Theories of Corporate Groups: Corporate Identity Reconceived

Virginia Harper Ho[*]

[*] Associate Professor, University of Kansas School of Law. The author wishes to acknowledge the helpful comments of David Millon, Justin Levitt, Darrell Miller, Christopher Drahozal, John Head, Laura Hines, Lumen Mulligan, Stephen Ware, Elizabeth Weeks Leonard, and attendees at faculty workshops at the University of Cincinnati School of Law and the University of Kansas School of Law. This study was completed with the generous support of a New Faculty Research Grant awarded by the University of Kansas and research assistance provided by Ashly Basgall and Blake Wilson. Any remaining errors are mine alone.

I. INTRODUCTION

Theoretical debates about the nature of the corporation have raged for over a century, with competing understandings of the corporation holding sway in different regulatory arenas and each view making competing claims for normative supremacy.[1] Far less attention has been devoted to the nature of the corporate group.[2] This is perhaps surprising given the dominance of corporate groups in the global economy and the challenges they pose to traditional legal systems and governance structures.

A number of ready explanations for this inattention to the corporate group come from within corporate law itself. First, contemporary understandings of the firm as a "nexus of contracts" encompass both individual corporate entities and large corporate groups equally.[3] Because the corporate group is viewed simply as the aggregation

[1] Numerous sources survey the primary positions. *See, e.g.*, Reuven S. Avi-Yonah, Citizens United *& the Corporate Form*, 999 WIS. L. REV. 999 (2010); Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990); Michael J. Phillips, *How Much Does Corporate Theory Matter? A Response to Professor Boatright*, 34 AM. BUS. L.J. 239 (1996). Early contributions include John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916); Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253 (1911); *see also infra* Part II.

[2] This is not, however, the case beyond corporate law. A rich body of literature on corporate groups exists within management theory and organizational studies, and regulatory scholars also have wrestled with the problem of enterprise or group liability. *See, e.g.*, *infra* Part II.A., C. (drawing on this scholarship). Notable contributions within corporate law include the work of Phillip Blumberg, Peter Muchlinski, Janet Dine, and Larry Catá Backer. *See, e.g.*, PHILLIP BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY (1993); JANET DINE, THE GOVERNANCE OF CORPORATE GROUPS (2000); PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW (1995); Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 TUL. L. REV. 541 (2006); Phillip Blumberg, *The Increasing Recognition of Entity Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295 (1996).

[3] *See generally* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985); *see also* FRANK H.

of its constituent entities, there is little need in corporate law for rules concerning the internal "contracts" among the entities comprising the corporate group or for rules directed at the corporate group as a whole.[4] Such rules are confined largely to select doctrinal arenas, such as veil-piercing and majority shareholder duties. In addition, corporate law in the United States does not recognize the corporate group as a separate legal entity form, nor has the United States adopted a federal incorporation approach.[5] As a result, the organization and internal affairs of each corporation, regardless of its place in a larger "corporate family," are governed separately by the law of the jurisdiction where it is incorporated.[6]

Another explanation is that the scope of corporate law is limited to enabling efficient implicit or explicit contracts among the contributors to the corporate enterprise. It is therefore "private" rather than "public" law.[7] Unless current corporate law rules are impeding efficient contracting within or among corporate groups, further regard for the nature of the corporate group is unnecessary. The nature of corporate groups, on the other hand, becomes relevant primarily in public policy debates about "corporate power."[8] Yet setting bounds on corporate conduct is more clearly the task of other areas of law, such as antitrust, environmental, labor, consumer protection, or tax

EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12–13 (1991) (applying contractual theories of the firm to conglomerates and other corporate groups).

[4] *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305, 311 (1976); *see also* W. RICHARD SCOTT & GERALD F. DAVIS, ORGANIZATIONS AND ORGANIZING: RATIONAL, NATURAL, AND OPEN SYSTEM PERSPECTIVES 232 (2006) (observing that Jensen and Meckling's contractual vision of the firm does not distinguish "internal" contracts within a particular corporation or corporate group from "external" contracts with third parties; both are contracts for inputs and outputs of the firm).

[5] *But see infra* note 27 and accompanying text (introducing comparative perspectives).

[6] *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 302–10 (1971) (regarding jurisdiction over the corporation's "internal affairs").

[7] *See generally* Millon, *supra* note 1 (discussing the public-private tension and its influence on theories of the corporation). Millon ultimately asserts that "corporate law is public law." *Id.* at 261; *see also* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES 29–39 (2006) (arguing for a vision of "corporate law as public law").

[8] It is no accident that much of the debate over the nature and purpose of the corporation had its origin in the 1930s, when the influence of corporations on society began to grow. *See* discussion *infra* Part II.B.

law—not corporate law.[9] Indeed, many regulatory regimes addressing corporate activity in the United States already extend their reach beyond the bounds of a single corporation to the corporate group, and, in some cases, even extraterritorially.[10]

At base, perhaps, is the sense that there is little value in theorizing about corporate groups. The skeptic might argue that if historical controversies over the nature of the corporation are any guide, their application to corporate groups may well have little bearing on actual business practice or on how courts decide cases where corporate obligations are in dispute.[11] This Article challenges these contentions.

Beginning from established theories of the firm, Part II extends standard views of corporate personhood to develop alternative theories of corporate groups. Conceptions of the firm within the field of economics are invaluable in explaining the origins of corporate structures and, indeed, the evolution of corporate groups.[12] However, not all legal rules, whether from a liability, regulatory, or governance standpoint, that fit the unitary corporate entity can be applied easily to the corporate group—as the proliferation of regulations directed at corporate groups attests.[13] Acknowledging these differences as a matter of law requires perspectives of the corporate group that recognize their complex organizational structure and diversity as well as standards for identifying where, as a matter of legal doctrine, differences between the firm as a single entity and the firm as a complex organization matter. Yet existing theories of corporate personhood have been articulated and interpreted largely at the level of a simple unitary organization.[14]

Much of the attention directed toward corporate groups by corporate law scholars has focused on veil piercing doctrine and the application of limited liability at the enterprise level, within or across the corporate group.[15] This Article does not challenge these principles. Instead, it argues that alternative theories of the corporate

[9] *See, e.g.*, Daniel Fischel, *The Corporate Governance Movement,* 35 VAND. L. REV. 1259, 1271–74 (1982). *But see* GREENFIELD, *supra* note 7, at 29–32 (critiquing this view).

[10] *See infra* notes 110–12 and accompanying text (surveying these regulations).

[11] *See infra* notes 147–52 and accompanying text (introducing these views).

[12] *See* sources cited *supra* note 3.

[13] *See infra* notes 110–12 and accompanying text (surveying these regulations).

[14] *See infra* notes 94–97 and accompanying text.

[15] *See infra* Part II.C.1.

group may lead to different legal rules and case outcomes even if existing limited liability rules are assumed.

This Article also responds to the broader critique that theories of corporate personhood are of little practical moment, whether from a positive or a normative standpoint. In fact, in two successive terms, the Supreme Court has had opportunity to consider several cases where the courts' (and legislatures') understandings of the corporation and of corporate groups played a foundational role. Part II of this Article weighs the normative implications of theories of the corporate group and what they contribute to evolving conceptions of corporate accountability. Part III of this Article then illustrates the utility of these theories by applying them in an analysis of the Supreme Court's recent decisions in *Citizens United v. FEC,* decided in early 2010,[16] *Janus Capital Group, Inc. v. First Derivative Traders,* decided in June 2011,[17] and *Kiobel v. Royal Dutch Petroleum Co.*, a case now pending before the Court.[18] This analysis sheds light on some of the inconsistencies and weaknesses within these cases that closer attention to the corporate group might have clarified and suggests how alternative theoretical perspectives of the corporate group matter to case outcomes.

The evidence presented here from a range of doctrinal arenas confirms that no one theoretical approach is likely to be predictive of case outcomes, nor is there a single approach that offers the "best" normative guide for courts and regulators in all doctrinal domains. Accordingly, the argument made here is not for convergence in perspectives on corporate groups across all areas of the law. Rather, it is that in different areas of the law, theories of the corporation, and, by extension, of corporate groups can be used to evaluate or legitimate particular legal rules.[19] In this effort, the conception of corporate groups that is optimal (and indeed the normative goal defining what "optimal" means) must be determined in light of the policy objectives motivating that area of the law and the realities of corporate prac-

[16] 130 S. Ct. 876 (2010).

[17] 131 S. Ct. 2296 (2011).

[18] 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (U.S. Oct. 17, 2011) (No. 10-1491).

[19] *See generally* Horwitz, *supra* note 1, at 176 (demonstrating the influence of legal theory on the evolution and legitimacy of legal rules that permitted the emergence of "big business"). On the legitimating function of corporate theory, see also Millon, *supra* note 1, at 241–43 (critiquing Horwitz and noting that the relationship between legal theory and social practice is, in fact, interdependent, such that practice can also legitimate one theory over another).

tice.[20] There is therefore an even greater need for an analysis of multiple perspectives since explicit recognition of the differences among potential approaches is the best route to greater predictability within discrete areas of the law.

To guide such choices, Part IV proposes a preliminary framework for identifying which approach offers the best foundation upon which alternative visions of the corporate group may lead to different legal rules or case outcomes. This analysis emphasizes the ways in which conceptions of the personhood of the corporation and, by extension, of corporate groups, have direct bearing on critical policy choices regarding corporate rights and duties, power, and voice.

II. FROM THEORIES OF THE CORPORATION TO THEORIES OF CORPORATE GROUPS

One of the fundamental defining characteristics of the corporation is that it constitutes a separate legal person with rights and obligations distinct from those of its owners.[21] Although this basic proposition is nearly universally recognized worldwide,[22] considerable controversy, within which the Supreme Court has recently become embroiled, surrounds notions of corporate personhood.

Rarely within this debate, however, have commentators considered how questions of corporate personhood play out in the context of the corporate group. Despite the fact that many regulatory regimes in the United States and elsewhere now approach the corpo-

[20] This conclusion is in line with earlier observations by Philip Blumberg. *See* BLUMBERG, *supra* note 2, at 120 ("Enterprise law . . . reflects very different considerations as the nature of the fundamental jurisprudential problem before the court changes . . . . [A]nd it is foolish to expect that any consistent or transcendental body of jurisprudence will emerge. The choice between enterprise principles and entity law will reflect the values and interests at stake and the fundamental nature of the [decision presented to] the court.").

[21] The defining features of the corporate form are legal personality, limited liability for owners and managers, shared ownership by investors of capital, delegation of management under a board structure, and transferability of shares. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439–40 (2001); *see also* EASTERBROOK & FISCHEL, *supra* note 3, at 11 ("Sometimes it is said that the distinctive features of the corporation are limited liability, legal identity, and perpetual existence . . . .").

[22] *See, e.g.*, DAVID MILMAN, NATIONAL CORPORATE LAW IN A GLOBALISED MARKET 60–61 (2009) ("This is a *sine qua non* of any corporate law model." (citing recognition of this principle by courts in both common and civil law jurisdictions, as well as by international courts)); Hansmann & Kraakman, *supra* note 21, at 439–40 (observing that full legal personality is one of the "core functional features of [the corporate form that] were essentially identical" worldwide by the end of the nineteenth century).

rate group as a single economic enterprise,[23] the question of what the corporation actually "is" continues to be analyzed as if the typical business entity were a single closely held private corporation. In actuality, of course, for decades the corporate group has been the predominant form of business organization for all but the smallest businesses.[24] Most major public corporations are in fact part of corporate groups that contain hundreds or even thousands of affiliated companies around the world.[25]

This Article takes these complex corporate organizations as its focus. This Part first introduces the primary understandings of corporate personhood that have been advanced over the past century and then extends them to corporate groups. It begins by introducing some of the core concepts that are essential to the discussion.

A. Defining the "Corporate Group"

Defining the corporation itself is of course fairly simple—it is a legal entity possessing the characteristics defined by the corporate law of its state of incorporation, or if beyond the United States, by the law of the jurisdiction in which it is formed.[26] Although what constituencies together form the "corporation" is at times unclear, state corporate law, the terms of the corporate charter, and other contractual mechanisms establish the corporation as a separate legal person and delimit its formal boundaries.

Defining the corporate group is a more complicated exercise. In Germany and France, the corporate group is a distinct entity form governed by its own body of law.[27] In the United States, however, there is no entity form corresponding to the corporate group, nor is there a uniform definition.[28] For convenience, academic commenta-

[23] *See infra* text accompanying notes 109–112.

[24] David Sugarman, *Corporate Groups in Europe: Governance, Industrial Organization, and Efficiency in a Post-Modern World*, *in* REGULATING CORPORATE GROUPS IN EUROPE 13, 20 (David Sugarman & Gunther Teubner eds., 1990).

[25] For a more complete discussion of multinational enterprises, see *infra* Part III.C.

[26] *See supra* note 21 (discussing these fundamental characteristics).

[27] *See* DINE, *supra* note 2, at 57–59 (describing the German "*Konzernrecht*"); JOSÉ ENGRÁCIA ANTUNES ET AL., REPORT OF THE REFLECTION GROUP ON THE FUTURE OF EU COMPANY LAW 59 (2011), *available at* http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf (surveying current practice within the European Union). The European Commission is currently considering whether to adopt uniform rules for corporate groups. *See generally id.* at 59–76.

[28] *See, e.g.*, Sugarman, *supra* note 24, at 25 (discussing the complexities surrounding this basic definitional issue).

tors and the courts use generic terms, such as the firm, the company, and even the corporation to refer to the corporate group.

At the outset, any effort to define the corporate group must begin by acknowledging that both the "corporation" and the "corporate group" are "firms" in the Coasian sense. That is, both are economic organizations that emerge when organizing production internally is less costly than coordinating transactions through market exexchange.[29] In other words, the corporate form or "hierarchy" is an alternative to markets.[30] The economic boundaries of the firm as an enterprise need not, and indeed, frequently do not, however, correspond in any transparent way to its legal boundaries.[31]

The key defining characteristic of a corporate group is typically common ownership. The prototypical corporate group includes a parent company and its direct and indirect subsidiaries, each with a separate legal identity and its own legal rights and obligations.[32] Assets of the corporate group may be held in trusts, special purpose vehicles, and other separate legal entities owned by one or more members of the corporate group.[33] The corporate group may, and in fact

[29] Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 393 (1937) (defining a firm as "the system of relationships which comes into existence when the direction of resources is dependent on an entrepreneur" rather than on the price mechanism); *see also* EASTERBROOK & FISCHEL, *supra* note 3, at 8 (defining the "firm" simply as "an aggregation of people banded together for a longer period," as compared to the short-term economic transactions that define a "market"); SCOTT & DAVIS, *supra* note 4, at 221–25 (explaining transaction cost theory and the origin of firms); Harold Demsetz, *The Theory of the Firm Revisited*, 4 J.L. ECON. & ORG. 141 (1988).

[30] *See generally* WILLIAMSON, *supra* note 3 (applying a transaction cost analysis to explain the emergence of organizational hierarchies as an alternative to markets). *See also* OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975) (exploring the role of market failure in the rise of organizational hierarchy and of organizational failure in the assignment of economic activity to the market).

[31] *See generally* Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 VA. L. REV. 515 (2007).

[32] *See, e.g.*, BLUMBERG, *supra* note 2, at 247 ("[S]tock ownership or control is the wellspring of 'control' in corporate groups . . . ."); DINE, *supra* note 2, at 40. This is the definition adopted by one of the few U.S. statutes that incorporates the term, "corporate group." *See* 12 C.F.R. § 32.5(c), (d)(1)–(2) (2011) (defining bank lending limits that apply to the "corporate group," defined based on majority equity ownership by one entity of another, and distinguishing other "common enterprises," which may arise, inter alia, if borrowers "are related directly or indirectly through common control" or are financially interdependent).

[33] *See, e.g.*, DEL. CODE ANN. tit. 8, § 271(c) (2012) (defining assets of a "subsidiary" to include those of "any entity wholly-owned and controlled, directly or indirectly by the corporation, . . . [including] without limitation, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, and/or statutory trusts").

typically does, include limited liability companies (LLCs) and other entities that are not formally corporations.[34] Corporate groups can therefore be seen as "hybrid arrangements between contract and organization," having a "paradoxical character of multiplicity and unity."[35]

Common equity ownership is not the only way for firms to enjoy the benefits of cooperative economic activity. As sociologists John Scott and Gerald Davis point out: "Between market (arm's length exchange) and hierarchy (vertical integration) lie a range of alternative means of governing exchanges that may be less costly, including hierarchical contracting . . . joint operating agreements, or other hybrid forms,"[36] including franchisees, distributors, licensees, and other independent contractors. Other common arrangements are "strategic alliances" or joint ventures between two otherwise independent companies where no legal entity is jointly established and owned by the joint venturers.[37] In areas of the law where equity ownership is a necessary criterion, a number of these common contractual relationships may lie beyond the boundaries of the corporate group. The contractual arrangement will generally itself indicate whether the parties' arrangement is intended to create joint rights and obligations or otherwise fall within the bounds of the corporate group. For example, McDonald's franchisees are not part of the McDonald's corporate group even though the franchisee has licensed rights to the McDonald's tradename, trademarks, and other intellectual property that constitute its brand and even though the franchisee is the face of the company to the public.[38]

Common ownership more clearly defines where the corporate group begins, but the question of where the corporate group ends is another matter. The answer has to do with the second and related

---

[34] *See id.*

[35] Gunther Teubner, *Unitas Multiplex: Corporate Governance in Group Enterprises*, *in* REGULATING CORPORATE GROUPS IN EUROPE, *supra* note 24, at 67.

[36] SCOTT & DAVIS, *supra* note 4, at 227; *see also* John Scott, *Corporate Groups and Network Structure*, *in* CORPORATE CONTROL AND ACCOUNTABILITY: CHANGING STRUCTURES AND THE DYNAMICS OF REGULATION 291 (Joseph McCahery et al., eds., 1995) (emphasizing the corporate group as network).

[37] *See, e.g.*, MUCHLINSKI, *supra* note 2, at 62–64, 72–74. In his survey of the law of corporate groups, Blumberg places contractual relationships beyond the boundaries of the corporate group. BLUMBERG, *supra* note 2, at 247.

[38] *See, e.g.*, *See if You Have What It Takes: McDonald's Franchising*, MCDONALDS, http://www.aboutmcdonalds.com/mcd/franchising.html (reporting that "[m]ore than 80%" of McDonald's franchises are owned and operated by the franchisees) (last visited Apr. 20, 2012). McDonald's instead refers to its franchisees as part of the McDonald's "system." *Id.*

criterion for membership in the corporate group—control. At its most basic, "control" is defined as the ownership of a majority voting interest of the corporation's shares, which confers the power to select the board of directors,[39] although control may also be conferred contractually.[40] Where the shareholder is another corporation, the degree of control exercised by the parent depends primarily on the voting interest of the parent corporation in the subsidiary, which need not be identical to its financial stake. Subsidiaries may be wholly or partially owned by their parent company, and the parent corporation may hold a percentage interest that is also sufficient to exercise indirect control over subsidiaries further down in the corporate structure.[41] Nonetheless, even where a parent corporation holds, directly or indirectly, only a minority interest, it may still have the ability to control the management of the subsidiary corporation through overlapping directorates, operational integration, or other means.[42]

Many statutory regimes, including ERISA, follow the eighty percent ownership threshold adopted under the Internal Revenue Code's definition of a "controlled corporate group" as a bright line mathematical standard.[43] Regulatory statutes often sweep broadly, encompassing the regulated entity and all others "that it controls, is controlled by, or is under common control with."[44] Because of the wide variation in control arrangements among firms, however, the tests developed in common law for establishing the presence of a "control" relationship are generally based on multiple factors.[45] For example, in cases involving majority shareholder duties, the Delaware courts define "control" to include majority ownership of the corpora-

[39] *See, e.g.*, Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113–14 (Del. 1994). Share ownership generally carries with it the right to elect the company's directors and vote on major transactions based on the percentage voting interest held. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 211(b), 212 (2012) (election of directors); *id.* § 242(b) (charter amendments); *id.* § 251(c) (mergers); *id.* § 271(a) (asset sales).

[40] *See* Blumberg, *supra* note 2, at 304–06, 343–44 (discussing the concept of control underling enterprise liability and noting that control can arise by share ownership and by contract).

[41] *See, e.g.*, MUCHLINSKI, *supra* note 2, at 65–73.

[42] *See, e.g.*, Geoffrey C. Kiel, Kevin Hendry & Gavin J. Nicholson, *Corporate Governance Options for the Local Subsidiaries of Multinational Enterprises*, 14 CORP. GOVERNANCE: INT'L REV. 568 (2006) (surveying various sources of subsidiary control).

[43] Blumberg, *supra* note 2, at 306 (citing as an example, Employment Retirement Income Security Act (ERISA) of 1974, 26 U.S.C. § 1563(a)(1) (2006), which defines a "controlled group of corporations" with reference to the eighty percent standard).

[44] *See* Blumberg, *supra* note 2, at 305 & n.22 (citing examples).

[45] *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 3, at 12–13 (providing examples of this variability).

tion's voting rights and/or the "actual control" of the business and affairs of the corporation.[46] The latter inquiry is "highly contextualized."[47] Relevant factors include the appointment by the parent corporation of its own officers to the subsidiary's board, the presence of external contracts or other business arrangements that facilitate the shareholder's control, and a general alignment of interests among the corporate entities through which the ultimate parent may exercise control.[48] Similarly, in veil-piercing jurisprudence, functional control by a parent corporation over its subsidiary may be found based on the degree of economic, financial, personnel, and administrative integration within the group, as well as the use of a common public persona.[49] Courts also look to similar factors in interpreting statutory definitions of "control."[50]

Without control, the corporation's relationship to an entity whose shares it owns begins to resemble a pure investment relationship. Yet clear lines cannot always be drawn. For example, which definition of "control" is relevant? How much indirect control is sufficient for the investee corporation to be deemed part of the corporate group? Should the distinction be based on formal criteria, a more substantive inquiry, or both?[51] At what point is control so attenuated that the corporate shareholder should be considered a passive investor in an unrelated entity rather than a member of the same corporate group?

A final factor that has guided courts in the veil-piercing context and in weighing these difficult questions is the consideration of whether related entities function as a single integrated enterprise. For example, in the famous case *Walkovszky v. Carlton* which involved claims against numerous New York taxi cab companies, the plaintiff sought to impose liability horizontally on ten separate corporations operating under common ownership and control on grounds that

[46] *E.g.*, Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113–14 (Del. 1994).

[47] *See id.*

[48] *Id.* at 1114 (noting that potential to control is insufficient, but finding evidence of control where a parent corporation with a 43.3% minority share in its subsidiary had nonetheless exercised actual control over its subsidiary).

[49] *See* BLUMBERG, *supra* note 2, at 116 (noting that the concept of "control" in veil-piercing cases has not necessarily been limited to a requirement of a majority or controlling ownership interest). For more on veil piercing, see *infra* Part II.C.1 and sources cited therein.

[50] *See, e.g.*, Harrison v. Dean Witter Reynolds, Inc., 974 F.2d 873 (7th Cir. 1992) (observing that the interpretation of control under the Securities Act depends on the facts and circumstances of the relationship).

[51] Some of these challenges are identified in Sugarman, *supra* note 24, at 25.

they constituted a single economic entity.[52] Although the court in that case rejected plaintiff's argument,[53] economic and decisional integration remains relevant in determining whether independent entities should be viewed, as a matter of law, as a single integrated enterprise.[54] Indeed, many courts often adopt an enterprise approach only when "control" is accompanied by evidence of financial, operational, or administrative integration.[55]

Ultimately, the bounds of the corporate group must often be set within particular regulatory domains or by corporations themselves. Securities regulations and accounting standards give companies some flexibility in determining whether to include minority holdings within the group for consolidated financial reporting purposes.[56] Corporations can also, by charter or otherwise by contract, determine the threshold that constitutes "control" in order to delimit the bounds of the corporate group.[57]

Figure 1 illustrates possible definitions of the corporate group, including contractual relationships. The broadest definition of the group would reach to the upper left corner of Figure 1 and include even loose contractual "networks" of intercorporate relationships, such as global supply chains, in which ownership and control elements are lacking.[58] Unless defined otherwise, the term "corporate group" is used in this Article to refer to the narrower conception rep-

[52] 223 N.E.2d 6, 7 (N.Y. 1966).

[53] *Id.* at 10.

[54] Labor, employment, and discrimination laws adopt a similar test to determine whether related entities constitute a single employer. *See* Blumberg, *supra* note 2, at 300, 307.

[55] *Id.* at 300–01.

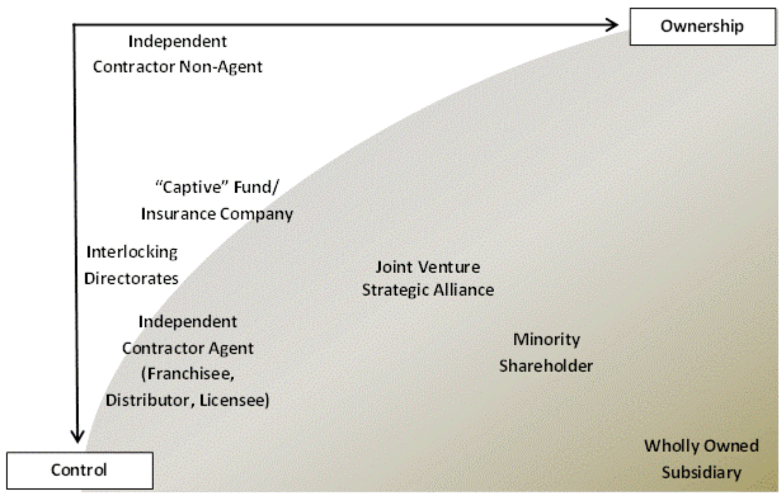
[56] *See* Rule 3A-02(a) of Regulation S-X, 17 C.F.R. § 210.3A-02 (2012) ("[C]onsolidated statements are [advisable under the regulations] when one entity directly or indirectly has a controlling financial interest in another entity"). Majority-owned subsidiaries generally must be consolidated. § 210.3A-02(a); Int'l Accounting Standards Bd., International Financial Reporting Standards, Standard 10, ¶ IN8 at A373–74 (2011) (effective Jan 1. 2013); *id.* ¶¶ 17–18, at A377 ("An investor controls an investee when the investor is exposed, or has rights, to variable returns from its involvement with the investee and has the ability to affect those returns through its power over the investee.").

[57] *See, e.g.*, SPRINT NEXTEL CORP., AMENDED AND RESTATED ARTICLES OF INCORPORATION Sec. 9 (2005), *available at* http://www.sprint.com/governance/docs/SprintNextelArticles.pdf (defining control to include the power to vote more than thirty-five percent of an entity's stock or to "directly or indirectly . . . elect a majority of the board . . . or direct . . . the management and policies of . . . the entity").

[58] *See supra* note 36 and sources cited therein (introducing network theories of the corporation); *see also, e.g.*, MUCHLINSKI, *supra* note 2 (describing transnational network enterprises).

resented in the lower right corner of Figure 1—an economic organization or enterprise that is comprised of multiple legal entities linked by some degree of common ownership and control.

Figure 1: Delimiting the Corporate Group



B. *Theories of Corporate Personhood*

Since the advent of the corporate form, the extent to which corporations should bear the same rights and duties as individuals has engaged corporate law scholars and the courts.[59] The long-standing debate surrounding the nature of corporate personhood has focused on three basic perspectives[60]: (i) the concession or "artificial entity"

[59] *See supra* note 1. The corporation is the most developed form of legal entity, but these perspectives can also be directly applied to other organizations, such as non-profits or labor unions, which use the corporate form. Some aspects of the discussion that do not depend on limited liability may also apply to partnerships and other informal associations. *See* BLUMBERG, *supra* note 2, at 210–11, 230 (exploring the extension of enterprise principles to non-corporate business associations); *see also* Laski, *supra* note 1 (exploring theories of entity personhood as applied to associations, including trade unions, trusts, and voluntary organizations); *infra* Part III.C (discussing Judge Posner's analysis of the personhood of a limited liability company in the *Flomo* case).

[60] There is voluminous literature surrounding these basic theories that cannot be fully captured in this abbreviated survey. *See, e.g.*, Reuven S. Avi-Yonah, *The Cyclical Transformation of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 767 (2005); sources cited *supra* note 1.

theory, which sees the corporation as a creation of the state or sovereign that grants its charter;[61] (ii) the aggregate theory, which sees the corporation as a fictional construct representing the sum of its shareholders, managers, and other constituencies who contribute to the success of the corporate enterprise; and (iii) the real entity view, which sees the corporation, not as an extension of the state or of its many constituencies, but as having a separate identity independent of both.[62]

Successive transformations of the corporate form have led to the somewhat cyclical ascendancy of one view over the other.[63] Owing to the heritage of English corporate law, the corporation has been recognized throughout the history of the United States as a legal person that enjoys certain rights and obligations independent of its shareholders.[64] As explored further in Part IV, the contested issues center instead on which rights and duties must be reserved for natural persons and the rationale for such distinctions. Theories of the corporation speak particularly to these underlying justifications.

The concession theory most accurately reflects the historical origins of the corporation and was the predominant view in the United States until the late nineteenth century.[65] This understanding was perhaps most famously articulated by Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. . . . Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it." [66] Any act of the corporation beyond the permitted scope contained in its charter

[61] This conception is also referred to as the "grant" theory. *See, e.g.*, Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1424 (2006).

[62] Some scholars refer to the "real entity" view as the "natural entity theory," while others distinguish the two. *See, e.g.*, *id.*; Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1067–68 (1994) (referring to the two synonymously).

[63] *See* Avi-Yonah, *supra* note 60 (tracing the evolution of the corporation through four evolutionary phases); *see also* Millon, *supra* note 1, at 205–40. There is some debate over the causal relationship between the emergence of these theories and changes in corporate law and practice. *See, e.g.* Millon, *supra* note 1, at 240–51; Lawrence E. Mitchell, *The Relevance of Corporate Theory to Corporate and Economic Development: Comment on the Transplantation of the Legal Discourse on Corporate Personality Theories*, 63 WASH. & LEE L. REV. 1489 (2006).

[64] *See* Avi-Yonah, *supra* note 60, at 785–86.

[65] *Id.*; *see* Millon, *supra* note 1, at 205–11.

[66] 17 U.S. (4 Wheat.) 518, 636 (1819). The Court in *Dartmouth College* also drew on elements of an aggregate theory. *See infra* note 94 and accompanying text.

was "beyond the power" of the corporation or "ultra vires." The ultra vires restriction limited not only the corporation's scope of operation, but its economic power and influence in society as well.[67] Because the corporation's authority was derived from the state, many early charters were granted to corporations to enable them to advance public purposes rather than strictly profit-making objectives, although commercial ventures also proliferated.[68]

By the late 1800s, New Jersey, and later other states, began to enact general incorporation statutes that facilitated the growth of for-profit corporations.[69] In time, the removal of many of the public welfare limits from state corporate codes and the ultimate decline of the ultra vires doctrine rendered the concession view largely obsolete.[70]

A new vision of the corporation that emerged during the early twentieth century was the aggregate view, which emphasized the objectives and interests of the individuals who formed the corporation.[71] This approach was a natural outgrowth of the emphasis on freedom of contract presumed by the incorporation statutes and was also inspired by massive changes in the economy. The end of the nineteenth century was a time when the growth of large-scale ventures, such as railroads, steel and oil companies, that required capital from a broad base of investors was revolutionizing the scale of American business. The aggregate view therefore resonated with a growing sense that economic activity was private activity that should be free from interference by the state, with market forces and private contracting, not state fiat, defining the corporate form.[72]

Like the aggregate view, the "real entity" view developed in response to the decline of state chartering, as corporate activity came to be seen as private rather than public, and corporate persons came to be viewed as sharing many of the rights and obligations of natural

[67] GREENFIELD, *supra* note 7, at 77 n.20 (citing Justice Brandeis' commentary on the doctrine).

[68] *See* Avi-Yonah, *supra* note 60, and sources cited therein; *see also* Millon, *supra* note 1, at 210–13.

[69] Millon, *supra* note 1, at 210–13.

[70] For more on this history, see, e.g., Mitchell, *supra* note 63, at 1491–93; *see also* Millon, *supra* note 1, at 212 (tracing the decline of the ultra vires doctrine to the 1920s and perhaps as early as 1898). The ultra vires doctrine is now quite limited in scope if not actually defunct. *See, e.g.*, DEL. CODE ANN. tit. 18, § 124 (2011). *But see* GREENFIELD, *supra* note 7, at 73–105 (calling for its revival as a restraint on violations of law by corporations).

[71] *See* Millon, *supra* note 1, at 212–15, 220–24. For more on this history, see Avi-Yonah, *supra* note 60, at 1012 and sources cited therein.

[72] *See* Millon, *supra* note 1, at 220–24. For more on this history, see Avi-Yonah, *supra* note 60, at 1012 and sources cited therein.

persons.[73] In contrast to the aggregate view, however, the "real entity" view posits that the corporation's separate legal personality as a matter of formal structure in fact represents a separate identity that is more than the sum of the constituencies which contribute to its operations.[74] This view was recognized by the courts in the early 1800s and came into its own in the early twentieth century when the Berle-Means firm, characterized by a large body of dispersed shareholders and a concomitant separation of ownership and control, became commonplace across the economy.[75]

Although much early case law and commentary during this period endorsed an aggregate view, with its emphasis on shareholder interests and property rights in the corporation, the new organizational reality could no longer be squared with the partnership conceptions that had grounded the aggregate view.[76] As a result, the real entity view prevailed during the early decades of the 1900s.[77]

In 1932, Adolf Berle and Gardiner Means published their seminal work, *The Modern Corporation and Private Property*, which reinvigorated the aggregate theory of the corporation and laid the foundation for conceptions of shareholder primacy that continue to dominate academic and popular understandings of corporate law.[78] They described the transformation of the corporate form in terms of the agency problems created by the separation of ownership and control, which, they suggested, could best be resolved by charging managers to serve as trustees for shareholders.[79] As David Millon observes, by focusing on shareholder property rights, "Berle and Means effectively disregarded notions of the corporate entity and peered directly into the corporate enterprise, focusing their attention on . . . the . . . shareholders and the professional managers" charged with steward-

[73] Millon, *supra* note 1, at 220–24.

[74] *See* Avi-Yonah, *supra* note 60, at 1012; Millon, *supra* note 1, at 213–20.

[75] For a thorough discussion of the early caselaw and this history, see Millon, *supra* note 1, at 205–40; *supra* note 60. Most scholars trace the real entity view's roots to the early 1900s. *See, e.g.*, Harris, *supra* note 61, at 1472–73.

[76] *See* Horwitz, *supra* note 1, at 181–82 (discussing the partnership roots of the corporate form); Millon, *supra* note 1, at 214 ("[D]evelopments in the internal relationship between management and shareholders rendered the partnership analogy untenable."); *see also* Celia Taylor, *The Inadequacy of Fiduciary Duty Doctrine*, 85 OR. L. REV. 993, 1000 (2006).

[77] Millon, *supra* note 1, at 214.

[78] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 312–13 (rev. ed. 1968).

[79] *Id.*; *see also* Adolf Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

ship of their investments.[80] In other words, Berle and Means' work rests implicitly on a view of the corporation as "an aggregation composed of shareholders and management, the latter confined to labor for the interests of shareholders."[81]

Since the rise of the law and economics movement, dominant thinking about the nature of the corporation has coalesced around an aggregate theory of the corporation that sees the corporation as a "nexus of contracts."[82] Under a contractarian approach, the corporation has no separate identity of its own, but is an artificial construct representing the sum of the various contracts between shareholders, managers, creditors, and other resource providers, who explicitly or implicitly negotiate the terms of their participation in the corporate enterprise.[83] Initially, the nexus of contracts approach focused primarily on shareholders' interests and their role as monitors and enforcers of the corporate contract.[84] Later scholars, however, expanded the constituencies whose contracts "mattered" to include employees, customers, and other stakeholders. A prominent example of the latter view is the team production theory of the firm advanced by Margaret Blair and Lynn Stout.[85]

The real entity view has fallen out of favor among corporate law scholars as an improper reification of the corporate form.[86] Nonethe-

[80] Millon, *supra* note 1, at 222.

[81] *Id.* at 222–23. For more on the link between Berle and Means' work and shareholder primacy, see *id.*

[82] *See, e.g.*, Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 858–60 (1996) (quoting then-Chancellor Allen's observation that the contractarian view is now the "dominant legal academic view" (internal quotations and citation omitted)). The seminal literature grounding this view include the work of EASTERBROOK & FISCHEL, *supra* note 3, at 12 (explaining the basis of the "nexus of contracts" understanding of the firm); Armen A. Alchian & Harold Demsetz, *Production, Information Costs and Economic Organization*, 62 AM. ECON. REV. 777 (1972) (arguing that information costs explain the rise of firms); Jensen & Meckling, *supra* note 4 (articulating the nexus of contracts model of the corporation); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989) (same).

[83] *See* Jensen & Meckling, *supra* note 4.

[84] *See* Millon, *supra* note 1, at 220–24; Phillips, *supra* note 62, at 1066, 1072–73.

[85] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999).

[86] *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 3, at 12 ("The 'personhood' of a corporation is a matter of convenience rather than reality."); Thomas A. Smith, *The Efficient Norm for Corporate Law: A Neotraditional Interpretation of Fiduciary Duty*, 98 MICH. L. REV. 214, 214 (1999) ("To economically oriented corporate law professors, distinguishing between directors' fiduciary duty to shareholders and a duty to the corpora-

less, the legacy of the real entity view remains today in modern corporate codes and common law doctrines—most notably the business judgment rule—that give directors discretion to act independently of the will of the shareholders.[87] Statutory arenas ranging from criminal law,[88] to securities regulation,[89] to antitrust,[90] as well as certain areas of constitutional law,[91] also reflect the view that the rights and duties of the corporate entity are distinct from those of the corporation's officers, directors, and other constituents.

The real entity approach also finds support beyond the legal academy among scholars of organizational culture and management. They observe that within single corporate entities as well as within corporate groups, collective identity emerges from the interrelationships of individuals and coalitions that constitute the organization as a whole. Although these identities may be shaped by senior management, they cannot be identified with a single individual or leadership structure.[92] The view that a corporation possesses its own

tion itself smacks of reification—treating the fictional corporate entity as if it were a real thing.").

[87] Ultimate oversight authority rests with the board, which must act in the best interests of the corporation and its shareholders. *See* DEL CODE ANN. tit. 18, § 141(a) (2011); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000). *See generally* Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 576 (2003) (identifying sources of director discretion); Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 73–76 (2010) (surveying the literature on the directory primacy model of corporate governance).

[88] For more on corporate criminal liability, see John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981) (arguing that criminal penalties for the corporation should not be displaced by sanctions on individual corporate decision-makers); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?* 109 HARV. L. REV. 1477, 1488–91 (1996) (observing that other legal systems outside the Anglo-American sphere are increasingly receptive to the concept of corporate criminal liability).

[89] For more on the consolidation of corporate group affiliates for reporting purposes under the securities laws, see *supra* note 56 and accompanying text.

[90] The Supreme Court has held that parents and their wholly owned subsidiaries must be treated as one entity under the Sherman Act on grounds that they cannot "agree" and therefore be deemed to form a "combination" or "conspiracy." Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 772 (1984).

[91] For a discussion on constitutional law, see *infra* Part III.A. (summarizing these cases).

[92] *See, e.g.*, HOWARD E. ALDRICH, ORGANIZATIONS EVOLVING 2–8 (1999) (defining organizations as the collective product of individual interactions, that is "socially constructed systems of human activity") (citations omitted); Suzana B. Rodrigues & John Child, *The Development of Corporate Identity: A Political Perspective*, 45 J. MGMT. STUDIES 885 (2008); Said Elbanna & John Child, *The Influence of Decision, Environmental and*

"culture" or "identity" was also implicitly accepted by the Delaware Supreme Court in its landmark case, *Paramount Communications v. Time, Inc.*, and from a historical standpoint has demonstrated remarkable staying power.[93]

C. Theories of the Corporate Group and Dimensions of Analysis

In part because the emergence of corporate groups is largely a twentieth century phenomenon, the theories introduced in Part II.B above have generally been articulated in terms of a single corporate entity and the real people behind it. For example, *Dartmouth College* is typically cited as the quintessential expression of the concession view, but it rests simultaneously on the associational interests of the individuals behind it: "By [the corporate form], a perpetual succession of *individuals* are capable of acting . . . like one immortal being."[94]

Similarly, early cases adopting an aggregate approach emphasize the interests of the firm's individual shareholders, employees, and managers. One example is the California Circuit Court's opinion in the *City of Santa Clara v. South Pacific Railroad Co.*, later affirmed summarily by the Supreme Court, which recognized that corporations are "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.[95] There, Justice Field stated: "[P]rivate corporations consist of an association of individuals. . . . The courts will always look through the [corporate] name to see and protect those whom the name represents."[96] Even though the aggregate theory as

Firm Characteristics on the Rationality of Strategic Decision-Making, 44 J. MGMT. STUDIES 561 (2007); Scott, *supra* note 36 (analyzing the nature of corporate groups).

[93] 571 A.2d 1140, 1154–55 (Del. 1990) (permitting Time's board of directors to accept a lower offer for its stock given their view that an acquisition by Paramount would threaten Time's corporate culture). Unfortunately, the court in *Paramount* did not provide any analysis of the implications of that claim for understandings of the corporation or corporate groups.

[94] Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (Story, J., concurring) (emphasis added).

> [A]n aggregate corporation at common law is a collection of individuals, united into one collective body, under a special name. . . . It possesses the capacity . . . of suing and being sued . . . . [It] is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage.

Id. at 667 (Story, J., concurring).

[95] 18 F. 385, 402–03 (D. Cal. 1883), *aff'd sub nom.* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

[96] *Id.*; *see* Horwitz, *supra* note 1, at 177–78 (discussing the companion circuit court cases).

seen through the lens of modern economics has long recognized that a corporation's shareholders, creditors, and other constituents might themselves be corporations, standard conceptions of the corporation in the caselaw and in the literature still fail to make any distinction between their application to single corporations and to complex corporate groups.[97] With the exception of the parent corporation as shareholder, juridical persons *within* the corporate group are ignored. The same can be said for articulations of the real entity theory.[98]

To understand the nature of the corporate group, however, a second dimension is needed. This dimension is best captured by two competing approaches: the enterprise view and the entity view. An enterprise approach views all of the legal entities that comprise the corporate group as part of a single economic organization, while the entity view emphasizes the separate legal identity of the affiliates that together form the corporate group.[99] Because much of the analysis of the enterprise-entity distinction has been directed at allocating liability among related entities in a corporate group, this discussion introduces these concepts first in that context before presenting a more nuanced view of the corporate group that builds on these categories.

1. Limited Liability & the Corporate Group

Historically, the enterprise and entity views have been articulated as competing theories of liability within tort law and various statutory regimes. In corporate law, they emerge primarily in veil-piercing jurisprudence.[100] Part of the tension between the enterprise and the entity approach, as well as the courts' general hesitation to impose enterprise liability,[101] can be explained in part by the complex nature of the corporate group itself.

---

[97] *See, e.g.*, Blair & Stout, *supra* note 85, at 275, 278 (describing the Team Production Theory of the corporation as one in which "a number of individuals come together to undertake a team production project that requires all to make some form of enterprise-specific investment" and noting that "a public corporation is a team of people"); *see also* Part III.A. (citing examples from *Citizens United v. FEC*).

[98] *See* discussion *infra* notes 184–219 and accompanying text.

[99] This distinction was first articulated by Phillip Blumberg. *See* BLUMBERG, *supra* note 2, at 65, 89–90.

[100] For a survey of veil-piercing doctrine and practice, see Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 637 n.1 (2005) (listing sources); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991); Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379 (1999).

[101] *See infra* notes 105–09 and accompanying text.

The fundamental principle that each corporation enjoys a separate legal personality with rights and obligations distinct from those of its owners, when combined with the grant of limited liability and the ability of one corporation to own shares in another, makes possible the formation of corporate groups.[102] Because each company within the corporate group is a distinct legal entity, corporations can structure their subsidiaries and allocate their assets so as to reduce the parent company's (and the group's) exposure to liability as well as to shield subsidiaries from risk created by other affiliates' operations.[103] Limited liability within the corporate group also reduces monitoring costs and permits diversification of business operations across multiple jurisdictions and (in the case of conglomerates, across multiple industries) to an extent that would be impossible were the corporate form routinely disregarded within the corporate group.[104] Limited liability is therefore key to the corporate group's efficiency as an economic organization.[105]

Limited liability is also a risk allocation device.[106] In particular, limited liability within the corporate group also allows corporations to shift costs to creditors when compensation cannot be obtained from the corporate group of which the defaulting entity or tortfeasor is a part.[107] As many commentators have noted, this raises particularly serious concerns with respect to tort claimants, who cannot contractually protect themselves against such risks.[108]

---

[102] *See infra* note 116 and accompanying text.

[103] *See* MILMAN, *supra* note 22, at 62–63.

[104] *See* EASTERBROOK & FISCHEL, *supra* note 3, at 40–62 (summarizing the basic rationales for limited liability); *see also* Stephen Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001). To be sure, the benefits of reduced monitoring and other agency costs are less relevant where there is no separation of ownership and control, which is the case both for close corporations and for corporate groups with wholly or majority owned subsidiaries. *See* David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1314–17 (2007) (observing that efficiency rationales do not apply equally to firms with different ownership structures)

[105] *See generally*, WILLIAMSON, *supra* note 3 (explaining internal markets within corporate groups).

[106] Millon argues in fact that the real policy justifications for limited liability are its risk-shifting function rather than the standard efficiency rationales. *See* Millon, *supra* note 104, at 1317–25.

[107] Limited liability is often contractually waived within the corporate group. *See, e.g.*, Richard Squire, *Strategic Liability in the Corporate Group*, 78 U. CHI. L. REV. 605 (2011) (describing the role of intragroup guarantees as a type of shareholder opportunism).

[108] Some have advocated unlimited liability within corporate groups, at least for entities within the same industry. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1881 n.4

Imposing obligations, and therefore the potential for liability, on the corporate group, or on a parent corporation as a proxy for the group as a whole, however, is problematic because it compels the courts to disregard the formal legal identity of the individual companies comprising the group. If applied broadly or unpredictably, this approach would threaten the very existence of corporate groups. When the separation between the corporation and its shareholders produces anomalous or inequitable results, courts have elected to "pierce the corporate veil" vertically or extend enterprise-wide liability horizontally, but only in exceptional circumstances.[109]

Beyond veil-piercing doctrine, however, U.S. law has recognized enterprise principles in a broad range of areas, including judicial procedure, bankruptcy, and statutes of general and specific application to corporate groups.[110] For example, enterprise principles have been widely adopted for decades under such diverse statutory regimes as environmental law, the Foreign Corrupt Practice Act's antibribery rules, antitrust, securities regulation, labor and employment laws, and corporate tax law.[111] Some of these regulations have explicit extraterritorial effect.[112]

(1991); Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203 (2002). *But see* Bainbridge, *supra* note 104. For a summary of this debate, see Robert J. Rhee, *Bonding Limited Liability*, 51 WM. & MARY L. REV. 1417, 1417–29 (2010).

[109] *See* Bainbridge, *supra* note 104, at 506–14 (surveying veil-piercing standards); *see also supra* note 100 and sources cited therein.

[110] BLUMBERG, *supra* note 2, at 96–97, 116–20 (summarizing the "unitary tax cases"). For more on recognition of enterprise principles in cross-border insolvencies and in substantive consolidation doctrine, see Harry Rajak, *Corporate Groups and Cross-Border Bankruptcy*, 44 TEX. INT'L L.J. 521 (2009); William H. Widen, *Corporate Form and Substantive Consolidation*, 75 GEO. WASH. L. REV. 237 (2007).

[111] *See* Blumberg, *supra* note 2, at 307–26. Blumberg divides statutory regimes into those of (i) "general application," such as antitrust and trade regulation, labor, environmental, and intellectual property laws, that do not explicitly reference corporate groups, and (ii) statutes of "specific application" to corporate groups, like the Bank, Savings and Loan, and Public Utility Holding Company Acts, which are designed specifically to regulate corporate groups on an enterprise-wide basis. BLUMBERG, *supra* note 2, at 101. In the environmental arena, the Supreme Court has retreated from the enterprise theories of liability observed by Blumberg. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 67–70 (1998) (holding that a parent corporation could not be liable for violations of CERCLA by its subsidiary solely by virtue of its ownership interest and majority control of the subsidiary board).

[112] *See, e.g.*, Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (2006); Arms Export Control Act of 1976, 22 U.S.C. § 2278 (2006) (munitions export controls); Export Administration Regulations, 15 C.F.R. §§ 730–774 (2012); *see also* Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110 (2010) (surveying the doctrine governing extraterritorial application of U.S. law). Some statutory regimes previously under-

Under common law, then, enterprise liability is acknowledged only in exceptional cases, while its application within statutory regimes has expanded over time. Despite the acceptance of enterprise principles in many areas of the law, Professor Blumberg—whose writings form the foundation of legal scholarship on corporate groups—concludes, based on a comprehensive survey across different areas of the law, that "enterprise law is not transcendental. It is applied only in selected areas of the law where it more effectively implements the underlying purposes and objectives of the law. In other respects, entity law continues unaffected."[113]

2. Extending Theories of Corporate Personhood to the Corporate Group

Because limited liability is essential to the existence of corporate groups, this Article does not argue for its elimination. Although others have made a convincing case for this within the bounds of the corporate group,[114] the remainder of this Article assumes no alteration in the scope of current limited liability rules. Instead, this Article considers how analyses of corporate identity might be applied to the corporate group.

As a starting point, consider first how the three traditional approaches to corporate identity intersect with the enterprise-entity distinction. Figure 2 illustrates how the conceptions of corporate identity that have been introduced here with respect to single firms (the entity approach) can be easily extended to corporate groups (the enterprise approach) simply by shifting the level of analysis.

stood to have extraterritorial effect have been limited by the Supreme Court's decision in Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010). *See, e.g.*, United States v. Philip Morris USA, Inc., 783 F. Supp. 2d 23 (D.D.C. 2011) (holding that the Racketeering Influenced and Corrupt Organizations Act ("RICO") does not apply extraterritorially post-*Morrison*).

113 BLUMBERG, *supra* note 2, at 230.

114 *See* discussion *supra* note 108.

Figure 2: Theories of Corporate Personhood in Two Dimensions

	Entity (single corporation)	**Enterprise (corporate group)**
Concession Theory	Corporations chartered by the state or sovereign.	Corporate groups chartered by a national or transnational chartering authority.
Aggregate Theory	The corporation is a fictional construct representing the sum of its constituencies.	The corporate group is a fictional construct representing the sum of its affiliates and their constituencies.
Real Entity Theory	The corporation has a separate identity greater than the sum of its constituencies.	The corporate group has a separate identity greater than the sum of its affiliates and their constituencies.

i. A Concession Theory of the Corporate Group

During the period when corporations were created by grant of the state, chartering authorities did not authorize corporations to include in their approved purposes holding shares of other corporations.[115] The formation of the corporate group became possible in the United States only in 1888 when New Jersey first permitted one corporation to become a shareholder of another.[116] Accordingly, the corporate group was not initially associated with the concession or grant model, even though states continued to charter corporations well into the early 1900s.[117]

Were the concession theory of the corporate group (shown in the upper right of Figure 2) to be revived for the modern corporate group, the corporate group would itself need to be created by grant from the state.[118] Since today's corporate groups extend beyond national boundaries, this approach would have practical meaning for many companies only in the unlikely event that a transnational legal

[115] *See* BLUMBERG, *supra* note 2, at 52–58.

[116] Act of Apr. 4, 1888, ch. 269, 1 1888 N.J. Laws 385.

[117] *See* Taylor, *supra* note 76, at 998–1001.

[118] Here, the term "state" refers to the source of chartering authority in a given jurisdiction, which could be at the supranational, national, or sub-national level. State-owned enterprises in Europe and in Asia are perhaps the closest modern example of corporate groups that operate under a quasi-concession model, although in the standard concession theory, the state holds no ownership stake.

order emerges with the authority to charter transnational corporations. The company law harmonization project of the European Union, the introduction of the European company as a separate entity form, and the creation of pan-European Works Councils suggest a model for such an approach, and scholars have begun to consider the potential for similar developments to emerge globally.[119] However, because this Article is focused on the import of these theories for U.S. law, the remainder of this discussion will consider only the "aggregate enterprise" and "real enterprise" theories.

ii. An Aggregate Enterprise Theory of the Corporate Group

If at the level of the corporation, the aggregate approach emphasizes the interests of the shareholders or other constituencies that form the corporation, then an "aggregate enterprise" approach to the corporate group must focus its analysis on the discrete business entities that constitute it and might reject any separate identity for the corporate group itself. Oliver Williamson's work provides a theoretical grounding for an application of aggregate theories to the corporate group. Williamson and others extended transaction cost theories of the firm to explain the corporate group as a larger system of explicit and implicit contracts among the members of the corporate group who provide resources within the corporate enterprise as a whole.[120] As German legal scholar and sociologist Gunther Teubner notes, "This approach allows the organized firm to be seen within a spectrum of various types of contractual relationships, from the spot-market transaction up to the multinational group," each with varying governance structures."[121]

In other words, because both a single corporation, such as Wal-Mart Stores, Inc., and the entire corporate group popularly known as "Wal-Mart" are firms, they can both be viewed as a fictional nexus of

[119] *See* MILMAN, *supra* note 22, at 15–20 (surveying various harmonization efforts in Europe, Africa, and via the model law projects of the United Nations Commission on International Trade Law (UNCITRAL)); *see also* Larry Cata Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591 (2008) (proposing international law as a source of regulation for global corporate groups); Robin F. Hansen, *The International Legal Personality of Multinational Enterprises: Treaty, Custom and the Governance Gap*, 10 GLOB. JURIST 1 (2010) (advances same). At present, territorial sovereignty prevents any state from authorizing or chartering an entity outside its borders.

[120] *See* WILLIAMSON, *supra* note 3; *see also* EASTERBROOK & FISCHEL, *supra* note 3, at 12–13 (describing the range of organizational forms adopted by corporate groups to illustrate the contractual nature of the corporate form).

[121] *See* Teubner, *supra* note 35, at 70.

the contracts that create them. More specifically, an "aggregate enterprise" theory of the corporate group conceives of an entire economic enterprise, such as "Wal-Mart," not simply as Wal-Mart Stores, Inc., the parent company of the Wal-Mart group, but as the complex aggregation of the relationships among the legal entities that comprise the Wal-Mart corporate group globally.

Under this vision, the relevant contracts are those between the corporate group and its shareholders, though precisely which shareholders' interests should matter is unclear: Is it the parent's interests? The affiliates' interests? The minority shareholders' interests? A broader alternative view is possible. Under the latter, the relevant contracts might include contracts among the entities that comprise the group *and* all affiliates' contracts with their respective constituencies—a potentially unlimited set.

Regardless of how this choice is made, the aggregate enterprise view, as a practical matter, implies two potential sets of legal rules. The first is the functional equivalent of a first-dimension entity approach. Under this "pure aggregate" approach, the group itself would be completely disregarded, and legal rules would only apply to the individual firms that make up the corporate group. Because this approach silos each entity within the corporate group, it would effectively ignore the network of relationships between and among corporate group affiliates that define the group's internal organizational and management structure and ultimately the corporate group itself. The only exception might be perhaps, direct parent-subsidiary relationships, which should be taken into account because the immediate parent corporation is a shareholder whose interests define the interests of its subsidiary. There is, however, little practical benefit to such an approach, since it implies no change to simple entity-based rules.

The pure aggregate approach is also unworkable in practice because in deciding cases involving entities with common ownership and control, courts cannot completely disregard the relationships between corporate affiliates and the existence of the larger corporate group. Instead, they are called upon to interpret the explicit and implicit contracts within the group and between members of the group and third parties. For example, the common law of fiduciary duties for majority shareholders has developed in recognition of the potential conflicts of interest that arise because of the control parent corporations exercise over their subsidiaries. Yet such conflicts do not exist if the reality of the group itself is not acknowledged. Similarly, agency problems *within* the corporate group cannot be understood without consideration of the existence of the group as an organization.[122]

Therefore, just as the corporation as a fictional nexus of contracts is reconciled with an understanding that corporations are juridical entities with rights and duties independent of their shareholders, so an aggregate enterprise theory must mean that the corporate group is a fictional aggregate wherein legal rules may apply to the corporate group on an enterprise-wide basis even though the group itself has no independent identity. For example, it may be more efficient within securities or tax law to regulate related entities collectively by means of this fictional construct on a consolidated or enterprise basis even if there is no actual reality or legal entity that may be identified as the corporate group. This is in fact the standard contractarian approach to the corporate group as a firm and the only coherent way in which enterprise principles might properly be extended to it consistent with an aggregate theory.[123] It is also the meaning intended by references to the "aggregate enterprise" approach in the remainder of this Article.

There are, however, a number of limitations to an aggregate vision of the corporate group, particularly when applied to modern corporate groups that function on a globally integrated basis.[124] First, since U.S. law does not recognize the corporate group as an independent legal entity, the practical application of this approach requires a designated entity within the corporate group, such as its ultimate parent or headquarters, to represent the consolidated group for purposes of regulatory compliance.[125] This system of unitary attribution is at odds with the decentralized and multi-centric decision-making structures now common among many corporate groups.[126]

---

[122] *See, e.g.*, Bongjin Kim, John E. Prescott, & Sung Min Kim, *Differentiated Governance of Foreign Subsidiaries in Transnational Corporations: An Agency Theory Perspective*, 11 J. INT'L MGMT. 43 (2005) (discussing strategies used to address these internal conflicts).

[123] *See* WILLIAMSON, *supra* note 3 (applying relational contracting theory to explain the emergence of modern corporate groups).

[124] *See generally*, Samuel J. Palmisano, *The Globally Integrated Enterprise*, 85 FOREIGN AFF. 127 (2006) (describing the shift from the "multinational corporation" to the "globally integrated enterprise").

[125] For purposes of the securities laws, for example, the "representative" of the consolidated entity will be the registrant or issuer, and for tax purposes, the entity is the U.S. "citizen" or taxpayer. These need not be synonymous with the ultimate parent or headquarters of a global corporate group.

[126] *See, e.g.*, Julian M. Birkenshaw & Allen J. Morrison, *Configurations of Strategy & Structure in Subsidiaries of Multinational Corporations*, 26 J. INT'L BUS. STUD. 729 (1995) (analyzing "hierarchical" and "heterarchical" governance models); Yves Doz & C.K.

More fundamentally, notions of freedom of contract on which an aggregate enterprise view must be premised disregard the ability of the corporate group's parent or controlling affiliate to unilaterally expand or contract the group (e.g., by forming or dissolving existing entities) to accomplish the group's strategic goals.[127] In addition, as Teubner notes,

> The dissolution of economic organizations into a complex contractual nexus [of affiliates] makes sense only with respect to member recruitment and the utilization of individual motivation for the purposes of the organization. But as soon as the contractual mechanism becomes [reduced to exchange relationships among resource holders]. . . . Cooperative and collective aspects of the organization are systematically ignored.[128]

iii. A Real Enterprise Theory of the Corporate Group

An alternative approach is to view the corporate group as a "real enterprise." As with other theories of the corporation, references in case law and academic articles to the rights or obligations of the corporation or to the real entity view of the corporation tend to do so without explaining how the concepts of identity associated with the corporation as a legal entity might apply, if at all, to the corporate group.[129] Extending the real entity view to the corporate group necessarily implies that the group itself has an identity independent from that of its constituent firms. This collective identity must also be distinct from that of the individual directors, officers, employees, and

Prahalad, *Patterns of Strategic Control Within Multinational Corporations*, 15 J. BUS. STUD. 55 (1984) (analyzing the managerial challenge of balancing responsiveness of subsidiaries to local conditions and the need for global strategic integration); Morten Huse & Violina P. Rindova, *Stakeholders' Expectations of Board Roles: The Case of Subsidiary Boards*, 5 J. MGMT. & GOVERNANCE 153, 157–58, 171 (2001) (surveying the literature on subsidiary board function); Palmisano, *supra* note 124, at 134. *But see* Geoffrey C. Kiel, Kevin Hendry & Gavin J. Nicholson, *Corporate Governance Options for the Local Subsidiaries of Multinational Enterprises*, 14 CORP. GOVERNANCE: INT'L REV. 568 (2006) (noting the perfunctory role of many multinational subsidiary boards).

[127] *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 3, at 14; *see also id.* and sources cited therein (surveying the literature on the relationship between multinational management strategy and corporate group structure).

[128] Teubner, *supra* note 35 at 71. Teubner identifies several limits of contractually based theories of the group, including the following: i) its emphasis on competition among "resource holders" within the group ignores cooperative aspects that create efficiency advantages, ii) the organization's members are subject to organizational norms and further its goals, iii) the contractual network is formed organically through evolutionary rather than market mechanisms, iv) transactions within the organization are decisions, not economic exchanges, and v) "the corporate interest is "an independent criterion in resolving conflicts among resource holders." *Id.* at 73.

[129] *See, e.g.*, disucssion *infra* Part III.

other agents through whom the parent, headquarters, or any other entity comprising the corporate group may act. From this perspective, for example, "Wal-Mart" is an ontological construct more akin to the embodiment of the Wal-Mart brand than an extension of the Walton family, Wal-Mart Stores, Inc., or its CEO. In contrast to the aggregate enterprise view, a real enterprise approach acknowledges the possibility for the corporate group itself to bear independent rights and duties apart from those of its constituent firms. This concept is recognized to a limited extent in cases extending enterprise liability horizontally across a corporate group.[130]

The real enterprise approach more closely meshes as a descriptive matter with the economic realities of corporate groups. Many multinational enterprises, in particular, utilize internal financing, management, and resource allocation mechanisms that extend across and integrate the entire enterprise.[131] This view also offers the best fit with research on organizational and corporate identity finding the dynamic interactions among senior managers and even key employees across separate divisions and affiliates within a corporate group can together produce an independent corporate identity or culture.[132]

However, like the aggregate enterprise approach, adopting a unitary view of the corporate group in practical terms requires the rights and duties of the corporate group to attach to the parent corporation or to another member of the corporate family. This approach presumes a hierarchical or pyramidal organizational structure and fits poorly with integrated, decentralized, collective, or multidimensional decision-making structures that are found within many corporate groups.[133] Secondly, as Janet Dine has observed, legal rules based on a strict unitary view of the corporate group ignore or even "destroy[] the separate identities of the companies within the group," which are formed often for regulatory and tax planning reasons and so "may remove real business convenience."[134]

An alternative version of the real enterprise theory offers a potential solution to this dilemma. Building on network theory, Gun-

[130] *See, e.g.*, Bainbridge, *supra* note 104 (discussing such cases in contrast to vertical veil-piercing).

[131] Multinational corporate groups are discussed further *infra* Part III.

[132] *See supra* notes 92–93 and accompanying text.

[133] *See, e.g.*, Sugarman, *supra* note 24, at 20; *see also supra* note 124 and sources cited therein.

[134] DINE, *supra* note 2, at 62–63; Teubner, *supra* note 35 at 88–89 (criticizing a unitary view as deemphasizing intra-group dynamics).

ther Teubner and John Scott have proposed a vision of the corporate group as a "polycorporate network" characterized by multiple interrelated decision centers rather than by hierarchy.[135] Indeed, commentators observe trends toward such a "heterarchical" structure among multinational firms, where geographical, product-based, or functional centers are spread across the organization.[136] Empirical studies also show that the organizational structure of many corporate groups does not necessarily follow a traditional hierarchy under a single decision center and controlling parent company.[137] Consistent with a real enterprise perspective, the group or "network" itself has an identity independent from either the parent or any of the other members of the corporate group.[138] Rights, duties, and legal liability can therefore potentially be borne by the network itself independent of the responsibilities borne by the members of the corporate group. Even if the corporate group is not formerly granted legal person status, recognition of multiple or cooperative control structures implies that legal responsibility for the network could be imputed to some or all group members, not just to the group's headquarters or parent.[139]

The primary limitation of this approach is the challenge of providing predictability, notice, and legal certainty in the absence of an identifiable "seat" of legal obligation for the corporate group, clear standards for assigning liability among group affiliates, or even a uniform default definition for the corporate group itself. These issues are considered further in Part IV.

D. *Intersections of Entity and Enterprise Theories*

Part C has extended theories of the corporation to develop alternative theories of corporate groups. Of these approaches, the "aggregate enterprise" approach best fits the formal legal structure of the corporate group as an extended "nexus of contracts." However, at a descriptive level, the "real enterprise" view better suits the realities of the corporate group as a corporate network. If the corporate group is viewed, at least for some purposes, wholistically from an enterprise perspective, a final issue to consider is how the real entity

---

[135] *See* Teubner, *supra* note 35 at 69–70. *See generally* Scott, *supra* note 36.

[136] PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 47–50 (2d ed. 2007).

[137] *See, e.g.*, Birkenshaw & Morrison, *supra* note 126 and sources cited therein; Doz & C Prahalad, *supra* note 126 and sources cited therein.

[138] *See generally* Scott, *supra* note 36.

[139] *See* Teubner, *supra* note 35 at 91–92 (proposing alternative policies to operationalize a "polycorporate network" approach).

and aggregate entity views at the level of the individual corporation intersect with the real enterprise and aggregate enterprise views at the level of the group.

In other words, is a "real enterprise" approach to corporate groups compatible with a "nexus of contracts" view of the corporation itself? Or can these theories be internally consistent only if the same theoretical approach to the entity is applied at the level of the corporate group? To the extent that both the corporate group and an individual corporation can be theorized as a single economic organization or "firm," one would expect the entity and enterprise dimensions of this analysis to necessarily move in tandem. However, it turns out that this is not entirely so. The analytical set is described in Figure 3 below. The concession theory is omitted here, given its lesser practical relevance.

Figure 3: Intersections of Entity and Enterprise Theories Within Corporate Groups

		Enterprise Theory (corporate group)	
Entity Theory* (single corporate entity)		**Real Enterprise**	**Aggregate Enterprise**
	Real Entity	Corporate group: separate group identity Entity within the group: separate identity independent of its management, shareholders, affiliates, and other constituencies	Corporate group: no separate group identity apart from that of its constituent entities Entity within the group: separate identity independent of its management, shareholders, affiliates, and other constituencies
		Real Enterprise	**Aggregate Enterprise**
	Aggregate Entity	Corporate group: separate group identity Entity within the group: no separate identity; entity as "nexus of contracts" among its management, shareholders, affiliates, and other constituencies	Corporate group: no separate group identity apart from that of its constituent entities Entity within the group: no separate group identity; entity as "nexus of contracts" among its management, shareholders, affiliates, and other constituencies

*Here, the "entity" dimension refers to the nature of each individual corporation or other entity that makes up the corporate group collectively.

In Figure 3, the upper left and lower right sectors pose little difficulty, with a similar understanding of the corporation at the entity level being extended to the corporate group. For example, in the upper left sector, the corporate group has its own collective identity, which is distinct from that of the other "real entities" that make up its corporate family. An example of a legal rule that reflects this perspective is the corporate attorney-client privilege under federal common law. As articulated by the Supreme Court in *Upjohn Co. v. United States*, the privilege attaches to the corporation itself, not to its directors, officers, or other key decision-makers.[140] Thus, this standard reflects a real entity view of the corporation.[141] Reasoning "that the parent (as well as the subsidiary) is the "client" for purposes of the attorney client privilege, federal courts and a number of state courts have held that the privilege is not held by a particular entity within the corporate structure but extends across the corporate group.[142] This rationale reflects a real enterprise approach to the corporate group as well.

The lower right sector, the "aggregate-aggregate" section, represents the corporate group enterprise as a nexus of contracts. Here, the corporate group is no more than the sum of its parts, an extended web of implicit and explicit contracts, including the contracts between parent companies as shareholders and their subsidiaries within the corporate structure. Similarly, each of the constituent legal enti-

[140] 449 U.S. 383 (1981) (holding that the attorney-client privilege extends to "the corporation" not solely to the "control group" of senior managers)*; see also* Bell v. Maryland, 378 U.S. 226, 263 (1964) (acknowledging that a "corporation, like any other 'client,' is entitled to the attorney-client privilege" (citation omitted)). This is consistent with the ethical obligations of attorneys to the corporation under the Model Rules of Professional Conduct. Under Model Rule 1.13, "A lawyer employed or retained by an organization represents the organization and not its directors, officers, or other constituents." MODEL RULES OF PROF'L CONDUCT R. 1.13 (2011).

[141] While this rule is most consistent with a real entity approach, it can be understood from an aggregate entity perspective as well. Under the latter view, the corporation as a legal entity is a *fictional construct* that possesses independent rights and duties. *See supra* note 83 and accompanying text.

[142] *See, e.g.*, *In re* Teleglobe Commc'ns. Corp., 493 F.3d 345, 369–70 (3d Cir. 2007) (surveying relevant precedent on this issue). Notably, *Upjohn* itself involved an investigation of potential anti-bribery violations by the company's foreign subsidiaries and therefore concerned communications between the attorney and employees across the corporate structure. *But see* Glidden Co. v. Jandernoa, 173 F.R.D. 459, 472–73 (W.D. Mich. 1997) (viewing the constituent companies within the group as "joint clients"). Some courts have also viewed affiliated corporate entities as a single client based on their "community of interest." *See, e.g.*, *id.* ("The universal rule of law, expressed in a variety of contexts, is that the parent and subsidiary share a community of interest . . . ."); United States v. AT&T Co., 86 F.R.D. 603, 616 (D.D.C. 1980) ("The cases clearly hold that a corporate 'client' includes not only the corporation by whom the attorney is . . . retained, but also parent, subsidiary and affiliate corporations. . . . *If the claimant of the privilege can show a substantial identity of legal interest in the specific matter, it therefore makes no difference whether the two corporations were so affiliated as to be a single 'client.'"*.) (emphasis added). *But see In re Teleglobe*, 493 F.3d at 366 (criticizing this approach).

ties is itself an aggregation of the contracts reached among its shareholders, creditors, managers, employees, customers, and other constituencies. Both the group and its member entities are purely fictional constructs.

In the upper right sector, the separate legal identity of the corporation is understood to reflect its real personhood but the corporate group is not—the group is simply an aggregation of affiliates that are linked by shareholding contracts. Under this view, there is little to distinguish equity-based corporate groups from other contractual relationships, such as the cartel or the joint venture. As a practical matter, this view implies that basic entity-based principles should generally apply because the proper bearer of legal rights and duties and the source of any collective "mind" or "will" is at the entity rather than the enterprise level. For example, some states that adopt the federal *Upjohn* test—again, one that the Supreme Court grounded on a real entity view—adopt an aggregate enterprise view at the group level, seeing the two affiliates as "joint clients" rather than a single "polycorporate" client.[143]

The lower left box is the only sector that represents an internal inconsistency between the two dimensions—it indicates a concept of the corporate group as having a "transcendent" identity while viewing each constituent entity within the group as a mere "nexus of contracts." Yet, some common legal rules in fact fit this pattern. For example, the appellate court's decision—reversed in *Upjohn*—adopted a "control group" rule of corporate attorney-client privilege that is expressly premised on the aggregate entity view and remains the rule in a number of states.[144] Distinguishing natural and juridical persons, the appellate court concluded that since the client was an inanimate entity, "only the senior management, guiding and integrating the

[143] *In re Teleglobe*, 493 F.3d at 369–70; *Glidden Co.*, 173 F.R.D. at 472–73 ("Numerous courts have recognized that, for purposes of the attorney client privilege, the subsidiary and the parent are joint clients."). For example, New York adopts an aggregate approach not based on group identity. It requires a "common legal interest" to bring two entities, even affiliates in a corporate group, under the "joint client rule." *See, e.g.*, Bowne of N.Y. City, Inc. v. AmBase Corp, 150 F.R.D. 465, 491 (S.D.N.Y. 1993).

[144] United States v. Upjohn Co., 600 F.2d 1223, 1226–27 (6th. Cir. 1979), *rev'd*, 449 U.S. 383 (1981). The control group test has been adopted in Alaska, Hawaii, Illinois, Maine, New Hampshire, Oklahoma, Oregon, and South Dakota. *See* Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629 (surveying state adoption or rejection of *Upjohn*); *see also* Caremark, Inc. v. Affiliated Computer Servs., Inc., 192 F.R.D. 263 (N.D. Ill. 2000) (applying the Illinois "control group" test of *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982)); HAW. R. EVID. 503 & cmts; OR. EVID. CODE 503(1)(d) & cmts.

several operations . . . can be said to possess an identity analogous to the corporation as a whole."[145] Although there are no cases so holding as of the time of this writing,[146] an example of this mixed approach would arise if a state that retains the control group test were to apply it across corporate families on an enterprise or group basis.

This matrix suggests that there is considerable flexibility in the way that understandings of the corporate group and the corporation intersect, and therefore, in how legal rules that apply at the entity level might be applied to the corporate group as a whole. It also emphasizes the importance of considering, at both the entity and the enterprise level, which perspective is most likely to advance the policy goals of a given area of the law. Where laws or regulations are intended to apply broadly to all corporations—whether single entities or part of a larger group—the intersection of these two levels should be considered.

E. *The Normative Implications of Corporate Theory*

This Article has thus far introduced current theories of the corporation and extended them explicitly to corporate groups. The underlying assumption behind this effort, of course, is that questions of corporate identity matter to the development of legal rules. Yet, this assumption has been challenged. After surveying the evolution of the theories of corporate personhood, a number of scholars have argued that it is all so much ado about nothing and that theories in fact simply do *not* matter, either from a normative or positive standpoint.[147] This is a serious contention that merits a response.

Beginning first from a positivist critique, they observe that attempts to map the three theories and their variations systematically against the evolution of legal principles historically have been unsuccessful as either a descriptive or predictive matter.[148] One reason is

---

[145] *Upjohn Co.*, 449 U.S. at 390 (quoting *Upjohn Co.*, 600 F.2d at 1226) (internal quotation marks omitted).

[146] For states adopting the control group test, see *supra* note 144. As of Oct. 27, 2011, no court had decided whether to adopt a "joint client" (i.e., aggregate) or "community of interest" (i.e., enterprise) approach at the group level.

[147] *See, e.g.*, Mitchell, *supra* note 63; Phillips, *supra* note 1 (reviewing, inter alia, Dewey's consequentialist and indeterminacy arguments); *see also* Dewey, *supra* note 1, at 669, 673 (pointing to the reemergence of each view over time as evidence of the "irrelevance" of theory).

[148] *See, e.g.*, Mitchell, *supra* note 63, at 1494 (arguing that the evolution of various corporate law principles "could easily have been varied by positive law under any of the different theories" and that "[w]hat mattered was the practicalities" driving different doctrinal areas).

that, as David Millon has observed, the link "between corporate theory and doctrinal and social developments is, in fact, more complex" than a unidirectional causal relationship.[149] He notes that "[w]e have yet to develop an adequate account of corporate theory's [legitimating] function," that is, its role in bolstering emerging regulatory or policy developments.[150] Another reason is that the complexity, diversity, and ongoing evolution of organizational forms makes tracing these theories' influence empirically difficult. One of the best syntheses of the historical evidence is perhaps Millon's own conclusion that the relationship between corporate theory and social practice is best understood as interdependent and mutually legitimating.[151] While corporate theory may not itself suffice to legitimate new legal forms or rules, neither is it irrelevant to their evolution.

A second challenge is that both academic commentary and the courts have yet to distill a single, elegant theoretical understanding that captures the corporation's complex and multifaceted identity (though network theory and the conventional contractarian view both come close). Critics also note that while each position's advocates claim normative superiority, the actual implications of the theories are more muddled.[152] Understandings of the corporate group are evolving even more slowly. This argument, in essence, is that corporate theory is indeterminate, lacking any definitive meaning or normative impact.[153]

Given that the corporate form is used by a wide range of firms—from close corporations to the global conglomerate—achieving a single unifying view of corporate identity may well be an impossible or even undesirable goal. Indeed, the different pragmatic and policy concerns underlying different areas of the law necessitate grounding in alternative visions of corporate (or group) identity. As a result, competing corporate theories can coexist across different doctrinal arenas, as explored later in this Article.

---

[149] *See* Millon, *supra* note 1, at 241

[150] *See id.* (responding to arguments by Horwitz, *supra* note 1).

[151] *See id.* at 243.

[152] *See, e.g.*, Phillips, *supra* note 1 (arguing that corporate theory is of little relevance to corporate social responsibility and that each of the theories of corporate personhood have been used to support divergent and even competing normative claims). *But see* Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97 (2009) (drawing on multiple theories to advance a conception of the corporation as having a moral, economic, and even "spiritual" dimensions).

[153] For the competing positions on the "determinacy" of corporate theory, see Horwitz, *supra* note 1, at 175–76; Millon, *supra* note 1, at 243–51.

Moreover, as Part III demonstrates, within particular cases—even cases touching, for example, on fundamental constitutional rights—assessments of corporate rights and duties cannot be severed from the courts' fundamental understandings of what, in fact, the corporation, and by extension, the corporate group, actually is. Indeed, the broad influence of the nexus of contracts vision of the corporation on corporate law itself demonstrates the impact of theory on the evolution of legal rules. In a given social and economic context, then, theories of the corporation can have determinate legal or political significance.[154] If perceptions of corporate identity in fact matter to case outcomes, then it is important to consider the potential normative implications of the competing theories and how these normative claims might apply to the corporate group.

1. The Concession Theory

Normative conclusions are easiest to draw under a concession theory of the corporation. Created by the state, corporations were accountable to the sovereign, or in the case of the United States, ultimately to the electorate, to carry out the largely public purposes for which they were formed.[155] In addition, states used the corporate charter to impose limits on corporate (mis)conduct and on the economic power of the corporation, which gave them direct power over the corporation to advance the public welfare.[156] Because of the concession theory's emphasis on the obligations of the corporation and its skeptical view of corporate power, some scholars have argued that modern corporate law should revive this lost understanding of the corporation as a force for producing both social and economic wealth and reintroducing a sense of public duty to the corporation.[157]

2. Aggregate Theories

An aggregate theory of the corporation, in contrast, is grounded on the freedom of contract of the contributors to the corporate enterprise. Accordingly, this theory is associated with the notion that the purpose of the corporation is inherently private rather than pub-

[154] Horwitz, *supra* note 1, at 175–76; *cf.* Millon, *supra* note 1, at 241–51 (contending that normative implications of the theories can only be observed specifically in hindsight and are otherwise continually evolving).

[155] *See* Citizens United v. FEC, 130 S. Ct. 876, 949–50 (2010) (Stevens, J., concurring in part and dissenting in part) ("The Framers . . . took it as a given that corporations could be comprehensively regulated in the service of the public welfare.").

[156] *Id.*; *see also* Mitchell, *supra* note 63, at 1491–92 (noting that early general incorporation statutes initially maintained many of these limits).

[157] *See, e.g.*, GREENFIELD, *supra* note 7.

lic.[158] Therefore, any responsibility of the corporation must derive from the expectations of the corporation's constituencies and, particularly, their contract with the shareholders as residual claimants to the firm's assets.[159] If shareholder wealth maximization is the contracted-for objective of the corporation, the normative standard by which corporate conduct should be judged is in fact economic rather than moral, making economic efficiency the surest path to maximizing shareholder and firm wealth, and ultimately, societal wealth.[160]

Some have broadened the normative implications of aggregate approaches by arguing that the terms of the corporate contract inure to the benefit of a wider range of constituencies.[161] For example, Blair and Stout's Team Production Theory of the firm posits that the firm has contractually obligated itself to a broad range of contributors to the corporate enterprise, including employees and even creditors.[162] Their theory is not only consistent with the standard "nexus of contracts" vision of the corporation but also with a contractually grounded notion of corporate social responsibility.[163]

The fact that aggregate theories can support such divergent views has led some to argue that the theory's normative implications are ambiguous.[164] Nonetheless, even such critics admit that the nexus of contracts (i.e., aggregate) view of the corporation commonly is regarded as having at least one solid moral implication," that is, that "it makes specifically *corporate* moral responsibility impossible."[165] Because the corporation has no "real" identity, any moral responsibility must rest with its individual directors, officers, or shareholders of the corporation, if at all. Similarly, at the level of the corporate group, moral obligation can be attributed solely to the individual directors and officers who serve on behalf of a specific corporate entity within the group. Since the corporate group has no separate legal identity under U.S. law, any *legal* obligations that apply at the enterprise level, for example under federal securities laws, must therefore be justified solely on efficiency grounds.

158 *See* Millon, *supra* note 1, at 220–40.

159 *See generally* Jill Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637 (2006) (reviewing the foundations of shareholder primacy).

160 For a classic articulation of the traditional approach, see EASTERBROOK & FISCHEL, *supra* note 3, at 35–39.

161 *See supra* notes 84–85 and sources cited therein.

162 *See* Blair & Stout, *supra* note 85, at 250.

163 *Id.* at 253–54.

164 *See* Millon, *supra* note 1, at 241–51; Phillips, *supra* note 1, at 242.

165 Phillips, *supra* note 1, at 242.

Whether an aggregate *enterprise* perspective is compatible with corporate social responsibility or stakeholder accountability as a normative objective depends on how the nature of the group contract is understood. If controlling shareholder interests are paramount, then the normative objective of the corporate group is to maximize their wealth. Thus, for example, in Delaware, the directors of wholly owned subsidiaries are obligated to manage the subsidiary in the interests of the parent and its shareholders.[166] However, shareholder economic interests are more likely to be diffuse in any organizational structure with minority shareholders at some level within the group. It is even more difficult to extend a stakeholder-oriented aggregate approach to the corporate group. Such an approach requires the "nexus of contracts" to include all of the constituencies (i.e., employees, creditors, and local communities) associated with every member of the corporate group—a potentially unlimited set. Moreover, it is unclear how the mediating function of subsidiary boards would be reconciled with their (varying) fiduciary duties across multiple jurisdictions.[167]

In sum, the aggregate theory emphasizes the economic interests of the firm's constituents and, particularly, its shareholders' interests over moral or ethical obligations. For corporate groups, it implies that the legal rules directed at the corporate group should be those that improve the economic efficiency of the group. This objective may be different for some corporate groups than maximizing shareholder wealth at the parent level or advancing stakeholder or minority shareholder interests at the subsidiary level.

3. Real Entity & Enterprise Theories

In his account of the emergence of the real entity view in the early 1900s, Millon notes that when corporations came to be seen as "private" entities with an identity separate from the state, they were "assimilate[d] . . . to the status of natural persons."[168] As a result, he writes that "[c]orporate law . . . lost much of its public character" and regulatory limitations previously imposed on corporations by state law were eliminated, while rights previously limited to natural persons

[166] *See* Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988).

[167] Under a Team Production Theory of the firm, the board of directors serves as a "mediating hierarch" among the competing interests of the firms' constituencies. Blair & Stout, *supra* note 85, at 250–55. Extended to the group level, this approach implies that directors of each affiliate would mediate the interests of the parent corporation, the group as a whole, and the separate constituencies of that entity.

[168] Millon, *supra* note 1, at 213

began to be extended to corporations.[169] Historically, the real entity view was associated with an expansion of corporate rights and a narrowing of corporate duties.

However, because the real entity theory conceives of the corporation as sharing the attributes of individuals, it has also been advanced, both in those early years and by more recent commentators, as offering a stronger grounding for conceptions of corporate morality.[170] This implies that the corporation can itself be found morally culpable, although whether the source of such moral obligations derives from universal norms of human behavior or from narrower norms that are collectively determined remains a subject of debate.[171] Advocates of the real entity view also emphasize its potential to ground tighter regulatory controls of the corporation, stronger voluntary commitments to corporate social responsibility, and a better "fit" between the corporation's duties and its rights. For example, the real entity theory was used in the 1930s by E. Merrick Dodd to advocate duties of the corporation to constituencies other than shareholders.[172]

To be sure, at a practical level, the power of the corporation to act independently from its shareholders as a "real person" is possible only if its directors enjoy decision-making discretion, as permitted under state corporate law.[173] The autonomy such rules give to corporate directors can permit them to consider the interests of broader constituencies, such as employees, local communities, or the environment.[174] Indeed, Berle and Means, whose seminal work on the rise of the modern corporation rests on an aggregate view that emphasizes the property interests of shareholders, recognized this dimension of the separation of ownership and control and ultimately concluded that the modern corporation must develop as a system that operates in the public interest, balancing the interests of diverse constituencies.[175] However, it is not inevitable that directors will in fact exercise their discretion in consideration of "public" (i.e., stake-

[169] *Id.*

[170] *See* Millon, *supra* note 1, at 216–20 (discussing Merrick Dodd's extension of entity theory to ground notions of corporate citizenship); Phillips, *supra* note 1, at 241'.

[171] *See, e.g.*, Peter Muchlinski, *Corporate Social Responsibility and International Law: The Case of Human Rights and Multinational Enterprises*, *in* THE NEW CORPORATE ACCOUNTABILITY 431, 436–39 (Doreen McBarnet et al. eds., 2007).

[172] *See* Phillips, *supra* note 1, at 241; Millon, *supra* note 1, at 216–20.

[173] *See supra* note 87.

[174] *See* Lawrence Mitchell, *The Board as a Path to Corporate Social Responsibility*, *in* THE NEW CORPORATE ACCOUNTABILITY, *supra* note 171, at 207, 283.

[175] BERLE & MEANS, supra note 78, at 312–13.

holder) as well as "private" (i.e., shareholder) interests. In fact, a director primacy model of corporate governance may also be the best way to advance shareholder wealth maximization, the same normative objective espoused by advocates of an aggregate theory of the corporation.[176]

But the possibility that the aggregate and real entity theories might point in the same direction is a critique going more to empirical questions of how directors and officers exercise their discretion. At the level of normative principles, a real entity approach clearly parts course from aggregate theories by positing the corporation as having an identity, and possibly even a will or moral center, such that it can ground collective culpability apart from any wrongful act or intent of its directors and officers.[177]

Abstracting to the level of the corporate group, then, a real enterprise perspective implies that the group as a whole bears rights and obligations that either derive from those of one or more members of the group or may also be independent. The derivative liability of the group or one entity within the group, based on wrongful conduct by another affiliate has been generally rejected within veil-piercing doctrine in order to preserve limited liability within the group.[178] It is, however, accepted within the major statutory regimes that currently operate on an enterprise-wide basis; in these areas, derivative liability is supported by general agency principles of attribution. The emergence of multilateral and transnational regulatory, monitoring, and enforcement mechanisms that approach the corporate group as a single enterprise rest on similar foundations.[179]

One challenge for a real enterprise approach is identifying the source of the group's moral obligation, will, and intent. Where an independent legal structure represents the group, or where the group is organized hierarchically so that a parent company or headquarters serves as a unitary "nerve center" for the organization, moral

---

[176] *See, e.g.*, Bainbridge, *supra* note 87 (advocating a view of the board of directors as the center of corporate identity and will, that is, as a "real nexus of contracts").

[177] *See, e.g.*, Phillips, *supra* note 1, at 242 (arguing that this conclusion is of little practical importance, since situations where there is "collective fault but individual blamelessness" are in practice quite rare). Yet it is easy to imagine examples of collective inaction where ordinary negligence of individuals produces wrongful acts or omissions by the organization as a whole.

[178] *See generally* Thompson, *supra* note 100.

[179] *See, e.g.*, Margaret Blair, Cynthia Williams & Li-wen Lin, *The Roles of Standardization, Certification, and Assurance Services in Global Commerce*, 4 COMP. RES. L. & POL. ECON. 1 (2008); *see also infra* notes 306–07 and accompanying text (identifying multilateral initiatives).

and legal obligations of the group may be attributable to that entity.[180] However, further work is needed to explain how collective legal or moral obligation might be assigned among constituent firms within the group in light of the diversity of organizational and decision-making structures adopted by corporate groups.

III. CORPORATE GROUP THEORY IN THE COURTS

Although concepts of corporate identity have been debated for quite some time, these issues have recently regained national attention. This Part traces the theories of the corporation and of corporate groups that were developed above through the Supreme Court's ruling in *Citizens United v. FEC*[181] and its more recent decision in *Janus Capital Group, Inc. v. First Derivative Traders*.[182] It then examines *Kiobel v. Royal Dutch Shell*, which at the time of this writing is pending before the Court and raises key questions about the nature of the corporation under international law.[183]

These cases illustrate how theoretical perspectives on the personhood of the corporation influence case outcomes and how entity-based views of the corporation fall short when extended to corporate groups. These examples are not intended to canvass the entire range of issues involving corporate groups or to survey all of the analytical approaches courts may take. However, they highlight how understandings of the nature of corporate groups vary across different doctrinal domains. By examining how theories of the corporate group illuminate some of the tensions in these decisions, this Part also suggests how enterprise-based perspectives might better guide courts in similar cases.

A. Citizens United v. FEC

In 2008, Citizens United, a nonprofit corporation, sought to shape the historic campaign for the Democratic presidential nomination. It produced the film *Hilary: The Movie*, a documentary that portrayed then-candidate Hilary Clinton in a less-than-favorable light.[184] Realizing that the project might fall afoul of federal limits on corpo-

---

[180] *See* Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192 (2010) (defining the corporation's "nerve center").

[181] 130 S. Ct. 876, 887 (2010).

[182] 131 S. Ct. 2296 (2011).

[183] *See infra* Part III.C (discussing Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) and Flomo v. Firestone Natural Rubber Co., *LLC*, 643 F.3d 1013 (7th Cir. 2011)).

[184] *Citizens United*, 130 S. Ct. at 887.

rate campaign expenditures, Citizens United sought a preliminary injunction against the enforcement of the restrictions and a declaratory judgment, both of which were denied.[185]

The case was appealed to the Supreme Court, and in January 2010 the Court found the challenged limits on corporate campaign expenditures unconstitutional.[186] In so doing, the Court overruled its earlier decision in *Austin v. Michigan Chamber of Commerce*, which had upheld expenditure limits on corporations.[187] *Citizens United* elicited strong reactions from the public and from commentators, and its implications for constitutional law, corporate jurisprudence, and broader public policy debates have proven far-reaching.[188]

An established principle of First Amendment jurisprudence is that campaign expenditures are speech and indeed "political expression" that lies "at the core . . . of First Amendment freedoms."[189] In *Citizens United,* the core question before the Court was the extent to which restrictions on the political speech of juridical persons, including corporations and labor unions, could be imposed consistent with the First Amendment.[190] The Court held that no distinction can be made between natural persons and corporations for purposes of the First Amendment and that corporations' right to freedom of speech

[185] *Citizens United* challenged federal restrictions imposed under § 441b of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441b (2006), as amended by the Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (codified at 2 U.S.C. § 441b (2006)). These restrictions prohibited corporations or unions from "using their general treasury funds to make independent expenditures on speech [that is] an 'electioneering communication' or for speech that expressly advocates the election or defeat of a candidate." *Citizens United*, 130 S. Ct. at 887.

[186] *Citizens United*, 130 S. Ct. at 917.

[187] 494 U.S. 652 (1990).

[188] The *Citizens United* decision prompted President Obama to take the unusual step of criticizing a Supreme Court decision publicly, which he did in his 2010 State of the Union speech. President Barack Obama, State of the Union Address (Jan. 27, 2010), *in* 156 CONG. REC. H418 (daily ed. Jan. 27, 2010). In response to widespread public outrage about the decision, legislation was also proposed in Congress to reconfirm that corporate expenditures by foreign-owned companies are within the existing ban on election expenditures by foreign nationals. *See* 2 U.S.C. § 441(e) (2006); *see also* Democracy Is Strengthened by Casting Light on Spending in Election Act (DISCLOSE Act), H.R. 5175, 111th Cong. § 102 (2010). Most recently, a petition has been filed with the SEC urging adoption of corporate political contribution disclosure requirements in the wake of *Citizens United*. *See* Editorial, *Serving Shareholders and Democracy*, N.Y. TIMES, Aug. 10, 2011, at A22.

[189] *Austin*, 494 U.S., at 656–57 (internal citations omitted).

[190] The Court had previously recognized the First Amendment rights of corporations in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978).

under the Constitution is coextensive with that of natural persons.[191] In reaching this conclusion, the majority opinion drew on multiple perspectives of corporate personhood without acknowledging the inherent contradictions among those approaches.[192] It also disregarded the extension of its holding to corporate groups whose voices are most likely to shape the landscape of future elections.

Corporations are nowhere mentioned in the text of the Constitution, and the question of whether particular constitutional rights of "citizens"[193] or "the people"[194] should be extended to corporations has not been answered systematically by the Court. The analysis typically turns on whether the rights at issue are "purely personal" and therefore limited to natural persons—an inquiry which depends "on the nature, history, and purpose of the particular constitutional provision."[195] Although corporations now enjoy many constitutional rights that are deemed to run to the entity itself, recent commentary observes the utter lack of a unified doctrine.[196]

---

[191] *Citizens United*, 130 S. Ct. at 898–908. The Court upheld the constitutionality of federal disclosure requirements and left intact the longstanding federal ban on direct corporate campaign contributions under 18 U.S.C. § 608(b) of the Federal Election Campaign Act of 1971. *Id.* at 901–02, 908.

[192] For further commentary on the conceptions of corporate personhood reflected in the *Citizens United* decision, see generally Avi-Yonah, *supra* note 1; Darrell A. H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497 (2011); Roger Coffin, *A Responsibility to Speak:* Citizens United, *Corporate Governance and Managing Risks* (Weinberg Ctr. for Corporate Governance Working Paper Series, Paper No. 01-11, 2011), *available at* http://ssrn.com/abstract=1766583.

[193] *See, e.g.*, U.S. CONST. pmbl., art. III, § 2.

[194] *See, e.g.*, *id.* art. I, § 2.

[195] This test was articulated by Justice Powell in *Bellotti*, 435 U.S. at 778 n.14 (stating that corporations generally enjoy Constitutional protections other than "[c]ertain purely personal guarantees" (citation omitted)).

[196] Miller, *supra* note 192, at 909. Miller describes the Court's jurisprudence as a "grab bag of history, metaphysical rumination, *Lochner*ian tailings, and pragmatism to resolve the specific corporate constitutional claim at hand . . . . a string cite rather than a doctrine." *Id.* at 909. He summarizes the state of corporate constitutional rights as follows:

> Today, corporations possess some First Amendment free speech and press rights, some rights of expressive association, and (perhaps) some right to free exercise. They enjoy Fourth Amendment rights against unreasonable searches but only a limited right to privacy. Corporations possess Fifth Amendment rights against double jeopardy and takings but no rights against self-incrimination. The Sixth Amendment guarantees corporations a right to trial by jury and to counsel but not a right to appointed counsel. Corporations are "citizens" for purposes of Article III powers, but not "citizens" for purposes of the Privileges and Immunities Clause. Corporations are "persons" with Fourteenth

The Court's fundamental holding—that corporation are "speakers" entitled to voice in the political process on par with individual citizens—clearly espouses a real entity conception of corporate personhood. Relying on its pre-*Austin* line of cases, which had invalidated corporate campaign expenditure restrictions, the Court repeatedly referred to the corporation as having its own "voice" and message that should not be restricted in the marketplace of ideas. Writing for the majority, Justice Kennedy concluded, "[S]uppressing the speech of . . . *corporations* . . . prevents *their* voices from reaching the public."[197] In so doing, the Court also distinguished the corporation's "voice" from that of its shareholders. It concluded that any interest in protecting shareholders from being compelled to promote the corporation's political views through their investment dollars was insufficient to justify restricting *the corporation's* political speech.[198] The speech rights of shareholders who do not approve of corporate speech, the majority wrote, can be addressed "through the procedures of corporate democracy," namely, director elections.[199] In the majority's view, then, the corporation has a real identity as a "speaker" independent from its constituents and thus indistinguishable (at least for First Amendment purposes) from an individual citizen.

> Amendment rights to equal protection and procedural due process and some, but not all, of the incorporated Bill of Rights. Corporations are also "persons" who may spend money to influence voters, but they cannot themselves become voters under the Fourteenth, Fifteenth, Nineteenth, or Twenty-Fourth Amendments.

Id. at 910–11 (internal citations omitted).

[197] Citizens United v. FEC, 130 S. Ct. 876, 907 (2010) (emphasis added).

[198] *See, e.g.*, *id.* at 911 (concluding that a potential disagreement by a media corporation's shareholders "with the political views the newspaper expresses" do not justify "restrict[ing] *the media corporation's political speech*" (emphasis added)); *see also* John Coffee, *Corporate Governance After* Citizens United, N.Y. L.J., Mar. 18, 2010, at 2 (observing that this argument implies that all federally required securities disclosures are compelled speech). The argument that corporate campaign contributions force investors to subsidize "compelled political speech" is based in part on the fact that, prior to *Citizens United*, corporations were not required to disclose these contributions to investors, preventing them from exiting investments in companies that contribute to campaigns they oppose. *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010) (advocating for heightened review of corporate political speech decisions under state corporate law); Tucker, *supra* note 192, at 514, 533–41 (outlining the compelled speech arguments in *Citizens United*). More than a dozen states have introduced new disclosure rules in the wake of *Citizens United.* Kenneth P. Doyle, *More States Passing Disclosure Laws in Response to* Citizens United *Ruling*, BNA CORP. L. DAILY, Dec. 8, 2011.

[199] *Citizens United*, 130 S. Ct. at 911 (citing *Bellotti*, 435 U.S. at 794). *But see id.* at 977–79 (noting the inability of corporate law to provide an adequate remedy) (Stevens, J., dissenting); *see also* Tucker, *supra* note 192, at 533–41 (explaining the limits of effective remedies to the compelled speech challenge).

However, another rationale relied on by the *Citizens United* majority reflects instead an aggregate view of the corporation that emphasizes the underlying rights of the shareholders and other individuals constituting the corporate entity. Similar reasoning had been previously followed by the Court in *Buckley v. Valeo*, a pre-*Austin* First Amendment case.[200] There, the Court had held that limits on independent associations' campaign expenditures restricted the speech rights of their members.[201] In the same vein, the *Citizens United* majority concluded that the challenged restrictions on corporate speech represent a "ban [on] the political speech of millions of *associations of citizens*."[202] Elsewhere, the Court also acknowledged concerns that corporate speech might reflect the views of shareholders, some of whom might be foreign nationals.[203]

At the same time, the majority failed to clarify how the corporation is itself a "speaker" if its speech and its rights to speak are merely derived from its constituents. More critically, it failed to explain its understanding of *which* constituents' voices the corporation represents. As the dissent observed, corporate officers and other employees do not voice their own personal views when they speak as agents of the corporation.[204] Yet as noted above, the Court equivocated on the issue of whether the corporation's voice is the voice of its shareholders. Corporate law does not permit the shareholders to "dictate" the corporate "message" to the board of directors or management, nor can it be assumed that shareholders of large public corporations share identical interests, particularly political views, that could be otherwise imposed on the corporation itself.[205] This lack of connection between corporate voice and any specific constituency may indicate that the *Citizens United* majority ultimately holds a real entity view

[200] 424 U.S. 1, 25–26 (1976).

[201] *Id.* at 22.

[202] *Citizens United*, 130 S. Ct. at 907 (emphasis added); *see also id.* at 928 (Scalia, J., concurring) ("[T]he individual person's right to speak includes the right to speak *in association with other individual persons.*").

[203] *Citizens United*, 130 S. Ct. at 911 ("We need not reach the question of whether the Government has a compelling interest in preventing foreign individuals or associations," that is to say, "corporations or associations that were created in foreign countries or funded predominately by foreign shareholders" from "influencing our Nation's political process."). Federal law already imposes such restrictions. *See* 2 U.S.C. § 441(e) (2006). The constitutionality of these restrictions was recently upheld. Bluman v. FEC, 800 F.Supp.2d 281 (D.D.C. 2011) (rejecting a First Amendment challenged based in part on *Citizens United*), *aff'd*, 132 S. Ct. 1087 (2012).

[204] *Citizens United*, 130 S. Ct. at 972 (Stevens J., dissenting in part).

[205] *See* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255 (2008) (discussing divergence of shareholder interests).

of the corporation, but this position is inconsistent with the opinion's stated rationale, which rests on individual speech rights.

The Court in *Citizens United* considered only in passing the implications of its holding for corporate groups. A key rationale behind *Austin* was that the unique economic and legal characteristics of corporations heightened the risk of corruption and the possibility of corporate "voice" dominating political debate.[206] In discounting the *Austin* Court's concerns of corporate expenditures "distorting" political debate, the Court pointed to media conglomerates as corporate organizations quintessentially at the core of First Amendment protections despite their ability to amass wealth in support of particular messages.[207] Reflecting a real enterprise approach, the Court's opinion throughout assumes that media conglomerates speak with one voice.[208] The majority also sympathized with concerns that campaign expenditures by the U.S. subsidiary of a foreign parent might "speak" with the voice of its parent or controlling shareholder.[209] This too implies a real enterprise perspective, that is, a view that a U.S.-based corporate entity within a corporate group might not "speak" with its own "voice" (in dollar terms) but rather on behalf of the entire corporate family.

A real enterprise view of the corporate group as a speaker in its own right is consistent with the *Citizens United* holding. It also comports better with the reality of corporations' ability to promote a unified corporate image, brand, and "message," the complex nature of corporate decision-making, and the common law fiduciary duties of corporate directors and officers. As acknowledged by the dissent, corporate "voice" does not necessarily reflect the views of *any* corporate constituency, whether it is the shareholders, directors, officers,

---

[206] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–59 (1990) (upholding restrictions on corporate political expenditures). The Court also rejected the policy argument found persuasive by the *Austin* majority that restrictions on corporate spending were necessary to prevent corporations "from obtaining 'an unfair advantage in the political marketplace' by virtue of their economic wealth." *Id.* at 659 (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)). The Court held that "First Amendment protections do not depend on the speaker's 'financial ability to engage in public discussion.'" *Citizens United*, 130 S. Ct. at 904 (quoting Buckley v. Valejo, 424 U.S. 1, 49 (1976)).

[207] *Citizens United*, 130 S. Ct. at 905–06 (noting that media corporations are exempted from BCRA's ban on corporate expenditures).

[208] *See, e.g.*, *id.* at 911 (considering circumstances where shareholders of a media corporation might oppose "the political views the newspaper expresses" but finding such interests insufficient to justify restricting *the corporation's political speech* (emphasis added)).

[209] *See supra* note 203 and accompanying text (addressing concerns about potential foreign influence on federal elections).

or other employees.[210] Distinguishing corporate "voice" from the corporation's human constituents in this way might have influenced the Court to credit concerns about corporate power and the potential distortion and "drowning out" of individual voice, but the majority opinion soundly rejects these rationales.

The corporations whose "voice" the majority explicitly sought to protect are "small corporations without large amounts of wealth," which make up the majority (in numbers but not in dollar terms) of corporate taxpayers and employers.[211] However, when corporate donors are in fact corporate groups, they are no longer associations of *individuals* but associations of other *corporations*—in other words, "polycorporate networks." Although the corporate group, too, is a (larger) association of individuals, citizens' expectation of communicating politically through the corporate form is certainly attenuated when they know that their participation (i.e., investment) will be filtered through a corporate group. Had citizens' expectations been understood this way, the risk of restrictions on *individual* voice might have posed less of a concern to the Court.

Once the group is understood to be the speaker, critical advantages corporations enjoy over individuals, such as "limited liability . . . perpetual life, and . . . favorable treatment of the accumulation and distribution of assets" might also have weighed more heavily in the majority's analysis.[212] Instead, the Court interpreted its earlier decision in *First National Bank of Boston v. Bellotti* to prohibit "restrictions distinguishing among different speakers."[213] Taking into account an enterprise perspective might have motivated the Court to credit the anti-distortion rationale of *Austin* over the anti-discrimination rationale of *Bellotti*.

A final issue in *Citizens United* concerns the boundaries of the corporate group. Advocates of the limitations on corporate "speech" had argued that the corporation's ability to establish a political action

[210] *See Citizens United*, 130 S. Ct. at 972 (Stevens, J., dissenting in part) (noting that because the corporation's personhood is only "a useful legal fiction" and that corporations are not "members of 'We the People'," but neither is the corporation speaking for its human constituents; observing further that "[i]t is an interesting question 'who' is even speaking when a business corporation places a[] [candidate] advertisement").

[211] *Id.* at 907 (majority opinion) (citing evidence that ninety-six percent of the members of the U.S. Chamber of Commerce have less than one hundred employees).

[212] *See id.* at 971 (Stevens, J., dissenting in part) (citing Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–59 (1990)).

[213] *Id.* at 898–99 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978)).

committee (PAC) through which expenditures could be made already gave the corporation an avenue to express its views, a position supported by the Court's earlier decision in *Austin*.[214] Adopting a real *entity* view of the PAC, the Court rejected this argument. It emphasized the corporation's formal legal separation from its PAC as cutting off any means for the corporation to meaningfully "speak" in political campaigns.[215] Thus, Justice Kennedy concluded that the challenged prohibition on corporate independent expenditures was an "outright ban . . . notwithstanding the fact that a PAC created by a corporation can still speak, for *a PAC is a separate association from the corporation*."[216]

To be sure, corporations are prohibited from contributing corporate treasury funds to the PAC.[217] However, the Court could have found the PAC to be part of the corporate group—a real enterprise approach—while still recognizing the independence of the PAC as a "separate segregated fund" holding non-corporate assets contributed by others. Viewed this way, the PAC is analogous to a minority subsidiary, and its views could be identified both with the founding corporation and with direct PAC contributors. The Court declined to do so, despite the fact that a corporate PAC is formed, supported, and in fact *controlled* by the corporation.[218] Interestingly, under campaign finance law, separate PACs of a parent and a subsidiary are consolidated for purposes of applicable funding limits.[219] The regulations view these separate PACs as affiliated with a single "enterprise," even though as a matter of campaign finance law, the Court determined that the voice of the PACs is not the voice of the corporate group itself.

[214] *See Austin*, 494 U.S. at 660–61. PACs established by corporations or unions may engage in "express advocacy" and "electioneering communications." 2 U.S.C. § 441b(b)(2) (2006).

[215] *Citizens United*, 130 S. Ct. 8 at 897–98 (Stevens, J., dissenting in part).

[216] *Id.* at 882 (emphasis added).

[217] 2 U.S.C. § 441b(b)(2) (2006).

[218] 11 C.F.R. § 114.5(d) (2012) ("A corporation . . . may exercise control over its separate segregated fund.").

[219] 2 U.S.C. § 441(a)(4)–(5) (2006); 11 C.F.R. §§ 100.5(g)(2), 110.3(a)(2)(i) (2011); *see* Walther v. FEC, 468 F. Supp. 1235, 1239 (D.D.C. 1979) ("[I]f two or more PACs are controlled by one person or one group of persons, then the PACs should be treated as one PAC for purposes of controlling political contributions."). The D.C. Circuit has recently held limits on certain individual contributions to PACs unconstitutional as applied, though without particular reference to the rules on parent-subsidiary consolidation. SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (challenging the individual contribution limits of 2 U.S.C. § 441(a)(a)(1)(C) and 441(a)(a)(3)).

Whatever its deficiencies in other respects, the *Citizens United* opinion rings true in its implicit understanding of the corporation as conveying messages that cannot be identified with any individual or group of individuals within the corporation. Yet the majority opinion failed to adequately consider the implications of its holding for large corporations—that is, corporate groups. The majority opinion also illustrates how the Court has drawn on competing theories of corporate personhood to ground its decisions in constitutional cases. The tensions between these views led the Court to give undue weight to the "nondiscrimination" rationales of *Bellotti* and to unduly discount *Austin*'s concerns about the potential distortive influence of corporate campaign expenditures.

B. Janus Capital Group, Inc. v. First Derivative Traders

Less than a year after *Citizens United*, the Supreme Court in *FCC v. AT&T, Inc.* confirmed that its concept of the "real" personhood of the corporation did not automatically extend to other contexts, particularly where federal statutes provide guidance to the contrary.[220] This result is consistent with the evidence presented elsewhere in this Article of considerable variation in courts' views of the corporation and the corporate group across different areas of the law. In *Janus Capital*, decided in June 2011, the Supreme Court again confronted questions of corporate identity but in the very different context of the federal securities laws.[221]

Janus Capital involved claims under Securities and Exchange Commission (SEC) Rule 10b-5[222] by shareholders of Janus Capital Group, Inc. (JCG) against JCG and its wholly owned subsidiary, Janus Capital Management, LLC (JCM).[223] Rule 10b-5 under the Securities Exchange Act of 1934 makes it unlawful for "any person, directly or indirectly . . . [t]o *make* any untrue statement of a material fact" in connection with the purchase or sale of securities.[224] JCM served as the investment advisor to Janus Investment Fund (the "Fund"), spe-

[220] 131 S. Ct. 1177 (2011) (rejecting AT&T's argument that it had a "personal privacy" interest in certain law enforcement records under exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C)).

[221] Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011).

[222] 17 C.F.R. § 240.10b-5 (2012).

[223] *Janus Capital*, 131 S. Ct. at 2299–300.

[224] 17 C.F.R. § 240.10b-5 (2012) (emphasis added). Rule 10b-5 implements Section 10(b) of the Securities Exchange Act of 1934, which makes it "unlawful for any person, directly or indirectly . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j (2006).

cifically a Massachusetts business trust, which was owned entirely by the mutual fund's investors.[225] The JCG shareholders alleged that because the investment advisor JCM, acting under the control of JCG, "participat[ed] in the writing and dissemination" of misleading statements in the Janus Investment Fund prospectus, JCM was in fact the "maker" of the statements and thus a direct violator of Rule 10b-5.[226] When the misleading nature of the statements was publicly revealed, investors withdrew funds from the Janus Investment Fund, which caused a decline in the value of JCG stock as well.[227]

The decision in *Janus Capital Group* hinged on whether the Court would adopt an "enterprise" analysis with respect to JCM and the Fund and required the Court to consider the contours of the corporate group. Like *Citizens United,* the case also raised questions regarding the source of corporate speech but in a statutory rather than a constitutional context.

In contrast to the constitutional arena, cases involving the extension of statutory rights and obligations to corporations begin from the definition of "person" in the statute at issue. In most federal statutes, "person" is defined to include corporations and other organizations.[228] Few statutes explicitly define the corporate group.[229] Whether a court approaches the corporate group from an enterprise or entity perspective generally depends upon its interpretation of the text and purpose of the statute as they pertain to the (i) "the nature of the group interrelationship, consisting of the intertwined structure and operations," and (ii) the importance of enterprise principles to furthering "the objectives of the law in the legal area involved."[230] Where the statutory regime contains provisions specifically directed at corporate groups, the statutory definition of "control" and general

[225] *Janus Capital*, 131 S. Ct. at 2299.

[226] *Id.*

[227] *Id.* at 2299–300.

[228] *See, e.g.*, Dictionary Act, 1 U.S.C. § 1 (2006) (defining "person" as used in federal statutes to include corporations and other business organizations).

[229] *See supra* Part II.A and note 32. The term "affiliate" is however defined in numerous contexts. *See, e.g.*, *infra* note 236 and accompanying text. A number of regulatory regimes use other terms to delimit the corporate group, such as "integrated enterprise" under federal labor law, the "unitary business" doctrine under constitutional law, and "enterprise" under the Fair Labor Standards Act and the Racketeer Influenced and Corrupt Organizations Act. *See* Phillip Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 345–60 (1990).

[230] BLUMBERG, *supra* note 2, at 119 (noting that this is also the general standard courts use to determine whether common law rules should apply on an enterprise or entity level).

agency principles will generally dictate whether an enterprise or entity analysis applies.[231]

Under Section 20(a) of the Securities Exchange Act of 1934, "[e]very person who, *directly or indirectly*, controls any person liable" for violations of the securities laws is also subject to liability.[232] Section 20(b) imposes liability on violations accomplished through intermediaries.[233] The definition of "control" under the securities laws is expansive and is "to be construed liberally" in light of the remedial purposes of the statute.[234] It is defined broadly as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the *ownership of voting securities*, by *contract*, or *otherwise*."[235] Federal securities regulations define an "affiliate" as "a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with" another.[236]

In *Janus Capital,* the identity of the "maker" of the misleading statements depended on whether the relationship between the defendant entities was viewed from an entity or enterprise perspective. The parties had acknowledged that JCG "controlled" its wholly owned subsidiary JCM, as defined by Section 20(a). Accordingly, JCG would have been an indirect violator of Rule 10b-5 if JCM had been found directly liable since the two would be deemed to have "made" the statements as a single speaker—an enterprise view.[237] However, Justice Thomas, writing for the 5-4 majority, concluded that the relationship between JCM and the Fund did not fit within the definition of

[231] *See id.* at 101, 119.

[232] 15 U.S.C.A. § 78t(a) (West 2006 & Supp. 2011) (emphasis added).

[233] *Id.* § 78t(b).

[234] *See, e.g.*, Harrison v. Dean Witter Reynolds, Inc., 974 F.2d 873, 880 (7th Cir. 1992).

[235] 17 C.F.R. § 230.405(b) (2012) (emphasis added) (defining "control" under the Securities Act of 1933); *see, e.g.*, SEC v. Todd, 642 F.3d 1207 (9th Cir. 2011) (applying this definition for purposes of controlling person liability under Section 20(a) of the Securities Exchange Act of 1934); *Harrison*, 974 F.2d 873 (same); SEC v. Int'l Chem. Dev. Corp., 469 F.2d 20 (10th Cir. 1972) (defining control within the definition of an underwriter under Securities Act Section 2(11)); *see also* 17 C.F.R. § 260.0-2(b) (2012) (adopting the same definition under the Trust Indenture Act of 1939, 15 U.S.C. § 77aaa).

[236] 17 C.F.R. § 230.405 (2012) (defining "affiliate" under the Securities Act of 1933); *see also id.* § 260.0-2(f) (adopting the same definition under the Trust Indenture Act of 1939, 15 U.S.C. 77aaa). This definition is also part of the definition of "affiliated person" under the Investment Company Act of 1940 (ICA), 15 U.S.C.A. § 80a-2(3) (West Supp. 2011).

[237] Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2301 n.5 (2011).

"control" under Section 20(a) and that JCM did not otherwise have "direct" or "ultimate" control over the misleading statements.[238] Accordingly, the majority held that JCM could not be held liable for any Rule 10b-5 violations of the Fund itself.[239]

In reaching this conclusion, the Court adopted a formalistic entity-level view of the corporate structure. It relied primarily on the fact that corporate formalities were observed in the formation and operation of the Fund, that JCM and the Fund were not under common ownership, and that the prospectus was filed solely in the name of the Fund.[240] In addition, only one of the Janus Investment Fund directors was simultaneously a director of JCM, making the Fund's board of trustees "independent" of JCM, as required by the Investment Company Act of 1940 (the '40 Act).[241] The Court thus adopted a real entity approach of the Fund as an independent speaker, with its board exercising "ultimate control" over its communications.[242]

Like the PAC in *Citizens United*, the formally independent mutual fund structure at issue in *Janus Capital* lies near the outer edge of what might be considered an enterprise under core conceptions of the corporate group—it is similar in many respects to a joint venture or other contractual relationship. However, as the dissent noted, JCM employees implemented the Janus Funds' strategies and handled its daily operations, and all the officers of the Janus Investment Fund were also officers of JCM—the Fund was in fact a "captive" mutual fund.[243] Without joint ownership or direct board control, the Fund was formally, if not functionally, independent of JCM in the eyes of the Court. Viewed in this way, the relationship between the mutual fund and JCM was defined by services and other contracts, so the Court could simply view the fund as a client who had hired an investment advisor and its management team—not part of the same corporate group.

Under this view of the corporate group then, JCM as an independent third party could be liable only for aiding and abetting the Fund's 10b-5 violation—an act for which no recognized private right

[238] *Id.* at 2305.

[239] *Id.* at 2299, 2304.

[240] *Id.* at 2304.

[241] The ICA permits up to sixty percent of the board of a mutual fund to be composed of "interested persons." 15 U.S.C.A. § 80a-2(a)(19) (West 2009 & Supp. 2011).

[242] *Janus Capital*, 131 S. Ct. at 2302.

[243] *Id.* at 2306 (Breyer J., dissenting); *see* Jones v. Harris Assocs., L.P., 130 S. Ct. 1418, 1421 (2010) (acknowledging the lack of practical independence between mutual funds and their investment advisers and referring to mutual fund clients established by an affiliate of the adviser as "captive mutual funds").

of action exists.[244] Alternatively, the *Janus* majority left open the possibility that an investment advisor such as JCM could be held liable under Section 20(b) of the Exchange Act in circumstances where the captive mutual fund might be an "innocent intermediary" of fraud by JCM.[245] Absent such a claim, the only way to render investment advisors directly liable for misleading disclosures they prepare may then be to require them to separately execute or attest to them, as John Coffee has proposed.[246]

In contrast, the dissent argued, in essence, that JCM and the Fund should be viewed as a real enterprise—that is, as a single "speaker" collectively communicating through the Fund prospectus.[247] Justice Breyer, writing for the dissent, observed: "Nothing in the English language prevents one from saying that several different individuals, separately or together, 'make' a statement that each has a hand in producing."[248] Even though the core indicia of the corporate group were lacking for purposes of *indirect* liability as a controlled entity under Section 20(a), for the dissent, the two entities could nonetheless be viewed as contributing to a collective communication—essentially, the product of a joint enterprise.

Had the Court adopted an aggregate enterprise approach emphasizing the interests of the Fund investors (which did not include JCM), it might also have concluded that their implicit (and likely explicit) contract with the Fund included an agreement that JCM would "speak" on the Fund's behalf by supplying its officers and management services and producing its required disclosures. Either enterprise approach might better have advanced the regulatory goals of Rule 10b-5 to protect investors and ensure the accountability of investment professionals. Instead, the majority ruling allows investment advisers to insulate themselves from Rule 10b-5 liability for captive

[244] Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

[245] *See Janus Capital*, 131 S. Ct. at 2304 n.10. In *Janus*, the plaintiff had not made any alternative claims under § 20b of the Exchange Act. *Id.* at 2311 (Breyer J., dissenting).

[246] *See* John C. Coffee, Jr., *U.S. Supreme Court and Securities Litigation*, N.Y. L.J., July 21, 2011.

[247] *See Janus Capital*, 131 S. Ct. at 2310 (Breyer, J., dissenting) (noting that the issue is not whether JCM is indirectly liable under Section 20(a) of the Exchange Act for control of the guilty Fund but whether JCM is itself "directly liable" as the maker of the statements).

[248] *Id.* at 2307.

mutual funds that they manage to an extent not permitted by the Court's earlier rulings.[249]

The flexibility conferred by modern corporate and investment law, contract, and the diversification of business entity forms has made defining clear boundaries for the corporate group or firm as a unified enterprise difficult. *Janus Capital* illustrates the types of principles courts look to in considering whether to view independent entities as part of a single enterprise and the policy implications of a strict entity-based approach.

In many contexts, there are good reasons to limit the bounds of the corporate group to entities linked by direct equity interests and control. First, this narrow approach gives due regard to the formal legal structure of the group. Second, it distinguishes unified enterprises more clearly from general agency relationships. Third, it is the combination of ownership and control that contributes to the efficiency of the corporate group as an organizational form even as it creates the potential for abuse. Hence, the need for regulatory intervention. While not justified everywhere, *Janus Capital* shows, however, that in some contexts, such as securities law, the interrelationship between the entities involved as well as the incentives that an entity-based rule creates might justify broader perspectives of the corporate group. In this regard, the *Janus Capital* majority's position illustrates the limits of control-based definitions of the corporate group, while the dissent shows how other factors—such as decision-making control and oversight authority—support a more expansive view.

C. Kiobel v. Royal Dutch Petroleum Co.

Thus far, this Article has considered the corporate group without reference to multinational enterprises. However, many of the most challenging regulatory and policy debates surrounding corporate groups arise because of their global reach. Any consideration of the nature of the corporate group must therefore consider the intersections of domestic and international legal regimes.[250] At the time of this writing, a decision is pending before the Supreme Court in the case of *Kiobel*, which raises the issue of corporate status and identity under international law.[251] The case applies customary international

[249] *Id.* at 2308 (questioning the majority's reading of *First Interstate Bank of Denver*).

[250] For a more complete treatment, see generally MUCHLINSKI, *supra* note 2; Reuven Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5 (2003).

[251] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010). The Supreme Court granted certiorari in the *Kiobel* case on Oct. 17, 2011. Kiobel v. Royal

law in one of the few contexts where it has direct bearing on the obligations of global corporate groups—human rights litigation under the Alien Tort Statute.[252]

1. The Multinational Challenge

There is no uniform definition of a multinational, and its boundaries are not necessarily limited to the legal structure of affiliated entities linked by shareholdings.[253] The Organisation for Economic Cooperation and Development (OECD) uses the term "multinational enterprise" (MNE) to refer to "companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways."[254] The United Nations defines the "transnational corporation," a generally parallel term, as "an economic entity [or entities] operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively."[255]

Dutch Petroleum Co., 132 S. Ct. 472 (2011) (No. 10-1491). The case was heard with *Mohamad v. Rajoub*, 634 F. 3d 604 (D.C. Cir. 2011), *cert. granted* 132 S. Ct. 454 (2011) (No. 11-88), a case involving similar issues under a related statute, the Torture Victims Protection Act.

[252] 28 U.S.C. § 1350 (2006) (giving district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations"). According to an exhaustive survey conducted by Michael Van Alstine, there are in fact at least 115 federal statutes requiring the courts to interpret and apply standards defined with reference to international law. *See* E-mail from Michael P. Van Alstine, Professor of Law, Univ. of Md. Sch. of Law, to Virginia Harper Ho, Associate Professor of Law, Kansas Univ. Sch. of Law (Jan. 28, 2011, 10:07 AM) (on file with author). However, the vast majority concern maritime law and the law of war and are of less direct relevance to multinationals outside related industries.

[253] *See* MUCHLINSKI, *supra* note 2, at 57–82; *see also* ORG. FOR ECON, CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 9, ¶ 2 (2008), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf ("Multinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organisational forms. Strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.").

[254] *See* ORG. FOR ECON, CO-OPERATION & DEV, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 17, ¶ 4 (2011), *available at* http://www.oecd.org/dataoecd/43/29/48004323.pdf (noting that "a precise definition of multinational enterprises is not required for the purposes of the *Guidelines*").

[255] *See* U.N. Econ. & Soc. Council, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, ¶ 20, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement (approved by U.N. Sub-Comm'n on the Promotion & Protection of Human Rights Res. 2003/16, Responsibilities of Transnational Corporations and Other Business

In this Article, however, the term is used more narrowly to refer to a corporate group linked by shareholding rather than contractual relationships.[256]

According to the United Nations' 2011 World Investment Report, multinational corporate groups currently account for one-fourth of the world's gross domestic product and one-third of all global exports.[257] A recent report on the role of corporate groups in Europe observed that "the international group of companies—not the single company—has become the prevailing form of European large-sized enterprises."[258] In the United States, multinationals also account for a significant percentage of the national economy.[259]

As a matter of organizational structure, management, sheer economic power, and indeed, identity, global corporate groups can be viewed most consistently from a real enterprise perspective as "polycorporate business networks."[260] Regardless of whether they are recognized as having independent "citizenship" or formal legal status within a given jurisdiction, corporate groups operate with a collective identity that is often embodied in a global brand or other symbol of corporate identity. From a management standpoint as well, multinational corporate group operations are characterized by the global coordination of legally independent parts to advance a common economic strategy.[261] Indeed, these realities are consistent with theories

---

Enetreprises with Regrad to Human Rights, 55th Sess., Aug. 26, 2003, U.N. Doc. E/CN.4/Sub.2/2003/L.11, at 52 (Aug 26, 2003)).

[256] This view is in line with other commentators who use the term "multinational corporation" to refer to firms that "invest directly in foreign facilities and hold management accountable for foreign activities" rather than all firms engaged in contracts with foreign parties. *See, e.g.*, DINE, *supra* note 2, at 41 (citations omitted).

[257] United Nations Conference on Trade and Development, Geneva, Switz., June 27–29, 2011, *World Investment Report 2011*, at xiii (July 26, 2011), *available at* http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf.

[258] ANTUNES ET AL., *supra* note 27, at 59.

[259] *See, e.g.*, JONATHAN CUMMINGS ET AL., MCKINSEY, GROWTH AND COMPETITIVENESS IN THE UNITED STATES: THE ROLE OF ITS MULTINATIONAL COMPANIES, (2010), *available at*
http://www.mckinsey.com/mgi/publications/role_of_us_multinational_companies/index.asp (reporting that as of 2007, U.S. multinationals accounted for one percent of all U.S. companies but contribute twenty-three percent of all private sector GDP).

[260] For a discussion of the term "polycorporate network," see *supra* notes 135–39 and accompanying text.

[261] Catá Backer, *supra* note 2, at 556; *see also supra* note 126 and sources cited therein (analyzing strategic considerations impacting multinational group structures); ANTUNES ET AL. *supra* note 27, at 59 (concluding that "group management is the heart of the [multinational enterprise]: the main reason for its success consists in the sophisticated and flexible management issuing from the optimal combination of central control exercised by the parent and local autonomy granted to subsidiaries.")

of the firm based on transaction cost economics wherein corporate groups can be understood as unified economic organizations.

Although the rise of multinational corporate groups has delinked corporations from ties to geographic and regulatory jurisdictions, international and domestic legal regimes remain territorially bounded.[262] This has enabled multinationals to engage in regulatory arbitrage, shifting operations and assets to the most favorable (i.e., weakest) regulatory jurisdictions, and in asset partitioning, strategically shielding corporate assets by isolating riskier operations in separate legal entities, each with limited liability.[263] Ultimately, the juxtaposition of geographically bounded sovereign nation-states as regulators and the emergence of business entities whose operations transcend such boundaries has weakened the power of any one state to regulate the corporation as a whole.[264]

Theories of the corporate group offer a new way to articulate this well-known dilemma—namely, that a transnational corporate group in fact exists as a "real enterprise" in an ontological sense beyond the bounds of its legal structure but that current regulatory tools can respond only at the level of the group's constituent parts, in other words, an "aggregate enterprise" approach. This regulatory gap is most evident in the rising number of claims by involuntary tort creditors against major multinationals.[265] One of the most prominent of the recent cases raising such claims is *Kiobel*.

2. *Kiobel v. Royal Dutch Petroleum Co.* and Alien Tort Claims Jurisprudence

From 1993 to 1994, Nigerian military forces engaged in a campaign of murder, rape, and destruction against local activists in the Ogoni region of Nigeria who had protested the environmental im-

[262] The challenges of regulating multinationals through traditional territorially grounded legal regimes have been much noted. *See, e.g.*, MUCHLINSKI, *supra* note 2, at 123–71 (analyzing the jurisdictional limits of MNE regulation through national or regional law); Catá Backer, *supra* note 2, at 543–44 (noting that "emerging patterns of economic globalization . . . expose the limitations of theorizing that is grounded on . . . principles" of territoriality and a hierarchy of legal sources premised on the ultimate authority of the state or sovereign); Hansen, *supra* note 119; Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1969).

[263] *See, e.g.*, Catá Backer, *supra* note 2, at 543 (on asset partitioning and its rationales); Iacobucci & Triantis, *supra* note 31.

[264] *See, e.g.*, *id.*

[265] A recent Westlaw search of all reported cases litigating Alien Tort Statute (ATS) claims since 1997 revealed that of a total of 645 cases, over 500 involved corporations (search conducted Apr. 12, 2012).

pact of oil exploration.[266] They did so allegedly at the behest of and with the direct assistance of a subsidiary of Royal Dutch Petroleum and Shell Transport and Trading Company PLC.[267] After litigation spanning more than fifteen years,[268] a panel of the Second Circuit held in September 2010 that corporations, as juridical entities, are not "persons" under international law and therefore cannot be sued under the Alien Tort Statute (ATS).[269] Like nearly every other circuit to consider the question, the Second Circuit had previously assumed without deciding that the ATS recognized corporate defendants.[270] Only the Eleventh Circuit had squarely confronted the issue, and it had upheld corporate liability under the ATS.[271] Since *Kiobel* was decided, the D.C. Circuit and the Seventh and Ninth Circuits have expressly ruled on the issue of corporate liability under the ATS.[272] All have sided with the Eleventh Circuit and rejected the position taken by the Second Circuit panel majority.

On July 8, 2011, the D.C. Circuit first rejected *Kiobel*'s conclusions in *Doe v. Exxon Mobil*, a case involving alleged torture, murder, and various torts committed by Indonesian military personnel hired as security by Exxon Mobil to guard its natural gas facility in Aceh,

[266] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010).

[267] *Id.* Shell Petroleum Development Company of Nigeria, Ltd. (SPDC) is the Nigerian subsidiary of the other named corporate defendants. *Id.* at 123. Plaintiffs, Nigerian citizens, alleged that Dutch, British, and Nigerian companies, which were engaged via a multi-layered corporate structure in oil exploration in 1993, paid the government and provided transport to the Nigerian army, which raped and murdered civilian activists. *Id.*

[268] Litigation by residents of the Ogoni region of Nigeria commenced on November 6, 1996, in the case of *Wiwa v. Royal Dutch Petroleum, Co.*, 226 F.3d 88 (2d Cir. 2000). *Kiobel* had been pending nearly a decade by the time the Supreme Court granted certiorari to hear the case in October 2011. Kiobel v. Royal Dutch Petroleum Co., No. 1:02cv07618 (S.D.N.Y. Sep. 20, 2002) (initial class action filing).

[269] *Kiobel*, 621 F.3d at 112–13.

[270] *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009), *cert. denied* 131 S. Ct. 122 (2010); *see also* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999) (entertaining claims against a corporate defendant where no challenge to corporate liability was raised). The Fourth Circuit recently considered claims against corporate defendants under the ATS where defendants failed to raise a timely challenge to the use of the ATS against corporate defendants. Aziz v. Alcolac, Inc., 658 F.3d 388 (4th Cir. 2011).

[271] *See* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (following *Romero* for the proposition that "corporate defendants are subject to liability defendants under the ATS"); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

[272] Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 2011 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011) (en banc), *cert. petition filed*, 80 U.S.L.W. 3335 (U.S. Nov. 23, 2011) (No. 11-649).

Indonesia.[273] Relying on the Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, the court refused to distinguish between individual and corporate defendants for purposes of ATS liability.[274] Three days later the Seventh Circuit followed suit in *Flomo v. Firestone Natural Rubber Co.*, a case against Firestone affiliates involving alleged child labor in Liberia.[275] Judge Posner, writing for the Seventh Circuit in *Flomo*, concluded that so long as the corporation's actions are condoned at the "decisionmaking level," the corporation as a juridical person may be held liable under the ATS.[276] An en banc opinion of the Ninth Circuit reviewing ATS claims against Rio Tinto recently reached a similar conclusion based in part on the lack of specific language within the ATS or any legislative history suggesting congressional intent to limit the ATS to claims against natural persons.[277]

These cases are among the most recent in a long line of claims brought against U.S. and foreign multinationals in the United States under the Alien Tort Statute.[278] The Alien Tort Statute, which was enacted by the first Congress as part of the Judiciary Act of 1789, confers subject matter jurisdiction on U.S. federal courts to hear tort claims by foreign plaintiffs based on violations of the "law of nations" or customary international law, such as piracy, crimes against humanity (including genocide), and torture.[279] The ATS is a statute of unique provenance and has few parallels in other legal systems.[280] The ATS was revived, ironically enough, by the Second Circuit in the

---

[273] *Exxon Mobil*, 654 F.3d 11.

[274] *Id.* at 50 ("[T]he ATS 'by its terms does not distinguish among classes of defendants.'" (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989))).

[275] *Flomo*, 643 F.3d 1013.

[276] *Id.* at 102–13.

[277] *Sarei*, 671 F.3d at 747–48.

[278] 28 U.S.C. § 1350 (2006) (giving district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations").

[279] Sosa v. Alvarez-Machain, 542 U.S. 692, 713, 715, 724 (2004); *see also id.* at 730 ("[T]he ATS is a jurisdictional statute creating no new causes of action."). Customary international law may be defined as the "[p]ractice of states . . . that law 'made over time by widespread practice of governments acting from a sense of legal obligation' . . . and 'gradually ripening into a rule of international law.'" *Exxon Mobil Corp.*, 654 F.3d at 42 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. b.; LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 33 (2d ed. 1979); *The Paquette Habana*, 175 U.S. 677 (1900)).

[280] *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (calling the ATS a "legal Lohengrin" of which "no one seems to know whence it came").

case of *Filartiga v. Pena-Irala*.[281] Since 1997, it has become a primary vehicle for foreign plaintiffs seeking compensation for violations of international law.[282]

Footnote twenty in *Sosa v. Alvarez-Machain*, the Supreme Court's only interpretation of the ATS, lies at the heart of *Kiobel* and the cases challenging its holding. It states: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[283] The question of whether *Sosa* requires a threshold jurisdictional finding that corporate liability is itself a "specific, universal, and obligatory" norm of customary international law is itself a matter of some dispute.[284] However, all of the appellate decisions reviewed here conclude that post-*Sosa*, the question of *who* can properly be named a defendant is a matter that must be determined with reference to customary international law.[285]

Based on an analysis of international criminal law and the practice of international criminal tribunals from Nuremburg to the International Criminal Court, the Second Circuit panel in *Kiobel* concluded that individuals, but not corporations, are "subjects of customary international law"[286]: "'subjects' [of international law are] those that, to varying extents, have legal status, personality, rights, and *duties* under international law and whose acts and concerns are the principal concerns of international law."[287] Thus equating personhood with status as a "subject" of international law, the court concluded that only individuals have such a status and therefore only they bear rights and duties under international human rights law.[288] The Second Circuit

[281] 630 F.2d 876, 890 (2d Cir. 1980).

[282] *See* Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part and rev'd in part*, 395 F.3d 932 (9th Cir. 2002) (accepting, for the first time, ATS claims against a corporate defendant).

[283] *Sosa*, 542 U.S. at 732 n.20.

[284] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 131 (2d Cir. 2010) (quoting *Sosa*, 542 U.S. at 732, and related authorities); *see Sosa*, 542 U.S. at 732 (quoting with approval lower court authority that "actionable violations of international law must be of a norm that is specific, universal, and obligatory" (internal citation omitted)); *see also* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 357–63 (2011) (analyzing precedent and commentary on the issue).

[285] *Kiobel*, 621 F.3d at 128–30 & n.33 (analyzing *Sosa* and later appellate authorities on this issue).

[286] *Id.* at 148–49.

[287] *Id.* at 126–27 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. II, at 70) (emphasis added by the court).

[288] *Id.* at 148–49.

thus interpreted *international law* as mandating a view of the corporation diametrically opposed to the one adopted by the Court, as a matter of *domestic* law, in *Citizens United*.[289] The issue of corporate liability under the ATS and the related question of the corporation's status under international law were squarely presented to the Supreme Court on appeal, and at the time of this writing are pending resolution.[290]

Kiobel illustrates the classic aggregate entity view of the defendant-parent corporations as fictional entities. The Second Circuit emphasized that corporations act through individuals, and finding no clear principles of attribution within international law, concluded that corporations are incapable of committing crimes under international law.[291] This implies that while the corporation as a "juridical person" has a legal identity,[292] it has no "real" personhood apart from that of the individual executives and employees through whom it operates. Accordingly, the court concluded that moral culpability for any violations of international law must rest, if at all, with the individual directors and officers of the named corporate defendants.[293]

The extent to which non-state actors, including individuals and corporations, are properly considered "subjects" of international law is a matter of some debate.[294] Indeed, the *Flomo* and *Exxon Mobil* opinions, as well as *amici curiae* writing in support of the *Kiobel* plaintiffs, strongly dispute the Second Circuit's interpretation of the Nuremberg trials specifically and the status of the corporation under cus-

[289] To be sure, as Judge Cabranes noted in *Kiobel*, the doctrinal basis for the two holdings is entirely distinct. *Id.* at 118, n.11 ("The history of corporate rights and obligations under *domestic law* is, however, entirely irrelevant to the issue before us—namely, the treatment of corporations as a matter of *customary international law.*").

[290] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d. Cir. 2010) (raising the questions of whether corporate civil tort liability under the ATS is a merits question or an issue of subject matter jurisdiction, and (ii) whether corporations may be sued as a defendant under the ATS for violations of the law of nations), *cert. granted*, 132 S. Ct. 472 (2011).

[291] *Kiobel*, 621 F.3d at 118–20, 147–49.

[292] *Id.* at 147–49.

[293] *Id.*

[294] *See, e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 175–77 (5th ed. 2003) (surveying the debate); JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 72–76 (2006) (also surveying the debate and noting that there is now "much greater recognition of the role of 'non-state actors' [including] companies . . . within the international community"); Ku, *supra* note 284, at 377, 373–89 (surveying the literature on corporate liability under international law and arguing that "the question of private corporation liability is far from universally settled under customary international law").

tomary international law generally.[295] The D.C. Circuit, in particular, goes to great lengths in *Exxon Mobil* to trace the history of corporate civil and criminal liability under international law.[296] Both find that under international law, the corporation is itself a bearer of rights and duties, which can be breached by its agents.[297] The Ninth Circuit's *en banc* opinion in *Sarei v. Rio Tinto* concurs.[298] These cases, then, reflect a fundamentally different view of the nature and status of the corporation under international law, and one that more closely resembles a real entity approach.

Consistent with standard tort and contract principles, the adjudication of ATS claims necessitates a strict entity approach that focuses on the tortfeasor directly responsible for the harm caused. Because of the evidentiary challenges of connecting a parent company or its directors and officers directly to those harms, however, the majority of ATS cases rely on aiding and abetting, conspiracy, or other indirect theories of liability.[299] None of these approaches reach the enterprise level because all disaggregate liability within the corporate group. Accordingly, all of the recent appellate decisions similarly approach the issue of liability in tort from an entity perspective, focusing on the indirect liability of the defendant parent companies rather than on the corporate enterprise as a whole.

Despite the inevitability of an entity-level view in ATS cases, a real enterprise approach is relevant to courts resolving emerging issues in these types of disputes and others concerning the human rights practices of MNEs. First, as many commentators have noted, the courts have thus far failed to develop a consistent standard for indi-

---

[295] *See, e.g.*, Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011) (noting that I.G. Farben, the German chemical cartel, was dissolved and its assets made "available for on the authority of customary international law"); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); *see also* Brief for Nuremberg Scholars Omer Bartov et al. as Amici Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011) (No. 10-1491), 2011 WL 6813570.

[296] *See Exxon Mobil Corp.*, 654 F.3d at 41–54.

[297] *See Flomo*, 643 F.3d at 1017–21; *Exxon Mobil Corp.*, 654 F.3d at 41 ("[T]he court may assume that individuals acting as agents of a corporation violated substantive international law norms. The question is whether a corporation can be made to pay damages for the conduct of its agents in violation of the law of nations.").

[298] 671 F.3d 736, 747–48. (9th Cir. 2011) (en banc) (adopting the reasoning of Judge Leval's concurrence in *Kiobel*), *cert. petition filed*, 80 U.S.L.W. 3335 (U.S. Nov. 23, 2011) (No. 11-649) .

[299] *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009); Romero v. Drummond Co., 552 F3d 1305, 1315 (11th Cir. 2008); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007); *see also* Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79 (2011).

rect liability in ATS cases, "leading to confusion in the lower courts and persistent uncertainty for litigants."[300] At present, the Second Circuit has adopted a high standard requiring proof that the *corporate defendant* acted with "purpose" to aid and abet the tortious conduct,[301] while the D.C. Circuit in *Exxon Mobile Corp.* espouses a lower "knowledge" standard as the test most consistent with customary international law.[302]

Yet standard agency principles aimed at attributing liability within a single corporation become more challenging when applied globally. As Judge Posner observed in *Flomo*, the question of the *scope* of corporate liability—that is, how far vicarious liability on a *respondeat superior* theory may extend—is uncertain.[303] Equally difficult is the question of whether the intent or knowledge of agents of indirect subsidiaries of a corporate defendant can be imputed through a chain of ownership or control to a defendant parent corporation.[304] The purpose and knowledge standards differ significantly in this respect. Unless the defendant parent corporation directed the challenged conduct, the purposeful intent of agents far lower in the corporate structure is unlikely to be shared across an enterprise and must be imputed to higher-level corporate agents for liability to attach. In contrast, if a knowledge standard applies, the fact that decision-making, disclosure, risk management, and other internal controls integrate information-sharing across a firm implies that plaintiffs may be able to satisfy a knowledge test for affiliated entities on an enterprise theory without having to establish its imputation from one affiliate to the next within the corporate group. If in fact the D.C. Circuit's interpretation of customary international law as establishing a "knowledge" standard is correct, then its application may turn on

---

[300] Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 62 (2008) (discussing the challenge "multiple and overlapping legal orders" pose to claims of corporate complicity in human rights violations generally and this point in particular).

[301] *See Khulumani*, 504 F.3d at 260, 277 ("[A] defendant may be held liable under international law for aiding and abetting . . . when the defendant . . . "does so with the purpose of facilitating the commission of that crime.") (Katzmann, J., concurring); *Presbyterian Church of Sudan*, 582 F.3d 244, at 258–59 (adopting *Khulumani*'s approach).

[302] *Exxon Mobil Corp.*, 654 F.3d at 32.

[303] Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1020 (7th Cir. 2011) ("[T]he theory [of *respondeat superior*] attenuates when the employees include local residents of Third World countries.").

[304] *See Presbyterian Church of Sudan*, 582 F.3d. at 161 (noting the challenges such issues present when the defendant corporation is a minority shareholder).

whether courts see defendants that are related entities from an enterprise or an entity perspective.

In addition to questions of intent, the potential for corporate civil liability under international human rights law, apart from the liability of any individual director or officer, implies a collective moral obligation whose source cannot be examined from an aggregate enterprise approach. Legal claims in other areas of international law, such as environmental law, may also soon require the courts to view a defendant corporation (read "corporate group") holistically as a "real enterprise."[305]

These questions have gained new urgency in light of recent international initiatives to promote greater accountability for multinational corporate groups through multilateral collaborative enforcement networks, voluntary or self-regulatory monitoring structures, and stakeholder-driven strategies that intersect with traditional regulation.[306] For example, on June 16, 2011, the United Nations formally endorsed the Guiding Principles on Business and Human Rights, a framework under which businesses have an ongoing due diligence obligation with respect to the human rights impacts of the business' operations.[307] Recent trends toward enterprise-wide risk management[308] are similarly grounded on an understanding of the corporate group as a "real enterprise." Even if limited liability and traditional common law principles are presumed, the fact that corporate groups now face real reputational, legal, and ultimately economic risks from human rights violations abroad on an enterprise-wide basis calls for

[305] The ATS has been used as a jurisdictional "hook" to ground claims under international environmental law, although none have succeeded to date. *See, e.g.*, Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999). *See generally* Luis E. Cuervo, *The Alien Tort Statute, Corporate Accountability & the New Lex Petrolea*, 19 TUL. ENVTL. L.J. 151 (2006) (analyzing the applicability of the ATS to environmental torts).

[306] *See generally* ANN MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Pierre-Hughes Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113 (2009); Blair, Williams & Lin, *supra* note 179.

[307] *See* Special Rep. of the U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework*, at 6, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), *available at* http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf (identifying MNEs' "obligations to respect" human rights). Other examples include the United Nations Norms for Transnational Corporations, the Global Compact, and the OECD Guidelines for Multinational Enterprises. *See What Is the Global Impact*, U.N.: GLOBAL IMPACT, www.unglobalcompact.org (last visited Apr. 20, 2012); *supra* notes 254–55.

[308] *See, e.g.*, Michelle Harner, *Barriers to Effective Risk Management*, 40 SETON HALL L. REV. 1323 (2010) (reviewing such trends before and after the global financial crisis).

further research on allocation of oversight responsibility and related governance questions as applied to corporate groups.

D. Enterprise Principles: A Synopsis

The selected cases reviewed here show that judges' views of the nature of the firm—both of the corporate form generally and, more importantly for present purposes, corporate groups—affect their application of legal rules and their conclusions about policy choices raised by corporate activities. At the same time, *how* it does so is less clear. The cases reveal a lack of systematic and consistent application of corporate theory even within discrete doctrinal arenas. In *Citizens United*, this discontinuity appears within the majority opinion itself. While these examples may suggest that judges are simply drawing on the theory that best suits their intended conclusion, they clearly show that corporate theory is not determinative in a mechanistic sense and that there is a need for courts to use greater care when drawing on corporate theory.

The opinions also demonstrate that even if limited liability and other fundamental characteristics of the corporate form are presumed, enterprise perspectives lead to new ways of approaching decisions involving corporate groups. However, even where the nature of the corporation and the scope of its rights and obligations are directly at issue, the Court has failed to directly confront the distinctions between the conduct of individual corporate entities and that of a larger enterprise or group, as the First Amendment cases make clear. Part of the challenge courts face is that there are, as of yet, few clear rules regarding the attribution of responsibility for collective decision-making within and across a corporate group. While the Court has been willing, as in *Citizens United*, to endorse the concept of collective rights, such as the right to "speak" as a firm, *Janus Capital* and *Kiobel* highlight the difficulty of doing so across formal entity and jurisdictional boundaries. Finally, *Kiobel* emphasizes a third tension, unresolved by the Court, between the rights and duties of the corporation under domestic and international law.

The cases do, however, suggest the key questions that should be part of the analysis. First, should corporations enjoy the same rights and bear the same duties as natural persons? If so, should enterprise principles apply to the corporate group or should the analysis be limited to the level of the entity? And finally, should the law reflect an aggregate enterprise that focuses on shareholder (and/or other constituents') interests or is a real enterprise approach more consistent with common group organizational structures or "universal" moral norms? No one perspective is suited for all doctrinal domains. However, a consistent approach *within* each doctrinal domain can be furthered by a clear recognition of what alternative visions of the corporation imply. At present, inconsistent understandings within even a single case can lead to incoherent decisions if not recognized and weighed in reaching a conclusion.

Relatedly, these cases illustrate the need for clearer standards for delimiting the bounds of the corporate group. Again, this can be done differently across discrete doctrinal areas,[309] consistent with specific policy goals and other factors discussed in Part IV below. Concepts of control clearly are foundational, but as *Janus Capital* shows, traditional definitions of formal legal control based on common ownership may not be sufficient to define the bounds of accountability in all contexts as corporate structures evolve. In such cases, statutory regimes may even reach to include contractual arrangements within the ambit of the "corporate group."

A new possibility might be to define the corporate group as a subset of control relationships characterized by some level of ownership and perhaps other functional characteristics, such as shared personnel, joint authority over strategy, and other factors suggesting the group's function as a single coordinated enterprise. Other approaches might look beyond control to a group's delimitation of its own external boundaries as a basis for allocating responsibility toward third parties.[310] If the Supreme Court rules in *Kiobel* that corporate groups and other corporations are in fact "persons" as a matter of customary international law, there will be an even greater need for clear rules that predictably allocate legal responsibility among the corporate group itself, its parent or headquarters, and/or constituent entities across jurisdictions.

IV. GENERAL PRINCIPLES: DEVELOPING THE LAW OF CORPORATE GROUPS

In sum, if the corporate group might be viewed differently for First Amendment purposes, for example, than in contract law or under securities regulations, then legislatures and courts face a number of challenging questions within each doctrinal arena: 1) When and

[309] *See, e.g.*, Teubner, *supra* note 35, at 89–91 (arguing that the complexity of corporate groups justifies such variation).

[310] To the extent a group functions as an economic organization, it necessarily establishes certain boundaries even if not corresponding to formal legal categories. *See* ALDRICH, *supra* note 92, at 42 (defining "organizations" as "goal-directed, boundary-maintaining, and socially constructed systems of human activity").

how should legal rights and duties attach, if at all, to the corporate group as a whole? 2) Should rights and duties inherent to the group displace, supersede, or complement the legal rights and duties of the group's constituent firms? 3) Should the parent corporation serve as the "proxy" for the enterprise or are alternative means of allocating responsibility on an enterprise basis possible and desirable? The following is a preliminary effort to propose basic guiding principles that might aid (though not complete) such an inquiry.

A. *An Entity or Enterprise Perspective?*

Existing canons of statutory interpretation offer a sound starting point for determining whether certain rights and obligations should apply at the level of the corporate group. For example, under the securities laws, as noted earlier, conceptions of control, which help define the boundaries of the corporate enterprise, should be interpreted broadly in light of the investor protection objectives of the securities regulations. Since companies are already required to satisfy consolidated reporting requirements and related accounting rules, consistency and predictability can be enhanced, not undermined, by directing regulation at the level of the consolidated group. Therefore, if as in *Janus Capital*, questions regarding the existence, scope, and obligations of a corporate group arise in an area of the law that already applies to corporate groups on an enterprise basis, such as the securities laws, then enterprise principles might be usefully adopted.

In addition to considering the policy goals of the doctrinal arena at issue, whether an entity or enterprise-level analysis is most appropriate should also be determined based on the nature of the dispute—namely, whether the matter involves external claims or claims within the group itself. For example, corporate tax rules in the United States apply on an enterprise-wide basis, but particular rules that deal with conduct internal to the organization and are deemed to be necessary to the fair function of the corporate tax system, such as transfer pricing rules, apply on an entity basis that focuses on each constituent member of the corporate family.[311] Likewise, the *Upjohn* rule governing attorney-client privilege under federal common law is not applied in disputes between a parent and the subsidiary or in disputes between the corporation and its shareholders. In such cases, the conflicting interests of the parent and subsidiary trump the shared interests of the corporate group that might be relevant where

[311] *See* 26 U.S.C. § 482 (2006).

the claim is being raised by an unrelated third party.[312] At the risk of over-simplifying, in some cases, the "internal"/"external" distinction might also be viewed jurisdictionally. For example, where a matter raises strictly local concerns unique to a certain entity in the corporate family, an entity-level approach might be most relevant, whereas enterprise-level rules might offer a better fit in the context of cross-jurisdictional business operations.

Third, pragmatic concerns matter. The Supreme Court recently emphasized these considerations in *Hertz Corp. v. Friend*, a case concerning the question of corporate citizenship for purposes of diversity jurisdiction.[313] There the Court stressed that rules extending to the enterprise level must be clear and susceptible of predictable application, yet they must also be adaptive.[314] Taking account of the dynamic nature of corporate group structures is particularly important because the boundaries of the corporate group are constantly changing.[315] Adaptive standards then might best be set as presumptions that foster clarity and predictability where bright line tests cannot be adopted, but which can be overcome if particular group structures require.

Established jurisdictional principles in the international arena and the presumption against the extraterritorial application of federal statutes may dictate the potential scope of an enterprise-based rule.[316] In this regard, Reuven Avi-Yonah has developed a useful ma-

---

[312] *See In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 359 (3d Cir. 2007) ("Neither [understanding of the] attorney-client privilege [that may apply to the corporate group] is effective in adverse litigation between the former clients [(i.e., affiliates)]."); Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970) (establishing this exception to the general federal common law rule).

[313] 130 S. Ct. 1181, 1192 (2010) (establishing that for diversity jurisdiction purposes, the corporation's principal place of business is its headquarters or "nerve center").

[314] *Id.*

[315] *See* EASTERBROOK & FISCHEL, *supra* note 3, at 13; ALDRICH, *supra* note 92, at 180–83; *see also In re Teleglobe Commc'ns Corp.*, 493 F.3d at 367–68 ("[B]ecause parent-subsidiary relationships often change, having [different] default rules for wholly-owned, solvent subsidiaries, and not-wholly owned or insolvent subsidiaries, seems unwieldy. . . . Because of the need for clarity and certainty in privilege law creating multiple, ever-shifting default rules would be unwise." (citing Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

[316] *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (discussing the presumption against statutory extraterritoriality); *see also Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1226 (2011) (surveying recent developments in the law of extraterritoriality). *But see* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011) (arguing, in part, that principles of international jurisdictional law may urge or mandate extraterritorially and should be implemented accordingly within U.S. law).

trix for analyzing whether entity-based or enterprise-based regulatory approaches should be adopted in different areas of the law by domestic jurisdictions, either as home-states or host-states for multinational corporate groups.[317] He argues that an entity approach that recognizes established limited liability principles is optimal where the law deals primarily with local issues, such as tort and contract.[318] Avi-Yonah suggests that where a law's purpose is best furthered (or can only be furthered) by an enterprise approach, this result can be achieved through the extraterritorial application of a corporation's home country law in areas where there is broader consensus among jurisdictions and less likelihood of conflicting law and policy.[319] Examples he cites in this area include tax, anti-corruption laws, and prohibitions on child labor.[320] Avi-Yonah posits that an enterprise approach can also be achieved by international harmonization in areas of the law that are inherently global in scope, but where consensus among nations and support of the global business community are lacking.[321] Examples of laws he places in this category include antitrust and employment discrimination laws.[322] As his effort shows, concerns about the potential direct and indirect extraterritorial effects of enterprise-based rules can be predictably resolved under principles of comity and existing private international law doctrines.

Finally, if an enterprise-level rule is adopted, there are certain normative implications that must be recognized. The most important of these is the need to explain the source of any moral obligation that applies to complex organizations. At the risk of eliding a deep and multifaceted debate, enterprise-based rules may facilitate a closer correspondence between the legal rights and duties of the corporate group than an entity-level approach. If large corporations, that is, corporate groups, are more like natural persons with respect to certain rights and duties, then they should be treated from a "real enterprise" standpoint under the law. For example, where MNEs influence law-making internationally[323] and enjoy the right to bring claims

---

[317] *See* Avi-Yonah, *supra* note 250.

[318] *Id.* at 13–16.

[319] *Id.* at 17.

[320] *Id.* at 17–26.

[321] *Id.* at 11–12, 26.

[322] *Id.* at 28–31.

[323] *See generally* STEPHEN TULLY, CORPORATIONS AND INTERNATIONAL LAWMAKING (2007).

against sovereign states on an enterprise-wide basis,[324] there is justification for requiring them to bear commensurate obligations. Where this is not the case, entity-based rules and other distinctions between natural and juridical persons may be equally appropriate.

B. Allocation of Rights and Duties Within the Corporate Group

Because the efficiency of modern corporate group structures derives from certain features of the corporate form, namely, limited liability, the free transferability of shares, and the power to vote shares held in another corporation, any application of theories of corporate groups to particular areas of the law should preserve these attributes of the corporate form. Standard limited liability rules, in particular, enable creditors to serve as specialized monitors of the particular assets (including subsidiaries and/or their respective assets) of the corporate group against which they have a claim without the added costs of monitoring the entire enterprise.[325] Existing legal rules establishing respect for corporate formalities, explicit contracts, and entity principles as the default rules therefore should continue to apply to the constituent entities within a corporate group as well.

Phillip Blumberg has rightly observed that "intra-enterprise attribution of rights or liabilities among the constituent companies of the group does not ["and we may add, should not] "flow from the legal acceptance of an overriding concept of the group as an economic entity."[326] Nonetheless, the collective commercial activity represented by the group must inform any assessment of the relationship of its constituent companies. Given this starting point, entity principles that respect the formal legal boundaries of the corporation are most

[324] Dispute settlement clauses contained in all model investment agreements and in the bilateral investment treaties (BITs) that follow them provide for host-state consent to arbitrator-investor claims against the host state before ICSID. MUCHLINSKI, *supra* note 136, at 694–98, 703–46. International investment agreements, including BITs, often identify the investments covered by the agreement to include investments owned or controlled, directly or indirectly, by a company that is a national of a party to the agreement; thus, the investor may include the foreign parent and any intermediary investment vehicle. *See id.* at 678–81 (discussing the identity of investors and investments covered by these agreements). This enterprise approach gives standing to parent corporations to bring claims against host governments in international arbitration. *See* 22 U.S.C. § 1650a (2006); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; *see also* MUCHLINSKI, *supra* note 136, at 674–702 (discussing general principles governing BITs).

[325] *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 3, at 57.

[326] *See* Blumberg, *supra* note 2, at 300.

useful in determining the contractual and other rights of the constituent affiliates within the group, while analyses that involve third-party claims arising out of the collective activity of the group may suggest a more appropriate context for the application of enterprise principles. The latter cases might arise more readily, for example, if the corporate group has adopted an integrated decision-making structure or otherwise functions as a coordinated enterprise. A real enterprise approach permits attribution of legal rights and duties at both levels, whereas any attribution to the enterprise or firm under an aggregate perspective must be allocated to its constituent entities.

C. Attribution to Parent Corporations and Alternatives

The scope of this Article does not permit consideration of when and where U.S. law might recognize the corporate group as an independent bearer of rights and duties. Acceptance of joint and several liability within the group based on shared decision-making, control, or other factors is perhaps more likely. However, on the question of whether the parent corporation or another affiliate should be deemed the sole "proxy" for the enterprise, *Hertz* offers some baseline guidance. It defines the "principal place of business" or "nerve center" of a corporate group for jurisdictional purposes, as the seat of direction, control, and coordination.[327]

Ultimately, the goal of any attribution rule should be to hold decision-makers accountable via direct and indirect incentive structures. Where a corporate group has a unitary "nerve center" in the jurisdiction that has full authority over the issue at hand, treating that entity as a proxy for the corporate group is an appropriate solution. For public companies, the listed entity generally represents the group of which it is a part in the listing jurisdiction. Statutory requirements, like those governing public companies, might also determine whether the listed entity, even if it is not a "nerve center," should represent the group on this kind of unitary attribution theory. Where a corporation adopts a decentralized or polycentric management structure, current law offers less guidance. However, standard principles of agency law, conceptions of comparative or joint liability in tort, and contractual allocations of risk within the corporate group offer possible sources of attribution rules that might be usefully adapted to such firms.

---

[327] Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192 (2010).

V. CONCLUSION

Historically, new legal forms and corporate governance rules have emerged when the comparative advantage of new organizational modes has already been validated by the market.[328] In other words, "legal structures merely reflect the underlying economic substructure."[329] Corporate groups, and indeed, multinational corporate groups have now become the dominant organizational form globally, yet only in specific regulatory domains has a legal framework for the corporate group been developed. Given the rapid changes in firm organizational and management structures and in the broader economy, establishing the "corporate group" as a formal legal entity under state law may not promote greater flexibility or efficiency. There is nonetheless a critical need for renewed consideration to those areas of the law where the corporate group matters and to areas of corporate law where existing rules may need to be adapted.[330]

In considering such rules, theories of corporate groups can play a formative role. However, traditional theories of the corporation that have been articulated only at the entity level continue to be applied by courts and analyzed by scholars as if they can be translated seamlessly from the entity to the enterprise level. Yet unlike a discrete business entity, the "enterprise" reflects an economic reality more than a legal one. At the level of theory, the effect has been a gap between the literature articulating theories of corporate identity, described and defined most often with respect to a single legal entity, and work on established theories of the firm. Moreover, recurrent debates over the nature of corporate identity as a matter of theory have begun to lose their original connection to the realities of corporate practice in a world dominated by corporate groups. At the level of practice, then, when courts and policymakers look to corporate law to inform the development of legal rules in other doctrinal domains, whether in constitutional law, securities law, or human rights, they have been left without a coherent framework for understanding the nature of the corporate group when the issues at hand implicate relationships beyond formal legal boundaries.

---

[328] Teubner, *supra* note 35, at 69.

[329] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 85 (1992).

[330] Although space does not permit consideration of concrete responses here, some potential applications of the theories developed in this Article to corporate law are addressed in a separate article. *See* Virginia Harper Ho, Rethinking the Governance of Corporate Groups (Mar. 1, 2012) (unpublished manuscript) (on file with the author).

This Article has advanced a framework for extending traditional understandings of corporate identity to the level of the corporate group and illustrated how conceptions of the corporate group can impact critical case outcomes and policy choices. It also bridges foundational literature on the theories of the firm and current thinking on corporate identity and "personhood." However, rather than derive a Grand Theory of the corporation to apply in all contexts, the more modest effort here has been to develop different theories that offer a better basis for reasoned choices in different doctrinal domains where the multi-dimensional nature of the corporate group is an important factor in the formulation and application of law.

Of the two primary approaches, the real enterprise view and the aggregate view, the former seems to offer the best fit with the multi-dimensional nature of the corporate group. At the same time, an aggregate enterprise approach may better explain contractual relationships among businesses that are not based on equity ties. The complex nature of the modern corporation and of corporate groups makes it unlikely that any single view will be well-suited to address the range of policy concerns that arise in different legal domains, and in fact, a multifaceted approach may be more true to reality. Each perspective also offers a different view of the corporate group and brings with it different normative underpinnings and implications that must be taken into account as new organizational practices and structures emerge.

The role of theory then, is not to drive the new reality but rather to articulate it, forming a kind of stepping stone in the evolution of the law. Through this "reality construction,"[331] perspectives of the corporate group can be developed that better take account of its simultaneous complexity and unity as an economic organization. At the present moment, the continued integration of global business organizations and the world economy calls for new modes of thinking about corporate identity and accountability. It is high time to revisit these questions from the perspective of the corporate group.

---

[331] *See* Sugarman, *supra* note 24, at 13, 20 (introducing this perspective on the role of theory).