Good morning! I cannot tell you what a joy and honor it is for me to talk with you today. When associate academic vice president John Rosenberg called to ask me to speak, he told me that my talk would be a forum but that I was free to make it as “devotional-ly” as I would like. Generally, a forum delivered by a BYU faculty member focuses on that faculty member’s research, and so I will start there and see where we go. In that spirit, I am going to talk about my academic research in the formation and financing of business entities and hopefully try to tie my research into a broader conversation about the importance of strong financial infrastructure and human flourishing.
y area of teaching and research is, broadly, business law. I study the organization and financing of businesses from formation to the initial public offering (IPO).

IPOs get a lot of attention, but interesting things happen in the lifecycle of a startup firm before it gets to IPO. At the other end of the spectrum, one of the most fascinating moments in the lifecycle is the very beginning.

Business firms begin not as firms but as business ideas. Though some big ideas come from the mind of one person, many firms begin with two or more persons collaborating on an idea that may have sprung up organically. Or one person might bring the beginning of an idea to another person or group, and then each collaborator will bring different skills and perspectives to grow the idea into a business plan.

Here the law needs to work to nurture, protect, and reward the contributions of the individuals. Depending on the sophistication of the parties, the complexity of the business idea, and other factors, the collaboration may continue for months or perhaps a year or so until a legal entity is formed, such as a limited liability company, limited partnership, or corporation. At that time, the parties will decide which founders will have management roles, and the participants’ agreements as to ownership of the entity will be represented by shares in the corporation or ownership interest in the LLC or limited partnership.

But what happens when conflicts arise prior to formal organization and formal documentation of ownership interests? How can law protect and encourage business collaboration? Those of you savvy about social media may recognize two notable examples of this type of conflict that resulted in litigation: Facebook and Snapchat.

Facebook, as you may know, was first the idea of Tyler and Cameron Winklevoss, brothers and students at Harvard who, along with a third founder, Divya Narendra, approached fellow student Mark Zuckerberg with the idea to launch a website called ConnectU. The three founders gave Zuckerberg access not only to computer code but also to the entire business plan. According to the ConnectU founders, Zuckerberg did not work on the website as promised but instead secretly created TheFacebook using the ideas and code shared with him. Zuckerberg then incorporated his business as an LLC with Eduardo Saverin and Dustin Moskovitz, not including the Winklevoss brothers or Narendra.

A slightly more recent example is the origin story of the social media platform Snapchat. Snapchat was created by three college students, this time at Stanford, not Harvard: Reggie Brown, Evan Spiegel, and Bobby Murphy. Reggie Brown came up with the idea of a mobile platform that would allow users to send pictures that then disappeared and shared it with Spiegel and Murphy. The trio spent a summer living together in Spiegel’s father’s home working on the project, with Brown creating the now-familiar ghost icon and applying for a patent on behalf of the three “coinventors.” By August, however, Spiegel had locked Brown out of the platform and formed an LLC with Murphy to own the mobile app.

Do these ousted founders have any recourse? How can the law protect those who contribute their ideas and labor pre-business form?

The answer is one of my favorite legal doctrines: the de facto partnership doctrine. The oldest business entity form is the general partnership, which dates back to the Babylonians, classical Greece, Rome, Europe, and then, specifically, the common law of England and the early United States. In a general partnership, two or more persons agree to co-own a business for profit. The persons do not need to make a filing, formally organize, or even have
a written agreement to create a general partnership. Under state law, a partnership is the default entity when a jointly owned business has not organized as anything else, such as a corporation or LLC. As long as the founders have agreed to work on a for-profit business venture together, they have formed a general partnership, and partnership law will step in to protect the partners.

General partnership law, the oldest of our business entity laws, reflects core values of a society: individuals choosing a small number of others to create a firm and the partners working to further the enterprise, sharing control. Partners have duties to the entity and one other. The entity and the partners are responsible to the outside world for debts of the partnership. The partnership is more valuable than the sum of its partners.

Limited liability entities, like LLCs and corporations, move away from this personal model, and the payoff is that business firms can be larger, can attract more capital from dispersed investors without familial or community ties, and can ensure management that they will be free from frivolous investor litigation. However, until parties form one of these entities, the law will consider them a general partnership.

In a general partnership, partners owe to one another, in the words of Justice Benjamin Cardozo, “the duty of finest loyalty” that surpasses “honesty alone.” This means that partners may not compete with one another, may not use partnership property for their own gain, may not use confidential partnership information, and may not steal partnership business opportunities.

The law is pretty clear: Zuckerberg arguably breached the duty of loyalty to his co-founders, and so did Spiegel and Murphy. The defendants in each of these cases settled fairly early on. The Winklevoss brothers were awarded $65 million in mediation, which they wisely asked for in a combination of cash and stock, which is now worth more than $500 million. Reggie Brown received $158 million to settle his breach of partnership duty case. Partnership law is powerful and, I believe, quite just.

Not all parties to these so-called de facto partnership cases are college students or even unsophisticated parties. Sometimes they can be very sophisticated parties who try to disclaim partnership ties opportunistically after the fact to reap all the rewards from the collaboration.

Though the defendants in these cases like to call the de facto partnership doctrine “partnership by ambush” or “surprise partnerships,” the doctrine is actually pro-entrepreneurship and pro-business. If parties cannot be protected when collaborating, then collaborating and the innovation it produces will be chilled. We want prospective founders sharing ideas, information, and technical specifications, and we want them to share the rewards of doing so.
CAPITAL MARKETS AND HUMAN FLOURISHING

Many, if not most, incoming law students would say that they are going to law school to help people, to make the world a better place, and to fight for justice, including me almost 30 years ago. Corporate law, tax law, partnership law—these endeavors don’t inspire and motivate a lot of humanities majors to go to law school. In practice, we used to joke that we were making the world safe for large corporations. But here I am. And not only do I believe that well-run capital markets and robust legal doctrines protect entrepreneurs and encourage human flourishing, I have also had the surprising opportunity to use my corporation-centric experience to see human flourishing on the ground.

As a few of you know, though I am a regular attender of our local ward of The Church of Jesus Christ of Latter-day Saints, I am officially a member of Community of Christ, formerly known as the Reorganized Church of Jesus Christ of Latter Day Saints. My grandpa was baptized after marrying my grandma and joining a family of RLDS members dating back to the early church in 1832. My husband, BYU Law professor Paul Stancil, is also not a member of The Church of Jesus Christ of Latter-day Saints but is a religious Evangelical Christian. As you might imagine, our long journey together has been a search for a spiritual home for our family, and that journey has taken us to some amazing houses of worship and has allowed us to fellowship with strong believers of many faiths. While professors at the University of Illinois, we worshipped with a Presbyterian church that we still pray for and support from afar.

After attending that church for a year or so, I became aware that a group from the church was starting a partnership with a village in Malawi, a country in which the Presbyterian church traces its influence to David Livingstone, the Scottish physician and missionary. As the group was close to making its first trip to Lisanjala, a rural village there, I suddenly felt that I was supposed to go with them. This was surprising mostly to me, because I am not an intrepid traveler. However, I moved forward in faith and found myself in a village lacking in water, electricity, and roads but abounding in its own faith and hospitality.

I was met by three groups of villagers at the Blantyre airport, including women from the women’s guild of the church—sort of like Relief Society but with a lot more dancing. The partnership was to have three prongs: water, secondary schooling scholarships (there is no tuition-free secondary school in Malawi), and microfinance. For several days I traveled around the countryside with bankers from Opportunity International, a microfinance institution. I met owners of small businesses who were able to grow their modest ventures with the help of microfinance.

Slowly during that trip, I realized that I knew a lot about early-stage businesses and finance, and I had tenure. So I devoted the next two years to learning everything about the current environment of international microfinance. I developed and taught a course on microfinance and even took law students to my beloved second home, Lisanjala.

Founders need legal doctrines to protect and nurture their business contributions, and they also need creative capital solutions to finance their ideas and efforts. Microfinance allows microentrepreneurs, alone as sole proprietors or in groups like partnerships, to borrow small amounts of money for small terms to invest in themselves through the purchase of inventory for a mini-shop, a piece of equipment to make wares, or even livestock. I met entrepreneurs who made popsicles to sell when schools let out or who had market stands selling clothing, auto parts, or groceries, and even rice farmers who had created a co-op for both borrowing
and selling purposes. Because mainstream banks aren’t well suited to provide financial services to the poorest of the poor, microfinance institutions fill the gap in developing countries with creative substitutes for credit scores and collateral.

I learned many things from my adventure in African microfinance. One is that strong financial institutions and capital markets—along with roads, public education, electricity, shipping, water, healthcare, and a strong legal system—are vitally important to human flourishing. Commentators have mocked a particular politician for arguing that business owners did not build their successful businesses all by themselves. We like to believe that our success is due to our own individual efforts, particularly when those efforts have been extraordinary and have involved huge sacrifices. However, I have seen microentrepreneurs whose sacrifices and expenditures of time and energy rival anyone’s, but without reliable ways to ship and order goods, hire an educated workforce, open bank accounts nearby, borrow funds, travel to and from places during the rainy season, and enforce legal rights, they are not allowed to live up to their human potential.

Yes, US business owners have created amazing opportunities, but we have unappreciated luxuries of knowing the lights almost always come on, water is safe and plentiful, the roads are open, and our bank accounts are safe. And we have opportunities to invest our surplus in the best public capital markets in the world.

Yes, I learned that business law is vital to human flourishing, whether that law protects the young person who shares her amazingly profitable idea with acquaintances, the young corporation that wants access to public capital markets, or the small business owner who is trying to access financial products such as savings accounts, credit, and insurance. Strong legal frameworks for business benefit business owners—people. And human flourishing depends on the law protecting, nurturing, and enabling us to receive value for our ideas and our labors.
So we went to Mulanje Mission. That afternoon we were sent to three different places and then told to return the next morning. Happiness met me early the next morning so we could continue our journey, and she brought a friend, Patrisia Zidyani, whom I also knew. Patrisia said to me, “I want to go to school too.”

That day we went from office to office where male officials treated the two young women pretty badly and made them feel ashamed of themselves. Our family decided to forego a fancy Christmas one year to finance the building of a well there. It went dry. Our first microfinance trust group ended when the chair absconded with the funds. I was a little disillusioned, to say the least.

One of my favorite books, Me, Myself, and Bob, is by Phil Vischer, the creator of VeggieTales. In that book, Vischer talks of how he had a dream to be the Christian Walt Disney and how he failed. Even you fans in the audience might not know that VeggieTales went bankrupt and was sold off, and Vischer lost creative control and the intellectual property rights to his creations. Struggling to come to terms with how he had a righteous dream to glorify God through children’s Bible-based animation and how God let his dream die, Vischer had an epiphany. His purpose on earth was not to achieve his dreams, no matter how good or righteous they were. His purpose was to walk in the will of God.²

One night in Malawi my law students asked me how I felt about the church partnership when we had had so many failures. Most recently, we had trusted our friend in Malawi to administer our scholarship program by sending him the funds and letting him distribute them to the students. You may be able to predict how that was going to end, but we could not, and so we lost our monies and our friend. Nevertheless, I found myself telling my students, who represented a mixture of faith backgrounds, that our purpose here was not to bring water to Lisanjala or to run a successful scholarship program. Our purpose was to show the love of Jesus Christ to everyone and, in the words of Phil Vischer, to walk in the will of God.

Let me share one more story of how I surprisingly found my background and expertise needed but with mixed success. On my fourth trip to Malawi, I was going to walk two miles north of the Lisanjala church to go to Tuesday market. A young woman named Happiness Chikopa offered to walk with me. She seemed like she wanted to linger there, so I thought maybe she wanted a treat, like a Fanta, before returning to the village. Happiness did not have many treats in her life. However, she turned down the Fanta but asked if we could go to the Mulanje Mission, which is two more miles in a different direction. I thought maybe she wanted to go to the hospital there, but she whispered, “I want to go to school.”

To make a long story not quite as long, Happiness wanted to go to high school, but she needed more than just tuition; she needed someone to get her registered in time for the next quarter—in one week. So, as I said, I am not a scientist or an inventor, but I am a mom. You can call me a helicopter mom or a snowplow mom or a lawnmower mom, but if someone needs to get registered for school, I can do it. And I know a bit about educational bureaucracy and other complex institutions.

So we went to Mulanje Mission. That afternoon we were sent to three different places and then told to return the next morning. Happiness met me early the next morning so we could continue our journey, and she brought a friend, Patrisia Zidyani, whom I also knew. Patrisia said to me, “I want to go to school too.”

That day we went from office to office where male officials treated the two young women pretty badly and made them feel ashamed of themselves. My law mom training enabled me to advocate for them and finally get them enrolled, get them uniforms, and get their required haircuts. I would like to tell you that all went well, but a year later we didn’t know where Happiness was, though Patrisia was still in school.
However, I remind myself that my purpose wasn’t really to get Happiness enrolled in school. My purpose was to show her how much Heavenly Father loved her—so much that He sent some crazy helicopter mom to her for a few days. Phil Vischer wrote in his book that our five-year plan should not be to be the Christian Walt Disney or to start a successful scholarship program in Malawi or even to be a nationally renowned corporate law scholar. Our plan for five years from now should be to walk in the will of God.3

Thank you very much for hearing me out. I have talked about my favorite things: IPOs, the de facto partnership, microfinance, and VeggieTales. I consider every day that I teach at BYU to be a blessing and a priceless opportunity. Today has been the highlight of an amazing life, right up there with dancing with the women’s guild in Lisanjala.

NOTES

1 Benjamin Cardozo, in Meinhard v. Salmon, 249 NY 458, 164 NE 545 (1928).
2 See Phil Vischer, Me, Myself, and Bob (Nashville, Tennessee: Nelson Books, 2006), 248. Vischer wrote: “My ability to accomplish anything good is dependent on my willingness to dwell in the current of God’s will. To wait on God and let him supply my form and my direction.”
3 See Vischer, Me, Myself, and Bob, 248.