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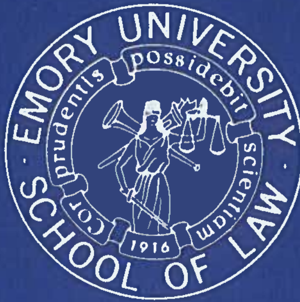

BOOK REVIEW

In Defense of the Corporation, by Robert Hessen — Roger Pilon

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IN DEFENSE OF THE CORPORATION

By Robert Hessen. Stanford, Calif.: Hoover Institution Press. 1979. Pp. 133. $7.95.

Reviewed by Roger Pilon*

I. INTRODUCTION

As the protean spirit of the sixties worked its way into and through the present decade, the corporation came increasingly to be a favored whipping boy. Ubiquitous, often large and prosperous, it stood to many a conspicuous symbol—initially of the oppressive "system," bent on keeping the downtrodden down, more recently of private aggrandizement, an end not to be tolerated in the world of diminished expectations the crusaders have in store for us. Not that these shifting motivations are necessarily at odds: more for the masses and less for all combine quite nicely in the asceticism of, say, a Ralph Nader or a Jerry Brown, however unappealing to the many as individuals and hence impossible of broad realization—short of the police state mechanism. But they do find their focus when the corporation comes into view: whatever the motivation, that is, the critics of the last two decades seem all to agree that "these massive institutions create serious adverse consequences for consumers, workers, shareholders, taxpayers, small businesses, and community residents."[1] That covers about all of us.

As its title indicates, the book under review is a response to much of this. Professor Hessen, who teaches in the Graduate School of Business at Stanford and is a research fellow at the Hoover Institution there, has written a ringing rejoinder to the corporate critics in general and to Ralph Nader in particular. At bottom, he says, he is defending the corporation "against the accusation that it is an illegi-

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[1] R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION 7 (1976) [hereinafter cited as GIANT CORPORATION]; *see* R. BARNET & R. MÜLLER, GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS (1974); CORPORATE POWER IN AMERICA (R. Nader & M. Green eds. 1973); J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967); IN THE NAME OF PROFIT (R. Heilbroner ed. 1972); C. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975).

timate institution,"[2] which has come in recent years from antagonists such as John Kenneth Galbraith and even from friendly critics such as Irving Kristol.[3] The charge of illegitimacy has its origins, however, in the seminal work of Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property,* which appeared in 1932. Hessen calls this "the single most influential work ever written about corporations," whose central thesis, concerning the separation of ownership and control in the modern corporation, continues to dominate the discussion.[4] In brief:

> Berle and Means claimed that during the twentieth century the increase in the number of corporate shareholders, each owning only a few shares, has enabled corporate officers to usurp authority; the shareholders have lost control over their own wealth and the officers have gained control of wealth which they do not personally own. Because of this separation of ownership and control, giant corporations are no longer private property and do not deserve to be treated or protected as private property by the government.[5]

Not even Adam Smith, the critics go on to say, would countenance these leviathans. Thus the government regulation that has mushroomed in this century[6]—to the increasing dismay of the business

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[2] R. HESSEN, IN DEFENSE OF THE CORPORATION xi (1979).

[3] *See, e.g.*, Galbraith, *What Comes After General Motors,* NEW REPUBLIC, Nov. 2, 1974, at 16; Kristol, *On Corporate Capitalism in America*, 41 PUB. INTEREST 125, 137 (Fall 1975); *"Reforming" Corporate Governance*, Wall St. J., May 12, 1978, at 20, col. 3.

[4] R. HESSEN, *supra* note 2, at xii.

[5] *Id.*

[6] For an indication of some of that regulation see Birdzell, Book Review, 32 BUS. LAW. 317 (1976) (R. NADER, M. GREEN & J. SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS). Birdzell observed that

> [b]oth the bargaining process and the business terms of the relationships among participants in the business organization are extensively regulated by Federal and state laws . . . . Legislation directed at the bargaining process is illustrated by the disclosure requirements of the Securities Act of 1933, 48 Stat. 74, the Securities Exchange Act of 1934, 48 Stat. 881, and the Truth in Lending Act of 1968, 82 Stat. 146; and by the collective bargaining requirements of the National Labor Relations Act of 1935, 49 Stat. 449, and its successors, the Labor Management Relations Act of 1947, 61 Stat. 136, and the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519. Illustrative of legislation limiting or specifying the terms of the bargain are the Fair Labor Standards Act of 1938, 52 Stat. 1060 (minimum wages), the Trust Indenture Act of 1939, 53 Stat. 149; the Social Security Act of 1935, 49 Stat. 620 (establishing participation in a government pension system as a required term of private employment) and the Employee Retirement Income Security Act of 1974, 88 Stat. 829 (regulating many of the terms of private pension plans).

world[7]—and the resurrection by the Nader group of proposals to federally charter the giant corporation, which would include measures to transfer large areas of control from corporate officers to shareholders, would impose sweeping disclosure requirements on corporations, and would erect stringent new tests of monopoly power aimed at breaking up these institutions.[8]

In reply to this charge of illegitimacy, Hessen argues "that the shareholders own [the corporation], that the officers make major decisions without consulting the owners, and that this relationship is unobjectionable because it rests on the principles of choice, consent, and contractual authorization."[9] Thus in its own way—in particular, in its focus upon the foundations of corporate legitimacy—this book is itself a reflection of the *Zeitgeist*—more precisely, of recent shifts to be found there. I allude here not so much to the political realm—to Proposition 13, or the recent ascendance of the Tories in Britain or the Conservatives in Canada—as to the realm of ideas, to the deeper intellectual currents running through the West of which these political events are but a manifestation.[10] Call it classical liberal, call it libertarian, call it conservative or neoconservative: in the world of thought the spirit of the sixties is on the defensive, however slow the appreciation of this in the halls of power and, indeed, in the closely connected, because closely funded, groves of academe.[11] The "moral demands" of the sixties, which inform so much of the criticism of the corporation, have come up against the sobering realities depicted all along by the market econ-

> There are some 40 to 50 significant Federal statutes which may reasonably be viewed as imposing requirements on corporate management in favor of employee, consumer, investor, or environmental interests, ranging all the way to comprehensive regulation of entry, prices and services in much of the transportation, communication, energy, and banking industries.

Id. at 317 & n.1.

[7] Indeed, the American Enterprise Institute for Public Policy Research now publishes a bimonthly under the title *Regulation.*

[8] *See generally* R. NADER, M. GREEN & J. SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS (1976); GIANT CORPORATION, *supra* note 1.

[9] R. HESSEN, *supra* note 2, at xiii.

[10] *See, e.g.*, R. WEAVER, IDEAS HAVE CONSEQUENCES (1948).

[11] For an indication of the alarm these recent shifts are generating, see *In Defense of Government*, COMMONWEAL, Mar. 16, 1979, at 131, and, for a rather less restrained view, Green, *America Amok*, THE NATION, Mar. 31, 1979, at 337.

omists—there are no free lunches.[12] And if this were not enough, the economists have had their empirical work buttressed in turn by a new group of moral theorists, whose emerging body of research is aimed at securing not so much the economic as the normative foundations of laissez-faire capitalism, especially as this involves the development of the natural rights thesis only adumbrated in the eighteenth century.[13]

In its concern with the normative underpinnings of the corporation, then, Hessen's book fits squarely within these recent developments.[14] Not that his defense does not point to many of the economists' arguments. But in defending the *legitimacy* of the corporation he is making primarily a moral, not an economic point. The corporation is legitimate not because it has contributed so materially to "a standard of living—of luxury, leisure, and longevity—that is unprecedented in world history and unparalleled in contemporary socialist societies,"[15] but because it arises and exists as a matter of right and in violation of the rights of no one. "The essence of capitalism is the inviolability of individual rights, including one's right to use or invest one's wealth as one chooses, and one's right to associate with others for any peaceful purpose and under any terms of association that are acceptable to all parties concerned."[16] The corporation is simply a product of the exercise of these rights, Hessen argues. It

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[12] For one of the best general statements, still sound today, see M. FRIEDMAN, CAPITALISM AND FREEDOM (1962).

[13] For the most part the work to which I refer here is scattered throughout the philosophical literature, in significant measure a continuation of Robert Nozick's important ANARCHY, STATE, AND UTOPIA (1974). But the legal literature too is indicative of these developments. *See, e.g.,* 13 GA. L. REV. ___ (1979) (symposium on the theory of rights). Noteworthy here too is Richard A. Posner's recent *Utilitarianism, Economics, and Legal Theory,* 8 J. LEGAL STUD. 103 (1979), where Posner is at some pain to dissociate his economic approach to law from utilitarianism. He calls the economic norm "wealth maximization," which "resembles what Adam Smith called the system of 'natural liberty' and what a student of Smith has referred to as the 'capitalist conception of justice.' " *Id.* at 135-36 (quoting Devine, *Adam Smith and the Problem of Justice in Capitalist Society,* 6 J. LEGAL STUD. 399, 408 (1977)). For a critique of Posner's argument see Pilon, *On Moral and Legal Justification,* 11 SW. U.L. REV. ___ (1979).

[14] Hessen does not develop any of this background moral theory himself, however, nor does he point to any of the current literature that does. Rather, he simply lists the rights of private property, association, and contract, the denial of which, he argues (correctly), is incompatible with a free society. Whether we have such rights, as against the long-standing arguments of moral scepticism, has ultimately, of course, to be demonstrated. For arguments in defense of the corporation that do develop this background theory, see Pilon, *Corporations and Rights: On Treating Corporate People Justly,* 13 GA. L. REV. ___ (1979).

[15] R. HESSEN, *supra* note 2, at xi.

[16] *Id.* at xiii.

arises, that is, through a just process—a process in which no one's rights are violated—and hence is a legitimate institution.[17] Thus it is not the various policies or practices of particular corporations that Hessen is out to defend; rather, it is the corporate form as such, the legitimacy of this institution as a form of business association.[18] And if the corporation is legitimate *as* an institution, then arguments for increased government regulation based upon its illegitimacy will not stand up.

In order to develop this central thesis, then, as well as the implications for government regulation that flow from it, Hessen takes on the long-standing antithesis, the concession theory of the corporation, resurrected most recently by the Nader group but widely held in legal circles as well. On this view, the corporation is a "creature of the state," not of private contract. Put most starkly by Nader: "In order to exist [a corporation] must obtain a charter. A corporate charter is in effect an agreement whereby a government gives the corporate entity existence and that entity, in return, agrees to serve the public interest."[19] Moreover, the concession theory holds that in addition to "creating" the corporation, the state grants it special privileges not enjoyed by other forms of business association: entity status, perpetual life, and limited liability.[20] By contrast, the

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[17] This way of putting the matter comes from NOZICK, *supra* note 13, at 150-53, and is explicitly developed in the case of the corporation in Pilon, *supra* note 14.

[18] R. HESSEN, *supra* note 2, at xvii.

[19] Nader & Green, *The Case for Federal Charters,* THE NATION, Feb. 5, 1973, at 173 (as quoted in R. HESSEN, *supra* note 2, at 25). *See also* GIANT CORPORATION, *supra* note 1, at 63.

[20] GIANT CORPORATION, *supra* note 1, at 15, 33-35, 63. A judicial expression of these views can be found in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 463 (1819), where Chief Justice Marshall stated that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creation of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Id.* at 489. The institution Marshall was speaking of was in fact a public creation, brought about under a special charter, but his dictum has been carried over uncritically to the modern business corporation created under general incorporation statutes. A similar thought was expressed in Hale v. Henkel, 201 U.S. 43 (1906), where the Court observed that "the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public." *Id.* at 74. Mr. Justice Brandeis, dissenting in Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933), noted that "[t]he prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen. . . . Throughout the greater part of our history a different view prevailed." *Id.* at 548. For clear statements of the entity thesis see 18 C.J.S. Corporations §§ 1, 3, 4, 10, 11, 13 (1939). *But see* Farmers' Loan & Trust Co. v. Pierson, 130 Misc. 110, 119, 222 N.Y.S. 532, 543 (1927) ("[A] corporation is more nearly a method than a thing.").

"inherence theory" that Hessen develops argues that these corporate features can arise by contract;[21] they are not special privileges bestowed by government. Far from "creating" the corporation, the state simply recognizes it, which occurs when the articles of incorporation, drawn up by the founders in *their* act of corporate creation, are signed by the designated official of the state in which incorporation takes place.[22] "Just as a registrar of deeds records every sale of land, and a county clerk records the birth of every baby, a commissioner of corporations records the formation of every corporation—*nothing more.*"[23] The registration of a corporation, Hessen adds, is no more essential to its existence than the registration of a birth is essential to the conception or birth of a child.[24]

Hessen's brief for corporate legitimacy takes on two aspects, then. On one hand he wants to explode the concession theory, which he does in part by an historical account, in part by arguments from moral theory. On the other hand he needs to develop his own affirmative case—the inherence theory—which also borrows from the historical record but is primarily an exercise in moral theory. Let us take up in order these two lines of argument, the historical and the theoretical.

II. The Historical Argument

As an historical matter, Hessen argues, the concession theory is not only quite out of date but very much misapplied in the case of the modern business corporation. The concession theory did indeed have its day; it originated in medieval England as

> a by-product of the Norman Conquest of England in 1066 A.D. When the Normans subjugated the people of the British isles, all existing titles to landownership were abrogated, and all land became the property of William the Conqueror. He, in turn, parceled out much of it to his lieutenants in return for pledges of continued loyalty and military support. In the

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[21] *But see* text accompanying notes 42-47 *infra.*

[22] R. Hessen, *supra* note 2, at 25-26.

[23] *Id.* at 26.

[24] This idea that individuals can create a corporation independently of state action is embodied in the doctrine of the "de facto" corporation. For the court is implicitly saying this when it recognizes an ongoing enterprise which has not been registered as a corporation in fact. *See* Berle, *The Theory of Enterprise Entity*, 47 Colum. L. Rev. 343, 345 (1947).

> Anglo-Norman system of feudalism, the king's subjects possessed no rights to liberty or property. Any wealth or land that a person was allowed to retain was considered to be a privilege or concession granted by the Crown, in return for which some compensation was demanded.[25]

From this regime of privilege and concession there arose the medieval "corporations"—boroughs, guilds, churches, and charitable trusts. Each came into existence as a concession from the Crown, taking on certain privileges by doing so, such as self-taxation in the case of boroughs, or monopoly powers in the case of guilds. And each exhibited at least something in common with the modern business corporation—usually perpetual existence despite changes in membership. But the differences were far more numerous. In fact, the actual precursors of the modern business corporation were not these medieval "corporations" at all, Hessen argues, but the joint-stock companies which originated in England in the sixteenth century.[26] Nevertheless, the common law precedents that grew out of cases involving these medieval institutions came to be applied uncritically to the emerging joint-stock companies, both in England and in America, and with this the concession theory was carried over as well.[27]

Judicial precedent aside, there are more direct reasons of historical fact and political theory which help to explain why these joint-stock associations were treated as concessions from the Crown, reasons stemming from the divine-right-of-kings doctrine. In the sixteenth and seventeenth centuries, Hessen observes,

> Englishmen who wanted to travel or trade overseas had to obtain a charter—a royal permit—which the king would grant

[25] R. Hessen, *supra* note 2, at 4.

[26] *Id.* at 10.

[27] Hessen points to Sir Edward Coke's dictum in the famous *Suttons Hospitall* case of 1613, which involved a charitable trust, as

> the first authoritative expression of the concession theory of corporations: "A Corporation aggregate of many is invisible, immortal, & resteth only in intendment and consideration of the Law." Coke's dictum was adopted not only by Sir William Blackstone in his *Commentaries on the Laws of England* (1765) but, more importantly, by Chief Justice John Marshall in the *Dartmouth College* case of 1819. Marshall merely paraphrased Coke . . . .

R. Hessen, *supra* note 2, at 9 (quoting The Case of Suttons Hospitall, 77 Eng. Rep. 937, 973 (K.B. 1613)); *see* note 20 *supra*.

> only if he stood to reap some gain. Freedom of commerce—freedom to join with others to engage in overseas trade—was viewed as a privilege or concession that the king could grant or withhold at will. When men sought the king's permission, their petitions contained glowing promises to serve the king, to bring wealth and glory to his realm.[28]

Since many of these early joint-stock companies were formed for the purpose of overseas trade—thus enabling the risk of that activity to be spread among numerous investors—the concession theory quite naturally came to be applied to them. But to cite this point of history is not, of course, to give a warrant for applying the concession theory today to the modern descendant of the joint-stock association. For that theory is rooted ultimately in a long history of royal prerogative and in particular in the divine-right-of-kings doctrine, which was repudiated in the Glorious Revolution of 1688. It is not a reflection of the individual rights or the freedom of association that characterize the modern constitutional republic—and indeed, Hessen concludes, is incompatible with such a republic.[29]

By the late seventeenth century, however, British businessmen had come to realize that corporate features could be acquired without royal or, later, parliamentary favor. Thus, as Hessen notes, "they simply copied the structure of the companies which held royal or parliamentary charters of incorporation. This enabled them, by contract and without obtaining governmental permission, to create joint-stock associations that offered investors the attraction of freely transferable shares."[30] When this was made illegal, at the urging of one of the chartered companies, by the Bubble Act of 1720, businessmen and barristers devised a second way of acquiring corporate features without obtaining a charter:

> They did so by combining two long-established forms, the partnership and the trust. By designating a few of the potentially numerous partners as trustees for all the others and giving them exclusive authority to make contracts with outside parties, they concentrated managerial power in a few hands. Consequently, all other investors could be offered freely trans-

[28] R. HESSEN, *supra* note 2, at 26-27.
[29] *Id.* at 27.
[30] *Id.* at 29.

> ferable partnership interests (virtually identical to corporate shares).[31]

But despite these developments, which were copied in America as well, and despite the demise of the diving-right doctrine, the concession theory and the concept of a charter continued to survive, both in England and in America. Part of the reason for this, Hessen points out, was the rise in the late eighteenth century of the quasi-public corporation, as a result of which concessions and charters came to take on a new purpose:

> They signified an exclusive grant to construct, operate, and profit by an activity such as building a canal, bridge, wharf, or harbor, or organizing a bank or a water, fire, or street improvement company. The rationale for these grants was not to enrich royal favorites but to encourage the investment of private funds to supply quasi-governmental services.[32]

Thus in exchange for certain privileges, such as a legally enforced monopoly or exemption from taxation or the power of eminent domain, businessmen brought these "public service" corporations into being by obtaining a special charter from the legislature. These were not, however, the forerunners of the contemporary private corporation. Rather, they were early public utilities.[33]

Quite apart from whether these chartered monopolies were in fact necessary—or justified—the power of state legislatures to grant charters and special privileges led to much abuse and corruption, as might be expected. This gave rise in turn to a considerable public outcry, especially among the Jacksonian reformers, all of which resulted in Connecticut's passage in 1837 of the first all-purpose general incorporation statute, with many other states following suit over the next several decades. These were the permissive or enabling statutes familiar to us today, establishing a standardized, simplified procedure for creating a corporation. With the demise of special chartering, then, and the advent of general incorporation laws in the middle of the nineteenth century, the "creation" of a corporation

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[31] *Id.* at 30; *see Corporate Rights and Responsibilities: Hearings Before the Senate Comm. on Commerce*, 94th Cong., 2d Sess. 235-36 (1976) (statement of Henry G. Manne).

[32] R. HESSEN, *supra* note 2, at 28.

[33] On this distinction see E. DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, at 16-34 (1954).

came to be rather less an act of state than a private contractual agreement which the state simply registered. "Under the general incorporation statutes," Hessen writes, "corporations were no longer awarded special privileges or legally enforced monopolies. Thus, they ceased to be creatures of the state."[34] As a contemporary case book puts it: "In the literal sense, no 'charter' is now issued to a business corporation under general incorporation laws."[35] The modern corporation, in short, is a creature of private agreement.[36]

What is surprising, then, is that anyone today should think otherwise. Yet there is Nader, seeking to return us, in effect, to the era of concessions, charters, and special privileges, with all the potential for corruption that that entails.[37] He would do it, of course, not in the name of the king but in the name of "the public interest"—which he nowhere defines, and not surprisingly, because it admits of no real definition.[38] As a jurisprudential matter, Nader's thesis is rank positivism, whether the will be that of the king or that of "the government." Indeed, as Hessen points out, Nader claims

> that all property rights are created by government: "The law creates and protects that bundle of rights called property or the corporation, and this same law can rearrange that bundle of rights if it is in the public interest." If the government does decide to modify or even abolish the right to private property, Nader says that no one should resist or complain: "It hardly seems valid to condemn the government for legally rearranging this bundle of rights when it created them in the first place."[39]

But Nader is not alone in his adherence to the concession theory. Hessen cites Professor Willard F. Mueller's comment that "[m]ost Americans seem to have forgotten that business corporations are

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[34] R. Hessen, *supra* note 2, at 30.

[35] H. Soward, Corporation Law: Cases and Materials § 1.02 (1974) (as quoted in R. Hessen, *supra* note 2, at 26).

[36] *See also* A. Berle, Cases and Materials on Corporation Finance 43 (1930); A. Machen, A Treatise on the Modern Law of Corporations 1:18 (1908); Maitland, *Introduction* to O. von Gierke, Political Theories of the Middle Ages at xxxviii (1900).

[37] *See* Birdzell, *supra* note 6, at 319.

[38] *See, e.g.*, The Public Interest (C. Friedrich ed. 1962).

[39] R. Hessen, *supra* note 2, at 27 (quoting Giant Corporation, *supra* note 1, at 258 and Nader, *The Case for Federal Chartering*, in Corporate Power in America, *supra* note 1, at 81). For an altogether uncritical review of Giant Corporation, *supra* note 1, see Blount, Book Review, 11 Ga. L. Rev. 445 (1977). *See also* Schuck, *The Nader Chronicles*, 50 Tex. L. Rev. 1455 (1972).

created and survive only as a special privilege of the state,"[40] as well as Professor Robert Dahl's observation:

> It is absurd to regard the corporation simply as an enterprise established for the sole purpose of allowing profit-making. One has simply to ask: Why should citizens, through *their* govenment, grant special rights, powers, privileges, and protections to any firm except on the understanding that its activities are to fulfill *their* purposes? Corporations exist because we allow them to do so.[41]

Such is the confusion—or worse—that has surrounded the corporate debate in recent years.

III. The Theoretical Argument

In this brief sketch of Hessen's more complete account I have tried to indicate that the corporate critics who still subscribe to the concession theory are simply wrong as a matter of historical record. With respect to the modern business corporation, at least, we no longer live in a regime of concessions and charters; rather, the articles of incorporation which the corporate founders draw up are simply recognized and recorded by the state. Thus far, however, the argument has not gone to the question of corporate features, and in particular to the features the critics often claim are special privileges—entity status, perpetual life, and limited liability.[42] It has not, that is, taken up the question of *what* the commissioner of corporations recognizes and records. Can the founders, in their contractual agreement, give their corporation any features they desire, including the three just mentioned?

In order to understand this question we have to recognize that the "features" of something, including a corporation, are in principle

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[40] R. Hessen, *supra* note 2, at xiii (citing N.Y. Times, Oct. 31, 1971, at 63, col. 1).

[41] *Id.* at xiii-iv (citing Dahl, *Governing the Giant Corporation*, in Corporate Power in America, *supra* note 1, at 11); *see* note 20 *supra*.

[42] Just what features are both necessary and sufficient to define a corporation is an open matter, of course, for corporations can and historically have varied in their features. *See* Mason, *Corporation*, in International Encyclopedia of Social Sciences 396, 396-97 (1968) (In defining the corporation "[t]he law is prone to emphasize [certain formal attributes which] tend to compress the corporation as a historical and developing institution into too narrow a mold; . . . the corporation is an evolving entity, and the end of its evolution is by no means in sight."). I will concentrate on the three features Hessen treats, which are those that Nader thinks are special privileges.

infinite in number; some will arise because we bring them about, while others are simply a reflection of the infinite number of relationships in which the thing stands. Thus in the case at hand, some corporate features, such as perpetual life, may arise as a result of the terms the founders stipulate in their articles of incorporation, while other features, such as limited liability for torts, will not really be "created" but rather will be more a reflection of the background rules of legal liability. Creating a corporation, then, is not an altogether straightforward matter; in fact, the distinction at issue here might best be drawn in terms of those corporate features the founders create *directly*, at their discretion, and those they create only *indirectly*, as a reflection of background conditions: the features that constitute this last category are "created" only in the sense that they arise as a result of the creation of the corporation itself. But the *legitimacy* of the corporation, again, is a function of whether *any* of its features—both the directly and the indirectly created—violate moral rights. Suppose, for example, that the background legal rules permitted corporations, both private and public, to exercise eminent domain when it was in "the public interest" to do so. Since the exercise of this power violates moral rights—eminent domain is nothing but a forced exchange—corporations having this feature would to that extent be illegitimate.[43]

Now I raise these fundamental issues because Hessen has been less than careful to address them. Earlier I said that he argues that under the inherence theory these corporate features *can* arise by contract. This is what he *should* have said (for his theory argues at least that). What he *in fact* says, however, is something stronger, namely, that "corporations *are* created and sustained *entirely* by an exercise of individual rights, specifically freedom of association and freedom of contract."[44] Now if this claim is understood as asserting a point of historical and legal fact about the contemporary corporation, as it must be in light of Hessen's historical discussion, then it

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[43] I leave it to the reader to extrapolate from this to the case of government itself. *See generally* NOZICK, *supra* note 13, at pt. 1. On eminent domain and corporate mergers, *see* Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 232 n.25 (1962).

[44] R. HESSEN, *supra* note 2, at xiv (emphasis added). *Compare id. with id.* at 18, 22.

is not really accurate in the case of limited liability for torts.[45] For this feature, which *does* characterize the contemporary corporation, does not arise *entirely* by contract but only partially or indirectly so; it is really more a product of the entity thesis and the theory of vicarious liability which comprise the legal background that serves to generate it.[46] But if, on the other hand, we understand Hessen to be making a point of prescriptive or normative theory as well, namely, that the contemporary corporation is legitimate because it arises through the exercise of contractual rights, which of course he does want to argue, then quite apart from the factual point just made, this claim will be true only if the legal background which serves in part to generate limited liability for torts conforms with the moral background of individual rights. I shall argue shortly that it does not, that the legal order here does not in all respects reflect the moral order, but for reasons very different from those ordinarily raised in connection with the discussion of this feature. Let me restate and amplify slightly the point made above, then, that a well-developed inherence theory—which Hessen's is not—does indeed explain how this corporate feature, or something close to it, *can* arise by contract, but in doing so it makes a point of moral theory, not a point of legal fact—or better, not *necessarily* a point of legal fact, for legal systems can and do vary.

We must be careful, then, to keep our descriptive history separate from our prescriptive philosophy, which Hessen does not always do. What *is* the case, which is a matter of historical record, including the record of current legal fact, is not necessarily what *ought* to be the case, which is where questions of legitimacy are ultimately grounded. Thus it is one thing to make the historical case against the critics, to show that today, for the most part, we live under the legal regime of the inherence theory and not the concession theory, and another to show that that regime is legitimate. As we turn then to the theoretical part of Hessen's brief—which of course is the more crucial part—our principal interest will be with the normative ques-

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[45] *Id.* at 18.

[46] Elsewhere Hessen says that limited liability for torts *cannot* be integrated into a contractual theory of corporations. *Id.* at 19. But this claim cannot be squared with the claim cited above (see text accompanying note 44), for the reasons just given—not, that is, if we understand him to be talking above about the contemporary corporation, as that claim and his historical argument indicate.

tions, with knowing whether a corporation having these features would be morally legitimate—that is, whether it would violate moral rights—if it did arise and operate as a matter of contract, assuming that it were legally permitted to do so. If it turns out that the extant law does not comport with the conclusions we draw from moral theory, then we will have a reason to change that law.

What this inquiry into corporate legitimacy amounts to, then, is an inquiry into the legitimacy of the three features mentioned above. Before considering each of those features in order, let me make a small but important methodological criticism. Hessen seems to think that if he is able to show that these features are not special privileges bestowed by government, then the call by Nader and others for special restrictions and controls on the corporation will be negated. Thus he argues, "in exchange [for these privileges], say corporate critics like Nader, corporations should be subject to special restrictions and controls. If the special privileges theory is invalid, then so is Nader's corollary."[47] Not necessarily. There may be *other* reasons that support Nader's conclusion than the ones he has given and Hessen has (presumptively) defeated. We have here a common logical fallacy called denying the antecedent; the denial of the antecedent of a hypothetical proposition will not suffice to deny the consequent. At most, then, Hessen's argument to the effect that these are not special privileges, if successful, will serve to defeat only this set of reasons for these restrictions and controls. If he wants to deny the legitimacy of these restrictions and controls *in toto,* he has to deny the legitimacy of every conceivable reason for imposing them, which would take a logically impossible exhaustive enumeration of an infinite class; or he would have to shift the burden of proof to show that the presumption (or more) is *against* regulation of the corporation—that is, that the affirmative case *for* regulation is what has to be demonstrated.[48] This presumption runs more or less implicitly throughout Hessen's book, but it is never really countenanced explicitly.

Turning then to the question of entity status, we want to know

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[47] *Id.* at 16.

[48] On these methodological issues generally, see A. FLEW, THINKING STRAIGHT 31-56 (1977). For an argument in defense of the corporation that follows the second of these methodological strategies, see Pilon, *supra* note 14.

whether this corporate feature is a special privilege and whether it violates rights. Hessen gives a very brief functional account of entity status, saying that it "merely means that a corporation can sue (and be sued) as a unit, instead of having to specify the name of every shareholder. It also means that a corporation can hold legal title to property despite changes in the ranks of its shareholders."[49] But it is not a special privilege, he adds, if by that is meant some advantage given by government at the expense of others. In fact, "entity status is an optional feature available to all unincorporated businesses, including partnerships, limited partnerships, and trusts."[50] Moreover, the entity feature cuts both ways: just as it makes it easier for the corporation to conduct its affairs, Hessen notes, so it makes it easier for outsiders to deal with and to sue the corporation. Here he cites Berle: "The reverse process—that of liability to be sued under a single name, is manifestly not advantageous to [corporations], but is rather a measure of fairness to their opponents."[51]

Perhaps this will suffice to show that entity status is not a special privilege, but much more could have been said on the matter. Hessen does not really bring out, for example, the full importance of the entity issue in both the contractual and tortious liability contexts, especially as this feature might arise there in violation of the rights of no one, as in fact it might. (I will develop this point shortly.) Nor does he sufficiently draw out the idea that the entity feature is a practical construct only.[52] In fact, after simply listing the two uses mentioned above, he concludes that "the entity concept serves no valid purpose," and that it "should be discarded"! [53] Part of his

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[49] R. Hessen, *supra* note 2, at 16.

[50] *Id.* at 17. Standing to sue is in a state of some flux right now with respect to business associations. For a synopsis discussion see R. Steffen, Agency-Partnership in a Nutshell 246-50 (1977).

[51] R. Hessen, *supra* note 2, at 17 (citing A. Berle & G. Means, The Modern Corporation and Private Property 120 n.2 (rev. ed. 1968)).

[52] *See, e.g.*, Dartmouth College v. Woodward, *supra* note 20, at 489 (dictum of Justice Marshall: the properties of immortality and individuality "enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand."); Berle, *supra* note 24, at 352 ("Courts have long recognized that, despite its long history of entity, a corporation is at bottom but an association of individuals united for a common purpose and permitted by law to use a common name.").

[53] R. Hessen, *supra* note 2, at 22, 41.

antipathy to this feature arises from the use to which it is too often put—to sever "the corporation" from its owners and hence the rights of the corporation from their origin in the individual rights of the corporate owners.[54] He makes here an important criticism, based upon an important insight; but once again, neither the criticism nor the insight is really developed. In particular, he might have shown how this move by corporate critics leads to the *ab extra* treatment of corporate rights, the straightforwardly positivist granting (and denying) of rights to the corporation from outside, as it were, often for practical reasons only—all of which follows if the connection between the corporation and its owners has been severed, leaving it to stand alone as some detached entity, a *persona ficta* of dubious constitutional personality.[55] Where else would the corporation get rights on that view except from the court—or worse, the legislature? But this lamentable use of the entity feature, which Hessen rightly condemns for its ultimate undermining of individual rights, does not warrant the abandonment of the entity idea altogether, especially since it serves such useful purposes—and indeed, in many contexts is a legitimate contractual creation.[56] Rather, we simply have to understand it for the practical construct that it is. Once we do, there is no reason to treat it as anything other than the product of the exercise of individual rights; it is not a special privilege. Thus, far from arising in violation of rights, it arises in the exercise of rights.[57]

Perpetual life is a relatively uncomplicated corporate feature. Hessen says that it "simply means that the articles of incorporation need not be renewed, unless the founders originally specified that the enterprise was to exist only for a fixed period of time."[58] He adds

[54] *Id.* at 40-42.

[55] For an indication that this may be changing, see *First Nat'l Bank v. Bellotti,* 435 U.S. 765 (1978); *Burger's Blast: Free-speech ruling stirs a row,* TIME, May 8, 1978, at 68.

[56] Thus it is not clear what Hessen means when he (twice) says that this feature should be discarded. Does he mean that the private construction of such a fiction should be legally prohibited—even when all parties agree to it, as when they contract with and on behalf of "the corporation" rather than with and on behalf of the individual corporate owners? Or would he allow these individuals to exercise this *moral* right (to create this fiction), but give the right no legal recognition by denying standing to the entity created through its exercise?

[57] It should be noted too that courts have seldom been reluctant to "pierce the corporate veil" when individuals have attempted to hide behind the corporate entity. *See generally* Berle, *supra* note 24; SOWARDS, *supra* note 35, at § 5.01; C.J.S., *supra* note 20, at § 6.

[58] R. HESSEN, *supra* note 2, at 17.

that here too there are arrangements that will enable partnerships to accomplish the same thing; hence perpetual life is not a special privilege. As for whether this feature arises and continues as a matter of right and in violation of the rights of no one, it does if the original agreement provided for it and if all subsequent transfers of shares, which amount to the regular execution of this feature, are matters of contract. Who is there to complain?

We come then to limited liability, which Hessen calls "the most controversial and least understood corporate feature."[59] Unfortunately, his own brief discussion, while moving in the right direction, does not really get to the heart of this complex subject either.[60] Let us take limited liability for contractual debts first, since this is relatively straightforward. Hessen argues, following Berle, that "[l]imited liability actually is the result of an implied contract between the corporate owners and their creditors."[61] Quoting Berle, he notes that "[a] clause could be put in every contract by which the apposite party [*i.e.*, the creditor] limited his right of recovery to the common fund: the incorporation act may fairly be construed as legislating into all corporate contracts an implied clause to that effect."[62] Here, it seems, the entity idea would be useful: creditors contract with "the corporation," not with the shareholders as individuals, who are thus sheltered from personal liability for corporate debts. As a moral matter, however, Hessen is quite right in holding that there is nothing exceptional about this arrangement, for creditors are at perfect liberty not to contract with the corporation. Indeed, "[t]hey can, and often do, insist that one or more of the shareholders become personal guarantors or sureties for the debt."[63] Thus limited liability for contracts is not a special privilege, disabling others involuntarily; accordingly, it violates no rights.

Limited liability for torts has always been the most difficult corporate feature to justify. Surely tort victims do not contract with the corporation to limit their claims to its assets[64]—as a result of which

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[59] *Id.*

[60] I have discussed this issue in some detail in Pilon, *supra* note 14. What follows here is a brief outline only.

[61] R. HESSEN, *supra* note 2, at 17-18.

[62] *Id.* at 18 (quoting BERLE & MEANS, *supra* note 51).

[63] *Id.*

[64] Two points need to be noted here. (1) It is not often that victims are left inadequately compensated due to the limited liability feature; on the contrary, compensation is usually

the personal assets of the shareholders are sheltered. How then, Hessen asks, "can limited liability for torts be integrated into a *contractual* theory of corporations?"[65] As noted earlier,[66] he replies that it cannot, that "[t]he question poses a false alternative: either limited liability for torts is a state-created privilege or it is contractual (which it obviously is not). In fact, there is a third possibility."[67] The discussion that follows, however, is a confusing blend of the descriptive and the prescriptive, which never makes clear just what this third possibility is.

Before discussing Hessen's argument, let me first sketch how the entity thesis combines with the theory of vicarious liability, or *respondeat superior,* to generate limited liability for torts. Very briefly, on a theory of vicarious liability, the current law treats the corporate employee—who usually commits the tort—as an agent of the corporation-principal. Thus the corporate-master is held liable for the torts of the employee-servant. But since the corporate-master, on the entity thesis, is the corporate entity, claims are limited to the assets of "the corporation," thereby sheltering shareholders from personal liability: *it,* the corporation-principal, is liable, not the shareholders personally. This has always seemed hard to justify, however, for critics have asked why victims cannot simply go directly to the shareholders, which would be tantamount to eliminating the corporate entity. Since Hessen too wants to discard this fiction, it would seem that he would sanction this more direct path as well.

He does not, however. Rather, he argues that shareholders are sheltered from personal liability because they do not *control* the business. (If they do control, however, he argues that they should not be sheltered.) "The proper principle of liability should be that

more than adequate when it is a corporation that is held liable. I concentrate on this issue, then, not because it raises serious problems today—except in the case of the small or underfinanced corporation—but because it is an important theoretical point which corporate critics have seized upon in developing their illegitimacy thesis. *See, e.g.,* GIANT CORPORATION, *supra* note 1, at 35, 63; STONE, *supra* note 1, at 46. (2) Although the emphasis of the discussion that follows may suggest otherwise, I am not at all unconcerned about the victims of corporate wrongdoing. But rectifying the wrong done them by doing injustice to someone else is no solution, however well intended.

[65] R. HESSEN, *supra* note 2, at 19 (emphasis in original).

[66] *See* note 46 *supra.*

[67] R. HESSEN, *supra* note 2, at 19.

whoever controls a business, *regardless of its legal form*, should be personally liable for the torts of agents and employees."[68] It is the *respondeat superior* doctrine, then, that Hessen fastens upon by way of limiting shareholder liability:

> Vicarious liability should only apply to those shareholders who play an active role in managing an enterprise or in selecting and supervising its employees and agents. The tort liability of inactive shareholders should be the same as that of inactive partners—that is, limited to the amount invested—and for the same reason; namely, inactive shareholders and limited partners contribute capital but do not participate actively in management and control.[69]

Now assuming his control test for vicarious liability is correct, which I will question in a moment, Hessen has missed an important issue here. His argument for unlimited or personal liability for active shareholders is based upon the control test of the *respondeat superior* doctrine. But he has given no *affirmative* argument for the liability—albeit limited—of *inactive* shareholders. The question, that is, is not only why inactive shareholders should have their liability limited, but more basically, why they should be liable *at all*! Hessen has made the negative point: he has argued that the control test will not serve to make inactive shareholders personally liable. But why should they be even "impersonally" liable? The only possible explanation here, if their liability is to be limited, would invoke the entity thesis, which Hessen wants to discard. What he needs, in short, is some affirmative principle of liability to account for limited corporate liability, some principle to explain why the inactive shareholders should be held liable even to this degree. Otherwise, it is *they* who are disadvantaged by the current law, not the victims of "corporate torts" (about which more in a moment); for their investments are jeopardized by the behavior of corporate employees they do not control.

In order to handle this problem, then, what Hessen might have done (but see below) is expand his interpretation of *respondeat superior* to include not just *control* but also *benefit* as a criterion of vicarious liability, as is often done.[70] This would have enabled him

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[68] *Id.* at 20 (emphasis in original).

[69] *Id.*

[70] *See* text accompanying notes 72-77 *infra*.

to avoid the entity thesis; but unfortunately the result would have been unlimited or personal liability for *inactive* shareholders too, which he wants to avoid. Thus, either inactive shareholders are sheltered *altogether* for the torts of corporate employees, or they are *personally* liable on a benefit test; but there is no way to *limit* their liability on a theory of vicarious liability without bringing in the entity thesis.[71]

All of which brings us to *respondeat superior.* Hessen has simply accepted uncritically the control version of this doctrine. I say "version" because the law has known at least nine different tests or criteria for generating vicarious liability,[72] all of which attempt to give respectability to a doctrine that has long been recognized to be of dubious moral legitimacy, however widely accepted as a legal principle.[73] (Thus do we seek to rationalize what in fact is a deep-pocket principle.) I have already mentioned the two most common rationales—control and benefit.[74] Very briefly, for I have discussed these issues elsewhere,[75] the control test raises serious philosophical issues which the current theory of action is far from having solved: unintentional acts, as most torts are, are performed *by* individuals, not *through* (other) individuals as the *qui facit per alium facit per se* maxim suggests. Ignoring this fundamental analytical point leads in turn to serious moral difficulties.[76] Yet on so slim a reed would

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[71] One way to limit the liability of inactive shareholders might be to treat control and benefit as distinct criteria in a two-tier test of liability, with control generating personal liability and benefit generating limited liability, *i.e.*, liability limited to the amount invested, which is the basis of benefit. (Perhaps this is Hessen's "third possibility," though nothing like this is suggested in his text.) But then "liability" is used ambiguously: "control liability" reflects a *wrong*—the failure of the control—for which the controller is liable; "benefit liability," on the other hand, suggests no wrong but simply a *business* loss. There may be something in this; but we have to be careful to hold individuals *tortiously* liable only for what they have done, not for the investments they have ventered. There appears, in short, to be no reason that is sufficient to justify imposing the losses caused by the acts of the corporate agent upon those who merely benefit from those acts. (Why not impose them upon others who benefit—fellow employees, sellers, customers, and the general public?)

[72] *See* Smith, *Frolic and Detour,* 23 COLUM. L. REV. 444, 455-56 (1923).

[73] *See, e.g.,* Stockwell v. Morris, 46 WYO. 1, 22 P.2d 189, 190-91 (1933); Holmes, *Agency,* 5 HARV. L. REV. 1 (1891); Holmes, *Agency,* 4 HARV. L. REV. 345 (1891); Smith, *supra* note 72. For a good recent discussion see C. GREGORY, H. KALVEN, & R. EPSTEIN, CASES AND MATERIALS ON TORTS 702-15 (3d ed. 1977) [hereinafter cited as GREGORY & KALVEN].

[74] *See* STEFFEN, *supra* note 50, at 73.

[75] *See* Pilon, *supra* note 14.

[76] Hessen seems intuitively aware of this point, but it leads him to a misunderstanding of the law. Thus he writes that in adopting the *respondeat superior* doctrine "the courts were

Hessen hold corporate officers *personally* liable for the wrongs of their employees—however far removed from actual control, one must suppose.[77] On the other hand, the benefit test suffers, *inter alia,* from its containing no principled limits, at least when applied by itself. As noted earlier, why not hold *anyone* who benefits from the acts of the employee liable?[78]

There is much more to be said on the problems that have traditionally surrounded the *respondeat superior* doctrine, but the little I have said here should be enough to suggest that what is called for is a well-developed theory of two-party (and more) liability, as this can be generated from justifiable principles of individual liability.[79] Such a theory would begin with rules for individual liability, would contain a strong presumption against "spreading" liability, and would do so (at least when the agent is an adult human) only with reference to action, not to status. Thus if liability were extended to corporate officers or even to shareholders, it would be because of what they *did* vis-à-vis the cause of action itself, not how they stood related otherwise to the agent whose act gave rise to the suit. Clearly, such a theory is a major undertaking, well beyond my scope here.

So much, in the barest of outlines, for the morally justified rules of liability in this matter—justified because they hold responsible only those who are causally related to the wrong, not those who are related for other reasons. Were these rules to become law, their effect would be to eliminate the *respondeat superior* doctrine as we

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serving notice upon masters that they must carefully choose and closely supervise their servants *or else* bear the financial consequences of their neglect to do so." R. Hessen, *supra* note 2, at 20 (emphasis added). This suggests that employers are held to a *negligence* standard when in fact they have long been held *strictly* liable for the torts of their employees. *See, e.g.,* Gregory & Kalven, *supra* note 73, at 706 ("After some early hesitation until 1700 or so, it became established that vicarious liability turned on the tort arising out of the servant's employment, not on the negligence of the employer in the selection and supervision of the employee . . . .").

[77] R. Hessen, *supra* note 2, at 20. I say "one must suppose" because Hessen offers no qualifications on the control test.

[78] *See* note 71 *supra.*

[79] For such a theory of individual liability see Epstein, *Intentional Harms,* 4 J. Legal Stud. 391 (1975); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability,* 3 J. Legal Stud. 165 (1974); Epstein, *Theory of Strict Liability,* 2 J. Legal Stud. 151 (1973); Epstein, *Pleadings and Presumptions,* 40 U. Chi. L. Rev. 556 (1973). For an overview of these essays, placing them against a larger philosophical background, see Pilon, *Richard A. Epstein: Rethinking Torts,* 2 L. & Lib. 1 (Winter 1976).

know it today, and with it the limited liability for torts issue—and of course the special privilege thesis. Individuals, not entities, would be held liable for "corporate acts," for to strangers, corporate acts are as fictitious as corporate entities. And on the other side, unless they had arranged otherwise, shareholders and their investments would be immune from losses caused by the acts of corporate employees. Far from being a state-created privilege, then, today's limited liability for the torts of corporate employees is an unwarranted disability upon shareholders. Thus for *this* reason, and not because tort victims are disabled, it is an illegitimate corporate feature.[80]

The rules of liability are one thing; the rules to insure solvency another. Under a legal regime that reflected the moral order there would be strict financial responsibility requirements. These would impose upon individuals the obligation to be solvent according to some measure of the risk to which they put strangers, the failure in which would make those risky acts proscribed. In such a regime, then, we should imagine that any number of intra-corporate contractual and extra-corporate insurance devices designed to satisfy this requirement would arise. Thus corporations, and hence shareholders, might themselves underwrite the solvency requirements of their employees, perhaps for reasons of efficiency. If the corporation underwrote only part of those requirements, then in virtue of this contractual relationship it would be financially liable to those limits for the torts of its employees, as with any third-party insurer. In that case, we might want to call this "limited liability" a corporate feature. But it would be a feature which arose in a morally legitimate way—by contract—and in violation of the rights of no one; indeed, it arises in satisfaction (in part) of the solvency obligations that are owing to strangers. It should be noticed finally that all of this would in most cases produce the same results we achieve today through the

[80] Tort victims are never really disabled by *respondeat superior* (a point about which Hessen is silent), because employee-agents are always at least personally liable for the torts they commit. *See* GREGORY & KALVEN, *supra* note 73, at 701. (I ignore here the solvency issue, which will be taken up presently.) But shareholders *are* disabled by this doctrine: either directly, when liability is wrongly placed upon them; or indirectly, insofar as they are not free to enter into corporate relationships in which they will be immune from the tortious liability that *respondeat superior* wrongly subjects them to, *i.e.*, insofar as they are not free as shareholders to contract with employees who, on their side, are at liberty for purposes of tortious liability to be independent contractors. (Thus even employees are prevented full freedom of contract by this doctrine.)

respondeat superior, entity status, and limited liability doctrines; but those results would be reached by a morally legitimate process and hence would leave no room for doubt about their legitimacy.

IV. The Current Debate: Contra Nader

I have focused in this review upon the historical and theoretical foundations of Hessen's argument because of their crucial bearing upon his central thesis about corporate legitimacy. He has pushed in the right direction, I believe, and for the most part is on the mark. My criticisms, in fact, have been not with his direction—which I would press even further—but with the depth and thoroughness of his analysis. Nevertheless, he is doing important spadework here in a relatively new area of inquiry—the normative foundations of the corporation—an area in which there remains a great deal to be done.

What I have left unexamined, however, is in many ways the larger part of the book: directed primarily at the Nader brief, it is a thoroughly detailed and devastating critique of the complaints that have come from that quarter in recent years. In particular, Hessen has done an excellent job of unmasking the "scholarship" of the Nader group, from phantom footnotes to fabricated quotations. To many readers this will be the most interesting and useful part of the book, for it focuses not so much upon questions of fundamental theory as upon the issues that have lately constituted the corporate debate.

It is here, for example, that Hessen takes up "the ideal of corporate democracy," which Nader has been advocating with his call for "shareholder plebiscites" on fundamental corporate transactions. This amounts, Hessen argues, to imposing a political metaphor on a business organization: Nader and his fellow critics "extend the language of politics to business and corporations and then condemn business organizations for not being the political institutions which they were never intended to be."[81] To read Nader one would suppose that most shareholders *want* to be involved in running their corporations; indeed, Nader seems not to appreciate that shareholders do their voting at will on the stock exchanges. More fundamentally, the separation of ownership and control, far from being a disability

[81] R. Hessen, *supra* note 2, at 52.

upon shareholders, appears to be exactly what both sides have wanted:

> According to Nader, who totally accepts the thesis of Berle and Means, the increase in the number of corporate shareholders has led to a separation of ownership and control. But that claim is wrong because it *reverses* cause and effect. It was the separation of ownership and control—i.e., the creation of two distinct functions (investment and management)—which made possible the increased number of shareholders. The corporate form flourished precisely because it split the atom of ownership in two.[82]

Hessen takes up also the question why state incorporation laws are permissive, concluding that it is for reasons of flexibility—and more importantly is a reflection of freedom of contract. If the Delaware laws were so unfavorable to shareholders, he observes, why are Delaware corporations not avoided by professional investors—banks, mutual funds, insurance companies?[83] He looks too at current proposals to break up big business, including the monumental confusion that just is our antitrust law. And finally, he draws upon some of the more obscure of Nader's pronouncements to depict the larger picture within which Nader's corporate criticisms should be seen. It is a Rousellian world of public service and private denial that Nader has in store for us, toward which his attack upon the corporation is but a "foot in the door."

This is a good book. It raises important issues that have too long been ignored, and it sets the record straight on a number of crucial matters on the public agenda today. It should help to continue the momentum begun in recent years toward better securing the moral foundations of a free society.

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[82] *Id.* at 43 (emphasis in original).

[83] *See also* Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).