

**OF “SINGLES” WITHOUT BASEBALL:  
CORPORATIONS AS FROZEN RELATIONAL MOMENTS**

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INTRODUCTION

Henry Hart opened his 1963 Holmes lectures by asking what a “single” would be like if there were no such thing as baseball.<sup>1</sup> The

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1. For the uninitiated, a “single” in baseball is a non-mishandled batted ball that allows the batter to reach first base safely. Professor Hart declined to publish the 1963 Holmes lectures, continuing a pattern of perfectionism which had led him to decline to publish the legendary 1958 “tentative” mimeographed materials for the Hart & Sacks casebook *The Legal Process*. See William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2045-46 &

question has haunted me ever since. In time, it dawned on me that Professor Hart was trying to make us groundlings think about whether an abstract legal concept can have a freestanding existence independent of the constellation of legal norms within which it is embedded. Many years later in *Bush v. Gore*,<sup>2</sup> lawyers for former president George W. Bush put Professor Hart's question to the test. They argued that the term "legislature" as used in Article II, Section 1, Clause 2 of the United States Constitution (dealing with the selection of presidential electors) should be treated as a freestanding, autonomous institution with no duty to follow a decision of the Florida Supreme Court construing Florida's election law<sup>3</sup>—in short, like a single without baseball. Ultimately, six members of the United States Supreme Court agreed that the Florida legislature could not be severed from its institutional moorings, ruling that its role in selecting presidential electors was subject to the normal limitations on legislative power established by the Florida Constitution, including judicial review<sup>4</sup>—although that did not stop a different five-judge majority from using a different theory to block the Florida Supreme Court's effort to assure an accurate tally of the presidential ballots.<sup>5</sup>

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n.92 (1994). In 1984, Norman Dorsen developed supplementary materials to the 1958 edition. See *id.* at 2046 & n.93. In 1994, William Eskridge and Philip Frickey prepared an updated version of the Hart & Sacks materials, as supplemented by Dorsen, for publication. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

2. 531 U.S. 98 (2000).

3. U.S. CONST. art. II, § 1, cl. 2 provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors [to choose a president and vice president]." Former President Bush's lawyers argued that since a Florida Supreme Court decision construing Florida's election law as impliedly mandating a partial recount had erroneously ignored firm time limits in the statute requiring certification of a winner by a certain date, the Florida state legislature, acting as an autonomous body under Article II, Section 1, Clause 2, was free to decline to recount the Florida presidential ballots, despite the ruling of the Florida Supreme Court. See Brief for Petitioner at 20-21, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949) (citing *Gore v. Harris*, 772 So. 2d 1243, 1248 (Fla. 2000)).

4. *Bush*, 531 U.S. at 110.

5. The five-member majority in *Bush v. Gore*, Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas, ruled that, since the imminent expiration of the congressional safe harbor period for recognizing state certification of presidential electors rendered it impossible to conduct a constitutionally acceptable recount without placing the choice of Florida electors at risk of second-guessing by Congress, Florida would probably wish to choose the lesser of two evils by terminating the recount and certifying the original winner, George W. Bush, as the ultimate victor. See *id.* at 110-11. The four dissenting Justices, Justices Stevens, Ginsberg, Breyer, and Souter, argued that the choice of whether to press forward with a recount should be left to Florida. *Id.* at 123-25 (Stevens, J., dissenting); *id.* at 129 (Souter, J., dissenting).

As the fiftieth anniversary of Professor Hart's question approaches, it occurs to me that he was also telling us that legal abstractions are often useful snapshots of legally frozen relational moments. For example, a "single" is a snapshot of relational behavior by a batter, a pitcher, fielders, and umpires that results in a batter lawfully standing on first base. Since the bare bones term "single" can be enriched by adjectives—a bunt single, a line drive single, a ground ball single, a bloop single, a Texas League single, an infield single, a clutch single, a scratch single, an RBI single, or a game winning single—the term serves as a rich shorthand summary of complex underlying human behavior. Substitute "corporation" for "single" and you have the subject of this Essay.

Italo Calvino once described a lost city where nothing endured except gossamer threads evidencing the relationships of love, lust, and power that once existed between and among the city's long-deceased human inhabitants.<sup>6</sup> I ask you to imagine a corporation as Calvino's lost city, consisting of the dense web of gossamer threads reflecting the relationships of right, duty, and power that bind the human participants together in a corporate enterprise. I will argue that the judiciary's approach to corporate legal personality should reflect and reinforce those gossamer relational threads; not ignore, distort, or displace them by creating a corporate fiction that stands apart from its human players—like a single without baseball. Just as it would be absurd to vest the descriptive term "single" with a freestanding, independent legal life of its own, it is, I believe, equally absurd to vest a legal fiction called a "corporation" with a freestanding, independent legal existence untethered to the rights, duties, and relationships of the human beings who play the corporate game.<sup>7</sup>

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6. ITALO CALVINO, *INVISIBLE CITIES* (William Weaver trans., Harcourt, Inc. 1974) (1972) (describing the lost city of Ersilia).

7. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809-14 (1935) (challenging the idea that legal concepts can be considered independent of their practical surroundings). The idea of a corporation as a frozen relational moment reflecting the myriad activities of at least some of its human components has support at both ends of the political spectrum. Compare Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989) (applying Ronald Coase's analysis to argue that the corporation is an off-the-rack summary of a cluster of contracts between and among the corporation's human participants), with Morton J. Horowitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1986) (urging acceptance of John Norton Pomeroy's brief in *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886), which argued that corporations should be analyzed for constitutional purposes as associations of individuals joined together in corporate form to achieve a common purpose). The cryptic holding of *Cnty. of Santa Clara* is generally viewed as the first case to recognize a corporation as a "person" within the meaning of the Fourteenth Amendment. Horowitz, *supra*, at 217.

I concede, of course, that for more than 150 years, most American judges have treated corporations as if they were independent “persons” whose rights and duties are logically derivable in splendid isolation from the rights and duties of the corporation’s numerous human participants.<sup>8</sup> The judicial tendency to anthropomorphize the corporation as a freestanding, sentient being appears to have been driven by at least three disparate groups of lawyers: (1) Continental jurists seeking to submerge individuals within communitarian units (like corporations), whose collective needs would outweigh those of the individual;<sup>9</sup> (2) progressive reformers seeking to render business corporations fully liable—civilly and criminally—for the unlawful acts of agents and employees;<sup>10</sup> and

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8. For example, consider the following remarks made by Chief Justice Waite *before arguments* in *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 1886 U.S. LEXIS 1942 (1886) (emphasis added):

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any *person* within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.

As Horwitz, *supra* note 7, at 174 (referring to Chief Justice Waite’s pre-argument remarks as if it were part of the opinion) asserts, “The Santa Clara case is . . . asserted to be a dramatic example of judicial personification of the corporation, which, it is argued, radically enhanced the position of the business corporation in American law.”

9. *See, e.g.*, FRIEDRICH KARL VON SAVIGNY, JURIAL RELATIONS 180-83 (W. H. Rattigan, trans., Wildy & Sons 1884); Michoud, *La Notion de Personnalité Morale*, 11 REV. DU DROIT PUB. 1, 8 (1899); ERNST FREUND, THE LEGAL NATURE OF CORPORATIONS (1897); OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (F. W. Maitland, trans., 1900); F. W. Maitland, *Moral Personality and Legal Personality*, in THE COLLECTED PAPERS OF FREDERICK WILLIAM MAITLAND 304-20 (H.A.L. Fisher ed., 1911). The experiment in romanticizing metaphysical collectives like corporations, nation states, religions, economic classes, and race at the expense of the individual went tragically wrong, providing the theoretical underpinnings of law in Nazi Germany, Stalinist Russia, and Maoist China.

10. *See* Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916), for an effort to invoke the freestanding nature of a corporation or trade union as a basis for imposing liability for the misbehavior of its members. Laski’s article is typical of efforts by progressive reformers to personalize the corporation in order to regulate it. *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493 (1909) (once derivative corporate civil liability is firmly established in a legal system, it is a small jump to vicarious criminal liability); *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 116-17 (1893) (corporate liability for punitive damages); *Salt Lake City v. Hollister*, 118 U.S. 256, 260-61 (1886) (describing the disastrous effects on the rule of law that would flow from immunizing corporate assets from damage liability for the unlawful employment-related acts of employees); *Phila., Wilmington & Balt. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 210 (1858) (holding that “for acts done by the agents of a corporation . . . in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances”); *Riddle v. Proprietors of the Locks & Canals on Merrimack*, 7 Mass. (5 Tyng) 169, 178, 186 (1810) (a corporation cannot be imprisoned but may be liable for damages); *Chestnut Hill & Spring House Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 13 (Pa. 1818) (corporations may be held liable for damages). The

(3) corporate lawyers seeking to fend off government regulation by asserting corporate legal rights.<sup>11</sup> I do not challenge the idea that recognizing a fictive corporate personality may have significant, pragmatic value as a technique to recognize and enforce the rights, duties, and expectations of the corporation's human participants. Recognizing a corporation's fictive legal personality empowers a centralized rights enforcer (usually corporate management), capable of asserting the rights of members of the decentralized corporate community, many of whom might find it cumbersome and expensive to assert their own rights. It also establishes a stationary regulatory target, permitting the effective enforcement of the duties of the corporation's human participants. Indeed, recognizing fictive corporate personality resembles other techniques like derivative shareholder actions,<sup>12</sup> organizational standing,<sup>13</sup> and the Rule 23

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early vicarious liability cases are summarized in Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923), and John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315 (1894). See generally PAULA GILIKER, VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE (James Crawford et al. eds., 2010).

11. Corporate lawyers argued successfully that corporations were freestanding "citizens" under Article III and "persons" within the meaning of the Fourteenth Amendment, triggering an avalanche of decisions protecting corporate legal rights that treated the corporation as a freestanding, sentient being, culminating in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). See, e.g., *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575-76 (1977) (protecting corporate participants against costs of multiple criminal prosecutions in violation of Double Jeopardy Clause); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491 (1931) (protecting participants in foreign corporations against uncompensated takings of their property); *Hale v. Henkel*, 201 U.S. 43, 85-89 (1906) (protecting Fourth Amendment privacy interests of participants in corporate enterprise); *Smyth v. Ames*, 169 U.S. 466, 522-50 (1898) (protecting corporate participants against deprivations of their property without due process of law); *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886); *The R.R. Comm'n Cases*, 116 U.S. 307, 345 (1886) (protecting corporate participants against unlawful takings of their property); *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 327-28 (1853) (basing diversity jurisdiction on a conclusive presumption that all shareholders are citizens of the state of incorporation); *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558-59 (1844) (treating corporation as a "citizen" for Article III purposes), *rev'g Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 65 (1809) (which treated a corporation as an association having the citizenship of each of the shareholders, rendering it difficult for a corporation to sue or be sued in federal court under diversity jurisdiction). Stay tuned for the corporate right to bear arms. See Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 946-56 (2011).

12. The history of the shareholders' derivative action is recounted in Bert S. Prunty, Jr., *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980 (1957).

13. For discussions of organizational standing, see *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers v. Ill. State Bar Ass'n.*, 389 U.S. 217 (1967); *Bhd. of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958); and *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). For a

class action<sup>14</sup> that generate an efficient enforcement agent for a decentralized community of rights-holders.

Until recently, judicial enthusiasm for the fiction of a freestanding corporation caused little real mischief, because it has either served to reinforce the legal rights of the human beings who constitute the corporate enterprise,<sup>15</sup> or to permit the effective enforcement of legal duties against the corporate enterprise.<sup>16</sup> Most of the time, American courts have used the fiction of corporate personality as off-the-rack shorthand to replicate legal outcomes that would have flowed from a careful judicial analysis of the myriad legal relations existing between and among a corporation's human participants.<sup>17</sup> As long as judges remember that corporate personality is merely a pragmatic metaphor for a complex set of underlying human activities and relationships, judicial decisions defining and enforcing corporate personality should reflect a proper calibration of those human activities and relationships, both within the corporation and between participants in the corporate enterprise and the outside world. When, however, judges forget that they are dealing with a snapshot of underlying human relationships, a legal fiction like corporate personality can assume a life of its own, overthrowing its useful role as a technique for reinforcing a corporation's underlying human relationships and morphing into a device to distort them.

I fear that we now face that danger. Judges in recent cases, like *Citizens United v. FEC*<sup>18</sup> and *Kiobel v. Royal Dutch Petroleum Co.*,<sup>19</sup> appear to have forgotten that a corporation is a legal fiction summarizing and reinforcing a series of legal and personal relationships between and among human beings.<sup>20</sup> In *Citizens United*, five members of the Supreme Court ruled that large, multi-

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recent, narrow application of the doctrine, see *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). For the related area of *parens patriae* standing, see *Massachusetts v. EPA*, 549 U.S. 497 (2007).

14. The literature on Federal Rule of Civil Procedure 23 is vast. For a useful summary of the role of mass adjudication, see Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

15. See *supra* note 11.

16. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909) (recognizing corporate criminal liability).

17. See generally Easterbrook & Fischel, *supra* note 7.

18. 130 S. Ct. 876 (2010).

19. 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011), *reargument ordered* 132 S.Ct. 1307 (2012).

20. See *Citizens United*, 130 S. Ct. at 896-99 (holding that the First Amendment prevents the government from limiting independent electoral expenditures of corporations and unions); *Kiobel*, 621 F.3d at 148-49 (holding that corporations cannot be sued under the Alien Tort Statute).

shareholder business corporations made up of thousands of human beings with vastly different political views must be viewed as freestanding entities with independent First Amendment rights to spend unlimited amounts of corporate treasury funds to influence the outcome of an election.<sup>21</sup> In *Kiobel*, a divided Second Circuit panel ruled that corporations, viewed as freestanding legal entities, may not be sued under the Alien Tort Statute for damages caused by the actions of their employees in violation of customary international law.<sup>22</sup> Both cases treat corporations as freestanding entities with “rights” of their own, which risks distorting the relationships between and among the corporation’s human constituents.

More than a century ago, John Norton Pomeroy, counsel for the Santa Clara Railroad Company, characterized the nineteenth-century business corporation as an association of human beings linked together by a set of legally defined rights and obligations, with the corporation authorized to act as a centralized enforcement agent for the human beings’ Fourteenth Amendment rights to equal protection of the law.<sup>23</sup> Pomeroy was right. The corporate fiction does—and should—serve as an enforcement agent (and enforcement target) for the rights and duties of the human beings who constitute the corporation.<sup>24</sup> But a corporation should not be permitted to enjoy an independent legal existence untethered (and potentially antithetical) to the rights and duties of its human constituents. It is not too late to listen to the ghost of John Norton Pomeroy (and the ghosts of Justices Black and Douglas)<sup>25</sup> by analyzing corporate law as operating directly on the corporation’s many human participants, instead of as a freestanding corporate entity.

Most of the time, such an approach will not change the legal landscape since recognizing the corporate entity as a centralized enforcement agent will generally reinforce the rights, duties, and reciprocal obligations of the individual corporate participants. However, in a crucial set of cases ranging from the right to engage in unlimited electoral spending from a corporation’s bottomless treasury, to the duty to compensate victims for employees’ violations of customary international law, remembering that a corporation, like

21. See *Citizens United*, 130 S. Ct. at 896-99.

22. *Kiobel*, 621 F.3d at 148-49. *But see* *The Paquete Habana*, 175 U.S. 677, 714 (1900) (recognizing liability under customary international law for compensatory damages).

23. See Horwitz, *supra* note 7, at 177-78.

24. See discussion *infra* Part II.

25. See *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 577 (1949) (Douglas, J., dissenting) (finding no “logic” behind the view that corporations are persons under the Fourteenth Amendment); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting) (“I do not believe the word ‘person’ in the Fourteenth Amendment includes corporations.”).

a “single,” is merely a metaphor for a cluster of frozen relational moments can make the difference between a properly calibrated corporate enterprise and the emergence of a small cadre of corporate insiders with massively disproportionate and dangerous political and economic power.

My argument is not new. It tracks John Dewey’s classic dissection of the history and role of the corporate fiction<sup>26</sup> and Felix Cohen’s celebrated spoof of the degree of “transcendental nonsense” associated with much judicial thinking about corporate personality.<sup>27</sup> Ordinarily, I would not venture to restate their elegant work, but decisions like *Citizens United* and *Kiobel* demonstrate that judicially perpetuated “transcendental nonsense” about the relationship between a fictive corporate personality and the human beings who constitute the corporate universe is alive and well and dangerous in the twenty-first century. I propose to summarize very briefly the transformation of the corporate form from an adjunct of government designed to permit private individuals to carry out delegated governmental tasks in an era before government possessed the financial and bureaucratic capacity to perform the tasks itself;<sup>28</sup> to a remarkably successful engine of economic development designed to permit human beings to assemble and manage capital efficiently in the private marketplace;<sup>29</sup> to a twenty-first-century behemoth that risks empowering a handful of corporate insiders to use corporate treasury funds to dominate the mass of individuals who constitute the corporation and to manipulate the governments that originally gave the corporation life.<sup>30</sup>

I. THE EMERGENCE OF THE MODERN BUSINESS CORPORATION AS A DEVICE TO VEST ITS INDIVIDUAL PARTICIPANTS WITH RIGHTS AND DUTIES USEFUL FOR THE EFFICIENT ACCUMULATION AND MANAGEMENT OF INVESTMENT CAPITAL

Business corporations evolved as a device to empower human beings to enter into four sets of stable legal relationships useful in assembling and managing investment capital.<sup>31</sup> Sophisticated

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26. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

27. Cohen, *supra* note 7, at 811.

28. See discussion *infra* Part I.

29. See discussion *infra* Part II.

30. See discussion *infra* Part III.

31. I claim no particular expertise in the legal history of corporations. My knowledge is drawn from several excellent secondary sources, including Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988); and Note, *Incorporating the Republic: The Corporation in Antebellum Political Culture*, 102 HARV. L. REV. 1883 (1989).



investors wished to: (1) insulate their personal assets from liability for losses suffered by the investment enterprise (limited liability);<sup>32</sup> (2) insulate the investment enterprise from the unrelated personal liabilities of the investors (entity-shielding);<sup>33</sup> (3) provide for the efficient management of investment capital over long periods of time (indefinite life and power to contract);<sup>34</sup> and (4) permit themselves to cash-out or to transfer ownership without disrupting the enterprise (negotiable shares).<sup>35</sup>

The history of the modern business corporation begins thousands of years ago as a device permitting governments lacking bureaucratic assets and a powerful tax base to delegate the performance of complex and expensive public functions to profit-seeking private investors under highly favorable investment ground rules.<sup>36</sup> As long ago as the Roman Republic, Roman law recognized the *societas publicanorum*, enabling entrepreneurs (the *publicani*) to assemble capital needed to build roads and aqueducts using investment vehicles with freely traded shares, extended life, limited liability, and entity-shielding.<sup>37</sup> The corporate concept bifurcated during the early Middle Ages into a nonprofit form designed to permit the decentralized operation of eleemosynary institutions like churches, schools, hospitals, and even municipalities<sup>38</sup> and its profit-driven cousin designed to permit private investors to profit from carrying out delegated public functions. An energized concept of the profit-driven business corporation emerged in Italy during the fourteenth century.<sup>39</sup> In Genoa, for example, government-chartered, joint stock companies were authorized to exploit state-granted monopolies in salt mining and coal importation.<sup>40</sup> The great banking houses of Florence and Siena operated during the 1500s as virtual national banks under the patronage and protection of the ruling authorities.<sup>41</sup> The corporate idea evolved during the seventeenth and eighteenth centuries into the great merchant joint stock companies of Holland and England that functioned as profit-making adjuncts of the state in governing India and settling the New World.<sup>42</sup> The late eighteenth-

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32. See Hansmann et al., *supra* note 31, at 1336.

33. See *id.* at 1337, 1343-50.

34. See *id.* at 1350.

35. See *id.*

36. See *id.* at 1356-64 (describing Roman origins).

37. See *id.* at 1360-64 (2006).

38. The modern eleemosynary branch of the history of corporations dates from Pope Innocent IV's conception of ecclesiastical corporations. See Dewey, *supra* note 26, at 665-69.

39. See Hansmann et al., *supra* note 31, at 1370-72.

40. *Id.* at 1376 (describing Italian city state origins).

41. *Id.*

42. *Id.* at 1376-79.

century world the Founders knew continued to view the business corporation as a device to permit government delegation of a public function (like building a bridge or governing a colony) to a small group of favored, profit-driven individuals under highly favorable investment terms.<sup>43</sup> Indeed, many of the political disagreements in the new nation were over whether the practice of delegating public functions to profit-seeking individuals (usually in corporate form) should continue, and if so, whether the rights granted under the charter of delegation/incorporation should be subject to regulation at the state or federal level.<sup>44</sup> The debate continues today under the rubric of “privatization.”<sup>45</sup>

As economic and social conditions changed during the Jacksonian era, critics asked why the beneficial investment relationships summarized by the idea of a corporation should be confined to a small group of government-favored investors willing to carry out public functions for fun and profit.<sup>46</sup> Access to the beneficial cluster of investment rights and duties summarized by the term “business corporation” became democratized.<sup>47</sup> State after state offered ordinary entrepreneurs access to an investment vehicle with perpetual life, limited liability, and entity-shielding.<sup>48</sup> While it would have been theoretically possible to use the law of contracts to handcraft a business enterprise that would have endowed its participants—investors, lenders, suppliers, customers, business creditors, managers, and the labor force—with some or all of the reciprocal legal rights and duties enjoyed by participants in a business corporation, the difficulty of entering into, monitoring, and enforcing such a web of reciprocal contracts, and the impossibility of including unknown future tort victims within such a contractually-defined universe,<sup>49</sup> rendered resort to a legal concept that would automatically confer and impose the desired bundle of reciprocal

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43. See Hovenkamp, *supra* note 31, at 1594-97 (discussing the development of mercantilism and classical corporate theory in America).

44. See *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) (regulation of for-profit bridge corporation); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (regulation of nonprofit eleemosynary charter).

45. See, e.g., Brian Cheffins & John Armour, *The Eclipse of Private Equity*, 33 DEL. J. CORP. L. 1, 5-8 (2008) (discussing concerns over the recent trend toward privatization in the United States).

46. Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENVTL. L. REV. 219, 232 (1995).

47. *Id.* at 225.

48. See *Louis K. Ligett Co. v. Lee*, 288 U.S. 517, 549 n.4 (1933) (Brandeis, J., dissenting) (setting forth a chronological listing of democratized state incorporation statutes).

49. See Hansmann et al., *supra* note 31, at 1340-41, n.15 (noting the difficulty of integrating tort victims into purely contractual model).

rights and duties a practical necessity. It was from that practical necessity that the modern business corporation was born.

Beginning with the democratization of the business corporation during the Jacksonian era, and culminating in New Jersey's adoption in 1889 of the first unrestricted corporation statute,<sup>50</sup> the corporate form emerged as a dominant mode of economic organization in the United States. Justice Stephen Field estimated that, by the mid-1890s, American corporations controlled four-fifths of the nation's wealth.<sup>51</sup> The general availability of investment vehicles favored with perpetual life, negotiable shares, limited liability, and entity-shielding contributed to a remarkable worldwide surge in productive capacity, benefiting millions. But the success of the corporate form also placed enormous power in the hands of a relatively small number of corporate insiders who controlled the corporation's assets *de jure*, or *de facto*. It also funded a small army of corporate employees and agents who, in carrying out their duties, occasionally fell short of their legal responsibilities.

Concerns over the disproportionate power of corporate insiders initially surfaced in protectionist efforts to prevent "foreign" corporations created under the laws of one state from competing with local businesses in another<sup>52</sup> and eventually led to the passage of the antitrust laws,<sup>53</sup> the emergence of the regulatory state,<sup>54</sup> and the

50. 1889 N.J. Laws 412.

51. See SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS VI (1st ed. 1895) (preface).

52. Compare *Bank of Augusta v. Earle*, 38 U.S. 519 (1839) (holding banks incorporated in one state have presumptive but defeasible rights to enter banking contracts in other states), with *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 26-27 (1910) (holding states may not impede "foreign" corporations formed in other states from doing business).

53. Efforts by one corporation to acquire control over the stock or assets of other corporate enterprises were thought to distort the free market by lessening competition and increasing the already significant powers of corporate insiders. See *State v. Standard Oil Co.*, 30 N.E. 279, 290 (Ohio 1892) (dissolving "oil trust" as inconsistent with corporate charters); *People v. N. River Sugar Ref. Co.*, 24 N.E. 834 (N.Y. 1890) (dissolving "sugar trust"). When the trusts reformed under the unrestricted 1889 New Jersey incorporation statute, the battleground shifted to the Sherman and Clayton antitrust acts. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *N. Sec. Co. v. United States*, 193 U.S. 197 (1904); see also Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985) (discussing the Chicago School of Antitrust policy legislation and the scholarship surrounding its declining use).

54. The failure to dissolve the oil and sugar trusts and the substantial power exercised by railroad and banking corporations led to efforts to impose direct regulation on corporate business activities, triggering disputes over the scope of constitutional protection enjoyed by corporations. See, e.g., *The R.R. Comm'n Cases*, 116 U.S. 307, 333-36 (1886) (holding that states may impose freight and passenger rates on railroad corporations as a valid exercise of state police power); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 187-89 (1888) (recognizing that private corporations are persons under the Equal Protection Clause);

effort to limit the power of corporate insiders to exercise disproportionate influence over the democratic process.<sup>55</sup> We continue to debate those concerns today, most recently in *Citizens United*.

Concerns over the competence and honesty of corporate employees and agents drove the nineteenth-century law of agency recognizing corporate contractual liability for agreements made by persons with actual, apparent, and—ultimately—legally implied power to bind the corporation's treasury.<sup>56</sup> Contract theory could not, however, provide a remedy for tortious behavior by corporate employees. Instead, courts turned to *respondeat superior* and other theories of vicarious liability to render the corporate treasury civilly liable for damages.<sup>57</sup> The theory underlying derivative corporate tort liability was never tidy, especially when it was complicated by the judicial tendency to think about a business corporation as if it were a sentient being.<sup>58</sup> Moreover, doctrines such as contributory negligence,

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Chi. Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 244-57 (1897) (holding the state must provide railroad corporation with just compensation for appropriated land); *Allgeyer v. Louisiana*, 165 U.S. 578, 591-93 (1897) (holding statute discriminating against out of state marine insurance corporations violated the right to economic liberty under the Fourteenth Amendment); *Smyth v. Ames*, 169 U.S. 466 (1898) (protecting corporate participants against deprivations of their property without due process of law); *Hale v. Henkel*, 201 U.S. 43, 86-89 (1906) (holding corporation immune under Fourth Amendment from compulsory production of documents before grand jury); *Adair v. United States*, 208 U.S. 161, 172-76 (1908) (upholding contract with corporate employer forbidding workers from joining unions).

55. See President Theodore Roosevelt's 1905 and 1906 messages to Congress, culminating in the passage of the Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b(a) (2006)).

56. See RESTATEMENT (SECOND) OF AGENCY §§ 2, 219, 220, 228, 229 (1958).

57. The early vicarious liability cases are summarized in John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 330-37 (1894), and Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923). The modern "enterprise liability" underpinning of vicarious corporate liability in tort is discussed by several distinguished judges in *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968) (Friendly, J.); *Konradi v. United States*, 919 F.2d 1207 (7th Cir. 1990) (Posner, J.); and *Taber v. Maine*, 45 F.3d 598 (2d Cir. 1995) (Calabresi, J.).

58. Debates raged in the late nineteenth and early twentieth centuries over whether corporations could be guilty of sufficient "fault" to warrant the imposition of punitive damages. See, e.g., *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893) (holding a railroad corporation not liable for the illegal conduct of a conductor because the corporation did not approve of or ratify the conduct). But see *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1246-47 (8th Cir. 1983) (quoting *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982)) ("A recent comment by the Supreme Court suggests some question whether *Prentice* would presently govern corporate liability for punitive damages . . . . 'A majority of courts . . . have held corporations liable for punitive damages imposed because of acts of their agents, in the absence of approval or ratification . . . . [T]he [Supreme] Court may have departed from the trend of late nineteenth century decisions when it issued [*Prentice*], requiring the principal's participation, approval, or ratification.'").

last clear chance, the fellow-servant rule, the status of independent contractors, and the notion of frolics of an employee's own often limited a tort victim's practical ability to receive compensation from a corporate defendant.<sup>59</sup> Despite the theoretical difficulties and the practical impediments, however, every legal system to adopt the corporate form quickly recognized that a corporation's treasury must be civilly liable for the unlawful behavior of corporate employees both as a matter of fundamental fairness and the effective maintenance of the corporate rule of law.<sup>60</sup>

In short, viewed historically, the modern business corporation was invented and has evolved as a legal device enabling the efficient enforcement of a bundle of investment-related legal rights and duties belonging to the corporation's human participants. It is not—and never was—a freestanding entity capable of transcending the rights and duties of its human constituents.

## II. THE USE OF A FICTIVE CORPORATE PERSONALITY AS A MEANS TO ENFORCE THE RIGHTS AND DUTIES OF INDIVIDUAL PARTICIPANTS IN THE CORPORATE UNIVERSE

John Dewey's classic study of the emergence of corporate legal personality demonstrates its historic role as a useful fiction permitting the centralized enforcement of rights, duties, and expectations of human beings joined together in a corporate enterprise.<sup>61</sup> Since recognition of a fictive corporate personality can be a useful device to enforce the complex cluster of rights, duties, and expectations that reach equilibrium in the modern business corporation, there is universal agreement that corporations should be recognized as having independent legal personalities in many settings.<sup>62</sup> While there has been no explicit effort to link judicial

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59. See 2-14 DAMAGES IN TORT ACTIONS § 14.03 (2011) (discussing measures affecting tort recovery); *Fairport, Painesville & E. R.R. Co. v. Meredith*, 292 U.S. 589 (1934) (discussing doctrine of last clear chance); *Osborn v. Haley*, 549 U.S. 225 (2007) (discussing frolics of an employee's own); *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368 (1893) (discussing the fellow servant rule); Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW 457 (1999) (providing a list of factors used to determine whether a person is an individual contractor or an employee).

60. *Riddle v. Proprietors of the Locks and Canals on Merrimack River*, 7 Mass. (1 Tyng) 169, 178, 185 (1810) (explaining that although corporation cannot be imprisoned, it may be liable for damages); *Chestnut Hill and Spring House Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 17-19 (Pa. 1818) (recognizing corporations may be liable for damages); see generally PAULA GILIKER, *VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE* (2010) (examining vicarious liability in the United States, Canada, Australia, New Zealand, France, and Germany to understand its meaning in both common and civil law jurisdictions).

61. Dewey, *supra* note 26.

62. See, e.g., *Louisville, Cincinnati, and Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558-59 (1844) (corporation is a "citizen" of state of incorporation for Article

recognition of corporate personality to the usefulness of the fiction in reinforcing the rights and duties of the corporation's human participants, there appears to have been an implicit judicial understanding that treating corporations as fictive legal entities is a means to an end—enforcement of the rights, duties, and expectations of the human beings who have joined together in corporate form pursuant to what Justice Scalia has called “the deal.”<sup>63</sup>

In *Bank of the United States v. Deveaux*, the litigants disagreed over whether a corporation was a “citizen” within the meaning of Article III and the precursor of 28 U.S.C. § 1332, authorizing “citizens” of different states to sue and be sued in federal court.<sup>64</sup> Chief Justice Marshall initially rejected the idea of freestanding corporate citizenship, ruling that a corporation is a citizen of each of the states of which a shareholder is a citizen, rendering it difficult to satisfy the rule of complete diversity.<sup>65</sup> In the pre-*Erie*<sup>66</sup> days of *Swift v. Tyson*,<sup>67</sup> that meant not merely exclusion from a neutral federal judicial forum, but potential exclusion from nineteenth-century federal common law that increasingly tracked the sophisticated commercial law emerging from the courts of Westminster.<sup>68</sup> Under *Deveaux*, corporate investors were penalized for adopting the corporate form by having their business transactions excluded from federal court and walled-off from federal common law.<sup>69</sup> Not surprisingly, the Justices blinked. In *Louisville, Cincinnati, & Charleston Railroad v. Letson*, the Court held that a corporation was a citizen of the state of its incorporation for Article

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III purposes); *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1185-86 (2010) (corporation is a “citizen” of both place of incorporation and its “nerve center”); *Salt Lake City v. Hollister*, 118 U.S. 256, 260-62 (1886) (describing the disastrous effects on the rule of law that would flow from immunizing corporate assets from damage liability for the unlawful employment-related acts of employees); *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (corporation is a “person” for purposes of Fourteenth Amendment Equal Protection Clause).

63. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 686-87 (1990) (Scalia, J., dissenting) (briefly describing “the deal” entered into by participants in a corporation), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

64. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86-92 (1809).

65. *Id.* at 91-92 (declaring that, for the purpose of determining jurisdiction, the courts should “look to the character of the individuals who compose the corporation”).

66. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 76-78 (1938) (holding that a federal court sitting in diversity must apply the common law of the forum state).

67. 41 U.S. (16 Pet.) 1, 18-19 (1842) (holding that federal diversity courts deciding “questions of general commercial law” are not bound by the decisions of the courts in the forum state).

68. See, e.g., *The Edward*, 14 U.S. (1 Wheat.) 261, 266 (1816) (discussing the applicable commercial law relating to vessels traveling to foreign ports); *United States v. Hatch*, 26 F. Cas. 220, 222-23 (C.C.D.N.Y. 1824) (discussing whether a shipping bond may be altered in the custom house after execution to correct mistake).

69. *Deveaux*, 9 U.S. (5 Cranch) at 87.

III diversity purposes.<sup>70</sup> The deal was sealed in *Marshall v. Baltimore & Ohio Railroad Co.*, when the Court ruled that corporate shareholders are conclusively presumed to have the same Article III citizenship as the corporation itself.<sup>71</sup> Presto, through the fiction of corporate personality, individuals engaged in doing business in corporate form regained their access to the federal courts.

The pragmatic process was repeated, albeit over a much longer period, in the seventy-year struggle over whether states had power to bar (or to impose onerous conditions on) the business activities of so-called “foreign” corporations incorporated in another state.<sup>72</sup> Unlike the Article III citizenship cases discussed above, in the “foreign corporation” cases, the Supreme Court moved from viewing a corporation as a freestanding legal entity to a recognition that a corporation is an association of individuals who do not lose the constitutional right to do business throughout the United States merely because they have joined together in the corporate form. In 1839, in *Bank of Augusta v. Earle*, the Court rejected the argument that corporations were merely collections of individuals with a constitutional right under the Article IV Privileges & Immunities Clause to do business throughout the United States.<sup>73</sup> Instead, the Taney Court ruled that a corporation was a distinct legal entity created by the laws of one state, whose interstate business activities could be curtailed or regulated at will by states wishing to advance policies inconsistent with the proposed corporate undertaking.<sup>74</sup> In *Paul v. Virginia*,<sup>75</sup> the post-Civil War Court followed *Bank of Augusta*, declining to recognize corporations as citizens within the meaning the Privileges and Immunities Clause of the Fourteenth Amendment, and upholding the exclusion of New York insurance companies from the Virginia market unless they posted expensive

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70. *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 557-59 (1844).

71. *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 327-28 (1853); see also *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 366 (1921) (class members presumed to share citizenship of named-representative). Three years after *Marshall*, the same Court held that black people could not be citizens of a state within the meaning of Article III. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 397 (1856).

72. See generally *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839) (upholding power to set conditions); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868) (upholding power to set conditions). But see generally *W. Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910) (rejecting power to set conditions).

73. *Bank of Augusta*, 38 U.S. at 520.

74. *Id.* The precise issue in *Bank of Augusta* was whether a bank incorporated in Georgia could transact ordinary banking business in Alabama in competition with Alabama banks. *Id.* at 521-22. The Court held that the answer was presumptively “yes,” but that Alabama could impose a ban if it expressed itself clearly. *Id.* at 604.

75. 75 U.S. (8 Wall.) 168 (1868).

bonds.<sup>76</sup> The net effect of *Bank of Augusta* and *Paul v. Virginia* was to subject human beings joined together in corporate form to discriminatory conditions as the price of engaging in interstate business activities. The tide did not turn until the early twentieth century, when a closely divided Court (4-1-4) in *Western Union Telegraph Co. v. Kansas* struck down, as a violation of the Commerce Clause, an effort to condition Western Union's continued operation in Kansas on the payment of a significant fee.<sup>77</sup>

The Article III citizenship cases and the "foreign corporation" cases migrate in different directions to reach the same place. In the Article III citizenship cases from *Deveaux* to *Letson*, the Court moved from viewing a corporation as an association of individual shareholders, with multiple citizenship, to a unified legal fiction with a single citizenship.<sup>78</sup> In the "foreign" corporation cases, from *Bank of Augusta* to *Western Union Telegraph Co. v. Kansas*, the Court moved from a view of a corporation as a unified legal fiction to a corporation as an association of individual shareholders joined together in a common enterprise.<sup>79</sup> The driving force in both sets of cases was obviously not the emergence of a coherent view of the nature of a corporation. Rather, by moving in opposite directions, the Court was able to reinforce the underlying rights, duties, and expectations of the multiple human beings who constitute the corporate universe and who are the true holders of the rights in question.

A similar pattern characterizes the Court's long line of decisions vesting business corporations with a fictive personality, enabling corporate management to act as a central enforcement agent for underlying constitutional rights against government regulation

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76. *Id.* at 181-85; *see also* *Ducat v. Chicago*, 77 U.S. (10 Wall.) 410, 415 (1870) (holding that Illinois may condition New York insurance companies' license to do business in Illinois on pro-rata payments to Chicago and other cities); *Fire Ass'n of Phila. v. New York*, 119 U.S. 110, 117 (1886) (holding that New York may condition the ability of a Pennsylvania insurance company to do business in New York on payment of fee).

77. *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 48 (1910). Justice White's swing vote turned on the fact that Western Union had expended significant funds establishing itself in Kansas before Kansas conditioned further activities on the payment of a fee. *Id.* at 51 (White, J., concurring). Justice Holmes, joined by three colleagues, dissented. *Id.* at 52-54 (arguing that a corporation, viewed as a fictive entity created by the law of one state could be denied access to sister states on virtually any terms). Justice Brandeis continued to fly that flag in solitary dissent well into the 1930s. *See, e.g., Liggett Co. v. Lee*, 288 U.S. 517, 549 n.4 (1933) (Brandeis, J., dissenting) (stating "the desire for equality and the dread of special privilege were largely responsible for the general incorporation laws").

78. *See, e.g., Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86-92 (1809); *Louisville, Cincinnati, and Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 558-59 (1844).

79. *Compare Bank of Augusta*, 38 U.S. (13 Pet.) at 520, *with W. Union Tel. Co.*, 216 U.S. at 21.



actually belonging to the corporation's decentralized individual participants. The story opens in *County of Santa Clara v. South Pacific Railroad Co.*, where the Court held, without explanation, that although under *Paul v. Virginia*<sup>80</sup> corporations are not "citizens" within the meaning of the Fourteenth Amendment's Privileges and Immunities Clause, they are "persons" within the meaning of the Fourteenth Amendment's guaranty of equal protection of the laws.<sup>81</sup> As Morton Horowitz has argued, the argument that drove the Court in *Santa Clara* was derived from John Norton Pomeroy's brief arguing for protection of the constitutional rights of the individual investors in the corporation to equal legal treatment.<sup>82</sup> As in *Letson*,<sup>83</sup> using the legal fiction of corporate personality to create a unitary enforcement agent for shared but decentralized Equal Protection rights made excellent sense.<sup>84</sup>

Once the pattern was established in *Letson* and *Santa Clara*, the Court repeatedly used the fiction of a corporate legal personality as a device to assure effective enforcement of rights and duties shared in common by individual members of the corporate community. In *The Railroad Commission Cases*, the Court used a fictive corporate personality to protect corporate participants against unlawful takings of their investment property.<sup>85</sup> In *Smyth v. Ames*, the Court used a fictive corporate personality to protect corporate participants against deprivations of their investment property without due process of law.<sup>86</sup> In *Hale v. Henkel*, the Court used a fictive corporate personality to protect the shared Fourth Amendment privacy interests of participants in corporate enterprise.<sup>87</sup>

80. 75 U.S. 168 (1868).

81. *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 409-10 (1886).

82. Horowitz, *supra* note 7, at 177-78.

83. *See supra* notes 70, 78 and accompanying text.

84. As we have seen, *supra* notes 73-79, the movement from *Bank of Augusta* and *Paul v. Virginia* to *Western Union Telegraph Co. v. Kansas* achieved the same result as coverage under the Privileges and Immunities Clause—the right of individual investors associated in corporate form to carry on their business throughout the United States.

85. *The Railroad Commission Cases*, 116 U.S. 307, 331 (1886).

86. *Smyth v. Ames*, 169 U.S. 466, 526 (1898).

87. *Hale v. Henkel*, 201 U.S. 43, 76-77 (1906); *see also* *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (protecting participants in foreign corporations against uncompensated takings of their property); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568-69 (1977) (protecting corporate participants against costs of multiple criminal prosecutions in violation of Double Jeopardy Clause); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945) (measuring specific *in personam* jurisdiction over a corporation by activities of corporate participants); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (requiring volitional behavior by corporate constituents to impose specific *in personam* jurisdiction over corporate assets); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 418-19 (1984) (setting geographical limits on general jurisdiction over corporation premised

In the modern era, the Court's controversial corporate free speech cases illustrate the useful role of a fictive legal personality in facilitating the centralized enforcement of rights held in common by the decentralized human participants in the corporate enterprise. The commercial speech cases endow a fictive corporate personality with centralized power to enforce the commonly shared interest of each corporate participant in maximizing a business corporation's ability to describe the corporate product to the consuming public.<sup>88</sup> The restriction in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York* of commercial free speech protection to "truthful" commercial speech about "lawful" products<sup>89</sup> reflects the strong interest of many participants in the corporate enterprise in avoiding false advertising and lawless behavior that threatens to diminish the value of the corporate enterprise. The corporate free press cases, like *New York Times v. Sullivan*,<sup>90</sup> recognize and protect the commonly shared interest of each participant in a business enterprise engaged in the production and sale of speech in assuring the widest range of product dissemination and the widest autonomy over what speech to sell.<sup>91</sup> The nonprofit corporate free speech cases,

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on unrelated activities of corporate constituents).

88. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (recognizing First Amendment protection for commercial speech for the first time and invalidating ban on price advertising for prescription drugs); *Linmark Assoc. v. Willingboro*, 431 U.S. 85, 96-97 (1977) (invalidating ban on display of real estate "for sale" signs); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700-01 (1977) (invalidating ban on commercial speech concerning contraceptives); *Cent. Hudson Gas and Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 578-79 (1980) (invalidating ban on truthful commercial speech promoting lawful consumption of electricity); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995) (invalidating ban on truthful information about alcohol content on beer labels); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (invalidating ban on liquor price advertising); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (invalidating ban on tobacco billboards within 1,000 feet of school or church as de facto ban).

89. *Central Hudson*, 447 U.S. at 576 (1980) (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 773).

90. 376 U.S. 254 (1964).

91. *Id.* at 269-72 (First Amendment requires "good faith" defense in libel action where allegedly false statement about a public official was believed in good faith to be true); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 688-89 (1959) (First Amendment bans censorship of movie portraying adultery in "alluring" light); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (First Amendment bans effort to forbid political editorials on election day); *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967) (First Amendment protects good faith depictions of newsworthy event); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (*New York Times v. Sullivan* applies to speech about "public figures" as well as "public officials"); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (First Amendment bans prior restraint on publication of Pentagon papers); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (First Amendment bans requiring newspaper to

like *Citizens United*<sup>92</sup> and *MCFL*,<sup>93</sup> reflect the Court's recognition that human beings who have joined together in corporate form to advance a given set of values share a common interest in maximizing the ability to communicate in aid of those values. The Court has repeatedly—and correctly—ruled that the leadership of such a nonprofit corporation should be vested with power to act as a centralized First Amendment enforcement agent for its members.<sup>94</sup>

Thus, when confronted with the challenge of enforcing commonly shared rights of human participants in the corporate enterprise to (1) the ability to gain access to the federal courts and pre-*Erie* federal common law; (2) the right to conduct business throughout the United States; (3) the right to equal protection of the laws in connection with the conduct of their business; (4) the right to due process law in connection with the regulation of their business; (5) the right to be free from unconstitutional takings of their business property; (6) the right to conduct business free from arbitrary search and arrest; (7) the right to urge customers to purchase the lawful products produced by their business enterprise; (8) the right to engage in the business of operating a free press; and (9) the right to associate with others in nonprofit corporate form to advance shared ideas, the Court has recognized a central enforcement agent—the fictive corporation—as a device to assert rights shared equally by the decentralized human members of the corporate community.

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publish response to charges); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-61 (1975) (First Amendment bans governmental refusal to permit use of auditorium to stage production of "Hair"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-52 (1988) (First Amendment bans damage claim for emotional distress based on parody); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (First Amendment bans effort to seize royalties payable to criminals for writing about their activities); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988) (First Amendment bans significant limits on newspaper display and sales racks on public sidewalk).

92. *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010).

93. *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986).

94. *See, e.g., Citizens United*, 130 S. Ct. at 929 (upholding nonprofit corporation's right to disseminate attack on Hilary Clinton funded with trace amounts (less than one percent) of corporate contributions); *MCFL*, 479 U.S. at 254-55 (upholding right of nonprofit "grassroots" corporation to disseminate information about candidates); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296 (1981) (invalidating unreasonably low limit on contributions by nonprofit corporation); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 686 (1990) (Scalia, J., dissenting) (urging recognition of free speech rights of nonprofit corporation); *FEC v. Wis. Right to Life*, 551 U.S. 449, 480-81 (2007) (upholding right of nonprofit corporation to disseminate "issue" advertising urging voters to contact candidates concerning judicial filibusters); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463-66 (1958) (recognizing out-of-state nonprofit corporation's First Amendment right to refuse to disclose membership list); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 573-75 (1995) (recognizing right of private parade organizer to exclude marchers who would alter parade's intended message).

It would, of course, have been possible to require each member of the decentralized corporate community to assert and enforce his or her rights individually, but that would have been inefficient, highly burdensome, and might well have put the rights at risk. It is no coincidence that one of the first uses of the class action fiction was the shareholders derivative action, designed to permit the shared rights and interests of decentralized corporate shareholders to be effectively asserted against corporate management by a unitary enforcement agent—the named representative.<sup>95</sup> Recognizing a corporate personality as a centralized enforcement agent is merely the flip side of the derivative class action. The derivative action allows members of the decentralized corporate community to assert rights effectively against the corporation itself. The recognition of fictive corporate personality permits the decentralized corporate community to assert rights effectively against the government and other third parties. The organizational standing cases,<sup>96</sup> especially those involving labor unions, are simply another example of the phenomenon.

Where, however, the Court perceives a significant risk of conflict between and among the decentralized rights-holders in a corporate community, it has declined to invoke corporate personality as a device to permit centralized enforcement of the potentially conflicting rights of the individual class members. The Court has recognized that the creation of a centralized enforcement proxy for potentially divided rights-holders risks favoring one set of participants in the corporate enterprise—usually high-ranking officers—over others.<sup>97</sup> Thus, in settings where intracorporate conflicts of interest are likely to exist, the Court requires each human rights-holder to assert his or her own constitutional rights without recourse to a centralized enforcer. In *Hale v. Henkel*, for example, the Court declined to recognize a corporate right against self-incrimination.<sup>98</sup> Although the *Hale* Court noted that corporations lack the attributes of conscience and personal dignity needed to support such a Fifth Amendment right, an equally persuasive explanation for the Court's decision is that centralized enforcement of the right to remain silent would enable one set of corporate actors (usually corporate management) to prevent notice of potential criminal wrongdoing from reaching other members of the corporate community.<sup>99</sup> In

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95. See *supra* notes 12-14 and accompanying text.

96. See *supra* note 13.

97. Recognition of the potential for widespread conflicts of interest within the modern, large corporate enterprise dates from at least ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119-25 (1932).

98. *Hale v. Henkel*, 201 U.S. 43, 75 (1906).

99. *Id.* at 69-70.

*Braswell v. United States*, Justice Kennedy, in dissent, argued persuasively that since no such intracorporate conflict is likely in a single-shareholder corporation, the rationale of *Hale v. Henkel* should not extend to single-shareholder corporations.<sup>100</sup> He was right. In *California Bankers Association v. Shultz*, the Court declined to recognize a privacy-based corporate right to exemption from financial reporting requirements by banks because disclosure of large cash transactions advances the interests of members of the corporate community in shielding the enterprise from being used for unlawful purposes.<sup>101</sup> In *Colonnade Catering Corp. v. United States*, the Court recognized a diminished level of centralized Fourth Amendment protection for corporations engaged in the alcohol industry,<sup>102</sup> reflecting the interests of members of the corporate community in preventing organized crime from gaining a foothold in the industry.<sup>103</sup> A similar result was reached in *United States v. Biswell*, involving the firearms industry.<sup>104</sup>

III. MULTISHAREHOLDER CORPORATIONS, INTRACORPORATE  
CONFLICTS OF INTEREST, AND LIMITS ON THE USE OF A FICTIVE  
CORPORATE PERSONALITY TO CREATE A CENTRALIZED  
ENFORCEMENT AGENT FOR RIGHTS HELD BY HUMAN PARTICIPANTS  
IN THE CORPORATE ENTERPRISE

As the Court's decision in *Hale v. Henkel* and Justice Kennedy's dissent in *Braswell* recognize, it is in the context of large, multi-shareholder business corporations that judicial recognition of a centralized corporate enforcement mechanism for rights actually held by decentralized participants in the corporate enterprise may break down.<sup>105</sup> As with class actions and organizational standing, when conflicts of interest are likely within a decentralized community of interest, the Court has been reluctant to vest centralized enforcement authority in one segment of the community—whether Rule 23 named-plaintiffs, the leaders of unincorporated associations, or corporate insiders—recognizing that the vesting of such a centralized enforcement power in one segment of the community threatens to distort the web of intra-community relationships.<sup>106</sup>

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100. *Braswell v. United States*, 487 U.S. 99, 104-06 (1988); *see id.* at 119-20 (Kennedy, J., dissenting) (Justice Kennedy was joined by Justices Brennan, Marshall, and Scalia). It is no coincidence that *Marshall v. Barlows, Inc.*, exempting a corporation from unannounced inspections by OSHA, involved a small family plumbing business organized as a corporation. 436 U.S. 307, 311-13 (1978).

101. 416 U.S. 21, 55, 81 n.1 (1974).

102. 397 U.S. 72, 75-77 (1970).

103. *See id.* at 75.

104. *See* 406 U.S. 311, 314-15 (1972).

105. *See supra* notes 11, 65, 100 and accompanying text.

106. *See infra* notes 108-12 and accompanying text; *see also* *Amchem Prods., Inc. v.*

Viewed from the perspective of avoiding distortion of the reciprocal rights and duties of the members of a corporate community, *Kiobel* should be an easy case. The two crucial legal rights that make the corporation such an attractive business vehicle are limited liability (exempting an investor's personal assets from liability for the investment's losses) and entity-shielding (shielding the investment assets from the investor's personal liability). It would be unthinkable for a court to use a corporation's fictive legal personality to free *both* the enterprise's investment assets and the personal assets of the investors from liability for damages caused by the job-related unlawful behavior of corporate employees. Where a corporate employee acting unlawfully within the scope of his employment causes such a loss, respect for the very nature of the corporate "deal" that provides investors with extremely favorable legal ground rules for conducting a business enterprise requires "enterprise" liability for the damages flowing from the unlawful job-related behavior of a corporation's human agents and employees.<sup>107</sup> That is why every legal system to adopt the corporate form has also recognized derivative corporate civil liability for the unlawful acts of corporate employees as a fundamental underpinning of the rule of law.<sup>108</sup> The Second Circuit panel's decision in *Kiobel* treats a large, multinational corporation as a freestanding entity for the purposes of customary international law, divorced from the rights and duties of the individual members of the corporate community in a way that insulates *both* the investment enterprise's assets and the investor's personal assets from liability.<sup>109</sup> The panel's reasoning appears to have been premised less on serious thought about corporate theory than on hostility to the idea of judicially enforceable customary international law<sup>110</sup> and mistrust of the plaintiffs' bar.<sup>111</sup> The *Kiobel*

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Windsor, 521 U.S. 591, 626-27 (1997) (explaining intra-class conflicts and agency concerns preclude recognition of ad hoc fictive legal entity empowered to act in each constituent's name); *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 864-65 (1999) (reversing a class certification for asbestos class action due to intra-class conflicts); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556-57 (2011) (declining to find adequate commonality to justify class certification).

107. The modern "enterprise liability" underpinning of vicarious corporate liability in tort is discussed by several distinguished judges in *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171-72 (2d Cir. 1968) (Friendly, J.); *Konradi v. United States*, 919 F.2d 1207, 1210-11 (7th Cir. 1990) (Posner, J.); and *Taber v. Maine*, 45 F.3d 598, 606 (2d Cir. 1995) (Calabresi, J.).

108. See PAULA GILIKER, *VICARIOUS LIABILITY IN TORT* 46-50 (2010).

109. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 130-31 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011), *reargument ordered* 132 S.Ct. 1307 (2012).

110. The *Kiobel* panel opinion reasoned that customary international law has not yet recognized derivative corporate liability. *Kiobel*, 621 F.3d at 149. The panel based its analysis on the allegedly contested nature of corporate criminal liability in many of the world's legal systems, *id.* at 146-47, ignoring the fact that corporate civil liability is

opinion cannot, in my opinion, withstand analysis.<sup>112</sup>

The Supreme Court's five-Justice *dictum* in *Citizens United* recognizing a First Amendment corporate right to electoral speech<sup>113</sup> is more complex than *Kiobel*, but no less subject to analysis from the perspective of the rights and duties of members of the corporate community. More than a century ago, the Court recognized in *Hale v. Henkel* that the potential for conflicts of interest within the corporate community over suppressing information about criminal activity by one or more of its members rendered it inappropriate to use the fiction of corporate personality to anoint corporate insiders as centralized Fifth Amendment rights-enforcers.<sup>114</sup> A similar analysis should persuade the Supreme Court to refrain from invoking the corporate fiction to anoint corporate insiders as centralized First Amendment enforcement agents for the rights of decentralized members of the corporate community to participate—or refrain from participating—in electoral politics. Unlike the garden-variety decisions about how to manage the corporate business falling within Justice Scalia's corporate "deal," no participant in the corporate enterprise believes that by joining a corporate community he or she has delegated the exercise of his or her First Amendment electoral rights to corporate management. Given the inevitable conflicts of interest within a large multi-shareholder corporate community about which candidate to support in a contested election, it appears inconsistent with *Hale v. Henkel* (and with Justice Kennedy's reading of the case in *Braswell*) to vest a corporate management with a centralized power to use other peoples' money for political ends. Thus, despite the *dictum* in *Citizens United*—which actually dealt

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the norm in every legal system to have adopted the corporate form. See GILKER, *supra* note 108, at 46-50. The panel majority also argued that derivative corporate civil liability had not been formally received into customary international law, *Kiobel*, 621 F.3d at 147, ignoring the fact that customary international law does not require a formal ceremony of adoption. See *The Paquete Habana*, 175 U.S. 677, 708 (1900) (rejecting need for formal ceremony of adoption).

111. Chief Judge Jacobs, the swing vote on the *Kiobel* panel, gave away the game in his separate opinion denying rehearing, arguing that recognizing corporate liability under customary international law would subject multinational corporations to rapacious American plaintiffs' lawyers who would "extort" settlements in a manner that would "beggar" the corporations. *Kiobel*, 642 F.3d at 270-72 (2d Cir. 2011).

112. At least four circuits have rejected the panel's reasoning. See *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (recognizing derivative corporate liability under Alien Tort Statute); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) (same); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39-57 (D.C. Cir. 2011) (same); *Sarei v. Rio Tinto*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927, at \*6 (9th Cir. 2011) (en banc). *Kiobel* is currently awaiting oral argument before the Supreme Court on a writ of certiorari to the Second Circuit. 132 S. Ct. 472 (2011).

113. *Citizens United v. FEC*, 130 S. Ct. 876, 928-29 (2010).

114. 201 U.S. 43, 69-70 (1906).

with the clearly protected speech of a nonprofit corporation similar to *MCFL*<sup>115</sup>—it remains open to argue that the Supreme Court should not deploy the fiction of a centrally enforceable First Amendment electoral right in the context of large, multi-shareholder corporations.

The Supreme Court has never been confronted with a case or controversy involving the likelihood of intracorporate conflict between and among the individual holders of the First Amendment electoral rights at issue. Apart from the commercial speech, free press, and nonprofit corporation cases discussed *supra*,<sup>116</sup> where an intracorporate commonality of interest in asserting free speech protection undoubtedly existed, the only corporate free speech actually involving a large multi-shareholder business corporation was *First National Bank of Boston v. Bellotti*,<sup>117</sup> involving a bank's use of treasury funds to oppose a statewide referendum on raising state income taxes.<sup>118</sup> Given the subject matter of the referendum in *Bellotti*, it was highly unlikely that intracorporate conflicts of interest over the speech existed. Indeed, Justice Powell noted that not a single member of the First National Bank of Boston corporate community objected to the speech in question or appeared in the litigation in defense of the Massachusetts statute.<sup>119</sup> Most importantly, Justice Powell ruled that the Massachusetts statute could not be defended as an effort to protect dissenting corporate participants because it was both under- and over-inclusive “under the circumstances of this case,”<sup>120</sup> leaving open the constitutionality of an appropriately drawn shareholder protection statute.<sup>121</sup> The majority in *Citizens United* followed the same decision-avoidance route.<sup>122</sup> The issue, therefore, unquestionably remains open.

If we remain true to the historic role of corporate legal personality as a technique permitting efficient centralized enforcement of shared rights held by a corporation's decentralized human participants, the Court should eschew centralized enforcement and permit each member of the corporate community to assert his or her own free speech rights. In *Abood v. Detroit Board of*

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115. See *Citizens United*, 130 S. Ct. at 916.

116. See *supra* notes 97, 99-100, 102-03 and accompanying text.

117. 435 U.S. 765 (1978).

118. *Id.* at 767-69.

119. *Id.* at 794 n.34.

120. *Id.* at 792-95.

121. See *id.* at 805-06 (White, J., dissenting).

122. *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010). The *Citizens United* Court declined to rule squarely on the conflict of interest argument, finding the statute before the Court both under-inclusive (because it was limited to a short period immediately prior to an election) and over-inclusive (because it covered both nonprofit and small, for-profit corporations, as well as large multi-shareholder corporations). *Id.*



*Education*,<sup>123</sup> *Keller v. State Bar of California*,<sup>124</sup> and *United States v. United Foods, Inc.*,<sup>125</sup> the Court ruled that organizational insiders could not use money provided to them under government compulsion to fund speech opposed by the providers of the funds.<sup>126</sup> While government compulsion is not ordinarily involved in a decision to provide funds to a corporation, the price to a dissenting shareholder, lender, business creditor, or customer of severing relationships with the corporation to avoid funding electoral speech favored by the centralized enforcer is very substantial, involving potential capital gains tax liability and an immensely inefficient distortion of economic decision-making. Viewed as a “burden” on a dissenting corporate participant’s First Amendment rights, the costs to a dissenting shareholder of exiting the corporation would appear to exceed the “burden” deemed sufficient in *Arizona Free Enterprise Club v. Bennett*<sup>127</sup> to invalidate Arizona’s effort to key public election subsidies to the spending of privately funded candidates.<sup>128</sup>

#### CONCLUSION

*Pace*, Professor Hart. There are no singles without baseball, and no such thing as a corporation untethered to the rights and duties of its human constituents. While judicial recognition of corporate personality can often serve as a useful fiction enabling centralized enforcement of the rights and duties of the members of a decentralized corporate community, cases like *Citizens United* and *Kiobel*, which misuse the corporate fiction to distort those rights and duties, are exercises in transcendental nonsense.<sup>129</sup>

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123. 431 U.S. 209 (1977).

124. 496 U.S. 1 (1990).

125. 533 U.S. 405 (2001).

126. *Abood*, 431 U.S. at 235-36; *Keller*, 496 U.S. at 13-15; *United Foods*, 533 U.S. at 415.

127. 131 S. Ct. 2806 (2011).

128. *Id.* at 2828-29.

129. *See* Cohen, *supra* note 7, at 811.