RATIFICATION, CONSTRUCTIVE CONSENT, AND THE U.S. SUPREME COURT

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INTRODUCTORY ABSTRACT

Under the doctrine of ratification, a principal can become bound by a contract that was made in its name but without its authority based on the principal's subsequent silence. How can this be reconciled with the contract rule that the creation of a contractual obligation requires a manifestation of assent by the obligor? What is the rationale for imposing contractual liability on principals without their personal consent? To answer these questions, this Article examines the history of ratification, with particular emphasis on fifteen U.S. Supreme Court cases that developed the doctrine. The Article concludes that ratification is a species of agency law, the body of precedent that holds principals responsible for what they do through others. The question under agency law is not whether the principal personally manifested assent to the contract but whether the manifestation of assent by an agent or purported agent of the principal should be attributed to the principal (that is, treated as if it were the principal's own action). Attribution under the ratification doctrine is justified if, with knowledge of the material facts, the principal approved the actions of the agent, tried to take advantage of the agent's actions, or waited too long to express disapproval. This expansion of principal responsibility through ratification recognizes the practical reality of group action and adds an informal, dynamic, social dimension to U.S. business law.

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[1] The author thanks Deborah DeMott, Jay Feinman, and Larry DiMatteo for their comments on earlier drafts of this Article.

Under the ratification doctrine, an understudied concept of enormous practical importance,[2] people can become responsible for actions they never authorized and never intended to approve, just as if the unauthorized actions really had been authorized.[3] This seemingly paradoxical idea is frequently used to turn unauthorized commitments into binding legal contracts even though the obligor never authorized the commitment and never manifested an intent, consent, or willingness to be bound.

In a 2014 case, for example, an agent employed by a trust sold property buyers a mortgage belonging to the trust for $250,000 and then pocketed the money for himself.[4] The trust commenced nonjudicial foreclosure proceedings on the property,[5] which it later justified with the argument that the transaction had been unauthorized.[6] Separately, the trust sued the agent to recover the $250,000.[7] After the buyers sued the trust for slander of title,[8] the Utah Supreme Court held that by suing the agent to recover the proceeds of the mortgage sale, the trust ratified the mortgage transaction and thereby lost its claim against the property buyers.[9]

In a 2022 case, a lawyer investigating a potential class action claim against a company searched a database maintained by that company.[10] In order to access the database, the lawyer had to agree, by clicking "Submit,"

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[2] From January 1, 2020 through June 30, 2023 (a period of just three and a half years) the word *ratification* appeared in 7,445 cases reported in LEXIS.

[3] RESTATEMENT (THIRD) OF AGENCY § 4.01(1) (AM. L. INST. 2007).

[4] Dillon v. S. Mgmt. Corp., 326 P.3d 656, 661 (Utah 2014).

[5] *Id.* at 661–62.

[6] *Id.* at 664.

[7] *Id.* at 661.

[8] *Id.* at 666.

[9] *Id.* at 664–66.

[10] Knapke v. PeopleConnect, Inc., 38 F.4th 824, 828, 830 (9th Cir. 2022).

to hyperlinked Terms of Service, which included a broad arbitration provision.[11] The U.S. Court of Appeals for the Ninth Circuit held that even if the plaintiff did not authorize the attorney to agree to the arbitration provision, the plaintiff might still be bound by the agreement to arbitrate under the doctrine of ratification if the plaintiff made use of information obtained by the attorney after learning of the arbitration provision.[12]

In an older case from California, a husband forged his wife's signature on a promissory note and deed of trust to obtain funds for a business venture.[13] The wife learned of the forgery a few days later.[14] She remained silent because she thought she had "an equitable interest" in the business.[15] Later, after the business failed, the wife revealed that her signature had been forged.[16] The California Supreme Court held that the wife's silence constituted ratification.[17]

In 2019, a bankruptcy court in Mississippi held that the principal of a corporate debtor was liable on a guarantee,[18] despite an allegedly forged signature,[19] because the obligor not only failed to give the bank prompt notice of the alleged forgery after learning of it but also engaged in negotiations with the bank while remaining silent.[20]

These decisions are hard to square with the classic precept of contract law that, since "mutual assent is an integral component of every contract,"[21] the creation of a contractual obligation requires that the obligor manifest an agreement or intention to be legally bound by the contract.[22] The goal of this Article is to explain why the doctrine of ratification nevertheless makes sense both doctrinally and as a matter of practical justice.

The first step in the explanation is an appreciation of how the law of agency supplements the law of contracts. While the creation of a contractual obligation requires a manifestation of assent from the obligor, that manifestation does not have to come directly from the obligor.[23] The

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[11] *Id.* at 829.
[12] *Id.* at 835. On similar facts, a federal court in Chicago found no ratification. *See* Mackey v. Peopleconnect, Inc., No. 22 C 342, 2023 U.S. Dist. LEXIS 44836 (N.D. Ill. Mar. 17, 2023).
[13] Rakestraw v. Rodriguez, 500 P.2d 1401, 1403 (Cal. 1972).
[14] *Id.* at 1403.
[15] *Id.* at 1404.
[16] *Id.*
[17] *Id.* at 1406.
[18] World Health Jets LLC v. Barrett, 610 B.R. 118, 149 (Bankr. S.D. Miss. 2019).
[19] *Id.* at 139–40.
[20] *Id.* at 148–49.
[21] St. Michael's Media, Inc. v. Mayor of Balt., No. ELH-21-2337, 2023 U.S. Dist. LEXIS 57324, at *91 (D. Md. Mar. 31, 2023).
[22] *See* Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK L. REV. 647, 654–55 (2012).
[23] *See* Landcastle Acquisition Corp. v. Renasant Bank, 57 F.4th 1203, 1233 (11th Cir. 2023) ("Mutual assent and consideration are required elements for contract

manifestation may also come from an agent or purported agent of the obligor, if the manifestation of the actor is attributable to the obligor.[24] Questions of attribution—that is, the issue of whether the actions of one person (an agent) should be treated as though they were the actions of another person (a principal)—are determined by the law of agency,[25] a body of precedent that is quite different from contract law, is not limited to contract cases, and follows a logic of its own.[26]

One of the peculiar features of agency law is the doctrine of ratification, which has been described as "at once one of the most unique and characteristic chapters in the law of agency, and also one of the most important."[27] Under the doctrine of ratification, the actions of agents who were acting outside the limits of their contractually conferred authority may nevertheless be attributed to a principal based on how the principal responded (or failed to respond) to the situation after learning the material facts. As we will see, the flexible ratification standards (which are employed in tort cases as well as contract cases) are used in conjunction with other rules of attribution as an additional test of principal responsibility, to confirm the results of the other rules, to expand the scope of the other rules, and to fill gaps in the other rules.

According to the Third Restatement of Agency: "Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority."[28] One form of affirmance leading to ratification is when the principal manifests an intention to be legally bound by the previously unauthorized action of an agent or purported agent.[29] Importantly, however, this is not the only path to ratification. Often, as we will see, findings of ratification are based on evidence that the principal, with knowledge of the material facts, tried to take advantage of an

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formation. In the agency context, however, it is the agent who manifests the assent to the exchange with the third party, not the principal.").

[24] *See id.* at 1233.

[25] *See* RESTATEMENT (THIRD) OF AGENCY Chap. 2, Introductory Note (AM. L. INST. 2007).

[26] Gerard McMeel, *Agency Theory Revisited and Practical Implications*, *in* INTERMEDIARIES IN COMMERCIAL LAW 107 (Paul S. Davies & Tan Cheng-Han eds., 2022).

[27] FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY at 259, section 345 (2d ed. 1914).

[28] RESTATEMENT (THIRD) OF AGENCY § 4.01(1) (AM. L. INST. 2007).

[29] A 2007 article by Deborah DeMott describes consent as a basis for ratification but does state that it is not the only possible basis. *See* Deborah DeMott, *Agency by Analogy: A Comment on Odious Debt*, 70 L. & CONTEMP. PROBS. 157, 162 (2007). Other scholars seem to have had intentional ratification in mind when discussing the subject. *See* Gerard McMeel, *Philosophical Foundations of the Law of Agency*, 116 L.Q. REV. 387, 400 (2000); *see* Aaron D. Twerski, *The Independent Doctrine of Ratification v. the Restatement and Mr. Seavey*, 42 TEMP. L.Q. 1, 6 (1968).

unauthorized transaction or waited too long to express disapproval. In these implied ratification cases, as Elliot Axelrod has explained, ratification is not based on the principal's "subsequent willingness to be bound" but, rather, because the principal's "conduct and actions are inconsistent with a disavowal of the agent's acts."[30]

While it is possible to stretch the rubric of manifested assent to include some instances of implied ratification,[31] leading scholars of an earlier generation preferred a more direct approach. They frankly acknowledged that the cases did not fit contract theory. For example, the 1957 commentary to the Second Restatement of Agency noted that ratification "does not conform to the rules of contract, since it can be accomplished without consideration to or manifestation by the purported principal."[32] A 1954 article by Warren Seavey described various instances of what Professor Seavey called "forced" ratification.[33] Similarly, a 1952 article by Phillip Mechem observed that "in the great majority of instances" ratification "may be treated as involuntary, since it rests not on the principal's wish to be bound but on some other" basis.[34]

To understand how ratification can be sometimes consensual, sometimes involuntary, and sometimes in between, let us start by looking at the Third Restatement of Agency, which was published by the American Law Institute in 2007. According to Section 4.01(2)(a), a "person ratifies an act by . . . manifesting assent that the act shall affect the person's legal relations."[35] The commentary to this section goes on to explain that inaction or silence may be deemed a manifestation of assent for purposes of ratification. As the commentary puts it: "Failure to object may constitute such a manifestation when the person has notice that others are likely to draw such an inference from silence."[36] Plainly, in cases of ratification by silence, the commentary

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[30] Elliot Axelrod, *The Doctrine of Implied Ratification—Application and Limitations*, 86 OKLA L. REV. 849, 849 (1983).

[31] Peter Tiersman tried to fit the ratification by silence cases into a consent model in a 1995 article, arguing that silence could be construed as a manifestation of assent based on social conventions as to how silence should be interpreted. *See* Peter Tiersman, *The Language of Silence*, 48 RUTGERS L. REV. 1, 42, 44 (1995). To some extent, this is circular because the social conventions arose because of the ratification doctrine. In any event, one could reach the same result more directly by saying that actual consent does not matter.

[32] RESTATEMENT (SECOND) OF AGENCY § 82 cmt. c (AM. L. INST. 1957). Ratification can not be justified on a theory of restitution, since the ratifier may not have received a benefit, nor the third person a deprivation. Nor is ratification dependent upon a doctrine of estoppel, since there may be ratification although neither the agent nor the other party suffer a loss resulting from a statement of affirmance or a failure to disavow. *Id.*

[33] *See* Warren A. Seavey, *Ratification by Silence,* 103 U. PA. L. REV. 30, 30 (1954).

[34] Philip Mechem, *The Rationale of Ratification,* 100 U. PA. L. REV. 649, 658 (1952).

[35] RESTATEMENT (THIRD) OF AGENCY § 4.01(2)(a) (AM. L. INST. 2007).

[36] RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. f (AM. L. INST. 2007).

stretches the ideas of manifestation and assent, making them more deemed or constructive than actual. It is very different from the norm of contract law in which the receipt of an offer imposes no duty on the offeree to respond,[37] silence in response to an offer is ordinarily deemed to communicate nothing[38] and, therefore, "[s]ilence or inaction by the offeree is . . . the very antithesis of acts that create contractual obligation."[39]

That is not all. Section 4.01(2)(b) of the Third Restatement goes on to provide that a person also "ratifies an act by . . . conduct that justifies a reasonable assumption that the person so consents."[40] The commentary to this subsection rephrases this idea, stating: "the person may ratify the act through conduct justifiable only on the assumption that the person consents to be bound by the act's legal consequences."[41] The commentary explains: "For example, knowing acceptance of the benefit of a transaction ratifies the act of entering into the transaction. This is so even though the person also manifests dissent to becoming bound by the act's legal consequences."[42]

Thus, ratification under Section 4.01(2)(b) does not require a manifestation of assent but may occur despite a manifestation of precisely the opposite intent. Once again, the rule here is not an application of contract principles. Ratification under Section 4.01 only applies "if the actor acted or purported to act as an agent on the" obligor's behalf.[43] In the absence of such an actual or apparent agency relationship, under contract law alone, the knowing acceptance of benefits under an unexecuted contract (such as a property owner accepting payments pursuant to a proposed lease the owner never agreed to) does not establish acceptance of that contract.[44]

The case law discussed at the beginning of this Article illustrates how the ratification doctrine (unlike contract law) does not require an actual manifestation of actual assent.[45] Two recent tort cases further illustrate how ratification does not require actual consent or a manifested intention to be legally bound. In 2019, the U.S. Court of Appeals for the Ninth Circuit held that the owner of student loans was potentially liable for violations of federal law by agents of its loan servicer under the doctrine of ratification because the owner had become aware through an audit that some agents were acting

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[37] *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. A (AM. L. INST. 1978).
[38] *See* Tiersman, *supra* note 31, at 26.
[39] *Id.* at 28.
[40] RESTATEMENT (THIRD) OF AGENCY § 4.01(2)(b) (AM. L. INST. 2007).
[41] *Id.* § 4.01(2)(b) cmt. d.
[42] *Id.*
[43] *Id.* § 4.03.
[44] *See* BPX Operating Co. v. Strickhausen, 629 S.W.3d 189 (Tex. 2021); Botticello v. Stefanovicz, 411 A.2d 16 (Conn. 1979).
[45] *See* FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY 314, § 430 (2d. ed. 1914) (noting that intent to ratify "may often be found by the law in cases where the principal, as a matter of fact, either had no express intent at all, or had an express intent not to ratify").

improperly and did not require the servicer to terminate those agents.[46] In 2020, a federal court in Florida held an auto dealership was potentially liable under the ratification doctrine for violations of law by its telemarketer because the dealership had become aware of problems with a telemarketing campaign for a sales event but went ahead with the sales event anyway.[47]

To summarize then, principals can become liable under the ratification doctrine for conduct or promises they never authorized and to which they never expressed consent. For those who see individual consent as the moral basis for contractual obligation, the doctrine is troubling.[48] As a 1914 treatise put it, the doctrine of ratification would "seem very strange if it had not become so familiar."[49]

The goal of this Article is to explain the theory of justice behind the ratification doctrine. The Article will begin by introducing the concepts of agency and ratification. The Article will then break new ground in the academic literature by focusing on fifteen U.S. Supreme Court cases from the nineteenth century, when the Supreme Court was primarily a common law court,[50] that developed the ratification concept and related ideas and helped establish the modern doctrine. These cases illustrate the practical and moral considerations underlying the ratification doctrine. The cases also show why courts have not insisted on express manifestations of consent by the obligor, but instead have been willing to find ratification based on the obligor's knowing silence or (increasingly through the years) conduct morally inconsistent with non-affirmation of the allegedly unauthorized transaction, such as deliberate efforts to benefit from the agent's actions.

The cases will demonstrate that, because of its flexibility and informality, the ratification doctrine has allowed courts to expand the responsibility of principals, based on what they do as well as what they say, to fit the demands of practical justice.

I. AGENCY AND RATIFICATION

Because ratification is part of agency law, this section will begin with an introduction to the law of agency followed by an introduction to the concept of ratification.

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[46] *See* Henderson v. United Student Aid Funds, Inc., 918 F.3d 1062, 1076 (9th Cir. 2019).

[47] *See* Grant v. Regal Auto. Grp., No. 8:19-cv-363-T-23JSS, 2020 U.S. Dist. LEXIS 248347, at *29–31 (M.D. Fla. July 30, 2020).

[48] *See* Brian M. Studniberg, *Revisiting the Self-Authorizing Agent*, 44 OTTAWA L. REV. 311, 348 (2012–13) (describing the concept of ratification as strange and controversial).

[49] MECHEM, *supra* note 45, at § 345.

[50] *See* Guar. Tr. Co. v. York, 326 U.S. 99 (1945).

A. *Agency*

Agency law is the body of precedent that applies whenever "one person (the agent) agrees to act on behalf of another (the principal) to carry out the principal's affairs under the principal's control."[51] By determining what it means for one person to represent another, agency law provides the basis for corporations, employment, and the transaction of business through intermediaries.[52]

Please note how agency fits into the schema of jurisprudence. As Gerard McMeel put it in 2022, "agency law is not within the law of things—obligations and property—at all, but within the . . . law of persons."[53] Professor McMeel went on to explain that the distinction between the law of persons and the law of things "is one of the basic facts of Western legal civilization."[54] Moreover, Professor McMeel noted, "[a]gency is a central component of the law of persons and is not subservient to contract, tort, or unjust enrichment reasoning."[55]

Agency law starts from the idea that people can expand their legal personalities through representation by agents.[56] Helpful for humans, this power is essential for corporations. Just as humans must use avatars to participate in computer fantasy worlds, corporations can only participate in the real world through representation by human agents.[57]

Because agents act as extensions of their principal's legal personality, an agent does not simply act for the principal. Within the scope of the agency, the agent acts as the principal.[58] In other words, while acting on the principal's behalf, the agent acts as the principal's alter ego or other self, so that the thoughts, words, and deeds of the agent are treated as though they were the thoughts, words, and deeds of the principal.[59]

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[51] Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1188 (2003).

[52] *See* Gabriel Rautenberg, *The Essential Roles of Agency Law*, 118 MICH. L. REV. 609, 611–12, 653 (2020).

[53] *See* McMeel, *supra* note 26, at 105.

[54] *See id.* at 106.

[55] *See id.* at 107. For a discussion of the economic rationale of agency law, see George M. Cohen, *Law and Economics of Agency and Partnership*, *in* 2 OXFORD HANDBOOK OF LAW AND ECONOMICS (Francisco Parisi ed., 2017). Also available here: https://ssrn.com/abstract=3208640.

[56] *See generally* Rachel Leow, *Understanding Agency: A Proxy Power Definition*, 78 CAMBRIDGE L.J. 99 (2019).

[57] *See* Daniel Harris, *The Case Against Vicarious Gatekeeper Liability*, 21 FLA. STATE U. BUS. REV. 43, 47 (2022).

[58] *See* Deborah DeMott, *The Contours and Composition of Agency Doctrine: Perspectives from History and Theory on Inherent Agency Power*, 2014 U. ILL. L. REV. 1813, 1816, 1833 (2014).

[59] *See* Floyd R. Mechem, *The Nature and Extent of an Agent's Authority*, 4 MICH. L. REV. 433, 436–37 (1906) ("By the creation of the agency, the principal bestows

This idea entered English law in the early fourteenth century and was expressed through a maxim imported from canon law[60]: *Qui facit per alium, facit per se* (which can be translated as, "she who acts through another, acts herself" or "he who acts through another, acts himself").[61] Originally used to allow masters to take title to property acquired for them by their servants,[62] the *qui facit* maxim was gradually expanded over the centuries to apply to other forms of attribution, so that principals were required to assume the burdens, as well as enjoy the benefits, of their expanded legal personalities.[63]

B. *Ratification*

The word "ratify" comes from a Latin word meaning to make valid.[64] The idea was used in this sense by Shakespeare in *Macbeth* when a character described the coming efforts to overthrow the tyrant and expressed the hope that God "will ratify the work."[65]

The legal doctrine of ratification goes back to ancient Rome.[66] Under Roman law, if a son borrowed money in the absence of the father, as if by the father's authority, and wrote to the father asking the father to pay the debt, then the father, if he did not want to be held responsible, was required to communicate his dissent to the lender promptly after learning of the loan.[67] If the father did not repudiate promptly or if he commenced making payments on the debt, then the father was deemed to have ratified the act of borrowing and was liable as if he himself had borrowed the money.[68]

Thus, in its original form, ratification did not require express consent. Fathers could be bound by unauthorized promises made by their sons if the father knowingly acquiesced in the unauthorized commitment or took action that was inconsistent with non-affirmation.

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upon the agent a certain character. For some purpose, during some time and to some extent, the agent is to be the *alter ego*, the other self, of the principal.").

[60] *See* R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297, 321 (1999).

[61] *See* Ford v. United States, 273 U.S. 593, 623–24 (1927).

[62] *See* Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 518 n.87 (2011).

[63] *See* Daniel Harris, *Corporate Intent and the Concept of Agency*, 27 STAN J.L., BUS. & FIN. 133, 138 (2022).

[64] *See* Edwin C. Goddard, *Ratification by an Undisclosed Principal*, 2 MICH. L. REV. 25, 40 (1903).

[65] WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH Act III, Scene VI.

[66] *See* Edwin C. Goddard, *Ratification by an Undisclosed Principal*, 2 MICH L. REV. 25, 25 (1903).

[67] *See* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY 316, § 257 (8th ed. 1874).

[68] *See id.*

In the Middle Ages, the English common law adopted the idea of ratification[69] and merged it into the law of agency,[70] to allow for the retroactive validation of previously unauthorized commitments made by agents or purported agents. The concept came to be expressed in a Latin maxim: *Omnis ratihabito retrohabitur, et mandato prior acquiparatur*, which can be translated as "[e]very ratification relates back, and is equivalent to a prior authority."[71] This same thought is now expressed in Section 4.01(1) of the Third Restatement of Agency, which says: "Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority."[72]

Please note the symbolic logic of the *omnis ratihabito* maxim when combined with the *qui facit* maxim. Under the *omnis ratihabito* maxim, ratification is equivalent to prior authorization. Under the *qui facit* maxim, an agent who acts with the prior authority of the principal is equivalent to the principal doing the act directly. Thus, taken together, the two maxims mean that ratification is equivalent to the ratifier doing the act directly and carries with it the same liabilities for the ratifier.

It is also worth noting that the *omnis ratihabito* maxim does not specify what acts constitute ratification.[73] That detail was left for the courts to work out through a common law process of inclusion and exclusion. Therefore, to understand how American courts fleshed out the idea of ratification, this Article will turn to U.S. Supreme Court cases on the subject.

II. RATIFICATION IN THE UNITED STATES SUPREME COURT

Today, the business of the U.S. Supreme Court is almost exclusively the interpretation of federal statutes and the U.S. Constitution. That has not always been the case. Prior to its landmark decision in 1938 in *Erie Railroad Co. v. Tompkins*,[74] holding that the common law to be applied by federal courts in federal diversity of citizenship cases should be based on the decisions of state courts in the State in which the federal court was situated, the U.S. Supreme Court spent a great deal of its time articulating what it called "the general principles and doctrines of commercial jurisprudence"[75] based on its own ideas of what the common law should be.[76]

As we will see, in its years as a common law Court, the U.S. Supreme Court frequently dealt with the question of ratification and related issues

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[69] *See* Eugene Wambaugh, *A Problem as to Ratification*, 9 HARV. L. REV. 60, 60 (1895).
[70] *See* Oliver Wendell Holmes, Jr., *Agency II*, 5 HARV. L. REV. 1, 13 (1891).
[71] *See* Goddard, *supra* note 66, at 25.
[72] RESTATEMENT (THIRD) OF AGENCY § 4.01(1) (AM. L. INST. 2007).
[73] *See* Eugene Wambaugh, *A Problem as to Ratification*, 9 HARV. L. REV. 60, 63 (1895).
[74] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
[75] Swift v. Tyson, 41 U.S. 1, 19 (1842).
[76] *See* Guar. Tr. Co. v. York, 326 U.S. 99 (1945).

regarding the authority of agents to bind their principals.[77] The Court's decisions reflected and shaped U.S. law in the area. As we will see, the Court's decisions essentially established the rules followed today.

Accordingly, this Article will consider fifteen of the more influential U.S. Supreme Court cases dealing with ratification and related agency ideas in a commercial setting. The cases will be taken in chronological order, divided into three groups. The first group will show the foundations of the idea through four cases decided prior to 1865. The second and largest group are seven cases decided between 1865 and 1880, when the post-Civil War expansion of business activity led to an unusually fruitful period for the development of agency law. The last group are four cases decided between 1880 and 1896, when the ascendant philosophy of classical liberalism and its concern with protecting liberty of contract may have contributed to refinements in the ratification doctrine, with the Supreme Court placing limits on ratification by silence while expanding the idea that knowing efforts to take advantage of an unauthorized transaction are equivalent to consent.

A. *Cases Decided Before 1865*

Prior to 1865, the U.S. Supreme Court set the foundations of the ratification doctrine. Here are four cases from that period.

1. *Clark's Executors v. Van Riemsdyk (1815)*[78]

In 1806, a ship owned by John Innes Clark and a partnership of Rhode Island merchants sailed for Batavia (now Jakarta, Indonesia) with a cargo of wine.[79] One of the partners, Benjamin Munro, went along as the agent for the owners.[80] The wine was unloaded in Batavia, but Munro was unable to find a buyer.[81] Not wanting to return empty, Munro borrowed money to buy a new cargo for the return voyage,[82] even though he did not have written authority to do so.[83] Munro directed the lender to charge Clark and the Rhode Island partnership for the loan.[84] Munro regularly sent letters to Clark and his partners in Rhode Island informing them of these proceedings.[85] The cargo

[77] *See, e.g.*, Law v. Cross, 66 U.S. 533 (1862); Veazie v. Williams, 49 U.S. 134 (1850); Clark's Ex'rs v. Van Riemsdyk, 13 U.S. 153 (1815).
[78] *See generally Van Riemsdyk*, 13 U.S. 153.
[79] *See id*. at 154–55.
[80] *Id.*
[81] *Id*. at 155.
[82] *Id.*
[83] *Id.* at 161.
[84] *Id.* at 155.
[85] *Id.*

purchased with the borrowed money was resold at a profit after the ship returned to America.[86]

The loan was not repaid.[87] The Rhode Island partners became insolvent, and Clark died. The creditor sued Clark's estate to recover the loan plus interest.[88] The executors of Clark's estate argued that there was no liability because Clark never authorized Munro to borrow money on his account and the Amsterdam firm knew that Munro had no such authority. The trial court ruled for the creditor, and Clark's executors sought review in the U.S. Supreme Court.[89]

The Supreme Court affirmed the ruling for the creditor in an opinion by Chief Justice John Marshall.[90] The Court's opinion began by expressing doubt that Munro acted without authority.[91] The Court noted that Munro's letter to his principals describing his actions he

> makes no apology for what had been done; gives no description of his . . . doubts whether the measure to which he had resorted . . . would be approved by them. His language is the language of an agent acting within his powers on a contingency which had been foreseen and provided for.[92]

Even more telling, the Court noted, was that neither Clark nor the Rhode Island partnership expressed dissent after receiving the letter. "Not a sentence escapes either of the owners, disapproving the conduct of Munro, or expressing [surprise] at it. With that full knowledge of the whole transaction which is given by the letter of Munro . . . they receive the cargo and dispose of it to a very considerable profit."[93] The Court went on to pose the rhetorical question of how, in these circumstances, the principals could "be permitted, in a Court of conscience to question the authority" by which the transaction was made on their behalf?[94]

The Court then noted that Clark's executors had no idea what Clark and the Rhode Island partners had told Munro. The executors' argument that Munro lacked authority was based entirely on the admitted fact that Munro did not have written authority to borrow the money.[95] Even if this fact were given "all the weight claimed for it by counsel" for the executors, the Court noted, it would not allow the executors to avoid liability. While the executors' answer asserted Munro borrowed money without authority from

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[86] *Id.* at 155, 159.
[87] *Id.* at 155.
[88] *Id.* at 155–56.
[89] *Id.* at 156.
[90] *Id.* at 154, 162–64.
[91] *Id.* at 158–60.
[92] *Id.* at 158.
[93] *Id.* at 159.
[94] *Id.*
[95] *Id.* at 161.

his principals, it did "not assert that his [principals] never confirmed the acts."[96]

The Supreme Court then invoked the doctrine of ratification: "It will not be denied that the acts of an agent, done without authority, may be so ratified and confirmed by his principals as to bind them in like manner as if an original authority had existed."[97] The Court went on: "The application of this principle to the case at bar is as little to be denied as the principle itself."[98] The Court explained that the same conduct by the principals described earlier in the opinion to show Munro probably had prior authorization to borrow money also "amount to a full confirmation of those proceedings of their agent which had been communicated to his principals, and to an undertaking to perform the engagements he had made for them."[99] Therefore, the Court concluded, the principals were liable for the loan negotiated by Munro just as if they borrowed the money themselves. "They have made his act their act."[100]

The case of *Clark's Executors* illustrates the practical utility of the ratification doctrine. Agents are not like old-fashioned computers, mechanically following written instructions and doing only what they have been specifically programmed to do. Rather, more in the fashion of modern computers and actual human beings, agents exercise discretion to fulfill the anticipated wishes of their principals. When this occurs, there may not be evidence as to what the agent was authorized to do because the principal never found it necessary to spell it out. A related problem (which is less likely today now that email and text communications are so common) is that principals may communicate to their agents through plausibly deniable verbal instructions, thereby making it difficult for third parties to find evidence of the agent's actual authority.

If principals could avoid liability for actions taken on their behalf, to which they knowingly acquiesced, and from which they benefitted, simply because the counter party is unable to prove the agent acting for the principal had prior authorization, principals could enjoy the benefits of being represented by agents without the concomitant responsibility. They could have their cake, eat it, and not be obliged to pay for it.

To avoid this obvious injustice and to prevent principals from gaming the system in an opportunistic way that, as Chief Justice John Marshall put it, a "Court of conscience" could never permit,[101] the doctrine of ratification allows courts to treat knowing acquiescence as equivalent to prior, formal authorization, particularly when, as in the case of *Clark's Executors*, the

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 162.
[101] *See id.* at 159.

principals knowingly benefitted from the actions taken on their behalf.[102] It is also interesting to note that, even though the Supreme Court used the same facts to show likely prior authorization and ratification, the Court did not treat ratification as implied consent, but rather as an alternative to consent.[103]

2. *President, Directors & Co. of Bank v. Dandridge (1827)*[104]

The Bank of the United States obtained a surety bond guarantying that the cashier of its branch in Richmond, Virginia, would faithfully perform the duties of the office.[105] In what appears to have been a friendly, non-adversarial, contrived test case designed to establish an important principle of corporate law, the bank filed suit against the cashier and other parties to the bond, seeking a declaration the bond was valid and then, at trial, did not introduce written proof that the bank's board of directors had approved the transaction in which the bank obtained the bond.[106] The trial court ruled against the bank because the evidence of prior authorization was missing.[107] The U.S. Supreme Court reversed, holding that, as a matter of corporate law, the validity of corporate action does not require written proof of prior authorization by the corporation's board of directors.[108]

The Supreme Court's opinion by Justice Joseph Story acknowledged that "in ancient times it was held, that corporations aggregate could do nothing but by deed under their common seal."[109] "Be this as it may," the Court went on, this old rule "has been broken in upon in a vast variety of cases, in modern times, and cannot now, as a general proposition be supported."[110] Consequently, unless the statute creating the corporation specifically required it, there was no reason to say that formal, written proof of prior authorization was necessary to validate corporate action.[111]

The Court went on to observe that the law has many presumptions designed to uphold "transactions intimately connected with the public peace, and the security of private property."[112] Thus, for example, the law will presume that a person acting in public office "has been rightly appointed; that entries in public books have been made by the proper officer; [and] that, upon proof of title, matters collateral to that title shall be deemed to have been done."[113] Those same presumptions, the Court reasoned, are applicable to

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[102] *See* RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt d, cmt, f, cmt. g (AM. L. INST. 2007).
[103] *Van Riemsdyk*, 13 U.S. at 161.
[104] *See generally* President, Dirs. & Co. of Bank v. Dandridge, 25 U.S. 64 (1827).
[105] *Id.* at 64–65.
[106] *Id.* at 66.
[107] *Id.* at 64–66.
[108] *Id.* at 82.
[109] *Id.* at 67.
[110] *Id.* at 68.
[111] *Id.* at 69.
[112] *Id.*
[113] *Id.* at 70.

corporations. "Persons acting publicly as officers of the corporation, are presumed to be rightfully in office" and if officers of a "corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed."[114] The Court added: "In respect to grants and deeds beneficial to a corporation, there seems to be no particular reason why their assent to, and acceptance of the same, may not be inferred from their acts as well as in the case of individuals."[115]

The Court noted that the bank's charter did not require that board approval of corporate transactions "be by writing, or entered of record."[116] Nor was there any basis for creating such a requirement based on general commercial practice. "The agents of private persons are not usually in the habit of keeping regular minutes of all their joint proceedings, and hitherto there has been no adjudication, which requires such a verification of their joint acts."[117] The same has been true for corporate bodies.[118] The Court said the law has not required written minutes demonstrating prior authorization because it recognizes "the loose and inartificial manner in which much of the business of agencies is generally conducted"[119] and because the "subsequent acts" of principals and agents "are often just as irresistible proof of the existence of prior dependent acts and votes, as if the minutes were produced."[120]

The Court went on to note that "the sense of the profession, and the course of private business, have never hitherto, in respect to private agencies and boards, [recognized] the existence of any rule which required their acts and proceedings to be justified by written votes."[121] On the contrary, the understanding has been that a corporate board of directors may accept a contract executed by a corporate agent "by a tacit and implied assent."[122] To change that understanding by adopting a rule requiring proof of prior written authorization of corporate action, the Court concluded, "would be attended with serious public mischiefs, and shake many titles and rights, which have been consummated in entire good faith, and the confidence that no such written record was necessary to their validity."[123]

Chief Justice John Marshall dissented, arguing that the "aggregate will" of a corporation must be communicated through an "aggregate voice" and

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[114] *Id.*
[115] *Id.* at 72.
[116] *Id.* at 80.
[117] *Id.* at 82.
[118] *See id.* at 83–86.
[119] *Id.* at 82.
[120] *Id.* at 82–83.
[121] *Id.* at 83.
[122] *Id.*
[123] *Id.* at 88.

that could only be done "by writing."[124] Chief Justice Marshall argued the old rule requiring corporate action be validated by a corporate seal had been overruled only with respect to the seal itself. According to the Chief Justice, the law still required that corporations speak in a manner appropriate to their artificial nature and that required, at the least, that the corporation express its will in writing.[125] In response to the Court's claim that requiring written proof of prior authorization would upset settled contracts and deeds, Chief Justice Marshall said: "I can scarcely suppose that so loose a practice has prevailed."[126]

The *Dandridge* case made it possible for the doctrine of implied ratification to apply to corporations, both as to contracts that were onerous to the company and contracts that were beneficial. The decision also meant American corporations did not have to follow a Soviet-style system of centralized control and detailed micromanagement. Rather, instructions from corporate boards and top managers could be loose, unrecorded, and informal.[127] Lower-level managers and other corporate agents could be given broad discretion in how to do their jobs, subject to supervision and tacit or implied assent.[128] While contending the Supreme Court had changed the law, Chief Justice Marshall acknowledged at the close of his dissent that "perhaps" the change was "to the advancement of the public convenience."[129]

3. *Veazie v. Williams (1850)*[130]

Nathaniel and Stephen Williams engaged Henry Head to sell two mills at an auction, which was conducted in Bangor, Maine, on January 1, 1836. At the auction, Head used sham bids to induce Samuel Veazie to buy the mills for $40,000, when the highest, genuine competing offer did not exceed $20,000.[131] After Veazie realized he had been swindled, he filed suit against the sellers, Nathaniel and Stephen Williams.

The U.S. Supreme Court held that the auctioneer, Henry Head, had engaged in fraud and that the sellers were liable for rescission of the sale or for return of the portion of the payment induced by the fraud, even though there was no proof the sellers "were personally guilty of fraud" or had

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[124] *Id.* at 92 (Marshall, C.J., dissenting).
[125] *Id.* at 93–94.
[126] *Id.* at 105.
[127] *See* RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt. c (AM. L. INST. 2007) ("[F]ormal characteristics do not capture either the practical or the legal reality of how most corporate organizations and other business organizations operate.").
[128] *See id.* at cmt. c ("The ability to delegate with a reasonably reliable sense of the legal consequences is the essence of corporate management. What is delegated often includes the right to make manifestations to subordinates within the organization or to persons external to it.").
[129] *Dandridge*, 25 U.S.at 116 (Marshall, C.J., dissenting).
[130] *See generally* Veazie v. Williams, 49 U.S. 134 (1850).
[131] *Id.* at 134.

"expressly directed falsehood or fraud."[132] To justify its ruling, the Supreme Court invoked the doctrine of ratification, noting that it is "as well settled in England as here, that if a principal ratify a sale by [an] agent, and take benefit of it, and it afterwards turns out that fraud or mistake existed in the sale," then the sale may be annulled or the injury resulting from the fraud may be otherwise redressed.[133] Liability does not require proof that the vendor intended the fraud or knew at the time what the sales agent was doing. Rather, the test is: "Was the purchaser deceived, and has the vendor adopted the sale, made by deception, and received benefits of it? For, if so, [the vendor] takes the sale with all its burdens."[134]

The *Veazie* case illustrates ratification by conduct rather than ratification by an expression of assent. There was no suggestion in the Court's opinion that the sellers had expressed approval of what the auctioneer had done or manifested a willingness to be bound by its legal consequences. Nevertheless, it was sufficient for ratification that they had obtained the benefits of a fraud by their agent and then sought to retain those benefits after the fraud had been exposed.[135]

The decision also shows how the doctrine of ratification is part of the law of agency, rather than the law of contracts. The question addressed is whether the actions of one person should be attributed to another. The general idea illustrated by this decision is that those who choose to extend their legal personality by employing agents and who knowingly choose to retain the benefits of what their agents do on their behalf after it is established that those benefits were achieved through wrongdoing by the agent thereby assume responsibility for the agent's actions.[136] The bitter and the sweet are inextricably linked. If principals choose to ratify frauds of their agents by knowingly retaining the benefits achieved for them through those frauds, then, through the combination of the *omnis ratihabito* and *qui facit* maxims, the principals become as responsible for the frauds as if the principals themselves had personally committed the wrongdoing.

The rule of the *Veazie* case is essential in today's world in which the economy is dominated by large corporations. These behemoths can operate only through representation by agents. It would be unconscionable if these companies could take credit for the good things their agents do on their behalf, including actions undertaken without specific authorization, and not be required to assume responsibility for the bad acts undertaken on their behalf, after the company has become aware that it is holding benefits achieved through agent misconduct. The application of the rule of law to large corporations would have a huge gap if corporations were not required

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[132] *Id.* at 156.
[133] *Id*. at 157.
[134] *Id.*
[135] *Id.* At 153, 157.
[136] RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. d. (AM. L. INST. 2007) ("[K]nowing acceptance of the benefit of a transaction ratifies the act of entering into the transaction.").

to assume the responsibilities demanded of them by the doctrine of ratification.

4. *Law v. Cross (1862)*[137]

George Law of New York owned a line of steam ships that sailed down the Atlantic, around the bottom of South America and then up through the Pacific to San Francisco. In January 1850, Law engaged Alexander Cross to buy a load of coal for him in Valparaiso, Chile, which would be picked up by Law's ship, the Antelope, for transport to San Francisco.[138] Cross accepted the assignment, but later in July 1850, Cross informed Law by letter that he had purchased coal in Coquimbo. Cross explained that "coal was scarce and difficult to procure in Valparaiso," so that the Antelope might arrive and find no supply, whereas Coquimbo "was but a day's sail further away," and the coal there was cheaper, and the port was a safer and easier place from which to ship the coal.[139] Law did not respond to Cross's letter.

As it happened, when the Antelope later arrived at Valparaiso, the ship was so disabled as to require repairs. The master of the ship decided that it was easier to purchase and load coal in Valparaiso, "which could be put on board while [the] vessel was being repaired."[140] The coal purchased at Coquimbo was sent to San Francisco on another ship. When that ship reached San Francisco, Law's agent there refused to accept the cargo and the coal was sold at a loss at an auction.[141] Since Cross had purchased the coal in Coquimbo with his own funds, Cross sued Law for reimbursement of his loss.[142] A jury found in favor of Cross.[143] On review, the U.S. Supreme Court affirmed.[144]

The Supreme Court held that the jury could find that Cross had acted within the scope of his authority even though he had deviated from his orders by buying coal in Coquimbo rather than Valparaiso.[145] The situation, the Court explained,

> presented a case where the agent, acting, as he supposed, for the best interest of his distant principal, under the circumstances, had nevertheless gone beyond the letter of his instructions. But, as the coal was purchased for the principal, it belonged to the principal, if the principal chose to accept it.[146]

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[137] *See generally* Law v. Cross, 66 U.S. 533 (1862).
[138] *Id.* at 533–37.
[139] *Id.* at 538.
[140] *Id.* at 539.
[141] *Id.* at 533–36, 538.
[142] *Id.* at 533–36.
[143] *Id.*
[144] *Id.* at 540.
[145] *Id.* at 539.
[146] *Id.*

Thus, the Court noted, if "the price had risen, and Cross had sold it, Law might justly have claimed the profit."[147] Law's right to take advantage of his agent's acts, the Court explained, carried with it a corresponding duty.[148] When informed by his agent of what the agent had done, if Law did not choose to affirm the act, it was Law's duty "to give immediate information of his repudiation."[149] A principal cannot, through silence and "apparent acquiescence, have the benefit of the contract if it should turn out to be profitable, and retain a right to repudiate it if otherwise."[150]

The Supreme Court then reiterated these points as establishing a general rule regarding ratification. "The principal must, therefore, when informed, reject within a reasonable time, or be deemed to adopt by acquiescence."[151] As to the application of that rule to case at bar, the Supreme Court said, "[w]hether there was such acquiescence or not the judge left fairly to the jury."[152]

The Supreme Court's decision takes the ratification idea further than the Supreme Court cases discussed above. Law never authorized Cross to buy the coal in Coquimbo. The clear instructions were for Cross to buy the coal in Valparaiso.[153] Moreover, after being informed of what Cross had done, Law never expressed assent to Cross's decision to go against the instructions.[154] Rather, Law's evident desire was to wait and see how things turned out and only embrace the departure if the price of coal went up, which it did not.[155] Furthermore, Law never received any benefit from Cross's decision to buy the coal in Coquimbo.[156] All that Law received was the possibility of a benefit that never actually eventuated.[157]

Nevertheless, in order to protect the exercise of good faith discretion by agents on their principals' behalf and in order to balance out the right of principals to take advantage of such discretion, the Supreme Court said a jury could treat Law's silence as the equivalent of authorization under the ratification doctrine.[158] The policy idea is that enterprises need to be flexible, so the law should protect agents who exercise good faith discretion from opportunistic conduct by their employers. The moral idea is that principals should have to place their bets at the same time ordinary people do. Those who employ agents should not have the option of waiting to see how things

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[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 537.
[154] *Id.* at 539.
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *See id.*

turn out before deciding whether to accept the deals made for them by their agents.

B. *Cases Decided Between 1865 and 1880*

The Civil War marked a watershed in American history, bringing with it (among many other things) the triumph of industrial capitalism and the rise of big business.[159] Perhaps as a result, the period 1865 to 1880 was an unusually fruitful time for the development of U.S. agency law. Here are seven U.S. Supreme Court decisions from that period.

1. *Smith v. Morse (1869)*[160]

Samuel B. Morse, the inventor of the telegraph, and the estate of Alfred Vail, one of Morse's business associates, became embroiled in litigation with one F.O.I. Smith concerning certain agreements relating to the telegraph.[161] The parties reached (or appeared to reach) an agreement to arbitrate.[162] The arbitration contract was signed by Smith and by Amos Kendall, as agent for Morse and the Vail estate.[163] The subsequent arbitration resulted in an award against Smith, who then refused to pay.[164] When Morse and the Vail estate sued to enforce the award, Smith argued (among other things) that Kendall did not have authority from Morse and the Vail estate to sign the arbitration contract, so there never was a valid arbitration agreement.[165] The trial court ruled against Smith and the U.S. Supreme Court affirmed.[166]

On the issue of Kendall's authority, the Court said Smith's objection came "too late" because Smith not only signed the arbitration agreement endorsed by Kendall on behalf of Morse and the Vail estate,[167] but also participated in an arbitration in which Kendall represented Morse and the Vail estate, and "took no exception to [Kendall's] authority."[168] The Supreme Court then supplemented these reasons by invoking the doctrine of ratification, holding that even if Kendall's authority to sign the arbitration agreement "had been originally insufficient," the plaintiffs (Samuel Morse and the Vail estate) "adopted and ratified" Kendall's acts by "accepting the

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[159] *See* THOMAS C. COCHRAN & WILLIAM MILLER, THE AGE OF ENTERPRISE: A SOCIAL HISTORY OF INDUSTRIAL AMERICA 111 (2d ed. 1961).
[160] *See generally* Smith v. Morse, 76 U.S. 76 (1869).
[161] *Id.* at 77.
[162] *Id.*
[163] *Id.* at 77–78.
[164] *Id.* at 78.
[165] *Id.* at 79.
[166] *Id.* at 83.
[167] *Id.* at 82.
[168] *Id.*

settlement" made by Kendall "on their behalf, and by bringing the present action" to enforce the arbitration agreement.[169]

It is worth noting the Supreme Court said that Smith's objection to Kendall's authority came too late, and not that Smith had no standing to object at all.[170] Presumably, if Smith had immediately backed out of the arbitration agreement, prior to any act of ratification by Morse and the Vail estate, the situation would have been different. As the Third Restatement of Agency now explains, ratification of an unauthorized contract is not effective unless it precedes "any manifestation of intention to withdraw from the transaction made by the third party."[171]

The Supreme Court's decision in *Smith v. Morse* establishes the rule that suing to enforce or secure benefits from a contract made by an agent operates as a ratification of that contract.[172] This rule greatly simplifies business and business litigation. Companies do not have to create and maintain records showing the authority their agents had to agree to particular contracts. Companies can take advantage of contracts executed by their agents even if prior authorization was lacking. A vast area of potential controversy is removed from the litigation arena.

On the other hand, as we will see, the rule that suing to take advantage of an unauthorized transaction operates as a ratification of that transaction has its disadvantages for principals as well. Principals cannot sue to enforce those parts of an unauthorized transaction that they like without thereby ratifying the entire transaction.[173]

2. *Bennett v. Hunter (1869)*[174]

B.W. Hunter owned property in Alexandria County, Virginia. During the Civil War, the federal government assessed taxes on the property, which were not paid. After the war, a tenant on the property tendered the delinquent taxes plus appropriate expenses, penalties, and costs to federal tax commissioners. The commissioners refused to accept the tender because it had not been made personally by the actual owner (at this point B.W. Hunter's son, who had inherited the property from his father). The commissioners then sold the property for non-payment of taxes.[175]

The U.S. Supreme Court held unanimously that the commissioners should have accepted the tender because it was "obvious" that the right to pay the delinquent taxes belonged "to the owner, either acting in person or

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[169] *Id.*
[170] *Id.*
[171] RESTATEMENT (THIRD) OF AGENCY § 4.05(1) (Am. L. Inst. 2007).
[172] *See id.* at 82.
[173] RESTATEMENT (THIRD) OF AGENCY § 4.07 (AM. L. INST. 2007). *See also id.* § 4.01 cmt. h.
[174] *See generally* Bennett v. Hunter, 76 U.S. 326 (1869).
[175] *Id.* at 326–32.

through some friend or agent, compensated or uncompensated."[176] The Court reasoned that the applicable law gave a right of payment to the owner or owners; "and it is familiar law that acts done by one in behalf of another are valid if ratified either expressly or by implication, and that such ratification will be presumed in furtherance of justice."[177] Consequently, it did not matter whether Hunter tendered the money personally or even whether Hunter had authorized the tender by the tenant. The right to pay "might be properly exercised" by Hunter "in person, or through any other person willing to act in his behalf and not disavowed by him."[178] Therefore, the Court concluded, the government's sale of Hunter's property for non-payment of taxes was invalid.[179]

The Supreme Court's decision in *Bennett v. Hunter* illustrates how the concept of agency and the doctrine of ratification are read into positive law in order to determine what it means for a person to do something. The applicable statute gave the owner the right to pay delinquent taxes in order to avoid forfeiture.[180] Under the concept of agency, the acts of the owner included the authorized acts of any agent of the owner.[181] Under the doctrine of ratification, the acts of a person acting on behalf of the owner could, if not disavowed by the owner, be treated as if they were the actions of an authorized agent of the owner.[182] Therefore, for purposes of the statute, the ratified actions of someone acting on behalf of the owner should be treated as if they were the personal actions of the owner.

The decision also illustrates that ratification does not require actual consent by the principal. Something more akin to constructive consent may be sufficient. Thus, if a principal has knowingly acquiesced in some action taken by another on the principal's behalf, then (as the Supreme Court put it in *Bennett v. Hunter*) "ratification will be presumed in furtherance of justice."[183] In other words, the ratification doctrine is a tool that courts can use in order to achieve just results.

3. *Feild v. Farrington (1870)*[184]

In October 1865, Feild, a resident of Little Rock, Arkansas, gave a load of cotton to Farrington & Howell, commission merchants of Memphis, Tennessee, with instructions to sell it.[185] A short time later, the Farrington firm gave Feild an advance of $11,000 on the expected proceeds of the

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[176] *Id.* at 337.
[177] *Id.* at 337–38.
[178] *Id.* at 338.
[179] *Id.*
[180] *Id.* at 337.
[181] *Id.* at 337–38.
[182] *Id.* at 338.
[183] *Id.* at 337–38.
[184] *See generally* Feild v. Farrington, 77 U.S. 141 (1870).
[185] *Id.* at 142.

sale.[186] In November 1865, the Farrington firm sent a letter to Feild, saying it had not yet sold his cotton because the market had been declining, but that the firm "will be compelled to sell" the cotton if Feild did not advance cash or ship more cotton to the firm.[187] Feild did not respond to the letter.[188] Several months later, in September 1866, after the price of cotton had declined even more, the Farrington firm sold the cotton[189] and demanded Feild pay the difference between the money the firm received for the cotton and the $11,000 advance that the firm had given him.[190] When that demand was refused, the Farrington firm sued Feild, who defended on the ground that the firm should have sold the cotton earlier.[191] That defense failed, however, because the trial court instructed the jury that all losses after Feild's failure to respond to the firm's letter were Feild's responsibility.[192]

The U.S. Supreme Court reversed.[193] The Court agreed with the trial court that Feild's failure to respond to the letter of November 1865 did ratify the Farrington's firm's conduct up to that point.[194] Quoting a treatise on agency law, the Court said that "when the relation of principal and agent does in fact exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what has been done on his account."[195] Therefore, the Court concluded, whatever instructions Feild may have given initially, his failure to respond to the firm's letter of November 1865 informing him the firm had not yet sold the cotton "must be deemed an approval of [the firm's] delay, and equivalent to an antecedent authority."[196]

The Court went on to hold, however, that Feild's failure to respond to the firm's letter did not excuse the firm's failure to sell the cotton after the November 1865 letter. The Court explained the Feild's "silence, at most, was an assent to what [the firm] had done up to the time when [the firm] informed him of [the firm's] breach of his orders. It was condonation of past neglect, not a permission given for future negligence or faithlessness."[197] The Court noted that the firm's letter did not propose an indefinite postponement of the sale of the cotton. "On the contrary, the letter threatened an immediate sale, unless other shipments were made or cash was remitted, and the silence of [Feild] can be deemed no more than an assent to what his correspondents had

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[186] *Id.*
[187] *Id.* at 143.
[188] *Id.* at 144.
[189] *Id.* at 145.
[190] *Id.*
[191] *Id.* at 145–46.
[192] *Id.* at 146–47.
[193] *Id.* at 152152.
[194] *Id.* at 148–49.
[195] *Id.* at 148.
[196] *Id.* at 149.
[197] *Id.* at 150.

done, and to what they proposed to do."[198] The Supreme Court went on to hold that whether the Farrington firm's continued delay after the letter of November 1865, "was in the exercise of a sound discretion, good faith and reasonable diligence, was a question that should have been submitted to the jury" and that if the delay was unreasonable, then the firm "should bear the loss that resulted from it."[199]

The *Feild* case illustrates that ratification by silence has its limits. While silence may be treated as the equivalent of express consent, it does not go beyond express consent. Thus, a principal's knowing acquiescence may be deemed approval of what the agent says it has done or proposes to do. It is not approval of anything the agent might do in the future, particularly when the future actions are not reasonably predictable from what the agent has communicated to the principal.

4. *Bronson's Executor v. Chappell (1871)*[200]

Fredric Bronson of New York owned land in Wisconsin. In 1865, Bronson's agent, William C. Bostwick of Galena, Illinois, negotiated a sale of Bronson's land to E. and J. Chappell, who lived near Galena.[201] The sales contract called for the Chappells to make installment payments, with the first payment to go to Bostwick in Galena and all subsequent payments to go to Bronson in New York. Instead, however, the Chappells made all their payments to Bostwick. Bronson did not object to the Chappells paying Bostwick until Bostwick went out of business and failed to remit the monies he had received from the Chappells. Bronson then claimed Bostwick had no authority to take the subsequent payments, demanded the Chappells pay him the monies Bostwick had failed to remit and sued to retake the Wisconsin property when the Chappells refused to do so.[202]

The Supreme Court held that by acquiescing in the Chappells paying Bostwick, Bronson had conferred apparent authority on Bostwick to receive the payments and therefore could not complain about the Chappells paying Bostwick. The Court explained that where a person, "without objection, suffers another to do acts which proceed upon the ground of authority from" that person or where that person engages in "conduct that adopts and sanctions such acts after they are done," that person "will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner."[203]

Even though the sales contract said that subsequent payments should be made to Bronson in New York, Bronson's acquiescence in the Chappells paying Bostwick created the impression that Bronson authorized Bostwick

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[198] *Id.* at 151.
[199] *Id.* At 151.
[200] *See generally* Bronson's Ex'r v. Chappell, 79 U.S. 681 (1871).
[201] *Id.* at 681–82.
[202] *Id.* at 682–83.
[203] *Id.* at 683.

to act as Bronson's alter ego when it came to receiving payments. As the Court put it: "If business has been transacted in certain cases it is implied the like business may be transacted in others."[204] Thus, third parties such as the Chappells may legitimately infer that "everything fairly within the scope of powers exercised in the past [by an agent] may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned."[205] In these circumstances, the Supreme Court explained, "the presence or absence" of actual authority "is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences."[206]

The case of *Bronson's Executor* illustrates the concept of apparent authority, which is now defined in Section 2.03 of the Third Restatement of Agency: "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."[207] The doctrine of ratification, however, played a key role in the case because Bronson's "manifestations" to the Chappells included Bronson's past acquiescence in their payments to Bostwick.[208]

Thus, the doctrine of ratification contributes to the informal and dynamic nature of agency authority. Whatever a contract might say, and whatever the formal instructions that principals give to their agents, principals can expand the authority of their agents through ratification.[209] Those acts of ratification not only validate past actions of the agents. The ratifications can also give agents the apparent authority to engage in similar actions in the future.[210] In cases against third parties who have reasonably relied upon an appearance of authority created or allowed by the principal, the apparent authority of the agent has the same legal effect for the principal as actual authority.[211]

5. *Insurance Co. v. McCain (1877)*[212]

In 1868, B.F. Smith, an agent of the Southern Life Insurance Company, sold a policy that insured the life of Adam McCain for the benefit of his wife

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[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. L. INST. 2007).
[208] *Chappell*, 79 U.S. at 683.
[209] *See* Ins. Co. v. Norton, 96 U.S. 234, 240 (1878).
[210] RESTATEMENT (THIRD) OF AGENCY §§ 1.03 cmt. b, 4.01 cmt. f. (AM. L. INST. 2007).
[211] RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. L. INST. 2007).
[212] *See generally* Ins. Co. v. McCain, 96 U.S. 84 (1877).

and children.[213] The McCains paid the premiums on the policy to Smith.[214] These payments were accepted without objection,[215] but there were two technical problems. First, Smith had lost his status as agent of Southern Life by taking employment with a competing company and later by resigning.[216] Second, under Southern Life regulations, Smith needed special authority, which he did not have, to collect renewal premiums.[217] Southern Life pointed out these problems to the McCains for the first time after Adam McCain died as grounds for refusing to pay on the policy.[218]

The Supreme Court ruled unanimously for the McCain family, relying mainly on the doctrine of apparent authority, discussed above.[219] First, Smith's loss of agency status was irrelevant. Because the company had held out Smith as its agent, the McCains had "the right to rely upon the continuance of" Smith's authority "until in some way informed of its revocation."[220] Similarly, the company could not invoke its rules limiting Smith's authority to collect premiums because special instructions limiting the authority of an agent to do that which similar agents are normally allowed to do "must be communicated to the party with whom [the agent] deals, or the principal will be bound to the same extent as though such special instructions were not given."[221] Thus, the company had to live with the appearances it created. As the Court put it: "Good faith requires that the principal should be held by the acts of one [it] has publicly clothed with apparent authority to bind [it]."[222]

The Supreme Court buttressed its holding by invoking the doctrine of ratification. The Court said that the company's silence "after receiving the statement of the agent that the premium had been paid . . . was equivalent to an adoption of the act of the agent, and closed the mouth of the company ever afterwards."[223] The Court noted that it did not appear the company ever objected to the payment to Smith until after Adam McCain died. "It was then too late. As pertinently said by counsel, the company cannot be permitted to occupy the vantage ground of retaining the premium if the party continued in life, and repudiating it if he died."[224]

The *McCain* case illustrates how the ratification doctrine is not limited to the actions of actual agents. Technically, Smith was no longer an agent of Southern Life when he accepted the later payments by the McCains since

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[213] *Id.* at 84.
[214] *Id.*
[215] *Id.*
[216] *Id.* at 85.
[217] *Id.*
[218] *Id.* at 84–85.
[219] *Id.* at 86.
[220] *Id.* at 86.
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*

Smith had resigned his agency. Nevertheless, Smith's actions were deemed ratifiable by and attributable to Southern Life because Smith was purporting to act as a Southern Life agent when he accepted the payments. This rule is now embodied in Section 4.03 of the Third Restatement of Agency, which provides: "A person may ratify an act if the actor acted or purported to act as an agent on the person's behalf."[225]

The *McCain* case also illustrates how the ratification doctrine is designed to prevent principals from behaving opportunistically. If a company knowingly takes advantage of unauthorized actions by its agent, then the company will be deemed to have ratified those actions.[226] It does not matter whether the company meant its acquiescence to be an endorsement or simply a way to preserve options.[227] Whatever the company had in mind, the law's goal is to make sure the game is played fairly. To further that end, knowing acquiescence by a principal may be treated as equivalent to express consent whenever necessary to promote the interests of justice.[228]

6. *Insurance Co. v. Norton (1878)*[229]

In 1867, the Knickerbocker Life Insurance Company of New York issued a policy insuring the life of Jesse O. Norton, a resident of Illinois, for the benefit of his wife and children.[230] Premiums on the policy were due each year on April 20.[231] The policy provided that if the annual premium was not paid by that date, then the policy would be void, unless the company expressly agreed in writing to accept a late payment.[232] The policy further provided that agents of the company were not authorized to make or alter contracts or to waive forfeitures.[233] Nevertheless, for several years, the company's agent repeatedly allowed Norton to pay premiums late and the company accepted those late payments.[234]

In June 1875, Norton's son asked the Knickerbocker agent for an extension of time to pay the premium.[235] The agent said, "All right,"[236] but later, on orders from the company office in New York, refused a tender of the premium made before the extension expired.[237] Jesse Norton died on

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[225] RESTATEMENT (THIRD) OF AGENCY § 4.03 (AM. L. INST. 2007).
[226] *See* RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. g. (AM. L. INST. 2007).
[227] *See id.* at cmt. d.
[228] *See id.*
[229] *See generally* Ins. Co. v. Norton, 96 U.S. 234 (1878).
[230] *Id.* at 234.
[231] *Id.*
[232] *Id.* 235.
[233] *Id.*
[234] *Id.* at 235–36.
[235] *Id.* at 236.
[236] *Id.*
[237] *Id.* at 237.

August 3, 1875.[238] Knickerbocker refused to pay on the policy because the premium had not been paid on time.[239] The widow sued,[240] and a jury ruled in her favor.[241]

On review, the U.S. Supreme Court affirmed the verdict against the insurance company.[242] The key issue, as the Court saw it, was whether the agent had the authority in June 1874 to waive the forfeiture and grant Norton an extension of time to pay the premium.[243] While the terms of the contract did not give the agent such authority, those terms were not decisive, the Supreme Court said, because "the company was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might, at any time, at its option, give them that power."[244] Whether the company had, in fact, chosen to exercise that option and give its agent the power to waive forfeitures, notwithstanding the express language of the contract, the Supreme Court noted, "was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing."[245]

In case at bar, the Supreme Court went on, there was evidence the insurance company had, in fact, given its agents the authority to waive forfeitures and accept late payments because the company had "acquiesced in and ratified their acts in this behalf."[246] Whatever the language of the contract, the company could not deny that it had given its agents this authority when the company had "constantly allowed them to exercise such authority and always ratified their acts, notwithstanding the language of written instruments."[247] It followed, the Supreme Court concluded, that the trial court had properly let the jury decide whether the insurance company "had or had not authorized its agent" to grant extensions and whether, "if such authority had been given, an extension was made in this case."[248]

Please note the Supreme Court did not say the insurance company had ratified the June 1874 extension. The Court held, instead, that the company's ratification of past extensions could be reasonably interpreted to give the agent the authority to grant the extension in June 1874, even though the insurance contract specifically denied the agent that power.[249] Thus, the *Norton* case illustrates how ratification serves as the yeast of agency authority, expanding the authority of agents to include that which their

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[238] *Id.* at 235.
[239] *Id.*
[240] *Id.* at 234.
[241] *Id.* at 238.
[242] *Id.* at 244.
[243] *Id.* at 239-40.
[244] *Id.* at 240.
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.* at 241.
[249] *Id.*

principals tolerate in fact and that which their principals have tolerated in the past.[250]

The *Norton* case also illustrates the informal nature of agency authority. The authority of an agent depends on all manifestations of the principal, not just those formally expressed in writing. To quote Section 2.01 of the Third Restatement of Agency, published by the American Law Institute in 2007: "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."[251] Because the principal's manifestations to the agent can include the ratification of past, technically unauthorized actions, the actual authority possessed by agents is informal, flexible, dynamic and typically a question of fact.[252]

7. *Gold-Mining Co. v. National Bank (1878)*[253]

The Rocky Mountain National Bank sued the Union Gold-Mining Company of Colorado to recover an overdraft of more than $20,000 created by checks drawn on the company's account with the bank by an individual named Sabin, who had claimed to be an authorized agent of the company.[254] The evidence at trial showed that Sabin had borrowed money from the bank to carry out company business[255] and that on December 16, 1868, the president of the Gold-Mining Company had closed the company's accounts with Sabin and paid Sabin the balance due to him. At this meeting, "Sabin's books and the bank-books were then present," and the president of the Gold-Mining Company was put on notice of "the amount of the indebtedness which had been incurred by Sabin to the bank in the name of the company."[256] In addition, two officers of the bank told the company president about the money the company allegedly owed.[257]

The trial judge informed the jury that these conversations were allowed into evidence for the purpose of showing the bank president's "knowledge of the indebtedness and the demand" for its payment and "not for the purpose of showing a promise on the part of" the Gold-Mining Company.[258] The trial judge further instructed the jury that if Sabin had borrowed money without the company's authority, but the president of the company was informed of such borrowing and of the amounts and a demand for its repayment "and if within a reasonable time thereafter the company failed to disavow the acts of

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[250] RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt. e. (AM. L. INST. 2007).
[251] *See id.* § 2.01.
[252] *See id.* § 1.03 cmt. e.
[253] *See generally* Gold-Mining Co. v. Nat'l Bank, 96 U.S. 640 (1878).
[254] *Id.* at 640–41.
[255] *Id.* at 643.
[256] *Id.* at 644.
[257] *Id.*
[258] *Id.*

its agent in so borrowing the money, the jury would be authorized to consider the company as assenting to what was done in its name."[259] The jury found for the bank and the U.S. Supreme Court affirmed, holding the judge's charge to be "entirely correct."[260]

A key aspect of the *Gold-Mining Co.* case is that the trial judge told the jury that the conversations with the company president were not to be taken as evidence of a promise by the company, but instead were relevant to show what the company president knew.[261] This illustrates that the liability of a principal for debts incurred by its agent is not based on some independent promise by the principal or on the principal's actual consent to assume liabilities incurred by the agent. Rather, the liability of the principal depends on whether the actions of the agent are fairly attributable to the principal. Where, as in the *Gold-Mining Co.* case, the principal has been informed of what was done in its name and fails to repudiate those actions within a reasonable time, a jury is authorized to treat the principal's failure to disavow the actions of the agent as the equivalent of express consent, thereby making it fair to treat the actions of the agent as the actions of the principal.[262]

C. *Cases Decided Between 1880 and 1896*

Beginning in the 1870s, there was a change in the intellectual climate that may have impacted the law of ratification. In response to the corruption of America's Gilded Age and the demands for government help by farmers, labor, and plutocrats, the educated classes of America's North moved away from a belief in activist government that had characterized their thinking during the Civil War and early years of Reconstruction.[263] In its place, they adopted instead a philosophy of classical liberalism, which emphasized limited government, liberty of contract, and the protection of property.[264]

This philosophy, together with efforts to make the common law more intellectually rigorous, led to criticism of the use of agency fictions to abridge property rights, most notably in the 1881 classic, *The Common Law*, by future Supreme Court Justice Oliver Wendell Holmes.[265] The Holmes criticism may have prompted doctrinal refinements. A treatise on agency by Floyd R.

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[259] *Id.* at 645.
[260] *Id.* at 644–45.
[261] *See id.* at 644.
[262] *See* RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. f. (AM. L. INST. 2007).
[263] *See* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION: 1863–1877 209–11 (1990).
[264] *See id. See also* Daniel Harris, *Corporate Responsibility for Rogue Agents*, 37 NOTRE DAME J.L., ETHICS & PUB. POL'Y 110, 124 (2023).
[265] *See* OLIVER WENDELL HOLMES JR., THE COMMON LAW 231 (1881).

Mechem,[266] first published later in the 1880s,[267] emphasized the more objective ratification by conduct,[268] while acknowledging that ratification based on presumed intent often involved the use of legal fictions.[269]

This new thinking about the role of intent may have had an impact on the Supreme Court's ratification decisions. As we will see from the next four cases, from the period 1880 to 1896, in the last two decades of the nineteenth century the Court limited ratification by silence while expanding ratification by conduct, making it clearer that attempting to profit from an unauthorized transaction would be treated as the equivalent of consent.

1. *Bennecke v. Insurance Company (1882)*[270]

In January 1878, Adolph Bennecke procured a life insurance policy from the Connecticut Mutual Life Insurance Company.[271] The insurance contract contained a provision that voided the policy if Bennecke, without the written consent of the company, resided south of the thirty-second parallel at any time between July 1 and November 1.[272] Despite this provision, Bennecke moved from his home in Bloomington, Illinois on September 26, 1878, without the consent of the insurance company, and relocated to New Orleans, Louisiana (south of the thirty-second parallel), where he died of yellow fever on October 15, 1878.[273]

On October 16, 1878, John Ansley, the Connecticut Mutual agent who had sold Bennecke his policy, learned that Bennecke had moved to New Orleans (but not that he was dead).[274] Ansley persuaded Bennecke's brother-in-law to pay $20 for a Southern permit authorizing Bennecke to live in New Orleans.[275] Ansley sent the money and a cover letter to the insurance company on October 17, 1878, but never received a permit from the

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[266] Floyd Mechem later became the nation's leading agency scholar. *See* Deborah DeMott, *The First Restatement of Agency: What Was the Agenda?*, 32 S. ILL. UNIV. L.J. 17, 18 (2007).
[267] *See* Davis v. Gassette, 30 Ill. App. 41, 47 (Ill. App. Ct. 1888) (citing the Mechem on Agency).
[268] *See* FLOYD MECHEM, A TREATISE ON THE LAW OF AGENCY §§ 431, 435 (2d. ed. 1914).
[269] *See id.* §§ 314, 430. Ratification, like authorization of which it is the equivalent, is generally the creature of intent, but that intent may often be found by the law in cases where the principal, as a matter of fact, either had no express intent at all, or had an express intent not to ratify. *Id. See also* Campbell v. Millar, 84 Ill. App. 208, 217 (Ill. App. Ct. 1888) (citing the Mechem treatise on Agency for the proposition that the obligor's "express intent not to ratify . . . does not prevent ratification").
[270] *See generally* Bennecke v. Ins. Co. 105 U.S. 355 (1882).
[271] *Id.* at 355.
[272] *Id.* at 355–57.
[273] *Id.* at 357.
[274] *Id.* at 359–60.
[275] *Id.*

company.[276] On November 6, 1878, after learning that Bennecke had died before the permit was requested, Ansley tendered the $20 back to Bennecke's brother-in-law.[277] The tender was refused.[278] Bennecke's widow sued on the policy.[279] The lower court ruled for the insurer[280] and the U.S. Supreme Court affirmed.[281]

In the Supreme Court, the plaintiff argued that even if Ansley did not have authority to issue a Southern permit, the insurance company waived this defense by retaining the $20 payment until November 6, 1878.[282] The Supreme Court rejected this argument[283] and then held that there also was no ratification by the insurer of the agent's conduct because "a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with full knowledge of all material facts."[284] The Supreme Court went on to explain that if "the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud."[285]

In the instant case, the Supreme Court noted, neither the company nor its agent knew the very material fact that Bennecke was dead when his brother-in-law paid for a permit to allow Bennecke to live in New Orleans.[286] Moreover, the company's agent tendered the $20 payment back to the brother-in-law on November 6, 1878, eleven days after learning that Bennecke was dead, and the Court did not think "this lapse of time sufficient to show that Ansley intended to waive forfeiture of the policy, even if he had been clothed with authority to do so."[287]

The *Bennecke* case illustrates that ratification is not a form of strict enterprise liability. It is not enough that the agent acted in the best interests of the principal or that the principal obtained a benefit from the agent's action. Rather, ratification must be made with the principal's full knowledge of all material facts, or at least with the principal's knowledge that material facts are unknown. This idea is now expressed in Section 4.06 of the Third Restatement of Agency, which provides: "A person is not bound by a ratification made without knowledge of material facts involved in the original act when the person was unaware of such lack of knowledge."[288]

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[276] *Id.* at 360–61.
[277] *Id.* at 361.
[278] *Id.*
[279] *Id.* at 363–64.
[280] *Id.* at 363.
[281] *Id.* at 364.
[282] *Id.* at 359–60.
[283] *Id.* at 360.
[284] *Id.*
[285] *Id.*
[286] *Id.* at 361.
[287] *Id.* at 362.
[288] RESTATEMENT (THIRD) OF AGENCY § 4.06 (AM L. INST. 2007).

2. *Rader's Administrator v. Maddox (1893)*[289]

Fletcher Maddox and William Gaddis owned two notes that were secured by a chattel mortgage on some four hundred horses.[290] Evidently the notes were not paid, because in August 1887, N.B. Smith, the lawyer for Maddox and Gaddis, asked William Rader, the sheriff of Meagher County, Montana, to execute on the mortgage.[291] Rader collected the horses and advertised them for sale.[292] The winning bid was for $8,096.50, but the bidder only had $1,752 immediately available.[293] With Smith's approval, it was agreed that the bidder would deposit the $1,752 with Rader as earnest money and pay the balance within five days and that, in the meantime, Rader would retain possession of the horses.[294] When the bidder was unable to come up with the additional money, Rader tendered the money and the horses to Smith, who refused to accept the tender.[295] Thereafter, Maddox and Gaddis took the money, but not the horses, and then sued Rader for the balance of the $8,096.50, [296] arguing that their attorney had no authority to approve the sale without collecting full payment for the horses.[297]

The trial court ruled for the plaintiffs, after striking testimony about how the plaintiffs and their attorney had approved the conditional sale arrangement.[298] The U.S. Supreme Court reversed, holding the evidence was competent to show that the plaintiffs had ratified the deal by accepting the $1,752.[299] The Court explained that even if the plaintiffs' attorney did not have the authority to approve the conditional sale transaction and the plaintiffs "were intending to repudiate it, they were bound to repudiate it in toto. They could not accept that which was beneficial and avoid that which was burdensome."[300] Thus, by taking the $1,752 deposit, the plaintiffs "ratified the arrangement made by their attorney as to the sale which the sheriff was making."[301]

The case of *Rader's Administrator* illustrates how ratification depends on the knowing, voluntary conduct of the ratifier, and not necessarily on what the ratifier had in mind.[302] While Maddox and Gaddis no doubt thought they could take the deposit money without accepting the rest of the

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[289] *See generally* Rader's Adm'r v. Maddox, 150 U.S. 128 (1893).
[290] *Id.* at 128.
[291] *Id.* at 128–29.
[292] *Id.* at 129.
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.* at 130.
[298] *Id.*
[299] *Id.* at 131–32.
[300] *Id.* at 131.
[301] *Id.* at 132.
[302] *See* RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. d. (AM. L. INST. 2007).

deal, the law did not honor that intention, but instead made their partial acceptance the equivalent of full approval.

The case also illustrates the "in for a dime, in for a dollar" nature of ratification. The many advantages that principals derive from representation by agents, such as the ability to take advantage of beneficial unauthorized transactions negotiated on their behalf, are balanced with corresponding burdens. Thus, principals cannot keep those parts of an unauthorized transaction that they like while repudiating the rest of the transaction.[303] As the Third Restatement of Agency explains, knowing acceptance of the benefit of a transaction ratifies the act of entering into the transaction.[304]

3. *Robb v. Voss (1894)*[305]

In 1887, Charles Kebler, an attorney in Ohio ostensibly representing James Robb and Charles Strong, agreed to a settlement of a lawsuit against Robb and Strong, allegedly without the clients' knowledge or permission.[306] The settlement involved the sale of property in which Robb and Strong had an interest. Kebler embezzled proceeds of the sale that were supposed to be paid to his clients[307] and then committed suicide.[308] After learning what had occurred, Robb and Strong filed a claim against Kebler's estate (which was later withdrawn) to recover the embezzled money.[309] They also filed a lawsuit against the purchaser of the property to void the sale.[310]

The trial court ruled in favor of the purchaser and the U.S. Supreme Court affirmed, agreeing with the lower court's conclusion "that the acts of Kebler, whether done with or without authority, were subsequently adopted and ratified" by Robb and Strong through their decision to file a claim against Kebler's estate to recover the monies from the sale.[311] The Supreme Court explained that by seeking the benefit of the transaction negotiated for them by Kebler, Robb and Strong ratified what Kebler had done on their behalf.[312] As the Court noted later in the opinion, "one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."[313]

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[303] *See id.* § 4.07 cmt. b.
[304] *See id.* § 4.07 cmt. b ("A person may not, by ratifying an act, obtain its economic benefits without bearing the legal consequences that accompany the act.").
[305] *See generally* Robb v. Voss, 155 U.S. 13 (1894).
[306] *Id.* at 19–20.
[307] *Id.* at 29.
[308] *Id.* at 19.
[309] *Id.* at 19–22.
[310] *Id.* at 22, 24–25.
[311] *Id.* at 39.
[312] *Id.*
[313] *Id.* at 43.

The Supreme Court also noted that Robb and Strong were not proceeding based on a mistake. Rather, their course of action "was deliberately chosen, after a lapse of several months from the death of Kebler, and with full knowledge of all the facts."[314] Moreover, the Court observed, the ratification of Kebler's actions made it impossible for the property purchaser to file a successful claim against Kebler's estate (presumably since the purchaser could no longer argue that Kebler deceived the purchaser by acting without authority).[315]

The *Robb* case is yet another illustration that ratification by conduct does not depend on what the ratifier had in mind.[316] Robb and Strong no doubt intended to recover their property and get the money that had been paid for it. By filing a claim against Kebler's estate, they did not want to ratify what Kebler had done. They simply wanted the money that he had misappropriated. Nevertheless, the law puts principals to a choice. They can repudiate an unauthorized transaction, or they can seek to benefit from it.[317] They cannot do both.

4. *Hansen v. Boyd (1896)*[318]

Beginning in August 1888, Theodore Hansen, a grain merchant residing in Bensen, Minnesota, placed several orders for wheat future contracts with the Minneapolis office of the brokerage firm James E. Boyd & Bro.[319] The purchases involved margin contracts, meaning that the Boyd firm advanced some or all the purchase money.[320] The speculations were not successful. After the various deals were closed with sales, Hansen ended up owing the Boyd firm on his margin contracts for monies the firm had advanced for his purchases.[321] When Hansen refused to pay, the Boyd firm filed suit[322] and recovered the full amount after a jury trial.[323]

The issue before the U.S. Supreme Court relevant for our purposes involved a particular grain purchase that Hansen had not requested. In April 1889, the Boyd firm told Hansen that his purchase of May wheat futures could be changed to June wheat.[324] When Hansen failed to respond, the Boyd firm proceeded anyway. The firm closed out Hansen's May wheat contract (which it had a right to do because Hansen was in default on this margin payments to the firm) and purchased 40,000 bushels of June wheat for

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[314] *Id.* at 39.
[315] *Id.*
[316] *See* RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. d. (AM. L. INST. 2007).
[317] *See id.* at cmt. g.
[318] *See generally* Hansen v. Boyd, 161 U.S. 397 (1896).
[319] *Id.* at 398–99.
[320] *Id.* at 399–400.
[321] *Id.*
[322] *Id.* at 398.
[323] *Id.* at 402.
[324] *Id.* at 409.

Hansen's account without Hansen's consent.[325] The firm sent Hansen a memorandum describing what it had done. Hansen did not respond to the memorandum.[326] (Of course, Hansen did repudiate the transaction later, after he was sued). At trial, the judge instructed the jury that if Hansen failed to object to the unauthorized purchase after being notified of it, then Hansen's silence constituted ratification.[327]

The U.S. Supreme Court held this jury instruction was erroneous because the "unauthorized voluntary act" of the Boyd firm in making the purchase of June wheat "could not be said, as a matter of law, to have been ratified by Hansen by his mere retention, without complaint, of an account and statement rendered to him" that the Boyd firm "had made a new purchase for his account."[328]

The Court explained that Hansen's silence was not enough to show the type of consent necessary to establish ratification as a matter of law. Rather, the "mere retention by Hansen of a report that an unauthorized purchase of 40,000 bushels of wheat had been made on his account was entirely consistent with the hypothesis that he did not approve and did not intend to adopt what he had previously declined to authorize."[329] The Court went on to reiterate that the "mere silence of Hansen was certainly not indicative of an intention to adopt the unauthorized act of Boyd & Bro., and it was, therefore, insufficient of itself to warrant an instruction that it constituted in law an adoption of such act."[330] The Court concluded: "The question of whether the evidence established ratification should have been submitted to the jury."[331]

The *Hansen* case demonstrates greater concern for tying the idea of ratification by silence to tacit or implied consent. Without acknowledging the discrepancy, the Court walked back from its 1870 statement in *Feild v. Farrington*[332] that "when the relation of principal and agent does in fact exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what has been done on his account."[333]

It is worth noting, however, that the walk back from the prior decision was limited. The Supreme Court did not reject the possibility that Hansen's silence (that is, his silence prior to the commencement of the litigation) could be deemed ratification. Rather, the Court said Hansen's silence was not ratification as a matter of law.[334] In other words, whether Hansen's silence

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[325] *Id.* at 410.
[326] *Id.* at 409.
[327] *Id.*
[328] *Id.* at 410.
[329] *Id.*
[330] *Id.* at 410–11.
[331] *Id.* at 411.
[332] Feild v. Farrington, 77 U.S. 141 (1870).
[333] *Id.* at 148.
[334] *Hansen*, 161 U.S. at 410.

constituted ratification was a question of fact that should have been submitted to the jury.

This flexible approach remains the law. The commentary of the Third Restatement of Agency explains that while a principal's delay "in expressing an objection to an unauthorized act may result in ratification," whether the length of time between the principal's learning of the unauthorized act and the principal's expression of an objection "is sufficient to constitute ratification" is a "question of fact" to be determined based on the "particular circumstances" of the case.[335]

The practical import of treating ratification by silence as a question of fact is that the law in this area is not technical, formal, or mechanical. Rather, the question of ratification will be tuned to the facts and equities of the case at bar. In general, the doctrine will follow the common sense of justice, in the particular time and place, because its application will depend on what a jury thinks is fair.[336]

D. *Summary*

The essence of the ratification doctrine (both in the nineteenth century and today) can be summarized in a few sentences. The concept of ratification allows people to take advantage of unauthorized actions done on their behalf. The catch is that if a person knowingly derives benefit from any part of such an unauthorized transaction, or even if the person just tries to do so, then the entire transaction will be deemed ratified and treated as if it had been fully authorized from the start. Mere delay in repudiating an unauthorized transaction, after notice thereof, may be deemed ratification, depending on the circumstances of the particular case and what the trier of fact considers to be just.

III. IMPLICATIONS FOR CONTEMPORARY LEGAL SCHOLARSHIP

This account of the ratification doctrine shows how the law of agency softens the individualism of contract law and did so even in the nineteenth century when formalistic individualism supposedly reigned supreme. There is food for thought here, both for those who wish to return to first principles and those who would consign first principles to the dustbin of history.[337]

According to the conventional academic wisdom: "Between the 1870s and the 1930s, American law was dominated by a jurisprudential style variously described as 'mechanical jurisprudence,' 'legal formalism,' and

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[335] RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. f (AM. L. INST. 2007).

[336] *See* DeMott, *supra* note 29, at 165. ("Common-law agency does not require a third party to establish that a principal affirmatively condoned an agent's conduct. The determinative question frequently is the inference that third parties will draw from the principal's failure to repudiate the agent's action.").

[337] *See generally* STEPHEN B. PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW 471 (2017).

'classical legal thought.'"[338] As Jay Feinman puts it in a representative article: "At the end of the Nineteenth Century, classical legal thought envisioned a highly systematic body of law through which courts could mechanically apply abstract legal concepts to reach determinate results, producing limited liability in contract and tort and expansive property rights."[339] In this system, according to Professor Feinman, contractual obligations required the consent of "autonomous individuals,"[340] who were free from contractual liability "unless consent had been exercised."[341]

Similarly, Danielle Kie Hart opines that classical legal thought, first "formulated in the 1860s," [342] was "characterized by abstract, formal, and rigid rules"[343] and, under its system, contractual "liability could only be assumed by the individuals themselves."[344] "That is, individuals could not be forced to enter into a contract; they were free to contract only if they wished to do so."[345] Many other scholars agree with this assessment, describing classic contract theory as formal and static[346] and ascribing its rigidity to "a theory based upon the sanctity of individual freedom."[347]

As we have seen, the nineteenth century law of agency does not fit the academic stereotype of the classic common law. In particular, the doctrine of ratification was flexible and dynamic, not at all rigid or formalistic.[348] Moreover, while individual freedom was important for nineteenth century judges, their law of agency also reflected concerns for commercial

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[338] Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1514 (2001).
[339] Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 2 (2004).
[340] *Id*. at 4.
[341] *Id*.
[342] *See* Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 184 (2009).
[343] *Id*. at 184–85.
[344] *Id*. at 186.
[345] *Id*. 186–87.
[346] *See* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1745 (2000).
[347] *See* Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 435 (1995). *See also* Chad McCraken, *Hegel and the Autonomy of Contract Law*, 77 TEX. L. REV. 719, 730 (1999).
[348] *See, e.g.*, Ins. Co. v. Norton, 96 U.S. 234 (1878); Law v. Cross, 66 U.S. 533 (1862); President, Dirs. & Co. of Bank v. Dandridge, 25 U.S. 64 (1827). The nineteenth century doctrine of ratification has the dynamism that Melvin Eisenberg ascribed to modern contract law. *See* Eisenberg, *supra* note 346, at 1813–14. ("[M]modern contract law recognizes that contract is a process, so that the picture we see at the time of contract formation, however important, is only one of a series of frames.").

convenience, business reality,[349] fair play[350] and substantial justice. As a result, parties were often bound to contracts to which they never manifested assent based on their subsequent conduct or silence.[351]

The point here is not simply to set the academic record straight. A proper understanding of the past has implications for the future because it reveals traditions that are worth preserving and sets bounds on what a return to the first principles of classic liberalism would mean.

The primary exponent of a modern revival of the classic individualist view of contract law is Randy Barnett, who posits that because consent is a "moral prerequisite to contractual obligation,"[352] a promisor "incurs a contractual obligation to perform only when she manifests to a promisee her intention to be legally bound."[353] According to Professor Barnett: "Reliance on a commitment that is something less than a manifested intention to be legally bound is not legally protected and is undertaken at the promisee's own risk."[354] Thus, the enforcement of a contract "against the reneging promisor is morally justified [only] because the promisor herself has undertaken the obligation in question."[355] Therefore, "to determine the prima facie case of contract, we should determine whether there was a manifested intention to be legally bound."[356]

Jody P. Kraus and Robert E. Scott take a similar view, arguing that because "contract law provides 'a domain . . . in which the self is sovereign,'" contractual duties should be determined solely on the basis of "the parties' intent at formation," and not based on subsequent events, so long as the parties agreed to the contract "under free and fair conditions."[357] Along these same lines, a separate article by Alan Schwartz and Robert E. Scott argues that "courts should be reluctant to admit act-or-acquiescence evidence to show a change in the meaning of a written contract."[358]

Whatever their merits in other contexts, these general precepts do not quite work for transactions involving agents or purported agents. When the parties to a contract are represented by other actors, then the individualist

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[349] *See* McMeel, *supra* note 26, at 400.
[350] *See* Anne Bradford, *Note Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Unwary?*, 21 IOWA J. CORP. L. 331, 353 (1996) ("Fair play is an alternative to consent as a basis of contractual obligation, but still protects the autonomy of the actors.").
[351] *See, e.g.*, Gold-Mining Co. v. Nat'l Bank, 96 U.S. 640 (1878); Ins. Co. v. McCain, 96 U.S. 84, 86 (1877); *Law*, 66 U.S. 533.
[352] *See* Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 297 (1986).
[353] *Id*. at 305.
[354] *Id*. at 315.
[355] Barnett, *supra* note 22, at 650.
[356] *Id*. at 655.
[357] Jody P. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. CAL. L. REV. 1323, 1327–28 (2020).
[358] Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 592 (2003).

rules of contract law need to be modified or qualified by principles of agency law in order to fit the law as it is, as it was and as it should be.[359]

First, the manifestation of consent to be legally bound that is required to create a contract need not come from the obligor directly.[360] Instead, the manifestation of consent may come from some other person who acted or purported to act on behalf of the obligor, if that other person's actions are attributable to the obligor under the law of agency. The theory here is that since people can, for their benefit, expand their legal personalities through representation by others, it is only fair that people be held responsible for the actions of their voluntarily enlarged legal selves.

Second, in determining whether the actions of an agent or purported agent should be attributed to the obligor, the manifested intent of the obligor at or before the moment of contract formation is relevant but not decisive. Under the doctrine of ratification, obligors may be held responsible for actions and agreements they never authorized based on the obligors' subsequent conduct or silence. The normative justification is that since people are allowed to take advantage of unauthorized actions done on their behalf, they should at least sometimes be held responsible for unauthorized actions done on their behalf based on how they behave afterwards.

Third, a finding of ratification does not require proof the obligor manifested actual consent to the unauthorized transaction or to the exercise of authority on the obligor's behalf. Rather, a finding of ratification may be based on evidence of tacit consent, implied consent, or even constructive consent (that is, conduct that was not really consent at all, but which the law will treat as the equivalent of consent). Thus, for example, a finding of ratification is justified if the obligor knowingly took advantage of any part of the unauthorized transaction, or tried to do so. Ratification may also be inferred from the obligor's unreasonable delay in objecting to the unauthorized transaction, after receiving notice thereof, with the trier of fact given wide berth in determining what is reasonable.

The justification for finding ratification based on constructive rather than actual consent is that people can derive benefits from unauthorized transactions without officially endorsing them, simply by going along with what was done on their behalf. The standard for holding people accountable for transactions they did not officially authorize should be similarly loose, so that the greater powers people derive from expanding their legal personalities are fairly balanced by corresponding responsibilities.

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[359] It is worth noting that Professor Barnett has recognized the need to qualify or at least explain the rules of contract law when dealing with transactions involving agents. *See generally* Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CALIF. L. REV. 1969 (1987).

[360] *See* Landcastle Acquisition Corp. v. Renasant Bank, 57 F.4th 1203, 1233 (11th Cir. 2023) ("Mutual assent and consideration are required elements for contract formation. In the agency context, however, it is the agent who manifests the assent to the exchange with the third party, not the principal.")

IV. CONCLUSION

The idea that contractual obligation requires the obligor's manifestation of consent to be legally bound is among the first principles of the individualist common law. Yet the law of agency adds a social dimension to this precept by expanding the definition of obligor to include other people who act as extensions of the obligor's legal personality. The doctrine of ratification adds yet another social dimension by expanding the definition of consent to include tacit or constructive consent. As a result, people who take knowing advantage of unauthorized actions done on their behalf are treated as if they had authorized the transactions, even if they never manifested assent and all they really wanted to do was take the benefits without the obligations.