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Trends in the Social [Ir]responsibility of American Multinational Corporations: Increased Power, Diminished Accountability

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Trends in the Social [Ir]responsibility of American Multinational Corporations: Increased Power, Diminished Accountability

Cynthia A. Williams and John M. Conley

Abstract

The purpose of this invited essay is to assess the future of the CSR performance of American multinationals in light of several ongoing trends. These trends include companies' voluntary CSR programs and the global self-regulatory standards for responsible company activities that are developing in almost every industry. Moreover, the decade-long project at the United Nations to identify multinational companies' responsibilities with respect to international human rights, ultimately spearheaded by Special Representative John Ruggie, has for the first time established global expectations of responsible corporate activity. At the same time, however, legal developments in the United States may be trending in the opposite direction, toward increased power and diminished accountability for corporations. Two legal developments that highlight this counter-trend will frame this discussion. The first, the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) recognizes a constitutional right for corporations to give financial support to a wide range of electioneering activities, including by using corporate funds to pay for and broadcast advertisements for specific candidates for office. The effect is to allow American companies to further consolidate their already substantial political power. The second, the opinion by the U.S. Court of Appeals for the Second Circuit in *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), *reh'g en banc denied*, 642 F.3d 379 (2011), *aff'd*, 569 U.S. ___, 133 S. Ct. 1659 (Apr. 17, 2013), denied the possibility of corporate liability under the Alien Tort Statute for Royal Dutch Shell's employees' alleged violations of Nigerian community members' international human rights. A 2-1 majority held instead that violations of international law could only be asserted against natural persons or nations. The Supreme Court granted certiorari and in a decision handed down on April 17, 2013, the Court unanimously affirmed the judgment of the Second Circuit. The five-Justice opinion of the Court held that the ATS cannot be used to redress violations of the law of nations that occur outside the territory of the United States, except in exceptional circumstances not found in *Kiobel*. Neither the majority opinion nor the concurrence addressed the corporate liability issue, which means that the Second Circuit's ruling on that issue remains the law of the Second Circuit — an important outcome, given the significance of the Second Circuit as a venue for ATS cases. Taken together, the overall effect of the Second Circuit's rejection of corporate liability for human rights violations and the Supreme Court's rejection of extraterritorial application of the ATS to any defendant, corporate or otherwise, is the substantial evisceration of companies' legal accountability for international human rights violations under the ATS. On a theoretical level, these decisions send mixed messages about corporate personhood and identity. But on a practical level, the two decisions work in unfortunate

concert to increase the already considerable political power of U.S. corporations at home, even as they reduce the risk of legal accountability for their actions abroad. By doing so, they shrink the shadow of the law — the threat of “hard” legal regulation — that has been an important incentive to the adoption of voluntary, “soft-law” CSR standards. Thus, these legal developments, though ostensibly unrelated to the voluntary pursuit of CSR activity, may in fact act as a disincentive to that activity.

KEYWORDS: corporate governance, corporate accountability, corporate constitutional rights, international human rights, Citizens United, Kiobel, Alien Tort Statute, Alien Torts Claims Act

**TRENDS IN THE SOCIAL [IR]RESPONSIBILITY OF
AMERICAN MULTINATIONAL CORPORATIONS:
INCREASED POWER, DIMINISHED ACCOUNTABILITY?**

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INTRODUCTION

As we initially considered the invitation to participate in this symposium, we focused on the word “normative” in the title, and its root, “norms.” We thought about the question of where the norms of corporate social responsibility (CSR) come from. One source of CSR norms is the law. That is, ostensibly voluntary CSR activity can sometimes be traced to messages being sent—directly or indirectly—by courts and legislatures. Such messages may fall short of direct mandates, but nonetheless can have a powerful influence on shaping corporate behavior in the social and environmental spheres. These considerations led us ultimately to focus on two cases that are not routinely discussed in the CSR context but which, we think, may be sending important messages that could undercut CSR in American multinationals.

The specific purpose of this essay is to assess the future of the CSR performance of American multinationals in light of several ongoing trends. These trends (which we and several colleagues have explored in detail in previous writings¹) include companies’ voluntary CSR

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1. See, e.g., Cynthia A. Williams & Ruth V. Aguilera, *Corporate Social Responsibility in a Comparative Perspective*, in OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 452 (Andrew Crane et al. eds., 2008); John

programs and, relatedly, the global self-regulatory standards for responsible company activities that are developing in almost every industry.² These voluntary efforts have no doubt improved the lives and working conditions of many people throughout the world within multinational corporations' supply chains and other areas of influence. Moreover, the decade-long project at the United Nations to identify multinational companies' responsibilities with respect to international human rights, ultimately spearheaded by Special Representative John Ruggie, has for the first time established global expectations of responsible corporate activity.³

At the same time, however, legal developments in the United States may be trending in the opposite direction, toward increased power and diminished accountability for corporations. Two legal developments that highlight this counter-trend will frame this discussion. The first, the Supreme Court's decision in *Citizens United v. Federal Election Commission* (FEC),⁴ recognized a constitutional right for corporations to give financial support to a wide range of electioneering activities, including by using corporate funds to pay for and broadcast advertisements for specific candidates for office.⁵ The effect is to allow American companies to further consolidate their already substantial political power.

The second, the opinion by the U.S. Court of Appeals for the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co. (Kiobel I)*,⁶

M. Conley & Cynthia A. Williams, *Engage, Embed and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1 (2005) [hereinafter *Engage*]; Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002), reprinted in *CORPORATE GOVERNANCE: LAW, THEORY AND POLICY* 30 (Thomas W. Joo ed., 2004); John M. Conley & Cynthia A. Williams, *Global Banks as Global Sustainability Regulators?: The Equator Principles*, 33 L. & POL'Y 542 (2011) [hereinafter *Global Banks*].

2. Margaret M. Blair et al., *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 329 (2008).

3. U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

4. *Citizens United v. FEC*, 558 U.S. 310 (2010).

5. *See id.* at 365–67.

6. *Kiobel I*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

denied the possibility of corporate liability under the ancient Alien Tort Statute (ATS; the statute is also referred to as the Alien Tort Claims Act)⁷ for Royal Dutch Shell's employees' alleged violations of Nigerian community members' international human rights.⁸ A 2-1 majority held instead that violations of international law could only be asserted against natural persons.⁹ The Supreme Court granted certiorari and heard oral argument on February 28, 2012, and then reargument on October 1, 2012 on the separate issue of the extraterritorial reach of the ATS.¹⁰ In a decision handed down on April 17, 2013, the Court unanimously affirmed the judgment of the Second Circuit (*Kiobel II*).¹¹ The five-Justice opinion of the Court held only that the ATS cannot be used to redress violations of the law of nations that occur outside the territory of the United States, except in exceptional circumstances not found in *Kiobel*. A concurrence by Justice Breyer signed by three others disagreed with the breadth of the Court's statement of the non-extraterritoriality doctrine, but agreed that the ATS was unavailable on the facts of this case. Neither opinion addressed the corporate liability issue, which means that the Second Circuit's ruling on that issue remains the law of the Second Circuit—an important outcome, given the significance of the Second Circuit as a venue for ATS cases.¹² Taken together, the overall effect of the Second Circuit's rejection of corporate liability for human

7. 28 U.S.C. § 1350 (2006).

8. *See Kiobel I*, 621 F.3d at 145.

9. *See id.* at 149.

10. Certiorari was granted on October 17, 2011 in conjunction with another case, *Mohamad v. Palestinian Authority*. 132 S. Ct. 454 (2011). In the second case, the plaintiff alleged that two organizations, the Palestinian Authority and the Palestine Liberation organization, had tortured and killed the plaintiff's decedent. The case presented the question of whether organizations as juridical persons are proper defendants in cases brought pursuant to the Torture Victims Protection Act, (TVPA), a statute passed in 1991. The language of the TVPA uses the term "individual" rather than "person," creating a civil damages remedy against "[a]n individual, who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture . . . or . . . extrajudicial killing . . ." 28 U.S.C. § 1350, note § 2(a)(1)–(2) (emphases added). In a decision last year, while *Kiobel* was awaiting reargument, the Court held unanimously that the term "individual" means only natural persons, and does not encompass organizations. *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

11. *Kiobel II*, 133 S. Ct. 1659 (2013).

12. *See infra* notes 104–06 and accompanying text.

rights violations and the Supreme Court's rejection of extraterritorial application of the ATS to *any* defendant, corporate or otherwise, is the substantial evisceration of companies' legal accountability for international human rights violations under the ATS.

On a theoretical level, these decisions send mixed messages about corporate personhood and identity. But on a practical level, the two decisions work in unfortunate concert to increase the already considerable political power of U.S. corporations at home, even as they reduce the risk of legal accountability for their actions abroad. By doing so, they shrink the shadow of the law—the threat of “hard” legal regulation—that has been an important incentive to the adoption of voluntary, “soft-law” CSR standards. Thus, these legal developments, though ostensibly unrelated to the voluntary pursuit of CSR activity, may in fact act as a disincentive to that activity.

The structure of this essay is straightforward. First, the *Citizens United* decision will be described and then evaluated in the contexts of constitutional law and theory and existing corporate law doctrine. Second, the various levels of *Kiobel* will be described and discussed. In contrast to the Second Circuit in *Kiobel I*, the Courts of Appeals for the District of Columbia Circuit and for the Seventh Circuit have recently both held precisely to the contrary, that a corporation, as a juridical entity, can be held liable for violations of international human rights law. Those opinions, *Doe v. Exxon Mobil Corp.*¹³ and *Flomo v. Firestone Natural Rubber Co.*,¹⁴ will also be discussed and contrasted to *Kiobel I*. Third, the CSR implications of *Citizens United* and *Kiobel I and II*, construed together, will be developed.

I. *CITIZENS UNITED* AND CORPORATE POLITICAL POWER

A. *Summary of Citizens United*

In *Citizens United*, a 5-4 decision, the Supreme Court struck down limits under federal law that prohibited corporations or unions from spending treasury funds to make independent expenditures (not coordinated with candidates or political parties) on “electioneering communications,” defined as “[a]ny broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for

13. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

14. *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

Federal office” and is “publicly distributed” within thirty days of a primary election and sixty days of a general election.¹⁵ Both corporations and unions can establish a Political Action Committee (PAC) with support from shareholders or employees (in the case of a corporation), or union members (in the case of a union), in order to make such expenditures at any time with segregated funds.¹⁶ The Court, however, did not find this option to be a sufficient mechanism for communication to render the general statutory scheme constitutional.¹⁷

The facts of the case are simple. In 2007 Citizens United produced a movie called *Hillary: The Movie* that was critical of then-presidential candidate Hillary Clinton. Wanting to distribute the movie broadly, but concerned about potential liability under the Bipartisan Campaign Reform Act of 2002 (BCRA),¹⁸ which limits independent electioneering expenditures (these limits are usually referred to as section 441b from their codification in 2 U.S.C. § 441b), Citizens United brought an injunctive and declaratory relief action in the United States District Court for the District of Columbia.¹⁹ It argued (1) that section 441b was unconstitutional as applied to *Hillary*; and (2) that the BCRA’s disclaimer and disclosure

15. *Citizens United v. FEC*, 558 U.S. 310, 320–21 (2010) (interpreting section 203 of the Bipartisan Campaign Reform Act (BCRA) of 2002, 2 U.S.C. § 441b (2006)).

16. 2 U.S.C. § 441b(b)(2) (2006). This statute is often referred to as McCain-Feingold after its principal Republican and Democratic sponsors in the Senate, John McCain (R-Arizona) and Russ Feingold (D-Wisconsin).

17. *See Citizens United*, 558 U.S. at 364–66.

18. Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.).

19. *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008).

requirements²⁰ were unconstitutional as applied to *Hillary* and to three ads promoting the movie.²¹

There were a number of unusual aspects of *Citizens United* that the dissent and various commentators have emphasized.²² The claim that the challenged limitations on corporate electioneering were facially unconstitutional, that is, could not be constitutional under any circumstances, had been argued in the alternative in *Citizens United*'s original district court pleadings seeking an injunction.²³ But that claim had been specifically abandoned by the plaintiff in its motion for summary judgment, and both parties had stipulated to its dismissal,²⁴ so the question was not (under normal procedure) properly in the case on appeal to the Supreme Court.²⁵ Rather, the Court sought supplemental briefing and a second round of arguments to bring the issue forward.²⁶

Moreover, the facts of *Citizens United* do not involve either a for-profit corporation or a union using treasury funds for electioneering communications, even though the opinion generally speaks in broad terms of the constitutional right of a for-profit corporation to make such expenditures.²⁷ Rather, *Citizens United* is a non-profit corporation specifically organized to engage in political activism, primarily funded by individuals, with a "small portion" of its budget provided by for-profit corporations. *Citizens United* has a well-

20. The disclaimer provision requires identification of the entity funding the electioneering communication and a clear disclaimer that the communication does not come from the candidate and has not been approved by the candidate. BCRA § 311, 2 U.S.C. § 441d(d)(2) (2006). The disclosure provision requires any person or entity making more than \$10,000 per year in independent electioneering expenditures to file a report with the FEC identifying the person making the expenditure, the amount, the election to which it relates, and identifying certain large contributors. BCRA § 201, 2 U.S.C. § 434(f)(1) (2006).

21. *See Citizens United*, 558 U.S. at 321.

22. *See infra* notes 68–70 and accompanying text; *infra* Part I.B.

23. Amended Verified Complaint for Declaratory and Injunctive Relief at 14–15, para. 47 *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008) (No. 07-2240).

24. *See id.*; Joint Stipulation at paras. 1–3, *id.*

25. *Citizens United*, 558 U.S. at 396–98 (Stevens, J., dissenting).

26. *Citizens United v. FEC*, 557 U.S. 932 (2009).

27. *See, e.g., Citizens United*, 558 U.S. *passim*. The opinion equally applies to unions, but the majority opinion does not emphasize that aspect of its rationale in any regard.

funded PAC, which it could have used both to produce the film and to distribute it at any time;²⁸ instead, it sought to challenge the restrictions.

The district court, which convened a three-judge panel to hear the case (as required under the BCRA), denied the injunction,²⁹ and then granted the FEC's motion for summary judgment, holding that the limit on independent electioneering expenditures was facially constitutional under the Supreme Court's 2003 precedent *McConnell v. FEC*,³⁰ and was constitutional as applied to *Hillary* under *FEC v. Wisconsin Right to Life, Inc.*³¹ since the movie was susceptible to no other interpretation than that it was advocating against voting for Hillary Clinton.³² The Supreme Court noted probable jurisdiction in 2008,³³ and then asked for supplemental briefing and argument in 2009 of whether some or all of the Court's prior precedents upholding the constitutionality of these limits on independent electioneering expenditures (in particular, *McConnell* and *Austin v. Michigan State Chamber of Commerce*) should be overruled.³⁴

An important principle of statutory interpretation in the United States is, whenever possible, to construe statutes narrowly so as to avoid constitutional invalidity. Citizens United had advanced a number of narrowing constructions to suggest that its communications were not covered by the statute, but none were

28. *See id.* at 321, 337–38 (discussing types of communications political action committees can fund).

29. *Citizens United*, 530 F. Supp. 2d at 282.

30. *Id.* at 278 (citing *McConnell v. FEC*, 540 U.S. 93, 203–09 (2003) (upholding limits on electioneering communications in a facial challenge)).

31. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007) (“[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”).

32. *Citizens United v. FEC*, 2008 WL 2788753, at *1 (D.D.C. July 18, 2008) (following its reasoning in *Citizens United v. FEC*, 530 F. Supp. 2d. 274).

33. *Citizens United v. FEC*, 555 U.S. 1028 (2008).

34. *Citizens United v. FEC*, 557 U.S. 932 (2009) (citing *McConnell*, 540 U.S. 93 and *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990)). *McConnell* had upheld the § 441b limit in a facial challenge on the authority of *Austin*, which had found constitutional a state law restriction that mirrored § 441b.

successful.³⁵ Perhaps the best of these arguments was that the statute should not be construed to apply to a nonprofit corporation funded overwhelmingly by individuals and specifically organized to advance political views, and with only a *de minimis* amount of corporate support. The statute itself clearly excludes from its restrictions ideological nonprofit corporations without corporate support. Moreover, this construction would have brought the case squarely within the holding of the Court's prior decision in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*,³⁶ which exempted from the section 441b limitations nonprofit corporations that are formed for the sole purpose of promoting political ideas and do not accept corporate or union funds.³⁷ The Court rejected this narrowing argument because, in contrast to the situation in *MCFL*, a "small portion" of Citizen United's budget was from corporate sources.³⁸ Implying a *de minimis* exception to the statute and *MCFL*'s holding would "require[] intricate case-by-case determinations," which the Court was reluctant to do, especially where the Court is "convinced that . . . this corporation has a constitutional right to speak . . ."³⁹ So,

35. A number of Citizens United's statutory arguments were (in our view) untenable. First, Citizens United argued that its movie was not an "electioneering communication," because that term had been defined to require potential communications to over 50,000 people, and Citizen United claimed the relevant metric should be each individual subscriber who bought access to the movie. Second, Citizens United claimed that the movie was not express advocacy against Hillary Clinton, even though it clearly was. Third, Citizens United argued that the Court should develop a special exception for video on demand, since that technology was not included in the regulatory definition. Its fourth argument for a narrowing statutory interpretation is worthy of more discussion, as described above. See *Citizens United v. FEC*, 558 U.S. 310, 322–29 (2010) (discussing Citizens United's arguments).

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

37. *Id.* at 263–65.

38. *Citizens United*, 558 U.S. at 319, 328.

39. *Id.* at 329. Of course if the Court had recognized a *de minimis* corporate (or union) funding exception, then Citizens United would have been allowed to promote its movie with non-PAC funds even within the thirty day/sixty day time limit as a nonprofit corporation organized to engage in political advocacy, and primarily funded by individuals, with *de minimis* corporate support. That such an entity, formed specifically to engage in political advocacy and concentrating the voices of individuals who share its political perspective, should have a "constitutional right to speak" throughout the election cycle is a position that is not

concluding that there was no narrower, non-constitutional basis for making its determination, the Court turned to the constitutionality of the restriction.

Since political speech is at the core of First Amendment protection, “an essential mechanism of democracy, for it is the means to hold officials accountable to the people,”⁴⁰ the Court applied strict scrutiny analysis to section 441b.⁴¹ While it first recognized that a corporation or a union can establish a PAC to engage in precisely the communications at issue, and thus evade the challenged limits, the Court held that the regulatory requirements to establish and utilize such a PAC are too onerous to save section 441b from constitutional infirmity.⁴² Nor did the Court find that a compelling governmental interest was being advanced by the restrictions at issue.⁴³ It considered three such potential interests, and rejected them in turn: an anti-distortion interest that had been critical to upholding the restriction in *Austin*; an anti-corruption interest that is evident throughout the Court’s campaign finance jurisprudence; and a shareholder protection interest.⁴⁴

only required by the holding of *MCFL*, but one that advances core First Amendment values. That is quite different from the Court’s actual holding that a for-profit corporation or union should have the right to use general treasury funds to promote political views with which at least some of its shareholders, employees and members undoubtedly disagree, bearing in mind that the statutory provision struck down in *Citizens United* only limited corporations’ or unions’ ability to engage in these types of communications in the immediate month(s) before a primary or general election—so, if anything, the statute itself was insufficiently protective of shareholders, employees and union members’ political views.

40. *Id.* at 339.

41. In U.S. constitutional analysis, if a government regulation restricts a fundamental right, such as that of free speech, it is subjected to “strict scrutiny.” To withstand strict scrutiny analysis, such a regulation must advance a compelling governmental interest and do so utilizing the least restrictive means possible. *See id.* at 340.

42. These regulatory requirements include a requirement of separately organizing the PAC with specified officers, limits on the PAC’s funding sources (employees, shareholders or union members are the only permissible funders of the corporation’s or union’s PAC), and quite specific reporting requirements. *Id.* at 337–38.

43. *Id.* at 365 (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

44. *Id.* at 348–62.

In *Austin*, the Michigan Chamber of Commerce sought to use general treasury funds to express support for a specific candidate for elected state office even though Michigan law prohibited such expenditures.⁴⁵ The Supreme Court upheld the constitutionality of that restriction in 1990, identifying the compelling governmental interest as preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁴⁶ The Court in *Citizens United* wholly rejected this anti-distortion rationale while giving little attention to the *Austin* Court’s other rationales: concerns about corruption or the appearance of corruption, and protecting individual shareholders from having corporate money used to support political candidates whom they opposed.⁴⁷

The Court construed the anti-distortion rationale as an effort to provide equal opportunity to speak, and found that goal to be foreign to the First Amendment.⁴⁸ If accepted, the Court thought, that rationale “would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form;”⁴⁹ it would allow “the Government [to] prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books;”⁵⁰ and it would eviscerate limits in the statute, such as those exempting media corporations from the

45. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 654–56 (1990).

46. *Id.* at 660, 673.

47. *Id.* at 658–59, 663.

48. *Citizens United v. FEC*, 558 U.S. 310, 314. U.S. campaign finance laws limit the amount of money candidates can spend as a condition of accepting generous federal campaign subsidies that are funded by individual tax-payers volunteering to contribute extra money when filing their federal tax returns. One provision of the BCRA that had been invalidated in 2008 increased the limits on campaign contributions for candidates in races where their opponent had contributed more than \$350,000 of personal funds to their campaign, the so-called “Millionaire’s Provision.” See *Davis v. FEC*, 554 U.S. 724, 743–44 (2008). The Court’s solicitude for wealthy candidates’ ability to use their wealth, and that of sympathetic PACs, without encountering countervailing spending by publicly-funded candidates, was on clearest display in *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*. 131 S. Ct. 2806 (2011); see discussion *infra* in Part I.B.1.

49. *Citizens United*, 558 U.S. at 349.

50. *Id.*

section 441b limitations. In short, the Court stated, relying the anti-distortion rationale of *Austin* to justify section 441b's limitations would "permit[] the Government to ban the political speech of millions of associations of citizens . . . [and] 'muffle the voices that best represent the most significant segments of the economy.'"⁵¹ Under this view, all speakers, not just corporations, use money amassed in the economic marketplace to influence elections.⁵² In the Court's view, preventing corporations from using wealth, gained in part through the advantages of the corporate form to distort the electoral process, was an insufficient governmental interest to support the form of censorship that section 441b imposes.⁵³

The anti-corruption rationale was similarly unpersuasive to the Court. That rationale has long been the basis for limits on direct contributions to candidates, including limits on individuals' contributions as well as those of corporations and unions, and those limits have consistently been upheld.⁵⁴ But it has not been extended to independent electioneering expenditures either in *Buckley v. Valeo*, where the rationale was held to be insufficient to support limits on individuals' independent electioneering expenditures,⁵⁵ or in *Citizens United* itself.⁵⁶ The Court in *Citizens United* relied on the *Buckley* rationale, holding that the possibility of corruption is too remote from independent corporate or union electioneering expenditures, given that these expenditures by definition are not prearranged or coordinated with the candidates.⁵⁷ The Court asserted that:

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech

51. *Id.* at 354 (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part) (alteration to original omitted)).

52. *Id.* at 351.

53. *See id.* at 350.

54. *Id.* at 356–57 (discussing *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (upholding limits on individuals' direct campaign contributions in order to protect against corruption of the electoral process or *quid pro quo* contributions by large individual contributors)).

55. *Id.* at 357 (discussing *Buckley*, 424 U.S. at 45 (striking down limits on individuals' independent electioneering expenditures)).

56. *Id.* at 360–61.

57. *Id.* at 357.

presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.⁵⁸

The Court dispatched the third asserted governmental interest, protecting dissenting shareholders from being compelled to support political speech with which they disagreed, in two paragraphs.⁵⁹ Protecting this interest would permit banning media corporations from publishing editorials about different candidates for elected office, since even one dissenting shareholder holding stock in *The New York Times* could be harmed by its editorials.⁶⁰ If shareholders are harmed, the Court suggested, the mechanisms of corporate democracy are sufficient to address that harm.⁶¹

Having found no compelling governmental interest promoted by the ban on a corporation or a union using its treasury funds to make independent electioneering communications (as opposed to using separate funds specifically donated by shareholders, employees or union members for the specific purpose of electioneering, which the statute clearly allowed), the Court did not need to, and thus did not, analyze whether section 441b was the least restrictive alternative to promote that interest. It did, though, need to confront—and overrule—*Austin*, which had upheld virtually identical state restrictions on corporate or union electioneering,⁶² and portions of *McConnell v. FEC*,⁶³ which had upheld section 441b against a facial challenge.⁶⁴ The Court found that *Austin*'s anti-distortion rationale was not worthy of the respect that *stare decisis* normally requires, and it asserted that the government itself did not vigorously defend the anti-distortion rationale (relying instead on anti-corruption and

58. *Id.* at 360 (citing *Buckley*, 424 U.S. at 46–47).

59. *See id.* at 361–62.

60. *See id.* at 361–62. *See also id.* at 351–52 (discussing the potential effects that the antidistortion rationale could have on political speech by media corporations).

61. *Id.* at 361–62.

62. *See id.* at 365.

63. *McConnell v. FEC*, 540 U.S. 93 (2003).

64. *Citizens United*, 558 U.S. at 332.

shareholder protection rationales). The Court interpreted *Austin* to be inconsistent with the previously decided *First National Bank of Boston v. Bellotti*, which struck down as unconstitutional restrictions on corporate spending to influence the results of a referendum, since “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”⁶⁵ It also noted that experience had shown the difficulties that *Austin*’s holding had created: “Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws.”⁶⁶ The majority thus overruled *Austin*, as well as so much of *McConnell* as had upheld the section 441b limits against a facial challenge. As the Court concluded, “[w]e return to the principle . . . that the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”⁶⁷

The *Citizens United* majority’s holding and rationale were rejected in a vigorous dissent written by Justice Stevens and joined by Justices Ginsburg, Breyer and Sotomayor. The essence of the dissent’s argument is evident in its introductory paragraphs, portions of which are set out here:

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it

65. *Id.* at 340 (discussing *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978)). As the dissent pointed out, however, the Court held in *Bellotti* that corporations could not be prohibited from spending money to affect the outcome of a statewide referendum, while also recognizing that the issues involved in corporations spending money to affect the outcomes of electoral campaigns are entirely different, and that in electoral campaigns the potential for corruption could well justify restrictions on corporate spending. *Id.* at 442–43 (Stevens, J., concurring in part and dissenting in part) (quoting *Bellotti*, 435 U.S. at 788 n.26).

66. *Id.* at 364.

67. *Id.* at 365. The Court then took up the disclaimer and disclosure requirements of BCRA, and found these constitutional. While they may burden speech, they do not prevent anyone from speaking, and they promote the government’s interests in having an informed electorate. *Id.* at 371. This portion of the Court’s opinion was joined by all but Justice Thomas.

could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the [thirty] days before the last primary election. Neither Citizens United's nor any other corporation's speech has been "banned"

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law⁶⁸

. . . .
. . . Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this "reflects a permissible assessment of the dangers posed by those entities to the electoral process," *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (*NRWC*), and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.*, at 209–[]10. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law including *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), *McConnell v. FEC*, 540 U.S. 93 (2003), *FEC v. Beaumont*, 539 U.S. 146 (2003), *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*),

68. *Id.* at 394–95. As the dissent later discussed, limits on the speech of students, inmates, members of the military, and civil service employees have been upheld, as have limits on corporations and unions use of their general funds in elections and for electioneering. *See id.* at 420–24 (Stevens, J., concurring in part and dissenting in part).

NRWC, 459 U.S. 197, and *California Medical Assn. v. FEC*, 453 U.S. 182 (1981).⁶⁹

The dissent concluded:

Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that §203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power.⁷⁰

II. ANALYSIS OF CITIZENS UNITED

A. Constitutional Analysis

In assessing the Court's constitutional analysis in *Citizens United*, we stress at the outset that, in our view, the majority opinion is *not* indicative of a deeply-held commitment to free speech rights, notwithstanding the breadth of the holding and the over-wrought language that the majority uses.⁷¹ As Erwin Chemerinsky has

69. *Id.* at 394–95 (Stevens, J., concurring in part and dissenting in part).

70. *Id.* at 478–79 (Stevens, J., concurring in part and dissenting in part).

71. For instance, the Court wrote, inaccurately, of Government “ban[ning] the political speech of millions of associations of citizens” or that “[t]he censorship we now confront is vast in its reach. The Government has ‘muffle[d] the voices that best represent the most significant segments of the economy.’” *Id.* at 354 (citation omitted). David Westbrook describes this latter language as “purple prose,” and “such bad lawyering as to be professionally irresponsible,” given that no speech had been “censored,” and given that “*Hillary[: The Movie]*” was made and distributed, and the question was whether Citizens United could pay for its distribution using funds from its treasury,” rather than its substantial PAC to distribute it. See David A. Westbrook, *If Not a Commercial Republic? Political*

demonstrated, the Roberts Court has not generally displayed a robust commitment to Free Speech rights, and has been hostile to them in many instances.⁷² On the contrary, Chemerinsky argued that the Roberts Court has routinely upheld restrictions on free speech when the government is “functioning as an authoritarian institution” vis-à-vis its employees,⁷³ students,⁷⁴ or prisoners.⁷⁵ The Roberts Court, in an opinion by the Chief Justice in *Holder v. Humanitarian Law Project*, upheld statutory prohibitions, including criminal sanctions, on providing “expert advice,” “training,” “service,” and “personnel” to groups designated as terrorists by the U.S. Government.⁷⁶ That holding came in a case where multiple NGOs and individuals sought to provide training in human rights advocacy and peacekeeping to Kurds living in Turkey and Tamils living in Sri Lanka, in part so they could bring human rights complaints to the United Nations.⁷⁷

Moreover, in two campaign finance cases where the effect of a statute was to increase the amount of money available to a financially-disfavored candidate—and thus, by the Court’s rationale in *Citizens’ United*, to increase the amount of speech—the Roberts Court ruled the statutes unconstitutional. In one case, *Davis v. Federal Election Commission*, the ruling was justified by rejecting as discriminatory the BCRA-defined subsidy to the financially disadvantaged candidate, and only to that candidate, in reaction to an opponent contributing \$350,000 or more of personal funds to his or

Economy in the United States After Citizens United, 50 U. LOUISVILLE L. REV. 35, 44 (2011).

72. See Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 725 (2011).

73. *Id.* (discussing *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that there is no First Amendment protection for the speech of government employees in the scope of their employment-related duties, where supervising district attorney concluded a government witness was lying about a criminal matter, and provided that evidence to the defendant’s attorney as he thought constitutionally required, and where the district attorney was subsequently demoted and not promoted)).

74. *Id.* at 727 (discussing *Morse v. Frederick*, 551 U.S. 393 (2007) (restricting student speech at school event when the speech, a banner with the inscription “Bong Hits 4 Jesus,” could reasonably be viewed as promoting illegal drug use)).

75. *Id.* at 728 (discussing *Beard v. Banks*, 548 U.S. 521 (2006) (upholding prison regulation prohibiting inmates from having access to newspapers, magazines, or photographs)).

76. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

77. See *id.* at 2712–14, 2723–24.

her own campaign.⁷⁸ In a second case decided after *Citizens United*, *Arizona Free Enterprise Club's Freedom Fund PAC v. Bennett*, the same majority that had decided *Citizens United* found unconstitutional an Arizona statute that increased the state subsidy to a financially disadvantaged candidate, subject to a fairly low cap (three times the regular subsidy), where her opponent contributed private funds to his or her own campaign or where independent expenditures by sympathetic PACs exceeded the cap.⁷⁹

Construing these two cases together with *Citizens United*, one sees a pattern where the Court is deeply unsympathetic to the view that money is speech and thus protected by the First Amendment where increased public funds help to equalize candidates' resources. But where increased private funds could be used to the advantage of candidates supported by wealthy entities such as corporations, the Court has used rhetorical devotion to the norms of the First Amendment to support those electoral advantages. As Chemerinsky stated, what is evident in these cases is not a "commit[ment] to free speech," but rather "a Court that is hostile to campaign finance laws—especially those restricting spending by corporations and the rich."⁸⁰

Despite the Roberts Court's inconsistent approach to the First Amendment, *Citizens United* might still be defended on the grounds that there are circumstances in which it is necessary to permit corporations to speak on behalf of their constituents. In the context of electoral participation, this argument is weak as a matter of corporate law, as we argue below.⁸¹ But it may also overstate the constitutional protection that should be given to "corporate speech" generally.

The theoretical "corporate right to speak" is not well grounded in First Amendment theory, according to the late constitutional and political theorist Ronald Dworkin. Dworkin identified three core justifications for broadly protecting political speech rights: to meet the need for an informed electorate; to protect the status, integrity and moral development of citizens as equal partners in the political process; and to promote the robust criticism of government as a

78. *Davis v. FEC*, 554 U.S. 724 (2008).

79. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

80. Chemerinsky, *supra* note 72, at 734.

81. *See infra* notes 84–94 and accompanying text.

contribution to its honesty and integrity.⁸² None of these justifications are advanced, Dworkin argued, by “allowing rich corporations to swamp elections with money.”⁸³

In short, the *Citizens United* Court reached out, aggressively, to answer questions that had not been posed by the litigants. It did so in order to reject decades of prior Court precedent in a way that is inconsistent with First Amendment theory so as to give even more political power to entities that already command enormous power. While one can ask as a philosophical matter what speech rights corporations ought to have, in this electoral context the answer by the Court seems purely political: they ought to have the right to spend whatever they want to influence elections.

It may well be that most individual companies will stay out of the messy, noisy, and potentially risky business of trying to shape individual elections directly, preferring to focus their electoral efforts through associations such as the U.S. Chamber of Commerce. From the perspective of individual legislators making decisions about policies to promote or resist, however, whether ads are directly supported by one company or indirectly supported by many through the Chamber of Commerce makes little difference. The point is that the views of the “business community” are well known, are communicated early and often through lobbying efforts, and must now be of even greater concern to legislators (and judges in states where judges are elected) after *Citizens United* than before.

B. Corporate Law Analysis

Turning to the more circumscribed field of corporate law, a first point is that one fundamental policy goal thought to be advanced by campaign finance law from the early 1900s has been controlling the agency costs of managers making campaign contributions with other peoples’ money.⁸⁴ Derived from core principal-agent concerns,⁸⁵ this

82. Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV. OF BOOKS, May 13, 2010, available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy>.

83. *Id.*

84. See Adam Winkler, “Other People’s Money”: Corporations, Agency Costs, and Campaign Finance Law, 92 GEO. L.J. 871 (2004) (using historical research to show that as early as the Tillman Act of 1907, which prohibited corporations from making direct campaign contributions, an animating concern was to protect

policy goal provides a basis for requiring the political activities of corporations and unions generally to be conducted through specifically-funded PACs with clear financial records. It also recognizes the First Amendment rights of “dissenting” shareholders not to have the corporation’s resources put in service of electoral goals with which they disagree. Such a view was forcefully articulated by Justice Brennan in his concurrence in *Austin*, for instance.⁸⁶

From a corporate law perspective one might respond that managers have broad discretion to make many decisions, expenditures, and contributions of a political nature, from contributing company philanthropic resources to the Metropolitan Opera rather than to the Urban League to deciding to support the lobbying efforts against climate change of the Chamber of Commerce.⁸⁷ Thus, one might ask,

shareholders from corporate managers using “their money” to advance political perspectives with which the shareholders would not necessarily agree).

85. Winkler also recognizes that from the late 1800s there has been a concern with electoral corruption and/or the perception of corruption that could occur were corporations permitted to make direct campaign contributions or independent electioneering expenditures. His argument is that the agency concerns have always been at least as relevant to the enacting legislatures, including the Congress in 1907 that enacted the Tillman Act. *Id.* at 871.

86. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 677 (Brennan, J., concurring) (“But just as speech interests are at their zenith in [speech about electoral campaigns], so too are the interests of unwilling Chamber members and corporate shareholders forced to subsidize that speech.”). *See also* Victor Brudney, *Business Corporations and Stockholders’ Rights under the First Amendment*, 91 *YALE L.J.* 235 (1981). Arguably this concern is given insufficient weight in campaign finance law, since companies electioneering expenditures are only limited in the thirty and sixty day period before primary and general elections. If so, then *Citizens United* just made things worse.

87. Indeed, one might argue that charitable contributions do raise agency and associational concerns similar to those raised by companies’ electoral involvement, precisely because of the political implications of those contributions and the increased heterogeneity of shareholders’ interests with respect to them. It is for this reason that companies’ charitable contributions have been controversial as a corporate governance matter, a point John Coates made in Congressional testimony concerning proposed legislative responses to *Citizens United*. *Additional Discussion of H.R. 5175, the DISCLOSE Act, Democracy Is Strengthened by Casting Light on Spending in Elections Before the Comm. on H. Admin.*, 111th Cong. (2010) (statement of John C. Coates IV, Professor of Law & Economics,

why should electoral expenditures be understood to be any different? One response is that the electoral context has been recognized by the courts to be the most central for the exercise of core First Amendment values, which is why restrictions on the political speech rights of individuals are given the most searching analysis in this context.⁸⁸ Conversely, corporations and unions are not members of the polity with voting rights, so their exercise of First Amendment rights in the electoral context has been understood to be properly limited (at least until *Citizens United*). As stated by the Court in *First National Bank of Boston v. Bellotti*, which upheld a corporation's right to spend money to promote its views on a statewide referendum, "our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office," where the interests in preserving public confidence in government and protecting dissenting shareholders are "weighty."⁸⁹

A further response is to argue that many other business decisions with political implications, such as engaging in lobbying or supporting trade associations that engage in lobbying, at least can be expected to contribute directly to the company's welfare. While some shareholders, and perhaps even a substantial minority, may not agree with particular lobbying efforts or trade association activities, they can be safely assumed to share a general preference that the company prospers. (This statement needs to be understood with caveats, since many shareholders today invest through pension funds or mutual funds and may not know or approve of individual companies held by the funds.) With electoral activity, such homogeneity evaporates. In response to these concerns, Lucian Bebchuk and Robert Jackson have

Harvard Law School) (citing Victor Brudney & Allen Ferrell, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191 (2002)).

88. See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (stating that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . .").

89. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788 n.26 (1978); see also *id.* at 787–88 (acknowledging that the interests in preserving public confidence in government and protecting dissenting shareholders are "weighty . . . in the context of partisan candidate elections . . .").

proposed special decision-making rules for companies' electoral involvement to protect shareholders in light of *Citizens United*, since to participate in the electoral process is not an ordinary business decision and should be subject to heightened procedural requirements.⁹⁰ They suggest that shareholder input be required; that there be a role for independent directors; and that there be real-time disclosure of a company's electoral involvement.⁹¹ Yet given how insufficient the mechanisms of "corporate democracy" often are, it is unlikely that even these heightened procedural protections would mitigate all the associational concerns that *Citizens United* creates in the corporate law arena.

But from one corporate law perspective *Citizens United* is unexceptional: the Court treated the corporation as separate from the individuals who contribute to it or can be said to comprise it (managers, employees, shareholders, bond holders and/or other capital providers). This statement should not be interpreted to say that as a matter of First Amendment jurisprudence the majority opinion is correct. It merely points out that the Court's recognition of the corporation as a distinct entity, separate from its constituents, is standard corporate law doctrine. The Court was not always consistent about this, criticizing *Austin* for "permit[ting] the Government to ban the political speech of millions of *associations of citizens*,"⁹² which not only looks through the corporation to one set of its constituents, but mischaracterizes them.⁹³ Yet the aspect of the opinion that is profoundly troubling from a political or First Amendment

90. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010).

91. *See id.* at 84. It is perhaps also the case that charitable contributions should be subjected to a similar regime, at the least involving much clearer disclosure of the amounts and recipients of contributions. *See* Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 U.C.L.A. L. REV. 579 (1997).

92. *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (emphasis added).

93. There are many ways to characterize corporations, but "associations of citizens" is certainly distorted, and very often may be incorrect as a matter of fact, since an increasing percentage of shares of corporations are held by institutions, rather than "citizens," including foreign institutions and foreign residents. *Citizens United*, a non-profit association formed to promote the political views of its members, can be characterized as an "association of citizens," but *General Motors* cannot be so characterized.

perspective—that the corporate entity as a separate entity has been imbued with electoral free speech rights—is unproblematic as a matter of corporate law doctrine. In contrast, one disconcerting aspect of the Second Circuit’s opinion in *Kiobel v. Royal Dutch Petroleum Co.*⁹⁴ is its failure to treat the corporation as separate from the people who act for it. It is to that opinion that this discussion now turns.

III. *KIOBEL* AND CORPORATIONS’ LEGAL ACCOUNTABILITY

*Kiobel I*⁹⁵ is one of a number of opinions from the Second Circuit arising out of international human rights challenges to the alleged cooperation of the Royal Dutch Shell Group of companies with the Nigerian government to violently suppress political opposition to Shell’s activities in Nigeria. One of these cases, *Wiwa v. Royal Dutch Petroleum Co.*,⁹⁶ established important principles that expand possible ATS liability in the United States. In that opinion, the Second Circuit held that personal jurisdiction over the Royal Dutch Petroleum Company and the Shell Transport and Trading Company (together, Royal Dutch Shell), Dutch and English holding companies respectively, was proper in the United States, given the ongoing presence of Royal Dutch Shell’s investor relations office in New York.⁹⁷ It further held that dismissal for reasons of *forum non conveniens* was improper in light of the consideration that should be given to the plaintiffs’ choice of forum.⁹⁸ *Kiobel I* and *Kiobel II* clearly have the opposite import, dramatically contracting the scope of potential ATS liability.

94. *Kiobel I*, 621 F.3d 111 (2d Cir. 2010), *aff’d*, 133 S. Ct. 1659 (2013).

95. *Id.*

96. *Wiwa v. Royal Dutch Petrol. Co.*, 226 F.3d 88 (2d Cir. 2000).

97. *Id.* at 95–96.

98. *Id.* at 99–100. This case was settled on the eve of trial for \$ 15.5 million, a large portion being contributed to a Nigerian NGO to use for economic development purposes. For an overview of the cases against Royal Dutch Shell, see *Wiwa et al v. Royal Dutch Petroleum et al*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum#files> (last visited Nov. 14, 2013). The Center for Constitutional Rights (CCR) has acted as co-counsel in all of these cases.

A. Facts and Legal Background of Kiobel

The facts underlying all of the Royal Dutch/Shell litigation arise out of the Nigerian government's suppression of the Ogoni people's political activism in response to Royal Dutch Shell's (and other oil companies') drilling in the Ogoni region of the Niger River delta in Nigeria. According to the plaintiffs (and confirmed by a number of international human rights and environmental organizations), the oil development and extraction activities in the Ogoni region since 1958 have involved decades of extensive gas flaring, enormous environmental damage to lands and waters, and forcible resettling of villages. These activities, which plaintiffs in both cases allege to have depended on coercive appropriation of Ogoni land, were said to have provided little or no economic benefits to the Ogoni people but rather to have destroyed their land, water and air.⁹⁹

The Ogoni people's resistance to these activities developed slowly, but eventually became highly visible through actions of the Movement for the Survival of the Ogoni People (MOSOP) led by Ken Saro-Wiwa, an internationally-recognized writer. The complaints in both *Wiwa* and *Kiobel* allege that Royal Dutch Shell Group's wholly-owned Nigerian subsidiary, the Shell Petroleum Development Company of Nigeria, Ltd. ("Shell Nigeria"), eventually encouraged the Nigerian government in its violent suppression of Ogoni political activism. The complaint in *Wiwa* contended that Shell Nigeria recruited the Nigerian government to arrest Ken Saro-Wiwa and other leaders of MOSOP on false charges, falsely imprison them, torture them, and try them and put them to death, all on false evidence; and that various other members of the Ogoni community were beaten and shot.¹⁰⁰ Similarly, the complaint in *Kiobel* alleged that Shell Nigeria aided the Nigerian military in its egregious human rights abuses, including the beating and raping of villagers, false arrests, torture and extrajudicial killings.¹⁰¹ The specific allegations against Shell Nigeria in *Kiobel* were that it supported the military's efforts by giving soldiers food, helping with transportation, allowing

99. The facts discussed here are taken from the discussion of the facts in *Wiwa*, 226 F.3d at 92–94.

100. *Id.* at 92.

101. *Kiobel I*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (U.S. 2013).

Shell's property to be used as a staging ground for the military's activities, and paying the soldiers.¹⁰²

The ATS provided the subject matter jurisdictional basis for plaintiffs to bring both *Wiwa* and *Kiobel* in the United States. This statute, enacted as part of the Judiciary Act of 1789, grants original jurisdiction in the United States District Courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁰³ The statute was virtually ignored for almost 200 years. Then, in 1980, the Second Circuit upheld the assertion of ATS jurisdiction in a case challenging a Paraguayan police officer's actions in torturing to death the brother of the plaintiff.¹⁰⁴ Fifteen years later, the Second Circuit decided for the first time that private actors, as well as state actors, can be reached in ATS cases.¹⁰⁵ Since then, the ATS has been the statutory basis for a wide range of cases being brought in U.S. courts alleging that the actions of U.S. and foreign multinationals have violated international human rights law.¹⁰⁶ The Supreme Court gave cautious encouragement to this use of the statute in 2004 when it decided in *Sosa v. Alvarez-Machain* that the ATS is a basis for subject matter jurisdiction in the United States, and that the substantive contours of the cause of action are defined by *jus cogens* norms of international human rights law, as incorporated into U.S. federal common law.¹⁰⁷

102. *Id.*

103. Alien Tort Claims Act, 28 U.S.C. § 1350 (2008). "Alien Torts Claim Act" and "Alien Torts Statute," or "ATS," are used interchangeably.

104. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). At the time of the case the police officer was living in New York, which is why the court had personal jurisdiction over him.

105. *See* *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

106. In order to bring a foreign citizen or multinational into court in the United States the assertion of personal jurisdiction must be consistent with due process. See Williams, *supra* note 1, for further discussion of this point and for discussion of the numerous procedural and substantive difficulties ATS litigation presents. For a comprehensive overview of the legal developments underlying use of the ATS as a mechanism of corporate accountability, written by one of the attorneys who is co-counsel on many of these cases, see Beth Stephens, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533 (2004).

107. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

While the ATS is important in allowing these cases to be heard in U.S. courts, there have been very few successful outcomes against corporations where cases have proceeded to a final judgment or settlement.¹⁰⁸ Notwithstanding these meager positive results to date, the use of the ATS as a mechanism for bringing corporate accountability claims is only fifteen years old. Given how long litigation takes in the United States, that is a relatively short period of time for the development of a new area of law. Moreover—and this may be of little comfort to unsuccessful plaintiffs—at the least ATS claims allow the facts of the alleged corporate activities to be brought into the open through court-monitored discovery, creating an important mechanism for promoting transparency and corporate accountability. The decision of the Second Circuit in *Kiobel I* is a significant defeat for claimants, however, and its affirmance on other grounds by the U.S. Supreme Court may well portend the end of ATS

108. *See Doe I. v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *case dismissed on stipulation upon settlement* 403 F.3d 708 (9th Cir. 2005). This case, challenging the Unocal company's cooperation with the Burmese government's forced resettlement of villages and use of forced labor to build a pipeline to transport natural gas, was settled on favorable terms, including substantial funds to an NGO working to improve local economic conditions. *See supra* note 98, for a discussion of how *Wiwa* was settled. Two other cases returned outcomes for plaintiffs after trial: *Chowdhury v. Worldtel Bangl. Holding, Ltd.*, 2009 U.S. Dist. LEXIS 131483 (2009) (\$1.5 million torture verdict against defendant); *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (judgment against defendant in labor trafficking case). In addition, there have been a number of successful ATS cases brought against government actors. *See, e.g.*, *Arce v. Garcia*, 434 F.3d 1254, 1259 (11th Cir. 2006) (a jury awarded \$54,600,000 to Salvadoran refugees who claimed they were tortured by the El Salvador Military); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1151 (11th Cir. 2005) (plaintiff administrator of the estate of a Chilean economist who was murdered by Chilean Military Officers, was awarded \$3 million in compensatory damages and \$1 million in punitive damages); *Abebe-Jira v. Negewo*, 72 F.3d 844, 846 (11th Cir. 1996) (Plaintiffs, former Ethiopian prisoners who sued the Ethiopian government alleging torture, were each awarded \$200,000 in compensatory damages, and \$300,000 in punitive damages); *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1253–54 (S.D. Fla. 1997) (Plaintiffs, the estates of United States citizens who were killed by the Cuban Air Force as they were flying to Cuba on a humanitarian mission, were awarded \$45.9 million); *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp 1460, 1463–64 (D. Haw. 1995) (Plaintiffs, victims of torture under the Former President of the Philippines, Ferdinand E. Marcos, were awarded \$1.2 billion in exemplary damages).

corporate accountability litigation, since (a) it would be the highly unusual case in which individual corporate employees acting in foreign countries would be susceptible to the personal jurisdiction of U.S. courts, and (b) even if they were, they could not be sued if their actions took place outside of the United States.

B. The Kiobel I Decision

In an opinion by Judge Cabranes that was joined by Chief Judge Jacobs, the Second Circuit held that a corporation as a juridical entity cannot be sued under the ATS.¹⁰⁹ The court stated:

From the beginning, however, the principle of individual liability for violations of international law has been limited to natural persons—not “juridical” persons such as corporations—because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an “international crime” has rested solely with the individual men and women who have perpetuated it.¹¹⁰

The court recognized that “nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation”¹¹¹ But it held that “insofar as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs’ claims fall outside the limited jurisdiction provided by the ATS.”¹¹²

A key aspect of the court’s rationale was that “international law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS.”¹¹³ In seeking to define the customary international law applicable to the question of corporate liability, the court canvassed widely accepted sources of international legal norms, including treaties, prior tribunals

109. *Kiobel I*, 621 F.3d 111 (2d Cir. 2010), *aff’d*, 133 S. Ct. 1659 (2013).

110. *Id.* at 119.

111. *Id.* at 122.

112. *Id.* at 120.

113. *Id.* at 126.

(especially the Nuremberg trials of I.G. Farben officials for their role in collaborating with the Nazis); other tribunals; and the writings of recognized international law scholars. It concluded that “customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations.”¹¹⁴

In concurring in the judgment of dismissal of the plaintiff’s claims,¹¹⁵ but not in the court’s rationale, Judge Leval wrote that the majority’s analysis went astray in looking to international law to define both the substantive wrong and the proper procedures for enforcement.¹¹⁶ Customary international law defines the actions that are violations of *jus cogens* norms—that is, norms that are specific, universal, and obligatory.¹¹⁷ In that sense, the majority in *Kiobel I* was correct that “international law . . . governs the scope of liability. . . .”¹¹⁸ Yet, according to Judge Leval, international law then leaves to domestic law questions of enforcement, including whether an alleged violation can be addressed by criminal enforcement or by private civil litigation.¹¹⁹ Unlike the United States, most countries in the world do not impose criminal liability on juridical entities such as corporations either for crimes defined by domestic statutes or international law. This denial of corporate criminal liability is premised on the belief that an artificial entity cannot have a criminal intent, and that criminal punishment of a juridical entity cannot serve

114. *Id.* at 120.

115. In a prior opinion, the Second Circuit had held that in order to establish liability for aiding and abetting violations of international human rights law, plaintiffs must establish that the defendants acted with a purpose to bring about the violation, and that merely knowing that a violation was likely to result was insufficient. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). Judge Leval concurred in the judgment of dismissal in *Kiobel I* because the evidence as alleged did not show that Shell Nigerian officials acted with that purpose. This aspect of Second Circuit law has recently been challenged in an opinion that also rejects the *Kiobel I* majority’s ruling on corporate immunity. *See Doe v. Exxon Mobil Corp., Inc.*, 654 F.3d 11 (D.C. Cir. 2011) (holding that a “knowledge” *mens rea* is sufficient under customary international law to establish aiding and abetting liability).

116. *Kiobel I*, 621 F.3d at 152 (Leval, J., concurring).

117. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

118. *Kiobel I*, 621 F.3d at 126.

119. *Id.* at 152 (Leval, J., concurring).

the “punitive objectives of punishment.”¹²⁰ That, according to Judge Leval, is why, for example, the Nuremberg Tribunal did not assert criminal jurisdiction over I.G. Farben as a company.¹²¹ And yet, “[i]n contrast, the imposition of civil liability on corporations serves perfectly the objective of civil liability to compensate victims for the wrongs inflicted on them and is practiced everywhere in the world.”¹²² While the United States is unique in granting its national courts jurisdiction for civil enforcement of violations of customary international law, Congress has clearly done so in the ATS, according to Judge Leval,¹²³ and that Congressional mandate must be respected.

The holding in *Kiobel I* disclaiming the existence of corporate civil liability for violations of customary international law has been explicitly rejected in two recent Circuit Court opinions, one by Judge Rogers of the D.C. Circuit in *Doe v. Exxon Mobil Corp.*¹²⁴ and the other by Judge Posner of the Seventh Circuit in *Flomo v. Firestone Natural Rubber Co.*¹²⁵ Both opinions agree with Judge Leval’s analysis, specifically that international law defines the scope of the substantive wrong, and domestic law the mode of enforcement.¹²⁶ Judge Rogers explained:

Although customary international law provides rules for determining whether international disapprobation attaches to certain types of conduct, such as torture, extrajudicial killing, prolonged arbitrary detention, or aiding and abetting the same, one could not expect . . . states out of “a sense of legal obligation,” to produce detailed rules of

120. *Id.*

121. *Id.* at 155.

122. *Id.* at 152.

123. *Id.* at 183.

124. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15–16 (D.C. Cir. 2011) (challenging the alleged actions of Exxon Mobil acting in collaboration with the Government of Indonesia to suppress political activism in Aceh, Indonesia by engaging in excessive force, extrajudicial killings, forced resettlements, and other violations of plaintiffs’ international human rights).

125. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1015 (7th Cir. 2011) (challenging the use of child labor on Firestone’s Liberian rubber plantation on behalf of 23 Liberian children).

126. *Exxon Mobil*, 654 F.3d at 42–43; *Flomo*, 643 F.3d at 1017.

procedure and evidence on matters like *res judicata*, burdens of proof, and *respondeat superior*.¹²⁷

Moreover, both opinions asserted that an important factual premise of the *Kiobel I* court was wrong. The *Kiobel I* majority was convinced its analysis was correct by what it interpreted as a lack of precedent for punishing a corporation, rather than its employees, for violations of customary international law, even in such egregious examples as chemical company I.G. Farben's collaboration with the Nazis. In fact, Judge Posner pointed out in *Flomo*, corporations such as I.G. Farben were punished: they were dissolved and on the authority of customary international law.¹²⁸ But he would not have been troubled even if there had been no such punishment: "And suppose no corporation *had* ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be."¹²⁹ The *Exxon Mobil* court, in scholarly detail, also recounted the punishments that had been levied against corporations found to have collaborated with the Nazis, including dissolution, and that these punishments were specifically tied to violations of international law.¹³⁰

This question of the liability of a corporation, as a juridical entity, for violations of customary international law has an "intersectionality" that led the *Kiobel I* majority astray, in our opinion. Does the resolution of the case really involve only international law, as the *Kiobel I* majority stated,¹³¹ or does it involve the intersection of international law with domestic tort law and agency law? The *Exxon Mobil* majority recognized these other bodies

127. *Exxon Mobil*, 654 F.3d at 42–43; *see also id.* at 50 (claims of corporate immunity for international human rights violations "overlook[] the key distinction between norms of conduct and remedies . . .").

128. *Flomo*, 643 F.3d at 1017.

129. *Id.* (emphasis in original).

130. *Exxon Mobil*, 654 F.3d at 52–53, (citing, *inter alia*, Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1098 (2009)).

131. The opinion in *Exxon Mobil* detailed several ways in which the *Kiobel* majority misinterpreted international law on the question of corporate liability. *See, Exxon Mobil*, 654 F.3d at 40–43, 51–55. *See also id.* at 51 (asserting that "the technical accoutrements to the ATS cause of action, such as corporate liability and agency law, are to be drawn from federal common law . . .").

of law as relevant. In examining the history of the ATS, the court found that “[b]y 1789, corporate liability in tort was an accepted principle of tort law in the United States.”¹³² Indeed, the *Exxon Mobil* majority concluded:

The law of the United States has been uniform since its founding that corporations can be held liable for the torts committed by their agents. This is confirmed in international practice, both in treaties and in legal systems throughout the world. Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for “shockingly egregious violations of universally recognized principles of international law.”¹³³

In fact, the question that the *Kiobel I* majority did not address is precisely the one that the *Exxon Mobil* opinion highlights: if the individual officers or directors can be held liable for international human rights violations, as *Kiobel I* recognized, on what theory would the corporation itself *not* be vicariously liable? After all, the issue before the court was not the *direct* liability of the company, that is, the liability of the company based on official actions of the board

132. *Id.* at 47.

133. *Id.* at 57 (quoting *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983)). The *Exxon Mobil* decision was a 2-1 opinion, in which Circuit Judge Rogers was joined by Circuit Judge Tatel, and Circuit Judge Kavanaugh dissented. Judge Kavanaugh’s dissent was based on four, independent grounds: (1) The ATS does not apply outside the United States, given the presumption against extraterritorial application of statutes; (2) the ATS does not apply to claims against corporations; (3) the ATS must be construed consistently with the TVPA, which clearly excludes juridical persons as defendants, *see supra* note 10; and (4) extending ATS jurisdiction in this case would be in conflict with the determination of the Executive Branch that Indonesia is an important ally of the United States and jurisdiction should not be so extended. *Exxon Mobil*, 654 F.3d at 72–73 (Kavanaugh, J., dissenting). Judge Kavanaugh’s rationale for not extending ATS to claims against corporations is based on, and quotes with approval, the rationale of the *Kiobel* majority. *See id.* at 83–84.

of directors, acting as a board. Rather, the question was the *vicarious* liability of the Nigerian subsidiary for the torts of its employees, based on the very well established common law theory of *respondeat superior*. *Respondeat superior* is a strict form of vicarious liability of the company for the torts and other wrongs committed by its employees in the scope of their business—strict because even if the employees are acting contrary to company policy or direct instructions, the company will be vicariously liable for their actions.¹³⁴

A further, separate question is the liability of the parent companies, the Royal Dutch Petroleum Company (a Netherlands corporation) and Shell Transport and Trading Co., PLC (an English corporation until 2005, when it was reincorporated in the Netherlands), for the actions of the Nigerian subsidiary, which, as the case was framed, would require piercing the corporate veil under the law of the state of incorporation.¹³⁵ So to ask if the two Royal Dutch Shell companies can be directly liable under international law, as the Second Circuit has framed the issue, is to ask the wrong question. The questions should be: can the Nigerian subsidiary corporation be vicariously liable for this type of wrong under Nigerian law¹³⁶ if its employees are found to have committed international human rights violations? If it is vicariously liable, is there any reason to pierce the corporate veil to reach the parent companies? As this line of inquiry shows, ultimately finding ATS liability over the parent companies will be difficult, but not because corporations as juridical entities are not amenable to suit under the ATS.

C. *Kiobel II*

On April 17, 2013, the Supreme Court unanimously affirmed the judgment of the Second Circuit. In four separate opinions, the nine justices relied solely on the extraterritoriality issue that the Court had

134. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 7.03 (2006).

135. As noted in the paragraph above, the Royal Dutch Shell parent company could theoretically be directly liable if actions and decisions of the board were responsible for the alleged violations of the plaintiffs' international human rights, which would be a separate basis other than piercing on which the parent could be liable.

136. New York choice of law rules would apply and would dictate the use Nigerian law on *respondeat superior* would prevail.

addressed in reargument,¹³⁷ and none of the opinions directly addressed the corporate liability rationale that had been the basis of the Second Circuit's 2-1 ruling. Writing for the Court (and joined by Justices Scalia, Kennedy, Thomas, and Alito), Chief Justice Roberts framed the question as "not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign."¹³⁸ The Court turned to "a canon of statutory interpretation known as the presumption against extraterritorial application," which "provides that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'¹³⁹ Examining the "text, history, and purposes of the ATS,"¹⁴⁰ the Court found no basis to derogate from this presumption. It concluded that "all the relevant conduct took place outside the United States," and that the claims did not "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritoriality."¹⁴¹

Justices Kennedy and Alito each wrote a brief concurrence. The former emphasized the fact-specific nature of the Court's holding, noting that in future cases "the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."¹⁴² The latter wrote separately "to set out the broader standard that [led him] to the conclusion that this case falls within the scope of the presumption," emphasizing that the domestic conduct alleged in this case did not fall within "the 'focus' of congressional concern" in 1789—"violation of safe conducts, infringement of the rights of ambassadors, and piracy"—but that it might in future cases.¹⁴³

Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) filed a lengthy concurrence. Although unwilling to rely on the presumption against extraterritoriality, he agreed with the Court's conclusion that, in *Kiobel*, "the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide

137. *Kiobel II*, 133 S. Ct. 1659, 1662 (2013).

138. *Id.* at 1664.

139. *Id.* (citation omitted).

140. *Id.* at 1665.

141. *Id.* at 1669.

142. *Id.* (Kennedy, J., concurring).

143. *Id.* at 1670 (Alito, J., concurring) (citations omitted).

jurisdiction.”¹⁴⁴ Specifically, he pointed out, this is what some have called a “foreign-cubed” case: “The plaintiffs are not United States nationals . . . The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so.”¹⁴⁵ In the future, however, cases presenting a more direct connection with the United States, including conduct by a defendant that “substantially and adversely affects an important American national interest,” might warrant a different conclusion.¹⁴⁶

Although none of the opinions addressed the corporate liability issue directly, both the Court and Justice Breyer commented in passing on the status of corporate defendants, in ways that do not conflict with the Second Circuit’s decision. The Chief Justice’s opinion for the Court, immediately after posing the question of whether the claims asserted “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritoriality,” observed that “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”¹⁴⁷ In a generally parallel vein, Justice Breyer noted at the end of his opinion that the defendants “are two foreign corporations” whose “only presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company).”¹⁴⁸ He concluded that, “under these circumstances, *even if the New York office were a sufficient basis for asserting general [personal] jurisdiction . . . it would ‘reach too far to say’ that such ‘mere corporate presence suffices.’*”¹⁴⁹ Thus, the Court and the concurring justices apparently agreed that corporate presence, a traditional linchpin of personal jurisdiction, cannot by itself create subject matter jurisdiction under the ATS.

At the end of the *Kiobel* saga, we know two things: (1) that a majority of today’s Supreme Court does not believe that the ATS can be applied to extraterritorial conduct, though at least four justices are

144. *Id.* at 1671 (Breyer, J., concurring).

145. *Id.* at 1678.

146. *Id.* at 1671.

147. *Kiobel II*, 133 S. Ct. at 1669.

148. *Id.* at 1677 (Breyer, J. concurring).

149. *Id.* at 1678 (citations omitted) (emphasis supplied).

open to reassessing that conclusion on different facts; and (2) that it is still the law of the Second Circuit that corporations cannot be sued under the ATS, even for the torts of their employees and agents. As we will argue in the remainder of the article, these results contribute to a strong negative message about the accountability of global corporations for socially irresponsible behavior outside their home countries.

IV. IMPLICATIONS FOR CORPORATE SOCIAL RESPONSIBILITY

In *Trustees of Dartmouth College v. Woodward*, the Supreme Court said, for the first time, that “[a] corporation is an artificial person, existing in contemplation of law, and endowed with certain power and franchises” by state law.¹⁵⁰ It was this aspect of a corporation’s existence, its artificial personhood, having only the powers that states decide are necessary for it to fulfill its economic purpose, that Chief Justice Rehnquist emphasized in his dissent from the recognition of corporate free speech rights in *First National Bank of Boston v. Bellotti*.¹⁵¹ Chief Justice Rehnquist thought that the proper constitutional inquiry was to “seek to determine which constitutional protections are ‘incidental to [the corporation’s] very existence.’”¹⁵² That inquiry led him to view as essential the constitutional right to Due Process for the protection of property, and—for media corporations—the First Amendment right to express political opinions. But other liberty interests, such as First Amendment rights for corporate political speech generally, he thought not only unnecessary for corporations to advance their economic interests, but dangerous. In prescient terms he stated that:

A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political

150. *Trs. of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819).

151. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 823–826 (1978) (Rehnquist, C.J., dissenting).

152. *Id.* at 823 (quoting *Dartmouth College*, 17 U.S. at 636).

sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial Branches of the State and Federal Governments remain open to protect the corporation's interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection.¹⁵³

We have come far from 1819 and the *Dartmouth College* Court's view of the corporation as an "artificial person." As the *Kiobel I* majority recognized, the idea of the corporation "as 'persons' with duties, liability and rights . . . continues to evolve in complex and unexpected ways."¹⁵⁴ With this view untouched by the Supreme Court, we have arrived at the point—at least in the Second Circuit—of looking through the corporation to its constituent employees, including directors and officers, treating the corporation itself as "invisible [and] intangible"¹⁵⁵—but only for the purposes of adjudicating its international human rights obligations. If that happens, what the Court will have constructed is a tragically ironic jurisprudence that ignores the corporate entity in the context of international accountability but recognizes it for every other purpose, from limiting liability to tax avoidance¹⁵⁶ to exercising broad political rights.

The general point we would emphasize is that the existing mechanisms for corporations to exercise political power in the United States are varied and extremely robust, while the mechanisms for imposing accountability—certainly accountability for international

153. *Bellotti*, 435 U.S. at 825–26 (Rehnquist, C.J., dissenting).

154. *Kiobel I*, 621 F.3d at 117 n.11 (citing *Citizens United v. FEC*, 558 U.S. 310 (2010)).

155. *Dartmouth College*, 17 U.S. at 636.

156. One situation in which the separate existence of parent and subsidiary corporations is recognized is in inter-company sales and transfers of intellectual property, both areas exploited by sophisticated multinationals to reduce their tax liabilities on a worldwide basis. *See, e.g.*, David Kocieniewski, *G.E.'s Strategies Let it Avoid Taxes Altogether*, N.Y. TIMES, Mar. 25, 2011, at A1 ("Although the top corporate tax rate in the United States is [thirty-five] percent, one of the highest in the world, companies have been increasingly using a maze of shelters, tax credits and subsidies to pay far less.").

human rights violations—are attenuated and insufficient. Even before *Citizens United*, corporations had broad authority to run political advertisements (just not in the months before a primary or general election), to establish political action committees (PACs), to engage in political advertising, and to use the funds and other organizational resources of the firm to communicate with shareholders and employees and encourage them to support the PAC. Corporations, because of their broad free speech rights, have unlimited power to engage in “issue advertising.” Even blatantly self-interested, misleading advertisements by corporations and corporate-funded think tanks on such topics as climate change or “clean coal” cannot be excluded from the marketplace of ideas because of how the First Amendment has been construed.¹⁵⁷ Corporations have broad constitutional authority to engage in lobbying, and do so prodigiously.¹⁵⁸ One would expect the lobbying efforts of corporations to be self-interested, and corporate law might demand it to be. But as we have seen in the United States in recent years, the self-interested lobbying of financial, oil, gas, coal, insurance, and pharmaceutical corporations has permeated the political environment and has created difficulties for advancing legislation in the public interest even where a majority of Americans support that legislation.¹⁵⁹ In this context, giving corporations additional, unrestrained powers to shape electoral outcomes is not only

157. See Jane Mayer, *Covert Operations*, NEW YORKER, Aug. 2010 (describing in depth how the billionaire Koch Brothers have used the resources of their oil, gas and pipeline corporation, Koch Industries (which is one of the top ten air polluters in the country) to lobby government, to fight legislation related to environmental protection and climate change, and to establish anti-regulatory think tanks such as the Mercatus Institute at George Mason University Law School, “Citizens for a Better Environment,” and other such deceptively-named entities to fight environmental regulations).

158. See, e.g., ROBERT J. SHAPIRO & DOUGLAS DOWSON, MANHATTAN INST. LEGAL POL’Y, CORPORATE POLITICAL SPENDING: WHY THE NEW CRITICS ARE WRONG, (2012), http://www.manhattan-institute.org/pdf/lpr_15.pdf (reporting that corporations spent \$6.8 billion on lobbying during the 2010 election cycle); Center for Responsive Politics, *Influence & Lobbying: Organization Profiles*, available at <http://www.opensecrets.org/orgs/index.php> (last visited Nov. 14, 2013) (listing several major corporations as among the leading spenders on lobbying).

159. See generally JACOB S. HACKER & PAUL PIERSON, WINNER TAKE ALL POLITICS (2010) (describing how policy positions supported by a majority of Americans fail to become law today given the influence of money in politics).

unnecessary, but deeply problematic, leading America away from any vision of democracy that the Founders would recognize, in our view.

The particular problem for the promotion of CSR is the shrinking of the shadow of the law. As we have documented elsewhere, CSR participants and stakeholders cite many possible motivations for CSR activity.¹⁶⁰ They range from a good-faith belief in improving the world to a more cynical concern about image management.¹⁶¹ But many people in the field put primary emphasis on another motive: preempting “hard” regulation.¹⁶² That is, companies engage in often-elaborate “soft” self-regulatory activities in order to head off demands for national and international law makers to impose traditional legal controls. In this important sense, companies pursue CSR in the shadow of the law, both current and prospective.

One example of this that we have studied in detail is the Equator Principles, a self-imposed (and largely unenforceable) regime of social and environmental review that has been agreed to by the large multinational banks that finance huge infrastructure projects in the developing world.¹⁶³ In the view of many of those who have participated in this endeavor, a primary has been to build a case that “hard” regulation by national and international authorities is unnecessary.¹⁶⁴ Almost all of the relevant stakeholders believe that the Equator Principles are doing some good, at least by making the banks stop and study the potential social and environmental consequences of the projects they fund.¹⁶⁵ If so, then any motivation is welcome.

Good-faith belief in CSR and the need to manage a company’s image are constants, motives that will exist (or not) regardless of external influences like legal policy. But corporate executives and boards will pursue soft-law CSR solutions to preempt hard law only if the threat of hard law is real. If, on the contrary, the Supreme Court takes away a historically significant means of enforcing responsibility for human rights violations, then a potentially

160. Conley & Williams, *Engage*, *supra* note 1, at 20–21.

161. *Id.* 13–18.

162. *Id.* at 20; Conley & Williams, *Global Banks*, *supra* note 1, at 564–65.

163. Conley & Williams, *Global Banks*, *supra* note 1, at 542–49.

164. *Id.* at 564–65.

165. *Id.* at 567–71.

important motivation for voluntary CSR activities will have been undermined. Since the Court has, at the same time, expanded corporations' ability to influence the political process, that effect will have been multiplied. The shadow of the law will diminish in extent even as the power of corporations to influence the law's content will grow.

CONCLUSION

Corporate social responsibility can be interpreted as yet another example of market self-regulation, asking corporations to volunteer to recognize and address their negative externalities in ways beyond what is required by law. With respect to core financial issues, the track record of devolving the task of advancing public welfare to corporate self-regulation does not inspire confidence. Consider the example of derivatives, which eventually undermined global financial stability in spectacular fashion. Why should we expect better in the case of corporate social responsibility? On the contrary, the same fragility and insufficiency seem likely. This skepticism only grows in the context of *Citizens United* and *Kiobel*, which, respectively, expanded the ability of corporations to exert political influence and narrowed the mechanisms of potential corporate accountability. In a globalizing world, recognizing the corporation as a "juridical person" for every purpose other than for legal accountability for international human rights violations cannot be brought into balance with the voluntary constraints of corporate social responsibility.