REAPPRASING THE REAL ENTITY THEORY OF THE CORPORATION

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As one commentator wrote in 1989, "[c]ritics and advocates agree that a revolution, under the banner 'nexus of contracts,' has in the last decade swept the legal theory of the corporation." Other observers concur, albeit more guardedly. In its usual formulation, the nexus-of-contracts (or contractual) theory asserts that a corporation is a set of contracts among the firm's participants. Because they think that the contractual theory has normative implications, its proponents have used the theory to advocate important changes in corporate law. The nexus-of-contracts theory's emergence also may have inspired the significant contemporary literature on theories of the corporation that began in the mid-1980s.


2. E.g., Lucian Arye Bebchuk, Foreword: The Debate on Contractual Freedom in Corporate Law, 89 COLUM. L. REV. 1395, 1408 (1989) (contractual view of the corporation now well accepted among economists and many corporate law scholars); Robert C. Clark, Contracts, Elites, and Traditions in the Making of Corporate Law, 89 COLUM. L. REV. 1703, 1705 (1989) (contractual theory now dominates the thinking of most economists and economics-oriented corporate law scholars); Jeffrey N. Gordon, The Mandatory Structure of Corporate Law, 89 COLUM. L. REV. 1549, 1549 (1989) (in the law and economics literature, it has become standard to treat the corporation as a nexus of contracts). In addition, some scholars who criticize specific positions taken by contractualists apparently accept their underlying view of the corporation. E.g., Bebchuk, supra, at 1409 (author uses the contractual framework because it is useful and illuminating, but rejects the usual contractualist position on mandatory rules of corporate law).

3. E.g., Larry E. Ribstein, Limited Liability and Theories of the Corporation, 50 Md. L. Rev. 80, 84 (1991) ("[c]ontractarians view the corporation as a set of contracts between the participants in the business"); see infra note 68 and accompanying text. See generally infra notes 64-62 and accompanying text (describing the contractual theory in some detail).

4. See generally infra notes 173-92 and accompanying text. Perhaps the most important of these suggested changes is that corporation law should become largely or entirely nonmandatory—that is, should provide a series of standard-form default rules which the parties to the corporate contract can avoid by so agreeing. See, e.g., Bebchuk, supra note 2, at 1396-97.

As that literature makes clear, however, things were quite different early in this century. At that time, another conception of the corporation—the real entity theory—tended to dominate. The real entity theory assumes many forms, but common to them all is the claim that corporations are real, naturally occurring beings with characteristics not present in their human members. Thus, the real entity theory differs sharply from the familiar aggregate theory of the firm, according to which a corporation is the sum of its human constituents and nothing more. Because it asserts that a corporation is a set of contracts and because those contracts must have parties, the nexus-of-contracts theory also is an aggregate theory of the firm. Thus, it too stands in sharp opposition to the real entity theory.

The real entity theory fell out of favor among American legal commentators after the 1920s. Today it has few, if any, advocates within the scholarly legal community. Outside that community, however, matters stand quite differently. The theoretical dispute that underlies the split between real entity and aggregate theories—the long-running debate between so-called holists and methodological individualists—remains a live issue among philosophers and social scientists. Indeed, holism may dominate within the latter group.

All this being the case, perhaps it is time to reappraise the real entity theory of the corporation. This Article attempts such a reappraisal. It begins by sketching four well-known conceptions of the corporation: the concession/fiction, aggregate, nexus-of-contracts, and real entity theories. Then it considers a question that has preoccupied recent writers on corporate theory: whether theories of the firm in general, and the real entity theory in particular, have definite implications for the law and for the social control of corporations. After that, this Article breaks new ground by reconsidering the validity of the real entity theory. It does so by evaluating the arguments turn-of-the-century legal scholars made on the theory's behalf. The article concludes that, contrary to popular belief, the real entity theory is more plausible (or less implausible) than its aggregate and contractual competitors. But none of these theories is sufficiently well-grounded to be a solid basis for legal or policy implications.

I. Three Theories of the Corporation

A theory of the corporation might be defined as an attempt to abstractly define the firm's nature or essence. Such abstract definitions abound. Traditionally, however, three have dominated American corporate theory. Although their names vary, they can be called the concession/fiction theory, the aggregate theory, and the real entity theory. The tale of their triumphs and defeats has been told in detail elsewhere and will not be repeated here. Instead, this section briefly describes the three theories, arranging them chronologically in order of their emergence within American legal thought. Maintaining that


6. See, e.g., Bratten 1, supra note 5, at 1490-91 (debate between contractualism and the real entity theory ended after 1900 due to the former's demise, but the latter survived in law reviews through the 1920s).

7. See infra notes 46-49 and accompanying text. On the various forms the theory assumes, see infra notes 30-37 and accompanying text.

8. On the aggregate theory, see generally infra notes 27-38 and accompanying text. See also infra notes 30-34 and accompanying text (suggesting that the corporate aggregate may have nonhuman elements as well).

9. "In its most recent incarnation, the private aggregation idea has assumed the garb of neoclassical economics under the 'corporation as a nexus of contracts' rubric." Millon, supra note 5, at 203.

10. See, e.g., Bratten 1, supra note 5, at 1491, and supra note 6. See also infra notes 58-63 and accompanying text.

11. One likely exception to this generalization is Schane, supra note 5 (whose author, however, is a professor of linguistics); see infra notes 237-40 and accompanying text. Although it does not argue for the real entity theory's validity, Hager, supra note 5, seems to have considerable sympathy for that theory.

12. Holism might be defined as the view that "social facts" or "societal facts" (among them institutions such as corporations and facts about such institutions) really exist, and that they cannot be reduced to facts about individuals. See, e.g., Alexander Rosenberg, Philosophy of Social Science 111-14 (paperback ed. 1988). Methodological individualism, on the other hand, might be defined as the view that social entities like corporations "are nothing but ensembles of individuals in various relations to one another." Daniel Little, Varieties of Social

EXPLANATION: AN INTRODUCTION TO THE PHILOSOPHY OF SOCIAL SCIENCE 183 (paperback ed. 1991). Because they make assertions about what entities actually do or do not exist, these definitions basically are ontological. However, holism and methodological individualism also have conceptual and explanatory dimensions. See id. at 183-90 and infra note 222.

13. See, e.g., Little, supra note 12, ch. 9; Rosenberg, supra note 12, chs. 5-6.


16. See, e.g., Bratten 1, supra note 5, at 1482-1501; Bratten 11, supra note 5, at 423-33; Horwitz, supra note 5, at 176-224; Mark, supra note 5, at 1447-83; Millon, supra note 5, at 205-40.
chronological arrangement, the section then discusses the aggregate theory’s reappearance in nexus-of-contracts clothing during the 1980s. The description of each theory draws both on contemporary scholarship and on the sizeable literature on corporate personality produced from the 1890s to the 1930s.

A. The Concession/Fiction Theory

Although the concession and fiction theories of the corporation sometimes are treated separately, they fit together to form a coherent whole. Both appear in the standard legal definition of a corporation, an artificial legal person created by state law. As Chief Justice Marshall declared in the Dartmouth College case, “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.” By declaring that corporations are artificial, invisible, intangible beings, Marshall stated the fiction theory of the corporation. According to that theory, a corporation is a fictitious, artificial, legal person or entity with an existence distinct from the existences of the people who form it. The concession theory, on the other hand, emphasizes the “existing only in contemplation of law” portion of Marshall’s definition. It does so by asserting that the corporation derives its being by concession from the State. For this reason, the concession theory appears to blend with the fiction theory. If corporations are creatures of state law and nothing else, they almost certainly must be artificial, invisible, intangible, and fictional.

17. As Morton Horwitz observes, “[b]eginning in the 1890s and reaching a high point around 1920, there is a virtual obsession in the legal literature with the question of corporate ‘personality.’” Horwitz, supra note 5, at 217. Representative articles include: W. Jethro Brown, The Personality of the Corporation and the State, 21 L.Q. REV. 365 (1905); George F. Canfield, The Scope and Limits of the Corporate Entity Theory, 17 COLUM. L. REV. 128 (1917); George F. Deter, The Jurisdiction of the Corporate Entity, 35 YALE L.J. 655 (1926); W. M. Geldart, Legal Personality, 27 L.Q. REV. 90 (1911); Harold J. Laski, The Personality of Associations, 29 HARV. L. REV. 404 (1916); Arthur W. Machen, Jr., Corporate Personality (pts. 1 & 2), 24 HARV. L. REV. 233, 347 (1910-11); Max Radin, The Endless Problem of Corporate Personality, 32 Colum. L. REV. 643 (1932); Bryant Smith, Legal Personality, 37 Yale L.J. 283 (1928); Paul Vinogrodo, Officiating Juridical Persons, 29 Colum. L. Rev. 594 (1929); Martin Wolff, On the Nature of Legal Persons, 54 L.Q. REV. 494 (1938).

18. E.g., HENN & ALEXANDER, supra note 15, at 144-45.


20. E.g., HENN & ALEXANDER, supra note 15, at 144-45.

21. E.g., Coates, supra note 5, at 810 (artificial-entity theory views corporation as having an existence separate from its shareholders).

22. HENN & ALEXANDER, supra note 15, at 145. The legal vehicle for this concession, of course, is a corporation’s charter or certificate of incorporation.

The concession and fiction ideas dominated American theorizing about corporations in the first part of the nineteenth century. During this period, corporations were individually created by a specific legislative grant (the special charter), which usually limited them to purposes of a public nature. In such an environment, it may have been plausible to regard corporations as creatures of the State and little else, because government played so decisive a role in creating them and in determining what they could do. In time, however, the concession and fiction ideas gave way to general incorporation statutes, which established a uniform, mechanical procedure for forming corporations and thus reduced the State’s role in their creation and functioning. Although the concession and fiction ideas still pervade formal corporate doctrine, they play little role in contemporary corporate theory.

B. The Aggregate Theory

The rise of general incorporation statutes also meant that private initiative played an increasingly important role in the formation and behavior of corporations. In William Bratton’s words, “[w]ith equal access to the form assured, corporations no longer seemed a product of sovereign grace,” and “widespread use of the corporate form directed attention ... toward the social reality of the business and the creative energy of the individuals conducting it.” As a result, during the latter part of the nineteenth century some theorists began to use partnership analogies to describe the corporation, thereby characterizing it as an aggregate formed by private contracting among its human parts.

23. For some details, see, e.g., Mark, supra note 5, at 1447-55.

24. On the special charter system, see, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 188-201 (1985).

25. E.g., Bratton I, supra note 5, at 1486 (“With equal access to the form assured, corporations no longer seemed a product of sovereign grace . . . .”). Mark, supra note 5, at 1456 (“By the beginning of the Gilded Age the state supplied only a corporation’s robes . . . .”).

26. See Bratton II, supra note 5, at 433-34, 443-44.

27. Nonetheless, early general incorporation statutes sometimes limited corporate powers in a fashion reminiscent of special charters. See Millon, supra note 5, at 208-11 (mentioning, inter alia, specific limitations on corporate purposes and powers; narrow judicial construction of those purposes and powers; the ultra vires doctrine; prohibitions on owning the stock of other corporations; limits on corporate capitalization, asset value, and life; and various industry-specific limits for banking, transportation, and insurance companies).


29. See id. at 1489-90; Horwitz, supra note 5, at 181-82, 184-86, 203-07; Mark, supra note 5, at 1457-64. During this period, moreover, the corporate bar sought ways to increase its clients’ freedom from state regulation of all kinds. Bratton I, supra note 5, at 1490; Mark, supra note 5, at 1457. One means for accomplishing this end was to maintain that corporations possess all the rights held by their human constituents. Mark, supra note 5, at 1458. For an application of this idea, see infra note 215 and accompanying text.
Early versions of the aggregate theory regarded the shareholders as the corporate aggregate's main, if not only, elements. Later formulations, however, tended to include various other people who make up the corporation. Thus, the firm aggregate also should include familiar corporate actors such as directors and officers. Some formulations of the aggregate theory go further by including other parties with a stake in the firm's actions. Still others add nonhuman components such as the various intracorporate relationships that link the corporation's members, the many internal positions it contains, and its internal rules. If it is to be complete, the corporate aggregate probably should include the fiction theory's artificial legal person as well.

Except perhaps for this fictional corporate person, the aggregate theory does not admit the existence of a distinct corporate entity. For example, Robert Hessen maintains that "[a] group or association is only a concept, a mental construct, used to classify different types of relationships between individuals." For a distinct firm entity to exist, it would have to possess attributes different from the attributes of its components, but to the aggregate theory the corporate whole is nothing but the sum of its human (and perhaps nonhuman) parts. That theory is a species of methodological individualism. As one prominent 1950s exponent of that position explains:

According to this principle [methodological individualism], the ultimate constituents of the social world are individual people. . . . Every complex social situation, institution, or event is the result of a particular configuration of individuals. . . . [We] shall not have arrived at rock-bottom explanations of such large-scale phenomena until we have deduced an account of them from statements about the dispositions, beliefs, resources, and inter-relations of individuals.

If individuals are the ultimate units of social explanation, and if groups such as corporations can be completely described through their human components, no distinct corporate entity should exist.

C. The Real Entity Theory

By 1900, the early aggregate theories of the corporation had largely disappeared. The most likely reason is the emergence of large, management-dominated corporations, which rendered shareholder-based conceptions of the corporate aggregate increasingly implausible. According to Morton Horwitz:

The [nineteenth century] contractualist view of the corporation as essentially no different from a partnership began to come under attack from the moment it was presented. Its most forceful claim was that any entity theory of the corporation was a fictional and anachronistic carryover from a bygone era of special corporate charters. Yet, the picture of the corporation as a contract of individual shareholders was itself becoming a nostalgic fantasy at the very moment the partnership view was most forcefully put forth . . . .

(D)uring the 1880s it was beginning to become clear that management, not shareholders, were the real decision-makers in large publicly owned enterprises.

As Gregory Mark elaborates, "[t]he attempt to reconceive corporations on individualist grounds had to face the functional reality that individual corporators were responsible neither for much of the growth within a given corporation nor for the adverse consequences of corporate actions."

30. See, e.g., Horwitz, supra note 5, at 184-85, 203 (discussing early aggregate theories which seemed to regard shareholders as the only relevant elements of the corporation).
31. To Robert Hessen, for example, "[t]he term corporation actually means a group of individuals who engage in a particular type of contractual relationship with each other." Robert Hessen, In Defense of the Corporation 42 (1979) (specifically mentioning shareholders, directors, and officers). As this quotation suggests, Hessen probably is best classified as an early legal exponent of the nexus-of-contracts theory, but the point is unimportant because that theory is an aggregate theory. See, e.g., Millon, supra note 5, at 203, 229, 231 and supra note 9 and accompanying text.
32. See Millon, supra note 5, at 226-27, 236-37 (describing aggregate theories that include, inter alia, management, lower-level employees, holders of equity and debt securities, and local communities).
34. See infra notes 68, 70, 180-81 and accompanying text (noting some nexus-of-contract theorists who include the fictional corporate person).
35. E.g., Coates, supra note 5, at 815 (aggregate theorists reject idea of the corporation as an entity distinct from its constituent individuals and their relationships). See Bratton II, supra note 5, at 423 (a significant line of thinking concerning the aggregate-of-entity inquiry denies the existence of a meaningful corporate entity).
36. Hessen, supra note 31, at 41. See also Bratton II, supra note 5, at 423 (on aggregate view, "firm entity [is] at most a reification—a construction of the minds of humans").
37. See Bratton II, supra note 5, at 423 (line of thinking represented by aggregate theory and new economic theory of corporation applies methodological individualism and attaches determinative significance to firm's aggregate parts).
39. Bratton I, supra note 5, at 1490 ("[c]ontractualism disappeared as a force in corporate legal theory after the turn of the century"); Horwitz, supra note 5, at 182 (by 1900, the real entity theory largely had triumphed over contractualist partnership models).
40. Horwitz, supra note 5, at 206.
41. Mark, supra note 5, at 1464-65.
As Mark also observes, because "[t]he 'life' of the corporation could no longer be identified with that of the corporators," its "actions . . . had to be recognized as autonomous, the product of its organization and management." Eventually this organized, autonomous corporate "it" began to be regarded as a real entity in its own right. British legal historian Frederic William Maitland aided this development. He helped introduce English-speaking people to Otto Gierke's organicist writings about corporate personality. The resulting real entity theory of the corporation, also known as natural-entity theory, was influential from the end of the 1920s.

Real entity theories differ considerably, but they all distinguish themselves from the aggregate theory by maintaining that a corporation is a being with attributes not found among the humans who are its components. This corporate being, moreover, is a real thing. In particular, it is not the artificial entity of the fiction theory. To Arthur Machen, for example, "[a] corporation is an entity—not imaginary or fictitious, but real, not artificial but natural." By using the word natural, Machen emphasized a view which distinguishes the real entity from the concession theory: The law does not create corporations but merely recognizes their independent existence.

In spite of their agreement on certain general points, however, real entity theorists differed greatly on the nature of the corporate entity. Sometimes they described it as an organism. Often they endowed it with a group will or a distinct personality. On occasion, they even personified it. Consider, for example Maitland's description of the "German Fellowship":

[I]t is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act; it wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand. It is not a fictitious person; . . . it is a group-person, and its will is a group-will.

Finally, if corporations resemble natural persons, then they may have moral rights and duties distinct from those the law gives them. Some real entity theorists hinted at this possibility.

Many exponents of the real entity theory, however, have decided less organicist conceptions of the corporation. To some observers, it is best regarded as a system: a network whose human and nonhuman components form a relatively coherent and stable whole due to their mutual interrelationships. To others, it is conceived in somewhat

42. Id. at 1473.
43. See Horwitz, supra note 5, at 179-81. See generally OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (Frederic William Maitland trans., 1927) (1990), especially Maitland's translator's introduction); 3 Frederic William Maitland, Moral Personality and Legal Personality, in THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 304 (1911). Here, an organicist theory of groups such as corporations is a theory of groups that analogizes them to biological organisms.
44. E.g., Horwitz, supra note 5, at 179-80 (noting theory's American beginnings in the 1890s). However, Mill contends that the theory only took hold early in the twentieth century. Millon, supra note 5, at 211.
45. Bratton 1, supra note 5, at 1490-91 (corporate realism survived in law reviews into the 1920s). For general descriptions of real entity theorizing from the turn of the century to the 1920s, see, e.g., Horwitz, supra note 5, at 179-81, 183-203, 207-24; Mark, supra note 5, at 1464-78; Millon, supra note 5, at 211-20. Of course, the theory still had adherents after the 1920s. See, e.g., E. Merrick Dodd Jr., For Whom Are Corporate Managers Trustees?, 45 HARV. L. REV. 1145, 1160 (1932). On Eisdell, see infra notes 195-205 and accompanying text.
46. E.g., Bratton 1, supra note 5, at 1475 (to entity theorists, a corporation is a real thing with existence apart from the existence of the persons connected with it); Horwitz, supra note 5, at 218 (to real entity theorists, a corporation is a separate and distinct from shareholdes); Woff, supra note 17, at 499-500 (to organic theorists, social organisations are entities that retain their identity even as their component parts change). Early twentieth century real entity theorists certainly made this point often enough. E.g., Deier, supra note 17, at 133 (a corporation has an existence distinct from the members that compose it); Laski, supra note 17, at 415 (a corporation is distinct from members, with a mind distinct from their minds).
47. E.g., Bratton 2, supra note 5, at 423 (on "entity" view, corporate firm is a real thing); Horwitz, supra note 5, at 218 (to real entity theorists, groups are just as real as individuals).
48. Machen, supra note 17, at 262.
49. E.g., Brown, supra note 17, at 370 (a corporation is not a creature of law, but is an entity that has compelled the law to give it official recognition); Deier, supra note 17, at 138 (a group is not a creation of law; law merely endows a pre-existing group with legal capacity); Laski, supra note 17, at 426 (personality of associations is real and not conceded thereto by the state); Machen, supra note 17, at 261 (a corporation exists as an objectively real entity, to which law merely gives recognition and legal effect); Maitland, supra note 43, at 314 (group personality is not a purely legal phenomenon).
50. E.g., Deier, supra note 17, at 310 (corporate body is a "composite organism"). See also Mark, supra note 5, at 1469 (discussing the organismic of, among others, Gierke and Maitland); Wolff, supra note 17, at 498-501 (discussing several continental thinkers who espoused the "organism doctrine").
51. E.g., Brown, supra note 17, at 368-70 (endowing the corporation entity with common will, spirit, and purpose); Deier, supra note 17, at 310 (endowing the entity with collective will and collective personality); Laski, supra note 17, at 405 (endowing the entity with "red blood of a living personality"); Maitland, supra note 43, at 314 (endowing group personality). See infra text accompanying note 225 for further reference to Laski.
52. GIERKE, supra note 43, at 206 (translator's introduction).
53. Cf. Deier, supra note 17, at 301 (seemingly asserting that corporations have extralegal rights and duties); Maitland, supra note 43, at 318-19 (apparently asserting that nations have moral obligations).
54. E.g., WERMAN, supra note 15, at 56 (describing corporations as "intentional systems"); see Michael J. Phillips, Corporate Moral Personhood and Three Conceptions of the Corporation, 2 Bus. Ethics Q. 435, 450-51 (1992); see also infra notes 270-80 and accompanying text (developing this suggestion).
more materialistic terms; for example, as an impersonal decision-making structure akin to a machine.\textsuperscript{55} Machen, on the other hand, refused to speculate about the corporate entity's nature,\textsuperscript{56} other than to say it is not like a natural person, it is not a rational being, and it has no will.\textsuperscript{57}

\section*{D. The Nexus-of-Contracts Theory}

The real entity theory ceased to be a force in American corporate theory after the 1920s. Unlike the concession/fiction and aggregate theories,\textsuperscript{58} changed intellectual fashions probably best explain its demise.\textsuperscript{59} During and after the 1920s, scholars increasingly refused to resolve practical legal questions by deducing solutions from some theory of the corporation. Instead, they assessed competing rules by looking to their consequences.\textsuperscript{60} In part, this was due to the belief that such deductions were useless because each theory has conflicting implications.\textsuperscript{61} For roughly fifty years, this antitheoretical attitude dominated corporate scholarship in the United States.\textsuperscript{62} During that period, general assertions about the essence of corporations were conspicuous by their absence, and attempts to reason from such assertions to practical legal or policy recommendations were scarcer still.\textsuperscript{63}

The recent rise of the nexus-of-contracts theory of the corporation has changed this picture dramatically.\textsuperscript{64} Although it originated in earlier works by economists,\textsuperscript{65} the theory found little acceptance among legal writers until about 1980.\textsuperscript{66} Since then, it has gained many adherents. In its most common form, the nexus-of-contracts theory treats a corporation as a connected group or series of contracts among the firm's participants.\textsuperscript{67} Because under this definition a corporation is simply a collection of smaller units, the nexus-of-contracts theory also is an aggregate theory of the firm.\textsuperscript{68} Like the aggregate theory, the nexus-of-contracts theory refuses to recognize a meaningful corporate entity distinct from the components that form the corporation.\textsuperscript{69}


\textsuperscript{56} Machen, supra note 17, at 261.

\textsuperscript{57} See id. at 262-63, 265.

\textsuperscript{58} See supra notes 23-26, 39-41 and accompanying text.

\textsuperscript{59} See, e.g., Mark, supra note 5, at 1478-82 (describing the intellectual shift). The most influential statement of the new view was a 1926 Yale Law Journal article by John Dewey. See generally Dewey, supra note 17, as discussed in Bratton I, supra note 5, at 1491; Hager, supra note 5, at 633-39; and Horwitz, supra note 5, at 175. Dewey's views are treated infra at notes 86-93, 115-16 and accompanying text.

\textsuperscript{60} See infra notes 94-102 and accompanying text.

\textsuperscript{61} See infra notes 115-16 and accompanying text.

\textsuperscript{62} "The theory of the firm had a bad reputation after the realist/anti-realist debate terminated in the late 1920s .... By 1976, traditional theory of the firm concepts had fallen so far from view that theoretically ambitious works on corporate structure omitted any mention of them." Bratton I, supra note 5, at 1508.

\textsuperscript{63} Nonetheless, general conceptions of the corporation may have been implicit in some scholarly discussions during the 1930-1980 period. Due to the scarcity of explicit theorizing, however, this assertion is conjectural. The uncertainty is illustrated by modern commentators' divergent discussions about the theoretical underpinnings of the managerialism whose most prominent exponent were Adolf Berle and Gardner Means. Compare Bratton I, supra note 5, at 1491-98, especially id. at 1494 n.110 (suggesting that to Berle and Means, the corporation was a management-dominated entity); and Coates, supra note 5, at 829-35 (real entity theory is implicit in the managerialist theorizing that dominated scholarship on corporations for much of this century) with Millon, supra note 5, at 220-25 (attributing an aggregate theory of the corporation to Berle and Means).
theory also rejects the organicism to which some versions of the real entity theory are prone.\textsuperscript{71} Instead, the contractual theory of the corporation obviously is a very individualistic one.\textsuperscript{72}

According to Judge Frank Easterbrook and Professor Daniel Fischel, the contracts\textsuperscript{73} that form the corporation may be created in various ways.

Some may be negotiated over a bargaining table. Some may be a set of terms that are dictated (by managers or investors) and accepted or not; only the price is negotiated. Some may be fixed and must be accepted at the "going price" (as when people buy investment instruments traded in the market). Some may be implied by courts or legislatures trying to supply the terms that would have been negotiated had people addressed the problem explicitly. Even terms that are invariant—such as the requirement that the board of directors act only by a majority of a quorum—are contractual to the extent that they produce offsetting voluntary arrangements.\textsuperscript{74}

In addition, these contracts usually are negotiated by representatives.\textsuperscript{75} Examples of typical contractual terms include those found in the articles of incorporation, contained in agreements with employees and suppliers, associated with debt and equity instruments, or set by the law and not varied by the corporation.\textsuperscript{76}

\textsuperscript{71} Easternbrook & Fischel, supra note 64, at 14.

\textsuperscript{72} Id. at 16.

\textsuperscript{73} See id.

\textsuperscript{74} Id.

\textsuperscript{75} Id. at 427 (nexus-of-contracts view resists the introduction of organicist thinking in business contexts).

\textsuperscript{76} Id. at 423 (identifying contractual theory with methodological individualism); id. at 430 ("extreme individualism" of theory); id. at 459-60 (theory embodies "unmitigated liberal individualism"); id. at 457-58 (theory "manifests a liberal vision in which individual choice shapes social life").

\textsuperscript{77} Accord to one observer, these "contracts" do not necessarily contain legally enforceable promises, but merely are arrangements involving mutual expectations between two or more parties. See Gordon, supra note 2, at 1549 (calling this the "economists' conception of a "contract".

\textsuperscript{78} Easterbrook & Fischel, supra note 64, at 14.

\textsuperscript{79} Id. at 11.

\textsuperscript{80} E.g., Bratton II, supra note 5, at 1549 (calling this the "economists' conception of a "contract").

\textsuperscript{71} Fischel, supra note 64, at 1262 n.9 (confining himself to shareholders and managers, but recognizing that other parties such as employees also can be included). See also Milton, supra note 5, at 229 (describing the theory as shareholder-centered).

\textsuperscript{72} E.g., Ribstein, supra note 3, at 94.

\textsuperscript{73} Gordon, supra note 2, at 1549 (describing the theory). See also supra notes 30-34 and accompanying text (discussing versions of the aggregate theory that include other classes of humans and even some nonhuman components within the aggregate).

\textsuperscript{74} Bratton II, supra note 5, at 420 (describing the theory). See also Hart, supra note 65, at 1764 (on nexus-of-contracts view, there is "little point in trying to distinguish between transactions within a firm and those between firms").

\textsuperscript{75} Bratton II, supra note 5, at 417 (footnote omitted).

\textsuperscript{76} Id. at 462. See also Milton, supra note 5, at 231 (nexus-of-contracts theory "conceives of the firm as nothing more or less than the product of individual actors freely contracting according to their own utility calculations").

\textsuperscript{77} Dewey, supra note 17; see supra note 59.
This section considers these two arguments in turn, emphasizing the real entity theory and its possible implications. After that, the section suggests a few of the real entity theory's implications for contemporary debates. The section concludes by discussing a subject whose importance this Article generally downplays; the possibility that if corporations are real entities, they may have moral rights. Throughout, this section assumes arguendo that some theory of the corporation (most often the real entity theory) is true. The section's main conclusion is that while few, if any, specific legal rules flow directly and unequivocally from the real entity theory, its acceptance would influence debates over certain legal questions and over certain issues involving the social control of corporations. In particular, if the theory is valid, the drives, interests, and obligations of the corporate group become factors that ought to be considered in some decisional contexts. More specifically, if the theory is true and if the corporate real entity assumes certain forms, corporations could have moral duties that sometimes might affect legal and policy deliberations. Again, however, such considerations ordinarily would not dictate specific legal outcomes by themselves. Rather, to quote Horwitz, they only would "tilt" or influence the resolution of certain issues.

A. Legal Instrumentalism and Corporate Theory

1. Dewey's Consequentialism

Dewey's article opened with its conclusion: "that for the purposes of law the conception of 'person,' is a legal conception; put roughly, 'person' signifies what law makes it signify." By taking that position, Dewey denied that the corporate legal personality depends on the existence of a real corporate person. For example, he argued against "the conception that before anything can be a jural person it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person." This conception, Dewey suggested, rests on a particular kind of definition: one that reflects "a definite metaphysical conception regarding the nature of things," and "proceeds in terms of an essential and universal inhering nature." But he rejected such conceptions in favor of a definition "which proceeds in terms of consequences." In this view, "a thing is—what it does, 'what it does' being stated in terms of specific effects extrinsically wrought in other things."

In spite of his language, Dewey probably did not intend that the law should literally define the word corporation in terms of consequences—that it should say, for example, "'corporation' = consequences a, b, and c." For one thing, he conceded that groups such as corporations have a real, underlying social identity of their own, distinct from the identities of the people who form them. This is difficult to square with the view that corporations are their consequences. But to Dewey neither this underlying social reality, nor any other basis for abstractly defining corporations, should control lawmakers. Instead, he evidently thought the decision whether to treat something as a legal person or to give it certain rights and duties should be governed by the consequences of so doing.

84. The next section discusses the real entity theory’s validity. In the process, it makes some arguments against the aggregate and nexus-of-contracts theories.
85. Horwitz, supra note 5, at 176; see infra notes 117-21 and accompanying text.
86. Dewey, supra note 17, at 655.
87. Turn-of-the-century real entity theorists, on the other hand, often maintained that the law merely recognizes the reality of a preexisting and naturally occurring corporate being. See supra note 69 and accompanying text.
88. Dewey, supra note 17, at 658; see id. at 658-60.
Both Dewey's contemporaries and later legal writers have adopted his general view. In particular, they assert that the existence of corporate personhood should depend on the circumstances. These attitudes typify what Robert Summers calls "pragmatic instrumentalism," a widespread outlook he specifically identifies with Dewey, among others. One of instrumentalism's central tenets is that because law is an instrument to serve chosen ends, a particular form of law must be justified by assessing its consequences to determine whether it advances those ends.

If these views are correct, the debate over theories of the corporation seems largely a waste of time. Although the debate may have in bearing on the practical issues lawmakers face. Those issues, an instrumentalist would assert, should be resolved by assessing the consequences of competing rules and not by deduction from some theory of the firm. Because it is difficult to ignore consequences in lawmaking or in any other normative endeavor, these instrumentalist arguments have considerable force. On a deductivist model, for example, corporate criminal liability should depend on whether corporations can perform the proscribed acts with the necessary mens rea. But this would block inquiry into many of the important considerations raised in modern debates about corporate criminal liability, especially those involving its efficacy as a corporate control device.

2. The Relevance of the Real Entity Theory

Consequences are important in evaluating legal rules. Even so, it hardly follows that corporate theory has no role to play in the process. To see why, it is necessary to take a closer look at instrumentalist legal decision making. Evaluating legal rules by their consequences requires criteria for distinguishing good consequences from bad. Unfortunately, Summers's pragmatic instrumentalists sometimes failed to provide those criteria. As he remarks, "the general value theory of leading instrumentalists was relatively anemic" because "it made little place for qualitative considerations of policy or justice." Some instrumentalists, he notes, were extreme skeptics about the validity of moral assertions. Still, most instrumentalists believed that values in general, and the goals of legal rules in particular, could and should derive from prevailing wants and interests. In this view, "we are to

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94. Although he disagreed with Dewey about the consequences of conferring legal personality on inanimate objects, Bryant Smith echoed Dewey's emphasis on tangible results when he wrote: "It suits the purposes of society to make a ship a legal person, not because the ship's conduct will be any different, of course, but because its personality is an effective instrument to control in certain particulars the conduct of its owner or of other human beings. The broad purpose of legal personality, whether of a ship, an idol, a molecule, or a man, and upon whomsoever or whatever conferred, is to facilitate the regulation, by organized society, of human conduct and intercourse."

Smith, supra note 17, at 296. See also id. at 298, 299.

95. There should be little mystery about the nature of a corporation. Whether or not it should be deemed a separate "legal entity" or "legal person" should depend on the question to be resolved. ... [To argue that a corporation is an entity, and therefore that certain results follow, is to put the cart before the horse. Analysis, in other words, should be directed not to the nature of corporateness but to the substantive policies underlying the issues.


96. E.g., Smith, supra note 17, at 298. (saying that to argue because corporation is a legal person for some purposes, it must be so regarded for all purposes; or to say that because a partnership is not a legal person for some purposes, it cannot be a legal person for any purposes, is to make corporate personality and partnership impersonality masters rather than servants, and to decide legal questions on irrelevant bases. See also Hamilton, supra note 95, at 981-82 ("the nature of a corporation is not static, but may vary from case to case, depending on the issues to be resolved").

97. See generally Robert S. Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use, 66 CORNELL L. REV. 861 (1981); see also id. at 865 (specifically identifying Dewey as a pragmatic instrumentalist).

98. See id. at 882-89.

99. "All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy." JOHN RAWLS, A THEORY OF JUSTICE 30 (1971).


101. For example, the early common law view was that a corporation cannot be criminally liable because, inter alia, it has no mind and therefore cannot form the requisite criminal intent. E.g., Henn & Alexander, supra note 15, § 184, at 480. This view is consistent with the concession/fiction theory of the corporation, according to which it is merely an artificial being. Under that theory, moreover, a corporation could not be legally responsible for sine qua non acts, because it derives its being and powers from the state, and acts exceeding these powers therefore are legal nullities. Hager, supra note 5, at 587, 593.

Early advocates of the real entity theory, however, often stressed its ability to overcome these obstacles to corporate criminal liability. Depending on the real entity's nature, it might be something capable of having a guilty mind, or at least might be something to which the criminal fault of its members could fairly be imputed. See, e.g., id. at 585-92 and sources cited therein (discussing tort liability as well). If a corporation is a real entity, moreover, its powers are "natural attributes of its own internal life," not "products of state recognition." Id. at 593. Thus, corporate acts are real, and a corporation may be criminally liable for some of them. Id.; see id. at 592-611 (discussing the turn-of-the-century debates on this question and the related problem of tort liability).

102. On those many considerations, see, e.g., Metzger, supra note 100, at 62-74.

103. Summers, supra note 97, at 915. Cf. Hamilton, supra note 95, at 981 (observing that when instrumentalist courts manipulate, a deductive "legal person" argument to reach result A rather than result B, they seldom articulate "why result A is better than result B").

104. Summers, supra note 97, at 879-80.

105. Id. at 874-80.
take wants and interests of individuals as they are expressed, and we are not to distinguish between them in qualitative terms; one interest is intrinsically as good as any other." Therefore, in assessing a legal rule by looking to its consequences, the relevant consequences are the rule's effects on prevailing wants and interests and the moral criterion is the extent to which those wants and interests are satisfied. Where the relevant wants and interests conflict, decision makers should try to maximize utility by recognizing as many interests as possible under the circumstances.

Legal instrumentalism, however, encounters at least one serious moral objection. Instrumentalism maintains that decision makers should look solely to consequences when assessing moral duties. Thus, some moral philosophers have advocated pluralistic ethical theories that urge the evaluation of actions by balancing their consequences for utility against other ethical concerns.

The nature of corporations really should influence the decision to grant them legal personality or to make them criminally liable. Even if instrumentalism survives these objections, moreover, corporate theory is not necessarily irrelevant to legal decision making. If the test for a good legal rule is its ability to satisfy prevailing wants and interests and if corporations are personified real entities, then their wants and interests might be relevant factors. For example, if the effect of a proposed legal rule is to frustrate the interests of a person-like corporate entity with a real will, why should instrumentalist lawmakers refuse to make this a factor in their deliberations?

B. The Alleged Indeterminacy of Corporate Theory

Dewey's apparent position was that lawmakers always should reason from consequences when deciding whether to personify corporations or adopt particular rules of corporate law, and should not let corporate theory influence those decisions. Because such an extreme instrumentalism looks doubtful, however, it seems that theories of the corporation can play a role in legal decision making. Even if consequences are all that matter, moreover the corporate real entity's interests still may prove relevant. Either way, corporate theory can figure in debates about practical legal questions.

1. Dewey's Second Argument

Dewey had a second objection to letting corporate theory influence legal decisions, however. This argument proposed that any theory of the corporation has too many conflicting implications to be useful. He urged that theories of the corporation have indeterminate implications because historically "[each theory has been used to serve the same ends, and each has been used to serve opposing ends." For the most

106. Id. at 876.

107. Id.

108. Another objection to legal instrumentalism is its allegedly illegitimate attempts to derive a value (i.e., the law should endeavor to satisfy prevailing wants and interests) from a fact (the mere existence of those wants and interests). See Summers, supra note 97, at 880 (pragmatic instrumentalists reduced value questions to questions of fact by translating the interests relevant to a problem into goals for resolving the problem); id. at 881 (moral issues cannot be reduced to factual questions). Here, of course, Summers is merely noting the logical gulf between "is" and "ought." See, e.g., ARNOLD BREITCH, POLITICAL THEORY: THE FOUNDATIONS OF TWENTIETH-CENTURY LEGAL THOUGHT 207-15 (1959). Because the desirability of satisfying prevailing wants and interests might find support on other ethical grounds, however, this objection to instrumentalism hardly seems conclusive.

109. E.g., JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY 93 (1986) ("The claim that only consequences matter is . . . a necessary part of Utilitarianism") (emphasis omitted).

110. See, e.g., id. at 93-97 (inquiring whether consequences are all that matter in ethical theory).

111. See, e.g., WILLIAM K. FRANKENA, ETHICS 43-44 (2d ed. 1973) (advocating a "mixed" theory in which the claims of utility somehow are to be balanced against the claims of justice); W.D. ROSS, THE RIGHT AND THE GOOD 18-22 (1930) (describing several classes of prima facie duties, each of which is binding unless outweighed by another prima facie duty against which it is weighed by intuitions: among these prima facie duties are duties of beneficence, which include duties to make other beings better off in terms of pleasure (or utility)). See also RAWLS, supra note 99, at 34-40 (sketching, but not endorsing, similar intuitionist approaches).

112. In fact, notions of collective moral fault are not completely absent from contemporary discussions of corporate criminal liability. Michael Metzger, for example, notes that some courts "have found corporate criminal intent on the basis of the 'collective knowledge' of a corporation's employees as a group, even though no single employee had sufficient knowledge to know a crime had been committed." See cases cited in Metzger, supra note 100, at 52. He also quotes commentators who argue that imputing certain crimes by directors and high corporate officers to the corporation is justified because these people "may be fairly likened to the 'brain' or 'alter ego' of the corporation." Id. at 50-51 (footnotes omitted).

113. To be sure, Summers spoke of individual wants and interests. See supra note 106 and accompanying text. But why should a suitably personified corporate real entity be treated any differently? See supra notes 30-33 and accompanying text.

114. Dewey, supra note 17, at 669; see id. at 669-73 and infra note 115. In addition to Dewey's position, the claim that theories of the corporation lack definite significance might assume at least three other forms. First, one could maintain that theories of the corporation lacked
part, the specific examples Dewey used to justify this assertion differ from the issues that have preoccupied past and present American participants in the debate and the issues this Article discusses. Nonetheless, his general argument apparently has found widespread acceptance since the 1920s.

historical significance because they were a response to changing social, economic, and legal developments rather than their causes. Cf. Bratton 1, supra note 5, at 1511-12 (although real entity theory could justify the rise of the management-dominated corporation, that rise may have sparked the theory more than the theory caused the rise); Millon, supra note 5, at 241-42 (existing legal doctrines do not have determinate legal implications, they lack the claimed power to justify). The Article asserts economic and legal circumstances influence theories of the corporation, it is the lack of determinacy that derives from social influences in historical contexts that gives rise to the theory. For example, historical factors go some way toward explaining the emergence of aggregate and real entity theorizing in the nineteenth and early twentieth centuries. See supra notes 23-26, 39-41 and accompanying text. Second, one could assert that even where theorizing about corporations does affect legal doctrine, it hardly is the only, or even the most important, influence on it. Third, one could argue that the Article asserts legal considerations simply do not follow from the theory: that it lacks the claimed power to justify.

Although this Article employs historical examples, this section is concerned mainly with the third argument. In other words, the Article asserts that the real entity theory, if valid, ought to influence corporate law and the corporate social responsibility debate in certain more or less definite ways. Thus, Dewey's examples of corporate theory's indeterminacy, see infra note 115, are irrelevant except as they involve the specific issues discussed below. The two other arguments just sketched do not are not definitive objections to this Article's position. First, although social, economic, and legal circumstances influence theories of the corporation, it is difficult to argue that social theory and (and human thinking generally) lacks any independent causal significance. For example, the demise of the real entity theory early in the twentieth century was probably due mainly to changes in the intellectual climate at that time. See supra notes 35-63 and accompanying text. Second, because this Article argues only that theory should influence the resolution of certain issues, see, e.g., supra note 85 and accompanying text, it is no objection that other factors may influence their resolution as well.

115. Dewey's statement about the conflicting implications of corporate theories went as follows:

Corporate groups less than the state have had real personality ascribed to them, both in order to make them more amenable to liability, as in the case of trade-unions, and to exalt their dignity and vital power, as against external control. Their personality has not been denied for like reasons; they have been pulverized into mere aggregates of separate persons in order to protect other laborers from them, to make more difficult their unified action in trade disputes, as in collective bargaining, and to enable union property to escape-liability, the associated individuals in their severality having no property to levy upon. The group personality theory has been asserted both as a check upon what was regarded as anarchic and dissolving individualism, to set up something more abiding and worth than a single human being, and to increase the power and dignity of the single being as over against the state. Even the doctrine that true personality resides only in the "natural" person has been worked in opposed directions. It was first used to give church or state a short and direct road of approach which would lessen the power of the singular being over against the collective being, while lately, through being affected by "natural" in the sense of natural rights, it has been employed to increase the expense of public interests.

Dewey, supra note 17, at 669-70. He also argued that theories of the state have presented analogous problems. See id. at 669.

116. E.g., Bratton 1, supra note 5, at 1508 (Dewey's indeterminacy assertion became conventional wisdom after the late 1920s).

2. Horwitz's Rejoinder

Morton Horwitz's much-discussed 1985 article probably is the most important contemporary critique of Dewey's second argument. In contrast to Dewey, and to Critical Legal Studies scholars who argue that legal concepts are infinitely "flipable," Horwitz maintained that "most important controversial legal abstractions do have determinate legal or political significance." This is not to say that one can make certain, mechanical, context-free deductions from general concepts. Nonetheless, general concepts can help justify certain practical conclusions in particular social or historical contexts. [When] abstract concepts are used in specific historical contexts they have more limited meanings and more specific argumentative functions than they do when considered in a logical vacuum. Thus, in particular contexts the choice of one theory over another is not random or accidental because history and usage have limited their deepest meanings and applications.

The central aim of Horwitz's article was to show that the real entity theory was a major factor in legitimizing big business and giving it sustenance during the late nineteenth and early twentieth centuries. As the following account suggests, it did so mainly by justifying the emergence of management-dominated bureaucratic firms and their increased freedom of action. To Horwitz, the theory performed these functions in at least six ways.

(a) Undermining Concession Theory-Based State Regulation

First, the real entity theory's emergence helped "destroy any special basis for state regulation of the corporation that derived from its creation by the state." One implication of the concession/fiction theory is that because corporations are products of state action and nothing else, the states can freely regulate their internal affairs and external

117. See generally Horwitz, supra note 5. See also Hager, supra note 5, at 575-78 and Millon, supra note 5, at 243-51 (who, despite differences on particular points, appear to share Horwitz's general views about the significance of corporate theory).

118. Horwitz, supra note 5, at 175-76.

119. Id. at 176.

120. Id.

121. Id.; see id. at 221 (stating the same general conclusion and outlining the specific examples discussed below). See also Mark, supra note 5, at 1470 (real entity theory instrumental in legitimizing the autonomy of corporate life); Millon, supra note 5, at 243 (although economic changes may have done as much to generate real entity theory as theory did to legitimize those changes, nothing is wrong with the former view).

122. Horwitz, supra note 5, at 221.
actions. If corporations are real, natural entities, however, this particular basis for state regulation does not work. The rationale also cannot stand under the aggregate theory, because that theory stresses the corporation’s origins in private initiative. Yet, while the aggregate theory is not necessarily inconsistent with corporate bigness, nineteenth century aggregate theorists tended to oppose large, oligarchic corporations.

(b) Justifying Director and Manager Power

In Horwitz’s view, the real entity theory also was well equipped to justify the weakened position of shareholders, and the correspondingly greater power exercised by managers and directors, which accompanied the emergence of large business enterprises. The general idea, apparently, is that if the corporation is a real entity distinct from its shareholders, the firm’s actions need not reflect their wishes, and instead may rightly reflect the wishes of the directors and (especially) the managers who actually run it. These developments may not conflict with the concession/fiction theory, although the theory apparently does little to legitimize them, but they do seem inconsistent with versions of the aggregate theory that make shareholders the aggregate’s key figures.

(c) Majority Shareholder Consent to Mergers and Consolidations

To Horwitz, the real entity theory also helped management justify the shift from a requirement of unanimous shareholder consent for mergers and consolidations to the rule that only a majority need agree. If a corporation is something distinct from its shareholders, why should its actions necessarily require their unanimous agreement? Instead, the real entity’s will might be identified with (among other things) a mere majority of the shareholders. While this majority-vote rule may not directly clash with the concession/fiction theory, that theory does little to bolster it either. More importantly, the rule is difficult to square with any aggregate theory. If a corporation is simply the sum of its human components, how can “it” decide to act unless every member agrees to the action in question?

(d) Limited Shareholder Liability

Today, shareholder liability for corporate obligations usually is limited to the amount a shareholder has invested in the corporation. This limited liability, a modern treatise asserts, “is probably the most significant attribute of the modern corporation.” The reason, presumably, is that by protecting investors against the possibility of crippling damage awards, limited liability has helped corporations amass the capital required for modern mass-production business operations. To Horwitz, the real entity theory played a major role in justifying the emergence of the modern limited-liability rule. By
postulating an independent corporate entity, it forced people to distinguish that entity’s liability from the personal liability of its shareholders, thus making it easier to limit the latter while preserving the former.135 Because the concession/fiction theory also postulates such an entity, however, it could help produce the same result. But limited liability is harder to justify under the aggregate theory, because that theory normally refuses to recognize a distinct corporate entity.136 It is not immediately obvious how a nonexistent entity can be completely liable for its obligations, while shareholders’ liability is limited to their capital contribution.137

(e) The Demise of Ultra Vires

Horwitz also maintained that the real entity theory helped further the large corporation’s ability to act as it wished in the economic sphere. For one thing, it contributed to the demise of the traditional ultra vires rule.138 As noted earlier, the old special charter system is closely linked with the concession/fiction theory, because under that system the states created corporations on an individualized basis and limited the powers stated in their charters.139 Even with the emergence of general incorporation statutes during the nineteenth century, many states continued to limit the corporate powers stated in charters, many corporations limited their own powers even when not required to do so, and many courts construed those powers strictly.140 The eventual elimination of these restrictions and the states’ increasing willingness to let corporations pursue any lawful purpose obviously do not square with the concession/fiction theory. Instead, they are most consistent with a theory that regards corporations as real, autonomous, naturally occurring entities whose powers do not derive from the state. Because it stresses the corporation’s origins in free entrepreneurial activity, the aggregate theory also might support the demise of ultra vires.141 But because to this theory the corporate charter is a binding contract whose modification requires unanimous consent, it might have difficulty justifying loose judicial construction of that contract.142

(f) Enabling Foreign Corporations to Do Business

Finally, in Horwitz’s view, the real entity theory also promoted corporate freedom by enabling firms to do business in states other than their state of incorporation. It did so by helping undermine the rule that states may constitutionally forbid foreign corporations from doing business within their boundaries.143 If, as the concession/fiction theory asserts, corporations simply are creatures of state law, it is difficult to see why other states need recognize their existence once they leave the creating state’s domain.144 This argument collapses, however, if corporations are viewed as naturally occurring entities with their own inherent reality. Because it regards corporations as the outcome of free contracting rather than the product of state power, however, the aggregate theory also creates problems for this argument.

3. The Real Entity Theory’s “Progressive” Implications

Horwitz’s arguments for the real entity theory’s pro-business implications have commanded some support.145 Because the theory may have other implications as well, however, it does not yet escape Dewey’s charge of indeterminacy. In a 1989 article, Mark Hager maintains that while Horwitz’s arguments are plausible,146 they do not tell the full story about the real entity theory’s impact. “If real entity theory did indeed provide pro-capital shifts in certain doctrines,” he argues, “it certainly was not meant by its most articulate advocates to do so.”147 Instead, these “progressive” advocates “tended to view the real entity theory as one which would help to curb and check the antidemocratic effects of large-scale corporation organization” by “articulating[ing] new visions of democratic social life.”148
Hager emphasizes two more or less antibusiness implications of the real entity theory that Horwitz omits or slights. One is the theory's potential to justify corporate criminal (and tort) liability.149 The other is its ability to legitimize institutions between an increasingly powerful government and an atomized mass of individuals—-institutions that might recreate medieval communities, enable people to resist government power, and provide them with meaningful opportunities for democratic participation.150 In the American context, trade unions apparently are the most important such institutions.151 But while these two arguments are plausible, they complement Horwitz's account more than they contradict it. The real entity theory tends to support the view that groups, rather than individuals, are the basic units of society.152 In its more extreme formulations, it also can support organismic theories of society in which corporations, like the body's organs, are major actors with important systemic functions, and in which people resemble cells in those organs. On such views, there is no inconsistency in asserting that business firms are new homes for an anomic mass of individuals153 and deserve certain rights and powers154 and should have legally enforceable moral duties.155

Hager, however, suggests other ways in which the real entity theory might generate conflicting implications. As previously discussed, Horwitz maintained that the real entity theory helped undermine state regulation of corporations.156 Nevertheless, progressive real entity theorists argued that because large corporations occupy a position intermediate between government and the citizenry, and because their activities are socially significant, they are in many ways public institutions. For this reason, they continued, the states can and must regulate their internal affairs.157 Whatever the connection between a corporation's public nature and its susceptibility to regulation, however, it is difficult to see how that asserted public nature flows from the firm's status as a real entity. For reasons noted earlier, the concession/fiction theory probably best supports the assertion that corporations are essentially public.158

However, Hager notes another implication of the real entity theory that probably does conflict with one of Horwitz's positions. Horwitz maintained that the real entity theory supports majority shareholder approval for mergers and consolidations because the majority's will can be imputed to the separate corporate entity.159 But the corporate real entity need not have this particular will. Instead, it might will other interests such as the protection of minority shareholders who are disadvantaged by a merger.160

C. The Real Entity Theory's Contemporary Implications

For the most part, Horwitz's and Hager's portrayals of the real entity theory's turn-of-the-century implications seem convincing. While those implications differ, they are more complementary than contradictory. Taken together, they generally suggest that if the real entity theory is true, corporations are real actors with drives and interests that deserve recognition, and with social functions and responsibilities that they must fulfill. This conclusion has two implications. First, it undermines Dewey's argument that theories of the corporation lack determinate implications. Second, it supports this Article's earlier contention that if the real entity theory genuinely describes corporations, then their drives, interests, and duties are factors the law ought to consider in some contexts.161 Again, however, the theory's implications only would be factors affecting particular decisions; ordinarily, they would not dictate legal outcomes by themselves.162

149. See Hager, supra note 5, at 585-611 and supra notes 100-02 and accompanying text.
150. Hager, supra note 5, at 611; see id. at 611-25 and sources discussed therein.
151. See id. at 617-25.
152. "The argument between entity and contractual theorists during the 1880s and 1890s was, at bottom, a conflict over whether the individual or group was the appropriate unit of economic, political, and legal analysis." Horwitz, supra note 5, at 220.
153. See DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING 288 (1973) (business corporations and other groups now are lifetime experiences for many of their members, and thus must provide a satisfactory way of life for them); id. at 289 (to the extent that traditional sources of social support such as small town, church, and family have crumbled, new kinds of organizations, especially corporations, have taken their place). Nevertheless, one can question how well corporations actually serve these communicative aims.
154. To Hager, progressive real entity theorists either did not recognize this possibility or did not take it seriously. See Hager, supra note 5, at 628-30 (suggesting some reasons for each tendency). This subject is discussed infra at notes 210-17 and accompanying text.
155. Of course, inconsistencies may arise when those different aspects of the group's life conflict with one another. In particular, claimed corporate rights (e.g., absolute or near-absolute property rights) obviously can clash with asserted corporate duties (e.g., an obligation to protect the environment) where the rights are exercised in certain ways (e.g., using corporate property to pollute air or water).
156. See supra notes 122-25 and accompanying text.
1. Are the Real Entity Theory’s Turn-of-the-Century Implications Relevant Today?

Horwitz’s and Hager’s arguments only purport to apply within the specific social/historical setting of America at the turn of the century. Thus, it is legitimate to ask whether those arguments are relevant today. This is not so much due to changes in the real entity theory, which legal thinkers have largely ignored for about sixty years, as it is to the aggregate theory’s subsequent evolution. Contemporary nexus-of-contracts theorists have expanded the aggregate theory’s power to explain and justify. Today, the contractual theory of the corporation arguably performs some of the “argumentative functions” that only the real entity theory could effectively perform a century ago.

Horwitz maintained that the real entity theory helped strengthen and legitimize big business by: (1) undermining state regulation of corporations based on the concession theory, (2) supporting the trend toward diminished shareholder power and the correspondingly greater power of managers and directors, (3) justifying the rule that mergers and consolidations require only a majority vote of the shareholders, (4) helping to justify limited liability for shareholders, (5) assisting the demise of the ultra vires doctrine, and (6) undermining restrictions on corporations’ ability to do business in states other than the state of their incorporation. Modern contractualism arguably supports both Horwitz’s general contention and almost all of his specific implications. First, unlike some of their nineteenth-century predecessors, today’s contractualists seem comfortable with big business. In their view, large firms are simply the product of rational, self-interested individual bargaining. Second, as this Article has shown, the aggregate and contractual theories are hostile to concession theory-based state regulation of corporations and to the states’ failure to recognize

Supra notes 133-37 and accompanying text, this rule has an important instrumentalist justification as well. By protecting investors against the possibility of crippling personal liability, it has helped corporations amass the capital required for modern mass-production business operations. See supra note 134 and accompanying text.

163. See Horwitz, supra note 5, at 175-76 and supra text accompanying notes 118-21. See also Hager, supra note 5, at 577. “Legal concepts have no trans-contextual, logically-deducible meanings, but they do have meanings that are powerful and definite in particular historical settings.” Id.; see also id. at 576-78.

164. Horwitz, supra note 5, at 221.

165. See supra note 125 and accompanying text.

166. “With the new economic theory, the heirs of the classical tradition surrender to the corporate hierarchy and embrace it. In so doing, the new theorists announce that corporate hierarchies had been composed of bilateral market contracts all along.” Bratton I, supra note 5, at 1915.

foreign corporations. Third, some nexus-of-contracts theorists argue that the main reason modern shareholders do not play an active role in internal corporate governance is “rational ignorance” of the firm’s operations. That is, because becoming informed about those operations involves large costs relative to the likely return, and because individual shareholders most likely cannot influence the firm’s decisions anyway, the sensible course is not to bother. The resulting information disparity makes it possible for managers to impose “agency costs” on shareholders by acting in their own self-interest at the shareholders’ expense. But, the contractualists assert, various forces (mainly market forces) tend to make managers work vigorously on the shareholders’ behalf. Fourth, contractualists often explain limited shareholder liability by asserting that rational, self-interested contracting parties would choose it. Finally, nexus-of-contracts theorists explain the decline of the ultra vires doctrine by claiming that many alleged ultra vires acts can benefit the firm economically and that for this reason rational contracting parties would accept the ultra vires acts.

So far as the author is aware, however, no nexus-of-contracts theorist has tried to justify Hager’s progressive implications of the real entity theory on contractualist grounds. Thus, the nexus-of-contracts theory has not usurped all of the real entity theory’s traditional justificatory functions. Unfortunately for the latter theory, however, changed circumstances may have eliminated some of those functions’ practical bite. Because each is fairly well entrenched today, for example, Hager’s arguments that the real entity theory helps legitimize organized labor and that it supports increased regulation of business probably are less significant than they were a century ago. Also, the real entity theory’s ability to justify corporate criminal and tort liability, while arguably valid in the abstract, has been rendered irrelevant by the modern tendency to base each on instrumental considerations. Turning to Horwitz’s arguments, although the real entity theory still could help legitimize big business, today it hardly needs such
support. Except perhaps for shareholders’ diminished role in internal corporate governance, moreover, the legal changes Horwitz discussed now seem noncontroversial. Thus, they might be of little interest today even if the contractual theory had not developed in such a way as to bolster them. The same probably is true of Horwitz’s one implication—the majority-vote requirement for mergers and consolidations—that this Article previously left without a modern contractualist defense.

2. The Contractualist Agenda

The preceding discussion suggests that while the real entity theory’s traditional pro-business and progressive implications retain abstract intellectual force, their practical importance has been undercut by the demise of old controversies and by recent elaborations of the aggregate/contractual view. Thus, any argument for the real entity theory’s contemporary significance should stress its relevance to modern debates. Today, the most important implication of the real entity theory is its potential to undermine the contractual theory and much of the practical legal agenda based on it. Before considering how the real entity theory might do so, this Article first sketches the nexus-of-contracts theory’s alleged normative implications and the practical agenda they support.

(a) General Normative Views

Some contractualists use their theory mainly to explain existing corporate law on economic grounds.\textsuperscript{173} But both contractualists and commentators on the theory often assert that it also has a normative thrust.\textsuperscript{174} In Jeffrey Gordon’s words, for contractualists “[[it is not simply that the corporation is best described as a nexus of contracts, but that the corporation should be permitted to function freely in that way.”\textsuperscript{175} That is, “private parties to the corporate contract should be free to order their affairs in whatever manner they find appropriate.”\textsuperscript{176} In particular, where feasible those parties ought to be free from government regulation in general, and from corporate law’s strictures in particular.\textsuperscript{177} Under these circumstances, economic efficiency, wealth, and utility arguably would be maximized as well.\textsuperscript{178}

(b) The Denial of Corporate Social Responsibility

Some nexus-of-contracts theorists are skeptical about the notion that corporations have social responsibilities to nonshareholder constituencies such as employees, suppliers, customers, and local communities. In part, this derives from their belief that self-interested profit-seeking, if not always beneficial to these stakeholders, works to their and to society’s advantage more often than is generally realized.\textsuperscript{179} But there is a more important reason contractualists deny that corporations have moral duties. According to Daniel Fischel:

> Those who argue that corporations have a social responsibility and, therefore, that managers have the right, and perhaps the duty, to consider the impact of their decisions on the public interest assume that corporations are capable of having social or moral obligations. This is a fundamental error. A corporation...is nothing more than a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for their mutual benefit. Since it is a legal fiction, a corporation is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations. Only people can have moral obligations or social responsibilities. \textsuperscript{180}

\textsuperscript{173} E.g., Easterbrook \& Fischel, supra note 64, at vii (describing their book as mainly “an exercise in positive economics,” whose conclusion is that “corporate law has an economic structure”).

\textsuperscript{174} See id. at viii–ix (also observing that portions of the book are “openly normative”). See also Thomas Lee Hazen, The Corporate Personas, Contract (and Market) Failure, and Moral Values, 69 N.C. L. REV. 273, 276 (1991) (although contractualists often purport merely to describe legal doctrine, some argue that it has normative consequences too).

\textsuperscript{175} It is unclear, however, how these normative implications flow from a theory that only purports to describe corporations. Cf. Bratton II, supra note 5, at 411 (contractualists make “normative and political assertions in the guise of ontological statements”). On the familiar logical gulf between “is” and “ought,” see supra note 108. In spite of this possible objection, the remainder of the Article will assume arguendo that both the nexus-of-contracts theory’s asserted normative implications and the contractualists’ practical agenda actually flow from the theory. Because this Article argues against the nexus-of-contracts theory’s validity, its overall position is unaffected by this concession.

\textsuperscript{176} Even if the nexus-of-contracts theory fails to support it, the contractualist agenda might get independent support from ethical criteria such as the intrinsic value of autonomy and/or the economic efficiency and utility that are said to result from autonomous, self-interested private decisions. See Clark, supra note 2, at 1714-17 (describing these as two distinct ethical bases for the contractualists’ general normative position). But the real entity theory’s validity might generate counter-arguments against this position. See infra notes 195-200, 207-09, 299-305 and accompanying text.

\textsuperscript{177} Gordon, supra note 2, at 1550 (describing the contractualist position).

\textsuperscript{178} Butler \& Ribstein, supra note 64, at 7-8.

\textsuperscript{179} See, e.g., Bratton I, supra note 5, at 1480; Hazen, supra note 174, at 284 (each describing the contractualist view without endorsing it).

\textsuperscript{179} See, e.g., Clark, supra note 2, at 1714-15.

\textsuperscript{180} See, e.g., Fischel, supra note 64, at 1269-70.

\textsuperscript{180} Id. at 1273. Recently, Fischel has taken an arguably different position on the question of corporations’ social responsibilities—that the matter is up to the contracting parties. An approach that emphasizes the contractual nature of a corporation removes from
By Fischel's rendering, the nexus-of-contracts theory apparently includes the fictional corporate person within its aggregate.181 Whether it is included or not, though, corporations seem incapable of having ethical duties. Business ethicists often claim that the criteria for an entity's subjection to moral responsibility are intent and the ability to act.182 It is not obvious how a purely fictional entity can possess either.183 Corporate moral responsibility's prospects are even dimmer under the typical aggregate/contractualist view that there is no distinct corporate entity of any kind; a nonexistent entity obviously cannot act or form intentions.184

(c) Nonmandatory Rules of Corporate Law

Because they value private autonomy and take an antiregulatory stance, many contractualists also attack mandatory rules of corporate law (including fiduciary duties), urging instead that the parties to the corporate contract should be free to set the terms of their interaction.

...the field of interesting questions one that has plagued many writers: what is the goal of the corporation? Is it profit, and for whom? Social welfare more broadly defined? ... Our response to such questions is: who cares? If the New York Times is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation's tempered commitment to a profit objective. ... Similarly, if a bank is formed with a declared purpose of giving priority to loans to minority-owned businesses or third-world nations, that is a matter for the venturers to settle among themselves.

EASTERBOOK & FISCHER, supra note 64, at 35-36.

Returning to the main point, some readers might object that even if there is no corporate entity to be the bearer of specifically corporate moral obligations, the firm's human members still have such obligations. Thus, the question of purely corporate moral responsibility has little practical impact because business people still are individually obligated to behave ethically. However, although a detailed discussion of the subject is beyond the scope of this Article, it sometimes matters whether specifically corporate moral obligations exist. This is most likely to be true where purely individual moral responsibility is not present. In such cases, corporate duties (if they exist) might be transferred to individual corporation members. See Michael J. Phillips, Corporate Moral Responsibility: When It Might Matter, 5 Bus. Ethics Q. (forthcoming 1995).

181. See supra notes 68, 70 and accompanying text.

182. "It has become standard in moral philosophy to explicate the concept of responsibility in terms of the notion of intentional agency." Peter A. French, Principles of Responsibility, Shame, and the Corporation, in SHAME, RESPONSIBILITY, AND THE CORPORATION 17, 19 (Hugh Curlett, ed., 1987). For an argument that corporations also should be morally responsible for their negligence, see Larry May, The Morality of Groups 84-89 (1987). If negligence is included, there seems little reason not to include recklessness as well.

183. See Phillips, supra note 54, at 438 (asking how a fictional entity that lacks physical existence and consciousness can act or form intentions).

184. Id. at 439. See also Jeffrey Neustadt, Bellotti and the Question of Corporate Moral Agency, 3 Columbia Bus. L. Rev. 683, 688 n.26 (1988) (aggregate view makes corporate moral agency impossible because it refuses to grant corporations any ontological status).

185. However, some observers argue that certain mandatory rules can be defended on contractualist premises. See, e.g., Bebchuk, supra note 2, at 1399, 1404-08; Hazen, supra note 174, at 286-87. See also Clark, supra note 2, at 1710-11 and sources cited therein.

186. E.g., Butler & Ribstein, supra note 68, at 7 (under contractual theory, terms of the corporate contract include provisions of state law, which are regarded as a standard form that the parties can accept or reject by, inter alia, drafting around the offending provisions); Fred S. McChesney, Economics, Law, and Science in the Corporate Field: A Critique of Eisenberg, 89 Colum. L. Rev. 1530, 1537-38 (1989) (any standard-form term supplied by the law must be an option that the parties can use if they want, but which they are free to contract around if they prefer). See also Bebchuk, supra note 2, at 1396-97; Clark, supra note 2, at 1706; Gordon, supra note 2, at 1531; Hazen, supra note 174, at 286 (each attributing similar views to the contractualists).

187. E.g., Bebchuk, supra note 2, at 1410-11; Clark, supra note 2, at 1706; Gordon, supra note 2, at 1550-51; Million, supra note 5, at 231 (all describing the contractualist position without adopting it).

188. See Easterbrook & Fischel, supra note 64, at 21-22 (a mandatory term might be justified where one is sure that it maximizes the joint wealth of the participants because it is the term they would have selected with full information and costless contracting, and where there are no adverse third-party effects); Gordon, supra note 2, at 1550-51 (to contractualists, the content of corporate law should reproduce the deal that typical parties would have reached if bargaining were costless, and the content principle of normative contractualism is that the sole purpose of corporate law ought to be wealth maximization).

189. E.g., Braston 1, supra note 5, at 1520 (contractualism of new economic theory "supports corporate control transactions against management objections"); see also Coates, supra note 5, at 837 (quoting Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1408 (1986) ("[t]o neo-aggregate theorists, the bidding wars that takeovers prompt are simply good, old-fashioned 'competition among various management teams'")).

190. See, e.g., Million, supra note 5, at 235 (contract theory suggests that target company management should be forbidden to block shareholders' access to the premiums takeover bid-
unrestricted market for corporate control also benefits society because it enhances economic efficiency by ensuring that corporate assets find their most highly valued uses.\textsuperscript{191} In particular, it encourages management to adopt the efficiencies necessary to minimize agency costs and ensure maximum returns for shareholders.\textsuperscript{192} If the encouragement fails and a takeover results, presumably the corporation’s assets will be deployed more efficiently by a new management team that will have the same incentives to maximize wealth and will suffer the same penalties if it fails to do so.

3. The Real Entity Theory and the Contractualist Agenda

Because the real entity theory asserts that a corporation is something more than the sum of its parts and the nexus-of-contracts theory denies this, both cannot be true.\textsuperscript{193} If the real entity theory is correct, therefore, the contractualist agenda obviously loses whatever support it derives from the assumption that a corporation is a collection of interconnected contracts and nothing else.\textsuperscript{194} This critical but easily stated point aside, the most important contemporary implication of the real entity theory’s validity is the possibility that corporations have moral duties that sometimes conflict with the contractualist agenda.

In the early 1930s, E. Merrick Dodd Jr. wrote an influential article that anticipated the arguments for corporate social responsibility.

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\textsuperscript{191} Ibid., supra note 5, at 837.

\textsuperscript{192} See, e.g., Coates, supra note 5, at 837; supra notes 31-32 and accompanying text, and if these groups are entitled to protection or to a say in the corporation’s affairs, the aggregate/contractualist view might support legal restrictions on takeovers. See, e.g., supra note 5, at 236-37, 239, 250. Because it restricts the shareholders’ ability to retain or sell their shares as they desire, however, this argument coexists uneasily with the economic autonomy so favored by the nexus-of-contracts approach. In addition, some contractualists argue that the aggregate’s shareholders can protect themselves against the risk of a hostile takeover by contract, or should be regarded as having accepted this risk and having received compensation for it if they did not expressly contract to avoid it. See id. at 238-40 (describing but not advocating this position).

\textsuperscript{193} See, e.g., Coates, supra note 5, at 235, 240; supra note 5, at 837 (each describing this view).

\textsuperscript{194} See supra note 64, at 110-14 (describing how the market for corporate control disciplines managers); supra note 5, at 235 (takeover threats are said to encourage management to maximize profits and asset values). On agency costs, see supra notes 168-69 and accompanying text.

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\textsuperscript{195} Dodd, supra note 45, at 1148.

\textsuperscript{196} Id. at 1154, quoting Address of Owen D. Young (Jan. 1929) as quoted in SABRE, THE NEW PLACE OF THE STOCKHOLDER 209 (1929).

\textsuperscript{197} Dodd, supra note 45, at 1153-54.

\textsuperscript{198} Id. at 1159-60.

\textsuperscript{199} Id. at 1160, quoting DICEY, LAW AND PUBLIC OPINION IN ENGLAND 165 (3d ed. 1920).

\textsuperscript{200} Dodd, supra note 45, at 1160.

\textsuperscript{201} See supra notes 180-84 and accompanying text. As supra note 180 observes, however, the absence of specifically corporate obligations to society and to the firm’s various stakeholders does not preclude personal moral duties of this kind. If such duties exist, perhaps purely corpo-
argument for the validity of the real entity theory. Dodd also failed to consider whether corporations are the types of real entities that can have moral obligations.\textsuperscript{202} Apparently he thought that business firms are sufficiently like natural persons to have such obligations,\textsuperscript{203} but he did not argue the point in any detail. Even assuming that corporations have ethical duties, Dodd did little to justify the particular duties he claimed they should meet. For example, he recognized that his overall position was consistent with the view that a socially responsible corporation's only obligation is to seek maximum profits for shareholders.\textsuperscript{204} Dodd's only argument against this view, and for his stakeholder-based conception of socially responsible corporate behavior was an assertion that public opinion was moving in his direction.\textsuperscript{205} But while this may have been true of the decade in which Dodd wrote, it presumably is not a position he would have maintained had he lived until the 1980s.

In spite of all these failings, however, Dodd at least used the real entity theory to sketch an argument that corporations have duties to certain nonshareholder constituencies. In the process, he made it clear that the debate over the nature of the corporation is critical to the question of corporate social responsibility. In all likelihood, however, this debate has little bearing on the second item in the contractualist agenda: the assertion that the rules of corporate law should be nonmandatory. The reason is that the real entity theory probably supports that assertion as well. Horwitz's arguments that the real entity theory helped legitimate and nourish big business around the turn of the century, especially his stress on the theory's antiregulatory implications,\textsuperscript{206} suggest as much. Only the most strongly justified mandatory rules, one might argue, should be imposed on real beings whose origins are nongovernmental and whose drives and interests deserve respect. In particular, such rules should not be based on the claim that because corporations are creatures of the state, state governments should be able to regulate them as they wish.


205. This subject is discussed infra at notes 300-06 and accompanying text.

206. See \textit{supra} note 122-25 and accompanying text.

\section*{4. Corporate Moral Rights and Their Implications}

As maintained throughout this section, if the real entity theory is true and if the corporate real entity assumes certain forms, corporations may have drives and interests that the law might sometimes be
obligated to respect; and also may have moral duties that restrict their freedom of action. But if corporations are sufficiently like natural persons to have such drives, interests, and duties, they may have rights—especially economic rights—as well. If so, would the existence of such rights undermine the corporation's asserted duties, support the contractualist agenda on all points, and justify additional legal rights for corporations?

There probably is less to these possibilities than initially meets the eye. Historically, there seem to be few clear links between the real entity theory and the emergence of corporate legal rights. Today, corporations have many such rights,210 rights they have acquired without much visible help from the long dormant real entity theory. For example, the corporate free speech right recognized in First National Bank of Boston v. Bellotti211 was not based on the notion that corporations are real entities with expressive interests the constitution must recognize. Instead, the main rationale was instrumental: If the marketplace of ideas is to function properly, corporations cannot be excluded from participating.212 As Horwitz has argued, moreover, the Supreme Court's 1886 decision in Santa Clara County v. Southern Pacific Railroad,213 which established that corporations are persons for Fourteenth Amendment purposes, occurred well before the real entity theory achieved hegemony in America.214

Corporate legal rights may get more support from the aggregate and contractual theories than from the real entity theory. Santa Clara County suggests as much. To Horwitz, the aggregate theory most likely underlay the Court's holding in that case. The reasoning was that because a corporation is nothing but the aggregate of its human components, and because those people undeniably are persons for purposes of the Fourteenth Amendment, corporate rights must be protected to protect the individual rights of the corporation's constituents.215 This argument seems easily extensible to other rights corporations might enjoy. If so, the aggregate and nexus-of-contracts theories

don't. This argument seems easily extensible to other rights corporations might enjoy. If so, the aggregate and nexus-of-contracts theories

may be better bases for corporate legal rights and aggressively pro-business policies than the real entity theory.

The real entity theory's validity also could mean relatively less support for such rights and such policies. The reason is that the real entity theory's ability to justify corporate moral rights would not necessarily undermine the possibility of corporate moral duties. Presumably, moral agents with rights and duties must accommodate them as best they can. This makes it much unlikely that corporate rights would invariably override corporate duties. In fact, those duties might trump corporate rights in many cases.

Therefore, the existence of corporate moral rights would not radically change the real entity theory's implications for the contractualist agenda. As just argued, it is unlikely that corporate moral rights would undermine all the corporate social responsibilities the real entity theory could help support. In addition, the existence of corporate moral rights probably would reinforce the real entity theory's two other implications for contractualism's practical agenda. Such rights could only strengthen the claim that the real entity theory, like the contractual theory, works against mandatory rules of corporate law.216 Further, if corporations are real entities with their own rights, presumably they deserve considerable protection against hostile takeovers.217

III. THE TRADITIONAL ARGUMENTS FOR THE REAL ENTITY THEORY

The previous section presumed that some theory of the corporation—most often, the real entity theory—might be true. In fact, it went further by assuming that the corporate entity may have moral rights and duties. Among law school academics, at least, neither position has enjoyed much support for some sixty years. One likely reason is the relatively skeptical, pragmatic mindset of many post-1920s Anglo-American legal scholars. This was evident among the 1930s critics of the real entity theory who dismissed it as medieval, mystical, unrealistic, and romantic.218 Even one of the theory's few recent sympathizers admits that its proponents "stretched metaphysical analogies
to lengths we find quaint in retrospect.”219 However, perhaps the most important reason those sympathizers now are so few, and why the contractual theory now dominates, is the liberal individualism to which many contemporary legal academics are attracted.220 To anyone who values human autonomy, personalized conceptions of the corporate real entity naturally provoke suspicion. Indeed, throughout the twentieth century organic theories of society, the state, and social groups have met violent attacks for their alleged anti-individualistic, and even totalitarian, implications.221

For these reasons, it is natural to wonder how any modern, rational, liberal-minded person ever could believe in the real entity theory of the corporation. This section attempts an explanation by describing and evaluating the main arguments turn-of-the-century Anglo-American legal scholars222 advanced in support of the real entity theory and against the aggregate theory.223 Most of these arguments, of course, are relevant to groups and business forms other than corporations. The section concludes by briefly considering how its findings affect section II’s position on the real entity theory’s practical implications. This Article takes the view that the real entity theory is more plausible (or at least less implausible) than any aggregate or contractual theory. But it is unlikely that the more persuasive versions of the theory support all the implications developed in section II.

A. Two Weak Arguments

Although the emergence of a new intellectual climate probably best explains the real entity theory’s demise,224 other factors may have contributed. Among them, perhaps, is the low quality of some traditional arguments for the theory. To test that opinion against readers’ evaluations, this Article briefly states and criticizes two such arguments.

1. The Felt Reality of the Real Corporate Person

As suggested, the belief that corporations are real entities has struck some as unrealistic, romantic, mystical, and even medieval. But it has not invariably been so. Indeed, some turn-of-the-century observers claimed to sense the corporate person behind its perceptible components. According to Harold Laski, for instance:

[W]e are compelled to personalise these associations. . . . The Bank of England is . . . the “little old lady of Threadneedle Street”; but no one would speak of seven distinguished merchants as a little old lady. The House of Commons is distinct from “its” members, and, no less clearly, it is not the chamber in which they meet. . . . Eton, we know well enough, is not six hundred boys, nor a collection of ancient buildings. Clearly, there is compulsion in our personalising. We do it because we must. We do it because we feel in these things the red blood of a living personality. Here are no mere abstractions

223. However, this section does not consider the concession/fiction theory of the corporation. One reason is that today few corporate theorists take the theory seriously because the emergence of general incorporation statutes deprived it of whatever relevance it once had. See Bratton II, supra note 5, at 432-34, 435-36. Also, while it remains technically accurate, the concession/fiction theory provides an incredibly impoverished description of corporations. The theory asserts that a corporation is simply an artificial state-created legal person. By stopping there, it implicitly suggests that most of the actors and activities that concern students of modern business are not essential to an understanding of corporations. While perfectly true so far as it goes, the theory also is perfectly trivial.

224. See supra notes 59-63 and accompanying text.
of an over-exuberant imagination. The need is so apparent as to make plain the reality beneath. 225

Because this Article is a qualified defense of the real entity theory, it cannot employ the most likely rejoinder to Laski's statement: that his felt corporate personality was simply the product of an overexuberant imagination. But as an argument for that theory, Laski's appeal to self-evidence obviously has serious defects. The main reason is that not everyone shares his perception. Of those who do, moreover, not all are willing to assume that it represents reality. Perhaps, for example, the "living personality" some people sense in institutions such as Eton is a metaphorical response to purely individual phenomena: the

225. Laski, supra note 17, at 404-05. See also Deiser, supra note 17, at 134 ("a suspicion is felt" that when people deal with corporations, they find their human components "plus something more—plus the corporation").

Although he did not develop the point, the last sentence of Laski's statement suggests an independent argument for the real entity theory, one based on its necessity. To Laski, this necessity apparently was the need for legal controls on large corporations. Hager, supra note 3, at 607 (Laski connected the real entity theory with the "law's evolving need to impose social responsibility" on corporate capital). For Laski and other real entity theorists, perhaps the most important of these controls was the imposition of criminal and tort liability on corporations, see generally id. at 585-611, which was felt to require a corporate mens rea and thus a real corporate personality, see supra notes 100-02 and accompanying text. Thus, the quotation's last sentence can be read as asserting that the need for corporate criminal and tort liability makes the corporate person's reality plain. However, Laski did not explain how the real corporate person's desirability could bring it into existence. Absent such an explanation, his assertion reduces to the following: if society somehow can impute fault to corporations, then society can control their misbehavior by rendering it criminal and tortious. But the obvious way to achieve this goal is to explicitly adopt the instrumentalist approach described earlier, eschewing talk of real corporate entities and instead advocating whatever legal devices are necessary to make corporations liable.

In other portions of his article, Laski also seemed to suggest that the law's evolution demonstrates the existence of organic corporate entities with real personalities and the muscle to make their wishes felt. For example, he can be read as suggesting that the demise of ultra vires (and of the conception/fiction theory on which it was based) resulted from the real corporate entity's drive to escape the chains imposed by a tight construction of its charter. See Laski, supra note 17, at 405-07, 410-13. He also might be read as asserting that increased corporate tort and criminal liability reflected the courts' growing tendency to recognize that corporations are real beings with a real mind and a real personality. See id. at 413-16. But there are other explanations for the demise of ultra vires and the expansion of corporate criminal and tort liability. Although the real entity theory helps justify the ultra vires doctrine's slide into insignificance, the aggregate theory does nearly as well in that respect. See supra notes 140-42 and accompanying text. More importantly, because tight charter limitations and strict enforcement of the ultra vires doctrine would inhibit corporations' ability to pursue new lines of endeavor, they make the economy less responsive to changing business conditions. As for the increase in corporate criminal liability, that expansion has been driven much more by the perceived need to control business misbehavior than by the belief that corporations are real entities capable of forming a mens rea. E.g., Metzger, supra note 100, at 62 and sources cited in n.431 (major stated purpose of corporate criminal liability is deterrence of misbehavior by corporate agents). Increased civil liability for corporations often is justified on risk-spreading grounds.

226. See infra note 233 and accompanying text.

227. Some turn-of-the-century real entity theorists, however, maintained that such a proof was unnecessary. To W. Jethro Brown, the proposition that a corporation is something distinct from the individual persons who constitute it is "too obvious to need proof" because "[t]he whole is more than its parts." Brown, supra note 17, at 366. An aggregate theorist, on the other hand, would say that the whole is the sum of its parts and nothing more. Strangely, the idea that the whole is more than the sum of its parts has been supported by no less a defender of individualism than Karl Popper. See Karl Popper, The Poverty of Historicism 82 (paperback ed. 1961) (three apples on a plate are more than a mere sum, because their being placed on the plate creates certain relations among them, relations that did not exist when the apples were apart).

228. Machen, supra note 17, at 259.

229. Id. n.8.

230. Id.
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The aggregationist presumably would reply that
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firm's membership. Although he failed to justify that assumption, he
had a separate argument for the existence of a persisting corporate entity.

[C]onsider for a moment any composite whole. Is a house merely the
sum of the bricks that compose it? This question cannot well be
answered in the affirmative; for you may change many of the bricks
without changing the identity of the house. . . . To come still closer
to the subject, take such a simple idea as "school" . . . . Was there
ever a schoolboy who had any difficulty in understanding that the
school is something distinct from the boys that constitute it? He does
not need to be told that the school may preserve its identity after a
new generation of boys have 'grown up, so that not a single pupil
remains the same, and though every teacher may have changed and
though the school building may have been moved to a different
location. He finds nothing strange or mystical in the conception of
the school as an entity.231

Thus, Machen concluded, "much instruction would be required to
make a healthy boy believe that the school . . . is a short-hand expres-
sion for the several members of the school . . . . so that every time a
new boy joins the school . . . . there is a new school."232

As this Article has shown, an aggregate theorist confronted with
Machen's statement would have to maintain that a new, if only
slightly different, "school" is created every time a new boy joins it.
Machen's point, however, was that people invariably perceive the
school as the same school in spite of the change in its membership.
The aggregationist presumably would reply that such a perception
arises only as a matter of convenience,233 and that if forced to think
the matter through, people would have to admit that the "school's"
identity actually has changed. Machen, though, believed that entities
such as schools and corporations have an objective reality.234 But he

refused to "waste words in discussing the nature of the existence of
[the] corporate entity," or to consider whether it is "ideal or mate-
rial."235 Nonetheless, he did assert that because corporations lack rea-
son and will, they are not like natural persons.236

Whatever one may think of Machen's assertions, they at least seem
to demonstrate the corporate entity's existence as a concept in thought
and language. As the linguist Sanford Schane maintained in a 1987
article, language treats the corporation not only as a real entity, but as
a real entity akin to a natural person.237 Nouns such as "corporation,
"university," and "church," he observed, usually are treated as
singular and as incompatible with plural verbs and pronouns.238

Also, people readily use cognitive verbs with institutional nouns, and
these verbs depict mental states.239 Furthermore, while some verbs that
describe activities are incompatible with institutional nouns, other ac-
tion verbs are used with such nouns.240 As depicted by the language,
therefore, corporations are singular entities (not aggregates) with cog-
nitive capacity and the ability to act in certain ways.

The obvious response to all of this, however, is that while Machen
and Schane make interesting linguistic points, their arguments do
nothing to demonstrate the corporate entity's real existence outside

231. Id. at 258-59. See also Laski, supra note 17, at 404-05 and supra text accompanying
note 225 (where similar examples are used).
232. Machen, supra note 17, at 259.
REASON 95, 96 (Liberty Press paperback ed. 1979) (wholes identified by collectivist approaches to
social science are no more than provisional theories, models, or mental constructs); Quinton,
supra note 14, at 10 (describing, but not adopting, the view that social objects like corporations
are logical constructions, which means that they "are not concrete things but abstractions,
convenient devices of abbreviation for thinking about the social actions and relations of individual
human beings"). See also De George, supra note 14, at 4 (describing, but not endorsing, the
view that supra-individualistic language is a "shorthand way of speaking about individuals taken
collectively").
234. Machen, supra note 17, at 260-61 (referring to corporations).
thought and language. The problem, as philosophers sometimes say, is how thought and language "hook onto" the world. Perhaps Machen and Schane thought either that language is a reliable guide to the world it purports to describe, or that it constitutes that world. But while arguments to each effect are available, real entity theorists apparently have failed to make them.

C. Group Socialization and Its Implications

1. Brown's Argument

Leaving further concerns about language and its implications to philosophers, this Article turns to an argument that probably is the best traditional basis for the real entity theory. After recognizing that the law views a corporation as a person distinct from the sum of its human members, W. Jethro Brown's 1905 article considered whether legal personhood is merely a useful device, or whether the law "is building on certain real and deep analogies to natural personality which exist wholly apart from legal recognition." This inquiry, he continued, requires an examination of human associations in general:

Whenever men act in common they inevitably tend to develop a spirit which is something different from themselves taken singly or in sum. No one who has had any experience as a member of a governing body, for example, can be ignorant of the fact that the decisions of such a body, even when they are unanimous, are often inexplicable if regarded from the point of view of the several characters of the individual members considered as so many units. When at a meeting of such a board a speaker begins with the statement, "I speak as a member of this board, and I say—", there will be reason to anticipate statements or proposals which are not adequately representative of the person making them. Under the inspiration of esprit de corps, the humane will give a cruel decision, the cruel a humane.

As Brown elaborated, by becoming a member of a group, "the individual is affected, however slightly, yet to some extent; qualities have been developed in him which cannot be explained save by reference to the union." After this, Brown went on to assert that groups such as corporations constitute real persons with a group will or group spirit. This corporate person, he said, is "neither a physical reality nor an organism," but rather "a representation of psychical realities which the law recognizes rather than creates." He did little or nothing, however, to justify these claims.

241. The naive realism which uncritically assumes that where there are commonly used concepts there must also be definite 'given' things which they describe is so deeply embedded in current thought about social phenomena that it requires a deliberate effort of will to free ourselves from it. HAYEK, supra note 233, at 96. See also Raimo Tuomela,uben and the Metaphysics of the Social World, 40 EDT. J. FOR PHIIL. SCI. 261, 263 (1989) (criticizing the "linguistic Myth of the Given," according to which "language is somehow logically tied to the world").

242. Kant described the problem of how anything in the mind can be a "representation" of anything outside the mind as the most difficult riddle in philosophy. Since the so-called linguistic turn in philosophy earlier in this century, that question has been replaced by the question "How does language hook onto the world?" but the replacement has not made finding an answer any easier.

243. One possibility is that because people use concepts to deal with the external world, a concept's widespread acceptance and persistence over time suggest that it corresponds to something in that world. Thus, because "corporation" and other institutional terms have long been accepted, there might be some reason to think that real corporate entities exist "out there." As noted earlier, however, the obvious response is that what really exists are aggregates of individuals, which are treated as entities mainly for linguistic convenience. Another argument apparently rejects the premise that there is an external world to which concepts might correspond. According to a position sometimes called conceptual relativism, different cultures may employ different conceptual schemes for defining what exists in the world, and it is impossible to rationally conclude that any such scheme defines reality better than any other. See, e.g., LITTLE, supra note 121 at 203; see generally id. at 202-14 (describing and criticizing conceptual relativism and a related position called belief relativism). Conceptual relativism easily can lead to the view that there is no external reality (or at least none that people can apprehend), and that the concepts each culture uses in its language constitute the only reality its members can have. For example:

[In discussing language philosophically we are in fact discussing what counts as belonging to the world. Our idea of what belongs to the realm of reality is given for us in the language that we use. The concepts we have settle for us the form of the experience we have of the world . . . . ] There is no way of getting outside the concepts in terms of which we think of the world. . . . The world is for us what we are presented through those concepts.

PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 15 (1958). See also Peter Winch, Understanding A Primitive Society, 1 AM. PHIIL. Q. 307 (1964) (aplying this general view to other societies and their conceptual schemes). Thus, if language continually treats corporations as real entities, presumably they are real entities under the only available test of reality.

244. Brown, supra note 17, at 367-68.
245. Id. at 368.
246. See note 179; see also De George, supra note 14, at 5-6 (arguing that individuals are constituted by their social relations). In the preceding quotation, therefore, Brown was referring to genuine qualitative change within the people composing the governing body he described. In particular, he was not noting the familiar fact that people in such situations sometimes retain their original identity while compromising on a decision none would have supported originally. On the latter tendency, see May, supra note 182, at 69-70 (presenting a hypothetical model of corporate decision making).
247. See Brown, supra note 17, at 369-72.
248. Id.
249. Apparently Brown thought that a group will comes into existence when the same purposes arise in each corporate member. Nevertheless, many persons' possession of the same
Nonetheless, by noting the qualitative changes people undergo after they enter groups, Brown identified a consideration highly relevant to the question whether corporations are real entities or aggregates. These palpable facts of human existence, which early twentieth century opponents of the real entity theory readily conceded, are regularly noted in organizational behavior texts. To be sure, these changes should vary within and among the various classes of people who form corporations. In some cases, the variations may be minute. For example, while one would expect the archetypal organization man to be significantly shaped by his corporate employment, it is unlikely that the average person changes appreciably after purchasing a corporation's stock for the first time.

2. Problems for the Aggregate Theory

Aggregate theories of the firm normally assert that a corporation is simply the sum of its human constituents and nothing else. From this, it seems to follow that the "corporation's" attributes are the sum of its human components' attributes and nothing more. But if people change after they enter corporations, the firm's attributes obviously cannot be the attributes those people possessed before they joined up. At any particular time, that is, the corporation's attributes (the sum of its members' attributes at that time) obviously differ from the sum of the attributes those people possessed prior to entering the firm. Thus, the aggregate theory fails to describe corporations if it asserts that a firm is the sum of its human elements as those people existed before forming the corporation.

The apparent solution to this problem is simply to say that at any particular time, "the corporation" equals the sum of its members as they exist inside the firm at that time. This seems to account for the socialization processes described earlier. Even this version of the aggregate theory, however, is problematic. For one thing, some organization theorists maintain that corporations and other institutions have properties such as profits that are not aggregates of their members' properties or reducible to their members' properties. Analogously, some foes of methodological individualism have asserted the existence of "social facts" or "societal facts" that cannot be satisfactorily derived from facts about individuals. On the other hand, those indivi-

254. E.g., ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 82 (1975) (according to principle of individualism, one should include "characteristics the individuals have because they are members of the group" when aggregating them to characterize the group).

255. See, e.g., MICHAEL KEELEY, A SOCIAL-CONTRACT THEORY OF ORGANIZATIONS 48, 230 (1988). As the title of his book suggests, Keeley rejects organismic conceptions of organizations. Nonetheless, he concedes the existence of irreducible group properties. His other examples of such properties include "deficits, goods, services, salaries, growth, survival, industrial accidents, pollution, [and] racial discrimination." Id. at 48. Maybe, however, one can regard these properties as nonhuman elements of a corporate aggregate. See supra note 33 and accompanying text.

256. Societal facts have been defined (with some circularity) as "any facts concerning the forms of organization present in a society." Maurice Mandelbaum, Societal Facts, in RYAN, supra note 222, at 105, 107. If corporations are analogized to society and if collective facts about corporations are analogized to social facts, then the debate over social facts seems relevant to the claim that corporations have irreducible group properties, and to the question of whether one can adequately characterize a corporation by aggregating its members as they appear within the firm. Collective facts about corporations probably include their organizational structure and many of the matters listed in supra note 255. Such facts, it is argued, cannot be completely reduced to facts that relate solely to individuals (usually psychological facts). See, e.g., id. at 107-13; Harold Kineald, Reduction, Explanation, and Individualism, 53 PSYN. SCI. 492, 494-503 (1986). In order to explain social facts in terms of individual properties, that is, one must include some "social" data among those properties. See, e.g., Lukes, supra note 222, at 126-27, 128-29; Mandelbaum, supra, at 108-09. It is suggested, however, that such explanations are not genuinely individualistic. More importantly, if explaining social facts requires that individuals be described by "social" concepts, maybe this suggests the reality of those concepts. See, e.g., Lukes, supra, at 125-26. If so, those concepts should be compelled to talk about the tribe first and not the tribe, the bank teller but not the bank?"

Nevertheless, methodological individualists sometimes profess to see nothing wrong with individualistic explanations of social phenomena that require "social" data. See e.g., Gregory Currie, Individualism and Global Supervenience, 35 BRIT. J. FOR PHIL. SCI. 345, 347 (1984); Graham MacDonald, Modified Methodological Individualism, 1985-86 PROB. ANALYST. SOC'Y 199, 201 (each describing that view). Sometimes it is denied that describing individuals in terms of social facts implies the existence of such facts. See e.g., Currie, supra, at 347. More importantly for present purposes, the debate may involve social concepts or theories rather than facts in the
duals also may give corporations \textit{too many} attributes. The reason is that among firm members' properties are many "private" or "personal" traits, attributes, and features that have nothing to do with corporate life as ordinarily understood.\textsuperscript{259} This problem, which also affects the real entity theory,\textsuperscript{258} has led at least one observer to suggest that a corporation's constituents should be \textit{roles} rather than human beings in all their richness.\textsuperscript{259}

None of these objections is necessarily fatal to the version of the aggregate theory just propounded. Nonetheless, even if aggregate theorists can adequately characterize corporations by summing their components, the nexus-of-contracts theory is attractive to many legal theorists can adequately characterize corporations by summing their malleable elements (here, human beings) as the fundamental building blocks for explaining other social phenomena (here, corporation's). Turning from explanatory to normative concerns, both the aggregate theory and the methodological individualism that underlie it draw much of their inspiration from individualistic values.\textsuperscript{260} As Bratton remarks, the nexus-of-contracts theory is attractive to many legal academics because it expresses a "liberal vision in which individual choice shapes social life."\textsuperscript{261} To the extent that people are shaped by

normal sense of the term. See, e.g., Harold Kincaid, \textit{Discussion: Eliminativism and Methodological Individualism}, 57 Ps. Sci. 141, 146 (1990) (nothing in the Kincaid article cited supra claimed to show the existence of real social entities over and above their members; instead, it involved theories and explanation); Mandelbaum, supra, at 111 (argument that social facts are irreducible to psychological facts may be reformulated as holding that sociological concepts cannot be translated into psychological concepts). See also id. at 114-16 (apparently refusing to argue that social facts exist as a matter of ontology). If so, a previous question returns: what does the language in which those concepts and theories are stated say about reality?\textsuperscript{257} For example, suppose that Joe, Jean, Art, and Suzy are employees of the XYZ Corporation. Suppose further that in their nonworking hours Joe raises hamsters, Jean races motorcycles, Art writes poetry, and Suzy works for the presidential campaign of Ross Perot. The point is that if a corporation's attributes equal the sum of its members' attributes as they exist within the firm, XYZ must include all these apparently noncorporeal matters.

258. See infra note 286 and accompanying text.

259. After arguing that collectives are real things of a certain kind, David Copp notes that "the account I have proposed implies that . . . my arm is a part of my university." Copp, supra note 14, at 265. Then, after remarking that "part" generally refers to "parts of a relevant kind," he suggests that it might be better to use roles rather than people to constitute collectives. See id. at 266-67; see also Phillips, supra note 54, at 444-45 (suggesting an imaginary slicing apart of concrete human beings make persons-in-their-corporate-aspect the firm's constituents).

260. E.g., Ernest Gellner, \textit{Hollam Versus Individualism}, in Broadacs, supra note 38, at 254, 256. "Individualists who attempt to save us, in the name of logic and liberty, from misconstruing our situation, are not wholly free at all times from the suspicion that a little propaganda for \textit{laisses faire} is being hitched on to these very general issues." Of course, real entity theorists may have their own (more or less communitarian) agenda as well. See, e.g., supra notes 147-53 and accompanying text (discussing the progressive implications of the real entity theory). And some academic holists may have a tangible interest in the success of that view. See infra note 309.


their social relations, however, those values may lose meaning. Where group socialization effects significant changes in people, that experience may shape those people much more than they autonomously shape the groups they join. In such cases, Bratton's "liberal vision" would be very imperfectly realized even if the groups in question can be described as aggregates. To take some extreme examples, suppose that the most tightly knit corporations—not to mention the military, monasteries, and even ant colonies—can be adequately described as aggregates of their members. Even so, who would regard such aggregates as havens for individualistic values or as contexts in which autonomous individual choices shape group life?

3. A Possible Contractualist Response

The problem that aggregationalists and contractualists must overcome is the tendency for social relations to shape people. Apparently what is needed are individualistic explanations of social phenomena that presuppose human beings with fairly stable traits and dispositions.\textsuperscript{262} Nexus-of-contracts theorists might assert that economic theory is ideally equipped to provide such explanations. Contractualists apparently assume that the units constituting corporations are not flesh-and-blood human beings, but rather are rational, utility-maximizing "economic men."\textsuperscript{263} Thus, they could plausibly maintain that because these abstract units retain their identity throughout their interactions with each other, they are not shaped or constituted by those interactions. If so, conceiving the corporation as a nexus-of-contracts among such parties would avoid all the problems just discussed.

This suggested argument, however, meets the familiar objection that the assumptions of economics are unrealistic—and hence untrue—because they do not capture human beings in their full variety and complexity.\textsuperscript{264} If so, it is difficult to see how the nexus-of-
tracts theory of the corporation could be true either. Nevertheless, perhaps an analogy to natural science might salvage this Article's suggested contractualist argument. Like economic theory, natural science employs entities and laws that are unrealistic in the sense that they do not fully reflect everyday experience. The argument could continue, however, that the laws and entities of natural science nonetheless are true because they enable people to predict a wide range of phenomena. Thus, if the nexus-of-contracts theory can achieve similar predictive successes with corporations, it also would deserve to be called true.

This reasoning, however, encounters several difficulties. Although the subject is best left to specialists, it hardly seems likely that the nexus-of-contracts theory has successfully predicted everything about corporations. More importantly, one is entitled to wonder what such successes would mean were they to occur. For example, even Judge Richard Posner recently conceded that because economic theories are not falsifiable but only confirmable, and because more than one theoretical explanation for a given set of observations can exist, such theories are tenuously grounded. Even if these problems were overcome, it still would be unclear whether one can validly reason from predictive success to truth. In fact, philosophers of economics who judge economic assumptions by their predictive success generally do not claim that such assumptions literally are true just because they enable successful predictions. Instead, they only are useful.

4. Implications for the Real Entity Theory

That human beings are shaped by their social relations, therefore, creates problems for the aggregate and nexus-of-contracts theories. It does not automatically follow, however, that corporations are real entities. Still, it is possible to argue from human malleability to the conclusion that corporations and other social groups exist in their own right. The basic idea underlying the argument is that any collection of people who interact on a regular basis, all of whom are what they are due to those interactions, has some claim to be called a real entity.

Perhaps the clearest statement of this view comes from an early twentieth century writer, L.T. Hobhouse, who cannot be accused of excessive fondness for organicist theories of society, the state, and social groups. Despite his antipathy to such theories, Hobhouse found it difficult to reject their starting point, the notion that organized society is something more than the individuals who compose it. "Every
association of men," he declared, "is legitimately regarded as an entity possessing certain characteristics of its own, characteristics which do not belong to the individuals apart from their membership of that association." After describing the family as such an entity, he turned to organized social groups such as corporations.

In an organized body, a profession, for example, a Trade Union, a business, a factory, there is again a whole numbering so many scores, hundreds, thousands of individuals as its members. In every case the members are in greater or lesser degree modified by the association into which they enter. Of the Trade Union, of the profession or business, certain things will hold true, which would not hold true of the individuals who belong to any of those associations if they did not belong to them. But again in the whole there is nothing but the coordinated or associated activity of the individuals which constitute it. This remains true though the organization may exist within the firm at any point in time may be an adequate description. Thus, if aggregate and contractual theorists can overcome all the problems presented by such an effort, perhaps the characterization of corporations depends on how one wants to regard them.

For at least two reasons, however, it may sometimes be preferable to regard Hobhouse's corporate systems as real entities. The first, a consideration this Article has alluded to repeatedly in preceding pages, concerns the problems posed by "micro" explanations of social phenomena whose human building blocks are not fixed. Because group systems such as corporations also undergo changes, however, perhaps the question is one of relative instability. But in some cases, collectivities seem to possess a continuity and fixity not found in the people whose lives they shape. To take two of Laski's examples, Eton and the House of Commons both have identities and traditions with some persistence over time—identities and traditions that arguably have shaped their students and members much more than any of them have shaped those two institutions. The second reason for preferring to characterize the corporate system as a real entity concerns the various

members are in greater or lesser degree modified by the association into which they enter,"276 this system's attributes cannot be described as the sum of those members' attributes as they existed before joining. As noted earlier, however, a summation of its members' attributes as they existed within the firm at any point in time may be an adequate description.277 Thus, if aggregate and contractual theorists can overcome all the problems presented by such an effort, perhaps the characterization of corporations depends on how one wants to regard them.278

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276. Id. at 173.
277. Id. at 173.
278. Id. at 173. See supra note 275.

In Hobhouse's view, then, a corporation might best qualify as a system: a collection of people united into a coherent whole by the mutual social relations that shape them.275 Because "[i]n every case the

...
linguistic arguments Machen and Schane advanced. Although those arguments prove inconclusive due to questions about language's ability to represent reality, they are not without persuasive force. For this reason, they bolster the Hobhouian arguments made here.

5. Objections

Despite its attractions, the version of the real entity theory just pronounced encounters several difficulties. They include the following objections.

(a) Unobservability

Some parts of the corporate system (e.g., the relations between its members) are not directly observable. For this reason and others, the corporate system is not directly observable in its entirety. Instead, its existence is inferred from things that can be observed—for example, the behavior of the corporation's members. The same generally is true, however, of various things ordinarily regarded as real—for example, some theoretical entities of physics and other minds. Only if something must be observable to be real, therefore, does the corporate system's imperceptibility defeat the claim that it exists.

(b) Overendowing the Corporate Entity

As noted earlier, if one takes seriously the claim that a corporation is simply its members aggregated, one almost certainly overends it with innumerable "private," noncorporate attributes. The aggregate theory's best apparent solution to this difficulty is to regard a corporation as the sum of its members' roles rather than the sum of those members in their individual totality. This contrivance poses problems for a theory that purports to explain social phenomena in terms of allegedly solid, independent, self-contained individual units. It also creates difficulties, however, for the view that corporations are system-like real entities. Nonetheless, those difficulties may be less severe in this case. If corporate systems are regarded as real things, perhaps one would be less apt to expect solidity and stability from their constituents and to be troubled by the absence of those traits. Indeed, the system's reality may not be affected much by the fluidity and instability of its constituents.

(c) Weak Socialization

This section's key argument against the aggregate and contractual theories and for the real entity theory urges that human beings are shaped by their social relations. But as even Brown recognized, the degree of that shaping varies considerably from case to case. Shareholders, for example, are less likely to be affected by their corporate affiliations than are long-time employees and managers. This might lead to the view that the "real corporation" consists only of those people who have been significantly shaped by their intragroup relations. For this reason, it also might compel the anomalous conclusion that many corporate shareholders are not really part of their firms.

Indeed, this argument stretches further. Today, there is some reason to believe that unlike the archetypal "organization men" of the 1950s, many managers and employees are so little attached to their firms that their corporate affiliations shape them in only the most minor ways. To the extent that this is so, it might make little sense to treat corporations as system-like real entities, even though they might be so described in theory. This is especially true in situations where the main forces shaping the firm are the autonomous values and drives of one person or a small group of people. Corporations dominated by one person or a few people and some close corporations might qualify.

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280. See supra notes 231-40 and accompanying text.
281. E.g., J.W.N. Watkins, Ideal Types and Historical Explanation, in Ryan, supra note 222, at 82, 89 (making this criticism of holism).
282. "Social wholes are not given to us as what we may call 'natural units' which we recognize as similar with our senses, as we do with flowers or butterflies, minerals or light rays, or even forests or self-infra-heaps." Hayek, supra note 233, at 96-97. But see Ernest Nagel, The Structure of Science: Problems in the Logic of Scientific Explanation 540 (2d ed. 1979); Lukes, supra note 222, at 123 (suggesting that people may really observe collective wholes such as parades, ceremonies, crowds, and court procedures).
283. E.g., Lukes, supra note 222, at 123 (other people's intentions); Quinton, supra note 14, at 9 (theoretical entities of natural science). Some philosophers of science, however, evidently base their doubts about the reality of natural science's theoretical entities on those entities' unobservability. See supra note 267. More importantly, some readers might maintain that this Article relies on the unobservability of "economic man" when maintaining that the nexus-of-contracts theory cannot provide a true account of corporations. See supra notes 256-69 and accompanying text. There, however, the problem was not that construct's unobservability—people sometimes do behave as rational wealth-maximizers. Rather, the problem was its failure to include all facets of human behavior.
284. See supra notes 257-58 and accompanying text.
285. See supra notes 246, 252 and accompanying text.
286. See, e.g., Robert Jackall, Moral Mazes: The World of Corporate Managers 59 (1988) (describing how modern managers employ the rhetoric of team play to advance their careers, while detaching from their organizations and even from themselves, and not internalizing the values they pronounce); see also id. at 59, 214 n.5 (where Jackall criticizes writers such as William H. Whyte and David Riesman for overstressing the extent to which managers identify with their firms).
(d) Authoritarian or Totalitarian Implications?

Finally, there is the familiar charge that viewing social groups as real entities has anti-individualistic, if not authoritarian or even totalitarian, implications. 287 However, the view of corporations advanced here, while perhaps unpalatable to strong libertarians, hardly implies that people are cells in a corporate organism to whose higher purposes they must (and perhaps should) submit. Although he regarded groups as real entities, Hobhouse refused to go so far. 288 Moreover, as just suggested, today many corporation members seem relatively unaffected by their group affiliations. Due to multiple group memberships and personal attachments, furthermore, corporations do not totally preempt those people's lives in any event. As a result, the corporate real entity depicted here is something less than a full-blooded moral organism. And even if corporations are group-persons, how could that fact's unpalatable implications make it false? 289

D. The Real Entity Theory's Implications Reconsidered

1. A Summary

Some traditional arguments for the real entity theory seem unconvincing when taken in isolation. Laski's felt corporate reality and Machen's equation, for example, would persuade only the already converted. Although Machen's and Schane's linguistic observations are interesting and suggestive, they fail to convince without some demonstrated link between language and the reality it purports to describe. Nevertheless, all these arguments at least might bolster more persuasive rationales for the real entity theory. Brown and Hobhouse arguably provide such rationales. But the picture of corporations their arguments suggest—a system of interacting individuals whose identities are shaped by that interaction—hardly is immune to criticism. In addition, some might alternatively regard that "system" as an aggregate of its members as they exist within the firm. The same human malleability that gives Brown's and Hobhouse's arguments some plausibility, however, also creates difficulties for such an attempt at aggregation. Even if that attempt succeeds, moreover, individualists may not find the result very satisfying. Finally, it seems unlikely that corporate contractualism and its underlying economic assumptions can rescue the aggregate theory from the many problems afflicting it.

2. The Validity of the Real Entity Theory's Asserted Implications

All things considered, therefore, viewing corporations as system-like real entities may pose fewer problems than regarding them as aggregates or as collections of interrelated contracts. Assuming arguendo that corporations are real entities of this kind, how would that fact affect section II's conclusions about the real entity theory's implications?

(a) Horwitz's Six Implications

Although some of the conclusions in section II depend critically on the nature of the corporate entity, this is not true of Horwitz's six implications of the real entity theory. Indeed, three of them—(destroying any charter-based rationale for state regulation of corporations, undermining ultra vires, and undoing the states' ability to exclude foreign corporations)—depend less on a clearly demonstrated real entity than on the concession/fiction theory's invalidity. 290 Three others—(undermining shareholders' intrafirm power position in general and the rule of unanimous shareholder consent to mergers and consolidations in particular, plus limited liability for shareholders)—arguably coincide with almost any kind of corporate entity. 291 Thus, all of Horwitz's arguments seem consistent with the assumption that corporations are system-like real entities.

(b) Hager's Progressive Implications

Of Hager's various "progressive" implications of the real entity theory, only two seem relevant here. 292 For these two implications, however, the nature of the corporate real entity is significant. One of them, Hager's claim that the real entity theory legitimizes participatory, communitarian institutions intermediate between big govern-

287. See, e.g., supra note 221. A related concern is that, regardless of whether real entity theories really have strongly authoritarian implications, those theories provide useful rhetorical ammunition for those with authoritarian leanings. See, e.g., Kamay, supra note 255, at 51-52. But can this possibility justify suppressing inquiry into the nature of corporations?

288. See supra note 276 and accompanying text.

289. "If these [anti-individualistic] consequences followed from what is the case, the fact that they are unpalatable would not be an adequate reason for denying the view [that society is a super-entity]." De George, supra note 14, at 10 (who then denies that social groups are such entities).

290. See supra note 122-25, 138-44 and accompanying text.

291. See supra notes 126-37 and accompanying text.

292. As discussed earlier, Hager's claim that corporate real entities are public in nature and hence can justly be regulated probably does not follow from the theory. See supra notes 156-58 and accompanying text. For his disagreement with Horwitz over the real entity theory's implications for the majority-vote rule on mergers and consolidations, see supra notes 159-60 and accompanying text, does not seem to depend on whether corporations are system-like real entities.
ment and an atomized mass of individuals, may well require a more organic corporate entity than anything offered here. The other, corporate criminal and tort liability, depends partly on a question addressed below: whether corporations are the kinds of entities that can have moral duties. Whether Hobhousian corporations are such entities remains unclear. Thus, the assumption that corporations are system-like real entities seems insufficient to support Hager's two most relevant assertions.

(c) The Contractualist Agenda

If corporations are real entities of any kind, it is difficult to see how the nexus-of-contracts theory can be true. Even if the real entity theory is implausible, moreover, it is questionable whether the aggregate and nexus-of-contracts theories fare much better. If the contractualist agenda depends on the nexus-of-contracts theory's validity, therefore, that agenda collapses under either assumption.

Nonetheless, the real entity theory probably gives independent support to one element in the contractualist agenda—the view that rules of corporate law should be nonmandatory. The real entity theory's validity, however, might provide additional reasons for rejecting that agenda's two other components. As this Article explained above, if corporations are the kinds of real entities that can have moral obligations, the main contractualist argument against corporate social responsibility cannot stand, and the contractualist position on hostile takeovers faces difficulties. Even though there is some disagreement on the criteria for determining whether an entity can have ethical obligations, many observers have assumed that those tests are intent (or some other culpable mental state) and the ability to act. A Hobhou-

sian corporation should meet the latter standard because it can act through the people who compose it. But what about the ability to form intentions or other guilty mental states? Nothing in the previous account suggests that a corporation is a group-person with a real mind and a real will. Although the leading theory of corporate moral responsibility in the business ethics literature asserts that corporations are responsible because they have an internal decision making structure that can be described as acting intentionally, this position is controversial. Another possibility is to say that because a corporation's human members are part of that firm, their culpable mental states are also the corporation's culpable mental states. Whether one may regard those states as genuinely corporate, however, appears unclear. For all these reasons, it is debatable whether corporations-as-systems have moral obligations whose breach would render them blameworthy. This conclusion, however, does not affect the previous paragraph's contention that the nexus-of-contracts theory cannot justify the contractualist agenda.

IV. Conclusions

This Article's aim has been to reappraise the real entity theory of the corporation. Along with several commentators, it maintains that the theory, if valid, would have certain implications for the law and for related policy disputes. Although some of these implications are not live issues, others plainly are significant today. Many of the theory's modern implications, however, depend on the nature of the real entity asserted. As this Article has asserted, the most plausible version of the real entity theory fails to clearly support all those implications. Nevertheless, that version of the theory and the arguments underlying it do have an important negative consequence: They undermine the aggregate and nexus-of-contracts theories and much of the practical agenda developed by proponents of the latter.

If nothing else, therefore, this Article suggests that the contractual theory's current popularity is undeserved, and counsels skepticism about the legal and policy conclusions which allegedly flow from it.

302. Cf. Geilker, supra note 260, at 257 (suggesting, in a 1950s essay, that no one would seriously advocate a "group mind" theory these days).

303. See, e.g., French, supra note 182, at 19-38; Peter A. French, The Corporation as a Moral Person, in May & Hoffman, supra note 221, at 133, 141-48; see also Wehman, supra note 15, at 34-40 (explaining French's theory).

304. See generally Curtler, supra note 182 (containing several essays that either attack French or state different views). See also Velaqer, supra note 33, at 9 (French's theory fails because corporate policies and procedures are not genuine minds with real intentions).

305. See Phillips, supra note 54, at 453.
But this Article also suggests skepticism about the whole enterprise of postulating theories of the corporation and deriving practical conclusions from them. If the arguments in section III are even minimally correct, the real entity theory is only somewhat more plausible than its aggregate and contractual counterparts. As Horwitz has observed, moreover, "[t]he argument between entity and contractual theorists during the 1880s and 1890s was, at bottom, a conflict over whether the individual or group was the appropriate unit of economic, political, and legal analysis." That argument, in turn, is part of a larger 300-year dispute between methodological individualists and holists, a dispute which continues to divide philosophers and social scientists. Perhaps because they perceive that fundamental values are at issue, participants in the debate tend to regard their positions as self-evident. For this reason, as well as the inherent difficulty of the issues it presents, no one should expect a truce in the war between holists and methodological individualists any time soon. This being the case, it is foolish to assume that any particular theory of the corporation is incontestable.

At present, then, theories of the corporation are poor foundations on which to base a practical agenda. This is not to say that such theories always lack clear implications. Rather, it is to say that those implications are no more secure than the theory on which they allegedly rest. If corporate theory is a weak reed, then what can take its place? One obvious possibility is a retreat to Deweyian instrumentalism. To be sure, that approach has its problems—most notably, its overconcern with consequences and its apparent failure to develop satisfactory moral criteria for assessing them. But it does not preclude the application of such criteria. Rather than relying on a dubious theory, for example, supporters of the contractualist agenda might make their case by detailing how the agenda's consequences would further values such as autonomy and wealth or utility maximization.

No doubt instrumentalism is less satisfying than the possession of a descriptively sound theory of the corporation with definite moral and legal implications. If this Article's arguments are at all correct, however, no such theory is either in hand or on the horizon. Absent such a theory, scholars concerned with corporate law issues simply will have to muddle through. Indeed, that is arguably what they did from the 1920s through the 1970s. Based on this experience, one can imagine worse fates.

306. Horwitz, supra note 5, at 220.
307. The ontological questions concern what you recognize as the factors you will invoke to account for social life [. . .] the terms you accept as ultimate in the order of explanation. The big debate in this area, which has been raging now for more than three centuries, divides atomists from holists, as I propose to call them. The former are often referred to as methodological individualists.
309. See, e.g., Gellner, supra note 260, at 256 and supra note 260 (suggesting that methodological individualists are sometimes inspired by laissez faire views). Of course, holists tend to have their own, broadly communitarian, agenda. See, e.g., supra notes 150-51 and accompanying text (some progressive real entity theorists supported the theory because it could legitimize intermediate institutions that could serve as new communities for a mass of increasingly atomized and isolated individuals).
310. See generally supra notes 86-102 and accompanying text. Business ethicists, however, probably lack this option. In their debate over corporate moral responsibility, see, e.g., supra notes 301-06 and accompanying text, the main concern is whether corporations are morally obligated to behave in a socially responsible fashion even though the law does not compel them to do so. It is difficult to see how such obligations can be created using a method analogous to the method legal individualists use to justify legal rules. That method, basically, is to make the adoption of a particular legal concept or rule (e.g., corporate personhood) depend on its consequences. See supra notes 90-98 and accompanying text. But if corporate moral responsibility depends on the existence of a real corporate entity with certain attributes, how can the good consequences of its existence bring such an entity into being? Thus, business ethicists must concern themselves with the nature of corporations.
311. See supra notes 103-12 and accompanying text.
312. See supra note 174 (suggesting that such values can serve as independent ethical bases for the contractualist agenda, and also suggesting that contractualism's normative goals may not logically follow from the nexus-of-contracts theory).
313. See Bratton I, supra note 5, at 1501-10. In this account, Bratton "looks only to corporate doctrine, drawing on the definitions of the firm operative in treaties and other doctrinal work from the mid-nineteenth to the mid-twentieth century." Id. at 1501. These sources, he says, state a "doctrinal theory of the firm" that survived both the late nineteenth and early twentieth century debates about the nature of the corporation and the demise of corporate theorizing after 1930, and that continue to inform corporate doctrine today. Id. at 1501-02; see also id. at 1510 (discussing the post-1930 period). This doctrinal theory of the firm, Bratton continues:

[M]ediated the tensions [between individualism and the demands of collective enterprise]. It amalgamates the theoretical alternatives, averting controversy by balancing the variant points of view advanced in more purely theoretical contexts. . . . And it appears to have performed a useful function: As a basis of agreement on basic conceptions, it has permitted corporate law decision makers to subordinate theoretical concerns and look to the particulars of situations in deciding cases.

Id. at 1502.