dodo." And you're right, and they're going that way because of institutional shareholder activists who brought resolutions. But it's taking 20 years, and it's been fought with resistance at every step. And it's, I think that you're right in the end. This is the right outcome. It's gonna be shareholder initiated supplemented by legislation to make sure they lease disclosure is in place and enforcement to some extent can be made of the rules that get adopted. But it's gonna take a long time, this is why I did my little statistical analysis cause it's gonna need, TIAA CREF is gonna need that as an institution to swing behind the idea of supporting

these kinds of restraints. They're gonna be a lot, we made other studies, and I invite anyone to do the same kind of analysis, because I think in the long run, your intuition is right, but it's gonna require a lot of convincing and a lot of effort to get there. So I think I will probably retire before we actually get to the right point in this debate, if we count on private action, which is one last point. Part of the reason the say on pay [start] legislation was so important is that even though we were headed in the way that Dodd Frank got us, it would have taken us another 20 years to get there to do what Dodd Frank did in, well, it took them a year and a half. Not that fast, but pretty fast. And it's interesting, in this country it's very different. In the UK, they got there much more quickly. Our political process, even before Citizens United, is sort of structured to be really slow. And all of this has to take place simultaneously in order for it to happen. So the reason I think for the different perspectives is, I think Bill's, you know, you see the end point and you say: "Well, we're gonna get there."

Chancellor Allen: I'm a young man.

Lance Lindblom: I just want to say we brought 14 of those resolutions on diversified boards in conjunction with Lucian Bebchuk's organization, of which 7 have now agreed. But this is, what, 20/20 on diversified boards. So I mean, that is a very long process. I don't know if we have 25 years in which to deal with the political issues in that kind of process.

Ciara Torres-Spelliscy: The gentlemen over here.

Audience Member #2: Lance took one of my points, but I want to go a little beyond that. I'm also representing small institutional investor, the Christopher Reynolds Foundation, it's been very active in this issue. We are in dialogue with Pfizer, we are in dialogue with Accenture, we've signed a number of letters. We have approached the companies, in fact, it really gets back to the fact that there's the direct expenditure but as Lance pointed out, the principle and agent issue of the National Association of Manufacturers, and the Chamber. A letter when out in January to I think 38 members of the Board of the Chamber signed by 47 trillion, something like that. It was a big number. To the saying: "Look, you have stayed in positions on a number of things that are totally contrary to the positions of the Board of the Chamber of Commerce. Tell us where you stand." And there's an old, you may not know Miles Law, which says: where you stand depends upon where you sit. And what we're finding is that these people are played standing in many places and sitting in many places, and you don't know what's coming out of their mouths. You get the easiest cases, virtually every company now says climate is an important issue. But the Board of the Chamber has been trying to do everything possible to get the EPA out of this business, etc, etc, etc. You all know that. I think the last count, now this is 3 months after the letter went out, 5 companies have responded to that letter. And most of them said: "Oh, everything's fine because President Obama spoke to the Chamber of Commerce." Total non-sequitur. But the fact is, obviously, the line was the same line in every one of the letters. I don't want to suggest an inclusion, but it may be there. Going back to Say on Pay for a moment, relayed that Say on Pay didn't just happen because every, Say on Pay, one of the important actors in Say on Pay was a 2 year process supported by corporations, investors, and legal scholars, meeting 4 to 5 times a year to try to work this out. Pfizer led on the corporate side, Walden Asset Management, Domini and others, and then Steve Davis at Yale was there. So there was something that corporations were willing to sit down and talk about. The corporations don't

want to sit down and talk about the political contributions, either at the level you were talking about, namely directly, and certainly not indirectly. Then you go back to another corporate governance issue which we haven't addressed. The Board of the Chamber of Commerce has 125 people. That's not a board, that's a convention. Committees. It's a license to kill. Tom Donahue is 007. The committees are 50 people, so what does that tell us about what's going to happen in this. And these companies need, one company said to us: "Look, we believe climate is an important issue. But it's not our most important issue as a business case. So we'll fight it if we can at the Chamber, but." All of this to say is, I think there's a certain air of unreality about the conversation from the legal perspective. Your sense of the benign quality of lobbying, you know, when a law is written in a Congressman's office, that's not, the independence of directors, we know what happens to directors. The question is, let's go to that principle agent issue and talk about how we can move that forward from a legal perspective. And certainly, it's an ecosystem, we need the Common Cause's and others operating it other ways, but where can you folks, as legal scholars, come in and help us?

Professor Robert Jackson: So, um, disclosure, I think that's where we start right? Start and end. Ok, I think I've got 11 seconds, so obviously there's a lot of layers in your questions. What I would say is that I think we all agree that federal intervention is needed on the disclosure front. I think what we're hearing from you, and by the way, this is consistent with conversations that I've been having about this for a year now, is that the self-help remedy, the notion that markets and shareholders can do the work on their own is less straightforward than it might appear as a matter of theory. That's why we've proposed the kinds of things we proposed on our paper. That's why we proposed the use of independent directors, that's why we proposed the use of a shareholder voting right. And I can tell you from the Say on Pay experience, before I started Columbia, I was a lawyer at the Treasury Department and I drafted the administration, the President's proposal for the Say on Pay statute, and I was in a lot of the meetings you're talking about. And what I'll say about that is the process, as John has said, is a very, very long process, right, so to me, what's encouraging about being here today, is that those of you who are working on the Shareholder Protection Act and some other legislation, have sort of got this process started because I can tell you, given the complexities of the issues, the challenges to the agency cost argument, I think it will be a long time before we get the kind of federal intervention we need, so to me, it's encouraging that we at least started down that road.

Ciara Torres-Spelliscy: And on that note, thank the panel for sharing their wisdom with us.