The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights

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ABSTRACT

The *Citizens United* and *Hobby Lobby* decisions of the US Supreme Court stoked the longstanding controversy over the court's doctrine that corporations are persons entitled to certain constitutional rights on the same basis as citizens. It is less widely noted that, in some fields of international economic law, firms are increasingly considered not just legal persons but bearers

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of *human* rights. This article critically examines the incipient arrogation of human rights discourse in the context of international investment arbitration, where the claims of firms are often articulated and adjudicated with language and standards borrowed from human rights law. This development, which the article describes as the *dehumanization of human rights*, is part of a larger process whereby international economic institutions accord legal recognition and certain protections to private economic actors. The article traces the important implications of business corporations being considered as bearers of human rights for determining the proper scope and purpose of international human rights norms, and for conceptualizing their relationship to constitutional democracy.

> A merchant, it has been said very properly, is not necessarily the citizen of any particular country. It is in a great measure indifferent to him from what place he carries on his trade; and a very trifling disgust will make him remove his capital, and together with it all the industry which it supports, from one country to another.
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> –Adam Smith, *Wealth of Nations* [1776]

I. INTRODUCTION

Notwithstanding all of the controversies that have swirled around the idea of human rights (including its historical origins,[1] substantive scope,[2] philo-

1. The origin of contemporary human rights norms has variously been traced, *inter alia*, to the Christian natural law tradition, the Magna Carta and the 1689 English Bill of Rights, the political thought of the Enlightenment, eighteenth century bills of rights, nineteenth century movements to abolish slavery and outlaw the transatlantic slave trade, and post-Holocaust consciousness about the value of human dignity. René Cassin, one of the framers of the Universal Declaration of Human Rights, proclaimed that "the concept of human rights comes from the Bible, from the Old Testament, from the Ten Commandments." (*Quoted in* Micheline R. Ishay, The History of Human Rights: From Ancient Times to the Globalization Era 19 (2004)) Others contest the historical accuracy of attributing such early genealogies to the contemporary human rights movement. For outlines of this debate, *see* Hersch Lauterpacht, International law and Human Rights, Pt. I, § 2 (1968 [1950]); Lynn Hunt, Inventing Human Rights: A History (2007); Jenny S. Martinez, The Slave Trade and the Origins of International Human Rights Law (2012); Ishay, *supra*; Mary Ann Glendon, A World Made New, at xvii (2002). For a historiographical critique of these origin stories, *see* Samuel Moyn, The Last Utopia: Human Rights In History (2010). For resolutely twentieth century genealogies, *see* Human Rights In The Twentieth Century (Stefan-Ludwig Hoffmann ed., 2011). For a masterful critique of contemporary human rights historiography as exhibiting a "search engine mentality" and as all-too easily ensnared by definitional issues, *see* Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 Harv. L. Rev. 2043 (2013).
2. Landmark contributions to the debate concerning the substantive scope of international human rights guarantees include Philip Alston, *Conjuring up new Human Rights: A Proposal for Quality Control*, 78 AJIL 607 (1984); Maurice Cranston, *Human Rights, Real and Supposed*, *in* The Philosophy of Human Rights 163 (Patrick Hayden ed., 2001); Henry Shue, Basic Rights: Subsistence, Affluence, And U.S. Foreign Policy (2d Ed. 1996).

sophical foundations,[3] and institutional implications[4]), one assumption has been relatively uncontroversial: the bearers of human rights are human beings, who are entitled to certain standards of treatment by virtue of being human.[5] This article documents and critically appraises some developments

3. Theories of human rights that rest on hypotheses concerning the essential features of humanity or of human flourishing that are held to be worthy of protection include James Griffin, On Human Rights (2008) (arguing that human rights protect "human standing" or personhood as an essential value, 32–33); Alan Gewirth, Human Rights: Essays on Justification and Applications (1982) (arguing that human rights follow from the necessary conditions of human agency); John Finnis, Natural Law and Natural Rights (1980) (treating human rights as "a usefully detailed listing of the various aspects of human flourishing and fundamental components of the way of life in a community" that encourages such flourishing, *id*. at 221); Jack Donnelly, The Concept of Human Rights (1985) (holding that human rights reflect and help to fulfill a moral ideal of human "nature" and "human potentials"). By contrast, political or nonfoundationalist conceptions of human rights understand human rights not as entitlements derived from any inherent features of humanity but as standards of treatment codified by international law that condition state sovereignty and make violations a matter for international concern. *See* Michael Ignatieff, Human Rights as Politics and Idolatry (2001) (treating human rights as a language of political struggle rather than moral trumps); Joseph Raz, *Human Rights without Foundations*, *in* The Philosophy of International Law 321, 329 (Samantha Besson & John Tasioulas eds., 2010) (arguing that human rights constitute a political and legal, rather than metaphysical or moral, category of norms "whose violation is a reason for action against states in the international arena"); Charles R. Beitz, The Idea of Human Rights 31–32 (2009) (arguing that "human rights are standards for the governments of states whose breach is a matter of international concern"); Joshua Cohen, *Minimalism about Human Rights: The Most We can Hope for*? 12 J. Pol. Phil. 190 (2004) (arguing that a conception of human rights that can serve as the centerpiece of a global public reason in a pluralistic world must remain agnostic about foundational concerns); Kenneth Baynes, *Discourse Ethics and the Political Conception of Human Rights*, 2 Eth. & Gl. Pol. 1 (2009) (arguing that the discourse ethics perspective on human rights and the political conception espoused by Cohen, Ignatieff, and others share an emphasis on inclusion and political membership). For a critique of the political approach, see Jeremy Waldron, *Human Rights: A Critique of the Raz/Rawls Approach*, N.Y.U. Pub. Law & Legal Theory, Working Paper No.13–32 (2013) (arguing that by making human rights contingent on the willingness of the international community to prevent their violation, the political conception unduly limits their scope and fails to condemn violations short of mass abuse).
4. For a debate about the implications of human rights for institutions of global distributive justice, see Thomas W. Pogge, World Poverty And Human Rights (2002); Thomas Pogge and his Critics (Alison M. Jaggar ed., 2010).
5. The phrase "by virtue of being human" can be understood in two distinct senses, one foundationalist and the other nonfoundationalist. Understood in the former sense, this statement is indeed controversial, since it means that the entitlement to human rights is derived from some intrinsic, natural feature of humanity. As Donnelly writes, in contrast to legal rights, which have "law as their source. . . . Human rights would appear to have humanity—'human nature'—as their source." Jack Donnelly, Universal Human Rights In Theory and Practice 13 (3d ed. 2013). The derivation of universal human rights from purportedly essential features of humanity founders on the essentially contested nature of these features; for a critique of this approach as "philosophical parochialism," see Beitz, *supra* note 3, at 67–68**.** However, the idea that human rights are rights enjoyed "by virtue of being human" is relatively uncontroversial if understood in a trivial, nonfoundationalist sense; that is, if it is understood as meaning that whatever their deep moral, legal, or philosophical sources are taken to be, human rights norms apply to human beings independently of any particularistic identities, attachments, or

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in international law that fundamentally challenge that seemingly banal assumption. Having been championed, enacted, and expanded to protect the dignity and essential interests of human beings, human rights are in the process of being appropriated to protect transnational corporations and bolster their claims against states.[6] This article offers an assessment of this process in the particular context of investor-state arbitration.[7] Whereas one might expect human rights norms to do the work of holding transnational corporations to account for the deleterious effects of their profit-seeking behavior, in actuality, "to the extent that human rights law issues have been referenced *to date* in [international] arbitration awards and rulings, this has generally been in relation to *investor rights* to property, due process, etc."[8] Human rights discourse has been marshaled in the context of international investment law to articulate, adjudicate, and vindicate the claims of investors[9] with concepts, language, and standards borrowed from human rights discourse.[10] I call this process the *dehumanization of human rights.*

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moral qualities that they may have. In other words, unlike the rights of citizens, they are not specific to any status other than the status of being human. Buchanan describes this as a "commitment to affirming and protecting the equal basic moral status of all individuals." Allen Buchanan, The Heart of Human Rights 28 (2013). In similar vein, Pogge writes, "All and only human persons have human rights and the special moral status associated therewith." Thomas W. Pogge, *How Should Human Rights be Conceived? in* The Philosophy of Human Rights, *supra* note 2, at 187, 191.

6. In this article, I use the term "transnational corporation" to refer to a business corporation that conducts business across borders. I choose this term over the more commonly used "multinational corporation" because it also captures firms that have a single country of incorporation (most commonly, a Western capital-exporting state), but nevertheless have transnational operations. *See* Henry J. Steiner, Philip Alston & Ryan Goodman, International Human Rights In Context: Law, Politics, Morals 1387 (3d ed., 2008).
7. José E. Alvarez is among the first to have sounded the alarm concerning the appropriation of international human rights norms in the context of international investment law. *See* José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 Univ. Miami Int-Am L. Rev. 303 (1997).
8. Luke Eric Peterson, Rights & Democracy, Human Rights and Bilateral Investment Treaties 43 (2009), *available at* http://publications.gc.ca/collections/collection_2012/dd-rd/E84-36-2009-eng.pdf.
9. "Investor" is the blanket term used in legal documents, arbitration, and commentary in the field of international investment law to refer to the agent that owns or controls commercial assets in a host state and whose nationality entitles it to bring an arbitral claim against that state. More often than not, this agent is a business firm ordered as a corporation rather than a natural person. Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 44–47 (2d ed., 2012). This usage of the term "investor" contrasts with its usage in the literature on corporate governance, where it is often used to distinguish individual shareholders from the firm and its management. In this article, I follow the former usage, whereby investors are usually business firms structured as corporations.
10. As one observer writes, the contemporary international investment regime is "thoroughly appropriationist in terms of human rights," appealing to human rights norms "to 'buttress' the rights of foreign investors, rather than the rights of individuals and communities affected by investor practices." Malcolm Langford, *Cosmopolitan Competition: The Case of International Investment, in* Cosmopolitan Justice and Its Discontents 179 (Cecilia M. Bailliet & Katja Franko Aas eds., 2011). *See also* James D. Fry, *International Human*

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The arrogation of human rights discourse by transnational business corporations is significant not simply because it recalibrates their status under international law, particularly in relation to states. It also has the potential to destabilize the moral and political force of human rights by diverting their focus from the protection of urgent human interests towards protecting the commercial interests of large firms. Although it is tempting to dismiss the attribution of human rights to corporations as preposterous, the settled practice of recognizing corporations as legal persons and bearers of rights in many domestic legal systems suggests that the issue is more complex. After all, doesn't the domestic recognition of corporate personhood imply that corporations should be regarded as bearers of human rights under international law? Shouldn't we assume that international human rights are simply the international law counterpart to domestic constitutional rights? Clearly, contesting the corporate takeover of human rights discourse necessitates revisiting fundamental questions concerning the nature of human rights norms, the institutions charged with upholding them, and their relationship to domestic constitutional orders. It also raises important theoretical problems regarding the kinds of *agents* that are entitled to claim the protection of international human rights norms, and the kinds of *interests* that these norms are properly called upon to protect.[11] Cosmopolitan accounts of human rights norms often appeal to the need to *expand* the scope of moral consideration and legal protection beyond what cosmopolitans consider to be the morally arbitrary boundaries of national membership.[12] By contrast,

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Rights Law in Investment Arbitration: Evidence of International Law's Unity, 18 Duke J. Comp. & Int'l L. 77, 82 (2007): "Investment arbitration awards refer to human rights and human rights jurisprudence in at least three different ways: "(1) in determining substantive rules; (2) in determining procedural rules; and (3) in dealing with supposed conflicts between human rights and international investment law."

11. I will use the phrase "international human rights norms" to refer to norms and standards codified in legal and quasi-legal international documents, treaties, and relevant protocols, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social and Economic Rights (ICSER), regional human rights regimes, such as the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the American Convention on Human Rights (ACHR), and specialized treaties such as the conventions regarding genocide, war crimes, torture, and racial discrimination. I will use the term "human rights discourse" to refer to the practice of invoking these norms in the context of particular struggles whose effect is not so much to concretize settled human rights norms but to transform their substance through use. As summarized by Goodale, "discursive approaches to human rights assume that social practice is, in part, constitutive of the idea of human rights itself, rather than simply the testing ground on which the idea of universal human [rights] encounters actual ethical or legal systems." Mark Goodale, *Locating Rights, Envisioning Law between the Global and the Local, in* The Practice of Human Rights: Tracking Law Between the Global and the Local 8–9 (Mark Goodale & Sally Engle Merry eds., 2007).
12. On the moral arbitrariness of national membership in the Rawlsian sense, *see* Andrew Kuper, *Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of*

the corporate claim to human rights suggests that *circumscribing* the circle of inclusion presents an equally pressing task, whose omission has allowed the off-label use of human rights norms to proliferate and fueled the charge that human rights represent "the normative gloss of globalized capitalism at its imperial stage."[13]

To address these challenges, the article begins by outlining the high stakes of importing human rights norms into the domain of international economic law. While most existing studies survey the rights and entitlements of transnational corporations with reference to public and private international law, I evaluate them with reference to conceptions of legal personhood developed in the domestic realm (specifically, in the realm of US constitutional law).[14] The development of the idea of corporate personhood in US constitutional law is instructive because the US model "has been aggressively exported through contemporary rounds of economic globalization and thus constitutes an important source for conceptualizing current aspects of the transnational or global political and economic order."[15] I argue that, just as the emergence of corporate personhood doctrines in the US dovetailed with the dismantling of barriers to commerce between states, under international law, the acquisition of rights by private economic actors is eroding states' ability to control commercial and financial flows across their borders.[16] The enlistment of human rights norms advances this process by further constraining the discretion of states to pursue legitimate domestic policies that range from public health to racial equality.

To clarify, the purpose of this article is not to contest the proposition that corporations can or should be considered as persons, whether as a legal, conceptual, or moral issue. Nor do I wish to contest the idea that corporations should be bearers of legal rights and duties, whether under municipal or international law. Rather, I summon conceptual, legal, and institutional arguments as to why it is unconvincing to use existing theories of corporate personhood to extrapolate a claim on the part of business corporations to international *human* rights. On the conceptual front, I argue that none of the three traditional theories of corporate personhood warrants the ascription of international human rights to transnational corporations. On the legal front, I

Persons, 28 Pol. Theory 640 (2000); Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 Phil. & Pub. Aff. 195 (1994); Charles R. Beitz, Political Theory and International Relations (1979). For a reflection on mitigating the moral arbitrariness of national membership, *see* Ayelet Shachar, The Birthright Lottery: Citizenship and Global Inequality (2009).

13. Costas Douzinas, Human Rights And Empire: The Political Philosophy of Cosmopolitanism 176 (2007).

14. For an important exception, see José E. Alvarez, *Are Corporations "Subjects" of International Law?* 9 Santa Clara J. Int'l L. 1 (2011).

15. Joshua Barkan, Corporate Sovereignty: Law and Government Under Capitalism 42 (2013).

16. For an early argument to this effect, *see* Sigmund Timberg, *International Combines and National Sovereigns* 95 U. Pa. L. Rev. 575 (1947).

argue that human rights law is the wrong model for interpreting the treatment owed to business corporations by states under international investment law, not least because human rights obligations are of a universal and categorical, rather than reciprocal and contingent, nature. On the institutional front, I argue that in their regulation of transnational corporations, states should not be held to the standards of treatment mandated by human rights norms; first, because the moral purchase of these standards stems from the vulnerabilities to which human beings–but not corporate agents–are susceptible and from fundamental human interests that corporate agents, for the most part, lack; and second, because applying human rights protections to corporations is likely to make it more difficult for states to adopt certain domestic policies necessary to protect their citizens.

Finally, I argue that the relative ease with which investment tribunals are repurposing human rights discourse to protect business corporations exposes a critical weakness at the heart of how we think about international human rights norms, including their substantive scope, the agents and interests that they are expected to protect, and their relationship to domestic constitutional rights. Immunizing human rights discourse against corporate takeover requires breaking our habit of thinking about human rights as aligned *against* state sovereignty, and reconstructing this relationship as a complementary one. I close this article by gesturing toward such a complementary conception.

II. CORPORATIONS AS RIGHTS-BEARERS UNDER DOMESTIC AND INTERNATIONAL LAW

Modern constitutional systems frame the basic rights and duties of those whom they govern. In the domestic context, the question of *who* can be a bearer of constitutional rights has been every bit as contested as the substance of those rights. In constitutional democracies, political struggles waged by oppressed and marginalized groups, including women, racial and ethnic groups, LGBT people, immigrants, as well as *ad hoc* categories such as "enemy combatants" have centered on gaining access to constitutional rights. A similar debate over the proper subject of rights and duties has been underway in international law since the end of World War II. Although traditionalists maintain that states constitute the only proper subjects of international law,[17]

17. In Oppenheim's classic formulation: "Since . . . the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations." Oppenheim explains that individuals such as heads of state and diplomatic envoys have rights under international law in the territory of foreign states "if only it is remembered that these rights would not exist had the several States not created them by their Municipal Law." Similarly, it is "an inaccuracy of language" to say that individuals have rights derived from international treaties; "such treaties do not create these rights, but they impose *the duty upon the contracting States* of calling these rights into existence by their Municipal Laws." L. Oppenheim, International Law: A Treatise Vol. I §289, 456–58 (3d ed., Ronald F. Roxburgh ed., 1920) (emphasis added).

the key innovation of postwar international law is widely seen as the recognition of nonstate actors as bearers of certain rights and duties alongside states.[18] Just as important, however, are the emerging distinctions between the *kinds* of agents acquiring the coveted status of a rights-bearer under international law. In examining this process, the expansion of the category of "personhood" from natural to legal persons in US law in the nineteenth and twentieth centuries can be instructive. The development of the doctrine of corporate personhood in nineteenth century US constitutional law went hand-in-hand with the gradual erosion of barriers to interstate commerce. Specifically, burgeoning business corporations used federal law and courts to dismantle hurdles that states imposed on crossborder transactions, a process that helped not only to strengthen the federal judiciary but also to establish a unified national commercial space. In this section, I sketch this process and argue that it bears notable resemblances to contemporary developments by which international economic agreements and dispute settlement mechanisms equip private economic actors with the legal means to constrain the regulatory capacity of states and challenge national obstacles to market access by asserting their status as bearers of rights under international law. Human rights norms represent a potentially powerful tool that transnational business corporations and arbitral tribunals can use to advance this broader process. In contrast to the development of a centralized federal regulatory apparatus in the US, however, the contemporary process of global economic liberalization has not yet engendered public institutions at the international level capable of compensating for the loss of regulatory capacity at the domestic level. This section unpacks this argument.

Although corporate entities or *universitates* such as religious orders, churches, or guilds enjoyed some form of recognition as juridical persons under Roman and canon law,[19] the recognition of for-profit corporations as bearers of certain *constitutional* rights on a par with citizens was a major and controversial innovation of nineteenth century US constitutional law. Over a series of landmark cases decided predominantly between 1886–1910, the US Supreme Court established that alongside the "core rights" and attributes traditionally ascribed to them by the English common law (including the capacity to sue and be sued, own and transfer property, and identity in

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18. In both its descriptive and prescriptive versions, this thesis was pioneered by Lauterpacht, *supra* note 1. *See also* Rosalyn Higgins, Problems and Process: International Law and how we use it (1994); Ruti G. Teitel, Humanity's Law (2011); Antonio Cassese, International Law 78, 85 (2001). For a cautious appraisal, *see* Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 14.
19. I. Maurice Wormser, Frankenstein, Incorporated, 3–27 (1931); Henry Osborn Taylor, A Treatise on the law of Private Corporations Having Capital Stock 3 (1884); P. W. Duff, Personality in Roman Private Law (1938) (arguing that while Roman private law recognized aspects of legal personhood as a capacity for rights and duties that was detachable from natural personhood—that is, one that could be attached to some nonhuman entities and denied to some humans—it lacked a fully coherent theory of it).

succession),[20] corporations, alongside natural persons, could claim some of the rights enshrined in the US Constitution.[21] In 1886, the Supreme Court deemed Southern Pacific Railroad Company a "person" within the meaning of the Fourteenth Amendment, and therefore entitled to equal protection by the law.[22] This and subsequent cases accompanied a furious legal theory debate in the early twentieth century concerning the precise respects in

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20. Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations* 15 Del. J. Corp. L., 283, 293 (1990).
21. This was established gradually over a long series of decisions, with important precursors. In his concurring opinion in the 1837 Charles River Bridge v. Warren Bridge, Justice Baldwin argued that "It is the object and effect of the incorporation, to give to the artificial person the same capacity and rights as a natural person can have"; and that incorporation "bestows the character and properties of individuality on a collective and changing body of men, by which their rights become as sacred as if they were held in severalty by natural person [*sic*]." Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837), *reproduced in* Henry Baldwin, A General View of the Origin and Nature of the Constitution and Government of the United States 136 (1837). In its 1844 *Letson* decision, the Supreme Court held that a corporation created in one state is "capable of *being treated as a citizen,* for all purposes of suing and being sued" Louisville, Cincinnati & Charleston R. Co. v. Letson, 43 U.S. 497 (1844) (emphasis added). The head note to the Supreme Court's 1846 Santa Clara County v. Southern Pacific Railroad Company decision reported Chief Justice Waite's statement "before argument" that "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." The Court did not, however, address this legal question in its decision or give reasons for it. Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394, 396 (1886). In its 1888 Pembina Mining Co. v. Pennsylvania decision, the Supreme Court held that although corporations cannot be considered "citizens" under the Fourteenth Amendment to the US Constitution, "[u]nder the designation of 'person' there is no doubt that a private corporation is included." Pembina Mining Co. v Pennsylvania, 125 U.S. 181, 189 (1888). In its 1906 *Hale v. Henkel* decision, it extended Fourth Amendment protections to corporations, arguing that "A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination." Hale v. Henkel, 201 U.S. 43, 76 (1906) Finally, in the 1910 *Southern Railway Co. v. Greene* decision, the Supreme Court declared: "That a corporation is a person, within the meaning of the 14th Amendment, is no longer open to discussion." Southern Railway Co. v. Greene 216 U.S. 400, 412 (1910). Section 7 of the Sherman Antitrust Act of 1890 designated corporations existing under the laws of the US and foreign countries as persons. *See* Martin J. Sklar, The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics 49–52 (1988).
22. Santa Clara County v. Southern Pacific Railroad Company, *supra* note 21. Because the all-important declaration regarding the status of corporations as "persons" under the US Constitution came in the head note rather than in the operative part of the judgment, where the Court pointedly declined to address that question, and because there was contrary precedent on this point, *Santa Clara*'s validity as precedent in this line of cases has been questioned, and even described as "bogus." *See* Dale Rubin, *Corporate Personhood: How the Courts have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 Quinnipiac L. Rev. 523, 556, 569 (2010). *See also* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173 (1985)

which corporate entities could be considered "persons" and the constitutional and statutory rights and duties that accrued to them.[23] By means of elaborate legal ratiocination, corporations were accorded legal personhood and constitutional rights under US law long before married women, while the protections extended to corporations under the Fourteenth Amendment came to surpass those of the natural persons, namely African Americans, for whom the amendment was intended.[24] Moreover, although the initial status of business corporations as bearers of constitutional rights had a broadly functionalist rationale, the rights that corporations enjoy have broadened dramatically beyond the contractual and due process rights required for market activity. As the US Supreme Court's controversial *Citizens United*[25] and *Hobby Lobby*[26] decisions recently reminded us, "today corporations have, with isolated exceptions, the same constitutional status as natural persons."[27]

In the US, the historical process by which corporations came to be recognized as bearers of constitutional rights for certain purposes instantiates the simultaneous and interdependent consolidation of capitalism and constitutional democracy.[28] The extension of constitutional protections intended for natural persons to corporations affirmed the status of private economic actors as legitimate (and valued) subjects of the polity in their own right. The same historical process also had a strong federalism dimension insofar as it helped to catalyze the gradual integration of the several states into a unified economic space.[29] Particularly in the late nineteenth century, the

23. See Section IV below.
24. Rubin, *supra* note 22, at 567; Barkan, *supra* note 15, at 67; Christian List & Philip Pettit, Group Agency: The Possibility, Design, and Status of Corporate Agents 175 (2011).
25. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
26. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
27. Blumberg, *supra* note 20, at 297. *See also* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L. J. 577 (1990).
28. Sklar has described this process as the "corporate reconstruction of American capitalism," and its outcome as a system of "corporate liberalism" in which property rights, the public interest, and economic efficiency all came to be defined "in terms of regulating, affirming, and legitimizing the corporate capitalist order." *See* Sklar, *supra* note 21, at 19, 175. *See also* Barkan, *supra* note 15, at 68. Barkan writes that in the US, the legal doctrine of "personhood was designed to make the immense value produced by corporations acceptable within a framework of liberal law." One could quibble with whether the law of corporate personhood was "designed" so much as it evolved in a haphazard and reactive way, but it certainly eased the adaptation of the corporate form to the modern liberal context.
29. Nowhere is this process clearer than in the gradual erosion of the "foreign corporation" doctrine. The Supreme Court's early jurisprudence held that corporations could not expect automatic market access in states other than that of their incorporation. Accordingly, "a corporation created by one state cannot, with some exceptions . . . do business in another state without the latter's consent, express or implied." Paul v. Virginia 75 U.S. 168 (1869). In later cases, however, the Supreme Court curtailed the scope of permissible interferences by the states in business activity across state lines, citing the Constitution's interstate commerce clause. *See* McCall v. California 136 U.S. 104 (1890) (holding that "a license tax imposed upon the agent for the privilege of doing business in San Francisco is a tax upon interstate commerce, and is unconstitutional.") *See also* Norfolk & Western R. Co. v. Pennsylvania, 136 U.S. 114 (1890).

federal judiciary increasingly sided with corporations clamoring for unrestricted commerce across state lines (a process whose primary vehicles were corporations such as banks, railroads, telegraph and insurance companies) by discouraging state practices that hindered such transactions.[30] In an early decision seeking to balance the rights of states to regulate the activities of "foreign corporations" (i.e. corporations chartered in other states) against the federal mission to encourage interstate commerce, the US Supreme Court observed:

> The great object of the Constitution was to erect a government for commercial purposes, for mutual intercourse, and mutual dealing. The prosperity of every state could alone be promoted and secured by establishing these on principles of reciprocity; and on the security and protection of the citizens of each state, in all the states united by the government.[31]

Although states were entitled to regulate their respective economic spaces, the Court reasoned that gratuitous interference with the activities of foreign corporations would stymie the "great object" of commercial expansion.[32]

As state-level incorporation statutes grew more permissive by the end of the nineteenth century, corporations doing business in states other than their own turned to the federal judiciary to challenge what they perceived to be instances of discriminatory treatment by host states.[33] First, they sought to expand market access by invoking a constitutional right to conduct business in a state other than that of their incorporation.[34] Second, they sought federal remedies against host states to contest what they perceived to be the biases of state legislatures and judiciaries against foreign corporations.[35]

30. Sklar, *supra* note 21, at 51–52. On the role of attempts at railroad regulation in the contested emergence of the US regulatory state, see Stephen Skowronek, Building a new American State: The Expansion of National Administrative Capacities 1877–1920 (1982).
31. Bank of Augusta v. Earle 38 U.S. (13 Pet.) 519 (1839), 526. In this decision, Hurst writes, "the Justices boldly erected a presumption of comity among the states under which a corporation might transact business under the protection of local law in states other than its domicile." James Willard Hurst, The Legitimacy of the Business Corporation in the law of the United States 1780–1970, at 142, 529–30 (1970). Although the court held that contracts made in one state must be enforceable in another, "for the purposes of this case . . . the state of Alabama has a right to pass a law declaring that no bank shall exist and do its business in that state, unless it be chartered by the legislature of the state." In other words, states retained the right to exclude the corporations of other states from doing business in their state, provided they did so clearly in law.
32. Barkan, *supra* note 15, at 93.
33. Sklar, *supra* note 21, at 51–53; Horwitz, *supra* note 22, at 194–96; Rubin, *supra* note 22, at 538–44.
34. Barkan, *supra* note 15, at 97–98.
35. Thus, to a large extent, the early jurisprudence of corporate personhood grew out of disputes over establishing a corporation's citizenship in order to ascertain its rights to bring suit in federal court under Article III(2) of the US Constitution. See the discussion in Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 Tul. L. Rev. 563 (1986).

The Supreme Court's gradual extension of the terms "person" and "citizen" to corporations indicated the erosion of its sympathy toward state measures that restricted the operations of firms incorporated in other states, subjected them to discriminatory treatment, or interfered with interstate commerce.[36] For instance, in a 1910 decision concerning a Kansas statute subjecting foreign corporations to a special tax in exchange for doing business in that state, the Court held:

> To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States, and *the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right*, unless Congress should see fit to interpose some contrary regulation on the subject.[37]

In this passage, which exemplifies its increasingly energetic "role of surveillance against state parochialism,"[38] the Court reasons that the Constitution guarantees US citizens the right to engage in cross border commerce, and that corporations can rely on this right on behalf of their corporators and against attempted interference on the part of states. As one observer writes, "the existence of the Supreme Court . . . provided the means to define and enforce values of the corporate style of business which could be realized only through law above and beyond the sovereignty of any one state."[39] Empowered by their newly affirmed status as constitutionally protected agents, corporations sought to expand their market access while evading state-level regulation.

Just as business corporations turned to the US Constitution and the federal judiciary to conquer obstacles to interstate commerce, contemporary transnational firms turn wherever possible to international economic institutions, and in particular to their adjudicative organs, to challenge domestic interference with their commercial interests. The recognition of firms as rights-bearers under international economic law is in turn helping to constrain the abil-

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36. As Skowronek writes, the Supreme Court by the 1890s sought to "provide clear and predictable standards for gauging the scope of acceptable state action, and to affirm with the certainty of fundamental law the prerogatives of property owners in the marketplace." Similarly, "Federal judges disgusted by the incompetence of democratic legislatures . . . gradually became more receptive to the corporate point of view and set a course that would impart the authority of fundamental law to laissez-faire ideology." *See* Skowronek, *supra* note 30, at 41, 137, *respectively*. *See also* Schane, *supra* note 35; Horwitz, *supra* note 22.
37. Western Union Telegraph Co. v. Kansas 216 U.S. 1 (1910), emphasis added. The italicized part of the passage shows the Court's reasoning that because corporations are composed of citizens, they may exercise the latter's rights in relevant ways.
38. Hurst, *supra* note 31, at 145.
39. *Id.* at 143. Hurst argues that the Supreme Court "wielded its share of national power with more vigorous effect upon the use of the corporation" than Congress.

ity of states to regulate economic activity across and within their borders. Among the various bilateral, regional, and multilateral economic institutions currently in existence, I focus here on the international investment regime, which consists of a thicket of bilateral investment treaties, regional free trade agreements that contain investment provisions, and specialized multilateral investment agreements such as the Energy Charter Treaty, all of which have been signed by states in the past few decades to encourage foreign direct investment and to ensure the protection of investors' assets in host states.[40] All told, there are around 3,240 international investment agreements currently in effect around the world.[41] Many of these agreements enable private firms to sue signatory states in arbitral venues in order to protect or reclaim the assets they have invested in their territories. Chapter 11 of the North American Free Trade Agreement (NAFTA) similarly enables investors to sue member states for treaty violations.[42] Most commonly, investment agreements assign particular arbitral rules or venues to settle disputes between private investors and states, although tribunals are constituted on an *ad hoc* basis. Most disputes are heard by tribunals constituted under the auspices of the International Center for the Settlement of Investment Disputes (ICSID), followed by those constituted under the United Nations Commission on International Trade Law (UNCITRAL) rules, and private arbitration houses such as the International Chamber of Commerce.[43] In bringing arbitration proceedings against states, private litigants commonly invoke treaty provisions that prohibit direct (e.g. through nationalization) or indirect (e.g. through regulatory measures that devalue the investment) expropriation, oblige states to accord "fair and equitable treatment" to foreign investors, and provide "full protection and security" for their assets.[44]

The private right of action granted to firms has been described as "the most revolutionary aspect" of contemporary international investment law,"[45] in

40. For a detailed account of the development of the investment treaty system, see José E. Alvarez, The Public International Law Regime Governing International Investment (2011). For useful overviews, *see* Dolzer & Schreuer, *supra* note 9, at 4–19; Gus Van Harten, Investment Treaty Arbitration and Public Law 24–30 (2007).
41. United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2014, at xxiii (2014). Of these, around 2,900 are bilateral investment treaties (BITs) (*Id.* at 114). Figures *available at* http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf.
42. NAFTA provides that disputes arising under Chapter 11 be resolved either under the United Nations Commission on International Trade Law (UNCITRAL) rules or under the ICSID Convention. *See* Van Harten, Investment Treaty Arbitration, *supra* note 40, at 118–19.
43. *Id.* at 30–33.
44. Dolzer & Schreuer, *supra* note 9, ch.s 6–7; Andrew Newcombe & Lluís Paradell, Law And Practice of Investment Treaties (2009) 321–377, 255–97, and 307–314 respectively.
45. Beth A. Simmons, *Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment*, 66 World Pol. 12, 17 (2014). Simmons explains: "private actors' access to enforceable compensatory damages, typically without the need to first exhaust domestic remedies, is unusual in public international law." *Id.* at 19. *See also* Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 Int'l & Comp. L. Q. 371, 377 (2007).

no small part because arbitration translates reciprocal commitments between signatory states into subjective rights owed to firms.[46] For example, the so-called national treatment principle enshrined in NAFTA Article 1102, which obliges states to apply the same standards of treatment to investors from other member states as domestic investors, gets translated into a subjective right to nondiscrimination on the basis of nationality. In other words, litigation enables private economic actors to cash in the commitments states have made to each another as individuated rights owed to them. Moreover, these rights do not come with corresponding duties: because trade and investment treaties codify the mutual obligations of states, the duties of private parties typically do not figure among their provisions.

Backed by hefty penalties and reputation costs, investor-state arbitration has proven a singularly effective strategy by which corporations can defend their interests against what they consider unfavorable treatment by host states, but the significance of this procedure goes further.[47] Tribunals do not simply enforce obligations to which states have agreed on paper, but tend to expand the scope of those obligations in the course of clarifying, refining, and interpreting them.[48] The progressive elaboration of investment law creates more opportunities for private actors to bring claims against sovereign states, gradually establishing a feedback loop that promotes further development of the regime, often in directions not envisaged by the signatories.[49] Litigation by private parties thereby helps to "legalize," entrench, and extend international norms to a greater extent than when this procedure is reserved to states.[50] Furthermore, private litigation can prompt more rigid application of international law than states intend.[51] To be sure, the creation of treaties remains firmly conditional on state consent. However, where treaties give

46. Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration,* 74 Brit. Y.B. Int'l L. 151, 153–54 (2003).
47. *See* Julian Arato, *Corporations as Lawmakers,* 56 Harv. Int'l L. J. 229 (2015).
48. *As theorized by* Alec Stone Sweet, Governing With Judges (2000). In the investment law context, *see* Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 L. & Ethics Hum. Rts. 47 (2010). *See also* Van Harten, Investment Treaty Arbitration, *supra* note 40, at 102 (stating "[B]oth a finding of illegality and an award of damages may have much wider implications for the state's regulatory position because of its status as a representative entity."
49. The idea of a "feedback loop" of dispute settlement is borrowed from Stone Sweet, Governing With Judges*, supra* note 48, at 75.
50. Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Legalization and World Politics*, 54 Int'l Org. 385, 392 (2000) (arguing that granting "domestic actors direct access to international tribunals . . . provides a unique form of representation for many social actors—one that reduces the cost of political action, thereby increasing the flow of internationally directed legal action and hence the likelihood of further development of legal rules."). *See also* Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational, in id* at 457–58; Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. Int'l L. & Pol. 527 (2001).
51. Ari Afilalo, *Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter*, 34 N.Y.U. J. Intl'l. L. & Pol'y 1, 4 (2001).

firms the opportunity to sue states, private economic actors acquire the status not just of passive rights-bearers, but *de facto* participants in the development of international law.[52] Thanks to their access to arbitration, moreover, firms can wield extensive influence over the domestic policy choices available to states and their citizens.[53]

In sum, just as the rise of corporate personhood helped to erode obstacles to interstate commerce in the US and strengthened the primacy of federal law,[54] the emerging status of private economic actors as rights-bearers under international investment law is helping to erode national barriers to commerce and expanding the influence of international norms over domestic policy.[55] However, two key differences are worth emphasizing. First, despite the extent of corporations' rights, US constitutional law nevertheless understands legal personhood in a derivative manner, that is, in relation to natural persons and their rights. Constitutional rights were designed to protect actual people (though initially only a small subset of them), and were only subsequently extended to corporate entities.[56] By contrast, the recognition, rights, and benefits afforded to nonstate actors under international economic institutions appear to treat corporate agents rather than natural persons as primary subjects. Thus, while international human rights treaties provide sparse procedural remedies and enforcement mechanisms and tend to lack direct effect within domestic systems,[57] the rights of investors can be invoked against states before international arbitral tribunals.[58]

52. As Rosalyn Higgins, the former President of the International Court of Justice has written in her critique of the rigid positivist distinction between states as subjects and individuals as objects of international law:

> It is more helpful, and closer to perceived reality, to return to the view of international law as a particular decision-making process. Within that process (which is a dynamic and not a static one) there are a variety of participants, making claims across state lines, with the object of maximizing various values . . . in this model, there are no "subjects" and "objects," but only *participants*. Individuals *are* participants, along with states, international organizations . . . multinational corporations, and indeed private non-governmental groups.

Higgins, *supra* note 18, at 50. For a commentary, *see* Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 14, at 11. *See also* Sands, *supra* note 50, at 543–48; Robert McCorquodale, *Beyond State Sovereignty: The International Legal System and Non-State Participants*, 8 Int'l Law: Rev. Colomb. Derecho Int'l. 103 (2006); Arato, *supra* note 47.

53. William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale J. Int'l L. 283, 332 (2010).
54. Barkan, *supra* note 15, at 75.
55. Van Harten, Investment Treaty Arbitration, *supra* note 40, at 4; Van Harten, *The Public-Private Distinction, supra* note 45, at 376–77.
56. Rubin, *supra* note 22, at 524.
57. Van Harten, Investment Treaty Arbitration, *supra* note 40, at 101–04.
58. A 2003 Report by the UN High Commissioner for Human Rights recognized this imbalance, observing that while "international mechanisms to deal with individual complaints of human rights violations are uneven," and while "there is currently no international mechanism to consider complaints on all aspects of economic, social and cultural rights,"

Thanks to investor-state arbitration, Alvarez contends, "investors' rights to legitimate expectations in their property may be the most effectively protected 'human' right that there is, at least at the global level."[59] Another observer illustrates this contrast with a poignant example: "while the founder of [the Russian oil company] Yukos languished in a Russian prison, that company's foreign investors have successfully invoked the jurisdiction of investment treaty tribunals in order to neutralize" the Russian government's attempts to dismantle that corporation.[60] Meanwhile, individual citizens, civil society groups, and advocacy organizations cannot activate the same dispute settlement mechanisms to challenge policies pursued by businesses or states. Investor-state arbitration is "limited to examining foreign investors' rights and are not forums to adjudicate all the harms that a foreign investor might inflict on local populations, local consumers, or locally hired employees."[61] Although WTO panels and ICSID tribunals have recently begun accepting briefs from NGOs and citizens' groups in dispute settlement proceedings, the most consequential channels of political agency they open up are reserved for private economic actors.[62]

Second, in the US, the federal judiciary's gradual dismantling of obstacles to interstate commerce at the state level was followed up by the development of a formidable regulatory state at the federal level.[63] By contrast, there is as of yet no comparable international authority capable of replacing domestic public policy measures that are being eroded through investment arbitration and other economic liberalization agreements.[64] The net result in the latter

> under investment agreements, investors have recourse to international redress against States and States have redress against other States. This risks skewing the balance of protection in favour of investors, which in turn could lead to investment decisions favouring the interests of investors over the human rights of individuals and communities who could remain voiceless in the event of a conflict of interests and rights.

U.N. Economic and Social Council, *Economic, Social and Cultural Rights: Report of the High Commissioner for Human Rights on Human Rights, Trade, and Investment*, Comm'n on Hum. Rts., Sub-Comm'n on the Promotion of Hum. Rts., U.N. Doc. E/CN.4/Sub/2/2003/9, ¶ 41, 54–55 (2003) [hereinafter UNHCHR, *Report on Human Rights, Trade, and Investment*].

59. Alvarez, Public International Law Regime, *supra* note 40, at 74.
60. Charles H. Brower, II, *Corporations as Plaintiffs Under International Law: Three Narratives about Investment Treaties*, 9 Santa Clara J. Int'l L. 179, 204 *n*.182 (2011).
61. Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 14, at 19.
62. For two thorough overviews of the role of NGOs in international law up until the mid-1990s, *see* Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 Mich. J. Int'l L. 183 (1997); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 Cardozo L. Rev. 957 (1996); also *see* Building Global Democracy? Civil Society and Accountable Global Governance (Jan Aart Scholte ed., 2011); Robert O'Brien, Anne Marie Goetz, Jan Aart Scholte & Marc Williams, Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements (2000).
63. Barkan, *supra* note 15, at 99–100.
64. As presciently noted in 1947 by US Department of Justice Anti-Trust Division Attorney Sigmund Timberg. *See* Timberg, *supra* note 16.

context is likely to be one of *less regulation* as opposed to centralized regulation. Thus, the expansion of the rights of corporations under international law is likely to weaken the ability of sovereign states to protect the public interest at the domestic level, without a federal authority to compensate for the pernicious regulatory race to the bottom among states.[65]

III. THE DEHUMANIZATION OF HUMAN RIGHTS

Neither the idea of corporate personhood, nor the emerging status of private economic actors as rights-bearers under international law is news. However, what deserves critical attention is the recent multiplication of references to human rights law in the context of international investment arbitration. Although corporate bodies (including business corporations and noncommercial associations such as political parties) have long been able to bring rights claims before some human rights institutions including the European Court of Human Rights (ECtHR),[66] the migration of human rights discourse into the domain of international investment law is new and noteworthy. Structurally, the international investment regime has a number of parallels to international human rights law: it enables private parties to bring complaints against states before transnational adjudicative mechanisms,[67] sets out substantive standards of state behavior that mimic human rights provisions,[68]

65. In recent years, states have increasingly moved towards supplementing agreements that liberalize trade and investment with bilateral and plurilateral schemes of regulatory cooperation. While these schemes represent an attempt to scale up regulation from the national to the international level, it is too soon to tell whether they are an adequate substitute for the erosion of domestic mechanisms that balance an array of public policy goals with commercial freedoms. Bernard Hoekman and Charles Sabel, *Multilateralizing International Regulatory Cooperation: What Role for Trade Agreements?* (forthcoming, draft article on file with the author).
66. Firms and shareholders have sued states before the ECtHR for, inter alia, alleged violations of the right to property and procedural due process rights. Article 1 of the First Protocol (P1-1) of the ECHR explicitly includes corporate persons in its remit: "Every natural *or legal person* is entitled to the peaceful enjoyment of his possessions" (emphasis added). European Convention on Human Rights, art. 1, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953). As Emberland observes, however, these tend to be small enterprises challenging the actions of their home states rather than foreign transnational corporations. *See* Marius Emberland, The Human Rights of Companies: Exploring The Structure of ECHR Protection (2006).
67. Douglas, *supra* note 46, at 185–86.
68. Francesco Francioni, *Access to Justice, Denial of Justice, and International Investment Law*, *in* Human Rights in International Investment Law and Arbitration 63, 65 (P.M. Dupuy, F. Francioni & E.U. Petersmann, eds., 2009); Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. Int'l & Comp. L. Rev. 429, 430 (2004); Alvarez, Public International Law Regime, *supra* note 40, at 60. While arguing that "State measures that affect individual foreign investors may well violate international human rights law and give rise to a claim under regional and

and can be used to target measures that states claim to have adopted in the public interest.[69] As Alvarez observes:

> Many of the NAFTA investment protections echo human rights contained in the Universal Declaration of Human Rights and the principal human rights conventions, including rights against discrimination, to security, to recognition as a legal person, to nationality, to freedom of movement, and to own property and not be arbitrarily deprived of it . . . Seen from this perspective, the NAFTA investment chapter is a human rights treaty for a special-interest group.[70]

Furthermore, arbitrators themselves look to international human rights law to gauge the treatment owed by states to foreign corporations. In doing so, they have made use of both *substantive and procedural guarantees* under international human rights law (such as rights to due process, access to justice, and property rights)[71] as well as *doctrinal tools* of international hu-

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international human rights instruments," Newcombe and Paradell observe that "[i]nternational human rights generally protect the human being and not corporate entities or commercial interests," and that "most minimum standard of treatment provisions only apply to *investments* made by investors and not to individual investors." Newcombe & Paradell, *supra* note 45, 252–3.

69. *See* Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 Va. J. Int'l L. 545, 549 (2014).

70. Alvarez, *Critical Theory and the North American Free Trade Agreement, supra* note 7, at 307–08; *see* Arato, *The Margin of Appreciation in International Investment Law, supra* note 69, at 553.

71. In *Lauder*, an arbitral tribunal constituted under UNCITRAL rules on the basis of the Czech-US BIT drew on the ECtHR's definition of "formal" (direct) and "*de facto*" (indirect) expropriation, observing that BITs "generally do not define the term of expropriation and nationalization, or any of the other terms denoting similar measures of forced dispossession." Using the ECtHR's standard, the tribunal did not find that any expropriation had occurred. Ronald S. Lauder v. Czech Republic, Final Award, ¶ ¶ 200–01 (UNCITRAL, 3 Sept. 2001); In *Tecmed*, the ICSID tribunal constructed its definition of expropriation with reference to the case law of the ECtHR and the Inter-American Court of Human Rights on the right to property. In addition, it referred to an ECtHR decision to ascertain the most appropriate standard of review in balancing the rights of a foreign (as opposed to domestic) proprietor against the public interest in regulating those rights. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ ¶ 116, 122, respectively (29 May 2003); The ICSID tribunal in the *Azurix* dispute followed *Tecmed*'s example by citing the same ECtHR decision at length in order to clarify the US-Argentina investment treaty's expropriation provision, arguing that the standard derived from ECtHR case law provided "useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation." Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 312 (14 July 2006); In *Mondev*, a NAFTA tribunal argued that ECtHR decisions on the right to a court (art. 6(1) ECHR) "provide guidance by analogy as to the possible scope of NAFTA's guarantee" of fair and equitable treatment and full protection and security of the investment, but emphasized that the ECtHR's standard does not pertain to investment law in particular. Mondev International Ltd. v. U.S.A., ICSID Case No. ARB(AF)/99/2, Award, ¶ 144 (11 Oct. 2002); In his separate opinion in the NAFTA dispute between Mexico and a Canadian gambling firm, arbitrator Thomas Wälde argued that compared to public international law, "more appropriate for investor-state arbitration are analogies with judicial review relating to governmental conduct," including institutions

man rights law (and domestic constitutional rights jurisprudence), including proportionality and least restrictive means tests that require states to tailor their policies so as to minimize the burden on rights-holders.[72] In sum, although tribunals are in charge of applying the investment agreement at hand, they increasingly also make use of human rights law to assess state behavior towards foreign investors, extending its protections to business corporations in both explicit and implicit ways.

Although arbitral tribunals draw on human rights law for guidance on norms, standards, and principles, they have stopped short of declaring outright that corporations' rights are human rights.[73] Nonetheless, there are good reasons to suspect that tribunals will continue to borrow from international human rights law. Given the lack of a consolidated, multilateral investment regime, a coherent body of legal precedent, and a permanent, authoritative interpretive body, participants in investment adjudication "routinely draw on comparisons with other legal fields when seeking to fill gaps, resolve ambiguities, or understand the system's nature."[74] As Anthea Roberts and Zachary Douglas have respectively argued, the relative novelty and "hybrid"[75] nature of international investment law leads litigants and arbitrators to reason with reference to various other legal "paradigms" and "analogies."[76] International human rights law presents a readily available template, not least because

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of "international judicial review" such as the European and Inter-American Human Rights Courts. International Thunderbird Gaming v. Mexico, Award, Sep. Op. Wälde, J., ¶ ¶ 13, 141 (NAFTA Ch. 11 Arb. Trib. 26 Jan. 2006); Wälde drew on the ECtHR's jurisprudence to define the principle of "legitimate expectations" and "acquired rights," as well as to argue that states must defray their own legal expenses. *Id.* ¶ ¶ 27, ¶ 141; In *Total v. Argentine Republic*, the ICSID tribunal drew on the respective doctrines of the ECtHR and ECJ on the "'legitimate expectations' of a foreign investor regarding the stability of the legal regime." Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 91 (27 Dec. 2010); Canvassing their case law, the tribunal concluded that the concept of "legitimate expectations" offers a very slender basis for grounding claims against states (in the absence of other breaches such as expropriation). *Id.* ¶ ¶ 113–24; In *Saipem* v. *Bangladesh*, the ICSID tribunal interpreted the expropriation clause of the Bangladesh-Italy investment treaty in the light of the ECtHR's case law, concluding that the right to an arbitral award constitutes "protected property that can be the object of an expropriation." Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction, (21 Mar. 2007), ¶ 130.

72. Sweet, *Investor-State Arbitration, supra* note 48, at 50; Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (Inst. for Int'l L. & Just., Working Paper No. 6, 2009); Arato, *The Margin of Appreciation in International Investment Law, supra* note 69, at 553; Fry, *supra* note 10, at 83–99.
73. Moshe Hirsch, *Investment Tribunals and Human Rights: Divergent Paths, in* Human Rights in International Investment Law and Arbitration, *supra* note 68, at 97.
74. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. 45, 46 (2013).
75. Douglas, *supra* note 46, at 153.
76. Roberts, *supra* note 74, at 47; Van Harten, Investment Treaty Arbitration, *supra* note 40, at 121–51.

individual rights such as rights to property, privacy, and due process, to name just a few of the norms relevant to commercial activity, have been extensively litigated before human rights courts such as the ECtHR.[77] As one arbitrator observed with regard to the allocation of costs between the parties, "[t]he judicial practice most comparable to treaty-based investor-state arbitration is the judicial recourse available to individuals under the European Convention on Human Rights."[78]

As Roberts stresses, choosing an area of international law from which to draw standards and rules for use in investment arbitration entails a politically consequential decision.[79] Given the context of strategic ambiguity, firms are likely to invoke those norms of international law that are most likely to further their interests. International human rights law is congenial to firms looking to challenge state measures because it offers a framework for contesting the treatment of private actors by states. Some observers have gone further, tracing shared moral, philosophical, and historical lineages between human rights and the rights businesses claim under international treaties.[80]

Perhaps most importantly, the discursive power of human rights norms makes them a particularly attractive resource to marshal against states. In the post-Cold War period, human rights have come to command such widespread moral currency that even the grossest violators hesitate to denounce the ideal itself. This moral stature makes human rights discourse appealing to firms looking to challenge state measures that prejudice their profit margins while claiming the moral (and legal) high ground. Framing investment treaties as the foreign firm's bill of rights enables investors to harness the power of rights as "trumps" over other public justifications,[81] and encourages resolution of the legal ambiguities that pervade investment treaties in favor of the rights-bearer.[82]

Having briefly sketched the appreciating currency of corporate human rights claims, in the rest of the article, I make a series of arguments as to why human rights norms should be kept distinct from any subjective rights attributed to corporations under investment agreements. I contend, first, that the move by which investment tribunals import human rights norms to adjudicate claims raised by corporate actors is poorly theorized. What reasons, if

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77. For an overview, *see* Peter T. Muchlinski, Multinational Enterprises and the law 509–14 (2007).
78. Wälde, Sep. Op., *International Thunderbird v. Mexico*, *supra* note 71, ¶ 141.
79. Roberts, *supra* note 74, at 46–47.
80. *See* Charles H. Brower II, *NAFTA's Investment Chapter: Initial Thoughts About Second Generation Rights*, 36 Vand. J. Transnat'l L. 1533 (2003) (arguing in particular that the private rights protected by NAFTA parallel "first generation" civil and political rights such as those found in the US Constitution and international human rights treaties, including "the emphasis on liberty from government intervention"). *Id.* at 1549.
81. *See* Ronald Dworkin, Taking Rights Seriously 153 (1977).
82. Van Harten, Investment Treaty Arbitration, *supra* note 40, at 138–39.

any, can justify the treatment of corporations as if they were human beings? To address this question, I examine three traditional theories of corporate personhood, and argue that none of them offers a suitable basis for recognizing business corporations as bearers of *human* rights. I flag important reasons for distinguishing between the categories of personhood and humanity based on the kinds of agents to which these categories respectively refer, and the morally relevant interests that these agents respectively process. Second, I explain that international human rights law represents the wrong model for most other treaty-based rights, because it establishes universal entitlements rather than reciprocal ones. Third, I argue that casting corporations' rights as human rights norms is likely to further narrow the scope of democratic autonomy within states while devaluing the moral currency of human rights discourse. In the conclusion, I argue that international human rights should not be viewed as the functional equivalent of constitutional rights at the domestic level, and suggest a way of framing the relationship between international human rights norms and domestic constitutional norms that can help fend off the corporate takeover of human rights.

IV. ARE CORPORATIONS HUMAN?

In virtually every modern constitutional system, corporations enjoy some rights and duties on a par with natural persons. Although the term "person" as a legal category has long included both humans and corporate bodies, the invocation of international human rights norms in relation to business corporations suggests that the term "human" is undergoing a similar expansion of its scope. In this section, I home in on the conceptual question of whether, to adapt Catherine MacKinnon's phrase, corporations are human.[83] In particular, I address the following set of challenges: because the recognition of business corporations as legal persons and bearers of important rights is, to some extent, inevitable within the legal systems of advanced capitalist countries, why should a similar form of recognition in the international context be problematic?[84] What are the reasons commonly given as entitling corporations to constitutional rights, and do these reasons apply equally to corporate claims to international *human* rights?[85] Taking US constitutional law as my example, I briefly survey three dominant accounts

83. Catharine A. MacKinnon, Are Women Human? And Other International Dialogues (2007).
84. This challenge is raised, albeit in passing, by Michael K. Addo, *The Corporation as a Victim of Human Rights Violations*, *in* Human Rights Standards and the Responsibility of Transnational Corporations (Michael K. Addo, ed., 1999).
85. This question suggests an analogy and/or duplication of functions between domestic constitutional rights and international human rights that I will problematize in Part VII of this article. It is assumed here *arguendo*.

of corporate personhood, and argue that although they provide competing reasons as to why corporations are entitled to rights as *persons*, none of these accounts generates an entitlement to human rights on the part of business corporations. And yet, when corporations argue that international *human* rights protections ought to be applied to them, they do precisely that: they attribute to themselves not simply the legal status of *personhood*, but also that of *humanity*. Insofar as they draw on international *human* rights law for interpretive guidance in ascertaining the rights of business corporations, therefore, international investment tribunals go a step further than the logic of corporate personhood under constitutional law. In what follows, I argue that this is one step too far. I make the case for distinguishing the legal rights of business corporations from human rights on account, first, of the fundamental differences between natural persons and business corporations as moral agents, and second, on account of the kinds of interests these agents respectively hold. These are morally and legally salient differences that must be taken into account in determining the standards of treatment that business corporations are entitled to expect from states and other institutions that wield public power.

A. The Concession or Fiction Theory of Corporate Personhood

The most restrictive conception of corporate personhood is that which regards the corporate entity as a creature of the state, chartered and dissolvable by law. Thus, a corporation has only those attributes of personhood (rights, duties, etc.) that the law chooses to grant to it. This was the original theory of corporate personhood under the English common law: emblematically, Coke defined a corporation as a body that is "'invisible, immortal, and rests only in intendment and consideration of the law.'"[86] Early US constitutional jurisprudence also understood corporate personhood in this vein.[87] Chief Justice Marshall's famous definition of a corporation in the 1819 *Dartmouth College* decision of the US Supreme Court (most recently invoked by Justice Ginsburg in her *Hobby Lobby* dissent) exemplifies the concession theory: "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[88] Accordingly, corpora-

86. *Quoted in* Taylor, *supra* note 19, at 8.
87. Blumberg, *supra* note 20, at 292–93.
88. Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819). For a critique, *see* Arthur Machen, Jr., *Corporate Personality, Pt.s I & II,* 24 Harv. L. Rev. 253, 347, 257 (1910–1911).

tions are recognized as subjects of the law and gain personhood under the public charter that animates them. Because the corporation's capacity for personhood is circumscribed by its charter, its rights differ "decisively from the fuller panoply of legal rights possessed by natural persons."[89]

Is it possible to extrapolate from the concession theory an argument that corporations are bearers of human rights under international law? That is, would we consider corporations to be human, and therefore entitled to human rights, because (or if) the law designated them as such? There is something contradictory about pronouncing corporations to be human for legal purposes, because the human rights movement in general, and the international law of human rights in particular, represent attempts to lend legal recognition to human beings *independent of* all other legal labels that might be attached to them by legal convention. In other words, the idea of human rights is fundamentally about *not* treating the attribute of humanity as a grant of the legislator and revocable at its whim (in the way that legal personhood is said follow from recognition lent by the state). This is the basis for our intuitive sense, affirmed by international human rights law, that human beings do not lose their attribute of humanity if their state decides to designate them as "subhuman," "cockroaches," "parasites," etc., as genocidal regimes have often done. To be sure, humanity *is* a legal category (as exemplified by the legal concept of "crimes against humanity"), but it is not *only* a legal category. As a result, it is not as manipulable by the law to the same extent as the category of personhood is sometimes said to be.[90]

B. The Organic or Natural Entity Theory of Corporate Personhood

Modern versions of the organic or natural entity theory of corporate personhood are conventionally traced back to the writings of the German legal philosopher Otto von Gierke and British legal historian Frederic William Maitland.[91] According to an early twentieth century proponent, "the oft repeated statement of lawyers and judges that a corporation exists *only* in contemplation or intendment of law is untrue."[92] Quite the contrary, "[a] corporation exists as an objectively real entity, which any well-developed child or normal man must perceive: the law merely recognizes and gives legal effect to the existence of this entity."[93] On this view, describing a

89. Blumberg, *supra* note 20, at 293.
90. *See* the legal theory debate, sparked by John Dewey, concerning whether or not legal personhood is an essentially legal, and therefore infinitely malleable, category: John Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L. J. 655 (1925–1926). For two critiques, see Schane, *supra* note 35; Horwitz, *supra* note 22.
91. Dewey, *supra* note 90, at 670; David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 Am. Pol. Sci. Rev. 139, 155 (2013).
92. Machen, *supra* note 88, at 260–61.
93. *Id.* at 261.

corporation as a legal fiction is akin to saying that "a river is fictitious, the only reality being the individual atoms of oxygen and hydrogen."[94] While all proponents of the natural entity theory insist that corporations are distinct from the sum of their members, some have gone so far as to argue that they exist as "[c]ommunities of spirit and purpose, will and action,"[95] "psychical realities which the law recognizes rather than creates."[96] Alternative, non-metaphysical versions of the natural entity theory attribute corporate personhood not to some psychic characteristic of a group but to its subjection to legal duties, reasoning that these are ascribed only to "beings capable of understanding the command, of feeling the penalty, and of exercising a will to act accordingly."[97]

Just as early modern liberals espoused a conception of the individual and his [*sic*] rights as existing prior to the state, pluralist thinkers of the early twentieth century conceived of associations as autonomous entities whose existence did not depend on the state's recognition or approval.[98] Writing in 1905, one proponent of this view pointed to the history of corporate personality in early modern England to argue that, "far from the corporation having been the creature of the law, it is truer to regard it as an entity which has compelled the law to grant it official recognition."[99] On this view, personhood is merely the homage that the law pays to the intrinsic attributes

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94. *Id.* at 261.
95. W. Jethro Brown, *The Personality of the Corporation and the State*, 21 L. Q. Rev. 365, 367, 371 (1905).
96. *Id.* at 372. Brown admits that "Such facts may appear when so stated to savour of metaphysics, but the metaphysics is already implicit in the legal lore which asserts that a corporation is more than a mere partnership." *Id.* at 379.
97. Machen, *supra* note 88, at 264. Machen advances a more moderate version of the natural entity theory, arguing that recognizing the reality of a corporation does not imply recognizing it as a person, but merely acknowledging that "a corporation bears some analogy or resemblance to a person, and is to be treated in law in certain respects as if it were a person." *Id.* at 263. Ultimately, Machen concludes,

   > The corporate entity, or personification, which we call a corporation is regarded as having rights and liabilities for the sake of convenience, but it is men of flesh and blood . . . who must in one form or another and in varying degrees enjoy the rights and bear the burdens attributed by the law to the corporate entity.

   Id. at 266. He warns that

   > notwithstanding the indispensable assistance which is afforded by the conception of a corporation as a person in solving legal problems, yet that idea should not be exalted into a divinity, or a great mysterious dogma, before which as loyal disciples of the common law we must stand in reverent awe, believing where we cannot prove.

   Id. at 356.
   Christian List and Philip Pettit advance a similarly nonmetaphysical argument in favor of attributing legal personhood to corporations that emphasizes the distinctiveness of group agency from member preferences and the consequent need to hold group agents responsible for morally salient actions (in addition to holding members responsible). List & Pettit, *supra* note 24, at Chs.7–8, 163; *also see*, Philip Pettit, *Responsibility Incorporated*, 117 Ethics 171 (2007).
98. *See especially* the essays collected *in* The Pluralist Theory of the State (Paul Q. Hirst ed., 1989).
99. Brown, *supra* note 95, at 370.

of the corporate body, attributes that exhibit "certain real and deep analogies to natural personality which exist wholly apart from legal recognition."[100] From the argument that corporations have rights as such, it is a short step to the conclusion that the state and its laws are legitimate to the extent that they recognize and respect these. Thus, English historian William Stubbs has argued that "the acquisition of a formal charter of incorporation [by the ancient boroughs of England] could only recognize, not bestow" the rights that they possessed under the law.[101] As Stubbs' background as an Anglican bishop might suggest, many of the thinkers who advanced the organic theory of corporate personhood in the late nineteenth and early twentieth centuries were thinking primarily of the identity and rights of religious associations rather than business corporations.[102] Religiously motivated or not, however, by emphasizing the corporate entity's independent existence, adherents of "polyarchism" meant to contest the purported ontological primacy of the state, and in turn, maximize the corporation's autonomy.[103] As Arthur Machen pointedly asked: "if corporations are endowed with personality by the state, who endowed the state, which is also a corporation, with that mysterious attribute?"[104]

Is it plausible to translate the natural entity theory of corporate personhood into a claim that corporations ought to count as *human* for purposes of claiming human rights? This account ascribes personhood to corporations not only because the group is "greater than the mere sum of its parts," but also because it is assumed to have "an organic unity" akin to that of an individual.[105] A proponent of the natural entity theory might ascribe humanity to corporations on the grounds that certain features of corporations make them anthropomorphic enough to merit the appellation "human" in addition to a designation of personhood. Still, this is a dubious proposition. Interpreted in a nonmetaphysical sense, a corporation's claim to be a natural entity boils down to its claim to autonomous agency.[106] Autonomous agency, in turn, supports ascribing to the corporation some anthropomorphic cognitive, motivational, and moral attributes, such as thinking, learning, making evaluative

100. *Id.* 368; Machen, *supra* note 88, at 263.
101. William Stubbs, Constitutional History of England, Vol.III (1903), *quoted in* Brown, *supra* note 95, at 370.
102. Dewey, *supra* note 90, at 671.
103. Harold Laski, *The Personality of Associations*, 29 Harv. L. Rev., 404, 425–26 (1915–1916)
104. Machen, *supra* note 88, at 361.
105. Horwitz, *supra* note 22, at 181. J.N. Figgis's statement with regard to the living existence of a church provides a stark example of this logic: "to deny this real life is to be false to the facts of social existence, and is of the same nature as that denial of human personality which we call slavery." *Quoted in* List & Pettit, *supra* note 24, at 74.
106. List & Pettit argue that groups, like individuals, possess the characteristics of autonomous agency insofar as they do not directly track the preferences of the members who compose them. List & Pettit, *supra* note 24, at 8–10.

judgments, deceiving and being deceived, acting maliciously, bearing guilt, etc.[107] Nevertheless, as List and Pettit argue, such agency is not exclusive to human beings.[108] Their cognitive, motivational, and moral qualities make some groups agents in their own right, and might justify ascribing certain rights and duties to them, but such agency does not itself imply humanity. By implication, the attributes of agency alone cannot entitle corporations to the full panoply of protections accorded to human beings under the rubric of human rights.[109]

We do not need to espouse a metaphysical conception of humanity to be convinced by the proposition that there is more to the ordinary sense of the term "human" than cognitive-moral agency. In ordinary language, "human" designates not just an agent, but also a sentient, embodied, and therefore particularly vulnerable type of agent. Business corporations may share important attributes with humans, but these do not include many of the attributes that inform normative accounts of why members of the species ought to be accorded certain minimal standards of treatment. A business corporation cannot be tortured or psychologically abused because it is not made of flesh, nor does it possess emotions. To stretch the anthropomorphic metaphor too far is to invite ridicule: including corporations within the category of the human would require us to consider the holding company (which is a corporation legally permitted to own other corporations) a legal form of slavery or to outlaw it altogether. Engaging in a similar exercise of *reductio ad absurdum*, the 2004 documentary film *The Corporation* argued that if a corporation is a person, it fits the American Psychological Association's criteria for psychopathology.[110] These examples illustrate our deeply rooted intuition that humanity, as a legally salient attribute, entails more

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107. Schane, *supra* note 35, at 606–09; List & Pettit, *supra* note 24, at 157; Ross Grantham, *The Doctrinal Basis of the Rights of Company Shareholders,* 57 Camb. L. J. 554, 576 (1998): "The function of much of company law is thus to forge an analogy between the company and natural persons . . . ."
108. List & Pettit, *supra* note 24.
109. For an exploration of the analytical distinction between being entitled to human rights as a *human being* and being entitled to human rights as a *person* (understood as beings who possess the capacity for agency), *see* Arval A. Morris, *A Differential Theory of Human Rights*, Nomos XXIII, 158–64 (J. Roland Pennock & John W. Chapman eds., 1981). In this critique of Alan Gewirth's argument, Morris argues that *person* is a more restrictive category than *human*, as it might exclude those who lack the capacity for agency; since Gewirth's conception premises human rights on personhood / agency, a human being who lacks agency, such as a severely mentally impaired person, might lack human rights. As I hope to show in this article, *person* is the more capacious term in another respect, as it can plausibly include nonhuman agents within its remit. Thus, predicating the entitlement to human rights on the capacity for agency, as Gewirth does, would expand the scope *ratione personae* of human rights bearers by giving group agents a plausible claim to them.
110. Mark Achbar, Jennifer Abbott & Joel Bakan, *The Corporation: A Documentary* (2004), *available at* http://thecorporation.com/.

than the sum total of capacities that humans may be said to share with other entities that lay claim to personhood.[111] In turn, many international human rights norms identify as salient and deserving of protection precisely those qualities that human beings possess but corporations lack.[112]

C. The Group or Aggregative Theory of Corporate Personhood

Whereas the natural entity theory draws "a sharp distinction between the corporate entity and the shareholders,"[113] the group theory of corporate personhood collapses that distinction. In a nutshell, it holds that corporate entities deserve legal recognition as persons because they are composed of and act on behalf of natural persons. In its simplest form, it casts the corporation as simply a convenient appellation for the people that constitute it; corporations are considered "persons by figment, and for the sake of brevity in discourse."[114] By that token, the corporate body acquires, or is entitled to vindicate, the rights of its corporators. US Supreme Court Justice Samuel Alito exemplified such an understanding of corporate personhood in his *Hobby Lobby* opinion, where he argued that the purpose of the "fiction" of corporate personhood is to "provide protection for human beings": "A corporation is simply a form of organization used by human beings to achieve desired ends . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."[115] Accordingly, he held that to bar a "closely held" for-profit corporation from acting in accordance with the religious preferences of its owners would be to tread on the First Amendment rights of actual people. On this view, attributing personhood and attendant rights to corporations presumes no metaphysical conception of the corporation as a natural entity endowed with a will and a moral faculty; it simply entails peeling back the corporate veil to reveal the actual people beneath.[116]

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111. As Maurice Wormser sums it up: "A reality the corporation is. A personality the corporation is not, except in contemplation of the law." Wormser, *supra* note 19, at 63.
112. As Donnelly writes, "Because only individual persons are human beings, it would seem that only individuals can have human rights. Collectivities of all sorts have many and varied rights, but these are not human rights—unless we substantially recast the concept." Donnelly, Universal Human Rights, *supra* note 5, at 30.
113. Horwitz, *supra* note 22, at 214.
114. John Austin, Lectures on Jurisprudence (5th ed.), *quoted in* Brown, *supra* note 95, at 368.
115. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).
116. In Justice Alito's rendering, the group theory implies that a corporation's claim to personhood is strengthened by its homogeneity and smallness, as evidenced by his emphasis on the "closely held" nature of the Hobby Lobby, Conestoga, and Mardel corporations. He even refers to the plaintiffs by their first names. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765 (2014). *Cf.* Brown's definition of the natural entity theory: "when a group is large and its organization becomes complex, recognition becomes sooner or later inevitable." Brown, *supra* note 95, at 379.

Can this logic be extended to cast business corporations as bearers of human rights under international law? That is to say, can corporations be considered as humans because they are ultimately composed of human beings? Is a state's treatment of foreign corporations governed by the standards of international human rights law because a corporation is simply a vehicle used by natural persons to attain their ends?[117] If the state violates the corporation's rights to property, for instance, does it thereby violate the shareholders' rights to property? There are several problems with this logic. For a start, it is vulnerable to the well-rehearsed point that corporations, virtually by definition, are legally distinct from the persons who compose them.[118] Corporate personality is, after all, a "mercantile device rendered necessary by a credit economy" whose chief purpose is to "secure the limitation of liability to the property adventured."[119] A corporation differs from a simple partnership in which partners own the property of the enterprise and are liable for its debts; that is to say, its distinguishing feature is the attenuation between the corporate entity and the corporators.[120] In addition to limited liability, the group theory fails to capture such essential features of corporations as perpetuity of succession and identity in succession, which enable a corporation to remain in existence even as shareholders leave and join the association.[121] Clearly, then, the corporation's legal personhood cannot be reduced to the personhood of the individuals who compose it without contradicting its distinctive legal status and obliterating the privileges that flow from the corporate form.[122]

Even if we put this difficulty aside, attempting to extrapolate a theory of corporate human rights on the basis of the group theory has similar nonsensical consequences to those I pointed out in the case of the natural entity theory. Even if it considered as nothing but an aggregation of human

117. Muchlinski, *supra* note 77, at 509.
118. Brown, *supra* note 95, at 367.
119. Max Radin, *The Endless Problem of Corporate Personality*, 32 Colum. L. Rev.643, 653–54 (1932).
120. As Chief Justice Taney observed nearly two centuries ago in the US Supreme Court's *Bank of Augusta* decision, if

> the members of a corporation were to be regarded as individuals carrying on business in the corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation.

Bank of Augusta v. Earle 38 U.S. (13 Pet.) 519, 586 (1839), *quoted in* Horwitz, *supra* note 22, at 185. *See also* Wormser, *supra* note 19, at 70: "an inalienable privilege of American citizenship seems to be the right to avoid individual liability and 'welsh' upon obligations, by plunging into the immunity bath of dummy incorporation."
121. Ciepley, *Beyond Public and Private, supra* note 91.
122. *Id.* 155; David Ciepley, *Neither Persons nor Associations: Against Constitutional Rights for Corporations*, 1 J. L. & Courts. 221, 226–28 (2013).

beings, the corporation still does not acquire, as though by some feat of transubstantiation, the attribute of humanity from them. The shareholders of the parent company do not biologically beget the shareholders of the other; nor does the membership of so-called sister companies consist of women reared in the same family. Mercifully, when a corporation dies, this neither results from nor brings about the biological extinction of its shareholders. While these examples seem to belabor a trivial point, they establish that even if the law in some moods implies that corporations acquire legal personhood from that of the individuals through whom they act, the latter's humanity is not thereby transferred to the former. For the same reason, while it might make sense to protect the corporate entity by attributing to it the legal rights necessary for performing its social functions (including profitmaking), these cannot include the *human* rights of individual corporators, which belong to them by virtue of their humanity and are nontransferable.

This argument may be countered with the observation that extreme adverse treatment of a firm, in certain cases, might tear right through the corporate veil and injure the basic interests of the human beings associated with it. The examples we choose will depend partly on which basic interests we believe to enjoy the protection of human rights, and on the degree of severity that adverse treatment must reach in order to go beyond an infraction solely against the corporation. And indeed, in exceptional cases, the human beings affiliated a corporate entity may have *bona fide* human rights grievances against a state on account of its treatment of the corporation. Even more exceptionally, they may have the opportunity to invoke these before an investment tribunal in the absence of a more suitable forum (such as an international human rights court or an impartial domestic judiciary). For instance, in the 2008 *Desert Line Properties LLC* v. *Yemen* dispute heard by an ICSID tribunal, an Omani firm claimed (and won) "moral damages" for the "'stress and anxiety'" that firm executives had suffered as a result of "being harassed, threatened and detained" by agents of the Yemeni state.[123] Similarly, a Dutch national doing business in Vietnam initiated arbitral proceedings against that state alleging arbitrary detention, torture, and inhuman treatment, all of which, he argued, violated the "full protection and security" and "fair and equitable treatment" guarantees of the Netherlands-Vietnam bilateral investment treaty.[124] Although these were couched as investment treaty claims, however, investment law simply provided an opportune context for holding states to account for real violations perpetrated against human beings.

123. Desert Line Properties LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award (6 Feb. 2008); Peterson, *supra* note 8, at 44; Brower II, *Corporations as Plaintiffs, supra* note 60, at 199–200; *See also* Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana, Arbitral Award on Jurisdiction and Liability, 95 ILR 183 (UNCITRAL, 27 Oct. 1989).

124. Peterson, *supra* note 8, at 24–25.

In such instances, allowing corporations to serve as indirect claimants of human rights has some appeal, and an investment tribunal may be justified in acting as a surrogate human rights court *faute de mieux*. Even as a second-best remedy, however, the application of human rights norms to a business enterprise in order to defend the natural persons associated with it remains troubling, and not only because (as I argue above) it is fallacious to construe a corporation as made up of individuals.[125] Even when the claims are brought by another type of firm (say, a partnership) or by individual shareholders themselves, investment tribunals are likely to give weight to human rights violations only insofar as they interfere with the claimant's investment activity.[126] When an infraction against a human being's basic rights is in question, litigating it as primarily an offense against her business interests can neither redress the underlying moral wrong nor bring justice to the person whose basic rights have been violated.[127] Instead, it would be an attempt to translate the injustice of a human rights violation into a calculus of financial loss on the part of a business, a dubious translation that would inevitably underplay the moral wrong committed by the state.[128]

Meanwhile, marshaling human rights discourse in favor of corporations creates greater risks than those it prevents, most notably the opportunistic use of human rights norms and the devaluation of their moral stature through such misuse. Other than exceptional cases such as those cited above, when a state violates investment law, it typically does so not by torturing or imprisoning sentient beings but by interfering with the profit expectations of large and diffuse enterprises, whose interests do not extend far beyond the commercial. Moreover, these enterprises knowingly assume the risks associated with transnational business ventures. Claiming the mantle of human rights is therefore not only a way for firms to offload the risks of doing business to the shoulders of host states and societies, but it also implies a nonexistent human right to immunity from investment risk.

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125. Ciepley, *Beyond Public and Private, supra* note 91, at 155.
126. For instance, the UNCITRAL tribunal in *Biloune* held that while "contemporary international law recognizes that all individuals, regardless of nationality, are entitled to fundamental human rights . . . it does not follow . . . that this Tribunal is authorized to deal with allegations of violations of human rights." The tribunal held that it "lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights." Biloune v. Ghana, *supra* note 123, at 203.
127. The *Biloune* tribunal held that while the acts cited by the claimant as human rights violations (including "the summons, the arrest, the detention, the requirement of filing asset declaration forms, and the deportation of Mr. Biloune without possibility of re-entry") did not give rise to an independent cause of action before the investment tribunal, these acts "had the effect of causing the irreparable cessation of work on the project" and as such, violated the guarantees of the investment contract. In other words, the Tribunal addressed human rights violations only insofar as they constituted an obstacle to the investor's exercise of his contractual rights. Biloune v. Ghana, *supra* note 123, at 209.
128. *Cf.* Brower II, who argues that such instances "prove[] the viability of drawing on human rights narratives to guide the application of investment treaties, at least in cases where the host state's conduct involves the sort of abuse normally associated with human rights violations." Brower II, *Corporations as Plaintiffs, supra* note 60, at 201.

By contrast, both the law and the broader political discourse of international human rights are rooted in vulnerabilities that are peculiar to human beings and which artificial bodies such as corporations or associations lack. Borrowing standards from the domain of human rights law to assess states' actions toward corporations amounts to drawing a moral equivalence between two very different kinds of injury, namely the losses that commercial entities are capable of suffering, which are predominantly of a financial nature, versus the full range of suffering that can be inflicted on human beings. The latter uniquely include "physical pain and suffering," "mental anguish," "humiliation, loss of enjoyment of life," "loss of companionship, comfort, guidance, affection and aid," "suffering, sadness and humiliation caused by disfigurement, loss of amenities, loss of recreational ability, loss of any of the five senses, inability to enjoy sexual relations," and others that "generally damage to the enjoyment of life."[129] In ascertaining the rights of a corporation under international law, therefore, it is preferable to "discard the conception of the aggregate person as a new and distinct species of humanity"[130] and instead treat the business corporation as "an aggregation of capital [rather] than an association of persons,"[131] much less a human being in its own right.

What about the fact that international human rights institutions themselves routinely allow firms to invoke human rights norms? For instance, the European Court of Human Rights accepts applications "from any *person, nongovernmental organisation or group of individuals* claiming to be the victim of a violation by one of the High Contracting Parties"[132] even if the text of the Convention is vague with regard to which substantive rights may be claimed by corporations.[133] The ECtHR has upheld the claims of corporate litigants with regard to certain provisions of the Convention and its additional Protocols (including the right to peaceful enjoyment of property and to a fair hearing).[134] For instance, it has ruled that the Article 10 guarantee of the freedom of expression "applies to 'everyone,' whether natural or legal persons,"[135] even though it tends to afford limited protection to corporations in respect of "statements made in a commercial context."[136] Likewise, under

129. This list is adapted from Dinah L. Shelton, *Reparations to Victims at the International Criminal Court: Recommendations for the Court Rules of Procedure and Evidence*, Prepared by the Center on International Cooperation, N.Y.U. 9 (1999), *available at* http://www.pict-pcti.org/publications/PICT_articles/REPARATIONS.PDF.
130. Ernst Freund, The Legal Nature of Corporations 52, 39 (1897).
131. *Id.* at 45.
132. European Convention on Human Rights, art. 34, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953).
133. Emberland, *supra* note 66, at 33.
134. Peterson, *supra* note 8, at 23; Muchlinski, *supra* note 77, at 513–44.
135. Autronic AG v. Switzerland, App. No. 12726/87, Eur. Ct. H. R. (ser. A) (22 May 1990).
136. Case of Markt Intern Verlag GmbH and Klaus Beermann v. Germany, App. No. 10572/83, Eur. Ct. H. R. (20 Nov. 1989), ¶ ¶ 35–36. In VGT Verein Gegen Tierfabriken Schweiz

Article 41, it has awarded compensation to business firms for nonpecuniary damages, such as inconvenience and uncertainty caused by delayed judicial proceedings.[137] Does this collapse the distinction I have sought to sustain between the rights of corporations under investment law and the domain of international human rights law?

A detailed treatment of corporate claims under the ECHR exceeds the scope of this article. What is important to note is that the marshaling of human rights norms to defend corporate interests in the investment arbitration context differs in marked ways from comparable claims brought before international human rights courts. First, as Emberland points out, "[t]he majority of international human rights conventions limit their scope to the individual human being or to organizations whose relation to profit is at best indirect."[138] For instance, under the ICCPR and ACHR, "states undertake to respect the rights of the individual only."[139] Although the ECHR admits applications from corporations, Emberland finds that "[a] direct link to free enterprise is . . . absent in the Convention."[140] Second, the ECtHR tends to grant a wider margin of discretion to states in their treatment of corporate claimants by comparison to investment tribunals, particularly where the balance to be struck is that between private property rights and regulatory measures taken in the public interest.[141] Third, when asked to adjudicate the compatibility of provisions of investment agreements with international human rights law, human rights tribunals tend to emphasize the normative primacy of the latter. For instance, in an indigenous peoples' rights case in

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v. Switzerland, the ECtHR defined "commercial context" as the communication of information for the purpose of "inciting the public to purchase a particular product." VgT Verein gegen Tierfabriken v. Switzerland, App. No. 24699/94 (28 June 2001), ¶ 57. *See also* Emberland, *supra* note 66, at 117–18, 164–65.

137. Comingersoll S.A. v. Portugal, App. No. 35382/97, Eur. Ct. H. R. (6 Apr. 2000).

138. Emberland, *supra* note 66, at 32.

139. *Id.* at 34.

140. *Id.* at 49. Elsewhere in the work, Emberland is more ambivalent on this point: he argues that

> the Convention does not as such protect a freedom of economic activity, in the sense of offering a guarantee regulation "the extent to which individuals and firms may engage in enterprise untrammelled by state intervention." But the Convention is *largely* and instrument for the protection of economic aspects of civil and political rights, and when it does offer this form of protection, the place of companies in the treaty system is justifiable.

Id. at 56–57, emphasis added. Emberland's assertion that the Convention is "largely an instrument for the protection of economic aspects of civil and political rights" is contestable.

141. Langford, *supra* note 10, at 196; Burke-White & von Staden, *supra* note 53, at 308–10; Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 14, at 30. For a set of instructive contrasts between human rights courts and investor-state tribunals, see Alvarez, Public International Law Regime, *supra* note 40, at 66–74. "[S]ome of the rights accorded investors in some investment treaties are broader or subject to fewer exceptions or caveats than are some human rights recognized in regional human rights treaties." *Id.* at 71.

which the government of Paraguay cited an investment treaty with Germany to justify its failure to reallocate land partly owned by German cattle farmers to the Sawhoyamaxa people, the Inter-American Court of Human Rights held: "[the] enforcement [of bilateral commercial treaties] should always be compatible with the American Convention [on Human Rights], which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among states."[142] In other words, it ruled that when investment and human rights law come into conflict, states' obligations toward investors are to be read in conformity with their obligations towards "individual human beings," not vice versa.

Finally, as I have argued elsewhere, institutions with functionally delimited mandates are often poorly attuned to principles or goals other than those that they have been tasked with realizing.[143] WTO panels enforce free trade rules; the Court of Justice of the European Union treats commercial mobility rights as "fundamental freedoms"; and investment tribunals scrutinize state behavior with a view to protecting investors. It is their mandate to prioritize these partial ends. When imported into functionally specialized regimes, therefore, human rights norms are likely to be distorted in favor of the specific objectives of the regime in question. For this reason, even though many commentators have argued in favor of using arbitral tribunals to hold corporations to account for purported violations of human rights, "[t]he importation of human rights law into investor-state arbitration is . . . most likely to enhance the rights of the investor—not *humans'* rights as traditionally construed."[144]

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The foregoing arguments, even when taken together, do not amount to a categorical claim that human rights ought *never* to be invoked to protect a corporate agent. Rather, they add up to a negative claim that none of the traditional theories of corporate personhood supplies persuasive reasons as to why the business corporation should be considered a relevant sort of agent for claiming the protection of international *human* rights. This does not mean that no such reasons exist; rather, the claim that corporations are entitled to the protection of international human rights must be supported

142. Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am Ct. H. R. (ser. C), No.146, ¶ 140 (29 Mar. 2006), emphasis added.
143. Turkuler Isiksel, *On Europe's Functional Constitutionalism: Towards a Constitutional Theory of Specialized International Regimes*, 19 CONSTELLATIONS 102 (2012).
144. Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 14, at 28.

on grounds other than traditional theories of corporate personhood. Second, the argument so far leaves open the possibility of a corporation invoking a human rights claim in cases involving serious injury to natural persons, since the effect of the corporate form should not be to deprive human beings of their human rights.[145] However, even when a corporation contests a genuine human rights violation on behalf of the human being(s) affected by it, the use of a corporate proxy cannot but obscure the moral stakes by representing the matter as damage done to an artificial entity. Third, nothing in the foregoing suggests that corporations must be denied all rights whose substance overlaps with human rights (such as due process rights, property rights, or the freedom of expression), much less that the law should refuse to recognize and protect them as agents in their own right. However, human rights norms must be seen as obligations that states have undertaken to respect in their treatment of human beings, in part because of vulnerabilities specific to human beings. Nonhuman entities might share some of these vulnerabilities or make a claim to similar standards of treatment, but their entitlement to similar protections must be grounded in considerations other than their humanity, whether literal (as the group theory implies) or metaphorical (as the natural entity and fiction theories imply). As such, adjudicators must view the rights and protections accorded to business corporations under international economic agreements not as concretizations of broader principles of international human rights law, but as distinct norms originating in interstate agreements designed to regulate activity in functionally limited domains such as trade or investment. Although these agreements inevitably stand in need of interpretation, and although the intentions and choices of the contracting states are often far from clear, international human rights law is an inapposite interpretive framework to use in clarifying them due to the mismatch between the agents and interests to which investment law applies and the agents and interests to which human rights law is tailored.

V. HUMAN RIGHTS LAW: THE WRONG MODEL FOR INVESTMENT ARBITRATION

I have so far argued that none of the dominant accounts of corporate personhood can sustain the extension of international human rights protections to business corporations. In this section, I highlight a key structural difference between international human rights law and other, cooperative international

145. I am grateful to George Bustin for challenging me on this point. Emberland attributes precisely such an attitude to the ECtHR in cases brought by shareholders to contest interference with the company in which they hold a stake: "the Court does not feel constrained by the construct of separate corporate personality if it hinders effective Convention protection for the shareholder applicant." Emberland, *supra* note 66, at 68.

agreements. The obligations of states under cooperative agreements typically rest on the logic of reciprocity: State A must refrain from imposing quotas on goods from State B because it expects the same behavior from B.[146] By contrast, the binding force of international human rights norms is not derived primarily from reciprocity among contracting states.[147] To be sure, there are various plausible ways to ground the binding force of international human rights norms: for instance, State A may be expected to respect the prohibition against torture because it has signed UN Convention against Torture; because the prohibition of torture is a peremptory norm of international law that states must respect regardless of consent; or because the sovereign equality of State A is contingent on refraining from large-scale human rights abuses.[148] But it is not normally because State A owes State B a duty to refrain from torturing people (at least assuming that the victims are not citizens of State B). Similarly, State A would not be released from its obligation to refrain from torture within its jurisdiction if State B decided to violate the prohibition. As the International Law Commission's Articles on State Responsibility state, human rights constitute obligations of "a nonreciprocal character and are not only due to other States but to the individuals themselves."[149]

To be sure, much of international human rights law is codified through the contractual form of the treaty;[150] and by signing these treaties, states establish domestic standards "whose breach is a matter of international

146. Cassese, *supra* note 18, at 13–15.
147. Anastasios Gourgourinis, *Investors' Rights Qua Human Rights? Revisiting the "Direct"/"Derivative" Rights Debate*, *in* The Interpretation and Application of the European Convention of Human Rights 147, 171 (Malgosia Fitzmaurice & Panos Merkouris eds., 2013). *Cf*. Bruno Simma, who argues that human rights treaties do not formally depart from the logic of reciprocity that characterizes all treaties, even if their content could be achieved unilaterally. Simma argues that by adopting the treaty form to enshrine these obligations, states indicate "the interest each contracting party has in every other party keeping step by accepting identical obligations." From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma (Ulrich Fastenrath et al. eds., 1994), *quoted in* Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, Eur. J. Int'l L. 489, 513–14 (2000).
148. The argument regarding the conditionality of sovereign equality on refraining from large scale human rights violations is drawn from Jean L. Cohen, Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism (2012).
149. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Chapter II, Commentary to "Countermeasures," *Report to the International Law Commission on the Work of Its Fifty–Third Session, adopted* 12 Dec. 2001, G.A. Res. 56/83, U.N. GAOR 56th Sess., Supp. No.10, U.N. Doc. A/56/10 (2001), 129, ¶ 5, *available at* http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, *quoted in* Roberts, *supra* note 74, at 74.
150. As Craven points out, "legal reciprocity is in reality a constitutive element of treaty relations." However, Craven observes that understanding human rights obligations solely as the product of a legal relationship of reciprocity fails to capture the fact that "it is only through its commitment to certain basic human rights standards that international law may be rescued from simply being the law of tyrants, slavers or pirates." Craven, *supra* note 147, at 504, 493 respectively.

concern."[151] However, although its legal form implies reciprocity, unlike many traditional interstate agreements, the normative force of human rights law rests less on the mutual performance of duties,[152] and more immediately on considerations such as its basis in universally affirmed moral principles, or each state's declaration of commitment before the international community.[153] As the Inter-American Court of Human Rights held in a 1982 Advisory Opinion, "[I]n concluding . . . human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction."[154] Similarly, in a 1961 decision, the European Commission of Human Rights held that once a state enters into a human rights treaty such as the ECHR, it

> undertakes, vis-à-vis the other High Contracting Parties, to secure the rights and freedoms defined in [the Convention] to every person within its jurisdiction, regardless of his or her nationality or status . . . in short, it undertakes to secure these rights and freedoms not only to its own nationals and those of other High Contracting Parties but also to nationals of States not parties to the Convention and to stateless persons.[155]

In this decision, the Commission went on to describe member states' human rights obligations as "essentially of an *objective character,* being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves."[156]

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151. Beitz, The Idea Of Human Rights *supra* note 3, at 31–32.
152. As Beitz observes, "most regimes are properly described . . . as cooperative arrangements: they were organized and their members participate in them for purposes of mutual benefit," whereas "the primary beneficiaries [of human rights] are not the cooperating agents themselves but rather their individual members." *Id*. at 43.
153. As Roberts writes, "Human rights treaties are based on interstate commitments, but they are more like independent pledges to behave in certain ways than contract-like devices between states establishing reciprocal rights and obligations." Roberts, *supra* note 74, at 71.
154. The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (arts. 74, 75), Advisory Opinion OC-2/82, Inter-Am Ct. H. R. (Ser. A) No.2 (24 Sept. 1982); *quoted in* Gourgourinis, *supra* note 147, at 170.
155. Austria v. Italy, App. No. 788/60, Eur. Com. H. R. (11 Jan. 1961), at 18–19. *See also* Case of Ireland v. United Kingdom, App. No. 5310/71 Eur. Ct. H. R. (Ser. A) (18 Jan. 1978), ¶ 239: "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement.'" Craven argues that the ECtHR's 1978 *Ireland v. UK* judgment represents a departure from the Commission's characterization of the Convention in the 1961 Austria v. Italy decision insofar as it grounds it in "a network of mutual bilateral undertakings . . . " that are complemented (but not exclusively constituted) by "objective obligations." *See* Craven, *supra* note 147, at 512.
156. Austria v. Italy, *supra* note 155, at 18–19, emphasis added.

By contrast, international economic agreements rest on precisely such a logic of "subjective and reciprocal rights" and duties that states undertake to observe in their relationships with one another. Any subjective rights that such agreements create for private parties have the character of exclusive "club goods," generated by obligations that member states have towards each other rather than towards humanity as a whole. Unlike human rights, which set out standards of respect owed by signatory states to all persons regardless of nationality, investment treaties ordinarily exclude nationals of third states from accessing the privileges granted by states to one another's nationals.[157] In other words, the mere fact that some provisions of investment treaties can be claimed as rights by private actors does not mean that these rights are universal entitlements akin to human rights; rather, they come into existence as a result of states exercising their sovereign discretion to create entitlements for one another's producers, traders, and investors.[158] As the International Court of Justice emphasized in its *Barcelona Traction* decision, human rights have *erga omnes* application,[159] meaning that "states undertake international human rights obligations vis-à-vis the international community as a whole,"[160] whereas the nationality of the firm remains a decisive criterion for unlocking the benefits of investment treaties.[161]

The broader point is that human rights claims made on behalf of business corporations in the context of investment disputes ignores the all-important distinction between the universal nature of states' human rights obligations, and the reciprocal nature of individual rights created by investment treaties (and other regimes whose beneficiaries are limited by the scope of cooperation). Eliminating that distinction, in turn, has important consequences for how the rights of private economic actors are understood under international law. First, if firms can claim certain standards of treatment as universal human rights, this catapults their interests onto a higher normative plane. Considering states' obligations towards foreign corporations under the rubric of human rights is therefore not a benign case of reasoning by analogy; it suggests an implicit judgment about the moral stature of corporations as agents.

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157. This is not to say, of course, that the legally binding status of human rights norms is not dependent on state consent. Although some human rights norms, specifically those considered under the contested category of peremptory or *jus cogens* norms, do bind states independent of their consent, in general, what distinguishes human rights from moral or natural rights is precisely that states have chosen to enshrine them in formal agreements. My point is that once recognized by states, international human rights norms, unlike investors' rights, have a universal rather than reciprocal character in their scope *ratione personae*.
158. Anthea Roberts, *Triangular Treaties: The Nature and Limits of Investment Treaty Rights*, 56 Harv. Int'l L. J. 353, 363 (2015).
159. Barcelona Traction, Light & Power Co. Ltd. (Belgium v. Spain), 1970 ICJ 3 (5 Feb. 1970), ¶ ¶ 33–35. *See also* Cassese, *supra* note 18, at 17.
160. Hirsch, *supra* note 73, at 109.
161. *See, e.g.*, *Barcelona Traction*, *supra* note 159, ¶ 88.

Second, if it is framed as having its exclusive source in a particular investment agreement, a firm's claim to fair and equitable treatment derives its authority from the contractual consent of the respondent state as one of the "masters of the treaty." By contrast, if the same claim is framed as a human right to due process, the claimant appeals to a normative authority that transcends the authority of the treaty at hand, and attempts to hold the respondent state to a standard of treatment other than that to which it has consented. Similarly, by claiming human rights as the appropriate interpretive framework for determining their rights under a given investment treaty, private economic actors misrepresent the primary objective of investment treaties as the protection of investors, just as the objective of human rights treaties is the protection of human beings. In reality, however, investment treaties, unlike human rights treaties, are not intended for the exclusive benefit of nonstate actors; rather, states approve them to secure a variety of public benefits that may not always dovetail with investors' interests.[162] As a result, not only does the use of human rights discourse vest the quest for profit with a moral urgency that it would otherwise lack,[163] but it also enables corporate claimants to tap into benefits beyond those that signatory states have agreed to grant within the framework of the investment agreement.

Third, the importation of standards from the domain of international human rights law into investment arbitration might "enhance the precedential value of investor-State decisions," indicating that the legal standards contained in international investment agreements are not simply "*lex specialis* limited to the investment regime," but expressions of generally applicable norms under international law.[164] In other words, borrowing from human rights law could create an even flow mechanism whereby norms cultivated within the domain of investment law spill over into the mainstream of international law.

Finally, if investors' rights are interpreted as a subspecies of human rights, this might limit states' discretion to terminate or renegotiate investment treaties.[165] Unlike rights created by other interstate agreements, human rights norms are sometimes understood to have an "irreversible character"

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162. Roberts, *Triangular Treaties, supra* note 158.
163. As Richard Bilder writes,

> To assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high order of legitimacy. . . . It must also be recognized that acceptance of the human rights label for some types of social claims while denying it to others implicitly accomplishes a sort of ordering of social values, prejudging which claims and interests are to prevail and which are to be sacrificed when different values come into conflict.

Richard B. Bilder, *Rethinking International Human Rights: Some Basic Questions*, Wis. L. Rev. 171, 174 (1969).

164. Alvarez, Public International Law Regime, *supra* note 40, at 183–84.
165. Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 14, at 24.

that makes the corresponding obligations of states impossible to extinguish even if a state withdraws its consent from the treaty that established them.[166]

VI. ARE FOREIGN INVESTORS VULNERABLE?

Among the arguments that motivate the interpretation of investors' rights in light of international human rights law, the most important is the claim that foreign firms are vulnerable to discrimination, expropriation, and persecution by host states. Investment treaties, like some human rights instruments, supply a means of holding states accountable when domestic guarantees fail to safeguard their interests. The idea that foreign investors deserve international legal protection due to their special vulnerability guides some of the expansive interpretations of investors' rights adopted by investment tribunals. In the emblematic 2003 *Tecmed* decision against Mexico, an ICSID tribunal relied on precisely such logic, marshaling the case law of the European Court of Human Rights to argue that foreigners are entitled to broader property and due process guarantees than citizens. The tribunal argued that

> the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitle [*sic*] to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors.[167]

Following this logic, the lack of democratic representation for foreign firms, combined with the presumed partiality of domestic courts, enables host states to effectively hold the assets of foreign investors hostage.[168] To bolster this claim, the tribunal quoted the ECtHR's statement in *James and others v UK* that "non-nationals are more vulnerable to domestic legislation."[169] Accord-

166. Anthea Roberts, *Transforming the Investment Treaty System through Joint Termination and Amendment*, unpublished lecture (14 Oct. 2013); Tania Voon, Andrew Mitchell & James Munro, *Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights*, 29 ICSID Rev. 451, 458 (2014).

167. *Tecmed v. Mexico*, *supra* note 71, ¶ 122.

168. *See* Justin Byrne, *NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access*, 35 Tex. Int'l L. J. *Texas International Law Journal* 415 (2000) (arguing that without private rights of action, investors' interests are hostage to power politics between states); Alvarez, Public International Law Regime, *supra* note 40, at 118.

169. *Tecmed v. Mexico*, *supra* note 71, ¶ 122; The tribunal did not note that the facts of the ECtHR case it referenced, James and Others v. the UK, App. No. 8793/79 Eur. Ct. H. R. (21 Feb. 1986)), were quite distinct from the *Tecmed* dispute. *James and Others* was a property rights complaint brought against the UK by natural persons who were UK citizens. The ECtHR decision itself did not obligate the UK to accord greater protections to foreigners' property rights. Rather, the plaintiffs sought to take advantage of a guarantee of compensation available under the general principles of international law referenced in Protocol No.1; the ECtHR explained why such a remedy under international law might be available to foreigners but declined to make it available to citizens seeking remedies against their own state. *See* James and Others v. the UK, *supra*, ¶ ¶ 58–66.

ing to the tribunal, the special vulnerability of foreign investors provides a reason for adopting an elevated standard of scrutiny vis-à-vis state measures that affect their property rights than would be appropriate in the case of domestic property-holders.[170] Quoting the ECtHR again,

> although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.[171]

The *Tecmed* tribunal interpreted this statement as meaning that whereas a state might be justified in mandating domestic firms to undergo sacrifices for the public interest, foreign investors are not part of the closed moral economy of the host state and are therefore entitled to greater immunity from regulatory takings. On this view, international tribunals are not only supposed to make up for foreign investors' disenfranchisement in the domestic legislative and judicial process,[172] that is, to provide them with what John Hart Ely termed "virtual representation";[173] they are also meant to hold states to a higher standard of treatment vis-à-vis foreign investors than would be warranted in the case of their domestic counterparts.

The appeal to the special vulnerability of foreign firms to justify the importation of elevated standards of review from international human rights law founders on several considerations. First, firms that operate abroad are far from being politically disenfranchised as the *Tecmed* tribunal implies. Even the term "transnational" falsely suggests a precarious position of statelessness, when in fact corporations are not stateless at all: the benefits

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170. Thomas Wälde's separate opinion in the *Thunderbird v. Mexico* arbitral decision illustrates this attitude. Wälde writes: "By contrast [to commercial arbitration], international investment law is aimed at promoting foreign investment by providing effective protection to foreign investors exposed to the political and regulatory risk of a foreign country in a situation of relative weakness. The main principles underlying the NAFTA . . . as developed in the most recent and authoritative jurisprudence by arbitral tribunals require that in case of doubt, the risk of ambiguity of a governmental assurance is allocated rather to the government than to a foreign investor and that the government is held to high standards of transparency and responsibility for the clarity and consistency in its interaction with foreign investors." Wälde, Sep. Op., *Thunderbird v. Mexico*, *supra* note 71, ¶ 4.
171. *Tecmed v. Mexico*, *supra* note 71, ¶ 122.
172. For a range of arguments in favor of international arbitration as a way of leveling the playing field between powerful states and vulnerable investors, *see* Hirsch, *supra* note 73, at 108–09.
173. The concept of virtual representation is used in the context of constitutional law by John Hart Ely, who argues that the Privileges and Immunities Clause of the US Constitution ensures that "state legislatures cannot by their various regulations treat out-of-staters less favorably than they treat locals," and that in enforcing that provision, federal courts provide the sole channel through which the interests of "out-of-staters" can be "virtually represented" in the host state's decision-making process. *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 83 (1980).

firms enjoy under international agreements accrue to them by virtue of their nationality.[174] Their juridical status is established (not extinguished) by sovereign fiat; that is to say, by the decision of two or more states to establish a treaty regime under which private actors incorporated in those states can claim benefits.[175] Furthermore, even if foreign firms cannot leverage their wealth to gain influence in the host state's domestic policy process (which they often can), they have the option to register their complaints with their home state and urge it to pursue remedies through diplomatic channels. In fact, the origins of international investment law lie in the diplomatic espousal of a foreign corporation's grievances against a host state by its country of incorporation.[176] Third, far from being disadvantaged as a result of operating abroad, firms often draw great benefits from crossing borders, which enables them to dodge jurisdictions, shop for favorable forums, conveniently circulate and conceal their assets, hide behind several layers of subsidiaries, and generally escape accountability for their actions while claiming the full protection of whichever legal system they choose to inhabit.[177] As a result, transnational businesses have access to extensive legal protections that "[n]o other category of private individuals—not traders (who do not invest), not human beings in their capacity as human rights holders, not even national investors in their home state—is given . . . in international law."[178] In reality, therefore, international investment law "privileges one over-privileged set of juridical entities to the detriment of the rights owed by all states to natural persons within their jurisdiction."[179] Far from justifying the extension of human rights guarantees to private economic actors, the disenfranchisement argument speaks in favor of using international law to re-establish and

174. *See Barcelona Traction*, *supra* note 159, ¶ 88; Dolzer & Schreuer, *supra* note 9, at 44–45.
175. *Barcelona Traction*, *supra* note 159, ¶ 90. Van Harten, *The Public-Private Distinction, supra* note 45, at 374, 379, 393; Roberts, *Triangular Treaties*, *supra* note 158.
176. In its 1924 *Mavrommatis* decision, the Permanent Court of International Justice ruled that only states, not individuals, have interests under the international system, but that the system allows the home state of an individual wronged by a foreign state to "espouse" its citizen's interests and represent them as its own in international proceedings. Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 PCIJ (Ser. B) No. 3 (30 Aug. 1924), ¶ ¶ 169–70. Roland Portmann, Legal Personality in International Law 65–67 (2010). Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 14; Alvarez, Public International Law Regime, *supra* note 40, at 106; *see also* Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. Int'l L. & Pol. 959, 977 (2009). For a detailed critique of diplomatic protection as an appropriate model for the contemporary international investment regime, *see* Douglas, *supra* note 46, at 164–81 (arguing that "the *raison d'être* of the investment treaty mechanism for the presentation of international claims may well be a response to the inadequacies of diplomatic protection." *Id.* at 182).
177. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L. J. 443, 463 (2001).
178. Simmons, *supra* note 45, at 42.
179. Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 14, at 19.

enforce the *duties* of corporations towards the communities from which they draw their profits.

The argument that foreign investors are especially vulnerable is further undermined by the fact that international investment agreements tend to reflect and further entrench existing asymmetrical economic relationships among capital-exporting industrialized countries and developing countries keen to gain a greater share of foreign direct investment.[180] Investment has tended to flow from wealthier states to developing countries, meaning that "investment treaty claims often involve multinational corporations with economic resources and leverage that may rival those of their host states."[181] Furthermore, the decentralized nature of international investment law "has exacerbated the competitive rush to sign BITs and contributed to bargaining concessions by developing countries."[182] As Simmons has shown, bilateral investment agreements can make it easier for powerful firms to prey on economically beleaguered states, particularly because "periods of slow economic growth render potential host governments more willing to accept constraints on their freedom of action in order to attract capital."[183]

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180. There is mixed empirical evidence on whether or not investment treaties encourage foreign direct investment. Berger, Busse, Nunnenkamp, and Roy argue that investment agreements that contain certain key provisions, particularly those that liberalize admission of foreign investment and incorporate a national treatment rule, do have a positive effect on foreign direct investment. Notably, they find that provisions for investor-state dispute resolution has only a minor effect in encouraging greater investment. *See* Alex Berger, Matthias Busse, Peter Nunnenkamp & Martin Roy, *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box*, 10 Int'l Econ. & Econ. Pol'y. 247 (2013). While Berger et al. explain the likelihood of BITs stimulating foreign direct investment in terms of the features of the treaty, Tobin and Rose-Ackerman argue that BITs tend to encourage investment only in the presence of a domestic political and economic environment favorable to investment, such as trade openness, market size, institutional stability, human capital levels, and the like. Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 Rev. Int'l Orgs. 1 (2011).

181. Brower II, *Corporations as Plaintiffs, supra* note 60, at 203. *See also* Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. Rev. 1, 29 (2007). Franck notes that although the majority of claims were made by investors from developed countries, the most likely respondents were "middle income" countries, while "low income" countries were mostly spared costly awards. *Id.* at 31–33. While the number of BITs signed between developing nations has increased in recent years, BITs are rarely concluded amongst developed countries, presumably because they share proximate standards of investor protection. *See* Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization*, *in* Transnational Corporations and Human Rights (Olivier de Schutter ed., 2006); Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties,* 38 Va. J. Int'l L. 639 (1997). *Cf.* Alvarez, Public International Law Regime, *supra* note 40, at 145–46 (citing the Energy Charter Treaty and NAFTA as a new generation of investment agreements between capital-exporting states).

182. Simmons, *supra* note 45, at 16. *See also* Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 Int'l. Org. 811 (2006).

183. Simmons, *supra* note 45, at 22.

These considerations further cast doubt on the claim that foreign investors are particularly defenseless actors and therefore deserving of the protection afforded by international human rights norms. To the contrary, they reinforce Alvarez's conclusion that "investment treaties provide powerful claimants with powerful remedies."[184]

VII. INVESTORS' RIGHTS, CONSTITUTIONAL RIGHTS, AND DEMOCRACY

Having laid out conceptual and legal arguments against treating corporations as entitled to the protection of international human rights norms, in the remainder of this article, I will enumerate the consequences that such treatment is likely to have for democratic autonomy and constitutional rights within the domestic context. I will argue that treating investors' rights as human rights can radically diminish the capacity of real persons, namely the citizens of a host state, from exercising their constitutional rights, not least their rights to collective self-rule. The 2003 *Tecmed* decision is once again instructive for understanding how a human rights approach emphasizing the vulnerability of foreign property holders can be used to protect their interests against domestic regulation.[185] The *Tecmed* tribunal held not only that states owe greater deference to the property rights of foreigners, but also implied that the scope of democratic decisionmaking must be curbed where these rights are concerned. To briefly recall the facts of the dispute, Tecmed, a Spanish firm, had purchased a landfill facility near the Mexican town of Hermosillo through its local subsidiary firm, Cytrar. However, the Mexican authorities decided to terminate Cytrar's operating licenses a mere two years after the purchase. The firm contested this decision before an ICSID tribunal, arguing that by canceling these licenses Mexico had violated several provisions of the Spain-Mexico investment treaty, including the prohibition of expropriation without compensation and the obligations to accord fair and equitable treatment to foreign investors and to provide full security and protection to their assets.

The revocation of Cytrar's license was not simply an administrative act, but a response to a sustained demand from citizens, expressed through the proper democratic procedures. For several years in the 1990s, residents of Hermosillo had waged an energetic (but by all accounts peaceful) campaign of opposition to the landfill, which was located a mere 8 km from the urban center of Hermosillo and handled "hazardous toxic waste originating in [a] former lead recycling and recovery plant" and "biological-infectious

184. Brower II, *Corporations as Plaintiffs, supra* note 60, at 204.
185. *Tecmed v. Mexico, supra* note 71.

waste."[186] During this time, Mexican authorities had kept the landfill in operation (and had sold it to Cytrar) in spite of a Mexican regulation that required landfills to be "a distance of at least 25 km" from any major settlement.[187] The citizens' movements sought to enforce this ban. Their actions included filing several public complaints, including a claim before the State Commission of Human Rights, participating in peaceful demonstrations in groups of several hundred, "marching down the landfill and closing it down symbolically," [188] issuing communications, and holding a 192-day sit-in at the Hermosillo town hall (actions which the arbitral tribunal characterized as "aggressive").[189] Unfortunately for the claimant firm, the elections of July 1997 brought new authorities to power at the municipal and state levels who were sympathetic to the community movement against the landfill, and who finally terminated Cytrar's operating licenses.[190]

In its submission to the arbitral tribunal, Tecmed argued that the termination of its subsidiary's license to operate the landfill amounted to illegal expropriation of its assets under the investment treaty because it was, "to a large extent, due to political circumstances essentially associated to [sic] the change of administration in the Municipality of Hermosillo . . . rather than to legal considerations."[191] The tribunal agreed. It essentially held that the "community pressure" exerted by the citizens of Hermosillo had not been grave enough to warrant a termination of the license, especially in the absence of concrete evidence that the landfill presented a harm to public health.[192] Because the "social or political circumstances and the pressure exerted on municipal and state authorities"[193] was not "so great as to lead to a serious emergency situation, social crisis or public unrest,"[194] shutting down the landfill represented a disproportionate and therefore illegal response by the Mexican authorities.[195] When the firm originally made the decision to purchase the landfill, it had counted on the Mexican authorities to continue *not* enforcing the law prohibiting landfills close to urban centers, and the arbitral tribunal found its expectations to be justified.[196] In

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186. *Id.* ¶ ¶ 49, 102, respectively.
187. *Id* .¶ 106.
188. *Id.* ¶ 108.
189. *Id.*
190. *Id.* ¶ 42.
191. *Id.*
192. *Id.* ¶ 140.
193. *Id.* ¶ 132.
194. *Id.* ¶ 133.
195. *Id.* ¶ ¶ 147–51.
196. *Id.* ¶ 106. In a 2001 submission to the North American Commission for Environmental Cooperation, the Academia Sonorense de Derechos Humanos, A.C., argued that "the government of Mexico is failing to enforce its environmental law effectively concerning the establishment and operation of the Cytrar facility near the city of Hermosillo, Sonora, Mexico." Press Release, Commission for Environmental Cooperation New Submission Reopens NACEC File on Cytrar (2 Mar. 2001), *available at* http://www.cec.org/Page.asp?PageID=122&ContentID=1705&SiteNodeID=362.

other words, Mexico was held to be in breach of its investment obligations because a group of conscientious citizens used their constitutional rights to pressure local authorities to enforce regulations already on the books, and because the newly elected local administration did what responsive democratic representatives are supposed to do.

Although sanguine observers have hypothesized that investor-state arbitration can promote "good governance" and the rule of law in states that lack them,[197] the *Tecmed* decision provides evidence to the contrary. In particular, it exposes a fundamental tension between, on the one hand, the guarantees of consistency, stability, and coherence of public decisionmaking that arbitrators associate with investment law, and on the other hand, the prerogative of democratic governments to make, rescind, and revise the laws in accordance with the duly expressed will of those whom they govern. According to the tribunal, by revoking the Spanish investor's license to operate the landfill in response to the demands of citizens expressed through democratic procedures, Mexican authorities had failed to honor "the basic expectations that were taken into account by the foreign investor to make the investment."[198] In other words, the dispute brought to the fore a tension between the principle of democratic self-rule and international investment law, one that the tribunal resolved in favor of the latter.

Contrary to what this discussion might so far seem to suggest, investment tribunals tend not to be investors' rights fundamentalists: in adjudicating disputes, they do take into account the duty (and discretion) of states to protect countervailing public interests. In balancing the investor's claimed losses against the public goods sought by the respondent state, however, they find themselves having to second-guess the public policy decisions of domestic institutions and the relative weight that those institutions choose to accord to different public goods.[199] For instance, the *Tecmed* tribunal decided, in effect, that considered against the forfeiture of the landfill operator's investment, it was reasonable to ask the half-million residents of Hermosillo to live within 8 km of a toxic waste dump. The tensions illustrated by the *Tecmed* dispute are currently being played out on a greater scale, *inter alia*, in the ongoing arbitral litigation between Germany and Vattenfall, a Swedish energy firm, over Germany's decision in to phase out all nuclear power facilities in the wake of the Fukushima disaster in Japan. Vattenfall has initiated arbitration proceedings against Germany at ICSID, and has brought a constitutional complaint before the German Federal Constitutional Court. Although decisions are still pending, Vattenfall's suits call into question the German government's ability to weigh the risks and benefits of different

197. Fry, *supra* note 10.
198. *Tecmed v. Mexico*, *supra* note 71, ¶ 154.
199. Kingsbury & Schill, *supra* note 72, at 1.

energy sources and to base its decisions on the democratically expressed preferences of its citizens rather than on the expected future profits of nuclear energy purveyors.

While these examples illustrate broader tensions between democratic sovereignty and international economic law, another investment dispute brought before ICSID in 2007 throws into high relief a different kind of conflict, namely, that between the constitutionally protected rights of citizens and the supranationally protected rights of investors.[200] In 2002, the Republic of South Africa adopted its Mineral and Petroleum Resources Development Act in order to "bring about equitable access to South Africa's mineral and petroleum resources," and to "[eradicate] all forms of discriminatory practices in the mineral and petroleum industries."[201] The Act furthered the 1996 South African Constitution's distinctive commitment to "redress the results of past racial discrimination"[202] and "bring about equitable access to all South Africa's natural resources."[203] To these ends, it required that all firms in the mineral and petroleum industries submit to a process of recertification during which they would need to show that their ownership structure and employment and management practices conformed to South Africa's Broad-Based Black Economic Empowerment targets.[204] The complainants in the *Foresti* case, ten Italian nationals and a Luxembourg firm with mineral interests in South Africa, claimed that the Mineral Act violated their rights under the Italy-South Africa and Luxembourg-South Africa bilateral investment treaties. They argued in particular that the Act was tantamount to expropriation of their assets since it led to the revocation of their mining rights and forced them to sell off 26% of their shares to historically disadvantaged South Africans below the market price.

The parties to the *Foresti* dispute reached a settlement before the ICSID tribunal returned a decision on the merits. Nevertheless, the dispute shows how casting private economic actors as rights-bearers under international investment law superimposes an additional layer of *de facto* constitutional constraints on states.[205] In this respect, investment law functions as "disci-

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200. Piero Foresti, Laura de Carli and others v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Award (4 Aug. 2010).

201. Mineral and Petroleum Resources Development Act, Act No.28 of 2002, Republic of South Africa, Pmbl. (2002).

202. Const. of the Republic of South Africa, art 25(8).

203. *Id.* art 25(4)(a). The 2002 Minerals Act repealed the apartheid-era Mineral Rights Act, which the South African government contended "was an instrument that entrenched white privilege in the minerals sector." *Foresti and Others v. South Africa*, *supra* note 200, ¶ 69.

204. For a detailed analysis of problems of compatibility between South Africa's obligations under its international investment agreements and its constitutionally mandated project of Black Economic Empowerment (BEE), *see* David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise 158–83 (2008).

205. *Id.*; Afilalo, *supra* note 51; Burke-White & von Staden, *supra* note 53, at 289.

plinary constitutionalism"[206] at the supranational level that conditions states' democratic autonomy in light of the interests of "large capital, and specifically, the investor as the dominant political subject."[207] However, while norms such as the South African racial equality legislation derive their legitimacy from having been negotiated and established through democratic processes, the rights enjoyed by private economic actors under international economic law lack equally strong sources of legitimation. Although the legitimacy of investment agreements is rooted primarily in the consent of signatory states, tribunals interpret these agreements in ways often not foreseen or approved by their state principals. As investor-state litigation has proceeded apace since the late 1990s, the scope of the private economic rights has grown at the expense of the democratic autonomy of states. By allowing investors to claim treaty provisions not only as subjective rights owed to them, but also as guarantees whose substance overlaps with, and must be read in light of, international human rights law, the international investment regime functions as a *de facto* layer of supranational constitutional constraints that take precedence over domestic constitutional priorities and policy autonomy.[208]

Not only are the constitutional norms that shape the exercise of public power no longer confined to the domestic realm, but when domestic and supranational constitutional norms come into conflict, the former stand at a disadvantage. A state's constitutional rules, principles, and values are not part of the "applicable law" in a transnational investment dispute, which must be settled under the relevant instruments of *international* law.[209] Even if a respondent state is obligated under its own constitution to provide a clean environment, affordable services, social justice, or racial equality for its citizens, these obligations do not necessarily prevail over the rights of investors in the context of an investment dispute. Even the most hallowed norms of a respondent state's constitution are presumptively suspect if they are cited in support of actions adversely affecting a foreign investor. As the *Tecmed* tribunal observed, "[t]hat the actions of [Mexico] are legitimate or lawful or in compliance with the law from the standpoint of [Mexico's]

206. Stephen Gill, *New Constitutionalism, Democratisation and Global Political Economy*, 10 Pacifica Rev. 23 (1998).
207. Stephen Gill, *The Constitution of Global Capitalism*, Unpublished Paper Presented at the International Studies Association Annual Convention, Los Angeles, 3 (2000) (on file with author).
208. Burke-White & von Staden, *supra* note 53, 284–91; Schneiderman, *supra* note 204.
209. Article 3 of the International Law Commission's Articles on State Responsibility provides that "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." Responsibility of States for Internationally Wrongful Acts, *adopted* 12 Dec. 2001, G.A. Res. 58/83, U.N. GAOR 53rd Ses., art. 3, U.N. Doc. A/56/49; Douglas warns, however, that in the sphere of investment, international law cannot be considered "a self-sufficient legal order" and therefore that the categorical exclusion of "internal law" in investment disputes might be wrong-footed. Douglas, *supra* note 46, at 155. *See also* Francioni, *supra* note 68, at 72.

domestic laws does not mean that they conform to the [Mexico-Spain investment] Agreement or to international law."[210] In the event of a conflict between domestic legal norms (including constitutional norms) and investment treaty obligations, the tribunal has discretion to decide how much deference a state is owed on account of the former.

To some extent, this is understandable: an international tribunal exists to interpret and apply international, not domestic, law. However, it also means that a host state's counterarguments in favor of the public interest can only be as strong as the international norms (or treaty norms) it can summon in defense of the interests in question. Here, unfortunately, the public interest stands at a disadvantage. Different areas of international law are unevenly developed; while norms such as the prohibition of expropriation and the national treatment principle are seen as unequivocal obligations on states under international trade and investment law, international norms relating to the protection of social, cultural, economic, and environmental interests have a far more fuzzy status.[211] The reason that such diffuse societal interests are rarely treated as generating binding obligations under international law is partly owing to the fact that their protection is assumed to be the responsibility of domestic institutions. But the mere existence of municipal norms obligating the host state to undertake environmental, cultural, or social regulation is not an adequate reason for privileging those norms over investors' rights, resulting in a Catch-22 that favors transnational firms and shortchanges the public interest. This problem is compounded by the fact that some of the most important public service industries of developing countries are often contracted out to foreign firms. In other words, many important state functions are routinely delegated to foreign investors, who thereby not only become gatekeepers for the provision of basic goods including water, energy, and telecommunications, but are also protected from public regulation by the shield of international investment law.

Although respondent states have invoked international human rights law in investment arbitration in order to defend their duty and prerogative to protect the public interest, this strategy has limited promise.[212] Summoned to justify state measures taken in the public interest, international human

210. *Tecmed v. Mexico*, *supra* note 71, ¶ 120.

211. As Ryan Suda points out, these tend to be "rights which States are to realize progressively," rather than rights that impose immediate requirements on state behavior. Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization* in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (Olivier De Schutter, ed., 2006) 90.

212. *Cf.* the UN High Commissioner's 2003 report on human rights, trade and investment, which encouraged states to "raise their human rights obligations before tribunals in an attempt to secure interpretations of investment agreements and tribunal decisions that take into account the wider legal and social context." UNHCHR, *Report on Human Rights, Trade, and Investment*, *supra* note 58, ¶ 55.

rights norms make weak tea, not least because the particular rights likely to be invoked in such a context (for instance, those protecting cultural or environmental rights, access to resources, subsistence, or social welfare) are not considered to have "ripened" to the same extent as rights to property and due process claimed by firms.[213] To take one example, the much-criticized *CMS* v *Argentina* arbitral decision dismissed Argentina's constitutional provisions pertaining to the "protection of health, safety and economic interests, adequate and truthful information, freedom of choice and equitable and dignified treatment" of citizens as consumers as "so-called third generation rights" that are merely "aspirational" in character and must therefore take a back seat to "enforceable," "fundamental constitutional rights" to property.[214] Furthermore, human rights discourse provides at best an awkward representation of public and diffuse (as opposed to private and individuated) interests;[215] while the civic language of public order, social welfare, and collective autonomy does not command anything like the trump value of human rights discourse in the arbitral context. In sum, international human rights norms, when invoked by states in defense of their domestic policy prerogatives, are unlikely to compensate for the narrowing of democratic autonomy in favor of investors' rights under international law.

VIII. AGAINST THE ALIEN SHIP MODEL OF HUMAN RIGHTS

Some observers have welcomed the spillover of human rights norms into other arenas of international law—particularly into international trade and investment law—as evidence of the constitutionalization of human rights

213. Brower II, *NAFTA's Investment Chapter, supra* note 80, at 1540–42; Fry, *supra* note 10, at 81, 96.

214. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (12 May 2005), ¶ 204. It is worth noting that the tribunal arguably erred in describing Article 42 of the Argentine Constitution relating to "the protection of health, safety, and economic interests, adequate and truthful information, freedom of choice and equitable and dignified treatment" of consumers as "third generation rights," since the enumerated list contains a mixture of what is conventionally considered first, second, *and* third generation rights as applied to consumers ("equitable and dignified treatment," even when it refers specifically to the treatment of consumers, seems to belong in the so-called first generation of civil and political rights; the protection of health, safety, and economic interests belongs in what is conventionally considered the second generation of economic, social, and cultural rights; access to "adequate and truthful information" is commonly considered a third-generation right). Furthermore, the classification of human rights in terms of "generations" has been criticized on conceptual, normative, and historical grounds. *See* Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?* 29 Neth. Int'l L. Rev. 307, 316–18 (1982).

215. Finnis, *supra* note 3, at 216.

norms at the global level.[216] It has been argued that such crosspollination will not only give human rights greater visibility and practical relevance, but may work to integrate the functionally fragmented landscape of international law under a series of overarching principles that include human rights.[217] On this view, international human rights transfer constitutional rights to the international level, and any additional traction they gain within international institutions signals progress towards a global constitutional order. By implication, if domestic legal systems allow corporations to claim constitutional rights for certain purposes, why shouldn't corporations analogously invoke human rights in the context of international law?

I would like to contest the assumption, undergirding the question posed above, that international human rights should be understood as the international counterpart to domestic constitutional rights. In the most basic sense, this analogy implies that the primary purpose of international human rights norms is to patrol the exercise of public power by *international* institutions, just as constitutional rights norms constrain domestic institutions. However, the primary of human rights is rarely understood in these terms, although the need for human rights norms to assume such a role might grow as international institutions acquire greater power.[218] For now, international human rights norms are more commonly construed as guarantees against the misuse of power by states and their agents, and their invocation in the investment context takes advantage of precisely this understanding.

If there is no straightforward analogy between domestic regimes of constitutional rights and international human rights, what then is the proper

216. Ernst-Ulrich Petersmann, *Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration,* 13 Eur. J. Int'l L. 621 (2002); Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?* 20 Mich. J. Int'l L. 1 (1999); Ernst-Ulrich Petersmann, *Limits of WTO Jurisprudence: Comments from an International Law and Human Rights Perspective, in* The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO 81 (Thomas Cottier & Petros C. Mavroidis eds., 2003). Controversially, Petersmann draws an intrinsic normative link between institutions of global economic governance and human rights: "From a human rights perspective, all national and international rules, including economic liberalization agreements such as the IMF and WTO agreements, derive their democratic legitimacy from protecting human dignity and inalienable human rights which today constitutionally restrain all national and international rule-making powers." Petersmann, *Time for a United Nations "Global Compact," supra* at 635.

217. For instance, Francioni argues that investment tribunals, who frequently adjudicate access to justice claims, should "arrive at the identification of an international standard on access to justice taking into account the law and practice of international human rights bodies—including the European Court of Human Rights" so as to further "the consolidation of an international standard on access to justice as a right of aliens and a human right alike." Francioni, *supra* note 68, at 70.

218. The Court of Justice of the European Union (CJEU) has marshaled the EU's human rights norms to constrain the use of executive power by the European Union and to indirectly contest the use of power by the United Nations Security Council. See Turkuler Isiksel, *Fundamental Rights in the EU After* Kadi and Al Barakaat, 16 Eur. L. J. 551 (2010).

relationship between them? For instance, do domestic constitutions merely "download" a quasi-natural set of universal human rights norms, which would imply that the task of democratic self-legislation is one of faithful transcription?[219] Or do democratic communities have originary authority to define the rights that they resolve to respect, making their act of self-legislation a *generative* rather than a *derivative* one? What degree of divergence between international and domestic rights regimes is acceptable? Although a comprehensive consideration of these questions is beyond the scope of this article, how we answer them has important implications for whether human rights discourse is likely to help or hinder the attempt by corporations to leverage international law against domestic regulation.

Briefly put, my point is that the appropriation of human rights discourse by corporations is facilitated by a prevalent and, in my view, misleading understanding of human rights. This is the view that human rights norms are of a fundamentally *supranational* and *anti-statist* character. According to this "alien ship" model of human rights (a metaphor inspired by the image of the alien ship that hovers over the White House in publicity posters of the 1996 film *Independence Day*), human rights norms are seen as located above states, making their impact on domestic politics primarily as foreign impositions. Emblematically, Samuel Moyn argues that the defining feature of the contemporary human rights movement is "the recasting of rights as entitlements that might contradict the sovereign nation-state from above and outside," in contrast to domestic struggles for rights that "serve as [the] foundation" of national political systems.[220] Whereas the latter are associated with "a politics of citizenship at home," human rights imply "a politics of suffering abroad,"[221] invoked by "a few foreign people criticizing another state for its wrongdoings."[222] According to Moyn, the modern human rights movement differs from earlier discourses of rights by the fact that it "attempts to step outside and beyond the state."[223] Precisely such a supranational understanding informs some of the most trenchant critiques of human rights today, including the claims that human rights discourse disempowers individuals and communities by casting them as passive vic-

219. See Christian Tomuschat, International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law Vol. 281 (1999).
220. Moyn, *supra* note 1, at 13. For a critique of Moyn's "determinedly cosmopolitan and supra-state vision" of human rights, *see* Alston, *Does the Past Matter?*, *supra* note 1, 2070.
221. Moyn, *supra* note 1, at 12.
222. *Id.* at 26. Moyn is correct that this is an important aspect of contemporary human rights practice, but it is only one aspect. This operational definition of human rights as primarily a supranational political ideology is at odds with the contemporary practice of human rights, as I explain below.
223. *Id.* at 21.

tims, undermines sovereign equality and collective autonomy, and serves as a moralizing alibi for old-fashioned power politics.[224]

There is, however, an alternative way to understand the relationship between human rights norms and democratically enacted constitutional norms, which I will call the *complementarity model*.[225] On this understanding, international human rights are meant to backstop, not replace, domestic constitutional guarantees. They are not constructed in the dry dock of the cosmopolitan imaginary to be deployed to circumvent, "transcend,"[226] or attack states or domestic institutions. Rather, they are developed, enriched, and transformed through domestic struggles aimed at reforming domestic institutions, struggles that in turn reverberate across societies and shape international instruments.[227]

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224. For a compendium of these and other fears about human rights, *see* David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 Harv. Hum. Rts. J. 101 (2002).

225. This conception is broadly in line with a number of recent interventions that have emphasized complementarity (rather than analogy) between the basic principles of domestic constitutional law and international law. Beitz, The Idea Of Human Rights *supra* note 3, at 108 (proposing a "two-level model of human rights" characterized by a "division of labor between states as the bearers of the primary responsibilities to respect and protect human rights and the international community and those acting as its agents as the guarantors of these responsibilities."); Buchanan, *supra* note 5; Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law,* 20 Ind. J. Global Legal Stud. 605 (2013) (arguing that national and international law are "co-constitutive" and "form an integrative whole," whereby international law, including human rights law, is needed to complete the task of constitutional rule in the domestic context, *at* 612). *Compare with* a study that treats domestic and international regimes of basic rights as being of a broadly analogous nature or instantiating a duplication (rather than division) of labor: Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 Stan. L. Rev. 1863 (2003) (characterizing domestic constitutional rights and international human rights regimes as two "parallel" legal regimes charged with applying fundamental rights, systematically spelling out the possible bases for conflict between the two and proposing mechanisms for mutual accommodation).

226. Moyn, *supra* note 1, at 35.

227. For influential empirical accounts of the domestic dimensions of human rights practice, *see* The Practice of Human Rights, *supra* note 11; the contributions in Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions (Ryan Goodman & Thomas Pegram eds., 2011); Beth A. Simmons, Mobilizing For Human Rights: International Law and Domestic Politics 125–47 (2009). In contrast to Moyn's position outlined above, Simmons argues that "[e]xternal actors can certainly facilitate" processes of domestic change, "but in principle, they are all possible without the contributions and the interference of outside actors." *Id.* at 126. Simmons elucidates several mechanisms through which "an official commitment to a specific body of international law helps local actors set priorities, define meaning, make rights demands, and bargain from a position of greater strength than would have been the case in the absence of their government's treaty commitment." *Id.* at 126. While Simmons sheds light on the domestic effects of human rights treaties, the classic volume by Keck and Sikkink shows the enmeshment of the domestic, international, and transnational dimension of human rights activism, arguing that "advocacy networks" can help to amplify local struggles both at home and abroad, chiefly by pursuing communicative strategies (e.g. monitoring compliance, disseminating information, seeking accountability, naming and shaming). Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders (1998).

A complementary relationship of this sort is captured by Seyla Benhabib's account of "democratic iterations," according to which universal human rights norms do not emanate from some immutable universal idea or supranational *nomos*; rather, they derive their validity from being continually appropriated, challenged, reinterpreted, and affirmed by particular political communities.[228] They give expression to the democratic aspirations of citizens who seek to hold the public and private institutions that govern them to higher standards of justice, while enabling citizens to broadcast their aspirations beyond their own societies. Furthermore, where domestic constitutional guarantees fall short, international norms perform a "backup function" by lending domestic and international visibility to those shortfalls, and by enabling different constituencies to mobilize for redress.[229] To the extent that they are successful in doing this, international human rights norms can help reinforce the legitimacy of domestic political institutions.[230] Finally, international human rights norms are intended to steer states away from a particularistic definition of their interests towards regard for the "justice-sensitive externalities" that their actions create for outsiders.[231]

Understood as a complement rather than an alternative to domestic regimes of basic rights, international human rights norms express and expand, rather than diminish, the capacity of political communities to govern themselves. Their primary purpose is not to conjure protective power at the global level, but to provide domestic institutions with universalistic principles for the inclusion, recognition, and protection of human beings subject to their power. To summon a visual metaphor, international human rights norms are scaffolds and buttresses to domestic constitutional systems, complementing domestic norms by establishing and generalizing basic standards for the treatment of human beings regardless of their particular identities.[232]

Conceiving of the relationship between international human rights norms and democratic self-rule as one of contiguity rather than opposition can help to expose gratuitously anti-statist uses of human rights discourse.

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228. Seyla Benhabib, Another Cosmopolitanism (2006).
229. Buchanan, *supra* note 5, at 110–12.
230. *Id.* at 112–13.
231. Kumm, *supra* note 225.
232. Constructing a similar relationship of complementarity, Henkin writes:

> Strictly, "international human rights," that is, human rights as a subject of international law and politics, are to be distinguished from individual rights in national societies under national legal systems, but the two are not unrelated. . . . The international movement accepts human rights as rights that according to agreed-upon moral principles, the individual should enjoy under the constitutional-legal system of his or her society. But national protections for accepted human rights are often deficient; international human rights were designed to induce states to remedy those deficiencies. . . . The law, politics, and institutions of international human rights, then, do not replace national laws and institutions; they provide additional international protections for rights under national law.

Louis Henkin, The Age of Rights 17 (1990).

If the purpose of human rights norms is to patch up the cracks of domestic legal protection in order to keep human beings from falling through them, rights claims whose effect is to widen those cracks, for instance by undermining domestic measures designed to protect the public interest, can be excluded from the category of human rights. Put differently, if the guiding aim of human rights is construed as elevating the standards of treatment that domestic institutions accord to citizens, it becomes less credible to invoke them as a sanction for *lowering* those standards. Similarly, if the authority of human rights stems in part from their invocation and appropriation through domestic political processes, instances in which human rights are invoked to curtail the self-governing capacity of political communities must meet a higher burden of justification. By implication, instances of apparent conflict between international human rights norms and duly enacted democratic decisions must be evaluated in the context of domestic constitutional priorities, which may include rights to subsistence, security, a clean environment, access to water and other basic needs, not to mention the right to collectively deliberate and decide on these priorities.

This understanding of the relationship between human rights and democratic rule implies a reserved answer to a related question, namely: which international institutions ought to assume the function of protecting human rights? While some institutions were clearly designed for this purpose, such as the ECtHR or the Inter-American Court of Human Rights, others such as the Court of Justice of the European Union (CJEU) have arrogated interpretive authority over human rights norms despite lacking a firm legal basis to do so.[233] Should investment arbitrators follow in the CJEU's footsteps in incorporating human rights norms into their repertoire of legal references, even assume the role of *ad hoc* human rights tribunals in order to hold not just states but also corporations to account? Should human rights guarantees be inserted into investment agreements as counting among the objectives of these agreements, as a 2003 Report by the UN High Commissioner for Human Rights recommended?[234] More broadly, how should we specify which international institutions should be tasked with the protection of human rights?

Viewing international human rights as a backstop to—rather than a surrogate for—domestic constitutional norms invites cautious responses to these questions. The proliferation of institutions that claim to champion human rights in some form or another could destabilize or undermine the authority of domestic guarantees by second-guessing them. Furthermore, there is a risk of *rights saturation* within international institutions: translating the treaty

233. For an overview of this process, *see* Isiksel *supra* note 218.
234. UNHCHR, *Report on Human Rights, Trade, and Investment*, *supra* note 58, at 5, ¶ 57; *See also* Weiler, *Balancing Human Rights and Investor Protection*, *supra* note 68, at 436–67.

obligations states owe one another into subjective rights held by private actors can upstage the primacy of domestic constitutional rights. As the *Tecmed* and *Foresti* disputes illustrate, rights saturation at the international level could come at the expense of domestic constitutional priorities, including the basic rights of citizens. Although cosmopolitans have celebrated the growing recognition of individual rights under international law, the entrenchment of expansive rights for private economic actors can diminish the ability of democratic communities to deliver a balanced range of public goods for their members and to realize more capacious and equitable systems of rights protection. Fundamental human interests are likely to be better protected under an international order that respects domestic rights priorities, particularly where these are the products of inclusive democratic processes.

IX. CONCLUSION

I began this article by reviewing the range of arguments legal theory offers to account for why and in what respects corporations might be considered as rights-bearing persons. I argued that however plausible they may be with respect to corporate *personhood* claims, none of these theories affords cogent reasons for treating corporations as bearers of *human* rights. This is no idle exercise in logic. When debates over defining the precise nature and scope of corporate personhood flared up early in the twentieth century, "the fundamental issue was not one of theoretical concept but the adaptation of the law to achieve an appropriate degree of control over the activities of the corporation in the light of the political values of the times."[235] Just as competing theories of corporate personhood were marshaled to advance various regulatory or deregulatory political agendas, today the race to define the proper subjects of human rights norms evidences a struggle to determine the new agents of global governance and the extent of their power. Thus, although trade and investment disputes can easily implicate human rights issues, and although importing human rights discourse into the domain of international economic law may seem like an attractive way to hold corporations to account, such importation is likely to have the perverse result of entrenching corporate privilege. As Blumberg has argued with regard to corporate personhood in domestic constitutional law, "the crucial issue for heavily industrialized societies the world over, seeking to assure corporate responsibility and accountability, has become . . . the imposition of *duties* upon corporations, not the recognition of their rights."[236] To the extent that corporations have begun to occupy the legal spaces opened up by global

235. Blumberg, *supra* note 20, at 296; *see also* Dewey, *supra* note 90, at 670.
236. Blumberg, *supra* note 20, at 285.

economic governance, that lesson applies with equal urgency to the realm of international institutions.

It would be easy to dismiss corporate human rights claims in the investment law context as a clever litigation strategy without any serious external consequences for the global human rights agenda. Sadly, this would be a mistaken assumption. First, the importation of human rights into the domain of international economic agreements is not only likely to be done in a way that affords greater protections to firms than to natural persons, but it is also likely to fuel the charge that human rights discourse is a mere smokescreen for neoliberal hegemony.[237] Second, as human rights have come to occupy a prominent place in the terrain of "global public reason"[238] or in the "public morality of world politics,"[239] scholars have argued that the *practice* of human rights should be given primacy and authority over exercises in abstract justification.[240] On this view, whatever their deep moral foundations, human rights animate "a global discursive community whose members recognize the practice's norms as reason-giving and use them in deliberating and arguing about how to act."[241] Jettisoning the search for a foundational "essence" of human rights and instead privileging discursive practices as constitutive of human rights norms might release us from the metaphysical morass, but it also means that human rights norms are as strong or as weak as the discursive practices that instantiate them. If the substance of human rights is contingent on the actors and interests that they are habitually mobilized to protect, it is difficult to overstate the corrosive effects of deploying human rights norms to frame and defend private capital accumulation. This consideration alone serves as a potent reminder, if such reminder is needed, that not all *individual* rights enjoyed by private actors under international law should be dignified with the title of *human* rights.[242]

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237. This critique is powerfully expressed in Douzinas, *supra* note 13; Michael Hardt & Antonio Negri, Empire (2000).
238. Cohen, *supra* note 3, at 192.
239. Beitz, The Idea Of Human Rights *supra* note 3, at 1.
240. As Beitz writes: "We do better to approach human rights practically, not as the application of an independent philosophical idea to the international realm, but as a political doctrine constructed to play a certain role in global political life." *Id.* at 48–49. *See also* Raz, *supra* note 3.
241. Beitz, The Idea Of Human Rights *supra* note 3, at 8.
242. For a passing recognition of this distinction by the International Court of Justice, *see* LaGrand (Germany v. United States of America), 2001 ICJ REP. 466, 494, ¶ ¶ 77–78.

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