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CORPORATIONS AND AMERICAN DEMOCRACY

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PARTICIPANTS:

Welcome:

DARRELL WEST
Vice President and Director, Governance Studies
Founding Director, Center for Technology Innovation
The Brookings Institution

Panel Discussion:

NAOMI LAMOREAUX, Moderator
Stanley B. Resor Professor of Economics and History; Chair, History
Yale University

MARGARET BLAIR
Professor of Law and Milton R. Underwood Chair in Free Enterprise
Vanderbilt University Law School

AJAY MEHROTRA
Executive Director, American Bar Foundation
Professor of Law, Northwestern University
Pritzker School of Law

WILLIAM NOVAK
Charles F. and Edith J. Clyne Professor of Law
University of Michigan Law

JOHN WALLIS
Professor of Economics
University of Maryland

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P R O C E E D I N G S

MR. WEST: Good morning. I'm Darrell West, vice president of Governance Studies here at the Brookings Institution. And I'd like to welcome you to this discussion on the relationship between corporations and American democracy. And for those of you who use Twitter, we have set up a Twitter hashtag at CorpsInUS; if you wish to post any comments during the course of the forum.

So, the corporation has a long and complicated history in the United States, there have been shifts in laws, regulations, in policies, we've also seen changes in operations in societal expectations. There furthermore have been complications owing to a range of Supreme Court decisions which have endowed American corporations with some extraordinary rights.

So, it is important to examine the impact of all these developments on American democracy and how these things have changed over the course of American history. There is a new book edited by Naomi Lamoreaux and William Novak, which addresses these topics, and those of you who are interested in more details, we actually are selling copies of the book right outside the auditorium. So, feel free to pick up a copy after this event.

The book is entitled: "Corporations in American Democracy," and it's published by Harvard University Press. The volume brings together 14 very distinguished historians for an assessment of the place of corporations in American society, and how corporations have generated serious issues for democracy.

So, today we are pleased to welcome several of these individuals here to Brookings. Naomi Lamoreaux is the Stanley B. Resor professor of economics and history at Yale University. She's also the chair of the History Department, and a leading expert on economic history. She and I actually were former colleagues at Brown University, so it's great to see all the tremendous work that she has done over the years.

Margaret Blair is professor of law and the Milton R. Underwood chair in free

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enterprise at the Vanderbilt University Law School, and she's the coauthor of a chapter in this book on the Supreme Court's view of corporations. Ajay Mehrotra is the executive director of the American Bar Foundation, and also professor of law at the Northwestern University School of Law, and he has a chapter on corporate taxation.

William Novak is the Charles and Edith Clyne professor of law at the University of Michigan, and he co-edited the book, and also wrote a chapter on public utility. And John Wallis is a professor of economics at the University of Maryland, and wrote the chapter on corporations after 1940.

So, I also want to note the financial support of the Tobin Project for this forum, and we very much appreciate their support. So, I will turn the discussion over to Naomi, who will moderate the discussion.

MS. LAMOREAUX: Thank you, Darrell. It's wonderful to be here. And I want to also thank the other people at Brookings who made this appearance possible. And thank you all for coming. So, we are here to talk about this book, "Corporations and American Democracy," you can hold it up, Bill. Bill is my co-editor.

This book was an undertaking of the Tobin Project, which is a foundation, I'm going to quote from its website, whose mission is to mobilize, motivate and support the community of scholars across the social sciences and allied fields, seeking to deepen our understanding of significant challenges facing the nation over the long term.

Now, this book in particular had its origins in a conversation between the Tobin Project's founder, David Moss, who is a professor at the Harvard Business School, and a Federal Judge. And this conversation took place in the aftermath of the U.S. Supreme Court's 2010 decision in the case of Citizens United versus The Federal Election Commission.

And if you recall, the Court ruled in that discussion, that the federal government could not prohibit political speech that took the form of expenditures during a political campaign on the basis of the identity of the speaker. That is, it could not ban speech because the speaker

was a corporation. The decision, effectively, gave free speech rights to corporations.

Now, the written opinion in that case included a sharp exchange over the history of the corporation between Justice John Paul Stevens, who was writing the dissenting opinion, and Justice Antonin Scalia who was writing a concurring opinion, the main opinion was written by Justice Anthony Kennedy.

And basically this exchange between Stevens and Scalia, reduced to the following: Stevens claim that the framers did not like corporations, and did not extend first amendment rights to them, and he quoted Thomas Jefferson's hope that, "We shall crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength, and bid defiance to the laws of our country."

And then Scalia made the counter claim that, hey, wait a minute, in the late 18th century the American government chartered lots of corporations and so he said, "It's far from clear that by the end of the 18th century corporations were despised, they were creating lots of them."

So this is the proverbial blind man and the elephants, not blind justice, blind man and elephant, and the justices seem not to have been willing to recognize, or at least to admit, that both statements in fact could be true. And they were also relying on quite dated histories of the corporation, and so David Moss, the founder of the Tobin Project thought it was time to provide the Court, and other policymakers, and other Americans, with a more modern, more nuanced history of the corporation. And the result is our book.

So, the book covers the history of the corporation from the period of the founding to the present. It includes 10 essays, by a total of 14 scholars, so only a few of us are here today. We are not all of the same mind, we don't all speak with the same voice, nonetheless, what emerges from this book is a remarkably coherent view of the history of the corporation in the United States, and its relationship to American democracy.

And so I want to, very quickly, highlight the five major points that I would say,

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came out of the volume, and then we are going to have brief presentations from the other members of this panel. Then we'll have some panel discussion, and then we'll open it up to the audience to ask questions.

All right; so, what are the five major things that come out of the volume? Well, first, the debate between Stevens and Scalia captures something really important, Americans have always, from the beginning, had an ambivalent love/hate relationship with the corporation. They have seen it as an engine of economic growth, of economic development, a vehicle of personal opportunity, but they have also viewed it as a tool for the accumulation of excessive and threatening economic and political power.

One of the contributions of the book is to show how this ambivalence has shaped the evolution of corporate law over the course of American history in a way that both spread the corporate form, and also developed institutions of control of the corporation. So, we have over the course of American history, both facilitated the growth of corporations, and regulated corporations.

So, the second major theme is that the corporation -- the corporate form is a device, it's a tool that allows human beings to do things, but it's a device, a tool that has always entailed special privileges, that human beings did not have in and of themselves, and those special privileges, have always been accompanied by special responsibilities.

So, with the spread of the corporate form, over time, over history, perhaps the privilege aspects have become less visible, but they are still very real, and there are still very real responsibilities to have to go along with those privileges.

The third theme is that because corporations are vehicles of privilege, historically, they were treated by the Court as artificial entities, so though they were considered to be legal persons for some purposes, they were never thought to have the same bundle of rights as human persons.

And so when the courts, historically, granted what appeared to be rights, to

corporations, they were not always aiming to -- they were aiming almost always to protect the individuals that were members of those corporations, not the entities themselves. And it's only recently that the Court has gotten mixed up about this, it's a really recent development.

The fourth theme, corporations have always been heterogeneous in their purposes, and in their characteristics, but over time they have become more heterogeneous, and also more numerous. So, if we just want to think about business corporations at the time of the framing when Jefferson was saying it in like, corporations that when we were creating them, too, at the same time, there were really just a handful of corporations in existence.

By the time the IRS started to keep track of business corporations in the early 20th century, there were 300,000 corporations. Today there are about 4.5 million business corporations in the United States, or about 1 for every 70 men, women and children in the country.

But they aren't just business corporations, the corporate form issues for other purposes as well, so there are about 1.5 million non-profit corporations, not counting churches that range from schools and hospitals, to advocacy organizations.

So, corporations are ubiquitous, they permeate all aspects of American life. There is no "the" corporation; which brings me to the final theme, and of the book, which is that this tremendous growth and diversity of the corporate form has subjected the legal framework under which corporations have operated since the founding to severe stresses.

And as a result the Supreme Court has, in recent years, broken with long-standing precedence, and so one of the main, and changed the way -- the legal framework for corporations. And so one of the main contributions of the volume; is to highlight the radicalness of that break.

But another contribution is to provide a sense of the changes that gave rise to that break; and then also to suggest how the response to these changes could have been different. As Bill and I wrote in our introduction, the key purpose of the volume is to improve the

discussion of current policy by recapturing a sense of possibility, a sense of what else might have been, and still can be. And we were going to try to do that in our conversation with you today.

All right; so, that's enough from me, and I'm going to let our panelists speak in turn, and I'll just tell you their names again right they are going to speak so that you know who they are.

But the first speaker is John Wallis, he's right on my right. Professor of economics of the University of Maryland; his contribution to the volume was an essay entitled "Corporations and organizations in the United States after 1840." John?

MR. WALLIS: It's great to be here. This process of writing the volume was really educational for all of us. We started out with the notion, many of us, that corporations were bad and too powerful, and Citizens United had given them more power, and probably that was bad.

I'm an American economic historian, I work on the international politics and economics built in America and sort of more generally in the world, and one of the things that happens in American history in the 1840s, is states began adopting what they call general incorporation laws, which allow anyone to form a corporation through the Administrative Act.

So, today, I live in Maryland, and if you wanted to form a corporation you would go to Annapolis to the attorney general's office, you would fill out a form and pay a fee, and you could become a corporation, and anybody can become a corporation. Before 1840, with very few exceptions, in order to become a corporation you had to actually get an Act of the State Legislature, so corporate charters are in the statutes of the state.

And what that meant was that state legislatures, as politician all want to do, were able to use the granting or withholding of corporate charters to influence political coalitions. If you know, the debate about the cause of the American Revolution in the famous book by Bernard Bailyn, "The Ideological Origins of the American Revolution," Americans were concerned in the 1750s and 1760s that what was happening in Britain, which of course is their

government, was that the King and his ministers were manipulating the economic interests of members of parliament.

Partly through corporations, like the Bank of England, and the South Sea Company, and the ownership of stock in those companies, and as a result the legislative branch was not independent of the executive branch, and corruption would follow. Or what they really said, is tyranny and slavery will follow.

So, why do we revolt? In Bailyn's words, "We revolt because we are worried about what's going to happen next, that if the political system continues to manipulate the economy for political purposes, bad things will happen."

So, that's the intellectual origins of what Americans get. And between 1790 and 1840, and unfortunately I don't know whether they flipped the coin or not, I didn't get to write the 1790 to 1840 chapter I had to write the 1840 to 1900, with Jessica Hennessey, who is now at Furman. What happens is that all kinds of crazy stuff happens in America, and in many states, and in many places, legislatures -- coalitions emerge, or political coalitions and parties emerge that literally manipulate corporate charters and privileges to build political coalitions.

The famous one is the case of New York and Albany Regency. I've done some research on Massachusetts, and people are really worried about this. They are worried about how we promote economic activity and growth, with these dangerous -- potentially politically dangerous corporations, where a minority of faction can use the corporate privileges to put together a party that can run the government. And merely being a minority of people were able to do that. So, some things haven't gone away. Right? (Laughter)

So, what happens in the 1830s the states invest heavily in banks, and they invest heavily in canals, and it turns out these projects go belly up, actually the projects don't go belly up, the states go belly up. So, in 1841 and '42, eight states in the territory of Florida default on their debts, Maryland is one of them, for the Chesapeake and Ohio Canal, which some of you can go this afternoon and have picnic by it.

When they do that they would say, what happened, what happened? And their conclusion really was, well, we let the political system manipulate economic privileges, where the canal would go, who would pay for it, who got the debt, who got the corporate privileges. And as a result we need to change that fundamental institutional feature, which essentially tied the hands of legislatures to prevent them from manipulating this economic privileges the corporations represent.

So, the paper that Jessica and I wrote shows that how after 1840, or in the 1840s and later, states begin adopting what were called general laws for corporate charters, but they also begin adopting general laws for cities, in incorporating them, they begin adopting rules that said, if you are going to pass a law for gas stations, all the gas stations have to be treated the same, was the famous court case in Maryland in 1980 about this. So, it still goes on.

Between 1840 and 1900 the notion of general incorporation that organizations, not just businesses, as Naomi said, but churches, schools, social clubs, should be allowed to form, and the larger society should actually support the formation of organizations at will. And we should take away from the government the ability to say, you get this and you don't. We could call that quality. I call impersonality, which is not a warm or fuzzy emotional word, because they are treating everybody the same, the government is forced to treat everybody the same.

That turns out they have huge implications for democracy. You can't take The Washington Post and put everybody in jail. Lots of places in the world today are taking the newspapers and putting them in jail, right, not letting them form. Now, we don't think this is a right, God made America, uh-uh-uh-uh-uh-uh, no. Okay? (Laughter)

Before 1840 the states, and it gives us all the states story, it's not a national story, had manipulated economic organizations, but organizations of all types, and in the 1840s they manage to stop, and we can only see that they stopped in the 1840s but they spread that, not just from business corporations, but the churches, the schools, but all kinds of forums as

civil society. So, that the history of American incorporation includes a deliberate choice to make that happen. Thanks.

MS. LAMOREAUX: Thank you, John. So, let me just quickly introduce our second speaker, who is my co-editor and co-conspirator on this volume, William Novak, professor of law at the University of Michigan. And he wrote the chapter on "Public Utility -- The Idea of the Public Utility and the Origins of Modern Business Regulations."

MR. NOVAK: Thanks. Thanks to Brookings, thanks to the Tobin Project -- thanks for my microphone. In a famous dissent in 1933 Louis Brandeis, Justice Louis Brandeis, expressed a certain frustration with some popular misconceptions about the nature of American corporations and their supposed historic rights.

In the critical realist opinion, Brandeis chastised his contemporaries for acting, "As if the privilege of doing business in the corporate form was inherent in the citizen." Such a deferential and submissive view to corporations, he argued, "Understated the historic power of American democracy to hold corporations accountable and encouraged," he suggested, "Too much public apathy, towards corporate abuses."

He concluded with what might be a mantra for our new book, throughout the greater part of American history, a different view prevailed. So, in contrast to the Scalia/Stevens exchange in Citizens United, Justice Brandeis' historical understanding of the American corporation was sophisticated and typically very detail, if you know anything about Brandeis' opinions or his briefs.

Contrary to recent efforts to depict corporations as simple and natural entities like persons entitled to constitutional rights or first amendment protections for most of American history our volume contends a different view prevailed.

Chief Justice Marshall as well as Chief Justice Taney agreed: a corporation was a special and artificial creature of government existing only in contemplation of law and accountable to the state, to the democracy, to the public at large. Many of America's first

corporations, bridge companies, water companies, transportation companies were viewed essentially as public service corporations or public franchises.

Importantly in this early period, corporations were not exempted in any way from generally applicable regulatory or police power laws. They were just not exempt from any general laws, to the contrary from the 19th to the 20th century they were routinely held to higher standards of public service, public accountability, social responsibility and public trust.

From special charter regulations in the period that John was just talking about, to the rise of independent regulatory commissions in the late 19th century, to antitrust and regulatory taxation, to the emergence of new kinds of environmental, regulatory, safety and social regulatory initiatives in the second-half of the 20th century.

Seemingly, and this is the regulatory story we try to tell in the book as well, with every new innovation and corporate form like the move to general incorporation that John just talked about, and every new transformation and economic development, new techniques and technologies of democratic regulation, new checks and balances, if you will, also developed to meet that challenge.

This was particularly true in one of my favorite periods, the populist and progressive eras, and their call is to do something in the late 19th and early 20th century, about unprecedented corporate consolidation and corporate corruption in this period, is the era of the so-called Gilded Age, the so-called Lochner era.

From muckraking texts, like Frank Norris' "The Octopus," to public appeals like Brandeis' "Other People's Money," to influential academic treatments like Berle and Means' "The Modern Corporation and Private Property." This period was simply saturated with public call, sometimes polemical, for something to be done about corporate power, corporate consolidation, corporate political influence, and corporate domination.

Walton Hamilton, one of the great institutional economists, who helped form the Brookings Institution, was very much in this vein of work as well.

A new regulatory response was swift in coming, as older traditions of public trust, public franchise and public service took on new forms in what I see as a kind of revolutionary spate of regulatory and administrative innovation.

State railroad and public utility commissions, to the Interstate Commerce Act, to the Sherman Antitrust Act, from new proposals on federal incorporation and corporate taxations, to the establishment of the Federal Reserve, the Federal Trade Commission, the Federal Power Commission, the Securities and Exchange Commission, and the extraordinary Public Utility Holding Company Act; the scale and scope of corporate regulation in this period changed as a moderate administrative and regulatory state burst on the scene, changing basic conceptions of the relationship with the corporation to the American public and the American democracies. So I see this as a kind of great, new formative era after the first era we chart in the 19th century.

Well, we live today, as you know, in an era that some have likened to a second Gilded Age, given increased economic inequality, kind of resurgent corporate capital financial assertiveness. The return of dark money, and other dark forces in political campaigning, it's easy to see the grounds for some surface historical comparison between our times and this late 19th century period.

The latent political orientation of our own time, sometimes captured by the telling, catch phrase, neoliberalism, features the unmistakable return of a discourse about American history, confined again, to sometimes its most undemocratic dimensions.

The anti-government, anti-regulatory, anti-state has stranded American political economic thought, has not been as aggressive in the United States since the original polemics of Herbert Spencer and William Graham Sumner. In law, formalism, originalism and constitutional limitations, sometimes dubbed the new first amendment Lochnerism, Lochners get reborn, are again ascendant as they have not been since the inventive doctrinarism of Christopher Teeman, and Justice Rufus Peckham.

The democratic deficit in recent economic and political trends is all too apparent,

we live, again, in what Hannah Arendt like to talk as "Dark Times," which Teese defined as periods in which the public realm becomes obscured, so dubious and so despised that people asked no more of politics than that it serve personal, private and ultimately, in her opinion, rather petty interests.

In just such times we contend, it's particular important to reacquaint ourselves with the rich, creative ways past Americans, tried to respond to, as Naomi had said, this double-sided nature, right, the opportunities as well as the challenges posed by the long history of corporate development within this democracy if we can keep it.

MS. LAMOREAUX: Thank you, Bill. Our third speaker will be Ajay Mehrotra who is the executive director of the American Bar Foundation, and also professor of law at Northwestern University. And his contribution to the volume was on "Corporate Taxation and the Regulation of Early 20th century American Business."

MR. MEHROTRA: Great. Thank you. First, let me begin by thanking our friends here at Brookings, as well as the Tobin Project for helping us put together this event. And thanks to Naomi and Bill, as editors. Those of you who've edited a volume that the proverbial "herding cats" is an understatement of what it takes to get everyone to contribute, but it was an honor to be part of this collection.

So, I thought I would do three things very briefly, I want to make some connections between the specific chapter that my coauthor and I, so this is a coauthored piece with Steve Bank for the UCLA Law School, who is also a historian of American tax policy. I want to draw some connections to what's already been said by the panelists.

And then I'll get to the central claims and arguments of our chapter, and then I'll actually try to provide some historical evidence. Make sure I'm not making this up, and you can see what we about, for example, the deep ambivalence in which the corporation has been held.

So, as Naomi mentioned in her opening remarks, and as Bill and John have referred to, I think one of the larger aims that animates this projects and certainly our chapters,

is really trying to get the history right, to make sure to go back to try to uncover what I think has been considered as a sort of a lost history of the corporation and its relationship to American democracy.

The exchange between Justice Stevens and Scalia I think demonstrates that there is the sort of tension, or this ambivalence that we try to uncover in each of the chapters, or at least many of the factors. But the goal really is to kind of recover, after this radical break that's occurred, to go back and find out, well, what exactly was going on, at least in the late-19th early-20th century, and in our period it's really the first -- third of the 20th century when the corporate tax becomes an important tool, not only for regulation but also for facilitation of economic growth.

So that's what we are trying to do in this one, and the broader research question that animated the work that Steve and I do, was really the importance of historical context, how did changing historical conditions actually affect reformers and lawmakers and their review of corporate taxation, because it's so consistent.

That's the one story I think we all agree on, there is change over time. There is not a consistent, or one single principle that defines at least corporate taxation in this period. So, in that sense we are linked to the larger project in trying to recover the complexity of corporate tax policy over the first-third or the 20th century at least.

So, let me get to our central claims and main arguments. We argue really that there is no one central principle behind corporate tax policy from its origins in 1909, that's the year when we have the first modern corporate income tax through The New Deal, which is the period that we look at.

There's an existing historiography, and existing literature that seems to suggest that the origins of the corporate tax were all about controlling the growing concentration of wealth. It is 1909, it's in the heart of the period that Bill just described, and so I think there's a presumption that because the power to tax is the power to destroy, that the corporate tax was

all about, and always about trying to control and penalize corporations.

But that's really not the case throughout even the first-third of 20th century when we look at corporate tax policy. So, we really, what we contend in our chapter is really that corporate tax policy in this period is really driven by mixed motives, and radically changing perspectives on the corporation, and how taxation of the corporation ought to be viewed.

And again, this is an example of that first point that Naomi illustrated, this is an example or a reflection of the deep ambivalence in which reformers, lawmakers and ordinary citizens, in fact, viewed the corporation and how the relationship between the corporation and American democracy ought to be regulated in that sense.

And so under certain conditions we find, lawmakers try to use corporate taxations to, in fact, punish and penalize. So, there is quite an abundance of evidence of the robustness of the rise of the administrative state and the role it plays through corporate tax policy.

But of course there were other times, especially during mild recessions, and changes in the political winds, and I'll talk a little bit about that in a second. We see lawmakers and reformers actually trying to support or subsidize the corporation as the engine of economic growth, because there is a period of course, especially in the Inter-War period I think, used some corporate tax policy where we see lawmakers and reformers, in fact, embracing the system of corporate capitalism as the engine of economic growth and prosperity.

So there's this sort of back and forth. And so what Steve and I have tried to do in our chapter is really to try to think of regulation in a much more capacious way, not just a notion of penalizing or limiting the control or power of corporations, and corporate managers I might add, it's not just owners but managers as well. But also thinking about the ways in which tax policy has been used to facilitate the growth of corporations.

Now, of course a lot of this all turns on this notion of mixed motives turns on this very important issue of incidence, which the economist referred to as the incidence, who actually bears the corporate tax, and this is of course, as we have a tax bill winding its way

through Congress right now, is a controversial issue, another example of how history still matters today.

Even back in the early 20th century there was tremendous disagreement about the incidence of the corporate tax, and I know often some of our friends in economics, and I'm referring here to public finance economists, not our economic historian friends who understand the importance of institutions in the past, but some of our friends in our (inaudible) discipline often think of economic science as being linear, that we just get more information, we get better at it.

Well, the notion of the shifting of taxation has been around for a very long time, economists have known that, and political economists, and other scholars have known for a very long time, who remits the tax may not be the person who actually bears the tax. And this is a very important issue in corporate taxation as we know today, and this was a very important issue back in the origins of the corporate tax.

But what was important was, the perception certainly was, and I think there's a lot of evidence now, I think the latest numbers suggest 60 percent of the corporate tax is borne by the owners of capital, right, so capitalist. And back in the early 20th century that was the predominant view that a corporate tax felt mostly on the owners of capital.

And so in that sense, it really became a proxy for taxing wealth. It was an indirect way the corporation became the sort of slush fund, or the conduit, or the remittance device, for some reformers. Now that's a much more neutral view of corporate taxation than of penalizing and trying to control its growth or limit its growth. And so a substantial amount of evidence, and Steve and I point to, about the role of the corporate taxes, it's a kind of remittance device to tax corporate wealth.

Now, of course -- in the brief time I have -- let me get to the more detailed historical evidence, and I'm going to focus really here, on the 1909 origins in fact. That is the year when the Congress, in fact, enacts the first modern corporate tax, and it's part of a

compromise where these mixed motives and mixed justifications come to the table, it's also the -
- the Act itself also has the constitutional resolution that will eventually lead to the 16th
Amendment, which is the amendment that empowers Congress to have a direct tax like an
income tax.

So, it's a very complicated resolution, but what's most important is the context,
the broader historical context in which this all occurs. Part of this is of course is as Bill has
already alluded to, corporate taxation is part of this long history of an anti-monopoly tradition in
the U.S. And so there is a view, even in 1909 of using corporate taxes to limit the power of
these growing trusts in corporations, and in that sense it fits very much with the historiography
as well as the political tradition.

But there's also this growing sense that as one lawmaker put it, we might kill the
goose that lays the golden egg. And so going too far with corporate taxation might be a
problem.

And so, I have some more evidence I can talk about, but the critical one is really
President William Howard Taft's message in 1909 in which he really brings together these
differing views, and in this very important statement to Congress, he actually outlines how these
differing views can actually be reconciled at least in the sense of having a corporate tax that can
do a little bit of both. Let me end there.

MS. LAMOREAUX: Thank you, Ajay. And our final presenter is Margaret Blair,
who is the Milton R. Underwood Professor in Free Enterprise at Vanderbilt University Law
School, an Economist my training thought. And she wrote, her chapter in the volume is, "On the
Supreme Court's View of Corporate Rights, Two Centuries of Evolution of Controversy."

MS. BLAIR: Thank you, Naomi. And thanks to Naomi and Bill for organizing this
project. I think it's been terrific, and of course the Tobin Project. They've done amazing work.
And thanks to the Brookings Institution and to Darrell for putting this event on. I have deep ties
to the Brookings Institution; I've spent 13 years here out of graduate school, and sort of began

my research career here, so it's nice to be back.

The chapter that Professor Pullman and I wrote, we wanted to look at, okay, what did the Supreme Court have to say, and what did the Supreme Court think about corporations. And it's important to start by saying that the word corporation doesn't appear in the Constitution, so the Founders said nothing about corporations in the Constitution.

So what the courts have done over the years, has had to be kind of an overlay on that, and kind of an attempt to interpret what did the Founders want? And what Professor Pullman; and we looked at every Supreme Court case that mentioned corporations in the context of some Constitutional Right over more than 200 years.

And one of the patterns that emerged is that you need to -- we can look pretty uniquely at those decisions that came out in the 19th century, and those decisions that came out in the 20th century. In the 19th century every case where the Supreme Court accorded and recognized the corporation is having a constitutional right.

The rationale of the Court used was not that the corporation is a person, and therefore entitled to Constitutional rights, it was that the corporation was an association of persons, and as such, there were situations in which, in order to protect the constitutional rights of the persons who were represented by the corporation, they needed to give the right to the corporation.

And that argument continued in the 20th century. But let me briefly talk about the case where this is -- in sort of the casual popular literature about, in response to Citizens United, you occasionally find references to a case called Santa Clara, Santa Clara v. Southern Pacific Railroad in 1886, in which the Court supposedly said that corporations are protected under the 14th Amendment which was designed to protect the rights of the freed slaves. Okay.

But the corporations are protected because they are persons, and the case actually, we had a weird history, and in the end the Court didn't say why they didn't articulate their argument about why they gave the corporation the protection that they did in that case, but

instead a law clerk wrote into the footnote, that something to the effect that all of the justices, they didn't ask to hear arguments on the question of whether the Fourteenth Amendment applied to corporations because: "We are all of the view that it does."

And that was written into a foot -- into a head note, what's called the head note, and future scholars, and future Supreme Court justices referred back to this case, and said, oh, Fourteenth Amendment applies to corporations. But what actually happened in that case is that they were -- they made a very brief decision in which they argued that the corporations at issue, that what had happened was that there was a tax rule passed in the State of California that discriminated-against railroad corporations that taxed them more heavily than other parties.

And they claimed that they had the right to equal protection, and the Supreme Court found, on other grounds they actually found that, yes, the corporations should be protected from being discriminated against in the tax rules.

But in every case where the Court really addressed the question, they said, this is an association of persons, the persons have the right, in order to protect the persons, we have to protect the corporation.

In the 20th century, things got a lot more complicated, for one thing the nature of the corporations in existence changed dramatically. We began to have professionally-managed corporations that had branded identities rather than just -- and they were no longer closely associated with particular individuals who had founded them, and built them.

They were huge, their shareholders who were sometimes recognized as the parties behind the corporation that the court was protecting. Their shareholders were trading in and out all the time. You didn't know it from one minute to the next who the shareholders were. And the kind of the cases that Court began to consider changed.

So, early on in the 20th century, the Court had to deal with question of whether a corporation could commit a crime. In order to do that they had to take up the question of whether -- what it means for a corporation to have criminal intent. Okay. So, this was a very

complicated kind of question, the Court ultimately concluded, not so much on the grounds that the corporation is a person, or that it represents persons, but on the grounds of public policy.

As a matter of policy we can't have a situation where the law can't be enforced against corporations because their associations of persons. Okay. So, the Court did decide that corporations could, indeed, commit a crime. So, subsequent cases got more complicated, and I'm sure we'll talk about the ones that have to do with freedom of speech later on. So, thank you.

MS. LAMOREAUX: Thank you, Margaret. So, before we -- I want to make sure we have a plenty of time for you to ask questions of the panelists, but I want to start the discussion by asking one question -- directing one question at the panelists myself. And that question is about the value of history. All of us on the panel are historians even though we might not all be formerly trained as historians --

MS. BLAIR: She's looking at me when she's saying that.

MS. LAMOREAUX: (Laughter) And we all, maybe, have a tendency to take for granted the value of history. So, I want to ask you, to the panelists, to tell us something succinctly about why studying this history of the corporation turned out to be so important for informing our current understanding of policy debate? Why looking at history changes the way we think about things? And I'll let John go first, and then we'll let whoever wants to jump in, and then we'll open up the floor for questions.

MR. WALLIS: So, this a big question.

MS. LAMOREAUX: A big question.

MR. WALLIS: Why does history matter? So, I'm going to address it in a couple of different ways. In 1800, the United States was a wealthy country by the standards of the time, but it was nothing like it is today. It was a developing country, not a developed country. There was nothing about the Constitution in Philadelphia that made America great.

It wasn't as though they figured out a political solution, and that says, a famous

title goes, "It Was a Machine That Would Run of Itself." Everything in American history stems from this compromise that was reached. We had a Civil War, Somalia, Syria, right; that's our history, it's our real history. We didn't get this right out of the box. I love these guys, (laughter) 300,000 corporations in 1900 and the first tax was in 1909?

SPEAKER: The first federal tax.

MR. WALLIS: The first federal tax. Okay. There are today something in the order of 15 corporations chartered by the national government, and there are millions of corporations, the Supreme Court. Which courts matter the most? Not the National Court, not the Supreme Court, there are some famous decisions, but the day-to-day laws that governed corporations in how they work is all at the state level. The whole history of corporations that matters is at the state level.

Now, does history matter? It sure matters, and it really matters, we don't know it. So, there's a reason to go back and make sure we get the history right. Now, I think, and this is my own work, and sort of my own shtick over the last 20 years, is that when we compare America to the rest of the world in the 1800, it's not particular special, it's special to us. Okay?

Just like Poland is special to the Poles, whether it's currently Poland or adjunct of some other state; what happens is, is America develops after 1840 and we don't know why. We say it's the Constitution, we say it's our culture and our values, we are just making stuff up. When we say we have rule of law, the people obey, we have a rich civil society.

Why? The guys in Mexico want to have rich, civil society too, they just live a couple of miles away from America. How come they can't do it? So, part of the message of this volume, which is hard to pick up out of the pieces, but it's really there strongly, is that in the beginning of the 19th century, because of these changes that states made with respect to rules, institutions, agreed-upon rules, deliberately decided that we need to allow organizations to form openly and freely.

Naomi and I have a volume, I don't have a copy of it because it just came out this

week, it's called, "Organization, Civil Society and the Roots of Development." That was not inherent in the early American institutions in the 1790s. States had deliberately decided to allow everybody to form a corporation. And that was a really good thing.

Not because of economic growth and development, but it gave us the ability to make democracy work. It gave us the ability to organize, to push back, which is what we are seeing now. But that's an inherent part of how our society works, that we can't see as something we constructed unless we know the history.

MS. LAMOREAUX: Who would like to take the next stab?

MR. NOVAK: Just one more word following up on that, because I really do want to hear your questions and your comments as well. But just to build off one of John's points.

We don't have a choice whether to talk about history or not, it seems to me, historical arguments about American history, are being used across the spectrum, in courts, in original public meaning, in public discourse, in polemics, arguments about the American tradition, the American political tradition, as John just said, are all over the place, and I would just -- so you don't have any choice but to talk about the history because big, big decisions are being made on the basis of it.

I think what we can do, and why I think, you know, David Moss' charge and Tobin Project charge was so helpful, is to say, can we get it more correct? So, do we have to -- do we simply have to be satisfied with some of the more kind of polemical, or less thorough historical presentations that you'll get even in a very important Supreme Court decision, by very smart jurists on opposite side of issues. Or can we actually go out and create a kind of more well-informed history to help us going forward?

MS. BLAIR: So, my piece of this had to do with looking closely at the -- looking at the history of what the Supreme Court had said, and this incredibly important. I think that it's a false argument to say, well, we should just pass -- I mean, if you are opposed to the outcome of Citizens United decision, then the idea is that we should just change the Constitution to say

that corporations are not people. That's not going to fix anything, because that was never the argument that the Supreme Court used.

The Supreme Court used -- looked at what was -- ultimately what is the -- by the 20th century they were on a case-by-case basis almost, looking at what's the public policy question here. And based on that they made the decisions that they made, and they would couch it in language that had to do, by appealing to the Fourteenth Amendment they appeared to be deciding the case on the basis that the corporation was a person, but wasn't really why they were deciding the case. And I don't think any of the decisions would come out differently if we had that additional thing in the Constitution.

MR. MEHROTRA: I would like say, very briefly, to pick up on these points. And I think Bill is absolutely right. I mean, if we are compelled to think about history, and as history is a political tool, right, with the way it's used, and the way we think about the past. I will just say in the corporate tax context, that certainly, I mean, it reminds me of Mark Twain's line about: history not repeating itself, but it rhymes.

And we see these kinds of themes over and over, and we see this certainly with the incidence of the corporate tax, right. We've seen most recently that the current administration's kind of political manipulation of what is still an ambiguity when you talk when you talk about the advanced economists about who actually bears the incidence of the corporate taxes.

It's nothing new. We've seen this from the very beginning of the corporate tax. I might also add, to get to Naomi's earlier point about the broad project of the (inaudible) volume, about the notion of historical contingency. The notion that the path we have taken is not the only path we could have taken. The notion of possibilities, and one of the things that happened at the moment of origin in 1909, for the corporate tax was what was known as a minor provision at the time, but a publicity provision.

This was a part of the compromise to assuage the populace who were very

concerned about growing powers of corporations, and this is on the heels of a major scandal among insurance companies, where in the 1909 law there is a provision that allows for the public access of corporate tax returns. It quickly leads to a corporate backlash, and it is repealed in just a couple of years, but that's not a crazy idea.

As some of you may recall when The New York Times recently did and exposé revealing General Electric's effective tax rate of a single digit. There was then, editorials in Bloomberg and in The New York Times saying, but why aren't public companies -- why aren't the tax returns of public companies made public? So this notion that we could try to use transparency kind of comes back.

And, you know, talking about Bloomberg News, this is one of the bastions of American capitalism, this isn't some Berkeley Sociologist saying, we ought this. Right? I mean, this is really something that is, you know, reaching back to an historical concept.

MS. LAMOREAUX: So, just on that point. This is where the ubiquity of corporations really matters, because one can talk about GE, right? But what about those 4.5 million corporations, many of them are small, single properties, probably you are -- some of those corporations are in this room, right? And so anything that we pass, that's targeted at the corporation applies to 4.5 million, or either that, or we have to draw lines about corporations, that some corporation are different than other corporations.

And that's another conversation we could have in this room. But let me throw the floor open. And would you just identify yourself, and I think we'll have a lot of people who want to speak, so if you could keep your questions succinct, that would be great. Yes, first, these two people -- okay.

QUESTIONER: Bobby Tesron, a citizen. Am I correct to understand your collective conclusion, that there really is no correct with regard to corporations? And in fact, correctness is a response to political conditions over time, and those politics are driven both by the interests of corporations and those who represent them, and the public at large represented

by people who have the ability to form an opinion, express it and move politics in that direction.

MS. LAMOREAUX: John?

MR. WALLIS: I think there's something to that. I don't think it always works that way, and there are trajectories and there are different eras where the relationship of corporate power and democratic power are different. So, I would want to put it uniform, well, it's the same thing happening over and over again. I do think we can detect, and that's why I mentioned neoliberalism, and like we can detect eras where there is more of a kind of discourse about democracy and the public, and public responsibilities, and other eras where there are less.

But you are certainly right, in the late 19th, early 20th century, populist and progressive periods, there is a give and take of unimaginable proportions, right. There is Standard Oil Company is trying to figure out how to get around Ohio Law, Ohio Attorneys General are trying to work at making sure that Standard Oil Company is obeying Ohio Law, New Jersey gets involved, it's going on as well in Illinois.

Yes. I think part of the book, and part of the aspiration of the book was to suggest, we can't just write about the corporation, simply within the confines of an economic perspective or a corporate law perspective, but we've got to see it in constant conjunction, as you just well put it, with democracy, with interest group, with contest, with contestation.

And just a final point, I mean, that goes to Ajay's point as well, right, that's where the contingency and the possibility is always there for changing this particular regime, is democratic politics.

MS. LAMOREAUX: But again just to emphasize, part of the message of the book is that corporation as a heterogeneous thing, and so some of the key decisions that change the right structure of corporations involve not business corporations, but other kinds of entity. So, a key one is decisions involved the NAACP in the 1950s and '60s, where Southern States are trying to use corporate law essentially to make it more difficult for the NAACP to operate in their bounds.

Citizens United is not a business corporation, right, it's an advocacy organization. So, we can't forget that as well. Identify yourself, please.

MS. COOLIDGE: Sure. Jackie Coolidge from the League of Women Voters. I'm really interested in the question of transparency, so maybe Professor Mehrotra, or anyone might want to respond to this. But we have, over the years managed, relatively recently to squeeze out like (inaudible) shares, and other non-anonymous instruments. But we still have a real problem, I think with some of the states, Delaware most famously; Nevada, and a few others, where it is extremely difficult for anybody to identify the beneficial owners or the influential managers of corporations.

And this, you know, in my mind at least, is certainly part of the big problem that we have right now with dark money in politics. So we could pass the Disclose Act, for example, but then I'm still wondering how easy will it be to really chase this down as long as you have, you know, the laws on the books, as they are at the moment, in Delaware, Nevada, and a few other places.

MS. BLAIR: And that's an extremely important question, and in the Citizens United decision the Court left open the possibility that it would be appropriate to regulate through disclosure requirements. And it's stunning to me that we have a history of the Court saying there that corporations should get rights because they represent persons, but nowhere do you have to actually name those persons.

Now, of course in the NAACP the whole point was to protect the privacy of the person, so that's where that came from. These are very complicated issues. Naomi mentioned that we need -- that was Citizens United didn't leave -- didn't address really, but certainly didn't invite, is that we do need to draw lines, we do need to say, some rules apply to some types of corporations under some conditions, and other rules apply, and that's going to be extremely difficult and extremely fraught with political problems.

But clearly, we wanted to protect the identity, the whole point of the NAACP

case, was that the members wanted to protect their identities. However, with the money flowing in -- I mean, we've got the same problem with the Internet, and the possibility of foreign influence, in that we don't have a mechanism that traces it back to who the people are that -- if we are going to say the rights belong to the people, who are the people we are talking about? I don't have an easy solution for that, however, without creating a problem somewhere else.

MS. AMRON: My name is Cory Amron, and I'm representing one of those tiny nonprofits that was most recently formed called Women Lawyers on Guard. My question has to do with, and I'm very interested in hearing the history of corporations that have responsibilities and also privileges, so for instance one of the things we learned in law school was that one of the main reasons for corporation is economically, and to the certain extent criminally, there is a shield over corporations so that, you know, you can't pierce the corporate veil as they say.

So, that's obviously one of the privileges of the corporation, on the other side of the privilege is responsibility again to the public, and so my question has to do with the Hobby Lobby decision. And how a corporation that is not a religious institution can impose some idea of religion on its employees? And I'm wondering, you don't have to tell me how that came about, but just what maybe we can do about that? (Laughter)

MS. LAMOREAUX: I will just say, we actually wrote an amicus brief in that case, which we didn't take a position on the merits of the case, but actually tried to point out the problems of the Hobby Lobby case, and actually ultimately of the decision, because what the Court essentially refused to do is draw lines, and it just said that this is a closed corporation, and therefore the beliefs of the people who are running it should be taken into account.

But the way that decision was articulated extended it by essentially -- I don't what the word is -- by default to our corporation, so there was no exercise -- Now, we actually have different about this, Margaret and I, but we agree that there has to be -- this has to be thought through very carefully, because just to label yourself a corporation, and to get the privileges that go along with that, but then in other respects claim that you are an individual, and therefore gets

exemption from the responsibilities that usually go with those privileges is clearly a very fraught idea, but -- Yes?

MS. BLAIR: That was one of the cases that Professor Pullman and I looked at where the court said that, you know, in the discussion, in the explanation for why they came out the way they did, that it should not be the case that an individual can act through themselves and have certain rights and soon as they form a corporation they don't have those rights.

That's why they had to give the right to the corporation, but it seems to me that the opposite is true. It should not be that just because a corporation is what it is, that the people behind them don't have to be identified in any kind of way. I think, you know, the court does have to begin drawing lines, that it is -- that we can't apply the same rules, I don't think, to non-profit advocacy organizations that we apply to subsidiaries of subsidiaries that have operations in six different countries, and shareholders that are rapidly trading in and out.

That doesn't make any sense to me, that across the board, all the rules would be the same. We do need to start making distinctions. And, you know, we have some distinctions in the law already, so the law distinguishes between for profit corporations and not-for-profit corporations, and they've got an elaborate set of rules, and it's complicated, but it can be done, and I think it needs to be done, and the court -- in Hobby Lobby, the Court kept using the phrase, "closed corporation" because it was trying to suggest that some lines would be appropriate.

But then it appealed to a concept that doesn't have a legal definition, okay, and didn't end up saying well, where would you draw the line. How many shareholders, how many - do the shareholders also have to be the managers, and if not, how many other shareholders could you have before it's no longer a closed corporation and the rule doesn't apply? And I don't think that's going to be easy, but I think to not draw the lines is really hugely problematic.

MS. LAMOREAUX: So, we have a number of people in the back who were -- and we have more people, but I just wanted to as Ajay to talk about this line between profit and

non-profit because at the same time, in some aspects of last -- historically corporations have all been treated the same, in the tax code, things have been pried apart and the tax officials are making certain determinations that we, as a society, need to understand.

MR. MEHROTRA: Right; absolutely so. In the early part of the 20th century, as non-profit corporations are beginning to expand, and more of them, policing the line between what counts for profit and non-profit is very important. And the tax authorities of course, not only for revenue sake, but to actually police unfair competition, and so there is, and as you know something about tax law, know that there's something known as the unrelated business income tax, where non-profits that are engaging in profitable activities are actually taxed on as a very famous NYU case about a spaghetti factory that NYU created.

So there is this line drawn and it's not just for the revenue sake, so this is again, about the kind of ambivalence, right?

MS. BLAIR: Right.

MR. MEHROTRA: It's about, it's not just that we want to make sure we are getting our revenue from the companies that are truly for-profit organizations, it's also trying to regulate corporate capitalism, and we don't want an unfair advantage to those corporations that claim to be non-profit or actually competing with other profits. So that the tax kind of overlay the heterogeneity, as Naomi has put it, is really important element to the historical development of all this.

MS. LAMOREAUX: There are several people right in the back, so let's get them, and then there's -- Okay.

MR. RIEMER: Yes. My name is Jeremiah Riemer, and I recently translated "A Short History of Capitalism" by Jürgen Kocka for Princeton University Press, everything you ever wanted to know about it in 170 pages.

And it includes a little bit of a discussion on corporation governance. I'd like to ask a question that moves maybe a little bit away from the focus on legal history that you have,

more to the political sociology so to speak, of corporate reform. There was this term that I think John Kenneth Galbraith has claimed in the '50s or '60s called "Countervailing Power" it's been used a lot more widely than the narrow focus that he had on the technocracy in the new industrial state, to include almost any kind of social or political force that provides some sort of check on corporate power.

Or was interested in corporate reform, it could be old money back in the progressive era that presented the rise of new money corporations. It could be professionals both natural science and the new social sciences, and in the law. It could be trade unions; it could be even within the corporation, shareholders who believed in dissent and exercising voice rather than loyalty, and simply agreeing to every CEO salary and golden parachute, and so on and so forth.

And these countervailing forces from the Progressive Era to Nader's Raiders, once had a certain leverage in the political system, and clearly they don't anymore. And I'm just sort of wondering, have you thought about that wide array of countervailing forces, why they once had this purchase on reform and how they might get their mojo back?

MS. LAMOREAUX: Okay, John is going to take the first piece of this.

MR. WALLIS: So, one of the reasons you want to look at history is things are really complicated, and how things are in this moment, is not how they always were, and will not always be.

So, the question really, here, in the countervailing forces notion, and Galbraith had it in a sort of business government relationship in this technology and the technocrats. In reading Madison, Federalist Paper No. 10, about balances, we can read it about -- we can read it in Machiavelli, we can read it in Aristotle, we can read it in Polybius. Okay?

So, the notion of countervailing forces is how do people compete and coordinate. And that turns out to be mostly a matter of organization, because as individuals we don't have a lot of power, and when we identify somebody, as an individual who has lots of powers, it's

because they are at the head of, or placed in an organization.

The actual configuration of organizations at any point in time, is always in flux, right? So, the important thing is not to say, we want to get these organizations power now, because these other organizations have too much power now. What we want to do is create a society in which the ability to form organizations is open.

And so maybe trade unions were a great thing, and they are not working very well now. Okay? Part of it has to do with the government, but most of it has to do with people don't want the trade unions. Are there tools for workers to organize? Yes, there are, but they are not utilizing them the way they were utilizing before.

The question is the availability of the tools. As a society we want a government to provide tools to everybody. We may not like the outcomes but we had better be careful about messing with the tools. Okay? I mean that's the point about Hobby Lobby, and there's a very strong tendency in human nature to fix the problem we just had, right, and assume that the configuration we are in now is going to continue.

Instead of saying, you know, when we look at cross-countries in societies over the last 200 years, the society has to provide tools to organize, are doing way better than the societies that don't. And I think that dynamic of organizations is crucial. And corporations are part of that, corporations are us.

I mean, there's not the corporate sector which exists aside from citizens, so how do we facilitate that. I think that's a really important problem for us to grasp, even if we don't like what the particular configuration of power is at a particular point in time, we need to understand that the societies with openness do way better than societies that can't enable that.

MS. LAMOREAUX: There was someone else back, right there who has a question? There wasn't? Oh, okay. And then we have two up here.

MS. COLLINS: Hello everyone. Thank you very much for your presentation. My name is Pamela Collins, and I'm a AAAS Science & Technology Policy Fellow. My question for

you is: so far you've spoken mostly about corporations that take their charters from states or from the American Federal Government. How do multinational corporations fit into this tapestry that you've woven today? Or is that question germane to this discussion?

MS. BLAIR: I think I'm the only one up here who teaches corporate law, so I'll take this on. In order to -- a foreign corporation that's headquartered overseas, in order to operate in the United States frequently will form a subsidiary, and the subsidiary in fact will be incorporated in the United States.

They can engage in trade, and they are going to be -- or other kinds of activities, and then they are going to be subject to, if they go in any particular place they go they may be subject to local rules about they have to register, they have to get a licenses in order to carry certain kinds of activities, but those are regulating the activity in that locality, in that state or in that community rather than regulating the corporation.

The corporation to have -- but what mostly happens is, with these big international conglomerates is that they actually have formed multiple separate corporations all under the umbrella of the parent company, and I mean, that's one of the reasons why I think it's so problematic if the Supreme Court says all corporations should have, say, freedom of speech, because many corporations exist simply as a holding device.

They don't have any employees, you know, they want to -- a corporation wants to put its intellectual property in the state of low taxation in --

SPEAKER: In Ireland, too, yes.

MS. BLAIR: Yeah Ireland, and so they create a subsidiary. The (inaudible) steps of particular subsidiary is simply a vehicle for holding assets in a different place, and since their intellectual or intangible assets, they don't have to be in a physical location, they can be anywhere. They can be in Ireland, or they can be in the Cayman Islands, and there is no -- and that operates as a subsidiary of the parent corporation.

And, you know, should that corporation, that doesn't have any employees even,

that's sitting -- that's Ireland, that's a tax maneuver, should that have freedom of speech too? Should that have freedom of religion? You know, when we make the -- when we refuse to draw the lines we get into really absurd kinds of results.

MS. LAMOREAUX: Right here, and then behind; yes, these two people.

MR. ADDISON: Thank you very much. My name is Doug Addison, and I'm representing a blog called "Free, Fair and Accountable Democracy." And what I've noticed over the last many years is a recent and ongoing trend shared by corporations and consumers alike to sort of declare their position on the political spectrum, and people make a point sometimes of shopping only at this place instead of that place.

But when I was younger and taking my economic classes, there was this strong presumption that corporations were to serve everyone equally and government shouldn't discriminate, and they shouldn't discriminate in terms of prices or services. So, I'm curious to know: how do you think this trend fits in with the framework in your book and your analysis? Thank you.

MS. LAMOREAUX: Right, okay, you go. Everyone wants to answer your question.

MR. WALLIS: So, there's the economic question about what we might call -- what we are calling personality, do you treat everybody the same, okay. So, there's a corporation required to serve everybody equally, in some sense. Are consumers required to go to stores at random or not? And that's the flip side.

And the answer is, on some things, yes, and on some things, no. You get to go the shop where you buy the products you like, and the prices you like, and we don't want to constrain those choices. And the corporations get to sell the products they want at the prices they want. And we don't want to constrain those choices either. So that means some corporations will provide really ugly clothes, and that I won't buy, right? But that's okay. You know, if they go out of business they go out of business.

SPEAKER: Demand supply?

MR. WALLIS: Yes, if somebody else likes them, that's okay. Okay? So, the Hobby Lobby case is a question about taxes, and the issue of taxes apply to everybody who is corporate and it turned out the answer was: oh, maybe not. And that becomes really problematic. So, again, I think these questions come about, not from the behavior of the corporation, or not the behavior of the consumers because we want them to be free to be able to do that.

But the framework in which consumers can choose, and the framework from which corporations can operate; and one of the things of the book is that in American history we got much better at essentially moving to rules, which are constantly being debated, right, about what corporations can and can't do. But the fundamental principle is, no matter what we do, they should, and this is the flip side of Margaret's point about lines, is that the lines should apply equally to everybody. Okay? And that's a really difficult thing to negotiate, so it's not a problem you can solve forever.

MS. LAMOREAUX: Do you want to; anyone who wants to add?

MS. BLAIR: Yes. I think that one of the things that happened in the late 19th century, and it certainly has accelerated in today's world, is that corporations began to use brands, and that was part of what separated the corporation from the individuals, so that the description that the Court had relied on was that the corporation was an association of individuals.

Increasingly, corporations were separating themselves from the individuals, they were identifying themselves as something separate through their use of brands, and that has become a high art today, but that also creates a mechanism in which people can begin to hold corporations accountable, so because the brand, if the brand becomes identified with, but in addition, you not only have to have branded corporations, and free consumers, you also have to have the Internet. Okay?

So that if a corporation behaves in a way that some people don't like, okay, they can go on the Internet and they can tell everybody about it, and then they've identified the corporation by the brand, and people know to stay away from that, if they believe that.

And that maybe one of the most important mechanisms we have in our current environment to be able to try to rein in corporations is the response by the public that can isolate them. But then this place is even more emphasis on being able to know actually who is it that posted that message on the Internet?

MR. NOVAK: Can I have one more go?

MS. LAMOREAUX: Yes, absolutely.

MR. NOVAK: So, I didn't talk very much about the actual chapter that I contributed to this volume, because it contributed a lot of pages to this volume. So, it could be - it's a little bit too long. But in the progressive period in the late 19th century, there's an obsession with the issue that you are focused on, and that is unfair methods of competition, a price discrimination, and kind of basic, including wars over brands, unfair wars over brands, they really saw corporations as engaged in certain kinds of almost warfare, economic warfare that violated very old common law principles, with respect to fair competition.

So, beyond then I trust, which is the issue we put out there so far in this discussion, to the great sort of progressive area, innovations are the notions of public utility, that in certain kinds of services, provision of services, i.e. the provision of water and basic necessities.

I'm from Michigan, Flint, think about the Flint water -- that's a public utility problem, and there would have been an old way of handling that question. And then also the law of unfair competition which falls into what was meant to be a very powerful Federal Trade Commission. Now, it didn't become as powerful as the ambitions of its founders were. But I think those concerns were very much on the minds of early 20th century reformers right up until the early New Deal period.

They are not necessarily on the radar screen of corporate law and corporate governance today, or public policy, but they are beginning to come back. So, there's recently a conference at Vanderbilt Law School, and returning to the idea of public utility perhaps, to go after some of these large scale, the Amazon, Google, Microsoft; that maybe we should start thinking again in terms of a public utility model. And no doubt, I think we'll be bringing back new methods of kind of unfair competition within antitrust rubric as well.

MR. GRUENBERG: I'm Mark Gruenberg, from the Communications Workers, among other places. I don't know where to start, but let me start by expanding on the old Jeffersonian point, which is: when you have a corporation, it's able to either evade its responsibilities to society or warp the responsibilities to society by the sole fact that it has the money. How do you deal with the countervailing -- how do you construct a countervailing power to the fact that money is the thumb on the scale, especially here in this town? (Laughter)

MR. MEHROTRA: So, taxation is one way. I mean, certainly that was one of the motivations of at least the populist rationales for corporate tax was that if you actually notes that the old Willie Sutton line, "where is the money," right. And there were the corporations, right, and so there was in fact -- and in fact during other historical moments, during World War I, in fact, to mitigate against war profiteering, which is what a lot of corporations in the munitions industry are doing at that time.

There is something called the excess profits tax. I mean think about that, and just think about that word. The notion of excess profits, I mean, it's on the books, it raises a lot of money, and there are some unintended consequences because of the heterogeneity of the different kinds of business organizations, and it comes back again in World War II.

So certainly they are getting at the money is one way of regulation, in trying to control the size, but of course corporations as, I think the first question alluded to and as Bill's response, is a dynamic process here. Rules come up, excess profits, whether it's World War I or World War II, or today's examples of putting intellectual property in the Cayman Islands, right,

that corporations often find a way.

Evade is a very dangerous word in the tax world, avoid is the word that the tax lawyers like, right, they actually use the rules on the books which permit putting intellectual property in the Cayman Islands or Ireland to lower your effective tax rates, so there's dynamic between the rule makers and the corporations that I think will always continue.

MS. LAMOREAUX: This person right here.

QUESTIONER: Hi. Lloyd Tutus, retired, but representing the "Society of Frustrated Citizens." (Laughter)

MS. LAMOREAUX: But you can have a corporation.

QUESTIONER: To this issue of corporate responsibility, and greater responsibilities to society, and the American tradition of kind of concerned about monopolies. There's a lot of consolidation going on now, in the arena, and it's kind of easy to kind of look at it, on national corporations on monopoly and restricting choices, but the one I'm interested in that is, to me, becoming very problematic is health care, hospitals in corporate.

And it becomes power based in regions and, you know, freedom for choice and options are being reduced on a regular basis. So, how does that fit into the idea of drawing the line, monopolies? Or, is there something in the laws about, you reach a certain point you go to a utility which is different than a corporation?

MR. NOVAK: I would just say, health care is one of the areas that people are -- my colleague, Nicholas Bagley, who some of you probably -- he's been blogging tirelessly, every day for the last couple of years on health care policy, but it's proposed exactly just as a thought experiment, perhaps returning to some of these kind of early 20th century ideas about thinking about health care as a public utility, and putting in place certain kinds of controls which were pretty much matter-of-fact in the early 20th century.

Once you got something dubbed a public utility, huge amounts of corporate responsibility could be leveraged, and quite direct kinds of controls could be placed in terms of

prices, non-discrimination, necessity, so it is precisely the kind of thing people are thinking about again.

Just to add to Ajay's point. You know, we don't want to give you the sense, right, that these problems are always the same and there's nothing we can do, but there is some of that to this problem, and Charles Francis Adams who is both a very important political figure, and a very important economic figure, as the President of a railroad, and one of the sort of innovators of the American administrators state.

From the very beginning, writing Chapters of Erie, when he's looking at the corruption of late 19th century railroad industries, and the degree to which they corrupted the legislature, right, that basically, the reason we knew that administrative agency, is because that legislature isn't going to do anything on behalf of the democracy, they are fully in the pockets of the lobby. In fact, they are standing in the lobby, that's where we get the name lobby, and people are running away with bags of money.

And so Charles Francis Adams uses railroad commissions, and an administrative response as something that might work at this particular moment in time, to solve the problem. Right at the beginning he says, "Will this mean the end of the story? We found the silver bullet, the final --" he says, "Absolutely not." That in a democracy you have to constantly think of new ways of establishing the kind of new checks and balances for the next round of economic change.

MS. LAMOREAUX: And just to add one point to that, going back to something Ajay said a while ago, where he was emphasizing contingency, so, we tried some of these things in the early 20th century, Bill is saying people are interested in returning to them, just because that was the road not taken does not mean those ideas failed in the early 20th century.

In any society there are political constellations that lead you to solve a problem in one particular way as opposed to another way. And as Ajay's chapter is all about a good part of the regulatory heavy lifting was going to be done by the tax system.

But that doesn't mean that that was the right way to do it, or that the other way failed, it's a product of contingency, it's a product of history. And so these ideas are still all in play, right, and in different configurations, we can in fact envision trying some ideas from the early 20th century again.

Okay. We have time for one more question. So, these three people back there, there's a microphone, I'll let you pick -- (Laughter)

QUESTIONER: Hi. I'm Dina Lassow, and I'm a retired lawyer. So, you suggested that the constitutional amendment being floated for Citizens United won't do anything, so what will?

MS. BLAIR: Well, my own view of this is that the Court was clearly open to some line-drawing in the way it phrased its response in Hobby Lobby. It did not appear to be open to line drawing in its decision in Citizens United. It basically said this applies to all corporations, and it's important that the corporation in question was a non-profit advocacy group, the court could have decided on very narrow grounds, but it didn't.

It specifically decided very broadly, and I'm guessing that, or I'm hoping that one of the lessons of the -- that we are still learning about the Internet, and about foreign meddling in elections, is that an awful lot of publication and information then and speech, is happening in a way that we don't know who is doing it.

And the most important thing I think is that we've got to find out, we've got to find traceable systems that allow people to find out who is behind, and this applies to foreign corporations, or foreign individuals being behind certain activity on the Internet.

It would apply also to campaign ads on television where, you know, it says sponsored by, and it gives the name of some completely innocuous name that you don't have a clue what that really means. We need to have a mechanism, particularly with the Internet in place, it would not be difficult to find a place where you can go on the Internet and you can find out who that is.

And then you can make up your own mind about it. We have taken the position that we want to let people make up -- give them all the information and let them make up their own mind, but they do need to have information, and the specific information they have to have is: who is it that's saying it.

MS. LAMOREAUX: So, I'll just round out that answer a little bit. We don't have time for any more questions, but I want to emphasize that this is not a right-left thing. In Citizens United Justice Stevens did propose a line-drawing exercise that had been used by the Court, for a previous set of advocacy organizations that were right to life organizations.

But the main precedence for Citizens United is a case in Massachusetts called First National Bank v. Bellotti, and in that case, the line-drawing -- the emphasis on line-drawing came from Justice Rehnquist on what I think you would say is on the right compared to Justice Stevens.

And he went back over history and he said, look, we create business corporations that have special privileges, and we just can't forget that, and we have regulated them for good reason because they are in fact accumulations of financial resources that can distort the political process.

And he said, we just have to draw those lines. And he went back to history to draw them, and that's basically -- that's the -- and I'll end on -- that's really what we are asking citizens to do today.

And so thank you so much for coming, and discussing this with us, and write us, and we are happy to continue the discussion. Thank you. (Applause)

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ANDERSON COURT REPORTING
706 Duke Street, Suite 100
Alexandria, VA 22314
Phone (703) 519-7180 Fax (703) 519-7190

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