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ZACHARY K. OSTRO\*

## *Janus Capital Group, Inc. v. First Derivative Traders*: Further Limiting Limited Liability, and Missing an Opportunity to Curb Corporate Misconduct

IN *JANUS CAPITAL GROUP, INC. v. FIRST DERIVATIVE TRADERS*,<sup>1</sup> the Supreme Court of the United States examined if the investment adviser of a mutual fund could be held directly liable for “mak[ing]” a knowingly false statement in the mutual fund’s prospectus under the U.S. Securities and Exchange Commission Rule 10b–5(b) and § 10(b) of the Securities Exchange Act of 1934.<sup>2</sup> Improperly relying on its prior holdings in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, where it expressly denied Rule 10b–5 primary liability to aiders and abettors,<sup>3</sup> and *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.*, where it held that the misstatements of a company’s supplier must be directly relied upon by the company’s shareholders in order to be primarily liable,<sup>4</sup> the Court held that an investment adviser firm of a mutual fund could not be liable under Rule 10b–5 because it did not have “ultimate authority over the [false] statement.”<sup>5</sup> In so holding, the Court improperly treated the independence of separate corporate entities as axiomatic, and misinterpreted (and vastly expanded) the protections from liability in *Central Bank* and *Stoneridge* — creating the opportunity for a loophole in corporate liability.<sup>6</sup> Instead of opening the floodgates to litigation as the

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1. 131 S. Ct. 2296 (2011).

2. *Id.* at 2299.

3. 511 U.S. 164, 191 (1994) (“Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).”).

4. 552 U.S. 148, 153 (2008).

5. *Janus*, 131 S. Ct. at 2302.

6. *See infra* Part IV.C.

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majority suggested, a finding of liability would have ushered in a much-needed era of socially responsible corporate governance in the wake of the 2007–2008 financial crisis.<sup>7</sup> Furthermore, this holding is not unique for the modern Court; it is a microcosm of a fervent pro-corporate jurisprudence that the Roberts Court continues to develop.<sup>8</sup> When viewed individually and collectively, *Janus* and its sister cases pose a real and immediate threat to investors, consumers, and employees, by shielding business entities from liability and drastically increasing their influence (to the detriment of average citizens) in our economic and political processes.<sup>9</sup> In each case, the Court has failed to properly balance corporate liability protections with citizens' ability to receive just compensation following misconduct.<sup>10</sup>

### I. THE CASE

Janus Investment Fund (“the Fund”) is a business trust that holds a family of mutual funds.<sup>11</sup> Investors in the mutual funds own all of the Fund’s assets.<sup>12</sup> Although its own legal entity, at the time of the initial complaint, all of the officers of the Fund were also officers of the Fund’s investment adviser, Janus Capital Management (JCM) — a wholly owned subsidiary of Janus Capital Group, Inc. (JCG), a publicly traded company.<sup>13</sup> Mutual funds are usually intended as long-term investments, and, as such, speculative and volatile forms of trading such as market timing are generally considered to be unattractive to mutual fund shareholders.<sup>14</sup> To this end, many of the Fund’s prospectuses stipulated that JCM

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7. See *infra* Part IV.C.

8. See *infra* Part IV.D.

9. See *infra* Part IV.D.

10. See *infra* Part IV.D.

11. *In re Mutual Funds Inv. Lit.*, 566 F.3d 111, 126 (4th Cir. 2009). A business trust, also referred to as a “Massachusetts Business Trust” or “common law trust” is an unincorporated business entity held in trust for its beneficiaries. See 13 AM. JUR. 2D *Business Trusts* § 1 (2011). Beneficiary rights to the corpus are transferable and may be evidenced in a certificate of ownership. *Id.*

12. *In re Mutual Funds Inv. Lit.*, 566 F.3d at 126.

13. *Id.* at 115; see also Brief for Respondent at 4, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari) (“Every one of the Janus Funds’ 17 officers was a Vice President of JCM.”).

14. See Brief for Respondent at 6, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari). Market timing is the trading of securities that seeks to take advantage of discrepancies in a security’s recorded Net Asset Value (NAV) and its true market value. See *In re Mutual Funds Inv. Lit.*, 529 F.3d 207, 211 (4th Cir. 2008) (“[I]nvestors move in and out of the funds to take advantage of the temporary differentials between the mutual funds’ daily-calculated ‘net asset value’ (‘NAV’) and the market price of the component stocks during the course of a day.”). For example, after a market closes, an event might occur which would alter a security’s true price yet would not be realized in its recorded NAV. *Id.* Therefore, due to time zone differences causing foreign markets to be closed while U.S. markets are open, if the security were a foreign asset, its NAV would stay constant until the close of U.S. markets. *Id.* Thus, an American trader in the interim would be able to buy the security at its recorded NAV and then sell it once the foreign market opens and the asset’s true value is reflected in its price — thereby allowing the trader to make a quick profit by exploiting the time delay in the security’s valuation. *Id.* However, the shortsightedness of such trading

would make efforts to curb market-timing activities by its traders; these were false statements.<sup>15</sup> Officers of JCM and JCG, including JCG Chief Executive Officer Mark Winston, not only allowed market timing, but also continuously tracked, and received reports on, the activities.<sup>16</sup> The allowance of market timing in the Fund became public knowledge in 2003 when then New York Attorney General Eliot Spitzer filed a complaint against JCG and JCM for fraudulent trading.<sup>17</sup>

As a result of Attorney General Spitzer's allegations being made public, investors in the Fund withdrew heavily.<sup>18</sup> This caused a chain reaction whereby JCM's management fees declined, as did JCG's total income and stock price — resulting in First Derivative Traders (First Derivative), a class of JCG shareholders, to bring claims against JCG and JCM.<sup>19</sup> Their complaint alleged violations by JCG and JCM under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5(b) for causing “certain misleading statements appearing in prospectuses for a number of individual Janus funds” which stated that market timing would be curbed.<sup>20</sup> In addition to a direct liability claim, First Derivative also brought a control person claim against JCG for JCM's actions per § 20(a) of the Securities Exchange Act.<sup>21</sup>

The United States District Court for the District of Maryland dismissed the complaint pursuant to Federal Rules of Civil Procedure Rule 12(b)(6).<sup>22</sup> According to the district court, JCG could not be liable as a Rule 10b-5(b) primary actor because it did not “make” false statements contained in the prospectuses; dissemination, and use of the Janus website, logo, and name, were insufficient for a finding of direct liability.<sup>23</sup> Furthermore, the court held that JCM could not be liable to First Derivative because, as shareholders of the parent company and not investors in the Fund, there was no loss causation between the false statements in the prospectuses and drop in JCG's stock price.<sup>24</sup> Furthermore, without the requisite “nexus” between First Derivative's loss and the issued prospectuses, JCG could not be held liable as a control person.<sup>25</sup>

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“can harm mutual fund investors by causing mutual funds to manage their portfolios in a manner that is disadvantageous to long-term shareholders” because the volatility of such trading is contradictory to the stability mutual fund investors expect. *Id.*

15. *In re Mutual Funds Inv. Lit.*, 566 F.3d at 117.

16. Brief for Respondent at 4, 7, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09-525) (on writ of certiorari).

17. *In re Mutual Funds Inv. Lit.*, 566 F.3d at 118.

18. *Id.*

19. *Id.* at 115.

20. *Id.* at 114-15.

21. *Id.* at 114.

22. *In re Mutual Funds Inv. Litig.*, 487 F.Supp. 2d 618, 620, 624 (D. Md. 2007); FED. R. CIV. P. 12(b)(6) (dismissing a complaint for “failure to state a claim upon which relief can be granted”).

23. *In re Mutual Funds Inv. Litig.*, 487 F. Supp. 2d. at 621-22.

24. *Id.* at 623.

25. *Id.* at 623-24.

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First Derivative appealed, arguing the district court improperly dismissed its complaint for failure to state a claim.<sup>26</sup> The United States Court of Appeals for the Fourth Circuit reversed, finding that First Derivative made a valid claim against JCM because the average investor would conclude, given JCM's day-to-day control over the Fund, that JCM issued the statement, or at least would have approved of its issuance.<sup>27</sup> However, the Circuit Court held that First Derivative did not have a valid Rule 10b-5(b) claim against JCG because it was too separate from the Fund's day-to-day activities for an investor to infer JCG played a role in issuing the false statement.<sup>28</sup> As such, according to the court, JCG's potential liability was limited to control person liability per § 20(a) of the Act.<sup>29</sup>

The Supreme Court of the United States granted certiorari to decide if JCM could be held primarily liable in a Rule 10b-5 claim for false statements made in the Fund's prospectuses.<sup>30</sup>

## II. LEGAL BACKGROUND

Historically, courts have struggled to develop a properly balanced interpretation of Rule 10b-5.<sup>31</sup> Determined to judicially create the necessary mechanics to ensure safe and open markets, while unwilling to legislate from the bench, the Supreme Court has slowly developed a more complete understanding of a Rule 10b-5 violation.<sup>32</sup> This piecemeal, and cautious, development of what constitutes a viable securities fraud led the Court to create a private right of action in *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*,<sup>33</sup> and then, over the past forty years, to conservatively interpret that right.<sup>34</sup> In so doing, the Court has read Rule 10b-5 with cautious liberality — avoiding judicial overreach, while working to ensure Congressional intent in enacting the Securities Exchange Act.<sup>35</sup> However, development of that right has been scaled back in recent years — leading to *Janus* where the Court improperly limited the scope of Rule 10b-5 liabilities.<sup>36</sup>

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26. *In re Mutual Funds Inv. Litig.*, 566 F.3d 111, 114 (4th Cir. 2009).

27. *Id.* at 127.

28. *Id.* at 128.

29. *Id.* at 131.

30. *Janus Capital Group, Inc. v. First Derivative Traders*, 130 S. Ct. 3499 (2010).

31. *See infra* Parts II.B–C.

32. *See infra* Parts II.B–C.

33. 404 U.S. 6, 12 n.9 (1971).

34. *See infra* Parts II.B–C.

35. *See infra* Parts II.B–C.

36. *See infra* Parts II.B–C.

*A. Congress Passed the Securities Exchange Act of 1934 in the Wake of the Great Depression as a Means of Promoting Sound Financial Markets*

Following the Great Depression and the Stock Market Crash of 1929, Congress recognized the need for a strong federal regulator to oversee securities markets.<sup>37</sup> In order to ensure investor confidence, while promoting open markets, fair transacting, and honest securities traders, the Securities Exchange Act of 1934 established the Securities and Exchange Commission (SEC).<sup>38</sup> The overarching intent of creating the SEC, and establishing federal regulations, was “to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.”<sup>39</sup> In order to hold securities traders accountable for any potential wrongdoing, and violation of the public trust, § 10(b) of the Act makes it “unlawful for any person, directly or indirectly,” to “use or employ . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.”<sup>40</sup>

*1. To Enforce § 10(b) of the Act, the SEC Promulgated Rule 10b–5*

In pursuance of the Congressional delegation to the SEC in § 10(b), the SEC implemented Rule 10b–5 — the enforcement mechanism against “manipulative and deceptive devices” in the securities market.<sup>41</sup> Mirroring the language of § 10(b), Rule 10b–5 states that:

*It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,*

*(a) To employ any device, scheme, or artifice to defraud,*

*(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or,*

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37. 15 U.S.C. § 78b (discussing the need for federal regulation of security trading).

38. 15 U.S.C. § 78d.

39. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (emphasis in original).

40. 15 U.S.C. § 78j(b).

41. 17 C.F.R. § 240.10b–5.

*(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.*<sup>42</sup>

It is unclear from the exact language of Rule 10b–5 if private citizens, as investors, have standing or if enforcement is limited to actions brought by the SEC — requiring the Court to interpret the Congressional intent in passing § 10(b).<sup>43</sup>

*2. The Court Has Read a Private Right of Action Into § 10(b) and Rule 10b–5*

In *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*,<sup>44</sup> the Supreme Court read a private right of action into the language of Rule 10b–5.<sup>45</sup> Acknowledging the lack of express direction from Congress, the Court asserted that the Act, and § 10(b) in particular, are not limited to the goal of maintaining stable securities markets.<sup>46</sup> Rather, the statute “must be read flexibly, not technically and restrictively” in order to provide private citizens a means of “redress under § 10(b).”<sup>47</sup>

*B. Over Time, the Court Established the Requirements and Limitations of Who Can Sue Under the Implied Private Right of Action*

After establishing the private right of action, the Court began to limit the scope of the action.<sup>48</sup> Doing this, according to the Court, was a necessary action to properly implement and enforce Congress’s intent in first enacting the Securities Exchange Act.<sup>49</sup> However, in order to avoid frivolous suits, while maintaining investors’ access to judicial remedy, the Court has established a set of requirements a private plaintiff, or class thereof, must meet in order to bring a valid action.<sup>50</sup>

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42. *Id.*

43. *See infra* Part II.A.2.

44. 404 U.S. 6 (1971).

45. *Id.* at 13 n.9.

46. *Id.* at 12.

47. *Id.*

48. *See infra* Parts II.B.1–2.

49. *See, e.g., Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (“The securities statutes seek to maintain public confidence in the marketplace” by curbing misconduct “through the availability of private securities fraud actions”).

50. *See infra* Parts II.B.1–2.

*1. The Court Has Adopted the Requirement of Materiality of Misstatements and an Investor's Reliance in Order to Establish a Valid Claim*

In *Basic, Inc. v. Levinson*,<sup>51</sup> the Court held that in order for a plaintiff to bring a valid securities fraud claim under § 10(b), the misstatements made must be of a material nature, and “[i]t is not enough that a statement is false or incomplete” if it “is otherwise insignificant.”<sup>52</sup> To determine what is “material,” the Court adopted an *ad hoc* balancing test where it looks at facts unique to each situation — such as the likelihood a misstatement will impact investment decisions, and the overall ramifications of those decisions.<sup>53</sup>

Additionally, the plaintiff must rely on the material misstatement.<sup>54</sup> The Court has “found a rebuttable presumption of reliance in two different circumstances”<sup>55</sup> — if there is a material omission and an actor had a duty to disclose,<sup>56</sup> or under the “fraud-on-the-market doctrine.”<sup>57</sup> This doctrine adopts a theory that in an efficient market, the price of a security represents all publicly available information on the asset.<sup>58</sup> Therefore, when an investor purchases a security, they do so based off of its price making it an attractive purchase; thereby necessarily creating reliance on the false statement or omission because that misconduct altered the security’s market price.<sup>59</sup> Over time, the Court added further requirements in addition to materiality and reliance in order to make a valid § 10(b) claim of securities fraud.<sup>60</sup>

*2. The Court Has Established Six Elements for a Valid Rule 10b–5 Claim*

While the Court in *Basic* established a private right of action in securities fraud litigation to complement criminal and SEC enforcement suits,<sup>61</sup> in order to avoid frivolous suits, it was necessary to judicially establish a complete set of

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51. 485 U.S. 224 (1988).

52. *Id.* at 238.

53. *Id.* (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968) (“[M]aterial[ity] ... will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.”)) (internal quotations omitted).

54. *Id.* at 243.

55. *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.*, 552 U.S. 148, 159 (2008).

56. *Id.* (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153–54 (1972)).

57. *Id.*

58. *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988).

59. *Id.*

60. *See infra* Part II.B.2.

61. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (“This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions. . .”).



requirements.<sup>62</sup> Relying on case law, and the Private Securities Litigation Reform Act which requires plaintiffs in private securities actions to plead with “particularity” certain elements of a claim,<sup>63</sup> in *Dura Pharmaceuticals, Inc. v. Broudo*<sup>64</sup> the Supreme Court outlined six elements plaintiffs must meet in order to have a valid securities fraud claim.<sup>65</sup> Following *Dura*, in order for private plaintiffs to make a valid Rule 10b–5 claim, they must illustrate: (i) “a material misrepresentation (or omission),”<sup>66</sup> (ii) a wrongful state of mind (“scienter”),<sup>67</sup> (iii) a connection between the misrepresentation and the “purchase or sale of a security,”<sup>68</sup> (iv) “reliance” on the misstatement,<sup>69</sup> (v) “economic loss,”<sup>70</sup> and (vi) the loss must be connected to the misstatement.<sup>71</sup> In addition to the limitations imposed on plaintiffs with regard to *how* they must sue pursuant to § 10(b) and Rule 10b–5, the Court has also imposed limitations on *who* plaintiffs can sue.<sup>72</sup>

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62. *Id.* (emphasizing the importance of “meritorious” suits); *see also* *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) (discussing the negative economic consequences high levels of securities fraud litigation).

63. Pub. L. No. 104–67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.). In a standard private civil claim of action, a plaintiff’s complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Aschcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotations omitted); *see also* FED. R. CIV. P. 8(a)(2) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”). However, in fraud actions, per Federal Rule of Civil Procedure 9(b), plaintiffs must “state with particularity the circumstances constituting fraud or mistake.” FED. R. CIV. P. 9(b). Similarly, the Private Securities Litigation Reform Act (PSLRA) requires plaintiffs to plead “with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind” in committing the securities fraud. 15 U.S.C. § 78u–4(b)(2)(A).

64. 544 U.S. 336 (2005).

65. *Id.* at 341–42.

66. *Id.* at 341 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988)).

67. *Id.* (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 199 (1976)).

68. *Id.* (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730–31 (1975)).

69. *Id.* 341–42 (2005) (citing *Basic*, 485 U.S. at 248–49).

70. *Id.* at 342 (citing 15 U.S.C. § 78u–4(b)(4)).

71. *Id.* (citing 15 U.S.C. § 78u–4(b)(4)). It should be noted, however, that there is currently disagreement as how to properly synthesize *Dura*’s elements with the requirements of the PSLRA; uncertainty remains as to which elements, if not all, must be plead with particularity. *Compare* Brief for Respondent at 54–55, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari) (asserting that scienter was the only element of a securities fraud claim a plaintiff must plead with particularity because the PSLRA only requires a “strong’ inference of scienter,” and courts are allowed to make inferences in “determining the sufficiency of pleadings as to the other elements”) (internal citations omitted), *with* Brief for Petitioner at 55, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (illustrating that since “[m]ental state is rarely susceptible to direct proof” Congress only intended to allow plaintiffs to plead with inferences to the element of scienter, but other elements “*can* be proved directly, and thus must be plead ‘with particularity’—not inferred”) (emphasis in original) (internal citations omitted).

72. *See infra* Part II.C.

*C. To Complement Strict Pleading Requirements for Plaintiffs in Securities Fraud Litigation, the Court Has also Limited the Scope of Potential Actions Creating a Private Right of Action Under § 10(b) and Rule 10b-5*

Just as the Court was reluctant to allow a broad right under a judicially established cause of action, the Court has also been reluctant to expose a large group of potential defendants to primary liability for securities fraud.<sup>73</sup> To that end, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,<sup>74</sup> the Court limited those primarily liable in a private action for “mak[ing]” a false statement under § 10(b) and Rule 10b-5 to those individuals or entities that actually made a material misstatement or omission, while denying a private cause of action against those who are secondarily liable for aiding or abetting the violator.<sup>75</sup> Following the Court’s holding in *Central Bank*, Congress, in § 1014 of the Private Securities Litigation Reform Act of 1995 amended § 20(e) of the Securities Exchange Act of 1934 to limit aider and abettor (secondary) liability to enforcement actions brought by the SEC.<sup>76</sup>

*1. Non-Corporate “Insiders” per Central Bank are Not Necessarily “Outsiders” and Thus, Under the Right Circumstances, Can be Primarily Liable in a Rule 10b-5 Action*

Although *Central Bank*’s holding facially limits the types of actors who may be potentially liable under Rule 10b-5 to those inside, and working for, the corporation,<sup>77</sup> the limitation it imposed was on the *action* not the *actor*.<sup>78</sup> The Court in *Central Bank* explicitly stated:

*Any person or entity, including a[n outside] lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming all of the [other] requirements for primary liability under Rule 10b-5 are met.*<sup>79</sup>

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73. See, e.g., *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (“[W]e are mindful that we must give narrow dimensions . . . to a private right of action Congress did not authorize when it first enacted the statute.”) (citing *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 167 (2008)) (internal quotations omitted).

74. 511 U.S. 164 (1994).

75. *Id.* at 180.

76. 15 U.S.C. § 78t(e).

77. See *Central Bank*, 511 U.S. at 176 (asserting that Plaintiff’s improperly read the use of “indirectly” in Rule 10b-5 as extending a private right of action against corporate outsiders).

78. *Id.* at 191.

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

This reasoning comports with earlier Court decisions that held that even if a contributor to a materially false statement was not named in the statement, they could still be held primarily liable under Rule 10b-5.<sup>80</sup> And in interpreting *Central Bank*, lower federal courts similarly have held that individuals or institutions that do not themselves produce the misstatement can still be liable if they: produce documents that are used to create a misstatement and are then reproduced in the statement, prepare but do not sign the document, or use an innocent conduit to produce or issue the statement.<sup>81</sup> However, in order to avoid overreach of holding corporate outsiders primarily liable under Rule 10b-5, in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*,<sup>82</sup> it was necessary for the Court to elaborate on the reliance requirement.<sup>83</sup>

## 2. In *Stoneridge* the Court Clarified the Requirement of Reliance for a Valid Rule 10b-5 Claim

Although *Central Bank* limited the private right of action to primary liability, in so doing the Court emphasized that under the right circumstances corporate outsiders could potentially be held primarily liable under Rule 10b-5, and lower federal courts have relied on *Central Bank* to extend primary liability in circumstances even where the maker of the statement is not facially responsible.<sup>84</sup> Without limitations, this holding has the potential to create a broad right of action against corporate outsiders — thereby usurping the role of the SEC in bringing enforcement actions per § 20(a) of the Act. Therefore, in *Stoneridge* the Court clarified the division between those primarily liable under § 10(b) and Rule 10b-5, and those that are only secondarily liable as an aider or abettor.<sup>85</sup> In *Stoneridge*, the Court held that the

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80. See, e.g., *Herman & MacLean v. Hudelston*, 459 U.S. 375, 386 n.22 (1983) (holding that corporate officers or outside advisers may be primarily liable even if “they are not named” in the statement); see also *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1225-27 (10th Cir. 1996) (holding outsider auditor primarily liable when opinion and certification letters were reproduced in a prospectus); *McConville v. SEC*, 465 F.3d 780, 787 (7th Cir. 2006) (holding a Chief Financial Officer was primarily liable for drafting misstatements which were later reproduced in her company’s 10-K even though she did not sign or file the public statement); *SEC v. Wolfson*, 539 F.3d 1249, 1261 (10th Cir. 2008) (finding an outsider consultant could be primarily liable for drafting statements later reviewed, certified, and published in a company’s filing statements). The extension of primary liability to secondary actors, however, is limited in scope — every element of the Rule 10b-5 element has to be met. *Central Bank*, 511 U.S. at 191. There are numerous circumstances where secondary actors cannot be held liable. See *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1046 (11th Cir. 1986) (holding that an outsider auditor could not be primarily liable for misconduct after the completion of the sale of the security); *Wright v. Ernst & Young*, 152 F.3d 169, 175 (2d Cir. 1998) (denying primary liability of an auditor when the misstatements were not “attributed” to it); *Ziembra v. Cascae Int’l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) (same, actor was an outside law firm); *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007) (same, actor was an auditor).

81. See *supra* note 80.

82. 552 U.S. 148 (2008).

83. *Id.* at 152.

84. See *supra* Part II.C.1.

85. *Stoneridge*, 511 U.S. at 153.

supplier of a company who colluded with the corporation to cause it to mislead their outside auditor — resulting in fraudulent financial statements on which shareholders relied — could not be held primarily liable because the statements made by the supplier were not *directly* relied on by the investors.<sup>86</sup> Thus, in *Stoneridge*, the Court did not expressly overrule *Central Bank*, but simply clarified that a corporate outsider may be only liable if the investor *directly* relies on their misstatement — thereby reiterating the distinction between primary and secondary liability, and the need to have a limited interpretation of the implied right of action.<sup>87</sup>

3. *Despite the Piecemeal Development of the Requirements for a Proper Rule 10b–5 Cause of Action, Securities Fraud Litigation and Corporate Misconduct Have Persisted*

In spite of, or perhaps due to, the gradual development of an understanding of which actions, or actors, can be held primarily liable for securities fraud, ambiguity in the law has persisted.<sup>88</sup> In response to this lack of clarity, corporate actors have continually found new ways to side step liability under Rule 10b–5.<sup>89</sup> For these reasons, the Court continues to be called to clarify the scope and meaning of Rule 10b–5 to best provide a remedy for securities fraud while avoiding judicial activism.<sup>90</sup> Similarly, financial crises have forced Congress to redefine, and expand, securities laws to best ensure socially responsible corporate conduct — most recently with the holistic Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>91</sup>

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86. *Id.*

87. *Id.* However, after *Stoneridge*, lower courts properly read the Court’s discussion of reliance to maintain the private right of action against outsiders discussed in *Central Bank*. See, e.g., SEC v. Wolfson, 539 F.3d 1249, 1261 (10th Cir. 2008) (finding an outsider consultant could be primarily liable for drafting statements later reviewed, certified, and published in a company’s filing statements).

88. See *infra* Part IV.

89. See *infra* Part IV.

90. See *infra* Part IV.

91. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-664, SECURITIES FRAUD LIABILITY OF SECONDARY ACTORS 2, 6 (2011) (discussing, per Congressional order via Dodd-Frank, the potential advantages, and support for, amending securities fraud law to potentially hold secondary actors primarily liable); Liability for Aiding and Abetting Securities Violations Act of 2009, S. 1551, 111th Cong. § 2 (2009) (proposed bill which would extend a private right of action to aider and abettors); Liability for Aiding and Abetting Securities Violations Act of 2010, H.R. 5042, 111th Cong. § 2 (2010) (same); see also Michael Greenberger, *Overwhelming a Financial Regulatory Black Hole with Legislative Sunlight: Dodd-Frank’s Attack on Systemic Economic Destabilization Caused by an Unregulated Multi-Trillion Dollar Derivatives Market*, 6 J. BUS. & TECH. L. 127, 128 (2011) (discussing how, “if properly implemented” the regulations proposed in Dodd-Frank would have the ability to minimize risk and improve corporate governance). *But see*, Stephen Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 U. MINN. L. REV. 1779, 1783 (2010) (stating that both Sarbanes-Oxley and Dodd-Frank are improper regulations of corporate governance and unjustified responses to anti-corporate populism).

## III. THE COURT'S REASONING

In *Janus Capital Group, Inc. v. First Derivative Traders*,<sup>92</sup> the Supreme Court, in a five-to-four decision,<sup>93</sup> held that JCM did not “make” the false statements in the Fund’s prospectuses, and therefore, could not be primarily liable for a fraud-on-the-market claim under Rule 10b–5(b).<sup>94</sup> Writing for the majority, Justice Thomas held that in order to “make” a statement per Rule 10b–5(b) the entity must have “ultimate authority over the statement.”<sup>95</sup> Here, Justice Thomas declared, because the Fund issued the prospectuses, the Fund had final control over the misstatements — causing the Fund, and not JCM, to be the only entity that had “authority over” it.<sup>96</sup> Drawing a parallel to the relationship between a speechwriter and a speaker, Justice Thomas asserted that while an individual or entity might have a hand in shaping and drafting the message, the statements are only attributable to the speaker.<sup>97</sup>

To support this analogy, Justice Thomas took a textual reading of Rule 10b–5(b) — declaring that while “make” itself can act as a verb when the action is directed at a noun (“e.g.: to make a chair,”) in other contexts when “make” is paired with a noun which conveys its own action, “the resulting phrase is approximately equivalent in sense to that verb.”<sup>98</sup> Thus, to “make a[] . . . statement” becomes equivalent to “to state.”<sup>99</sup> Accordingly, Justice Thomas held that the language of Rule 10b–5(b) only extends liability to the person or entity that itself “states” the falsity, and, therefore, the Government’s assertion that “mak[ing]” should be equivalent to “creat[ing]” was too broad.<sup>100</sup> Correspondingly, Justice Thomas also rejected First Derivative’s argument that the word “indirectly” in Rule 10b–5 should modify “make” as it does not directly modify “make,” but rather all of the verbs in Rule 10b–5, including the actions in sub-sections 10b–5(a) and 10b–5(c) “to employ” and “to engage;” suggesting that “indirectly” refers to how the statement is conveyed to the public, not one’s role in issuing the statement.<sup>101</sup>

This close reading, according to Justice Thomas, is in line with the Congressional intent in originally drafting the Securities Exchange Act, and its unwillingness to legislatively expand liability under Rule 10b–5, and the Court’s prior holding in

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92. 131 S. Ct. 2296 (2011).

93. Justice Thomas wrote the opinion of the Court; Chief Justice Roberts, and Justices Scalia, Kennedy, and Alito joined; Justice Breyer wrote the dissent, joined by Justices Ginsburg, Sotomayor, and Kagan. *Id.* at 2299.

94. *Id.*

95. *Id.* at 2302.

96. *Id.*

97. *Id.*

98. *Id.* at 2302–03 (internal citations omitted) (internal quotations omitted).

99. *Id.* at 2302 (internal quotations omitted).

100. *Id.* at 2303–04 (internal citations omitted).

101. *Id.* at 2305 n.11 (internal quotations omitted).

*Central Bank*<sup>102</sup> where it denied a private right of action to aiders and abettors.<sup>103</sup> By limiting the actors potentially primarily liable in a private Rule 10b–5 action, Justice Thomas drew “a clean line” between those that can be held directly liable, and those who only aid and abet.<sup>104</sup> Any broader reading, per Justice Thomas, would “undermine” this distinction in *Central Bank* and open the courts to private actions against any party who contributes to the making of a false statement — thereby creating a new right of action expressly denied by Congress when it limited control person liability to an action brought by the SEC.<sup>105</sup> This reasoning, according to Justice Thomas, is consistent with the Court’s holding in *Stoneridge* because like the supplier in *Stoneridge*, JCM’s actions were not themselves public, but rather only contributed to public statements and were thus not directly relied upon by First Derivative.<sup>106</sup>

In so holding, Justice Thomas rejected First Derivative’s claim that the overlapping relationship between an investment adviser and a mutual fund is unique and should cause JCM’s actions to extend beyond mere aiding and abetting — allowing JCM to be considered the direct actor — and “decline[d] this invitation to disregard the corporate form.”<sup>107</sup> Justice Thomas illustrated that because the Fund was a legally separate entity from JCM, First Derivative’s reading would expand the scope of Rule 10b–5 liability that the Court expressly rejected in *Stoneridge*.<sup>108</sup> Furthermore, Justice Thomas stated that “[a]ny reapportionment of liability in the securities industry,” given its unique nature, is a matter of legislation and reserved to Congress expressly.<sup>109</sup>

Finding the majority’s interpretation of “make” to be too narrow, and an extension of the protection of liability granted in *Central Bank*, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented.<sup>110</sup> According to Justice Breyer, the majority misinterpreted *Central Bank*’s protection of liability as excluding Rule 10b–5 liability for any separate legal entity by requiring “attribution” to a false statement made in a public document.<sup>111</sup> This ruling, Justice Breyer asserted, improperly applied *Central Bank*, which was concerned with secondary liability, to a question of primary liability, and extended its protections;

102. 511 U.S. 164 (1994).

103. *Janus*, 131 S. Ct. at 2302 (2011); *Central Bank*, 511 U.S. at 191.

104. *Janus Capital Group* 131 S. Ct. at 2302 n.6.

105. *Id.* at 2302.

106. *Id.* at 2303.

107. *Id.* at 2304.

108. *Id.* (citing 15 U.S.C. § 80a-10 (detailing the requirements of independence of a corporation’s board members)). Furthermore, Justice Thomas also noted that First Derivative failed to illustrate that any comments made by JCM to the Fund were “public statements” as required for a securities fraud violation. *Id.* at 2304 & n.9 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 227–28 (1988)) (internal quotations omitted).

109. *Id.*

110. *Id.* at 2305–06 (Breyer, J., dissenting).

111. *Id.* at 2308 (internal citation omitted).

instead of “drawing a clean line,” the majority, in Justice Breyer’s view, expressly broadened liability protection to a situation the Court in *Central Bank* suggested would give rise to a private cause of action under Rule 10b–5.<sup>112</sup> Here, Justice Breyer declared, JCM was directly involved in the day-to-day operations of the Fund and the relationship between the two entities “could hardly have been closer.”<sup>113</sup> Thus, unless the Court incorrectly and “arbitrarily exclude[s] from the scope of the word ‘make’ those who manage a firm,” per Justice Breyer’s opinion, management persons and entities should be held liable for misstatements issued themselves, or through an “unknowing intermediary” that they manage.<sup>114</sup>

#### IV. ANALYSIS

The Court’s holding in *Janus* failed on three distinct levels, as it: misinterpreted existing case law, missed an opportunity to add nuance to the law, and ignored the implications of its holding which created a loophole for corporate actors to avoid (or attempt to avoid) securities fraud liability.<sup>115</sup> In so doing, the Court expanded the limitations of *Central Bank*’s holding, failed to add nuance to the law to address the unique nature of mutual funds, while denying shareholders of JCG remedy and indirectly encouraged corporate misconduct at a time when increased corporate responsibility and responsiveness is crucial.<sup>116</sup> In *Janus* the Court simultaneously failed to adhere to judicial restraint and acknowledge recent Congressional (in)action.<sup>117</sup> Coming in the aftermath of the 2007–2008 financial crisis, the Court’s holding in *Janus* improperly ignored the ramifications of its holding, and missed an opportunity to judicially create a catalyst for much needed corporate reform.<sup>118</sup> Furthermore, this holding highlights the modern Court’s unnecessarily pro-corporate jurisprudence; in a series of cases, the Court has continuously preserved corporate immunity from liability, and denied individuals any legal remedy for corporate misconduct.<sup>119</sup>

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112. *Id.*

113. *Id.* at 2312

114. *Id.* Justice Breyer also found fault with the majority’s interpretation of *Stoneridge* — asserting that *Stoneridge* was a case concerning if investors relied on statements made, not which entity made a statement. *Id.* at 2308–09. Therefore, Justice Breyer found the majority’s reliance on *Stoneridge* to be misplaced, and inapposite to the facts of this case. *Id.* at 2309–10. Lastly, Justice Breyer also criticized the majority for its unwillingness to remand the case to allow First Derivative to amend their complaint to, as the majority suggests is a possibility, claim JCG and JCM could be liable in a § 20(a) aiding and abetting suit brought by the SEC. *Id.* at 2311 (internal cross reference omitted).

115. See *infra* Parts IV.A–C.

116. See *infra* Parts IV.A–C.

117. See *infra* Part IV.C.

118. See *infra* Part IV.C.

119. See *infra* Part IV.D.

*A. The Court's Holding Improperly Misapplied Case Law by Expanding the Limitations Central Bank Imposed*

In holding that JCM did not “make” the false statements in the Fund’s prospectus, the Court misinterpreted both Congress’s original intent in enacting the Securities Exchange Act, and the limitations *Central Bank* imposed.<sup>120</sup> Vigilantly afraid of judicial overreach, Justice Thomas, in refusing to expand those potentially liable under Rule 10b–5, inadvertently expanded the Rule’s limitations and incorrectly applied *Stoneridge* to an inapplicable set of circumstances.<sup>121</sup> On the surface, the Court merely reiterated prior case law when it held that “the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.”<sup>122</sup> However, this holding shifted the focus from *action* to the *actor* — thereby expanding the scope of actors protected from Rule 10b–5 liability.<sup>123</sup>

*1. Justice Thomas’s Textual Interpretation of Rule 10b–5 Contradicts the Legislative History of § 10(b) and the Context of Rule 10b–5 Promulgation which Requires a Flexible Reading*

The economic realities that gave rise to the enactment of the Securities Exchange Act, and promulgation of Rule 10b–5, closely mirror the current financial climate. As such, it would have been pertinent for the Court to take the recent financial collapse into consideration. The Act was created with the express purpose of ensuring fair and open securities markets.<sup>124</sup> In order to maintain investor confidence, while encouraging investment activity, it was Congress’s express intention to avoid corporate misconduct and maintain a high standard of clear, recognizable, and responsive business principles.<sup>125</sup> Therefore, in order to give the legislative intent full support to best apply the spirit of the law, the Court has continuously read § 10(b) and Rule 10b–5 “not technically and restrictively” but “flexibly” to best apply its purpose.<sup>126</sup> Indeed, implying the right of action is a

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120. See *infra* Part IV.A.1.

121. See *infra* Part IV.A.2.

122. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011).

123. See *infra* Part IV.A.2.

124. See *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (stating that the Securities Exchange Act of 1934 should be read liberally to best enforce the statute’s purpose).

125. See Brief for Respondent at 14, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari) (“Congress’s primary purposes in enacting the Exchange Act was to establish ‘honest securities markets and thereby promote investor confidence after the market crash of 1929’ and ‘to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.’”) (citing *Zandford*, 535 U.S. at 819) (emphasis in original) (internal citations omitted).

126. *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971).



perfect example of the Court's liberal reading.<sup>127</sup> The Court's prior unwillingness to expand on that right was a necessary balance in order to avoid meritless lawsuits, however, the limitations imposed in *Janus* unjustly established an imbalance in securities fraud litigation by limiting the number of potentially liable primary violators.<sup>128</sup>

By taking such a textual reading of Rule 10b-5, without consideration of the Rule's purpose and legislative intent, or the Court's instruction in *SEC v. Zandford* requiring a liberal reading (a unanimous opinion in which he participated), Justice Thomas improperly held that JCM could not be primarily liable for false statements made in the prospectus.<sup>129</sup> In his strict interpretation of "make," and closed reading of *Central Bank* and *Stoneridge*, Justice Thomas's analysis was limited in scope.<sup>130</sup> In holding that JCM did not "make" the false statements because it did not have "ultimate authority" over the statements, Justice Thomas focused solely on the fact that "corporate formalities were observed,"<sup>131</sup> such as the fact that the Fund was the only entity to have the statutory duty to file the prospectuses with the SEC, in order to maintain JCM and the Fund as separate legal entities.<sup>132</sup> Focusing on these technical formalities, without an analysis of the substance of the creation and dissemination of the misstatements, Justice Thomas improperly expanded the Court's holding in *Central Bank*, and misapplied *Stoneridge*.<sup>133</sup>

## 2. Justice Thomas's Limited Interpretation of "[M]ake" and Inflexible Adherence to Corporate Technicalities Vastly Expanded Rule 10b-5 Liability Protections

In the Court's holding, Justice Thomas, in an attempt to adhere to *Central Bank*'s protection of aiders and abettors, inappropriately expanded that protection to primary violators.<sup>134</sup> As previously mentioned, the Court in *Central Bank* expressly asserted that a corporate outsider could be held primarily liable provided all of the

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127. See *supra* Part II.A.2.

128. See *infra* Part IV.A.2.

129. See *infra* Part IV.A.2.

130. See *infra* Part IV.A.2.

131. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302, 2304 (2011) (internal quotations omitted). Justice Thomas relied on a select set of cases, and his analysis was primarily limited to a textual reading of Rule 10b-5. *Id.* at 2302. In so doing, Justice Thomas failed to consider the numerous cases, both before and after *Central Bank* and *Stoneridge*, where separate legal entities from the entity issuing the misstatement, or undisclosed individuals, could still be held liable. See *supra* note 80.

132. *Janus*, 131 S. Ct. at 2304.

133. See *id.* at 2308 ("[D]epending upon the circumstances [under *Central Bank*], board members, senior firm officials, officials tasked to develop a marketing document, large investors, or others (taken together or separately) all might 'make' materially false statements subjecting themselves to primarily liability. The majority's rule does not protect, it extends, *Central Bank*'s holding of no-liability into new territory that *Central Bank* explicitly placed outside that holding. And by ignoring the language in which *Central Bank* did so, the majority's rule itself undermines *Central Bank*." (Breyer, J., dissenting) (emphasis in original).

134. *Id.*

six elements of a valid Rule 10b–5 claim are met.<sup>135</sup> First Derivative made a valid claim: JCM (having total control over the Fund) caused prospectuses to be issued, which included the material misstatement that the Fund did not engage in market timing; JCM knowingly caused the misstatements to be issued; the misstatements made the mutual funds more marketable because of the risks market timing creates, which in turn made JCG a more attractive investment for members of First Derivative; First Derivative members relied on the misstatement in purchasing stock in JCG; shareholders of JCG lost money following the disclosure that JCM allowed market timing; and the loss was a result of the misstatements.<sup>136</sup> No one, not even Justice Thomas, would conclude otherwise; in fact, Justice Thomas recognized the high level of control JCM had over the Fund by admitting in a footnote that it could, even under his narrow reading of § 10(b) and Rule 10b–5, be held liable for “act[ing] through [an] innocent intermediar[y].”<sup>137</sup> The holding of no liability per Rule 10b–5 is solely due to his limited interpretation of “make” and focus on corporate structure technicalities.<sup>138</sup> However, as illustrated, this reading is in direct conflict with *Central Bank*.<sup>139</sup>

JCM had total control of the production and distribution of the prospectuses, and directly caused the economic loss suffered by the plaintiffs.<sup>140</sup> A mutual fund as an independent corporate entity is a legal fiction; they are a shell with all of their directors and officers wearing dual hats — serving the Fund while also serving either the parent company or the investment adviser.<sup>141</sup> Thus, to limit the potentially liable actor to the entity with “ultimate control” in a mutual fund scenario denies investors the opportunity to sue anyone.<sup>142</sup> Additionally, by asserting nothing on the prospectuses indicated that JCM in fact “ma[d]e” the misstatements, Justice Thomas failed to consider the fact that the “Janus” name is the property of JCG (and thus JCM as its wholly-owned subsidiary), and the Funds have been allowed to use the name in conducting business.<sup>143</sup> This allowed Justice Thomas to declare, by citing *Stoneridge*, that the investors did not rely on JCM’s

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135. See *supra* Part II.B.2.

136. See *supra* Part. I; see also *Janus*, 131 S. Ct. at 2312 (Breyer, J., dissenting); *In re Mutual Funds Inv. Litig.*, 566 F.3d 111, 115 (4th Cir. 2009) (finding First Derivative’s § 10(b) claim against JCM was sufficient to overcome the motion to dismiss).

137. *Janus*, 131 S. Ct. at 2304 n.10 (majority opinion); see also *id.* at 2311 (Breyer, J., dissenting).

138. *Id.* at 2304 (majority opinion) (internal quotations omitted).

139. See *supra* note 134 and accompanying text.

140. See *supra* Part I.

141. See, e.g., *Jones v. Harris Assocs. LP*, 537 F.3d 728, 731 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing en banc) (stating that “mutual funds are ‘captives’ of investment advisers”); see also *supra* Part I.

142. See *infra* Part IV.C.1.

143. See Brief for Respondent at 4, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari) (“Janus entities engaged in a coordinated marketing strategy that blurred the distinction between the entities that constituted JCG’s business, so that investors perceived a unified Janus brand.”).

misstatements.<sup>144</sup> However, provided the fact that JCM cannot be separated from the Fund, JCM had ultimate control over the day-to-day operations of the Fund, and the prospectuses were issued under the Janus name, the Fourth Circuit properly held that the investors did rely on the misstatements to purchase stock in JCG.<sup>145</sup>

Based off of this holding, by construing such a limited reading of “make” in an attempt to stay true to the Court’s purpose in *Central Bank* to avoid excessive litigation, Justice Thomas improperly expanded its protections.<sup>146</sup> The Court was right in *Central Bank* when it denied a private right of action for aiding and abetting.<sup>147</sup> Accountants, lawyers, consultants, bankers, and financiers play a crucial role in our economic structure, and to hold such actors primarily liable in *any* securities fraud action — even if they themselves are not the primary violator — would both open the floodgates to litigation, and discourage smart and capable people from entering those professions.<sup>148</sup> When outsiders play a direct role in the issuance of a misstatement or omission, the Court recognized in *Central Bank* the need to hold them primarily liable.<sup>149</sup> However, Justice Thomas’s unwillingness to read “make” liberally unnecessarily expanded *Central Bank*’s protections to corporate outsiders even when they are primarily liable.<sup>150</sup> Even if the Court’s interpretation and expansion of *Central Bank* is proper, an exception should be recognized in the mutual fund scenario.<sup>151</sup>

*B. Even Under the Court’s Rule of Who “[M]ake[s]” a Misstatement per Rule 10b–5, an Exception Should be Made for the Mutual Fund-Investment Adviser Relationship Provided the Interdependence Between the Two Entities*

The Court’s holding, by limiting the type of actors potentially liable under Rule 10b–5, even if it were accepted as prudent in an average securities fraud situation, would still be improper when the misstatements are made by a mutual fund’s

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144. Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2303 (2011).

145. *In re Mutual Funds Inv. Litig.*, 566 F.3d 111, 115 (4th Cir. 2009).

146. *See supra* note 130.

147. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994).

148. *See id.* at 189 (“[U]ncertainty and excessive litigation can have ripple effects. For example, newer and smaller companies may find it difficult to obtain advice from professionals . . . In addition, the increased costs incurred by professionals because of the litigation and settlement costs under 10b–5 may be passed on to their client companies, and in turn incurred by the company’s investors, the intended beneficiaries of the statute.”) (citing Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 948–66 (1993)).

149. *Id.* at 191.

150. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2308 (2011) (Breyer, J., dissenting).

151. *See* Brief for Respondent at 21, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari) (discussing the close relationship between a mutual fund and its investment adviser should have guided the Court’s opinion).

investment adviser, because doing so effectively eliminates a private right of action in this scenario.<sup>152</sup> As previously illustrated, JCG, JCM, and the Fund purposely held themselves out as one entity to the investing public.<sup>153</sup> Additionally, all of the Fund's directors and operators were from, and thus its day-to-day operations were controlled by, JCM; all seventeen of the Fund's officers were Vice Presidents of JCM, the Fund's General Counsel simultaneously served the same position for JCG and JCM, the Fund's Chairman was the former CEO of JCG, and the primary revenue stream for JCG was JCM's management of the Funds.<sup>154</sup> This situation is not unique in the mutual fund market.<sup>155</sup> Accordingly, even by accepting the Court's interpretation of "make," it should have created an exception for the mutual fund—investment adviser relationship.<sup>156</sup> By not creating such an exception, in the average mutual fund securities fraud claim, the plaintiffs are denied the ability to seek judicial remedy against *anyone*; most mutual funds do not have directors, officers, or employees distinct from the investment adviser, yet remain a separate legal entity.<sup>157</sup> Therefore, by focusing on the legal separateness of individuals and entities who issue statements, and not the substantive actions, in *Janus* the Court imprudently denied a private right of action in almost all mutual fund-related securities fraud claims, and gave corporations and corporate actors a roadmap as to how to avoid liability.<sup>158</sup> In so doing, the Court not only missed an opportunity to curb corporate misconduct, but also expressly created a loophole in the law that will encourage it.<sup>159</sup>

### C. Janus Will Encourage Corporate Misconduct

In holding that JCM could not be primarily liable for false statements made in the Fund's prospectuses, not only did the Court deny the class members of First Derivative an opportunity to financially recover from their losses, but it also improperly provided corporations with a roadmap as to how to avoid liability.<sup>160</sup> For these reasons, the Court's holding in *Janus* was a failure on both the micro and the macro level. The bright-line rule of what it means to "make" a statement for

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152. *Id.*

153. See *supra* note 141 and accompanying text.

154. Brief for Respondent at 4, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari).

155. See *supra* note 141 and accompanying text.

156. See Brief for Respondent at 21, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari) (discussing how the close relationship between a mutual fund and its investment adviser should allow the Court to have found JCM liable under Rule 10b–5(b)).

157. *Id.*

158. *Id.* at 30.

159. See *infra* Part IV.C.

160. See Brief for Respondent at 30, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari) (stating a finding that JCM could not be liable for "mak[ing]" a false statement "opens a roadmap for securities-fraud violators").

purposes of Rule 10b–5 was improper, and will have, absent Congressional action to amend the Securities Exchange Act, strong negative reverberations in the corporate world.<sup>161</sup>

*1. Justice Thomas’s Reasoning, by Emphasizing the Corporate Form, Created a Loophole in Federal Securities Law*

By emphasizing that: (i) JCM was a separate legal entity; (ii) it followed corporate formalities; and (iii) the Fund, not JCM, distributed the prospectuses, Justice Thomas injudiciously focused on the *form* of transactions, and not the *substance*.<sup>162</sup> In so doing, the Court provided corporations with a step-by-step plan as to how to avoid liability: create a legally separate corporation, trust, or other business entity; funnel all misstatements or omissions through it; and therefore avoid liability.<sup>163</sup> Regardless of the fact that the separate entity would be a shell — having no independent directors, officers, or employees of its own — it, per the holding in *Janus*, would be the only entity potentially liable for securities fraud.<sup>164</sup> Based on his holding, it would appear, that if Justice Thomas were to watch *The Wizard of Oz*, he would in fact “pay no attention to that man behind the curtain” and attribute all of the statements completely to the fictional image with absolute disregard to the person giving it life and controlling its every move.<sup>165</sup> By focusing on corporate form and ignoring the substance of the transactions, Justice Thomas improperly held that the only entity that could be liable in this case, and in likely future cases, is a shell firm with no actual independent agents or other actors, and not the individuals who are actually doing all of the work.<sup>166</sup>

This limited reading of Rule 10b–5 not only denies investors the ability to seek judicial remedy in a private right of action, but it also makes it more difficult for the SEC to bring enforcement actions against aiders and abettors pursuant to § 20(e) of the Securities Exchange Act.<sup>167</sup> In order for one to aid or abet, there must be an

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161. *Id.*

162. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011).

163. *See id.* at 2311 (Breyer, J., dissenting) (“I can find nothing in § 10(b) or in Rule 10b–5, its language, its history, or in precedent suggesting that Congress, in enacting the securities laws, intended a loophole of the kind that the majority’s rule may well create.”); *see also* Scott Lemieux, *The Right to Double Speak*, AMERICAN PROSPECT (July 14, 2011), <http://prospect.org/article/right-double-speak> (“The Court’s opinion provides a blueprint for executives of financial firms who want to profit from defrauding their customers: Just form a subsidiary your company runs, and you can’t be held responsible for lying to the customers who choose to do business with you.”).

164. *Janus*, 131 S. Ct. at 2311 (Breyer, J., dissenting).

165. *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer 1939).

166. *See supra* notes 162, 165 and accompanying text.

167. *See* Brief for Respondent at 30, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari) (“Nor is it clear that the SEC could bring an enforcement action on an aiding-and-abetting theory against an entity that creates and disseminates misstatements issued in another entity’s name.”).

actor, or actors, who the aider aids.<sup>168</sup> If a shell corporation issues a statement, but itself has no independent agents, there can be no identifiable primary violator of a securities fraud.<sup>169</sup> Thus, even though Justice Breyer was correct in his dissent, given Justice Thomas’s suggestion that JCM could still be held potentially liable as a secondary actor, that the Court should have remanded on this issue,<sup>170</sup> it is likely that a lower court would not be able to find JCM secondarily liable using Justice Thomas’s reasoning.<sup>171</sup> Because the Fund itself is the actor, JCM is the aider, and the Fund does not have any agents independent of JCM, under Justice Thomas’s holding, the actor and the aider are one in the same — they would be assisting themselves.<sup>172</sup> Therefore, if one cannot be primarily liable as an actor, the same individual cannot logically be held secondarily liable as an aider or abettor.<sup>173</sup> The Court’s holding in *Janus*, for these reasons, directly created a loophole in securities fraud litigation that, as discussed below, has and will encourage corporate misconduct.<sup>174</sup>

Nor was Justice Thomas willing to nuance his holding to recognize an exception for the relationship between a mutual fund and its investment adviser.<sup>175</sup> This relationship truly is, to borrow from the gatekeeper of Emerald City, “a horse of a different color” and the law should reflect this difference.<sup>176</sup> JCM, like most other investment advisers to mutual funds, controlled all of the Fund’s actions; the two entities cannot be separate from each other.<sup>177</sup> Therefore, the loophole only gets larger, and liability easier to avoid, with respect to mutual funds.<sup>178</sup>

## 2. *Janus Has Stalled Much Needed Corporate Reform Because the Loophole it Creates Has Encouraged Corporate Misconduct, and its Reasoning Fails to Recognize Congress’s Attempted Reforms*

Although Justice Thomas was attempting to avoid judicial overreach and prevent a rise in securities fraud litigation,<sup>179</sup> his holding has encouraged corporate

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168. *Id.*

169. *Id.*

170. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2311 (2011) (Breyer, J., dissenting).

171. Brief for Respondent at 30, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09–525) (on writ of certiorari).

172. *Id.*

173. *Id.*

174. See *infra* Part IV.C.2.

175. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011) (majority opinion).

176. *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer 1939).

177. *Janus*, 131 S. Ct. at 2312 (Breyer, J., dissenting).

178. See *supra* note 143 and accompanying text (discussing the interconnectedness of mutual funds and their investment advisers).

179. *Janus*, 131 S. Ct. at 2303 (majority opinion).

misconduct.<sup>180</sup> This has caused lower federal courts in the aftermath of *Janus* to try and reconcile the Court's interpretation of Rule 10b-5 with the spirit of regulation, and the need to hold those who commit securities fraud primarily liable in a private right of action.<sup>181</sup> This reading is not only bad policy, but was also a missed opportunity to judicially complement Congressional actions such as the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>182</sup> While Justice Thomas's unwillingness to act absent Congressional action, and strict adherence to the separation of powers,<sup>183</sup> is respectable, it was misguided.<sup>184</sup> Congress's failure to act is not an example of its unwillingness to act.<sup>185</sup> In fact, Congress — both individual members and the institution itself — have attempted to act to address shortcomings in securities fraud law.<sup>186</sup> By not recognizing Congress's attempt to reform federal securities law, while misinterpreting *Central Bank*, the Court in *Janus* missed an opportunity to spur corporate reform.<sup>187</sup>

The Court's holding in *Janus* improperly extended *Central Bank* and now allows for outsiders or secondary actors of the corporation in question, *even when they are the primary actor* causing the misstatement or omission, to be protected from liability because they do not technically have "ultimate control" over the statements.<sup>188</sup> This reasoning has caused numerous defendants in later cases to utilize the loophole created in *Janus*, by arguing that the logic of the opinion extends to protect corporate insiders from personal liability when they engage in misconduct because they themselves did not "make" a statement — forcing lower federal courts to develop a nuanced reading of Justice Thomas's black-and-white opinion to prevent total elimination of the concept of agency.<sup>189</sup> Some of this misconduct is clearly inapposite to the facts of *Janus* — such as in *Securities & Exchange Commission v. Das* where two Chief Financial Officers attempted to claim that *Janus* protected them from misstatements made in their corporation's financial statements — however, the fact that defendants in these cases even improperly

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180. See *infra* note 192 and accompanying text.

181. See, e.g., SEC v. Das, No. 8:10CV102, 2011 WL 4375787, at \*6 (D. Neb. Sept. 20, 2011) (agent of a corporation improperly relying on *Janus* to try to avoid liability for a misstatement issued by the corporation); *In re Merck & Co., Inc. Securities, Derivative & ERISA Litigation*, Nos. 05-1151, 05-2367, 2011 WL 3444199, at \*24 (D.N.J. Aug. 8, 2011) (same); see also, e.g., *Hawaii Ironworkers Annuity Trust Fund v. Cole*, No. 3:10CV371, 2011 WL 3862206, at \*4 (D. Ohio Sept. 1, 2011) (discussing the confusion if *Janus*'s holding extends to protecting corporate insiders without final control over issuance of a fraudulent statement).

182. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 and 15 U.S.C.).

183. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011) (stating that "[a]ny reapportionment of liability ... is properly the responsibility of Congress and not the courts").

184. See *infra* notes 192-202 and accompanying text.

185. See *infra* notes 192-202 and accompanying text.

186. See *infra* notes 192-202 and accompanying text.

187. See *infra* notes 192-202 and accompanying text.

188. See *supra* note 130-33 and accompanying text.

189. See *supra* note 183.

relied on *Janus* illustrate the exact shortcomings of the Court's reasoning.<sup>190</sup> Corporations will likely rely on *Janus* as a defense as they continue to engage in misconduct.<sup>191</sup>

As opposed to a judicial decision that would have reined in corporate misconduct, the Court's holding in *Janus* essentially encourages corporations to act improperly.<sup>192</sup> This reality is in direct conflict with the dire need for increased corporate responsibility in the wake of the financial crisis; holding JCM liable, or at least avoiding the creation of a loophole in federal securities laws, would have been a perfect judicial complement to Dodd-Frank.<sup>193</sup> By finding JCM primarily liable, corporate actors, fearing they too would be found liable, would have increased their oversight and internal operations so as to comply with implicitly stronger federal securities laws.<sup>194</sup>

Justice Thomas was unwilling to act absent direction from Congress.<sup>195</sup> However, Justice Thomas failed to recognize that Congress has expressly attempted to refine and modernize federal securities laws as part of Dodd-Frank.<sup>196</sup> A provision of Dodd-Frank required the Government Accountability Office to conduct a study on the effects of a potential extension of a private right of action against aiders and abettors.<sup>197</sup> The study was inconclusive on the issue.<sup>198</sup> Similarly, in 2009,

190. SEC v. Das, No. 8:10CV102, 2011 WL 4375787, at \*6 (D. Neb. Sept. 20, 2011); see also *supra* note 183 and accompanying text.

191. See *supra* notes 165, 183 and accompanying text.

192. See Editorial, *So No One's Responsible? If Mutual Funds Want to Lie, the Supreme Court's Conservatives Have Given Them a Way to Do It*, N.Y. TIMES, June 15, 2011, at A26 (discussing how the Court's decision makes it "much harder for private law suits to succeed against mutual fund malefactors, even when they have admitted to lying and cheating"); Chuck Jaffee, *Supreme Court Leaves Fund Investors Hanging*, WALL ST. J. MARKETWATCH (June 19, 2011), <http://www.marketwatch.com/story/supreme-court-leaves-fund-investors-hanging-2011-06-19?dist=countdown> (stating that if a parent company is not held liable for misstatements made by a subsidiary, then "there's no telling what they might think they can get away with someday"); Scott Lemieux, *The Right to Double Speak*, AMERICAN PROSPECT (July 14, 2011), <http://prospect.org/article/right-double-speak> (discussing how the Court's focus on the corporate form may have negative ramifications in the initial public offering market, and the long-run negative consequences of initially over-valued start-up corporations).

193. Cf. Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policy Makers Too*, 22 GA. ST. U. L. REV. 251, 312 (2005) (analyzing the historical development of the Sarbanes-Oxley Act, and the lessons from the legislation stressing the importance of continual reconsideration of financial legislation and regulation in light of case law development); see also Catherine Shakespeare, *The Sarbanes-Oxley Act of 2002: Assessing Its Impact, Charting Its Future*, 3 J. BUS. & TECH. L. 333, 355 (2008) (stating that "[Sarbanes-Oxley] has restored investor confidence in the U.S. capital markets"); see also *supra* note 91.

194. See *supra* note 193.

195. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011).

196. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 929Z (2010) (directing the Comptroller General of the United States to "conduct a study on the impact of authorizing a private right of action against any person who aid or abets another person in violation of the securities laws").

197. *Id.*

198. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-664, SECURITIES FRAUD LIABILITY OF SECONDARY ACTORS 45 (2011).



Pennsylvania Democratic Senator Arlen Specter introduced S. 1551, the “Liability for Aiding and Abetting Securities Violations Act of 2009.”<sup>199</sup> The act would amend § 20(e) to allow for private rights of actions against aiders and abettors.<sup>200</sup> Although the study illustrated the uncertainties of creating a private right of action against secondary actors,<sup>201</sup> and the bill never made it out of committee,<sup>202</sup> both are reflective of the need, and desire of the American public, to increase corporate governance oversight.<sup>203</sup> Justice Thomas not only failed to recognize Congress’s actions, or attempted actions,<sup>204</sup> in doing so he judicially established a new rule for securities fraud that is completely antithetical to the directions from Congress, the spirit of the Securities Exchange Act,<sup>205</sup> and the economy’s current needs.<sup>206</sup> Because of *Janus*, corporate misconduct will likely increase, and the needed reform in corporate governance is now that much more unobtainable.<sup>207</sup>

*D. The Court’s Holding in Janus Reflects a Pro-Corporate Jurisprudence by the Roberts Court to the Detriment of Investors, Consumers, and Employees*

The Roberts Court’s willingness to interpret laws to promote the interests of corporations, and shield them from liability, is not limited to *Janus*, or even securities law.<sup>208</sup> Denying First Derivative a right of action is but one example of the current Court’s jurisprudence that is dedicated to promoting the rights and interests of corporations, while simultaneously limiting individual investors (both financial and political), consumers, and employees access to judicial remedy, and their role in our economic and political processes.<sup>209</sup> In an array of cases — involving such diverse issues as the proper scope of the First Amendment,<sup>210</sup> federal pre-emption,<sup>211</sup> and establishment of commonality in Class Action certifications<sup>212</sup> — the current Court has fervently promoted the rights of corporations to the

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199. Liability for Aiding and Abetting Securities Violations Act of 2009, S. 1551, 111th Cong. § 2 (2009).

200. *Id.* Congresswoman Maxine Waters introduced a complementary bill in the House of Representatives. Liability for Aiding and Abetting Securities Violations Act of 2010, H.R. 5042, 111th Cong. § 2 (2010).

201. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-664, SECURITIES FRAUD LIABILITY OF SECONDARY ACTORS 45 (2011).

202. Bill Summary and Status, Liability for Aiding and Abetting Securities Violations Act of 2009, S. 1551, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01551:@@L&summ2=m&>.

203. *See supra* note 193.

204. *See supra* note 193–200 and accompanying text.

205. *See supra* Part IV.A.1.

206. *See supra* note 192 and accompanying text.

207. *See supra* note 179 and accompanying text.

208. *See infra* Parts IV.D.1–3.

209. *See infra* Parts IV.D.1–3.

210. *See infra* Part IV.D.1.

211. *See infra* Parts IV.D.2.b–c.i.

212. *See infra* Part IV.D.3.

detriment of individual citizens.<sup>213</sup> These holdings represent the Court’s consistent inattention to needed corporate governance reform, while drastically expanding protections for corporate entities.<sup>214</sup> In *Janus* and its analogous cases, the Court has adopted a clear-cut answer, with limited room for nuance: corporations win, individuals lose.<sup>215</sup> Both collectively and individually, these cases will have long-term negative reverberations in legal, economic, and political spheres.<sup>216</sup>

*1. In Janus the Court Limited the Scope of Rule 10b–5, While in Other Cases they Have Broadened the Scope of the First Amendment — Benefiting Corporations Over Individual Financial and Political Investors*

In *Citizen United v. Federal Election Commission*, the Court held the Bipartisan Campaign Finance Reform Act, which placed limits on corporate campaign expenditures, to violate the First Amendment.<sup>217</sup> Per Justice Kennedy, the Court held that a limitation on political expenditures was suppression of an entity’s freedom of speech under the First Amendment,<sup>218</sup> and such limitations are only justified when they are, or have the appearance of, corruption.<sup>219</sup> And an independent expenditure, because it is technically unassociated with any political campaign, cannot lead to corruption or its appearance; only a *quid pro quo* bribe, according to the Court, constitutes corruption in political campaigns.<sup>220</sup> As such, the right of both not-for and for-profit entities to make independent political expenditures supporting or opposing candidates for elected office is now totally unencumbered<sup>221</sup> — necessarily allowing a select group of individual donors and corporate actors to spend millions of dollars and single-handedly control, or at least influence, the outcome of political campaigns.<sup>222</sup>

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213. See *infra* Parts IV.D.1–3.

214. See *infra* Parts IV.D.1–3.

215. See *supra* Parts IV.A–C; *infra* Parts IV.D.1–3.

216. See *supra* Parts IV.A–C; *infra* Parts IV.D.1–3.

217. 130 S. Ct. 876, 913 (2010) (“The First Amendment does not permit Congress to make these categorical distinction based on the corporate identity of the speaker and the content of the political speech.”).

218. *Id.* (holding that “restrictions on corporate independent expenditures are therefore [an] invalid” restriction on political speech).

219. *Id.* at 908–09. The Court reaffirmed that the Court in *Buckley v. Valeo* properly “sustained limits on direct contributions in order to ensure against the reality or appearance of corruption” because “direct contributions” have the ability to create improper “*quid pro quo* corruption.” *Id.* at 908 (citing *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)). However, the limitations imposed on independent expenditures in the Bipartisan Campaign Reform Act were too distinct to “lead to, or create the appearance of, *quid pro quo* corruption,” and “[t]he fact that [corporate] speakers [making independent expenditures] may have influence over or access to elected officials does not mean that these officials are corrupt” or such expenditures do not lead to corruption. *Id.* at 910 (internal citations omitted).

220. *Id.* at 910.

221. *Id.*

222. See *infra* notes 225–26 and accompanying text.

In *Janus* the Court failed to acknowledge that corporations cannot be separated from the people that run them;<sup>223</sup> in *Citizens United* it failed to acknowledge that corporations are not people.<sup>224</sup> Each case emphasizes the *form* of a dynamic, while failing to understand the *substance*. By treating corporations as individual citizens, and grating them the uninhibited right to making expenditures, the Court completely restructured the American political process, and granted corporate entities an even greater voice in our elections.<sup>225</sup> Now, with the ability to freely express a political position, and spend millions of dollars to ensure that that position is heard, corporate actors are able to influence the outcome of an election, as well as legislative activity.<sup>226</sup> Just as *Janus* shields corporations from liability and limits the rights of individual investors,<sup>227</sup> *Citizens United* promotes the control corporations have in our political process, while minimizing the voice of individual citizens.<sup>228</sup> *Janus* will deny financial investors a right to remedy following corporate misconduct;<sup>229</sup> *Citizens United* will effectively deny investors in our political process the right to remedy of electing new officials, or influencing policy, because they will necessarily be outspent by corporate entities.<sup>230</sup> Furthermore, the Court has opened the door to political corruption and corporate misconduct as corporations freely spend money promoting, and candidates willingly endorse, agendas benefiting corporations to the detriment of individuals.<sup>231</sup>

Following *Citizens United*, there has been widespread opposition to the Court's holding — both as a matter of jurisprudence,<sup>232</sup> and because of its consequences on our political process.<sup>233</sup> This opposition includes legislation on the state level to

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223. See *supra* notes 166–68 and accompanying text.

224. See *supra* note 217 and accompanying text.

225. See, e.g., Anne Tucker, *Rational Coercion: Citizens United and a Modern Day Prisoner's Dilemma*, 47 GA. ST. U. L. REV. 1105, 1106 (2010) (discussing how the Court's ruling in *Citizens United* will increase the incentive of corporations "to participate in politics via their checkbooks" which, in turn, will increase the costs of such political participation).

226. See *Citizens United*, 130 S. Ct. at 975 (2010) ("Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is 'far more destructive' than what noncorporations are capable of.").

227. See *supra* Parts IV.A–C.

228. See *supra* note 226 and accompanying text.

229. See *supra* note 159 and accompanying text.

230. See *supra* note 226 and accompanying text.

231. See Tucker, *supra* note 225, at 1106 (discussing the increased corporate political participation due to *Citizens United*); see also *supra* note 226 and accompanying text.

232. See, e.g., Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 497 (2012) (stating that the majority's reasoning is contrary to their stated positions of judicial restraint and originalism, and instead is a form of "selective judicial activism") (emphasis in original).

233. See, e.g., *Taking Back our Democracy: Responding to Citizens United and the Rise of Super PACs: Hearing Before the S. Comm. On the Constitution, Civil Rights and Human Rights of the S. Judiciary Comm.*, 112th Cong. (2012) (testimony of Lawrence Lessig, Roy L. Furman Professor of Law and Leadership, Harvard Law School) (discussing how the Court's ruling in *Citizens United* has concentrated the political power and

limit,<sup>234</sup> and federal level to overturn, the Court's holding.<sup>235</sup> Despite this backlash, however, the Court continues to ignore the realities of the negative implications of its *Citizens United* holding, and in fact further strengthen its pro-corporate campaign expenditure jurisprudence.<sup>236</sup>

In *Arizona Free Enterprise Club v. Bennett*, the Court overturned an Arizona law that provided publicly funded candidates matching funds when they ran against privately funded candidates to level the playing field and ensure a fair election.<sup>237</sup> Per Chief Justice Roberts, the Court held, using parallel logic to *Citizens United*, Arizona's matching fund scheme violated the First Amendment by limiting the ability (or desire) of citizens to make political contributions and engage in the debate.<sup>238</sup> In so holding, the Court strengthened *Citizens United* by ensuring the power of a limited number of corporations and individuals to control elections.<sup>239</sup>

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influence in the country in a minute portion of the population, and the anti-corruption opposition that has arisen in response).

234. See *infra* note 241 and accompanying text.

235. S.J. Res. 29, 112th Cong. (2011) (granting Congress, and the individual states, the right to regulate campaign fundraising and spending). Four parallel pieces of legislation were introduced in the House of Representatives — each proposing an amendment to the Constitution which would allow Congress to control campaign finance, and limit the power of corporations to control political elections. H.R.J. Res. 6 112th Cong. (2011) (amending the First Amendment to not extend freedom of speech protection to “any corporation, partnership, business trust, association, or other business organization with respect to the making of contributions, expenditures, or other disbursements of funds in connection with public elections,” and granting Congress and the states to make laws to regulate and enforce this provision); H.R.J. Res. 7 112th Cong. (2011) (same, but no language granting Congress or the states enforcement power); H.R.J. Res. 8 112th Cong. (2011) (granting Congress and the states the power to limit and regulate campaign contributions); H.R.J. Res. 86 112th Cong. (2011) (same). President Obama expressed his support of an amendment to the Constitution that would overturn the Court's ruling in *Citizens United*. Bryon Tau, *Obama Calls for Constitutional Amendment to Overturn Citizens United*, POLITICO, Aug. 29, 2012, <http://www.politico.com/politico44/2012/08/obama-calls-for-constitutional-amendment-to-overturn-133724.html> (“Over the longer term, I think we need to seriously consider mobilizing a constitutional amendment process to overturn Citizens United (assuming the Supreme Court doesn't revisit it). Even if the amendment process falls short, it can shine a spotlight of the super-PAC phenomenon and help apply pressure for change.”) (internal quotations omitted).

236. See *infra* notes 237–243 and accompanying text.

237. 131 S. Ct. 2806, 2813 (2011).

238. *Id.* at 2818 (“Once a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent. That plainly forces the privately financed candidate to shoulder a special and potentially significant burden when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy.”) (internal quotations omitted) (internal citations omitted).

239. See *id.* at 2835 (Kagan, J., dissenting) (“So to invalidate a statute that restricts no one's speech and discriminates against no idea—that only provides more voices, wider discussion, and greater competition in elections—is to undermine, rather than to enforce, the First Amendment.”). Justice Kagan, along with Justices Ginsburg, Breyer, and Sotomayor, dissented from the majority, and asserted that the Arizona law promoted free speech by subsidizing candidates to guarantee that their voice is heard. *Id.* at 2812, 2835. Subsidization, according to the dissenting justices, never limited speech because the provision merely gave others the ability to speak, but did not limit the rights of speakers. *Id.* Thus, the petitioner's argument, Justice Kagan illustrated, was a rather novel one: their right to free speech was violated because another individual's right to free speech was protected. *Id.* This, to Justice Kagan, and the author, is what one “might call [] *chutzpah*.” *Id.* (emphasis in original); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 206 (10th ed. 1996) (defining “chutzpah” as Yiddish for “supreme self-confidence,” “nerve,” or “gall”).

Similarly, much like Justice Thomas was unwilling to develop a nuanced reading of Rule 10b–5 in *Janus*,<sup>240</sup> so too was the Court unwilling to limit its holding in *Citizens United* this past summer when it summarily reversed a decision of the Montana Supreme Court.<sup>241</sup> Montana passed a law in the aftermath of *Citizens United* that limited the ability of corporations to make political expenditures on state campaigns given the corruption they created.<sup>242</sup> In *American Tradition Partnership, Inc. v. Bullock*, the Court, in a matter of eight sentences, invalidated Montana’s law without even hearing the merits of the case, and held that *Citizens United* applied to state elections.<sup>243</sup> This holding, and the Court’s reluctance to nuance its jurisprudence, reaffirms its commitment to protecting corporations to the detriment of individuals.<sup>244</sup> In so doing, the Court has left the American people with only one remedy: a constitutional amendment establishing that corporations are not individuals subject to the First Amendment.<sup>245</sup> Because of the difficulty of amending the Constitution, this remedy will likely prove to be impractical<sup>246</sup> — further creating opportunities for corporate misconduct, while denying individuals a meaningful ability to participate in the political process.<sup>247</sup>

## 2. The Court’s Protection of Consumers over Individuals Has Denied Proper Consumer Protections

Cases such as *Janus* and *Citizens United* limit the ability of individual investors to have significant control or contribution in our financial and political systems.<sup>248</sup> However, the Court’s jurisprudence protecting and promoting corporations is not limited to denying the rights of investors — people who make the conscious

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240. See *supra* Part IV.B.

241. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam).

242. MONT. CODE ANN. § 13-35-227(1) (2011), *invalidated by Am. Tradition P’ship*, 132 S. Ct. at 2490 (per curiam).

243. *Am. Tradition P’ship*, 132 S. Ct. at 2491 (“The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does.”) (citing U.S. CONST. art. VI, cl. 2.). Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan dissented — stating that they ideally would grant certiorari to “reconsider *Citizens United*,” however, “given the Court’s per curiam disposition” they “vote[d] instead to deny the petition.” *Id.* at 2492.

244. See Rachael Weiner, *Supreme Court’s Montana Decision Strengthens Citizens United*, WASH. POST BLOG (June 25, 2012, 10:43 AM), [http://www.washingtonpost.com/blogs/the-fix/post/supreme-courts-montana-decision-strengthens-citizens-united/2012/06/25/gJQA8Vln1V\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/supreme-courts-montana-decision-strengthens-citizens-united/2012/06/25/gJQA8Vln1V_blog.html) (quoting Sen. Charles Schumer as saying that the Court’s holding, “[f]or apparently political reasons[,] . . . further tipp[ed] the balance of power in America in favor of deep-pocketed, outside [corporate] interests.”) (internal quotation marks omitted).

245. For recent legislative action addressing this remedy, see *supra* note 235.

246. Amending the Constitution requires a proposal by either two-thirds of all Senators and Representatives, or, two-thirds of all state legislatures calling for a “Convention for proposing amendments,” as well as ratification of the proposed amendment by three-fourths of the states. U.S. CONST. art. V, § 1.

247. See *supra* notes 226 and accompanying text.

248. See *supra* Parts IV.C–D.1.

decision to contribute.<sup>249</sup> Instead, the Court's pro-business holdings also limit the rights of consumers.<sup>250</sup> In a series of cases, the Roberts Court has: protected the ability of wholesale distributors to control retail prices,<sup>251</sup> allowed corporations to impose contract terms which make consumer recovery impractical,<sup>252</sup> shielded generic drug companies from liability,<sup>253</sup> and limited the ability of Congress to regulate commercial activity to best promote socially responsible corporations.<sup>254</sup> Each holding poses its own unique detriment to consumers, and, when viewed collectively, are illustrative of the current Court's pro-business jurisprudence and its negative economic and political consequences.<sup>255</sup>

*a. The Roberts Court Overturned Nearly a Century of Precedent to Make it Easier for Corporations to Control and Maintain High Retail Prices*

Manufacturers and wholesale distributors of goods necessarily have a tremendous amount of control over distribution, and therefore, ultimate consumption of their products.<sup>256</sup> An historic limitation on that control, however, was the *per se* illegality of vertical price controls under § 1 of the Sherman Act as established in 1911 by the Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*<sup>257</sup> Under *Dr. Miles*, a contract between a manufacturer and retailer to set a minimum price for the manufacturer's product (known as "resale price maintenance" or "RPM") was *prima facie* anticompetitive, and an antitrust violation because "their sole purpose [is] the destruction of competition and fixing of prices."<sup>258</sup> Despite nearly 100 years of continued business reliance on the Court's holding in *Dr. Miles*, the Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* overturned *Dr. Miles* and established a rule of reason analysis for vertical price restraints.<sup>259</sup>

By adopting a rule of reason analysis for RPM, the Roberts Court has made it easier for large corporations to control the channels of distribution, set prices without downstream integration, and assure themselves steadier profits by limiting the power of discount retailers to provide consumers with quality products at

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249. See *infra* Parts IV.D.2.a–c.

250. See *infra* Parts IV.D.2.a–c.

251. See *infra* Part IV.D.2.a.

252. See *infra* Part IV.D.2.b.

253. See *infra* Part IV.D.2.c.i.

254. See *infra* Part IV.D.2.c.ii.

255. See *infra* Parts IV.D.2.a–c.

256. See, e.g., Frederick E. Webster, Jr., *Understanding the Relationships Among Brands, Consumers, and Resellers*, 28 J. OF ACAD. OF MKTG. SCI. 17, 17 (2000) (discussing the interplay between manufacturers and resellers, and their ultimate influence over consumers and consumption of a product).

257. 220 U.S. 373, 408 (1911), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007).

258. *Id.* at 408.

259. 551 U.S. 877, 882 (2007).

affordable prices.<sup>260</sup> The potential benefit of preventing free riders — something Justice Breyer recognized as limited in his dissent — does not outweigh the practical costs of consolidating the retail markets to the select group of manufacturer-approved retailers, and guaranteeing a higher price for consumers.<sup>261</sup> The long-term consequences of *Leegin* may indeed be muted when compared to other pro-corporate decisions because some RPM schemes may still be held to violate the Sherman Act.<sup>262</sup> Nevertheless, it remains yet another example of the Modern Court's pro-corporate jurisprudence.

Just as *Janus* illogically denied investors a right of action following corporate misconduct,<sup>263</sup> and *Citizens United* has granted corporations a greater voice in our political process,<sup>264</sup> *Leegin* has limited the power of the consumer.<sup>265</sup> In *Leegin* the Court held that RPM could spur competition between retailers for manufacturers' contracts.<sup>266</sup> However, retailers should compete for customers, not exclusive dealing rights; being an exclusive dealer is worthless unless the retailer has customers who can afford it.<sup>267</sup> By granting manufacturers the ability to fix prices, and ignoring the need to compete for customers by offering lower prices, the Court in *Leegin* provided corporations greater control in the marketplace, and greater protection from antitrust violations — necessarily increasing their ability to influence market supply, while exposing consumers to higher prices.<sup>268</sup> Such protection, and enhancement, of corporate bargaining power against consumers was again exemplified in the Court denying California the ability to protect its consumers against unconscionable adhesion contracts in *AT&T Mobility LLC v. Concepcion*.<sup>269</sup>

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260. See *id.* at 929 (“[One] safe prediction[] to make about today's decision [is] that it will likely raise the price of goods at retail.”).

261. *Id.* at 916 (“All this is to say that the ultimate question is not whether, but how much, ‘free riding’ of this sort takes place. And, after reading the briefs, I must answer that question with an uncertain ‘sometimes.’”) (emphasis in original) (internal citations omitted).

262. See *Leegin*, 551 U.S. at 882 (“We now hold that *Dr. Miles* should be overruled and that [the illegality of] vertical price restraints are to be judged by the rule of reason.”). In fact, since *Leegin*, plaintiffs have been successful in bringing claims of unlawful RPM under the rule of reason. See, e.g., *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 226 (3d Cir. 2008) (finding that agreements not to compete between Mack truck dealers had anticompetitive effects, and therefore, violated the Sherman Act).

263. See *supra* Part IV.A.2.

264. See *supra* Part IV.D.1.

265. See *supra* note 261 and accompanying text.

266. *Leegin*, 551 U.S. at 890–91 (discussing how “[a]bsent vertical price restraints . . . discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate” and the benefit of RPM to “increase interbrand competition by facilitating market entry for new firms and brands”).

267. See Brief of Amicus Curiae Consumer Fed'n of Am. As Amici Curiae Supporting Respondent at 5, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480) (“In assuming that the retail sector is a mere conduit exhibiting atomistic competition, [petitioners] overlook the robust contribution that interstate competition has played in the development of the American economy.”).

268. See *supra* note 260 and accompanying text.

269. 131 S. Ct. 1740, 1749 (2012); see *infra* Part IV.D.2.b.

*b. The Court Has Protected and Promoted Highly Restrictive Consumer Contracts by Making Small Claims Recovery Uneconomical*

Given the size disparity between individual consumers and business entities, contracts of adhesion for commercial products are inevitable; producers sell a uniform product, and it is impractical for corporations to draft a new contract for each customer.<sup>270</sup> However, contracts of adhesion create an inherent risk of the entity with significantly greater bargaining power to impose unconscionable clauses on the customer.<sup>271</sup> Therefore, in order to avoid blatant customer mistreatment, and abusive contracts, it is the duty of courts to void such contracts as unenforceable.<sup>272</sup> The California Supreme Court attempted to do this in *Discover Bank v. Superior Court* when it held that class waivers in consumer arbitration agreements were unconscionable in adhesion contracts.<sup>273</sup> However, in *AT&T Mobility LLC v. Concepcion*, the Supreme Court, per Justice Scalia, held the restriction to be preempted by the Federal Arbitration Act (FAA) because it violated a “liberal federal policy favoring arbitration.”<sup>274</sup>

In abrogating the *Discover Bank* rule, the Supreme Court established an interpretation of the FAA that protects corporations from paying claims against aggrieved customers, and, illogically, will discourage small claims arbitration.<sup>275</sup> Many retail arbitration claims are minimal, and, without the ability to aggregate claims in class arbitration, such consumers will likely make the decision to not pursue the claim provided the low payout and high costs.<sup>276</sup> By making it uneconomical for consumers to individually arbitrate a claim, along with the high costs and time associated with litigation, consumers are left without a practical remedy, while corporations are free from payment.<sup>277</sup> Furthermore, while the FAA was written with the express purpose of promoting arbitration, it expressly voids highly restrictive agreements “upon such grounds as exist at law or in equity for the

270. BLACK’S LAW DICTIONARY 25 (abr. 6th ed. 1991).

271. E. ALLAN FARNSWORTH ON CONTRACTS 557 (3d ed. 2004) (“Dangers are inherent in standardization . . . for it affords a means by which one party may impose terms on another unwitting or even unwilling party.”).

272. See, e.g., SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 2–7 (4th ed.) (2010) (“[W]hile freedom of contract has been regarded as part of the common-law heritage so that absent an invalidating cause such as mistake, fraud, or duress, parties who make a contract are bound to it even though the contract may be unwise and even foolish, courts of equity have often refused to enforce some agreements when, in their sound discretion, the agreements have been deemed unconscionable.”).

273. 113 P.3d 1100, 153 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2012).

274. *Concepcion*, 131 S. Ct. at 1749 (internal citations omitted). Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented — stating that the *Discover Bank* rule did not discourage arbitration, because its purpose was “with the scope of the [FAA]’s exception” for unconscionable contracts. *Id.* at 1757 (Breyer, J., dissenting).

275. *Id.* at 1761 (stating that in cases involving small claims, a denial of class arbitration will “have the effect of depriving claimants of their claims”) (Breyer, J., dissenting).

276. *Id.* (“What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?”).

277. See *supra* note 275 and accompanying text.



revocation of any contract.<sup>278</sup> By limiting the right of California to define what constitutes unconscionable contract clauses — a matter of common law traditionally left to the states — the Court’s holding in *Concepcion* denied California the ability to protect its consumers.<sup>279</sup> This holding will prevent states from pursuing legislation or common law development that will ensure consumers a right to recourse against corporations.<sup>280</sup> Just at *Janus* interpreted the Securities Exchange Act in a manner that denied investors the ability to sue anyone,<sup>281</sup> the holding in *Concepcion* makes it impractical for consumers with small claims against retailers a right to remedy.<sup>282</sup> As discussed below, this unjust reality of the unprotected consumer in the retail market is most acute in the health care industry.<sup>283</sup>

*c. Recent Decisions Regarding Health Care Have Both Expressly and Implicitly Illustrated the Court’s Pro-Corporate Jurisprudence*

The health care market — a multibillion dollar-a-year industry encompassing a variety of goods and services — requires strong regulations and access to judicial remedy provided the severe mental and physical health consequences of misconduct.<sup>284</sup> However, in a pairing of recent cases involving the health care industry, the Court has extended its pro-corporate jurisprudence by protecting generic drug manufacturers from liability for inadequate labeling,<sup>285</sup> and interpreted the Commerce Clause in a manner that makes it significantly more difficult for Congress to establish commercial markets where individuals proactively protect themselves, and companies are required to market goods and services that allow for adequate protections.<sup>286</sup> These cases prevent a truly socially responsible health care market (and in turn, the safest and healthiest possible general population), and commercial markets generally, while providing yet another vignette of a jurisprudence that systematically denies the opportunity to hold corporate actors responsible for their misconduct, and ensure the safety and soundness of American commercial activity.<sup>287</sup>

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278. 9 U.S.C. § 2.

279. *Concepcion*, 131 S. Ct. at 1760–62.

280. *Id.* (stating that the FAA was written with Congress’s express intention of preserving the rights of the states to define what constitutes unconscionable contract terms, and, the Court’s holding abrogates that principal).

281. *See supra* Part IV.A.

282. *See supra* note 276 and accompanying text.

283. *See infra* Part IV.D.2.c.

284. *See* 42 U.S.C.A. § 18091(2) (West 2012) (discussing the wide scope of the health insurance market, the growing costs of health care, and negative economic and health consequences of improper medical care).

285. *See infra* Part IV.D.2.c.i.

286. *See infra* Part IV.D.2.c.ii.

287. *See infra* Parts IV.D.2.c.i–ii.

*i. The Court Has Established a Loophole in Drug Labeling Law Protecting Generic Drug Companies from Liability*

In an opinion strikingly similar to *Janus*, in *PLIVA, Inc. v. Mensing*, the Court denied generic drug users a remedy against manufacturers for inadequate labeling.<sup>288</sup> The opinion, like *Janus*, was written by Justice Thomas, and was decided five-to-four with Justices Sotomayor, Ginsburg, Breyer, and Kagan dissenting.<sup>289</sup> The plaintiffs in *PLIVA* were denied the opportunity to sue *anyone* for the physical and medical wrong they suffered<sup>290</sup> — much like First Derivative members were denied the opportunity to sue anyone for the fraudulent statements in the Fund’s prospectus.<sup>291</sup> Like *Janus*, *PLIVA* will have the detrimental consequence of generic drug manufacturers consciously labeling their drugs insufficiently because they know that they are free from liability absent any action by the Food and Drug Administration (FDA).<sup>292</sup>

In a consolidated opinion, the Court held that *PLIVA* — a generic drug manufacturer — could not be liable for their failure to provide adequate warning labels because their liability under state commercial tort law was pre-empted by federal law which denies generic drug manufacturers the ability to unilaterally change drug warning labels.<sup>293</sup> The 1984 Hatch-Waxman Amendments to the Food, Drug, and Cosmetic Act allow generic drugs to forgo extensive studying and testing prior to marketing, so long as the manufacturer can sufficiently illustrate “sameness” to the brand name drug that must be pre-approved by the FDA.<sup>294</sup> As such, a generic drug must have the same label as the brand name, and the manufacturer must convince the FDA and the brand name drug to adopt different

288. 131 S. Ct. 2567, 2572 (2011).

289. *Id.* at 2572, 2582. Justice Kennedy joined the majority opinion in all but Part III.B.2. of the opinion. *Id.* at 2571. In this section of the opinion, Justice Thomas asserted that the Supremacy Clause of the Constitution is a *non obstante* clause — a parliamentary mechanism used to “impliedly repeal conflicting [] law.” *Id.* at 2579–80. As such, it was not necessary, according to the plurality of the Court, for a party facing conflicting state and federal laws to proactively find ways to reconcile conflicting state and federal law duties. *Id.* at 2580.

290. *Id.* at 2581 (“Had *Mensing* and *Demahy* taken *Reglan*, the brand-name drug prescribed by their doctors . . . their lawsuits would not be pre-empted[,] [b]ut because [their] pharmacists, acting in full accord with state law, substituted generic metoclopramide instead, federal law preempts these lawsuits.”); see also *id.* at 2583 (Sotomayor, J., dissenting) (“As a result of today’s decision, whether a consumer harmed by inadequate warnings can obtain relief turns solely on the happenstance of whether her pharmacist filled her prescription with a brand-name or generic drug. The Court gets one thing right: This outcome ‘makes little sense.’”) (internal cross-reference omitted).

291. See *supra* Part IV.A.

292. See *infra* notes 297–301 and accompanying text.

293. *PLIVA*, 131 S. Ct. at 2581 (“Here, state law imposed a duty on the Manufacturers to take a certain action, and federal law barred them from taking that action. The only action the Manufacturers could independently take – asking for the FDA’s help – is not a matter of state-law concern. *Mensing* and *Demahy*’s tort claims are pre-empted.”).

294. 21 U.S.C. § 355(j)(2)(A)(iv) (stating that a generic drug manufacturer must provide “information to show that the new drug is bioequivalent to the [brand name] drug”).

language to their label in order to maintain labeling equivalence.<sup>295</sup> However, the Court held that the state law duty did not require the generic manufacturer to petition the FDA for a new warning requirement — making PLIVA not liable even though they knew their warning labels were inadequate.<sup>296</sup>

Due to the Court’s interpretation of federal pre-emption, which allowed PLIVA to remain idle, the plaintiffs were denied the ability to sue *any* entity because federal law pre-empted PLIVA’s liability, and there was no cause of action against the brand name manufacturer because their pharmacist did not fill the prescription with the brand name drug, even though that is what their doctor prescribed<sup>297</sup> — a very common practice (occurring nearly 90% of the time when a generic drug is available) that is encouraged by both states and the federal government as a means providing consumers access to affordable medication.<sup>298</sup> This creates an illogical situation (which Justice Thomas even recognized as absurd): consumers of prescription medication with inadequate labeling are at the mercy of their pharmacist, and generic drug manufacturers — a \$66 billion a year industry in the United States — are free from liability for inadequate liability because they cannot unilaterally change their labels, and have no duty to change them absent action from the FDA or the brand name manufacturer.<sup>299</sup> In *PLIVA*, like in *Janus*, the Court knowingly interpreted federal law in a manner that expressly denies individuals remedy against corporate wrongdoing.<sup>300</sup> By shielding generic drug manufacturers from liability, the Court missed an opportunity to provide individuals adequate remedy, and ensure socially responsible drug labeling.<sup>301</sup> This protection of generic drug manufactures was complimented this summer by a rejection of Congressional commercial regulatory power — again denying necessary consumer protection and corporate regulations.<sup>302</sup>

*ii. The Court’s Restrictive Commerce Clause Jurisprudence Denies Congress the Ability to Create Pragmatic Consumer Protection Laws*

Superficially, the Court’s decision in *National Federation of Independent Businesses v. Sebelius*, in which it largely upheld President Obama’s signature Affordable Care

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295. *PLIVA*, 131 S. Ct. at 2581 (holding that the respondents “[could not] satisfy [their] state duties without the Federal Government’s special permission and assistance”).

296. *Id.* at 2581.

297. *Id.* at 2582.

298. *Id.* at 2584 (Sotomayor, J., dissenting) (citing CONG. BUDGET OFFICE, HOW INCREASED COMPETITION FROM GENERIC DRUGS HAS AFFECTED PRICES AND RETURNS IN THE PHARMACEUTICAL INDUSTRY 27 (1998), available at <http://www.cbo.gov/ftpdocs/6xx/doc655/pharm.pdf>).

299. *Id.* at 2583–84 (Sotomayor, J., dissenting).

300. *Id.*; see Part IV.A.

301. See *PLIVA*, 131 S. Ct. at 2592 (Sotomayor, J., dissenting) (stating that “[a]s a result [of the decision], in many cases, consumers will have no ability to persevere their state-law right to recover for injuries caused by inadequate warnings[,]” which, in turn, “could have troubling consequences for drug safety”).

302. See *infra* Part IV.D.2.c.ii.

Act (ACA), is representative of a change in the Court's jurisprudence denying consumer protections against corporations (e.g., insurance companies limiting or denying coverage to certain individuals).<sup>303</sup> However, the nature of the decision makes the case a pyrrhic victory for individuals, and will likely leave corporations — both generally, and in the health care market specifically — unharmed.<sup>304</sup> In upholding the individual mandate's penalty for failure to purchase health insurance as a tax, and not a valid regulation of commerce, the Court maintained the practical integrity of the ACA because all individuals will be required to purchase insurance or pay a penalty.<sup>305</sup> In so doing, however, the majority of the Court asserted an interpretation of the Commerce Clause<sup>306</sup> that is highly restrictive.<sup>307</sup> The language used in the Chief Justice's opinion, as well as the joint dissenters' opinion, rejecting the individual mandate to be a valid regulation of commerce unequivocally rejects the notion of broad federal power to regulate commercial (in)activity, and reasserts the Court's jurisprudence rejecting broad (and liberal) interpretations of federal laws to regulation corporations.<sup>308</sup>

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303. See 132 S. Ct. 2566, 2600 (2012) (“The Affordable Care Act’s requirement that certain individual’s pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”).

304. See *infra* note 312 and accompanying text.

305. See *infra* note 312.

306. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have [p]ower [t]o . . . regulate [c]ommerce with foreign [n]ations, and among the several [s]tates, and with the Indian tribes.”).

307. *Nat'l. Fed. of Ind. Bus.* 132 S. Ct. at 2587, 2589, 2591 (stating that “[t]he individual mandate . . . compels individuals to *become* active in commerce by purchasing a product” and “[a]ccepting [this interpretation of the Commerce Clause] would give Congress the same license to regulate what we do not do” would be unacceptable because “[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave. . . .”) (emphasis in original); see also *id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“If Congress can reach out and command even those furthest from participation in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton’s words, ‘the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.’” (citing THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (C. Rossiter ed., 1961))); *id.* (“[T]he Commerce clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce.”) (emphasis in original); *id.* at 2648 (“[I]f every person comes within the Commerce Clause power of Congress to regulate [their activity] by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.”); *id.* at 2677 (Thomas, J., dissenting) (“I adhere to my view that the very notion of a substantial effects test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases. As I have explained, the Court’s continued use of that test has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. The Government’s unprecedented claim in this suit that it may regulate not only economic activity but also *inactivity* that substantially affects interstate commerce is a case in point.”) (emphasis in original) (internal quotations omitted) (internal citations omitted). *But see id.* at 2625 (Ginsburg, J., dissenting) (finding that a proper reader of the Commerce Clause does grant Congress the power to require individual to purchase health insurance, and the majority’s objection is based on the legislation’s “novelty” but “[a]s our national economy grows and changes, [the Court] ha[s] recognized, Congress must adapt to the changing economic and financial realities. . . . [I]f history is any guide, today’s construction of the Commerce Clause will not endure”).

308. See *supra* note 307.

This highly restrictive reading of the Commerce Clause will likely make it harder for Congress to pass legislation designed to protect consumers and ensure socially responsible corporations.<sup>309</sup> As the ACA requires individuals to purchase health insurance, it is theoretically plausible that Congress would require businesses to purchase virus software to protect their servers from hackers and ensure the safety of shareholders' assets, or pay a substantial penalty. Or, similarly, to ensure the safety of American children, Congress could require individuals claiming dependents on their annual tax return to provide proof that if they purchased a vehicle, it is one that is safe for children, or pay a penalty. Yet, following *NFIB*, despite how logical these laws would be, they would only be upheld, if at all, as a tax.<sup>310</sup> Therefore, such laws would have to be written with that clear intent — making it significantly harder to pass Congress given the general aversion to taxes.<sup>311</sup> Without requiring companies purchase virus software, many would likely forgo the purchase as a cost saving measure; and without requiring that parents purchase child-safe cars, auto manufacturers would be less inclined to produce such costly vehicles — leaving consumers unprotected, and corporations unregulated. Furthermore, the Court's narrow Commerce Clause jurisprudence may even inspire future litigation on existing laws and regulations.<sup>312</sup> Just as the Court's restrictive reading of the Commerce Clause in *NFIB* will have the detrimental consequence of denying Congress of the ability to pass legislation designed to protect consumers,<sup>313</sup> so too did it in *Walmart v. Dukes*,<sup>314</sup> take a narrow reading of class certification requirements — unnecessarily denying minority individuals class action remedy following workplace discrimination.<sup>315</sup>

### 3. *The Court's Restrictive Reading of Class Action Certification Provides Employers a Roadmap for Avoiding Employee Class Action Litigation*

In 2007 in *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court denied Lilly Ledbetter a right of action for pay discrimination because her claim was filed more

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309. See *infra* notes 312 and accompanying text.

310. See *Nat'l Fed. of Ind. Bus.*, 132 S. Ct. at 2600 (“The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax.”).

311. See, e.g., Eduardo Porter, *America's Aversion to Taxes*, N.Y. TIMES, Aug. 15, 2012, at B1 (discussing the role the issue of taxes play in our political campaigns and legislation, and the public's general aversion to incurring higher tax liability).

312. See Adam Liptak, Justices, *By 5-4, Uphold Health Care Law; Roberts In Majority; Victory For Obama*, N.Y. TIMES, June 29, 2012, at A1 (quoting Yale Law School Professor Akhil Amar as stating that a “dark cloud” of the Court's Commerce Clause language is that “[f]ederal power has more restrictions on it . . . [g]oing forward, [causing] there [to] even be laws on the books that have to be re-examined” in light of the Court's holding) (internal quotations omitted).

313. See *supra* note 312 and accompanying text.

314. 131 S. Ct. 2541 (2011).

315. See *infra* Part IV.D.3.

than 180 days after the initial violation, and therefore past the statute of limitations.<sup>316</sup> Recognizing this inadequacy, Congress passed the Lilly Ledbetter Fair Pay Act of 2009, which established that an unlawful discriminatory compensation is made every time an employee is paid — thereby restarting the 180-day statute of limitations every pay period.<sup>317</sup> This new law is a logical amendment to promote non-discriminatory pay, while protecting the rights of women and minorities to remedy following unfair treatment by their employers.<sup>318</sup> Despite this recent change in the law, and the underlying recognition that gender-based pay discrimination is a reality, the Court in *Wal-Mart Stores, Inc. v. Dukes* denied a class action certification of over two million female Wal-Mart employees scattered across the country for lacking commonality of claims per Rule 23(a)(2) because discriminatory hiring decisions were made at each store, and not through the corporate headquarters — thereby making their claims too disparate for a class action.<sup>319</sup>

This high pleading standard unnecessarily imposes restrictive class certification standards,<sup>320</sup> and, furthermore, disregards recent changes in the law following *Ledbetter* to make it easier for employees to bring discrimination claims against their employer. However, most importantly, in holding that Wal-Mart’s decentralized decision making disallowed for the proposed class to meet the commonality requirement, the Court provided large corporations with a roadmap to avoid class action liability: give regional managers or distributors greater control in the hiring process.<sup>321</sup> Much like the Court’s reasoning in *Janus* gave companies a step-by-step guide of avoiding securities fraud liability,<sup>322</sup> in *Dukes* the Court gave corporations explicit guidelines for protecting a company from class actions. Following *Dukes*, decentralized decision-making process in a corporate enterprise all but guarantees the inability of separately located employees to satisfy Rule 23(a)(2)’s commonality requirement.<sup>323</sup> *Janus* has and will encourage corporate misconduct to the detriment of investors,<sup>324</sup> so too will *Dukes* encourage

316. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 621 (2007).

317. Pub. L. 111–2, 123 Stat. 5 (2009) (codified in scattered sections of 29 and 42 U.S.C.).

318. See, e.g., 155 CONG. REC. E159, E170 (2009) (statement of Rep. Charles Rangle) (“The passage and enactment of this act will restore prior longstanding law which will enable women and others to challenge instances of pay discrimination within 180 days of a discriminatory pay check. For too long women have performed the same tasks and have been unequally compensated. Unequal pay is not merely a women’s issue but a disparity that affects all of us.”).

319. 131 S. Ct. 2541, 2556–57 (2011); FED. R. CIV. PRO. R. 23(a)(2) (“One or more members of a class may sue or be sued as representatives of all members only if . . . there are questions of law or fact common to the class.”).

320. *Dukes*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting).

321. *Id.* at 2556 (majority opinion) (holding the decentralized decision making process made it impossible for the plaintiffs to have a common complaint for class certification).

322. See *supra* Part IV.C.

323. See *Dukes*, 131 S. Ct. 2556 (holding the decentralized decision making process made it impossible for the plaintiffs to have a common complaint for class certification).

324. See *supra* Part IV.C.

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corporations to adopt management structures designed to avoid litigation, instead of actively pursuing policies to promote fair and equal treatment of employees<sup>325</sup> — making it yet another illustration of the Roberts Court’s holistic jurisprudence that continuously promotes the interests of corporations over investors, consumers, and employees, and misses opportunities to promote socially responsible corporate governance.<sup>326</sup>

### V. CONCLUSION

The Court’s holding in *Janus Capital Group, Inc. v. First Derivative Traders*<sup>327</sup> was a three-part failure.<sup>328</sup> It misinterpreted, and vastly expanded, the protection of secondary actors in *Central Bank* to extend to primary violators.<sup>329</sup> It missed an opportunity to judicially create an exception for the investment adviser scenario.<sup>330</sup> And lastly, by focusing on the corporate form, it created a loophole for securities fraud violators to avoid liability.<sup>331</sup> In the guise of judicial restraint, the Court inappropriately further protected corporations and corporate actors from liability, and missed an opportunity to judicially complement recent legislative attempts to reform financial markets, and promote socially responsible corporations.<sup>332</sup> Furthermore, the Court’s failure in *Janus* is an illustrative microcosm of a jurisprudence that consistently and emphatically protects corporations to the injury of individuals<sup>333</sup> — creating a zero sum game between private litigants and corporate defendants. An equilibrium must be reached, however, where corporations are free from oppressive regulations, while still held accountable for their actions, and not impervious to the law. Recent decisions by the Roberts Court fail to recognize this need, and will prevent socially responsible corporate governance, while encouraging and protecting corporate mistreatment of investors, consumers, and employees.<sup>334</sup>

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325. See *supra* notes 321–23 and accompanying text.

326. See *supra* Parts IV.A–D.2, note 323 and accompanying text.

327. 131 S. Ct. 2296 (2011).

328. See *supra* Part IV.

329. See *supra* Part IV.A.

330. See *supra* Part IV.B.

331. See *supra* Part IV.C.1.

332. See *supra* Part IV.C.2.i.

333. See *supra* Part IV.D.

334. See *supra* Part IV.