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The Corporate Entity in an Era of Multinational Corporations

Phillip Blumberg

University of Connecticut School of Law

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THE CORPORATE ENTITY IN AN ERA OF MULTINATIONAL CORPORATIONS

BY PHILLIP I. BLUMBERG*

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* Dean and Professor of Law and Business, Emeritus, The University of Connecticut School of Law. Copyright, The Blumberg Trust, 1990.

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I. INTRODUCTION

In the face of modern economic development resulting in fundamental changes in corporate structure and operations, traditional views of the corporate personality in American law have become increasingly inadequate. The problems of a complex corporate system in the modern industrial age have outstripped traditional corporation law, shaped long ago under very different conditions. Corporation law in the United States (and in other countries as well) is breaking down because of the increasing tension between the conventional view of each corporation as a separate legal entity, irrespective of its interrelationships with its affiliated corporations ("entity law"), and the economic reality of a complex industrial society overwhelmingly conducted by corporate groups: parent companies, sub-holding companies, and innumerable subsidiary companies collectively conducting worldwide integrated enterprises. The predominance of such powerful multinational corporate complexes is creating irresistible pressures for the development of new legal concepts to impose more effective societal controls than those available under traditional entity law reflecting the society of centuries ago.

The extensive discussion of the nature of the corporate personality in the United States, a preoccupation of legal scholars for more than a century, has become increasingly irrelevant. First, the discussion rests on a stereotyped view of "the corporation" that with the passage of time no longer realistically describes the corporate world. Second, the discussion has been overwhelmingly concerned with an inquiry into the question of the *rights* to be accorded to the corporation, particularly rights of a corporation under the United States Constitution. These issues have long since been almost entirely settled. The extent of corporate freedom of speech is one of the few remaining issues. Today, reflecting the dramatic change in the nature of corporate society, the crucial issue for heavily industrialized societies the world over, seeking to assure corporate responsibility and accountability, has become the reverse, the imposition of *duties* upon corporations, not the recognition of their rights.

Discussion of the corporate personality accordingly requires re-examination and fundamental reorientation. Of central importance in any such re-examination of the corporate juridical entity in the modern world is the extent to which the legal consequences of the actions of any subsidiary corporation should extend to its

parent and affiliated companies in order to implement effectively the policies and objectives of the law in the area involved. What is at stake (in most, but not all legal questions of this nature) is the continued acceptability of the principle of limited liability for each of the separate controlled constituent companies, for each entity that is part of a corporate group. Although entity law does not inevitably involve limited liability, limited liability cannot exist without acceptance of entity law.¹

The American discussion of the corporate personality to date has largely ignored the modern development of corporate groups. The commentaries assume the existence of the corporation as a separate juridical unit, recognized by the law with those fundamental attributes identified centuries ago by Coke,² Kyd,³ and Blackstone⁴: the capacity to sue and be sued, to hold and to transfer property, to have a term of existence, typically perpetual⁵—all separate from the individuals or others who might own its shares from time to time—and, in addition, the right of shareholders to transfer their shares without any effect on corporate existence. This conception of the corporation embodying these “core” rights, commonly called entity law, has been a fundamental part of the Anglo-American legal system for centuries. In reliance on medieval notions of Roman law

1. Numerous modern courts unaware of the early historic origins of entity law long before the relatively recent triumph of limited liability incorrectly assume that the two doctrines are essentially interrelated. See Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986) [hereinafter Blumberg, *Limited Liability*].

2. See, e.g., *Case of Sutton's Hosp.*, 10 Coke 23a, 30b-32b, 77 Eng. Rep. 960, 970-73 (1612) (corporation is “invisible, immortal, and rests only in intendment and consideration of the law”); 2 E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND OR A COMMENTARY ON LITTLETON* 250a (1628).

3. See 1 S. KYD, *A TREATISE ON THE LAW OF CORPORATIONS* 69-70, 103 (1793).

4. See W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* §§ 475-476 (1st ed. 1765).

5. The English commentaries invariably refer to corporate existence as perpetual. In fact, the early American statutes generally limited corporate life to fixed terms of 20, 30, or 50 years. See *Liggett Co. v. Lee*, 288 U.S. 517, 548 n.3 (1933) (Brandeis, J., dissenting). Thus, the New York General Incorporation Act in 1811 fixed a maximum term of 20 years for manufacturing corporations. N.Y. Act of Mar. 22, 1811, ch. 67. Modern statutes generally permit incorporation for a fixed term of years. E.g., CAL. CORP. CODE § 204(a)(4) (West 1977); DEL. CODE ANN. tit. 8, § 102(b)(5) (1983 repl. vol.); MODEL BUSINESS CORP. ACT § 2.02(b)(2)(iii), Official Comment 3c (1984).

that underlie all Western legal systems,⁶ the corporation is conceptualized as a separate legal right-and-duty-bearing unit.⁷

The debate on corporate personality has not challenged this centuries old principle. The debate in the United States has instead been largely concerned with the very important (but less than fundamental) issue of the outer boundaries of corporate rights, particularly a corporation's constitutional rights to supplement the universally accepted concept of the corporate juridical entity with its "core" rights. Although different theories of the nature of the corporate personality have been advanced to support the attribution or denial of constitutional rights to corporations, none has either challenged the corporation's existence as a separate entity or sought to broaden the juridical unit to include interrelated corporations. This discussion has focused on the extent of the constitutional protection against actions of the federal and state governments to be extended over corporations and their businesses, questions that arose with greatest intensity a century ago in the days of vigorous economic development when recognition of corporate interests to promote economic growth had a special appeal.

Today, this framework for analysis has become outmoded.⁸ The reality of our times, which the law must take into account, is that large multinational corporations with hundreds of thousands of public shareholders and corporate structures of "incredible complexity"⁹ dominate the modern business world. Such corporations and the legal problems that they present are vastly different from the simple corporations that constituted the business world when corporation law took shape long ago.

It is no longer realistic to adhere to the traditional view that for legal purposes each of the constituent corporations in a corporate

6. See W. BUCKLAND, *ROMAN LAW AND COMMON LAW* 54 (F. Lawson 2d ed. 1965); C. Carr, *Early Forms of Corporateness*, in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 161 (1909); Williston, *History of the Law of Business Corporations Before 1800* (pt. 2), 2 *HARV. L. REV.* 149, 164 (1888).

7. This term, frequently used in the commentary, apparently originated with Maitland. See 3 F. MAITLAND, *COLLECTED PAPERS* 307, 314-15 (H. Fisher ed. 1911 reprinted 1979).

8. In an area of lesser importance, the same factors make desirable an examination of the expansion of corporate legal rights to constituent companies of corporate groups in certain areas of procedure. See P. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS* (1983) [hereinafter *BLUMBERG: PROCEDURE*].

9. See Hadden, *Inside Corporate Groups*, 12 *INT'L J. SOC. L.* 271, 273-74 (1984).

group is a separate legal entity with rights and duties unaffected by its functioning as an integral component of a group collectively conducting a common business under common control. It is time for the bench, bar, and academy to consider the circumstances under which the parent and affiliated companies of the group should also be liable for the duties and obligations of other group constituents in order either to protect persons dealing with companies of the group in cases arising at common law or to implement governmental controls and prevent their frustration and evasion more effectively in cases involving statutory law.

The issue whether the law should extend the rights and duties of the parent corporation or other constituent companies of the corporate group to reflect the activities of an affiliated company of the group is increasingly becoming one of the major problems in corporation law. By reason of the prominence of multinational companies, enterprise liability is also looming as an important problem in international law, international relations, and international bankruptcy as well.

In the corporate area, this problem thus far has typically been analyzed by reference to the body of law that I have termed "piercing the corporate veil jurisprudence." Through this doctrine providing isolated relief from the strictures of entity law and limited liability in exceptional cases, the law has applied a single body of rules for imposition of shareholder liability without regard to whether the shareholder was an individual or the parent or an affiliated corporation of a giant multinational complex; in effect, a "shareholder" is a "shareholder." Identical protection has traditionally been accorded to the shareholder who is merely an investor in the corporate business and to the shareholder-parent company in a complex corporate group, which is itself engaged in the conduct of the business of the group, although the relationships of these two very different types of shareholders to the enterprise are universes apart. Reflecting this vast discrepancy, both legislative and judicial authorities have increasingly recognized that very different legal issues are presented by these sharply contrasting relationships.

Statutory regulatory law, in particular, has widely abandoned the traditional perception and has significantly moved from an entity to an enterprise frame of reference. Many regulatory statutes utilize such standards as "control," "controlling," and "controlled" or employ numerical standards of stock ownership in order to extend the regulatory program to all component companies of corporate groups. American common law, too, is beginning to recognize the

inadequacy of entity law in dealing with the special problems presented by complex multi-tiered corporate structures. In cases involving the construction of statutes not expressly extending their reach to all affiliated companies of a group, courts have construed the statutes, particularly remedial statutes, liberally to do so. In the process of construing the statutes, a special variant of "piercing the veil jurisprudence" has emerged applying the doctrine free of some of the significant restrictions applicable to common law controversies.¹⁰ Thus, the courts are moving at varying paces in different areas of the law to acknowledge that "shareholder" protection for parent corporations and sub-holding companies in corporate groups may be very different from that accorded public shareholders of the parent corporations or shareholders in small corporations. These signs of transformation in the traditional perception of the corporation represent the early stages in the development of enterprise law. While such departures are beginning to occur, respect for the legal insulation of the public shareholder continues unabated. Thus, in no case, to the knowledge of the author, has liability been imposed on the public shareholders of a parent corporation of a corporate group.¹¹ Despite the departures, limited liability has in all cases been preserved for the very persons sought to be protected when the traditional concept became fully accepted centuries ago.

As the future unfolds, the pressures for the extension of legal obligations of individual companies of a corporate group to other members of the group will likely lead to a reconsideration of entity law in the case of the large modern corporation, conducting business as a part of a complex corporate group and to a recognition of some form of enterprise law.

10. See, e.g., *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981) (inquiry into construction of statutes "gives less respect to the corporate form than does the strict common law alter ego doctrine"); *Capital Tel. Co. v. FCC*, 498 F.2d 734, 738-39 (D.C. Cir. 1974); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 700, 717 (7th Cir. 1965); *SEC v. Elmas Trading Co.*, 620 F. Supp. 231, 234 (D. Nev. 1985); *United States v. Firestone Tire & Rubber & Co.*, 518 F. Supp. 1021, 1039 (N.D. Ohio 1981). See also cases cited *infra* note 323; P. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS UNDER STATUTORY LAW OF GENERAL APPLICATION* (1989) [hereinafter *BLUMBERG: GENERAL STATUTORY LAW*].

11. A possible exception is *Anderson v. Abbott*, 321 U.S. 349, *reh'g denied*, 321 U.S. 804 (1944), imposing statutory double liability on public shareholders in bank holding companies in an effort to prevent evasion of the double assessment provisions of the Banking Act by the organization of holding companies. See *BLUMBERG: GENERAL STATUTORY LAW*, *supra* note 10, § 2.03.

"Piercing the veil jurisprudence" has provided the safety valve in American law for American courts in "exceptional" cases to avoid unacceptable results arising from the rigid application of entity law in situations in which third parties have been injured by the substantial departure of controlling shareholders from accepted corporate *mores*. "Piercing the veil jurisprudence" has, however, typically hopelessly muddled together the problem of the small businessperson, simultaneously conducting his or her business both personally and in corporate form, and the issues raised by the largest corporations of our time conducting integrated enterprises consisting of hundreds of affiliated corporations in innumerable countries around the world.

Just as the traditional view is beginning to recognize the vital difference between the issues presented by these very different economic institutions, "piercing the veil jurisprudence" is similarly beginning to change. In the past, cases applying "piercing the veil jurisprudence" unwisely asserted that the parent (or controlling shareholder) and the subsidiary (or controlled corporation) were a single entity for all purposes. This view has become increasingly outmoded. In most modern cases, the "piercing the veil" decisions do not challenge the existence of the corporate entity of the subsidiary (or controlled corporation) for all purposes. Instead, they typically attribute certain rights or impose certain duties upon the group (or controlling shareholder) by reason of the activities of its subsidiary (or controlled corporation) only *for the purposes of the case at hand*. The American "piercing the veil" cases, thus, continue to acknowledge the primary role of entity law in the American legal system. They are still concerned only with the secondary issue of the imposition in "exceptional" cases of the duties or obligations of constituent companies of a corporate group on the parent corporation or other companies of the group.

Thus, contemporary consideration of enterprise law, like the historical discussion of the nature of the corporate personality, involves an examination in particular cases of the attribution of rights and imposition of duties in particular cases on constituent companies of corporate groups. It does not yet undertake a basic challenge of the separate corporate existence of the controlled company for other purposes. It has, however, abandoned the earlier philosophy that emphasized the universality of the relationship of all corporations to their shareholders, irrespective of whether the shareholders were the ultimate public investors in the enterprise or affiliated companies, themselves engaged in the conduct of the enterprise, particularly affiliated companies collectively engaged with their parent corporation in the conduct of a unitary business under common control. Instead of automatically

insulating the parent corporation and its sub-holding companies and affiliated subsidiary companies from all legal consequences for acts of a subsidiary corporation in accordance with traditional entity law, the newer enterprise view makes the attribution of rights and imposition of duties with respect to related corporations under common control turn, in the particular case, on the extent of the interrelationship between the group and its component controlled companies. This will reflect the extent of organizational direction (that is, the exercise of group control), economic interdependence and economic integration, administrative and financial interdependence, and use of a common public persona. It will also turn on whether enterprise or entity law most effectively implements the underlying objectives of the law in the case at hand.

A fuller understanding of the influence of these changing concepts of the nature of the corporate personality in American law requires careful analysis of the various cases in which such questions of entity or enterprise have been central in the attribution of corporate rights or imposition of corporate duties for the purposes of the litigation at hand. Such an examination in comprehensive form would be an enormous encyclopedic undertaking well beyond the scope of this review. With respect to rights, it would involve primarily an examination of the numerous Supreme Court decisions which have almost fully resolved uncertainties with respect to the status of corporations under the various provisions of the United States Constitution. It would also involve a review of decisions, particularly in the procedural area, extending procedural and other rights of controlled companies to the parent and affiliated companies of the group. With respect to duties and obligations, it would involve a comprehensive review of the thousands of decisions, arising in private common law, primarily in tort and contract, and in statutory law under governmental regulatory programs.

To remain within acceptable limitations, this article reviews these matters in summary form. Although constitutional developments have been elaborately explored in the literature, a summary review is essential for a fuller understanding of the incipient movement away from entity law toward the imposition in selected areas, both under common law and statutory law, of duties and obligations of subsidiary companies on their parent and affiliated corporations.

II. TRADITIONAL THEORIES OF THE NATURE OF THE CORPORATE PERSONALITY

Although recognition of the separate legal personality of the corporation—separate from that of the shareholders—goes back centuries,

there has been intensive controversy on the jurisprudential level as to the exact nature of the corporation as a legal institution. The discussion has been worldwide with an enormous bibliography,¹² described, as long ago as 1911, to be of "appalling size."¹³

As is well known, this development has gone through three stages in the United States. It now appears to be entering a fourth stage which has not attracted the attention it deserves.

First, in the early days of the Republic prior to the adoption of general incorporation statutes, when each corporation was chartered by a special act of the legislature, the corporation was seen as an "artificial person" as visualized by Coke, Kyd, and Blackstone.¹⁴ It was the creation of the legislature, owing its existence to state action, rather than to the acts of its shareholder-incorporators. This view—alternatively called the *artificial person*, or *fiction*, or *concession*, or *grant doctrine*¹⁵—was exemplified by Chief Justice Marshall's description of the corporation in the *Dartmouth College* case:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature

12. See generally E. HALLIS, *CORPORATE PERSONALITY* (1978); A. NÉKÁM, *THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY* (1938); S. STOLJAR, *GROUPS AND ENTITIES: AN INQUIRY INTO CORPORATE THEORY* (1973); O. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* (1958); Canfield, *The Scope and Limits of the Corporate Entity Theory*, 17 COLUM. L. REV. 128 (1917); Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954); Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916); Machen, *Corporate Personality* (pts. 1 & 2), 24 HARV. L. REV. 253, 255, 257 (1911); Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932).

More recent literature includes: Bratton, *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L.Q. 407 (1989); Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575 (1989); Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1597-601, 1640-51 (1988); Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990); Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TULANE L. REV. 563 (1986); Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987); Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641 (1982).

13. See Machen, *supra* note 12, at 254 n.3.

14. See *supra* notes 2-4.

15. These form sub-sets of the theory with differing emphasis, but as Professor Dewey said in distinguishing between the fiction and concession theories: "In spite of their historical and logical divergence, the two theories flowed together." See Dewey, *supra* note 12, at 668.

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.¹⁶

The essence of this view is that the corporation is a separate juridical unit created by state action, an artificial creature of the state possessing in addition to its essential "core" attributes only such limited powers as are granted by the state. While a separate legal entity, its legal capacity beyond its "core rights" depends on its charter and thereby differs decisively from the fuller panoply of legal rights possessed by natural persons. (We shall accordingly refer to it as the "artificial person"¹⁷ or "weak entity" theory.) This Anglo-American view of the corporation also prevailed on the continent in the same period.¹⁸

In early Supreme Court cases considering the application of the new Constitution to corporations, a second, more complex theory of the corporate personality emerged. Facilitating the attribution to a corporation of constitutional rights protecting the interests of shareholders to supplement its common law "core" attributes, this theory perceived the corporation as an association of individuals contracting with each other in organizing the corporation. The subsequent growth of general incorporation statutes making corporate status freely available¹⁹ moved the predominant role in corporate organization from the state to the incorporators and shareholders. This development made reliance on the associational view even more appealing.

As Justice Field said in *The Railroad Tax Cases*:

Private corporations are, it is true, artificial persons, but . . . they consist of aggregations of individuals united for some legitimate business It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by

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16. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1810).

17. The "artificial person" or "weak entity" view should not be confused with the theories referring to the corporate "person" or "personhood" or "personification." These frequently are referring to the "real person" or strong entity view of the corporation. See, e.g., Schane, *supra* note 12; Note, *supra* note 12.

18. See, e.g., G. HEINAN, OTTO GIERKE: ASSOCIATIONS AND LAW 27-33 (1977) (reviewing views of Savigny). See also Machen, *supra* note 12, at 255.

19. New York enacted the first general incorporation statute as early as 1811; this was the first in the world. N.Y. Act of Mar. 22, 1811, ch. 67. However, general incorporation did not become the norm until the 1870s. See W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION 37 (1970).

the states, should cease to exert such protection the moment the person becomes a member of a corporation.²⁰

This conception of the corporation has alternatively been called the *aggregate*, or *group*, or *associational*, or *contract* theory.²¹ (We shall refer to this view as the "associational" theory.)

Under this view, the constitutional rights of shareholders are attributed to the corporation because "the courts will always look beyond the name of the artificial being to the individuals whom it represents."²² However, the theory does not involve any suggestion that the corporation was not a separate legal entity of its own—separate and different from its shareholders—with the "core" rights traditionally recognized by the common law.²³

While Chief Justice Taney, among others, recognized that the associational theory was theoretically inconsistent with the concept of limited liability,²⁴ reliance on it did not lead to any threat to the continued acceptance of limited liability.²⁵ Nor did any case seem to

20. *The Railroad Tax Cases*, 13 F. 722, 743-44 (C.C.D. Cal. 1882), *writ of error dismissed as moot sub nom. San Mateo County v. Southern Pac. R.R.*, 116 U.S. 138 (1885); *Santa Clara v. Southern Pac. R.R.*, 18 F. 385 (C.C.D. Cal. 1883), *aff'd*, 118 U.S. 394 (1886).

21. *See id.* at 744-58; V. MORAWETZ, *LAW OF PRIVATE CORPORATIONS* § 1 (1882) ("the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, not of an imaginary being").

22. *The Railroad Tax Cases*, 13 F. at 744.

23. Thus, in *The Railroad Tax Cases*, Justice Field adopted the following argument of John Norton Pomeroy, counsel for the railroad:

Whatever be the legal nature of a corporation as an artificial, metaphysical being, separate and distinct from the individual members, and whatever distinctions the common law makes, in carrying out the technical legal conception, between property of the corporation and that of the individual members, still, in applying the fundamental guarantees of the constitution, and in thus protecting the rights of property, these metaphysical and technical notions must give way to the reality. The truth cannot be evaded that, for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators.

Id. at 758.

The associational view is advanced to support the *attribution* of the constitutional rights of shareholders to the corporation, not to destroy the separate legal entity of the corporation.

24. *See Bank of Augusta v. Earle*, 38 U.S. (5 Pet.) 517, 586 (1839) (Taney, C.J.); *infra* text accompanying notes 83-87.

25. After the firm tilt towards limited liability climaxed by the adoption of a limited liability statute by Massachusetts in 1830, the political struggle over the issue continued for another two decades or so. There were repeated attempts to revise limited liability but they ultimately failed. Michigan in 1837, New Hampshire

have challenged the fundamental attributes flowing from recognition of the corporation as a separate juridical unit—with such essential “core” attributes as the capacity to sue and be sued,²⁶ the capacity to hold and transfer property, and to have perpetual existence, irrespective of any change in its shareholders as a result of death or transfer or otherwise. Conversely, there was no movement to permit shareholders directly to assert such corporate rights.

Third, the corporation has been perceived as an organic social reality with an existence independent of, and constituting something more than, its changing shareholders. This has been termed the *natural entity*, or *real entity*, or *realism* theory.²⁷ Under this view, the corporation is a juridical unit with its *own* claims, much like those of a natural person, that extend beyond both the circumstances of its legal creation by the state and the claims or interests of its shareholders. It is the ultimate stage of the entity view. (Accordingly, we shall refer to it as the “strong entity” view.)

As Professor Teubner points out, each of the competing contentions involved in “the old dispute on the nature of corporate personality”²⁸ has some validity and contributes to a better understanding of the full dimensions of a “remarkably fluctuating reality.”²⁹ The corporation is indeed simultaneously a legal fiction, a contractual network, and a “real” organization. Teubner notes that “Max Weber came closest

in 1842, Wisconsin in 1849, and Pennsylvania in 1853 briefly turned to unlimited liability but soon returned to limited liability. 1837 Mich. Laws §§ 285, 286; 1842 N.H. Laws §§ 605, 607. Such actions reflected the earlier division on the issue. They clearly did not arise from the adoption of general incorporation statutes; these have been seen as representing a political compromise in which the Jacksonians reluctantly traded off limited liability in order to gain acceptance of general incorporation. See E. DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860*, at 384-85 (1954); Blumberg, *Limited Liability*, *supra* note 1. Further, these unsuccessful efforts to restore limited liability came to an end before the full emergence of the associational theory.

26. From the early days of the Republic, suits involving corporate rights and liabilities were brought by or against the corporation, not by or against shareholders. *E.g.*, *Graves v. Boston Marine Ins. Co.*, 6 U.S. 419 (2 Cranch) (1805); *Marine Ins. Co. v. Young*, 5 U.S. (1 Cranch) 332 (1803); *Bank of N. Am. v. McKnight*, 2 U.S. (1 Dall.) 157 (Pa. 1792).

27. See Machen, *supra* note 12, at 261-62 (a real and natural entity); Vinogradoff, *Juridical Persons*, 24 COLUM. L. REV. 594, 602 (1924). See also E. FREUND, *THE LEGAL NATURE OF CORPORATIONS* (1897); O. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* (1958).

28. Teubner, *Enterprise Corporatism: New Industrial Policy and the “Essence” of the Legal Person*, 36 AM. J. COMP. L. 130, 138 (1988).

29. *Id.*

to capturing this ambivalence by treating collectivities only as 'ideas' in the heads of judges . . . while at the same time assigning them 'a powerful, often a decisive, causal influence on the course of action of real individuals.'"³⁰

A remarkable amount of scholarly examination of these theories has continued for more than a century. After decades of debate, the growth of the "legal realism" movement³¹ during the 1920s led to increasing recognition that, whatever its philosophical nature, the corporation was a "means to achieve an economic purpose"³² and that the fundamental issue was not one of theoretical concept but the adaptation of the law to achieve an appropriate degree of control over the activities of the corporation in the light of the political values of the times.³³

For half a century thereafter, the intensity of interest in the problem of corporate personality ebbed. Then with the great increase in the utilization of economics as a tool for examination of legal institutions, libertarian scholars arguing for increased reliance on market forces reopened the debate. They have rejected the emphasis on the central role of state action embodied in the artificial person view. Instead they underscore the role of shareholders as contracting parties in organizing the corporation,³⁴ and depict the corporation in associational terms as a complex network of various contracting parties.³⁵ In effect, they seek to justify reduced governmental intervention in economic matters by reasserting the associational view.

30. *Id.* (citing M. WEBER, *ECONOMY AND SOCIETY* 13 (1978)). (When we examine the American decisions and see how the courts variously appeal to one theory or another to support their result, we will appreciate more fully the power of such " 'ideas' in the heads of judges.")

31. See L. KALMAN, *LEGAL REALISM AT YALE 1927-60*, ch. 1 (1986).

32. See *Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 130, 133 (Tanaka, J., dissenting). See also *Farmers' Loan & Trust Co. v. Pierson*, 130 Misc. 110, 119, 222 N.Y.S. 532, 543 (Sup. Ct. 1927) (Bijur, J.) ("more nearly a method than a thing"), quoted in H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS* 147 (3d ed. 1983).

33. Professor Dewey pointed this out so effectively in 1926 that further theoretical discussion subsided. See Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655 (1926).

34. See R. HESSEN, *IN DEFENSE OF THE CORPORATION* chs. 1, 2 (1979); R. WINTER, *GOVERNMENT AND THE CORPORATION* (1978).

35. See, e.g., Alchian & Demsetz, *Production, Information Costs and Economic Organization*, 62 *AM. ECON. REV.* 777, 787 (1972); Fama, *Agency Problems and the Theory of the Firm*, 88 *J. POL. ECON.* 288 (1980); Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976). See also Bratton, *supra* note 12.

This history, familiar to all American students of corporation law, sets the stage for the present inquiry. To what extent have these competing theories been accepted by the courts in determining the constitutional or other rights and obligations of the corporation involved, for purposes of deciding the particular case before them? What alternative new principles have emerged as judicial standards for the attribution of corporate rights or, more importantly, in the newer area of the imposition of corporate responsibilities?

The three traditional theories have much more than philosophical interest. They have played a fundamental role in shaping the law. The view of the corporation as an "artificial person" underlies entity law, the view of the corporation with rights and duties separate from those of its shareholders, which for ages past was the prevailing view of Western jurisprudence. Arising from historical and philosophical roots, this ancient doctrine, which preceded the triumph of limited liability by centuries, has been tremendously reinforced by it. Entity law provides the substratum on which Anglo-American corporation law rests.

As we will see, the view of the corporation as an association or aggregate of the individuals composing it played an important role in the late nineteenth century in facilitating the development of the law to broaden and extend constitutional protections to corporations in order to protect the economic interests of shareholders. It survives today in some areas of the law regulating internal corporate affairs. Even where accepted, it has been used to support the attribution of shareholders' interests to the corporation for assertion *by the corporation*, not by shareholders. Moreover, it has had no influence whatsoever in issues involving the imposition of liability or other duties on shareholders. Thus, notwithstanding any philosophical inconsistency, the doctrine has not led to any abandonment of entity law or lack of full recognition of the corporation as a separate juridical unit.

The third stage in theories of the corporate personality has seen the corporation as a "real entity" with its own interests transcending those of its shareholders. This view has dominated corporation law for decades. It is particularly evident in the final period of constitutional development in which the Court extended constitutional protection to corporations under numerous provisions so that today corporations have, with isolated exceptions,³⁶ the same constitutional status as natural persons.

36. Corporations are not protected by the privileges and/or immunities clauses

American law is now entering a fourth stage. In American statutory law, in particular, traditional theories of the corporate personality are being increasingly supplemented by newer doctrines emphasizing enterprise over entity. This development is a response to the fundamental need to establish effective legal controls over the very large corporations that dominate the economic system.³⁷ These very large corporations typically operate as multi-tiered multinational groups of parent and subsidiary corporations collectively conducting worldwide economically integrated enterprises that for legal or political purposes have been fragmented among the constituent companies of the group.

In selected areas, the law is beginning to recognize corporate groups rather than a particular subsidiary company, as the juridical unit, and to impose group obligations and, less frequently, to recognize group rights as well. In this movement, still in its early stages, the enterprise theory of the corporation is beginning to emerge. This theory which treats the corporate group as the juridical unit, while still inchoate, has already won acceptance in important areas of the law.³⁸ As traced in *The Law of Corporate Groups*,³⁹ this very significant development in American law has not yet matured so as to emerge as a coherent philosophy.

of article four and the fourteenth amendment, nor by the self-incrimination clause of the fifth amendment. It is still not clear whether they are protected by the due process clause of the fourteenth amendment against deprivation of "liberty," nor is the extent of corporate freedom of speech entirely settled. *See infra* text accompanying notes 78-96, 106, 107-15, respectively. *Cf.* *Austin v. Michigan Chamber of Commerce*, 58 U.S.L.W. 437, (U.S. Mar. 27, 1990).

37. *See* STAT. ABSTR. OF U.S., Tables Nos. 884, 885 (1989); N.Y. STOCK EXCH. FACT BOOK 78 (1986).

38. In "piercing the veil jurisprudence," the crucial factor is the intimate interrelationship of the component companies of the group and their operation under common control. Thus, it does not generally matter whether the litigation seeks to impose liability upon a parent corporation for the acts of its subsidiary or upon a subsidiary for acts of its parent or upon one subsidiary for the acts of a sister subsidiary. Intragroup liability extends to all members of the group conducting fragmented portions of an enterprise under common control. *See* P. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS §§ 8.03, 21.01, 21.02 (1987) [hereinafter BLUMBERG: SUBSTANTIVE COMMON LAW]; BLUMBERG: PROCEDURE, *supra* note 8, §§ 21.01-21.03.

39. *See* BLUMBERG: PROCEDURE, *supra* note 8; P. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROBLEMS IN THE BANKRUPTCY OR REORGANIZATION OF PARENT AND SUBSIDIARY CORPORATIONS, INCLUDING THE LAW OF CORPORATE GUARANTIES (1985) [hereinafter BLUMBERG: BANKRUPTCY]; BLUMBERG: SUBSTANTIVE COMMON LAW, *supra* note 38; BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10.

One important manifestation of an enterprise analysis is the use of the doctrine of "control" employed in many federal statutes to expand the scope of the regulatory program to embrace interrelated companies as well as the group constituent subject to regulation. Another is the "unitary business" standard developed in the worldwide unitary tax apportionment cases to determine the constitutionality of state taxation of local units of multinational corporations. Still another is the "integrated enterprise" doctrine in labor law and employment discrimination law. Finally, there are the numerous modern developments in "piercing the veil jurisprudence" which I have termed the law of corporate groups.⁴⁰

In these respects, American law, while still retaining entity law in most areas, is increasingly supplementing traditional theories of the corporate personality with newer doctrines emphasizing enterprise over entity.

How influential are the theories of the corporation? What have been their role and significance? Is the theory the moving factor for the judicial decision? Alternatively, does the decision rest on other considerations with the theory utilized as an argument to support the decision? Indeed, on occasion are both of these factors at work simultaneously? Let us turn then to the decided cases.

III. THE CORPORATE PERSONALITY IN THE COURTS

A. *Constitutional Applications*

The cases involving the application of various provisions of the United States Constitution to the corporation provide a particularly fertile area for examination of judicial approaches to the corporate personality.

Although the concept of the separate legal personality had been firmly embraced by the English legal system long before the American Revolution and by the United States after the Revolution, this meant only that the corporation was a legal entity distinct from its shareholders with fundamental "core rights." Entity law did not provide a ready answer to the uncertainties of the application of the new Constitution

40. See BLUMBERG: PROCEDURE, *supra* note 8; BLUMBERG: BANKRUPTCY, *supra* note 39; BLUMBERG: SUBSTANTIVE COMMON LAW, *supra* note 38; BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10. The fifth volume, being written in collaboration with Professor Kurt A. Strasser, deals with statutory law directly applicable to parent and subsidiary corporations and will appear in 1992.

to corporations. However, the process of constitutional construction inevitably involved consideration of various theories of the corporate personality in determining the extent to which corporations could invoke constitutional provisions and obtain constitutional rights in addition to their unchallenged "core rights" at common law.

The new Republic knew little about corporations. At the time of the adoption of the Constitution, there were very few corporations. As late as 1801, there were only 317 corporations in the entire country.⁴¹ These were almost entirely in banking, insurance, and public service areas; only a handful were manufacturing corporations. This condition began to change with the growth of the textile industry following the introduction of the power loom, the embargo laws against manufactured imports, and the War of 1812.⁴² However, not until the 1830s did charters for manufacturing corporations exceed those for banking, insurance, and public service corporations.⁴³ Determining constitutional meaning and intent with respect to a class of parties with which neither the society nor the law had had much experience rendered the problem of constitutional construction even more difficult.

The language of the Constitution complicated the problem. For example, the Constitution does not uniformly describe the parties it protects. In different provisions, it refers to "person" or "citizens" or "people." Other provisions generally prohibit certain acts by the federal government without reference to the class protected. Are these terms being used as precise delimitations of the class being protected or are they simply generic references sweeping all juridical entities under their protection?

The issue of whether corporations are protected by a constitutional provision has arisen in the following areas:

41. 2 J. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS*, NUMBER 4, *EIGHTEENTH CENTURY BUSINESS CORPORATIONS IN THE UNITED STATES* 27 (1917) (reissued 1965); W. HUPST, *THE LEGITIMACY OF THE BUSINESS CORPORATIONS* 14 (1970).

42. In contrast to only seven Arkwright loom mills in the United States in 1800, the number of New England textile workers skyrocketed to 100,000 by 1815. The number of spindles increased from 8,000 in 1807 to 191,000 in 1820 and to 1,250,000 in 1831. See BLUMBERG: *SUBSTANTIVE COMMON LAW*, *supra* note 38, § 1.04.3. The number of corporations increased from 317 in 1801 to 1,500 in 1816. See R. WIEBE, *THE OPENING OF AMERICAN SOCIETY* 153 (1984); Blumberg, *Limited Liability*, *supra* note 1.

43. See W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION* 18 (1970).

<i>Provision</i>	<i>Term</i>	<i>Subject</i>
Art. I, § 10, cl. 1	----- ⁴⁴	Impairment of Contracts ⁴⁵
Art. III, § 2, cl. 1	"Citizens"	Diversity of Citizenship Jurisdiction ⁴⁶
Art. IV, § 2	"Citizens"	Privileges and Immunities ⁴⁷
1st Amendment	----- ⁴⁸	Freedom of Speech ⁴⁹
4th Amendment	"People"	Unreasonable Searches and Seizures ⁵⁰
5th Amendment	"Person"	Self Incrimination ⁵¹
5th Amendment	"Person"	Double Jeopardy ⁵²
5th and 14th Amendments	"Person"	Due Process of Law ⁵³
5th and 14th Amendments	"Person"	Equal Protection of the Laws ⁵⁴
14th Amendment	"Citizens"	Privileges or Immunities ⁵⁵

44. This provision is a general restraint on the states without reference to any particular class or group.

45. Corporations included. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1810).

46. Corporations included. Corporations are *not* citizens for this purpose. Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809). However, jurisdiction was, nevertheless, determined by citizenship of the shareholders. *Id.* at 91. Later, it was held that the corporation "although an artificial person" was "deemed" to have the citizenship of the state in which incorporated or was conclusively presumed to have such citizenship, respectively. Marshall v. Baltimore & O. R.R., 57 U.S. (16 How.) 314 (1853); Louisville, C. & C. R.R. v. Letson, 43 U.S. (2 How.) 497, 557-58 (1844).

47. Corporations not included. *See, e.g.,* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 517 (1839).

48. This provision is a general restraint on the federal government without reference to any particular class or group.

49. Corporations included. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1968).

50. Corporations included. *See, e.g.,* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946); Hale v. Henkel, 201 U.S. 43 (1906).

51. Corporations not included. *See, e.g.,* Bellis v. United States, 417 U.S. 85 (1974); United States v. Kordel, 397 U.S. 1 (1970); Hale v. Henkel, 201 U.S. 43 (1906).

52. Corporations not included. *See, e.g.,* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

53. Corporations included. *See, e.g.,* Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26

1. "Citizens"

a. *Diversity-of-Citizenship Jurisdiction: Article III*

The first corporate constitutional controversy arose in connection with diversity-of-citizenship jurisdiction. Article III, section 2, clause 1 of the Constitution provides that the federal judicial system may hear "cases" or "controversies" between "citizens" of different states.⁵⁶ This was clear enough in the case of natural persons,⁵⁷ but what of corporations? Was a corporation a "citizen" for purposes of this provision? If so, of what state was it a "citizen"?⁵⁸

This question arose in 1808 in *Bank of the United States v. Deveaux*,⁵⁹ in which a corporate action⁶⁰ on a note was brought in the federal court under diversity-of-citizenship jurisdiction. The district court dismissed for want of jurisdiction, holding that a corporation could not be a "citizen" and accordingly, that diversity of citizenship could not arise.⁶¹ If not reversed, this decision would have barred all litigation involving corporations—whether as plaintiff or defendant—from the federal courts insofar as common law matters or state corporation law matters were concerned.⁶² Thus, the issue far tran-

(1889). *But see* Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85 (1938) (Black, J., dissenting).

54. Corporations included. *See, e.g.*, Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181 (1888); Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886). *But see* Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576 (1949) (Douglas, J., dissenting).

55. Corporations not included. *See, e.g.*, United States v. Hague, 307 U.S. 496, 514 (1939); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); *Pembina Consol. Silver Mining & Milling Co.*, 125 U.S. at 187-88.

56. U.S. CONST. art. III, § 2, cl. 1.

57. In the case of natural persons, citizenship was determined by residence, a doctrine later confirmed in the fourteenth amendment. *See* U.S. CONST. amend. XIV.

58. *See* McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853 (1943).

59. 9 U.S. (5 Cranch) 61 (1809).

60. Alleging their citizenship in Pennsylvania, "[the] President, Directors and Company of the Bank of the United States" sued residents of Georgia on a note in the federal district court in Georgia. *Id.* at 61-62. The quoted reference is the name of the corporation as set forth in the statute of incorporation, reflecting the style of the time. Act of Feb. 25, 1791 § 3, 1 Stat. 283. The suit asserts a "corporate right" in the "corporate name." *Deveaux*, 9 U.S. (9 Cranch) at 86-87. The individuals holding the office of president or director were not parties.

61. *See* Bank of the U.S. v. Deveaux, 2 F. Cas. 692, 693 (C.C.D. Ga. 1808) (No. 916).

62. Cases not involving federal questions or admiralty matters may be heard in the federal courts only under diversity-of-citizenship jurisdiction.

scended the impact on the immediate parties. It involved the role of the new federal judicial power over major areas of law affecting the new corporate society.

On appeal, the Supreme Court reversed. Chief Justice Marshall, writing for a unanimous court, first described the corporation in language borrowed from Coke and Blackstone⁶³ "as a mere creature of the law, invisible, intangible, and incorporeal."⁶⁴ He agreed with the district court that a corporation, "[t]hat invisible, intangible, and artificial being, that mere legal entity[.]. . . is certainly not a citizen"⁶⁵ However, unlike the lower court, he went further and upheld the action. He disregarded the separate legal personality of the corporation and held that for purposes of determining jurisdiction, the case was controlled by the citizenship of its shareholders. He stated that "the controversy is, in fact and in law, between those persons [the shareholders] suing in their corporate character, by their corporate name, for a corporate right"⁶⁶ and the other party. The term "citizen" is only used "to describe the real persons who come into court, in this case, under their corporate name."⁶⁷

In terms of the theory of the nature of the corporation, the rationale of the decision in *Deveaux* clearly represents an early, if not the earliest, judicial expression of the associational view of the corporation. However, the decision does not challenge the fundamental principles of entity law. Chief Justice Marshall made it plain that the associational view was superimposed upon, rather than replacing, entity law. Thus, he carefully referred to the corporation as a "mere creature of the law," "an artificial being" and "a mere legal entity" and emphasized that the case involved the assertion in "corporate name" of a "corporate right."⁶⁸ The judgment was for the corporation, not its shareholders. Shareholder interests entered only to support the assertion of federal jurisdiction over corporate litigation and the attribution to corporate entities of the ability to sue and be sued in federal courts under the diversity-of-citizenship jurisdiction clause.

63. Marshall acknowledged that "our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books" *Deveaux*, 9 U.S. (5 Cranch) at 88.

64. *Id.*

65. *Id.* at 86.

66. *Id.* at 87.

67. *Id.* at 91.

68. *Id.* at 86-87.

Decades later in *Louisville, Cincinnati & Charleston Railroad v. Letson*,⁶⁹ decided in 1844, and *Marshall v. Baltimore & Ohio Railroad*,⁷⁰ decided in 1855, the Court abandoned this technique of looking through corporate parties to the citizenship of their shareholders for the purpose of determining corporate citizenship for diversity jurisdiction purposes.⁷¹ While recognizing that a corporation was not a "citizen" for this purpose, it, nevertheless, insisted on preserving the "valuable privilege" of federal jurisdiction for corporations.⁷² The Court held that irrespective of the actual citizenship of shareholders, it would be conclusively presumed that the shareholders of a corporation were citizens of the state of incorporation.⁷³ Through this "bizarre" legal fiction,⁷⁴ the corporation received the jurisdictional opportunities open to citizens without the Court having to accord "citizenship" to it.⁷⁵

The determination of a corporation's rights, duties, or standing to sue by reference to the character or interests of its shareholders as in *Deveaux* and its progeny is not unknown in other areas of the

69. 43 U.S. (2 How.) 497 (1844).

In *Letson*, the Court rejected the *Deveaux* standard and reverted to the "weak entity" view of the corporation. The Court held that for purposes of diversity jurisdiction, a corporation was to be regarded as "a person, though an artificial one, inhabiting and belonging to [the state of incorporation] and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state." *Id.* at 555.

The holding in *Letson* that a corporation was a "citizen" was controversial. It provoked repeated dissent from the Court in subsequent cases. *E.g.*, *Northern Ind. R.R. v. Michigan Cent. R.R.*, 56 U.S. (15 How.) 233, 246 (1853) (Catron, J., dissenting); *Rundle v. Delaware & Raritan Canal Co.*, 55 U.S. (14 How.) 80, 95 (1852) (Daniel, J., dissenting). In the *Marshall* case, decided 11 years later, the Court found it prudent to retreat in theory, but not in result.

70. 57 U.S. (16 How.) 314 (1853).

71. *E.g.*, *Commercial & R.R. Bank v. Slocomb*, 39 U.S. (14 Pet.) 60 (1840).

72. *Marshall*, 57 U.S. (16 How.) at 327-28.

73. *Id.* at 328-29.

74. See Schane, *supra* note 12, at 580.

75. American law today recognizes the state of incorporation as decisive for diversity jurisdiction purposes. Section 1332(c) of title 28 of the United States Code provides: "[A] corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Through the provision for a corporation to be a citizen of more than one state, the Congress was restricting diversity citizenship. 28 U.S.C. § 1332(c) (1982). See BLUMBERG: PROCEDURE, *supra* note 8, §§ 9.02-.08.

law, both in the United States⁷⁶ and in England," dealing with such matters as status as an enemy alien or as a charitable corporation. While these decisions *characterize* the corporation as a "citizen" or as an "enemy" or as "charitable" by reference to the shareholders, such characterization and attribution only determine certain rights and liabilities of the *corporation*. They do not transfer such rights or liabilities to the shareholders.

b. *Privileges and/or Immunities: Article Four and Fourteenth Amendment*

"Citizens" is also the crucial term in article IV, section 2, providing that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"⁷⁸ and in the fourteenth amendment, section 1, providing that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."⁷⁹ In a series of cases, the Court consistently held that corporations were not "citizens" for these purposes and refused to apply article IV and the fourteenth amendment to invalidate state statutes discriminating against foreign corporations.

76. Thus, in the area of state governmental immunity from suit under the Eleventh Amendment, it is clear that profit-making governmental owned instrumentalities are also constitutionally exempt in cases where the instrumentality is regarded as the "arm" or "alter ego" of the state. The immunity of the governmental shareholder is attributed to them. *E.g.*, *Ainsworth Aristocrat Int'l Pty. Ltd. v. Tourism Co. of P.R.*, 818 F.2d 1034 (1st Cir. 1987); *Feeney v. Port Auth. Trans-Hudson Corp.*, 693 F. Supp. 34 (S.D.N.Y. 1988). *See* BLUMBERG, *GENERAL STATUTORY LAW* *supra* note 10, § 3.09.

Similarly in *Town of Brookline v. Gorsuch*, a subsidiary of Harvard University operating an electric power generation plant was held to qualify as charitable for purposes of the Clean Air Act. 667 F.2d 215 (1st Cir. 1981).

In these cases, the character of the shareholder was decisive although it is evident that but for the attribution of the shareholders' status to the corporation, the corporation would not qualify.

77. *E.g.*, *Daimler Co. v. Continental Tyre (Great Britain) Co.*, [1916] 2 A.C. 307 (H.L.) (company held an enemy alien, although organized in England and conducting its business there, where all of its shareholders, except one, and directors were citizens and residents of Germany); *Abbey Malvern Wells Ltd. v. Minister of Local Gov't & Planning*, [1951] Ch. 728 (profit-making corporation operating a school held charitable and exempt from assessments when all shares were held in trust for charitable purposes).

An Irish commentator correctly has concluded that the English decisions do not in any way disregard the separate legal personality of the corporation. *See* R. KEANE, *COMPANY LAW IN THE REPUBLIC OF IRELAND* §§ 10.19-.20 (1985).

78. U.S. CONST. art. IV, § 2 (emphasis added).

79. U.S. CONST. amend. XIV (emphasis added).

Bank of the United States v. Deveaux,⁸⁰ holding that a corporation was not a "citizen" for purposes of diversity jurisdiction, also casts its shadow over the construction of the similar reference in article IV, section 2 that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."⁸¹ In *Bank of Augusta v. Earle*,⁸² decided in 1839, the Court affirmed that corporations were not "citizens" and refused to apply article IV to invalidate a state statute discriminating against foreign corporations.

Writing for the Court, Chief Justice Taney relied entirely on entity law and the "artificial person" theory. Pointedly refusing to apply the associational theory, he stated: "Whenever a corporation makes a contract, it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members."⁸³ He concluded that a corporation was "'a mere creature'"⁸⁴ of local law without any "legal existence out of the boundaries of the sovereignty by which it is created."⁸⁵ Unlike *Deveaux*, the Court refused to look to the shareholders and outlaw such discrimination as a means of protecting shareholder rights.

Chief Justice Taney was concerned with the implications of a contrary decision resting on the associational theory for the limited liability of shareholders. Seeking to avoid impairment of the principle of limitation of liability, he pointed out that if:

members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore, entitled to the privileges of citizens, in matters of contract, it is very clear, that they must, at the same time, take upon themselves the liabilities of citizens, and be bound by their contracts in like manner [and] be liable, to the whole extent of [their] property, for the debts of the corporation
...⁸⁶

There is no fundamental inconsistency between the traditional "artificial person" view and the associational view. As we have seen, the cases such as *Deveaux* and *Dartmouth College* enunciating the as-

80. 9 U.S. (5 Cranch) 61 (1809).

81. U.S. CONST. art. IV, § 2.

82. 38 U.S. (13 Pet.) 517 (1839).

83. *Id.* at 587.

84. *Id.* (quoting *Head v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127 (1804)).

85. *Id.* at 588. See also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1868).

86. *Bank of Augusta*, 38 U.S. (13 Pet.) at 586.

sociational theory also reaffirmed the traditional view. In *Bank of Augusta*, Chief Justice Taney, however, realized that reliance on shareholder interests to attribute constitutional rights to corporations in addition to their traditional common law "core" rights might well lead to the reverse process of attributing corporate duties to shareholders and thus destroy limited liability. Until the early nineteenth century, the law had in fact recognized both traditional entity law and unlimited liability of shareholders.⁸⁷ Chief Justice Taney, writing fresh on the heels of the triumph of limited liability and at a time when not all states had embraced the principle,⁸⁸ evidently did not want to contribute to possible reversal of this development.

Almost thirty years later, the issue came again before the Court in *Paul v. Virginia*⁸⁹ decided in 1868. By this time under *Letson* and *Marshall*, corporations were deemed "citizens" for purposes of the Diversity-of-Citizenship Jurisdiction clause. The Court, however, reaffirmed its conclusion in *Bank of Augusta* and again held that a corporation was not a "citizen" for purposes of the privileges and immunities clause of article four. Justice Field stated: "The term citizens ... applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."⁹⁰

Conceptually, the different conclusions on the two constitutional references are manifestly inconsistent. However, as a matter of constitutional development, opening the federal courts to litigation involving corporations is a very different issue from permitting states to exclude foreign corporations in matters not involving interstate commerce.⁹¹ The fact that the same constitutional term, "citizen," was employed did not prevent conflicting conclusions on its applicability to corporations.

The fourteenth amendment adopted in 1868 also contained a privileges or immunities clause⁹² applicable to "citizens of the United

87. See BLUMBERG: SUBSTANTIVE COMMON LAW, *supra* note 38, § 1.02.

88. See BLUMBERG: LIMITED LIABILITY, *supra* note 1.

89. 75 U.S. (8 Wall.) 168 (1868) (Field, J.).

90. *Id.* at 177.

91. See *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 507 (1926); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 517 (1839).

92. Article IV, § 2, clause 1 refers to "Privileges and Immunities of Citizens in the several States" while the fourteenth amendment, § 1 refers to "privileges or immunities of citizens of the United States" (emphasis added).

States." However, unlike articles III and IV, the new amendment defined "citizen" as "persons born or naturalized in the United States," terms difficult to adapt and apply to corporations.⁹³ In *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*,⁹⁴ decided in 1888, involving the applicability of this fourteenth amendment clause to a discriminatory Pennsylvania tax on foreign corporations, Justice Field, writing for the Court and quoting from his opinion in *Paul v. Virginia*⁹⁵ that restricted "citizens" in article four to natural persons, had no difficulty in holding that in the fourteenth amendment, like the fourth amendment, the term "citizens" applied only to natural persons, not to corporations.⁹⁶

2. "Person"

The term "person" is the crucial term in no less than four constitutional provisions: the equal protection and the due process clauses of the fourteenth amendment and the self-incrimination and the double jeopardy clauses of the fifth amendment. The Court has held that corporations are protected persons under the equal protection, due process, and double jeopardy clauses, but are not protected under the self-incrimination clause.

a. *Equal Protection of the Laws: Fourteenth Amendment*

The status of the corporation under the equal protection clause of the fourteenth amendment referring to "person" first arose before the Supreme Court in *Santa Clara County v. Southern Pacific Railroad*,⁹⁷

93. The Amendment provides: "All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

94. 125 U.S. 181 (1888).

95. 75 U.S. (8 Wall.) 168, 177 (1868).

96. *Pembina Consolidated Silver Mining & Milling Co.*, 125 U.S. at 187-88. *Accord* *United States v. Hague*, 307 U.S. 496, 514 (1939); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907).

Article IV refers to "Citizens of each State" while the fourteenth amendment refers to "citizens of the United States." Although *Pembina* did not focus on this distinction, the Court in the *Slaughter House* cases construed the reference so restrictively that the provision has become the "almost forgotten . . . clause of the Fourteenth Amendment." *Colgate v. Harvey*, 296 U.S. 404, 443 (1935) (Stone, J., dissenting) (citing *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873)). Thus, the clause has been described as "practically a dead letter." Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140, 144 (1949). See also R. BERGER, *GOVERNMENT BY JUDICIARY* ch. 3 (1977).

97. 118 U.S. 394 (1886).

decided in 1886. Although the question had been argued at length in the various briefs, the Court surprisingly announced:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to . . . corporations. We are all of opinion that it does.⁹⁸

The Court's brief announcement threw no light on the rationale for the conclusion.⁹⁹

Although some scholars have looked upon *Santa Clara* as reflecting the view that the corporation was a "person" for constitutional purposes generally with rights comparable to those of natural persons, Professor Horwitz, among others, disagrees.¹⁰⁰ Setting *Santa Clara* against the legal thought of its time, Professor Horwitz concludes that the Court was in fact applying the associational theory of the corporation. Relying in part on two of Justice Field's opinions in the circuit courts below,¹⁰¹ Professor Horwitz asserts that the corporation's interests for these constitutional purposes were seen as identical to its shareholders' interests and that the Court was seeking to give the corporation the same protection as its shareholders would have received.¹⁰² Professor Horwitz states that the "'natural entity' "

98. *Id.* at 396.

99. It is far from clear what the Court meant by its statement. Graham quotes a letter from Chief Justice Waite to the court reporter in which Waite referring to the announcement said, "I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision." Letter from Waite, C.J. to J.C.B. Davis (May 26, 1886), quoted in H. GRAHAM, *EVERYMAN'S CONSTITUTION* 567 (1968). See Comment, *supra* note 11, at 1464 n.64.

100. See Horwitz, *supra* note 11, at 174 ("real meaning of *Santa Clara* . . . has not been understood").

101. The Railroad Tax Cases, 13 F. 722 (C.C.D. Cal. 1882), writ of error dismissed as moot sub nom. *Santa Clara County v. Southern Pac. R.R.* 116 U.S. 138 (1885); *Santa Clara v. Southern Pac. R.R.*, 18 F. 385 (C.C.D. Cal. 1883), *aff'd*, 118 U.S. 394 (1886).

102. Horwitz, *supra* note 12, at 178. Professor Hovenkamp suggests that the constitutional problem of corporate "personhood" was twofold. First, it involved the preservation of the same constitutional protection of property held in the name of a corporation as the owners of property had had in their own name. Second was the question of standing: who could assert the constitutional rights in corporate property? Relying on a dictum of Justice Field in his circuit court opinion in *Santa Clara*, among other matters, he concludes that if the corporation had not received

or " 'real entity' " theory was still "nowhere to be found" and that the Court was *not* deciding that "the corporate entity was no different from the individual in its constitutional entitlements."¹⁰³

b. *Due Process of Law: Fourteenth Amendment*

*Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*¹⁰⁴ followed two years later. Although refusing to recognize a corporation as a "citizen" for purposes of the privileges or immunities clause of the fourteenth amendment as noted above, the Court held that a corporation was a "person" within the meaning of the due process and equal protection clauses of the new amendment which utilized that term rather than the term "citizen."¹⁰⁵

Pembina does not make it clear what kind of "person" the corporation was in being a "person" protected by the provision. The Court was apparently not ready to conclude that the corporation as an "artificial person" qualified as a "person" for constitutional purposes of the fourteenth amendment. In order to support its result, the Court also found it necessary to invoke the associational theory asserting that "corporations are merely associations of individuals." The Court said: "Under the designation of person [in the amendment] there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution."¹⁰⁶

property? Relying on a dictum of Justice Field in his circuit court opinion in *Santa Clara*, among other matters, he concludes that if the corporation had not received constitutional protection, the corporate property still would still have been protected by the fourteenth amendment; shareholders rather than the corporation would have been allowed to assert such claims. See Hovenkamp, *supra* note 12, at 1641.

The problem may not be disposed of so easily. In other areas such as the privileges and immunities clause and the self-incrimination clause, individual rights do not carry over to the corporation to trigger constitutional recognition of such rights by the corporation, nor may individuals assert their rights to protect the corporation. It is not so clear that the same result would have occurred under the fourteenth amendment if a corporation had not been recognized as a "person" entitled to its protection. See BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, §§ 7.08, 20.05, 28.02.

103. Horwitz, *supra* note 12, at 174, 223.

104. 125 U.S. 181 (1888).

105. *Pembina Consol. Silver Mining & Milling Co.*, 125 U.S. at 189.

106. *Id.* The language is borrowed from Justice Story's concurring opinion in the *Dartmouth College* case. *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 666.

Eight years later in *Covington & Lexington Turnpike Road Co. v. Sanford*,¹⁰⁷ decided in 1896, the Court felt able to say without further explanation: "It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."¹⁰⁸

The Court took the final step a decade thereafter. In *Southern Railway v. Greene*¹⁰⁹ decided in 1910, the Court again flatly held "[t]hat a corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion."¹¹⁰ *Southern Railway* represents the great divide. In its opinion, the Court went on to quote the sentence in *Pembina* referring to the corporation as a "person," while pointedly omitting from the quotation the succeeding sentence referring to corporations as "merely associations of individuals."¹¹¹ By so doing, the Court showed that for the first time it was prepared to rely solely on an entity view treating the corporation as a "person" without any distinction between "artificial" and "natural" persons. The associational theory was no longer required to support the attribution of constitutional rights to the corporate entity.

The Court had at last moved beyond both the "weak" entity view in its pure form, or in its reinforced form involving reliance on both the "weak entity" and the associational theories. It had emerged with a new "strong entity" theory. In this more developed concept, the corporation was for the first time explicitly recognized as a "real" entity or person, qualifying, with isolated exceptions,¹¹² for the same rights as natural persons under the constitutional protection of the provision accorded to a "person."¹¹³ In the process, the Court had emerged with a doctrine under which all forms of business organizations—whether sole proprietorship, partnership, or

107. 164 U.S. 578 (1896).

108. *Id.* at 592. The Court relied on *Santa Clara* and three other decisions in which Justice Field had written the opinion. *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26 (1889); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888); *Charlotte, C. & A. R.R. v. Gibbes*, 142 U.S. 386 (1882).

109. 216 U.S. 400 (1910).

110. *Id.* at 412.

111. *Id.* at 412-13. The quotation from *Pembina* appears four paragraphs earlier in the text of this article. See *supra* text accompanying note 106.

112. See *infra* note 115.

113. See Horwitz, *supra* note 12, at 216; Schane, *supra* note 12, at 590.

corporation—received very much the same constitutional protection.¹¹⁴ The development of business institutions would not be distorted by a pressure to adopt a particular form of business organization in order to claim constitutional protection.

Whether a corporation is a “person” under the provisions of the due process clause pertaining to “liberty” as distinct from “property” is not as clear.¹¹⁵

c. *Self-Incrimination: Fifth Amendment*

In contrast to the Court’s decisions construing “person” in the equal protection and the due process clauses to include corporations, *Hale v. Henkel*,¹¹⁶ decided in 1906, held that corporations were not protected by the provision of the fifth amendment: “nor shall [any person] be compelled in any criminal case to be a witness against himself”¹¹⁷

Justice Brown, speaking for the majority, relied on the “artificial person” theory and on state powers over corporations created by it. He stated:

[T]he corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public.... It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.¹¹⁸

114. See Flynn, *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept* in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 131 (W. Samuels & A. Miller eds. 1987); Graham, *An Innocent Abroad: The Constitutional Corporate “Person,”* 2 U.C.L.A. L. REV. 155 (1955); Horwitz, *supra* note 12.

115. In *Northwestern Life Ins. Co. v. Riggs*, decided in 1906, the Court stated flatly: “The liberty referred to in [the Fourteenth] Amendment is the liberty of natural, not artificial persons.” 203 U.S. 243, 255 (1906). In *Western Turf Ass’n*, 204 U.S. at 363, the Court reaffirmed this conclusion.

However, the decision in *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978), protecting corporate freedom of speech against state action in reliance on the first amendment incorporated into the fourteenth amendment, clearly looks the other way. See *Near v. Minnesota*, 283 U.S. 697 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2 (1988).

116. 201 U.S. 43 (1906).

117. U.S. CONST. amend. V.

118. *Hale*, 201 U.S. at 74-75.

This markedly contrasts with Justice Brown's utilization of the associational theory to apply the unreasonable searches and seizures clause of the fourth amendment to a corporation in the very same case.¹¹⁹

Numerous decisions have affirmed that corporations are not protected by the self-incrimination clause.¹²⁰ In *United States v. White*,¹²¹ Justice Murphy explained the result:

The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. . . . It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him [and thereby avoid p]hysical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence¹²²

d. *Double Jeopardy: Fifth Amendment*

The fifth amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb"¹²³ Notwithstanding the inescapable reference to natural persons in the use of such terms as "life or limb," the Court, without expressly deciding the issue, has repeatedly assumed the applicability of the clause to corporations.¹²⁴ Relying on such *sub silentio* holdings, the lower federal courts have expressly held that corporations are protected by the provision.¹²⁵

The different conclusions on the applicability to corporations of the fifth amendment clauses pertaining to self-incrimination and double jeopardy are particularly interesting as a textual matter. Both

119. See *infra* text accompanying note 131.

120. E.g., *Bellis v. United States*, 417 U.S. 85 (1974); *Essgee Co. v. United States*, 262 U.S. 151 (1923); *Wilson v. United States*, 221 U.S. 361 (1911).

121. 322 U.S. 694 (1944) (trade union defendant).

122. *Id.* at 698.

123. U.S. CONST. amend. V.

124. E.g., *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). See Note, *Double Jeopardy and Corporations: "Lurking in the Record" and "Ripe for Decision,"* 28 STAN. L. REV. 805 (1976).

125. E.g., *United States v. Hospital Monteflores, Inc.*, 575 F.2d 332 (1st Cir. 1978); *United States v. Security Nat'l Bank*, 546 F.2d 492 (2d Cir. 1970), *cert. denied*, 430 U.S. 950 (1977). See BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, § 3.06.

clauses use the same term "person." In addition, the self-incrimination clause follows immediately after the double jeopardy clause in the text of the fifth amendment, and, indeed, is grammatically part of the prior clause, sharing with it the same subject, "person."

Further, the decisions applying the double jeopardy clause to corporations are inconsistent with the decisions refusing to protect corporations under the self-incrimination clause. The associational theory provides no explanation of the different construction of the two companion clauses. Nor may one contend that the existence of corporate injury damaging to shareholders from risk of trial and conviction justifies invocation of the double jeopardy clause. The very same factors are insufficient to result in application of the self-incrimination clause.¹²⁶

3. The "People"

a. *Unreasonable Searches and Seizures: Fourth Amendment*

Hale v. Henkel not only involved the applicability to corporations of the constitutional protection to "person[s]" against self-incrimination in the fifth amendment as discussed above, it also involved the applicability to corporations of the constitutional protections extended to "the people" against "unreasonable searches and seizures" in the fourth amendment.¹²⁷ Not without difficulty, the Court in *Hale v. Henkel*¹²⁸ held that the term "people" protected corporations against the production of corporate records seized under circumstances violating the provision.¹²⁹

Justice Brown relied¹³⁰ on the associational theory, asserting: "A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself

126. See, e.g., *United States v. Armco Steel Corp.*, 252 F. Supp. 364, 368 (S.D. Cal. 1966).

127. The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

128. 201 U.S. 43 (1906).

129. *Id.* at 76. See also, e.g., *Silverthorne Lumber Co. v. United States*, 351 U.S. 385 (1920). See BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, § 3.06.

130. The Court also emphasized the importance of the economic interests at stake. The Court stated in further support of its conclusion: "Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises." *Hale*, 201 U.S. at 76.

as a collective body it [the association of individuals] waives no constitutional immunities appropriate to such body."¹³¹ This invocation of the associational theory contrasts with Justice Brown's refusal to look beyond the artificial person view in refusing to protect corporations under the self-incrimination clause in the very same case.¹³²

Not all the justices accepted this view. Justice McKenna, concurring in the result, was more doubtful, stating: "There are certainly strong reasons for the contention that if corporations cannot plead the immunity of the Fifth Amendment [self-incrimination clause] they cannot plead the immunity of the Fourth Amendment."¹³³ Justice Harlan, also concurring in the result, was more positive: "[A] corporation—'an artificial being, invisible, intangible, and existing only in contemplation of law'—cannot claim the immunity of the Fourth Amendment; for it is not a part of the 'People' within the meaning of that Amendment. Nor is it embraced within the word 'Person' in the [Fifth] Amendment."¹³⁴

The different results in *Hale v. Henkel* do not turn on the different terminology employed, i.e., "people" in the fourth amendment and "person" in the fifth. The Court instead upheld the applicability of the unreasonable search and seizure clause because the rights of shareholders against search and seizure could readily be attributed to the corporation under the associational theory.¹³⁵ On the other hand, refusing to protect corporations under the self-incrimination clause in no way clashed with or eroded the personal claims of shareholders to be protected under the clause.¹³⁶

4. General Constitutional Prohibitions on Governmental Power

The Supreme Court has considered the applicability to corporations of two constitutional provisions imposing general limitations

131. *Id.* The above reference to "distinct corporate entity" and the reference to "the corporation being a creature of the state" in the discussion of the self-incrimination clause (*Hale*, 201 U.S. at 74) illustrate how reliance on the "associational" theory for attribution of constitutional rights to the corporation in no way represents a rejection of the traditional concept that whatever its peripheral rights, the corporation is a separate juridical entity with the universally accepted fundamental attributes long ago set forth by Coke, Kyd, and Blackstone. See *supra* notes 2-4 and accompanying text (citing to Coke, Kyd, and Blackstone).

132. *Id.* at 75.

133. *Id.* at 82.

134. *Id.* at 78.

135. *Id.* at 76.

136. *Id.* at 74-75.

on governmental action: the prohibitions against impairment of contracts and abridging freedom of speech or press.

a. *Impairment of Contracts: Article I*

The celebrated *Trustees of Dartmouth College v. Woodward* case,¹³⁷ decided in 1819, involved a challenge to the constitutionality of a New Hampshire statute changing the governance structure of the College from that provided in the original charter. While the Court again affirmed the traditional view of the corporation as an "artificial being" or "person" created by the State previously expressed in *Bank of the United States v. Deveaux*,¹³⁸ it concluded that the corporate charter was not simply a state grant or concession; it was also a contract between the State and the incorporators.¹³⁹ Shareholder interests were also at stake. The Court accordingly held the amendatory statute an unconstitutional impairment of the contract represented by the charter in violation of article I.¹⁴⁰ Thus, as in *Deveaux*, decided ten years earlier, the Court, while affirming the continued vitality of entity law in determining the fundamental nature of the corporate personality, embraced the associational view to expand the boundaries of corporate constitutional rights.¹⁴¹

b. *Freedom of Speech: First Amendment*

The first amendment, clause 2, provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." This prohibition restrains such action by the states as well; the Court has held that the due process clause in the fourteenth amendment binding the states incorporates the first amendment.¹⁴²

137. 17 U.S. (4 Wheat.) 518 (1819).

138. 9 U.S. (5 Cranch) 61 (1809).

139. *Id.* at 642-44. *See also* *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 558 (1830) (Marshall, C.J.) ("[I]t is not denied, that a charter incorporating a bank is a contract.').

140. U.S. CONST. art. I, § 10[1], cl. 5 provides: "No State shall . . . pass any . . . law impairing the obligation of contracts"

141. This appears plainly in Justice Story's concurring opinion: "An aggregate corporation . . . is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective character, which do not belong to the natural persons composing it." *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 667.

142. *See* *Near v. Minnesota*, 283 U.S. 697 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2 (1988).

In *First National Bank v. Bellotti*,¹⁴³ decided in 1978, the Court held by a 5-4 vote that a Massachusetts statute restricting corporate political expenditures to influence public referenda or issues, except on matters materially affecting the corporation,¹⁴⁴ was unconstitutional because it violated the guaranty of free speech of the first amendment.¹⁴⁵

Writing for the majority of the Court, Justice Powell stated that the issue was a narrow one not involving theories of corporate personality: "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 [of the Massachusetts statute] abridges expression that the First Amendment was meant to protect."¹⁴⁶ Justice Powell characterized as "extreme" the conclusion of the dissenters that the corporation was only a creature of the state possessing only those rights granted it by the State.¹⁴⁷ However, he did not find it necessary to articulate his own theory of the nature of the corporation in order

143. 435 U.S. 765 (1978).

144. The statute provided: "No corporation . . . shall directly or indirectly give, pay, expend or contribute . . . for the purpose of influencing or affecting the vote on any question submitted to the voters, other than one materially affecting . . . the property, business or assets of the corporation." *Id.* at 768 n.2 (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)). In *Bellotti*, the parties disagreed whether the statute would have a significant effect on the appellants' businesses. *See id.* at 770.

145. *Id.* at 795. The first amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I, cl. 2.

146. *Bellotti*, 435 U.S. at 776.

147. *Id.* at 778 n.14. However, in *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637 (1987), Justice Powell seemed to retract this conclusion. *CTS Corp.* involved the constitutionality under the commerce clause of an Indiana statute regulating corporate take-overs and creating procedures involving difficulties and delays for acquiring companies. While the issue did not involve the personality of the corporation, it presented sharply the conflicting roles of state and federal law.

Writing for the Court, Justice Powell said: "[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." *Id.* at 1649. Justice Powell then quoted Chief Justice Marshall's description in the *Dartmouth College* case of the corporation as an "artificial being" created by the state. *CTS Corp.*, 107 S. Ct. at 1649-50 (quoting *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 638). Justice Powell also pointed to the portion of Justice Rehnquist's dissent in *Bellotti* quoting from the *Dartmouth College* case that the constitutional rights of a corporation were those "incidental to its very existence." *Bellotti*, 435 U.S. at 824. This is the very passage which he criticized as "extreme" in *Bellotti*. *Id.* at 778 n.14.

to dispose of the case.¹⁴⁸ Instead, he relied on the fundamental value of "the right of public discussion" from the societal point of view¹⁴⁹ and he held that the corporation, as well as its officers or directors, could not be constitutionally barred from discussion of public issues.

Justices White and Rehnquist, separately dissenting, relied on the "weak" entity theory. Justice Rehnquist quoted Chief Justice Marshall's well known description of the corporation as "an artificial being" in the *Dartmouth College* case. He stated flatly that a corporation had only the constitutional rights "'incidental to its very existence' . . . necessary to effectuate the purposes for which States permit commercial corporations to exist."¹⁵⁰ Justice White, with whom Justices Brennan and Marshall concurred, similarly concluded: "Corporations are artificial entities created by law for the purpose of furthering certain economic goals. . . . The State need not permit its own creation to consume it."¹⁵¹ Four justices were thus appealing to the "weak entity" theory.

5. Terminology or Nature of Interest

In light of the Court's inconsistent applications to corporations of constitutional provisions, it should be apparent that the decisions are not controlled by the terminology. Similarly, the inconsistent utilization of conflicting theories of corporate personality indicates that the theories are utilized to support results, rather than as guiding principles to help reach them.

In *First National Bank v. Bellotti*, Justice Powell echoed the concept of "purely personal" constitutional rights restricted to natural persons, which, among others, Justice Murphy had invoked in *United States v. White*.¹⁵² Justice Powell stated, "Whether or not a particular [constitutional] guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision."¹⁵³ Hence, "nature, history, and purpose" control. Constitutional terminology and theories of the corporate personality—although employed to justify the result—are not identified as important.

148. See *Bellotti*, 435 U.S. at 778 n.14.

149. *Id.* at 792.

150. *Id.* at 824-26.

151. *Id.* at 809.

152. 322 U.S. 694 (1944). See *supra* text accompanying notes 121-22.

153. *Bellotti*, 435 U.S. at 778-79 n.14.

B. Shareholder Unanimity in State Corporation Law

When we turn from constitutional litigation to other areas of the law, we find many references to traditional entity law in the decisions insulating shareholders from responsibility for corporate actions but little discussion of the nature of the corporate personality. This should be no surprise since the discussion of corporate personality to date has been concerned with the attribution of rights, not the imposition of duties.

The associational theory of the corporation may also be seen in the older common law insistence on unanimous stockholder approval for certain fundamental corporate changes, such as merger or dissolution or sale of all, or substantially all, the assets of the business. These events are perceived as departures from the contract among shareholders underlying the foundation of the corporation and, therefore, require the consent of *all* contracting parties.¹⁵⁴ While this requirement for unanimity has vanished for most purposes, other vestiges of the "contract" principle remain to this day. Examples include the doctrine of "waste" and the elimination of preferred stock dividend arrearages by charter amendment.

Under the doctrine of waste, corporate expenditures are invalid unless supported by some rational basis for concluding that the challenged corporate expenditure will in some way benefit the corporation and accordingly not represent a gift of corporate assets.¹⁵⁵

154. See, e.g., *Mason v. Pewabic Mining Co.*, 133 U.S. 50, 59 (1890); *State ex rel. Brown v. Bailey*, 16 Ind. 46 (1861); *McCray v. Junction R.R.*, 9 Ind. 358 (1857); *Abbott v. American Hard Rubber Co.*, 33 Barb. 578 (N.Y. App. Div. 1861); *Stevens v. Rutland & Burlington R.R.*, 29 Vt. 545 (1851), collected in Horwitz, *supra* note 12, at 201 n.139. See also V. MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS iii (2d ed. 1886).

155. See A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE § 1.34 (Tent. Draft No. 5, 1986) ("A transaction constitutes a 'waste of corporate assets' if its terms are such that no person of ordinary sound business judgment would say that the consideration received by the corporation was a fair exchange for what was received by the corporation"). See *Michelson v. Duncan*, 407 A.2d 211 (Del. 1979):

The essence of a claim of waste of corporate assets is the diversion of corporate assets for improper or unnecessary purposes. Although directors are given wide latitude in making business judgments, they are bound to act out of fidelity and honesty in their roles as fiduciaries [of the minority shareholders]. . . . It is common sense that a transfer for no consideration amounts to a gift or waste of corporate assets.

Id. at 217 (citations omitted).

In the absence of unanimous shareholder approval, waste is barred by contemporary law.¹⁵⁶

Another illustration was the requirement until recently in Delaware corporation law for the unanimous approval of preferred shareholders of an amendment of the certificate of incorporation eliminating dividend arrearages on preferred shares in the face of a statutory provision authorizing charter amendments by two-thirds vote.¹⁵⁷ However, the significance of this decision was promptly undermined by the readiness of the Delaware courts to allow such action through a merger with a subsidiary organized for this purpose, which requires only majority vote.¹⁵⁸ It was subsequently overruled by statute.¹⁵⁹

Shareholder power in these instances ultimately rests on the theory that the challenged action violates a fundamental understanding for the benefit of shareholders embodied in the original act of incorporation. They represent clear reflections of the associational theory of the corporation.¹⁶⁰ It should be noted, however, that these matters relate to the *internal* governance of the corporation and to the allocation of corporate decision-making authority between the directors and the shareholders. Neither involves the corporation's dealings with the larger world. Accordingly, they have limited usefulness in an examination of different theories of the corporate personality.

156. Although waste resembles the "ultra vires" problem, its essential difference is that state interests as reflected in a narrow construction of the corporate charter are not concerned at all.

In the area of corporate charitable contributions, the modern law defers more to the business judgment of the board of directors of the corporation recognizing indirect or long term benefit as sufficient while the older cases insisted on direct, short-term benefit. See Blumberg, *Corporations and the Social Crisis*, 50 B.U.L. REV. 157 (1970).

157. *E.g.*, *Keller v. Wilson & Co.*, 21 Del. Ch. 391, 413, 190 A. 115, 125 (Del. 1936) (statutory power authorizing shareholder amendment of charters did not permit amendment cancelling preferred stock accrued unpaid dividends) (overruled by subsequent statute); *Davison v. Parke, Austin, Lipscomb, Inc.*, 285 N.Y. 500, 505, 35 N.E.2d 618, 623 (1941) (overruled by subsequent statute).

158. *Federal United Corp. v. Havender*, 24 Del. Ch. 318, 330-31, 11 A.2d 331, 338 (Del. 1940).

159. DEL. CODE ANN. tit. 8, § 242(a)(4) (1983 repl. vol.); N.Y. BUS. CORP. LAW § 801(a)(12) (McKinney 1986); MODEL BUSINESS CORP. ACT § 10.01(b) (1990). See 1 E. FOLK, R. WARD, & E. WELCH, *DELAWARE GENERAL CORPORATION LAW* §§ 242.5, 242.8 (2d ed. 1988).

160. See FOLK, WARD, & WELCH, *supra* note 159, § 242.2.

C. *"Piercing the Veil Jurisprudence"*

With the recognition of limited liability for constituent corporations comprising a corporate group, inevitable tensions developed between the traditional legal view of each corporation as a separate legal entity and the economic reality that all of the constituent corporations of the group comprised a single firm, typically engaged in the collective conduct of a single integrated worldwide enterprise, whose activities had been fragmented among the companies comprising the group. Inevitably, the doctrine of the corporation as a separate and distinct entity, reinforced by the principle of limited liability under which shareholders are insulated from liability for corporate obligations, led in some cases to results that, however conceptually sound under the theory of entity law, were unacceptable to the courts in the particular case before them. The law required a safety valve.

The doctrine of "piercing" or "lifting" the veil, or disregard of entity in "exceptional" cases, first emerged in cases of controlled corporations and controlling individual shareholders. It subsequently was lifted bodily and applied to cases involving corporate groups as well, without any awareness that very different economic and social problems were involved. Courts drew no distinction between the insulation of limited liability to protect investors in a business and its use to create multiple layers of such protection in the complex multi-tiered corporate group protecting the parent and sub-holding companies against liability for obligations of the subsidiaries although all were collectively engaged in the conduct of a common business.

Thus, cases adapting "piercing the veil jurisprudence" to corporate groups constitute the raw material out of which American enterprise law, or the law of corporate groups, is beginning to emerge.¹⁶¹ In addition to such essentially episodic and incremental judicial developments, American statutory law has widely (although not exclusively) enacted varying enterprise definitions effectively extending the scope of statutory regulatory programs from a constituent company of a corporate group to the parent corporation and sub-holding companies of the group and in some cases to the sister subsidiaries as well.

161. This development is reviewed in the author's volumes in the series constituting *The Law of Corporate Groups* to which readers are referred. See *supra* notes 8, 10, 38, 39 & 40.

"Piercing the veil jurisprudence" and statutory enterprise law are being comprehensively discussed in the author's series of volumes on *The Law of Corporate Groups*. The scale of the topic has already led to the publication of four volumes in the Series dealing with such matters in the areas of procedure, bankruptcy, common law disputes (particularly contracts, torts, property, and conflict of laws), and federal statutes of general application. Several additional volumes remain to be written. This article will seek to do no more than explore their implications for newer dimensions in formulations of the corporate personality and for the development of enterprise law.

D. Relation of Entity Law to Corporate Rights and Duties and to Limited Liability

It is essential to distinguish between the recognition of the corporation as a separate juridical unit,¹⁶² and an identification of the various legal rights and duties that may be attributed to or imposed upon corporations in various areas of the law.

As a separate juridical unit, a corporation has its own legal capacity, without the participation of shareholders or any other legal person, to assert certain fundamental rights and to bear certain duties;¹⁶³ further, shareholders have no legal standing to assert the rights of the corporation.

In the early days of the law, well before the American Revolution, the development of this concept of the corporation as a separate juridical unit included the recognition of the fundamental "core" rights already enumerated: the capacity to sue and be sued; the right to hold and transfer property; and the right of perpetual existence—all without regard to its changing membership—and, in addition, the right of shareholders to transfer their shares without any effect on corporate existence.¹⁶⁴ The American legal system adopted this traditional view.

162. In view of the increasing interest in the extent to which the use of the term "person" and the development of a concept of "personhood" have influenced the development of the law in the constitutional area, reference to the corporate "person" is better avoided. "Entity" is no better because it has become a conclusory expression representing a different approach than "enterprise" in the analysis of the interrelationship of the corporate constituents of a corporate group to the group. What term should then be used? "Corporate juridical unit" is not elegant but at least does not present the foregoing difficulties.

163. As Maitland put it, the corporation is a "right-and-duty-bearing" legal unit. See 3 MAITLAND, *supra* note 7, at 307, 314-15.

164. See *supra* notes 2-4.

In the subsequent development of the law, a case-by-case resolution of the conflicting interests before them led courts to consider whether *additional* rights should also be attributed to the corporation. The universally accepted "core" rights of the corporations remained unchallenged; the issue was whether *other* rights should be attributed as well. In this resolution, concepts of the corporate personality "in the heads of the judges" obviously influenced their thinking, but clearly did not lead to any ultimate conclusion as an inexorable logical deduction from the concept.

Thus, in the case of the recognition of the constitutional rights of a corporation, the corporation's status as a juridical unit enabled it to qualify for the protection of many constitutional provisions. However, such recognition of the status of the corporation for certain purposes did not result in automatic qualification for constitutional protection of the corporation to the same extent as a natural person. The application of each constitutional provision to the corporation was a matter of interpretation and development in the light of the nature of the corporate interest being asserted, the history of the particular provision, and its purpose in the light of the constitutional jurisprudence of the time.¹⁶⁵ Competing theories of the nature of the corporate personality influenced such developments, but the process reflected a struggle over competing values and interests, a struggle in which the status of the corporation as a separate juridical unit was not determinative. The status of the corporation as a separate entity merely set the stage for resolution of the legal questions about the nature of additional corporate constitutional and other legal rights and duties and of shareholders' liability for corporate obligations. It did not answer them.

Similarly, recognition of the corporation as a separate entity distinct from its shareholders did not inevitably mean that shareholders were not, directly or indirectly, liable for corporate debts. On the contrary, both direct shareholder liability for corporate debts and indirect shareholder liability through liability for assessments or levations¹⁶⁶ to provide the funds required for the payment of corporate debts continued until long after the separate personality of the corporation had been firmly recognized.¹⁶⁷ Eventually, statutory change,

165. See *Bellotti*, 435 U.S. at 778-79 n.14 (Powell, J.); *supra* note 147 and accompanying text.

166. BLUMBERG: SUBSTANTIVE COMMON LAW, *supra* note 38, §§ 1.03.1, 1.04.1, 1.04.2.

167. See *id.* at ch. 1; Blumberg, *Limited Liability*, *supra* note 1.

not judicial decision, was required to bring about limited liability.¹⁶⁸

E. Summary

Discussion of the nature of the corporate personality flourished for decades before it was at last set in perspective by Professor John Dewey in 1926.¹⁶⁹ Professor Dewey dismissed the debate as an academic exercise without larger reality. He emphasized that corporate rights and liabilities were the product of the law and that the legal implications or meaning of the corporation was "whatever the law makes it mean."¹⁷⁰ Thereafter until the rise of the libertarians a half century later, discussion of the nature of the corporate personality languished.

Dewey's view does not do justice to all aspects of the problem. First, in the law, concepts have a life of their own because of their ability *ex ante* to influence the thinking of judges and *ex post* to be invoked by judges to justify their conclusions. These aspects of judicial decision making have clearly been evident in the judicial treatment of corporate personality in the constitutional cases reviewed above.¹⁷¹ Second, the use of particular language has a cultural force of its own. Identification of the corporation as a "person" may start as a metaphor,¹⁷² but its usage gives rise to an association of the attributes of a person and those of the corporation. Indeed, the use of the term arises because of the plausibility of such an association.¹⁷³

Finally, in neither the cases nor the discussion has there been any attempt to look upon the corporation as anything other than a

168. *E.g.*, Act of Feb. 23, 1830, ch. 53, § 8, 1830 Mass. Acts 325, 329; Limited Liability Act, 1855, 17 & 19 Vict. ch. 133 (1855); and Joint Stock Companies Act, 1856, 19 & 20 Vict. ch. 47 (1856).

169. Dewey, *supra* note 12.

170. *Id.* at 656. Bryant Smith aptly made this the distinction between the status of the corporation as a separate juridical unit and the various rights—constitutional and otherwise—accorded to it by the law. He stated:

It is not the part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes, . . . is to make of . . . corporate personality . . . a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiry into their merits. Issues do not properly turn upon a name.

Smith, *Legal Personality*, 37 YALE L.J. 283, 298 (1928) (footnote omitted). *See also* Comment, *supra* note 12, at 1479.

171. Professor Horwitz similarly concludes that legal conceptions "do have 'tilt' or influence in determining outcomes." *See* Horwitz, *supra* note 12, at 176.

172. *See* Machen, *supra* note 12, at 263.

173. *See* Schane, *supra* note 12, at 594-95.

separate juridical entity, separate from its shareholders, possessing its traditional "core" attributes recognized long ago. Each of the theories of the nature of the corporation that has been advanced in the United States has accepted entity law without challenge. Where debate about various theories of the nature of the corporate personality has played a lively role, it has been about the constitutional rights to be accorded to the corporate entity in addition to such "core" common law rights. Whatever the theory utilized to support the outcome or the constitutional rights attributed to the corporation or the shareholder interests recognized in such attribution, the traditional concept of entity law has remained unimpaired. The debate has related only to the details of the superstructure erected on a universally accepted foundation.

Among its other limitations, this debate over corporate rights has ignored the profound economic and political developments of the past century: the emergence of corporate groups as well as the increasingly important question of *corporate* duties. We now consider the emergence of corporate groups since the "turning point in American business history" when New Jersey 100 years ago amended its corporation laws and for the first time permitted corporations generally to acquire and hold stock of other corporations and thus organize corporate groups.¹⁷⁴

IV. ECONOMIC DEVELOPMENT AND THE RISE OF CORPORATE GROUPS

The extended American discussion of the nature of the corporate personality has overwhelmingly turned on an abstract consideration of the legal and philosophical interrelationships of a corporation and its shareholders. This discussion has been on a rarified level viewing the corporation and its investor-shareholders as stereotypes. Corporations have been assumed to be essentially equivalent to each other. The corporation has been seen as the equivalent of the firm conducting the enterprise, and the shareholders as investors not

174. See A. CHANDLER, *STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE AMERICAN INDUSTRIAL ENTERPRISE* 30 (1962). See also Act of Apr. 4, 1888, ch. 269, § 1, 1888 N.J. Laws 385; Act of Apr. 17, 1888, ch. 295, § 1, 1888 N.J. Laws 445; Act of May 9, 1889, ch. 265, § 4, 1889 N.J. Laws 412; Act of Mar. 14, 1893, ch. 171, § 2, 1893 N.J. Laws § 301.

engaged in the conduct of any portion of the enterprise for their direct personal account.¹⁷⁵

This view accurately described the simple corporate structure characteristic of the early days of the Republic before the emergence of the modern corporation. However, over the last 100 years in which the law has generally permitted the organization of corporate groups without express authorization by statute or special charter, this model has become increasingly unhelpful and should be discarded as archaic.

The traditional concept of the corporation as a separate juridical unit clashes violently with reality when applied, not merely to simple corporations with shares owned by individual investors, but to corporations that are members of a corporate group. In such cases, the "corporation" and the enterprise are no longer identical. The enterprise is no longer being conducted solely by a single corporation but collectively by the coordinated activities of numerous interrelated corporations under common control. The law thus asserts that Mobil Oil Corporation consists of hundreds of separate and distinct corporations¹⁷⁶ while the economic reality is that it is a single enterprise.¹⁷⁷ Recognizing this reality, economists are concerned, not with the corporation, but with the firm or the enterprise. In their analysis corporate legal structures are not merely unimportant; they are irrelevant.

In the world today, economic activity in the developed countries is overwhelmingly dominated by very large corporations,¹⁷⁸ typically

175. Although in the small corporation shareholders may be managers as well as major investors, this does not tend to occur in the large corporations which dominate the economic society although the recent trend to leveraged management buyouts may herald a change. Further, even where the major investor manages, he or she is participating in the conduct of the *corporation's* business, not his or her own.

176. See BLUMBERG: PROCEDURE, *supra* note 8, at 465, at Table 5 (Mobil had 512 majority owned and 13 less than majority owned subsidiaries in 1982).

177. Such modern doctrines as product liability in tort and "stream of commerce" in jurisdiction to adjudicate illustrate how strong social pressures may lead the law to develop doctrines resting on economic interrelationships. Thus, in these areas, the imposition of liability or assertion of jurisdiction has even moved beyond direct participation in the activity complained of, or even the parent-subsidiary relationship and "piercing the veil jurisprudence," to rest on participation at an earlier stage in the economic activity in question even when conducted by parties unrelated by ownership or control to the defendant. See BLUMBERG: PROCEDURE, *supra* note 8, § 5.12a (1989 Supp.); BLUMBERG: SUBSTANTIVE COMMON LAW, *supra* note 38, at ch. 13.

178. See STAT. ABSTR. OF U.S., Tables Nos. 884, 885 (1989); N.Y. STOCK

conducting worldwide businesses often through "incredibly complex" structures of holding companies, sub-holding companies, subsidiaries, and affiliates, involving scores, if not hundreds or even a thousand, of constituent corporations.¹⁷⁹ An examination of the corporation that is not concerned with the significance of such corporate groups is largely irrelevant. While a parent corporation is indeed the shareholder of its subsidiaries, it differs radically from the original shareholder in the older stereotype. Unlike the shareholder-investors in the simple corporation, or the public shareholder-investors in the modern parent corporation, the parent corporation is typically not a passive investor. Instead, it is a major part of the enterprise, engaged along with its subsidiaries in the collective conduct of a common business under centralized control; in brief, the parent and subsidiaries constitute a group. The parent company's relationship to the subsidiary corporations of which it holds the shares is profoundly different from that of public shareholder-investors.¹⁸⁰

Any examination of the relationship of the corporation law to the contemporary corporate world must accordingly concern itself with the legal problems presented by corporate groups to deal with the important issues that contemporary major business presents for the legal order. A new model must be devised that accurately reflects the modern enterprise. We must examine the significance of inter-related corporations functioning under common control to determine whether in the particular case, the rights or duties of the parent corporation are so affected by the activities of the subsidiary that the law should consider the corporations constituting the enterprise as the appropriate legal unit for recognition of rights and duties. In any such analysis, it is essential that a central role be given to review of the economic integration of the enterprise being conducted by the

Exch. Fact Book 78 (1986). Compounding such concentration, the largest corporations have grown considerably in size in the years between 1970-1986.

179. See Hadden, *supra* note 9, at 273. The author's 1982 survey indicated that 1,000 largest American corporations had an average of 48 subsidiaries each. The very largest, of course, had many more, averaging 189 each. See BLUMBERG: PROCEDURE, *supra* note 8, at 464-68, at Table 5.

180. With respect to investment in new business opportunities, particularly in a different industry (that is, the so-called conglomerate group), the group may present problems with respect to limited liability, risk evaluation, and entrepreneurial risktaking resembling those presented by the simple corporation and its individual shareholders.

affiliated corporations to determine whether the related corporations are collectively conducting an enterprise that has been fragmented among the component companies of the corporate group.¹⁸¹

In brief, in order to deal realistically with the major actors on the corporate scene today, the corporate group, whether described as the "controlled group," or as the "enterprise," or as the "economic entity," must be the focus of any study of the modern corporate entity.

V. CORPORATE ENTITY, CONTROLLED GROUP, OR ECONOMIC ENTITY?

The challenge for legal systems the world over is the adaptation of corporation law to reflect these economic realities with the development of doctrines to supplement or replace entity law. The thousands of decisions in the United States courts involving "piercing the veil jurisprudence"¹⁸² should leave no doubt as to the intensity of the problem for the legal system. Similarly, the much criticized, irreconcilable, and unpredictable nature of such decisions¹⁸³ should leave no doubt as to the fundamental inadequacy of traditional entity law to deal with the problems presented by the new corporate world.

181. Such fragmentation is common as part of programs to achieve tax, accounting, exchange control, political and public relations, and other objectives of the group, as well as to limit liability.

182. The tables of cases in the four volumes of the series on *The Law of Corporate Groups* published to date include approximately 5,500 decisions. Most of the cases cited involve "piercing the veil" although a significant number involve other matters.

Many, if not most, of the "piercing the veil cases" involve simple corporations owned by individual controlling stockholders. However, an increasing number involve corporate groups.

183. See H. BALLANTINE, CORPORATIONS § 136, at 312 (rev. ed. 1946) ("The formulae invoked usually give no guidance or basis for understanding the results reached."); E. LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS 157-58 (1936) ("[N]o help is to be derived from the multitude of meaningless, though undeniably picturesque, epithets which have been applied to corporations whenever the court has felt . . . that the corporate device was being used in ways or circumstances which the court did not sanction.').

Further, the conceptual standards of entity law are frequently regarded as universal principles and applied indiscriminately across the entire range of the law. Courts applying "piercing the veil jurisprudence" frequently rely on such decisions arising in very different areas of the law. See BLUMBERG: SUBSTANTIVE COMMON LAW, *supra* note 38, § 6.01; Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 985 (1971) (failure of courts to distinguish contracts from torts cases termed "astounding").

The time is ripe for consideration of alternate doctrinal approaches to rectify the inadequacies of entity law as applied to corporate groups. The various concepts developed thus far in the American judicial decisions and governmental regulatory programs involving corporate groups provide the obvious starting point for suggesting standards that might most effectively serve such a purpose. Of the standards already utilized in American law, "control," "unitary business," "integrated enterprise," and "economic integration" are the most prominent. "Enterprise" itself serves as a standard in isolated American statutes, but not in a particularly useful context.

We must inquire into the extent to which each of the foregoing concepts might effectively provide a satisfactory unifying standard to serve as the legal foundation for regarding two or more separate but affiliated corporations as constituting a *single* actor, for certain legal purposes. Each of these will be briefly reviewed in the light of the American decisions and statutes from which it has emerged.¹⁸⁴

A. "Control"

In many areas of United States law, particularly in statutory law, "control" has provided an effective and workable standard for assigning to controlling parties, and frequently to parties under common control as well, important legal consequences by reason of the actions of controlled parties.

1. "Control" as a Statutory Standard

Where the standard of "control" as the basis for imposing duties and obligations on parent corporations, and sometimes on corporations affiliated under common control as well, means only the *existence* of "control," the concept permits ready definition and easy application. This is particularly true of corporate groups, where the existence of "control" is virtually self-evident as a result of the extent of stock ownership and with the parent inevitably designating the boards of directors of the group subsidiaries. The essence of a corporate group is that the constituent companies are not only affiliated by stock ownership but also operate under common control. It is

184. Let us defer for the moment the fundamental issue whether any alternate doctrine should replace entity law entirely, or whether it should have the more limited objective of supplementing traditional concepts with a new legal standard for the attribution of legal duties and obligations of one entity within a corporate group to affiliates conducting with it a common business under common control.

the ability of the group to coordinate and to integrate the operations and resources of the controlled constituent companies for the benefit of the group as a whole¹⁸⁵ that is primarily responsible for the corporate group's development into the prevailing business institution of our time.¹⁸⁶

Thus, insofar as corporate groups are concerned, the existence of "control" may be assumed. The precise extent of the *exercise* of "control" in the individual case—where deemed relevant—would depend on the extent of centralization or decentralization within the particular group. This would, of course, require individual investigation. However, in the corporate group with the parent controlling the subsidiaries' boards, the extent of centralization or decentralization represents no more than a tactical decision of the moment as to management techniques. Subservience to group objectives will always remain paramount.

In the Securities Act of 1933,¹⁸⁷ the Congress first enacted a defined standard of "control" that has been utilized in numerous later statutes, frequently regulating the prices, services, issuance of securities, entry, and transfers of control of firms in a designated industry. Such statutes include the Securities Exchange Act of 1934,¹⁸⁸ the Federal Communications Act of 1934,¹⁸⁹ the Interstate Commerce Act,¹⁹⁰ and the Federal Power Act.¹⁹¹ In such statutes, use of a standard of "control" extends the scope of the statutory regulatory program beyond the controlled corporation conducting the regulated activity in question to:

any corporation controlling it, controlled by it, or under common control.

185. In the case of partly-owned subsidiaries, this economic objective is somewhat restricted by fiduciary obligations of fairness with respect to transactions between the parent corporation and such subsidiaries. However, these standards are loose and not particularly effective. *See, e.g., Sinclair Oil Co. v. Levien*, 280 A.2d 717 (Del. 1971).

186. *See* O. WILLIAMSON, *CORPORATE CONTROL AND BUSINESS BEHAVIOR* 141-50 (1970). *See also* J. VAN HORNE, *FUNDAMENTALS OF FINANCIAL MANAGEMENT* 496-502 (2d ed. 1974) (multinational corporations). *But see* Blake, *Conglomerate Mergers and the Antitrust Law*, 73 COLUM. L. REV. 555, 571-72 (1973).

187. 15 U.S.C. § 77b(3) (1982).

188. 15 U.S.C. §§ 78c(a)(18), (12)(b)(1) (1982). *See also* 15 U.S.C. § 78u(a) (1982).

189. 47 U.S.C. § 219(a) (1982).

190. 49 U.S.C. § 310 (1982).

191. 16 U.S.C. § 825c (1982).

In other words, "control" transforms the statutory scope from entity law to enterprise law and sweeps under the enactment the entire corporate group whenever *any* constituent company is subject to its provisions.

There are two important limitations on the significance of the statutory experience. First, the standard of "control" is being used only to expand the concept of the legal entity to embrace the corporate group *for the specific purposes of the statute*. It in no sense seeks to replace entity law as a whole. Second, each of these statutes deals with a carefully limited area of the economy where use of a standard such as "control" is deemed essential to achieve full implementation of the statutory regulatory program, to prevent frustration of the statutory objectives, and to prevent ready evasion of the statute through the organization of subsidiary companies.¹⁹² Whether such a standard might serve as usefully in other areas of law or as a complete substitute for entity law is quite another matter.

If the "control" standard relates to the *exercise*, not merely the *existence*, of control, the standard loses some of its simplicity and ease of application, requiring case-by-case determination. However, as noted, the exercise of control is self-evident in the case of corporate groups; accordingly, the problem will virtually never arise.

2. Definitions of "Control"

There are two patterns in the statutory definitions of "control" in its traditional meaning pertaining to control over the decision-making processes of a corporation. One involves reliance on numerical benchmarks, either as the statutory standard or as establishing presumptions on whether the statutory standard, however expressed, has been satisfied. The other carefully avoids all numerical standards and relies on a functional, pragmatic standard turning on the "reality" of control. In addition to definitions employing "control" with its traditional meaning, "control" has become so accepted as the standard for referring to a specified degree of affiliation between

192. See BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, § 2.05.4.

The United Kingdom labor relations and employment discrimination experience provides two dramatic illustrations of the type of frustration and evasion possible under regulatory statutes not including such a standard for application to constituent companies of corporate groups. See *Dimbleby & Sons Ltd. v. National Union of Journalists*, 1 W.L.R. 67 (1984); *Haughton v. Olau Line (UK) Ltd.*, 1986 I.C.R. 504 (C.A.). See also BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, §§ 2.05.4, 13.06, 14.13.6.

corporations that the term has in some cases lost its traditional meaning. Other statutes have used it, although giving it a content requiring factors in addition to control over the decision-making process.

First, many statutes contain numerical definitions of control, often supplemented by statutory presumptions about the extent to which ownership of a minority of voting stock of a regulated corporation will be deemed to represent "control" for purposes of the statute.¹⁹³ The Bank Holding Company Act of 1956 thus utilizes five percent stock ownership as a benchmark to establish a rebuttable presumption and twenty-five percent to establish a conclusive presumption of control.¹⁹⁴ The Public Utility Holding Company Act of 1935 provides that ten percent creates a rebuttable presumption of control.¹⁹⁵ The Investment Company Act of 1940 uses twenty-five percent to establish a rebuttable presumption of control.¹⁹⁶ It should be noted that these statutes also utilize the same functional, and pragmatic definition of control to supplement their presumptions. They refer to the power "directly or indirectly [to] exercise[] a controlling influence over the management or policies" of another company.¹⁹⁷

State corporation statutes, content with a less inclusive standard in order to achieve certainty, typically employ definitions referring to ownership of a majority of the voting shares or a majority of the shares entitled to vote for the election of the members of the board of directors of the corporation.¹⁹⁸ The Internal Revenue Code widely employs numerical standards to determine corporate affiliation. However, while it uses the term "control," as we will see, the provisions are also concerned with the extent of common proprietary interest, a factor playing no direct role in the traditional statutory standards of "control."

Second, other statutes, such as the Federal Communications Act of 1934 and Transportation Act of 1940, carefully avoid numerical

193. *E.g.*, Public Utility Holding Company Act, 15 U.S.C. § 79b(a)(7) (1982); Investment Company Act, 15 U.S.C. § 80a-2(a)-(9) (1982); Bank Holding Company Act, 12 U.S.C. §§ 1841(a)(2)(A), (3) (1982).

194. 12 U.S.C. § 1841(a)(2)(A)(3) (1982).

195. 15 U.S.C. § 79b(a)(7) (1982).

196. 15 U.S.C. § 80a-2(a)(9) (1982).

197. 12 U.S.C. § 1841(a)(2)(C) (1982); 15 U.S.C. §§ 79b(B), 80(a)-2(a)(9) (1982). *Cf.* 1933 Securities Act Rule 405, 17 C.F.R. § 230.405 (1988).

198. MODEL BUSINESS CORP. ACT § 7.21(b) (1989); CAL. CORP. CODE § 189 (West 1977); DEL. CODE ANN. tit 8, § 160(c) (1983 repl. vol.).

standards and utilize a "broad" definition of "control."¹⁹⁹ Thus, the Transportation Act of 1940 provided that "control"

shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.²⁰⁰

In the Revised Interstate Commerce Act, this definition of "control" in the Transportation Act of 1940 was amended to read: "[C]ontrol" . . . includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means."²⁰¹

In the Securities Act of 1933, joint and several liability, subject to certain exculpatory provisions, is imposed on: "Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more persons by or through stock ownership, agency, or otherwise controls any person liable under section 11 or 12."²⁰² Securities Act Rule 405, dealing with the registration of securities, defines "control" for the latter purpose to mean:

The term "control" (including the terms "controlling", "controlled by," and "under common control with") means 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.²⁰³

199. See *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 125 (1962).

200. 54 Stat. 899-900 (1940), 49 U.S.C. § 1(3)(b) (1976), *superseded by* 49 U.S.C. § 10102(7) (1982).

201. 49 U.S.C. § 10102(7) (1982).

202. 1933 Act § 15, 15 U.S.C. § 77o (1982).

203. 1933 Act Rule 405, 17 C.F.R. § 230.405 (1989). The same definition is employed in 1934 Act Rule 12b-2, 17 C.F.R. § 240.12b(2) (1989), and Accounting Regulation S-X, Rule 1-02. Professor Loss concludes that the definitions adopted for purposes of registration or qualification "presumably apply by analogy" in other contexts. See L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 395 n.8 (2d ed. 1988).

Finally, still other statutes omit any *statutory* definition of control in order to block or impede attempts at statutory evasion and leave it to the agency administering the statute to formulate and reformulate sophisticated definitions of "control" in the light of the regulatory experience with the particular industry or activity.²⁰⁴

Internal Revenue Code section 482 departs from the general pattern of the Code utilizing mathematical benchmarks of stock ownership to define corporate affiliation. Section 482 also follows the traditional statutory approach to "control." Dealing with tax abuse through the manipulation of intragroup transactions, section 482 gives sweeping authority to the Commissioner of Internal Revenue to reallocate income, deductions, credits, or allowances between related parties "to prevent evasion of taxes or clearly to reflect the[ir] income."

Like the securities acts, section 482 defines "control" in the most general terms, leaving detailed definition to administrative regulation. The statute merely applies to transactions between "two or more organizations, trades, or businesses . . . owned or controlled directly or indirectly by the same interests"²⁰⁵

As pointed out by the Court of Appeals for the Second Circuit, neither section 482 nor the regulations define the crucial statutory term—"the same interests"—except in terms of the "reality" of control.²⁰⁶ In dealing with "control," the Treasury Regulations proceed in very much the same manner as the federal regulatory statutes and regulations reviewed above. Avoiding reliance on any precise mathematical test that could serve as a blueprint for evasion, the regulations refer in general, inclusive terms to define "control" to include: "any kind of control, direct or indirect, whether legally enforceable, and however exerciseable or exercised. It is the reality of control, which is decisive, not its form or mode of exercise. A presumption of control arises if income or deductions have been arbitrarily shifted."²⁰⁷

204. Thus, in the case of the securities acts, the Congress "believ[ed] that strict definitions of control would be 'undesirable' because it 'would be difficult if not impossible to enumerate or to anticipate the many ways in which control may be exerted.'" H.R. REP. NO. 1383, 73d Cong., 2d Sess. 26 (1934), *cited in* *Metge v. Baehler*, 762 F.2d 621, 630 (8th Cir. 1985), *cert. denied sub nom. Metge v. Bankers Trust Co.*, 474 U.S. 1057 (1986).

205. I.R.C. § 482 (1989).

206. *See* *B. Forman & Co. v. Commissioner*, 453 F.2d 1144, 1153 (2d Cir. 1972), *cert. denied*, 407 U.S. 934 (1972), *reh'g denied*, 409 U.S. 899 (1973).

207. Treas. Reg. § 1.482-1(a)(3) (1989).

The foregoing definitions of "control" have been analyzing the term in a precise functional sense, concerned with the matters underscored in Securities Act Rule 405—"the power to direct or cause the direction of the management and policies" of the related corporation. However, the term "control" has become so recognized in American usage as establishing affiliation between corporations that it has been used in statutes with meanings that are very different from this functional usage. While the same term has been used, it has broadened and acquired a new, more demanding content than control over the decision-making process. For application of such statutory provisions, additional standards are imposed as well. Thus, in the 1984 amendments to the Age Discrimination in Employment Act and in numerous instances in the Internal Revenue Code, except for section 482 discussed above, the statutory definitions of "control" require more than mere control over management decision-making.

The 1984 amendments to the Age Discrimination in Employment Act (ADEA) seeking to give the Act extraterritorial application to Americans employed by foreign subsidiaries of United States-based multinational corporations thus depart from the prevailing patterns and employ a unique approach. As amended, ADEA, which utilizes a standard of "control," defines "control" functionally, incorporating *in haec verba* the four-factor "integrated enterprise" standard developed by the National Labor Relations Board and adopted by the courts to determine when affiliated corporations constitute a "single employer" for jurisdictional and certain other purposes under the federal labor relations²⁰⁸ and employment discrimination²⁰⁹ statutes.

The 1984 amendments provide:

(g)(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be the practice by such employer.

* * *

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

208. See BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, §§ 13.03, 13.04.

209. *Id.* § 14.03.

- (B) common management,
 - (C) centralized control of labor relations, and
 - (D) common ownership or financial control,
- of the employer and the corporation.²¹⁰

In view of the increased pressures for greater operational discretion that geography necessarily exerts in the case of foreign subsidiaries, the utilization of such a functional standard rather than reliance on a benchmark employing a specified percentage of stock ownership gives the statute a less sweeping extraterritorial effect than might at first appear.

In the Internal Revenue Code, there are numerous sections providing for different tax treatment of certain transactions between stock-linked corporations. By their terms, these provisions become applicable upon establishment of the existence of "control," as defined. In all, there are no less than ten differing major definitions of "control" in the Code for the purposes of the particular sections in issue. All but one of these utilize a mathematical benchmark of stock ownership—sometimes 80%, sometimes 50.01%, sometimes 50.00%.²¹¹ None, however, applies the benchmark solely to voting stock, the factor related to control over the decision-making process.²¹²

210. Pub. L. No. 98-459, 98 Stat. 1767, 1792 (1984), 29 U.S.C.A. § 623(h) (Supp. vol., 1987).

211. Sections requiring 80% of voting stock or voting power include: I.R.C. §§ 368(c), 582(b), 1504(a)(2), 1551(b), 1563 (1989).

Sections referring to 80% of "total value" or "total number" or to "each class" of stock as an additional requirement include: §§ 368(c) ("total value"), 562(b) ("each class"), 1504(a)(2) ("total value") (1989).

Sections referring to 80% of "total value" of stock as an alternative standard include: §§ 1551, 1563 (1989).

The only section requiring 50% of both "voting power" and "total value" is I.R.C. § 246A (1989). It requires "at least 50 percent," that is 50.00%.

Sections referring to either 50% of "voting power" or "total value" include: I.R.C. §§ 246A, 267, 269, 304, 957 (1989). Sections 267 and 957 refer to "more than 50 percent," that is 50.01%. Sections 246A, 269, and 304 refer to "at least 50 percent," that is 50.00%.

The foregoing provisions cut a much wider swathe than may be apparent because they are incorporated into other sections as well. Thus, the standard of § 1504(a)(2), for example, applies not only to the consolidated returns sections of which it is a part, but also to §§ 243(a)(5), 332(b)(1), 336(e)(1), 337(b)(1), and 864(e) as well.

212. The regulations under § 537 provide one exception. Section 537 regulations impose a penalty tax on the unreasonable accumulation of earnings beyond the "reasonable needs of the business." In response to the question of whether a parent's accumulation may be justified by reference to the needs of a subsidiary,

Each applies its benchmark, either as an additional standard to be met or as an alternative standard, to include certain nonvoting shares as well.²¹³ Thus, although the term "control" is being used, it is apparent that a substantial identity of proprietary ownership, unrelated to direction of management, is also being used as a standard. In these sections, "control" over management alone is not the standard of "control" although it will, no doubt, turn out to be present in almost all cases.

3. The Role of Administrative Agencies in Determinations of "Control"

Administrative agencies play a major role in the implementation of these regulatory programs. Through their rule-making power and their adjudicatory powers, the agencies formulate a vast body of law and practice supplementing the statutes. This process is particularly evident in the case of administrative determinations of "control."

In the *Rochester* case, the Supreme Court greatly expanded the importance of administrative adjudications of control, holding that they were determinations of "fact," resting not on mathematical standards, but on all the circumstances in the particular case and that such decisions of the agency were conclusive so long as supported by substantial evidence in the record.²¹⁴

As illustrated by the following examples, various agencies have employed different formulations of "control." Thus, for purposes of the First War Powers Act regulating exports in time of war and national emergency, the Office of Foreign Assets Controls, in the absence of any formal rule or regulation, construed "control" generally to include "any type of control, actual or potential." It concluded that fifty percent ownership of voting common stock, or a

Treasury Regulation § 1.537-3(b) provides that a single business is involved for this purpose (and accumulation proper) when a parent corporation owns 80% of the voting stock of the subsidiary. While the standard solely involves voting stock, the use of a benchmark far above the amount of stock required for election of the board of directors—the ultimate standard for control—indicates that this provision, too, is concerned with the extent of common proprietary interest.

It should be noted that the regulation establishes a conclusive presumption, but somewhat smaller holdings may also be found acceptable after examination on a case-by-case basis.

213. Traditional non-voting preferred shares with limited dividend and liquidation rights are generally excluded, but the provisions are far from uniform.

214. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 145-46 (1939).

lesser amount where there were no other large blocks would constitute control.²¹⁵

The anti-boycott regulatory controls²¹⁶ under the Export Control Act of 1969²¹⁷ and the Export Administration Act of 1979²¹⁸ apply to foreign subsidiaries or affiliates "controlled in fact" by United States corporations or persons. The Regulations elaborately define "controlled in fact" to mean "the authority or ability of a domestic concern to establish the general policies or to control day-to-day operations" of its "foreign subsidiary . . . affiliate . . . or other . . . establishment."²¹⁹ The definition is supported by a number of rebuttable presumptions. These include voting control where the "domestic concern beneficially owns or controls (whether directly or indirectly) more than fifty percent of the outstanding voting securities of the foreign subsidiary or affiliate;"²²⁰ or "twenty-five percent or more . . . if no other person owns or controls (whether directly or indirectly) an equal or larger percentage."²²¹

Other circumstances under the Export Administration Act giving rise to a rebuttable presumption of "controlled in fact" include cases where the domestic concern operates the foreign concern under an exclusive management contract;²²² where the same individuals comprise a majority of the boards of directors of the domestic concern and the foreign subsidiary or affiliate;²²³ or where the domestic concern has the authority to appoint the majority of the board or the chief executive officer of the foreign subsidiary or affiliate.²²⁴

It will be readily seen that all standards of "control" include the power to direct the decision-making of the board of directors. The courts and agencies, however, have not restricted "control" to the actual direction of corporate affairs. Some courts have extended "control" even further to include "the ability to exert influence,

215. See Summerfield, *Treasury Regulations Affecting Trade with The Euro-Soviet Block and Cuba*, 19 BUS. LAW. 861, 866 (1964); U.S. Treas. Dep't Pub. Circular No. 30, 7 Fed. Reg. 2503 (Apr. 1, 1942).

216. 15 C.F.R. § 369.1(b)(v) (1988).

217. Pub. L. No. 91-184, 83 Stat. 841 (1969) (expired 1979).

218. Pub. L. No. 96-72, 93 Stat. 503 (1979), 50 U.S.C. app. § 2401 (Supp. 1989).

219. 15 C.F.R. § 369.1(c)(1) (1988).

220. *Id.* § 369.1(c)(2)(i).

221. *Id.* § 369.1(c)(2)(ii).

222. *Id.* § 369.1(c)(2)(iii).

223. *Id.* § 369.1(c)(2)(iv).

224. *Id.* § 369.1(c)(2)(v).

directly or indirectly, over the decision-making process of another person.”²²⁵ The regulations under the export control acts defining foreign concerns “controlled in fact” thus refer to “the authority or ability to establish the general policies or to control”²²⁶

When one turns from “control” for general purposes to the particular problems presented in case of specialized activities singled out for rules of their own, specialized definitions may be employed to implement the particular statutory provision in issue. Thus, for purposes of determining whether an allegedly controlling party is an “issuer” under the Securities Act of 1933, “control” has been defined as the power to cause the corporation to sign a registration statement.²²⁷

4. Summary

In its *Principles of Corporate Governance*, the American Law Institute has defined “control” as the “power, directly or indirectly . . . to exercise a controlling influence over the management or policies of a business organization”²²⁸ It further provides that a person “who owns or has the power to vote more than 25 percent of the equity interest . . . is presumed to be in control . . . unless some other person . . . owns or has the power to vote a greater percentage”²²⁹ The standard includes a power arising from an “arrangement or understanding with others.” The Comment makes it plain that the presumption is rebuttable. These provisions are substantially the same as those contained in the proposed Federal Securities Code of the Institute²³⁰ modelled after comparable provisions in the Public Utility Holding Company Act,²³¹ the Investment Companies Act,²³²

225. *See* *Westlake v. Abrams*, 565 F. Supp. 1330, 1345 (N.D. Ga. 1983) (citing *American Gen. Inc. Co. v. Equitable Gen. Corp.*, 493 F. Supp. 721, 751 (E.D. Va. 1980)).

The question remains whether such influence must be a “controlling influence.” The Public Utility Holding Company Act, thus, refers to a “controlling influence over . . . management or policies.” 15 U.S.C. §§ 79b(a)(7)(B) (1982). *See also* A.L.I., *PRINCIPLES OF CORPORATE GOVERNANCE* § 1.05(a) (Tent. Draft. No. 5, 1986); A.L.I., *FEDERAL SECURITIES CODE* § 230 (1980).

226. 15 C.F.R. § 369.1(c)(1) (1988).

227. *See* L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 402 (2d ed. 1988).

228. A.L.I., *PRINCIPLES OF CORPORATE GOVERNANCE* § 1.05(a) (Tent. Draft No. 5, 1986).

229. *Id.* § 1.05b.

230. A.L.I., *FEDERAL SECURITIES CODE* § 230 (1980).

231. 15 U.S.C. §§ 79b(a)(7), (8), (11) (1982).

232. *Id.* §§ 80a-2(a)(3), (9).

and the Investment Advisers Act.²³³ While this does not represent a generally accepted standard of "control" in areas other than the securities acts, the definition, if not the presumption, will unquestionably influence the development of the law in this area.

B. "Control" as the Sole Standard or as Part of a More Complex Standard

This experience in American statutory law leaves no doubt that utilization of the concept of "control" as the legal standard for the attribution of legal rights and duties of a controlled subsidiary corporation to its parent corporation, or to affiliated corporations under common control as well, is an entirely feasible test. It is a test that would bring legal and economic frames of reference into happy congruence to the extent that the companies under common control collectively conduct a common enterprise.

But what if a conglomerate of unrelated businesses is involved? The affiliated corporations are as much linked by "control" as in other groups. However, their economic interrelationship is very different insofar as the markets and industries served are concerned. In such aspects of group operations as the extent of administrative and financial interdependence of the affiliated companies within the group or the question of whether the business operations conducted by the group function under a common public persona, or under different public personae, conglomerate groups differ among themselves, and generalization is impossible.

In light of this economic diversity, is "control" in and of itself sufficient to identify those circumstances under which the rights and duties of one corporation of a corporate group should be attributed to its parent corporation or other affiliated constituent companies of the group? If "control" is not sufficient, what additional unifying factors, reflecting the nature of the interrelationship of the affiliated corporations in the conduct of their economic activities and in the corporate managerial structure might be required as well?

In this connection, it should be recognized that in the case of particular statutes, "control" may appear to serve as the single standard in the statute or regulations. However, as noted above, such a definition is designed to implement regulation of a particular industry or economic activity and, within that sector, deals only with

233. *Id.* § 80b-2(a)(12).

carefully specified activities, such as rates, services, issuance of securities, transfers of control, merger, or entry. Accordingly, notwithstanding its central role in the statutes, "control" is somewhat less than a universal unifying factor in practice.

The case for requiring unifying factors in addition to "control" rests essentially on an evaluation of the advantages and disadvantages of limited liability *within* the group.²³⁴ Utilization of a "control" test as the sole basis for imposition of liability on affiliated companies of the corporate group would mean the automatic elimination of limited liability for the constituent companies of the group in every case. The group constituent companies would be telescoped into a single juridical entity, and group liability would arise in place of the multiple layers of corporate limited liability within the group existing under current law. The corporate group would then be equivalent to the simple corporation that was the norm when legal liability was first accepted. The concept of limited liability would again protect only the public investors in the enterprise from the obligations of the enterprise. To this extent, law and economic realities would again be in harmony.

However, limited liability encourages investment by limiting risk. This principle applies to corporate groups as well. An inability to segregate corporate risks and to achieve limited liability with respect to particular activities would inevitably on the margin deter some groups from undertaking capital investment perceived to involve high risks. Such a damper on risk taking and on entrepreneurial activity has to be recognized as a cost of the imposition of group liability. If accepted, one would have to do so on the basis of a recognition that even greater gains would be achieved by a new doctrine.

The costs involved and offsetting advantages of such a step vary with various areas of the law. Contract liability, for example, provides the best example of adverse consequences arising from a standard resting solely on "control." Where there is no disparity in bargaining power, it is economically advantageous for freely bargaining independent parties to have the freedom to bargain over the credit elements of the transaction, including a specification of the company or companies to be liable. Although such an opportunity could be preserved by express waiver of liability, such a rule introduces the burden of requiring the parties to contract around the law. In the

234. As previously noted, the protection of limited liability for investors in the parent corporation would continue without change.

case of public issues of corporate debt, a regime of piece-meal group liability waivers may contribute to some public confusion, although the sophisticated securities markets should have the capacity to identify readily the obligors on a subsidiary's debt issue. Another undesirable consequence would be the windfall for third parties dealing with a group constituent without recognizing that it was a group member. In enterprises not utilizing a group persona, trademark, logo, or otherwise presenting a common identity to the public, the imposition of group liability under all circumstances seems excessive.

This, however, is only one aspect of contract liability. In the many instances where the superior bargaining power of the large corporate group enables it to designate the terms on which it will deal with weaker parties, the group would automatically include in its standard forms a clause expressly limiting liability to the particular constituent company involved in the transaction. In such cases, limited liability would continue *de facto* notwithstanding the use of "control" as a unifying factor determining group liability in other areas. The alleged disadvantages of "control" in discouraging risk-taking and entrepreneurial activity may, accordingly, not be as significant as might first appear in contract matters.

Tort law presents a different problem. While use of "control" would, indeed, mean the loss of multiple layers of limited liability within the group and make the group as a whole liable for torts of each constituent company, there is widespread agreement that just such an elimination of limited liability would be an advantageous development. The group would then be responsible for all costs of the enterprise being conducted by it and the group would lose its present capacity to externalize some of its costs by limiting its liability for torts of constituent companies. Such a change would dispose of one of the principal criticisms of the economists with respect to limited liability.²³⁵ Further, the availability of insurance for such increased tort exposure provides a ready means for the group to restrict its exposure.

In the case of conglomerate groups, this advantage must be weighed against an adverse consequence. Where the group conducted a number of unrelated businesses, the elimination of limited liability within the conglomerate group would result in the automatic imposition of costs arising from one economic activity upon unrelated activities in other areas; costs would inevitably be externalized. This

235. See Blumberg, *Limited Liability*, *supra* note 1, at 616-19.

would be contrary to the premise underlying modern concepts of enterprise liability that costs should not be externalized and that consumers purchasing a product should be paying ultimately for all the costs of producing the product.²³⁶

Within the group, such limited externalization would arise only where the assets of the constituent company in question were insufficient to satisfy its uninsured tort liabilities. Although likely to be isolated, such instances would inevitably arise, particularly in cases attracting public attention. The question whether such marginal occurrences would significantly reduce entrepreneurial activity overall is problematic. The impact would not only be limited to conglomerates but to conglomerates with the isolated problem described above.

In those areas of the law where limited liability does not play any role, the foregoing concerns with adverse consequences of reliance on "control" as the sole unifying factor for attributing legal consequences to a parent corporation or to affiliated companies within the group by reason of the activities of a subsidiary do not arise.

Thus, in the law of procedure where the functioning of the process of the legal system rather than the imposition of liability is involved, utilization of "control" alone as the standard and the consequent elimination of limited liability presents few difficulties. Indeed, in some procedural areas of which discovery, *res judicata*, collateral estoppel, statute of limitations, and injunctions are ready examples, the development of the law of corporate groups in unheralded fashion has already moved on to use of the doctrine of "control" to determine the attribution to the parent (or controlling shareholders) of certain legal consequences from activities or determinations involving a subsidiary (or controlled corporations).²³⁷ Without limited liability in the way, the movement of the law from entity law to enterprise law *for this limited purpose* has been a relatively easy process for judicial evolution, even in a period in which entity law has been almost universally accepted for other purposes. Similarly, in the area of bankruptcy, the doctrine of voidable preferences and, to a lesser extent, the doctrine of fraudulent

236. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEG. STUD. 461 (1985).

237. See BLUMBERG: PROCEDURE, *supra* note 8, at chs. 10-12, 15.

transfers have been held applicable to constituent companies of corporate groups in reliance on "control."²³⁸

Even in the areas of the law where substantive liability is concerned, reliance on "control" as the sole unifying standard for group liability with the consequent elimination of limited liability within the group appears to present few undesirable consequences, except to some degree in the case of conglomerate groups conducting a series of enterprises serving widely separate markets.

Recognition of the existence of this aspect of the problem—although limited—may lead to the inquiry into whether the appropriate unifying standard for determining group liability should embrace other elements in addition to "control." In such event, the extensive American judicial experience considering the alternatives of entity law or enterprise law in constitutional law, statutory law or from the common law vantage point of "piercing the veil jurisprudence" have suggested a host of factors to be considered along with "control" for purposes of determining group liability for the purpose at hand. These include: economic integration of the business or businesses of the constituent companies; administrative interdependence of the constituent companies; financial interdependence of the constituent companies; and the use of a common public persona for the constituent companies of the group. They provide a comprehensive set of criteria for defining an "economic entity" that can serve as the basis for imposition of group liability to supplement or replace the legal entity of traditional corporation law.

At the outset, it should be recognized that these factors are obviously independent variables, and that the permutations of distribution among groups are almost endless. Thus, any concept of the "economic entity" would have considerable variations and diffuse contours in contrast to the well defined standard of entity law or "control" as the sole determining factor.

Reliance on the foregoing unifying factors in varying degrees is evident in a number of areas in American law employing alternative approaches in the formulation of doctrines of "economic entity" or "enterprise" to supplement or replace traditional entity law. These are the "unitary business" principle in American constitutional law, the "integrated enterprise" or "single employer" doctrines in American labor and employment discrimination law, and the enterprise law cases emerging from "piercing the veil jurisprudence." Although

238. See BLUMBERG: *BANKRUPTCY*, *supra* note 39, at chs. 7-9.

differently expressed, economic integration of the activities of the related companies is a cardinal feature of each and unmistakably must be recognized, along with "control" as a paramount factor in these newer doctrines.

C. "Unitary Business"

The "unitary business" doctrine in United States constitutional law provides just such an example combining "control" with economic integration and managerial structure to provide a workable enterprise law standard for determining the constitutional limitations on the imposition of liability on constituent companies of corporate groups in the area of state taxation.

From 1980 to 1983, five decisions of the Supreme Court, starting with *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*,²³⁹ involved the constitutionality under the commerce clause, equal protection clause, and foreign commerce clause of state taxation of local affiliates or operations of American multinational corporations.²⁴⁰ In these cases, the Supreme Court developed the theory of the "unitary business" as the standard for determining the constitutionality of the taxation by states of local affiliates or operations of multinational enterprises by apportionment formulae taking into account the worldwide activities of the group of which the local affiliates or operations were a constituent part. Typically, the formula imposed a tax on the local company based on the proportion that its local sales, assets, and net income bore to the worldwide sales, assets, and net income of the group. Through use of the formula, the states derived significantly higher taxes than if the local unit had been taxed solely on its own activities.²⁴¹

239. 445 U.S. 425 (1980). The other decisions are *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, *reh'g denied*, 464 U.S. 909 (1983); *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 454 (1982); *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982); and *Exxon Corp. v. Department of Revenue of Wis.*, 447 U.S. 207 (1980).

240. The five decisions involved American-based multinational corporations. States have also employed worldwide unitary tax apportionment in the taxation of subsidiaries of foreign-based multinational corporations. The courts of appeal have not agreed whether in such cases the foreign parent corporation has standing to contest the constitutionality of such an action. *Compare Alcan Aluminium, Ltd. v. Franchise Tax Bd.*, 860 F.2d 688 (7th Cir. 1989) (standing upheld), *rev'd on other grounds*, 58 U.S.L.W. 4121 (U.S. Jan. 10, 1990) (in present posture action barred by the Tax Injunction Act, 28 U.S.C. § 1341 (1989)), *with Shell Petroleum, N.V. v. Graves*, 709 F.2d 593, 595 (9th Cir.) (standing denied), *cert. denied*, 464 U.S. 1012 (1983).

241. *See Container Corp. of Am.*, 463 U.S. at 197-201 (Powell, J., dissenting), *reh'g denied*, 464 U.S. 909 (1983).

Each of these Supreme Court decisions involved a nondomiciliary *parent* corporation authorized to conduct business within the taxing state. However, the Supreme Courts of Alaska and Colorado have used the "unitary business" standard to uphold the application of unitary apportionment to in-state *subsidiary* corporations.²⁴²

In applying the due process clause to the imposition of state taxes under a unitary apportionment formula on in-state group affiliates through the apportionment of multi-state or multinational operations of the group as a whole, the Court has vigorously rejected various constitutional challenges in the face of the "underlying economic realities" of a unitary business. As long as the in-state affiliate and the out-of-state affiliates included in the apportionment formula base are commonly engaged in the conduct of an integrated unitary business and do not represent "discrete" business enterprises, the Court has repeatedly upheld the constitutionality of the tax, not only under the due process clause, but under the commerce clause and the foreign commerce clause as well.

As stated in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*,²⁴³ "[T]he linchpin of apportionability in the field of state income taxation is the unitary-business principle,"²⁴⁴ the crucial factor on which constitutionality turns. The Court has focused both on the underlying "unity or diversity of [the] business enterprise,"²⁴⁵ and on the fact that, as an economic matter, "a functionally integrated enterprise"²⁴⁶ was involved. It has refused to distinguish between the form of investment or business organization, such as the organization of subsidiaries and affiliates rather than unincorporated divisions. "The underlying economic realities of a unitary business" are decisive.²⁴⁷ In this analysis, the Court has stressed such factors as economies of scale and centralized management as well as functional integration.

The formal segregation of functional departments as independent profit centers has been ignored where the departments are parts of a "highly integrated business which benefits from an umbrella of centralized management and controlled interaction."²⁴⁸ The necessary

242. *Earth Resources Co. v. State Dep't of Revenue*, 665 P.2d 960 (Alaska 1983); *Lone Star Steel Co. v. Dolan*, 668 P.2d 916 (Colo. 1983) (*en banc*).

243. 445 U.S. 425 (1980).

244. *Id.* at 439.

245. *Id.* at 440.

246. *Id.* at 441.

247. *Id.*

248. *Exxon Corp.*, 447 U.S. at 224.

relationship is demonstrated by such features as the availability of "essential corporate services for the entire company, including the coordination of . . . operational functions"²⁴⁹ or the use of "centralized purchasing" or a centralized marketing system involving "a uniform credit card system, uniform packaging, brand names, and promotional displays"²⁵⁰

In contrast, functional integration of the subsidiaries within the group and centralization of management were held not to exist²⁵¹ where foreign merchandising subsidiaries autonomously and independently performed such major functions as selection of merchandise, store site selection, advertising, and accounting without any "centralized purchasing, manufacturing, or warehousing" or "central personnel training," where financing was independent of the parent, and where there was no exchange of personnel.

The dividing line is whether the affiliated companies in question are "an integral part" of a unitary business²⁵² or whether they are "discrete business enterprises." Are the activities interrelated in "any business or economic sense"?²⁵³ The critical issue is whether the business conducted by the group component within the taxing state is dependent on or contributes to the out-of-state operations of the group and whether a sharing or exchange of values is present.²⁵⁴ The Court had previously made it plain that as long as an integrated business was involved, it was irrelevant whether it was integrated

249. *Id.*

250. *Id.*

251. *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 454 (1982).

252. A Maryland court has held that the critical issue is not whether there is a unitary relationship between the in-state parent corporation receiving an interest payment and the out-of-state debtor company making the payment. The question is whether the portion of the parent's business responsible for the loan was a unitary part of the parent's in-state business. See *Comptroller v. Armco, Inc.*, 70 Md. App. 403, 420, 521 A.2d 785, 793 (Md. Ct. Spec. App. 1987).

253. *ASARCO*, 458 U.S. at 328 (quoting *Mobil Oil*, 445 U.S. at 439-42).

254. See *Chase Brass & Copper Co. v. Franchise Tax Bd.*, 10 Cal. App. 3d 496, 501-02, 95 Cal. Rptr. 805, 807, *cert. denied*, 400 U.S. 961, *appeal dismissed for want of jurisdiction*, 400 U.S. 961 (1970).

vertically²⁵⁵ or horizontally.²⁵⁶

This economic test supersedes the technical legal form of organization in determining the constitutionality of the application of the tax to the group in question. Indeed, a reluctance to have the incidence of taxation controlled by a taxpayer's selection of the formal structure for the conduct of its business is a major factor supporting utilization of unitary apportionment in preference to other tax methods.

Although there have been suggestions that multinational corporations present different issues from multi-state enterprises in which foreign nations are not involved,²⁵⁷ the Court has refused to make any such distinction and has repeatedly upheld the application of a tax based on worldwide unitary apportionment to foreign operations of United States-based multinational groups²⁵⁸ or to foreign operations of the taxpayer itself.²⁵⁹ An issue still not definitively resolved is whether such a tax may be constitutionally imposed on the domestic components of foreign-based multinationals.²⁶⁰

1. *Mobil Oil*

*Mobil Oil Corp. v. Commissioner of Taxes of Vermont*²⁶¹ involved a New York corporation ("Mobil") which had its commercial domicile in New York but which conducted a worldwide integrated petroleum business with hundreds of subsidiaries. It did business directly in many states, including Vermont; however, its Vermont activities were "but a small part of the corporation's worldwide enterprise." Vermont imposed an income tax on the portion of a taxpayer's federal net taxable income attributable to Vermont under a three-

255. *Container Corp. of Am.*, 463 U.S. at 166. See also *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); *Chase Brass & Copper Co. v. Franchise Tax Bd.*, 10 Cal. App. 3d 496, 95 Cal. Rptr. 805, cert. denied, 400 U.S. 961, appeal dismissed for want of jurisdiction, 400 U.S. 961 (1970).

256. *Container Corp. of Am.*, 463 U.S. at 166. See also *Butler Bros. v. McCollgan*, 315 U.S. 501 (1942); *Chase Brass & Copper Co. v. Franchise Tax Bd.*, 10 Cal. App. 3d 496, 95 Cal. Rptr. 805 (1970) cert denied, 400 U.S. 961, appeal dismissed for want of jurisdiction, 400 U.S. 961 (1970); *Commissioner of Revenue v. Associated Dry Goods, Inc.*, 347 N.W.2d 36, 38 (Minn. 1984).

257. See *Container Corp. of Am.*, 463 U.S. at 189 n.26, 195 n.32.

258. *Id.* at 195; *Mobil Oil*, 445 U.S. at 448.

259. *Container Corp. of Am.*, 463 U.S. at 194-95.

260. See *id.* at 195 n.32.

261. 445 U.S. 425 (1980).

factor apportionment formula. Mobil contended that the taxation of dividend receipts from its subsidiaries and affiliates operating abroad violated the due process clause, the commerce clause, and the foreign commerce clause. It asserted that the very character of dividends from a foreign source precluded state taxation.

The Court, rejecting that contention, enunciated the following constitutional standard:

For a State to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment imposes two requirements: a "minimal connection" between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise. The requisite "nexus" is supplied if the corporation avails itself of the "substantial privilege of carrying on business" within the State²⁶²

The source of the income does not preclude taxability as long as the business is unitary and the tax is appropriately apportioned.

Invoking entity law, Mobil attempted to identify its holding company function as a separate business. The Court did not find the argument "particularly persuasive," stating:

So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability.

Superficially, intercorporate division might appear to be a more attractive basis for limiting apportionability. But the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise. ... Transforming the same income [directly earned by a parent through divisions] into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives.²⁶³

The Court also rejected Mobil's commerce clause challenges.

262. *Id.* at 436-37 (citations omitted).

263. *Id.* at 440-41 (citations omitted).

2. *Exxon Corporation*

*Exxon Corp. v. Department of Revenue of Wisconsin*²⁶⁴ involved a vertically integrated multinational corporation organized under the laws of Delaware with general offices in Texas. Wisconsin, where Exxon conducted marketing operations, sought to tax Exxon based on a unitary three-factor apportionment formula utilizing worldwide Exxon sales, assets, and payroll. Exxon contended that such action violated the due process clause because it only conducted marketing operations in Wisconsin, while its functional accounting structure separated its income into three distinct categories—marketing, exploration, and production.

The Court applied the due process clause standards enunciated in *Mobil Oil*. It found that Exxon comprised a unitary business and upheld the constitutionality of the Wisconsin tax. The nexus between the interstate activities and the taxing state could not be defeated by the company's internal accounting procedures. Recognizing that the "unitary-business principle" was the "linchpin of apportionability," the Court found that the Wisconsin marketing operation was an integral part of a "highly integrated business which benefits from an umbrella of centralized management and controlled interaction."²⁶⁵ Accordingly, there was "'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'"²⁶⁶ It was irrelevant that Exxon was functionally organized, with its operational departments treated as independent profit centers.²⁶⁷

3. *ASARCO*

*ASARCO, Inc. v. Idaho State Tax Commission*²⁶⁸ involved the constitutional power of Idaho to tax a nondomiciliary multinational parent corporation authorized to do business within Idaho on such intangible income as dividends, interest payments, and capital gains that the parent received from Latin America and European subsidiary corporations that had no connection with the State. The Court held

264. 447 U.S. 207 (1980).

265. *Id.* at 224.

266. *Id.* at 219-20 (quoting *Mobil Oil*, 440 U.S. at 436-37).

267. *Id.* at 224-25.

268. 458 U.S. 307 (1982).

that the parent did not exercise its power to control three of the five subsidiaries in which it had a majority interest and that it lacked a majority interest in the other two. The subsidiaries did not seek approval from the parent with respect to their decisions. Emphasizing the need for the actual exercise of control in this context, not merely potential control, the Court held, in language borrowed from *Mobil Oil*, that the businesses of the subsidiaries were autonomous and “‘discrete business enterprise[s]’ that—in ‘any business or economic sense’—have ‘nothing to do with the activities’ of ASARCO in Idaho.”²⁶⁹ It rejected the alternative standard advanced by Idaho that it was sufficient if the intangibles contributed or in some way related to or furthered the taxpayer’s business.²⁷⁰ Accordingly, the Court held that the Idaho tax was unconstitutional.

4. *F.W. Woolworth Company*

*F.W. Woolworth Co. v. Taxation & Revenue Department of New Mexico*²⁷¹ involved New Mexico’s application of worldwide unitary tax apportionment to a nondomiciliary multinational corporation, with its principal place of business and commercial domicile in New York, conducting a national chain of retail stores in the United States, including a New Mexico store, as well as abroad. New Mexico taxed dividends received by the nondomiciliary parent from four English subsidiaries that had no connection with the State. The Court held that taxation of such foreign dividends violated the due process clause where the subsidiaries were not “functionally integrated” into the parent’s business and therefore were not part of the “unitary business,” the income of which could be constitutionally taxed by appropriate apportionment.²⁷²

The Court reviewed the operations of the subsidiaries in the light of the standards established in *Mobil Oil* to ascertain whether “contributions to income [of the subsidiaries] result[ed] from functional integration, centralization of management, and economies of scale.”²⁷³ It found “that no phase of any subsidiary’s business was integrated with the parent’s.”²⁷⁴ Each subsidiary autonomously and

269. *Id.* at 328 (quoting *Mobil Oil*, 445 U.S. at 439-42).

270. *Id.* at 326-27.

271. 458 U.S. 354 (1982).

272. *Id.* at 372.

273. *Id.* at 364 (quoting *Mobil Oil*, 445 U.S. at 438).

274. *Id.* at 365.

independently decided such questions as merchandise selection, store site selection, advertising, and accounting controls. Each had its own accounting, financial staff, and outside counsel. There was no centralized purchasing, merchandising, warehousing, or personnel training programs. Each subsidiary did its own financing. Management was autonomous, and there was no rotation of personnel. No consolidated returns were filed.²⁷⁵ On the other hand, there were managerial links on a senior level, and the parent approved major financial decisions, the amount of dividends, and major borrowing. Consolidated financial statements were published, and all companies used the Woolworth name.

On these facts, the Court held that the subsidiaries were not part of a unitary business but were "discrete business enterprise[s]."²⁷⁶

F.W. Woolworth carried the *ASARCO* decision²⁷⁷ one step further. Unlike the parent company in *ASARCO*, the parent in *F.W. Woolworth* had the potential power to operate the foreign subsidiaries "as integrated divisions of a single unitary business."²⁷⁸ The Court found that it had not done so and that accordingly, notwithstanding the incidental economic benefit from the subsidiaries, the dividends were not subject to apportionment under the due process clause.²⁷⁹

5. *Container Corporation*

In *Container Corp. of America v. Franchise Tax Board*,²⁸⁰ the Court reaffirmed its earlier decisions in *F.W. Woolworth*, *ASARCO*, *Exxon*, and *Mobil Oil*. It upheld the constitutionality of California's application of worldwide unitary tax apportionment to a nondomiciliary

275. *Id.* at 365-66.

276. *Id.* at 372 (citation omitted) (quoting *Norfolk & W. R.R. v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 n.5 (1968) (quoting *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949)).

277. The *ASARCO* case was argued in tandem with *F.W. Woolworth*. *Id.* at 362.

278. *Id.*

279. *Id.*

280. 463 U.S. 159, *reh'g denied*, 464 U.S. 909 (1983). See Hartman, *Constitutional Limitations on State Taxation of Corporate Income from Multinational Corporations*, 37 VAND. L. REV. 217, 247-70 (1984); Stuart & Williams, *Constitutional Considerations of State Taxation of Multinational Corporate Income: Before and After Container Corporation of America v. Franchise Tax Board*, 16 IND. L. REV. 783 (1983); Weissman, *Unitary Taxation: Its History and Recent Supreme Court Treatment*, 48 ALB. L. REV. 48, 86-105 (1983).

American parent corporation authorized to conduct business within the State involving subsidiaries based abroad without property, payroll, receipts, or other connection with the State. The parent was incorporated in Delaware and had its headquarters in Illinois; it controlled twenty foreign subsidiaries operating in Europe and Latin America.

The Court first drew a distinction between a limited investment relationship and the economic integration of the components of a corporate group, stating:

Investment in a business enterprise truly "distinct" from a corporation's main line of business often serves the primary function of diversifying the corporate portfolio and reducing the risks inherent in being tied to one industry's business cycle. When a corporation invests in a subsidiary that engages in the same line of work as itself, it becomes much more likely that one function of the investment is to make better use—either through economies of scale or through operational integration or sharing of expertise—of the parent's existing business-related resources.²⁸¹

The Court then reaffirmed the standards enunciated in *Mobil Oil* and *F.W. Woolworth*, requiring proof of "'[s]ubstantial mutual interdependence'"²⁸² of the components and contributions to income resulting from "'functional integration, centralization of management and economies of scale,'"²⁸³ and a "functionally integrated enterprise."²⁸⁴

The California Court of Appeals had concluded that the parent and its foreign subsidiaries constituted a unitary business.²⁸⁵ As reviewed by Justice Brennan, speaking for the Court, the California court relied on

appellant's assistance to its subsidiaries in obtaining used and new equipment and in filling personnel needs that could not be met locally, the substantial role played by appellant in loaning funds to the subsidiaries and guaranteeing loans

281. *Container Corp. of Am.*, 463 U.S. at 178.

282. *Id.* at 179 (quoting *F.W. Woolworth*, 458 U.S. at 371).

283. *Id.* (quoting *F.W. Woolworth*, 458 U.S. at 364 (quoting *Mobil Oil*, 445 U.S. at 438)).

284. *Id.*

285. *Id.* at 159.

provided by others, the "considerable interplay between appellant and its foreign subsidiaries in the area of corporate expansion," the "substantial" technical assistance provided by appellant to the subsidiaries, and the supervisory role played by appellant's officers in providing general guidance to the subsidiaries.²⁸⁶

In light of the foregoing factors, the Court found the decision of the state court upholding the tax constitutionally acceptable.

Although illustrations of enterprise law, these decisions relate only to a collateral aspect of the problem. The "unitary business" standard supports the constitutionality of state taxation *imposed* on the local affiliate, not on the group or its foreign affiliated companies, and only *measured* by worldwide apportionment of the total sales, assets, and net income of the group. Thus, it must be recognized that the "unitary business" principle supplements but does not displace the local affiliate (or the corporation conducting the local branch) as the separate juridical unit on which tax liability is being imposed.

There is a further problem to utilization of the "unitary business" principle as a standard for determining the scope of liability or other vicarious attribution of legal consequences among group members not directly involved in the activities under consideration. If the extent of economic and functional integration of the group were to play a critical role in determining application of the standard to the group, there would be a substantial risk of manipulation. Lawyers would be influenced to counsel diversification, conglomerate development, or managerial decentralization to avoid the imposition of group liability. There would be incentives for groups to structure themselves after the pattern in *F.W. Woolworth* rather than those in *Mobil Oil*, *Exxon*, and *Container Corp.*

Thus, adoption of a "unitary business" standard for general legal purposes might lead in some cases to the adoption of economic and management policies resting on legal efforts to sidestep group liability rather than on economical considerations. This would inevitably mean inefficiencies in terms of business operation and frustration of the objective of developing an effective world legal order to deal with multinational enterprises. These adverse consequences apparently did not arise in the case of unitary tax apportionment,

286. *Id.* at 179 (citations omitted).

perhaps because of the relatively limited extent of the tax burden involved. Worldwide liability exposure would undoubtedly provide a greater incentive for uneconomic corporate restructuring.

6. Summary

The "unitary business" standard turning on "functional integration" imposes relatively tight boundaries to define the type of multinational enterprises that are included, and is limited to particular models of managerial direction and of economic integration. Further, it ignores other factors that have been recognized as significant in enterprise cases occurring elsewhere in American law, particularly administrative interdependence, financial interdependence, and group use of a common public group persona. As a result, as illustrated by the decision in *F.W. Woolworth & Co.*, the "unitary business" standard excludes major multinational enterprises that any system of comprehensive enterprise law would seemingly have to include.

In addition to "unitary business," American law provides three other standards for the development of a new enterprise law to govern corporate groups. One is the "integrated enterprise" or "single employer" doctrine developed in American labor law for purposes of applying aspects of the labor relations and employment discrimination statutes. Another is the "enterprise" concept utilized in the Fair Labor Standards Act.²⁸⁷ The third is the fragmentary body of American enterprise law emerging as offshoots of "piercing the veil jurisprudence," that I have called The Law of Corporate Groups.

D. "Integrated Enterprise"

The National Labor Relations Board has developed²⁸⁸ and the Supreme Court has upheld²⁸⁹ the four factor "integrated enterprise" standard²⁹⁰ for treating separate but closely related and "sufficiently integrated"²⁹¹ concerns as a "single employer" for determination of certain vital issues arising under the National Labor Relations Act.²⁹²

287. The Racketeer Influenced and Corrupt Organizations Act also uses an "enterprise" standard but not in a context useful for this purpose. *See infra* note 314.

288. *See* 6 Fed. Reg. Empl. Serv. (Law. Co-op) §§ 46:8, 46:22 (1978).

289. *Radio & Television Broadcast Technicians Local Union v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255 (1965) (*per curiam*).

290. *See* 6 Fed. Reg. Empl. Serv. (Law. Co-op) §§ 45:7, 45:93-94 (1982).

291. *See Broadcast Serv. of Mobile*, 380 U.S. at 256.

292. 29 U.S.C. §§ 151 *et seq.* (1982).

The "integrated enterprise" standard for determining "single employer" status serves as the standard for determination of subject-matter jurisdiction. It is also employed in the determination of the appropriate bargaining unit, in the determination of unfair labor practices including the duty to bargain, and in the determination of unfair labor practices involving secondary activity for purposes of the Labor Act.

Developed for the special needs of the labor laws, the "integrated enterprise" standard employs four factors:

- (a) interrelation of operations;
- (b) centralized control of labor relations;
- (c) common management;
- (d) common ownership or financial control.²⁹³

The decisions make it plain that no one of these factors is essential²⁹⁴ and that, of the four factors, integrated operations and centralized control of labor relations are the most important.²⁹⁵ Common ownership and control, which are present in every case involving parent and subsidiary or affiliated corporations, are clearly not decisive.²⁹⁶ There is no mechanical formula, and determinations require a case-by-case factual evaluation.²⁹⁷ In addition to the four-factor standard, the Board has also relied on the group's common public persona²⁹⁸ when deemed a representation that the group constituted a single "integrated enterprise."²⁹⁹

293. This standard, expressed by the Board in its 1956 Annual Report, was subsequently approved by the Supreme Court in *Broadcast Serv. of Mobile*.

294. See *Carpenters Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1276 (9th Cir. 1984).

295. This factor is satisfied where major labor policy decisions are made by a central authority, even though day-to-day control of labor relations at a worker level has been decentralized. See *NLRB v. Carson Cable TV*, 795 F.2d 879, 883-84 (9th Cir. 1986); *NLRB v. Don Burgess Constr., Inc.*, 596 F.2d 378, 385 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979); *Sakrete of N. Cal., Inc. v. NLRB*, 332 F.2d 902, 907 (9th Cir. 1964), *cert. denied*, 379 U.S. 761 (1965).

296. See 21 NLRB ANN. REP. 14-15 (1956).

297. *General Teamsters Local 959 v. NLRB*, 743 F.2d 734, 738 (9th Cir. 1984); *Retail Stores Employees Union, Local 1001 v. NLRB*, 627 F.2d 1133, 1138 (D.C. Cir. 1979); *NLRB v. Steel, Metals, Alloys & Hardware Fabricators*, 460 F.2d 1, 6 (2d Cir.), *cert. denied*, 409 U.S. 1041 (1972).

298. For review of other areas of the law in which use of a common public persona has received attention in legal problems of components of corporate groups, see BLUMBERG: PROCEDURE, *supra* note 8, § 22.05 nn.35-40; BLUMBERG: SUBSTANTIVE COMMON LAW, *supra* note 38, §§ 10.04, 11.08, 13.02, 14.01, 14.02, 19.08, 20.09.

299. *NLRB v. Marinor Inns, Inc.*, 445 F.2d 538 (5th Cir. 1971); *International Union of Operating Eng'rs, Local 428*, 169 N.L.R.B. 184 (1968); 6 Fed. Reg. Empl. Serv. (Law. Co-op) §§ 45:7 n.14, 46.23 (1977 & Supp. 1982).

This approach is functional, not conceptual. It looks to a series of factors throwing light on the degree of interrelationship of the affiliated corporations. Are the businesses of the affiliates economically integrated so as to represent aspects of the same economic enterprise? Are their operations under common control? Do the same individuals act as directors, officers or managers of both affiliates, and, in particular, do they act in the labor relations area of both affiliates? Is control exercised to such an extent as to involve common or intertwined decision-making about business matters, in general, and labor matters, in particular? Do the affiliates present themselves to the market as a single group utilizing the same group persona, trademark, logo, color scheme, and the like? Are the affairs of the two companies characterized by an absence of the arm's-length relation found among nonintegrated companies?

It is noteworthy and surprising that despite this functional standard of enterprise law developed by the Board and accepted by the courts in cases reaching them from the Board, the very same appellate courts in labor relations cases arising directly in the district courts³⁰⁰ continue to employ the traditional conceptual standards of entity law and "piercing the veil jurisprudence" for purposes of determining intragroup liability.³⁰¹

As noted above, the "integrated enterprise" standard has also been employed for purposes of intragroup application of the American employment discrimination statutes³⁰²—Title VII of the Civil Rights Act of 1964³⁰³ and The Age Discrimination in Employment Act.³⁰⁴

The Title VII and ADEA cases widely apply the four factors embraced in the "integrated enterprise" in the same manner as in the labor statute from which the standard was borrowed. Of all the factors, centralized control of labor relations and employment matters has been recognized as the most important factor because it involves

300. Under the bifurcated system of review under the labor laws, certain matters fall within the primary jurisdiction of the National Labor Relations Board whose decisions are directly reviewed by the circuit courts of appeal. The "integrated enterprise" doctrine is applied to this area. Other cases may be brought directly in the district courts subject to appeal to the circuit courts of appeal. The Board plays no role in such cases, and the "integrated enterprise" doctrine is ignored. See BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, § 13.02.

301. See generally BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, at ch. 13.

302. See BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, §§ 14.01-.06.

303. 42 U.S.C. §§ 2000e *et seq.* (1982).

304. 29 U.S.C. §§ 621 *et seq.* (1982).

the very relationship giving rise to the complaint that the statute has been violated. However, even its absence has not been fatal in the presence of the other factors. The focus is on the intertwining of the businesses of the affiliated companies and on the extent of control and participation by the parent (or other affiliate) in the decision-making.³⁰⁵ The "integrated enterprise" standard has also been applied, but less often, in cases arising under the Fair Labor Standards Act.³⁰⁶

E. "Enterprise"

"Enterprise" has served as a standard in at least two American statutes. First, the Fair Labor Standards Act (FLSA) providing for minimum wage and overtime standards applies to all "employers" of employees of an "enterprise" in interstate commerce.

The Act defines "enterprise" as "the related activities performed (either through unified operation or common control) by any person or persons for the common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units."³⁰⁷

The legislative history at the time of the later amendments in 1966 is instructive on the meaning of "enterprise" in the 1966 Act. In discussing these provisions, the congressional committees noted:

[T]he operations through substantial ownership or control of a number of firms engaged in similar types of business activities constitute . . . related activities performed through unified operation or common control within the meaning of the definition of enterprise. The fact that the firms are independently incorporated or physically separate or under the immediate direction of local management, . . . is not determinative³⁰⁸

Thus, the fragmentation of a single business among a number of affiliated corporations collectively conducting an enterprise does not present the problems for imposition of intragroup liability under

305. See BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, § 14.03.

306. See, e.g., *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 327-28 (E.D. Pa. 1984).

307. 29 U.S.C. § 203(r) (1982).

308. H.R. REP. NO. 1366, 89th Cong., 2d Sess. 9 (1966); and S. REP. NO. 1487, 89th Cong., 2d Sess. 7 (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3002, at 3009.

the FLSA that arise under other statutes lacking such an "enterprise" definition. Separate incorporation and entity law are irrelevant, but important issues remain under the FLSA. Application of the Act still requires proof of such matters as the interdependence of operations, the presence of centralized decision-making of significant corporate decisions, the existence of a single source creating and funding the separate entities, or the use of a common persona in dealing with the public.³⁰⁹ On the other hand, the fact that the units are formally distinct and retain control of day-to-day operations has been regarded as no more than "the ordinary attributes of separate incorporation and the management of physically separate units."³¹⁰ Control over the selection and supervision of the local managers is sufficient.³¹¹ Where the necessary interrelation is not shown, a mere parent-subsidiary relationship or the existence of common control is insufficient to support application of the FLSA.³¹²

The significance of this use of "enterprise" is limited. It is an isolated example. Further, application of the Act requires proof of an employer-employee relationship as well. Although the latter relationship has an expansive statutory standard including persons "acting in the interests of an employer," the Court has limited application of the Act to parent corporations exercising substantial control over their subsidiaries.³¹³

The second statute which uses the term "enterprise" is the Racketeer Influenced and Corrupt Organizations Act. However, this statutory definition is not useful for application to contract, tort, and other legal problems of legitimate business organizations.³¹⁴

309. *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 966-71 (5th Cir. 1984), *cert. denied*, 421 U.S. 1174 (1985); *Donovan v. Janitorial Servs., Inc.*, 672 F.2d 528, 530 (5th Cir. 1982); *Brennan v. Veterans Cleaning Serv., Inc.*, 482 F.2d 1362, 1366-67 (5th Cir. 1973); *Shultz v. Mack Farland & Sons Roofing Co.*, 413 F.2d 1296, 1299-1301 (5th Cir. 1969); *Wirtz v. Barnes Grocery Co.*, 398 F.2d 718 (8th Cir. 1968).

310. *Donovan*, 747 F.2d at 970.

311. *Id.* at 970-71; *Shultz*, 413 F.2d at 1300-01. *See also Donovan*, 672 F.2d at 531; *West v. Wal-Mart, Inc.*, 264 F. Supp. 158 (W.D. Ark. 1967).

312. *Hodgson v. University Club Tower*, 466 F.2d 745 (10th Cir. 1972) (parent and subsidiary corporations); *Wabash Radio Corp. v. Walling*, 162 F.2d 391 (6th Cir. 1947); *Ferrer v. Waterman S.S. Corp.*, 70 F. Supp. 1, *reh'g granted*, 76 F. Supp. 601 (D.P.R. 1970); *Wirtz v. Hardin*, 253 F. Supp. 579 (N.D. Ala. 1964), *aff'd per curiam*, 359 F.2d 792 (5th Cir. 1966); *Gerdert v. Certified Poultry & Egg Co.*, 38 F. Supp. 964 (S.D. Fla. 1941) (sister corporations).

313. *See* BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, § 15.02.

314. 18 U.S.C. § 1961 (1982).

F. American Law of Corporate Groups

In many areas of "piercing the veil jurisprudence," variously called the "alter ego" or "instrumentality" or identity doctrine, bordering on enterprise law, such factors as economic integration, managerial structure, administrative and financial interdependence, and use of a common group public persona play an important role, along with control, in determining the boundaries of intragroup rights and duties. Although these cases cover an enormous area of the law and do not as yet reflect a well-defined body of law, they represent the early stages of the development of a law of corporate groups. They provide the basis for still another unifying principle to serve the needs of enterprise law.

Conventional "piercing the veil jurisprudence" combines "control," particularly intrusive exercise of control over the decision-making processes of a subsidiary, with five very different elements to establish a foundation for disregard of the corporate entity: (a) lack of indicia of separate corporate organization such as separate offices, telephone numbers, stationery, plants, employees, or equipment; (b) lack of compliance with corporate formalities, such as failure to hold meetings of directors and shareholders, absence of minutes of meetings, lack of records, books of account, tax returns or reports; (c) lack of adequate capitalization commensurate to the risks and scale of the enterprise being undertaken; (d) group integration (economic integration, administrative interdependence, and financial interdependence); and (e) use of a common group public persona.³¹⁵

Even where such factors have been shown, most, but not all, courts applying "piercing the veil jurisprudence" require some additional proof before the court will disregard the separate entity to impose liability or attribute other legal consequences to the parent or other affiliated corporations. Such courts require proof of some "inequitable" or "fraudulent" or "morally culpable" or "fundamentally unfair" acts of the parent corporation (or controlling share-

The statute combines definition of "enterprise" with an unlawful conduct constituting a "pattern of racketeering activity." For this highly specialized purpose, the statute defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). See BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, § 29.03.2.

315. See BLUMBERG: SUBSTANTIVE COMMON LAW, *supra* note 38, at chs. 6, 10-11, 19-20.

holder) causing injury to creditors. Financial manipulation of the subsidiary's (or controlled corporation's) affairs, damaging to creditors—such as asset-siphoning for the benefit of the parent, asset-shuffling among controlled companies generally, and confusion created by absence of financial records—is perhaps the most frequent type of misconduct satisfying such courts' element of major importance.³¹⁶ Inadequate capitalization is another.³¹⁷ Misrepresentation is a third.

Such disregard of entity of a constituent company of a corporate group and recognition of group liability through "piercing the veil" occurs only in "rare" or "exceptional" cases. Courts exercise their powers of equitable intervention to prevent unacceptable conduct in particularly egregious cases.

In the past, courts widely applied the doctrine indiscriminately without recognizing the fundamental distinctions involved by the different areas of the law involved. "Piercing the veil" was generally very much the same whether the case at hand involved tort, contract, property, tax, jurisdiction, bankruptcy, or federal statutory matters. Along with inconsistency and unpredictability, such indiscriminate use has been one of the most criticized features of the doctrine. There are some signs of change. This is most evident in cases involving federal statutory law³¹⁸ and in a growing recognition of the vital differences between the underlying objectives of the law in tort and contract cases.³¹⁹

Courts are also beginning to become increasingly concerned with the chaotic theoretical content of the doctrine. Thus, in *Mesler v.*

316. See BLUMBERG: SUBSTANTIVE COMMON LAW, *supra* note 38, §§ 10.07, 11.05, 19.09, 20.04.

317. Inadequacy of capitalization is a powerful factor making for liability although traditional "piercing the veil jurisprudence" typically requires other factors as well. See *Fisser v. International Bank*, 282 F.2d 231, 240 (2d Cir. 1960) (no "piercing the veil" case can be found imposing liability solely because of inadequate capitalization); BLUMBERG: SUBSTANTIVE COMMON LAW, *supra* note 38, §§ 19.12, 20.10.

318. See, e.g., *Town of Brookline*, 667 F.2d at 221; *Capital Tel. Co.*, 498 F.2d at 738-39; *Kavanaugh*, 353 F.2d at 717; *Elmas Trading Co.*, 620 F. Supp. at 234; *Firestone Tire & Rubber Co.*, 518 F. Supp. at 1039. See also cases cited *infra* note 323.

319. *Edward Co. v. Monogram Indus., Inc.*, 730 F.2d 977 (5th Cir. 1984); *J-R Grain Co. v. FAC, Inc.*, 627 F.2d 129, 135 n.13 (8th Cir. 1980); *Geletucha v. 222 Delaware Corp.*, 7 A.D.2d 315, 182 N.Y.S.2d 893 (4th Dept. 1959); *Gentry v. Credit Plan Corp.*, 528 S.W.2d 571, 573 (Tex. 1975).

Bragg Management Co.,³²⁰ the California Supreme Court has recently forcefully asserted the principle, which should have been obvious but has been widely ignored, that a disregard of the corporate entity under the doctrine was only for the particular purposes of the case at hand, and not for all purposes.

In *Castleberry v. Branscum*,³²¹ the Supreme Court of Texas commendably attempted to break down "piercing the veil jurisprudence" into a number of different related doctrines turning on the nature of the "inequitable" conduct involved. The Texas court first pointed to cases where the separateness of the corporate identity of the subsidiary (or controlled) corporation had ceased and where restricting liability to the controlled entity would result in injustice; it stated that the "alter ego" label should be restricted to such cases. In addition, it noted numerous other circumstances for "piercing the veil" even though "corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been part of a basically unfair device to achieve an inequitable result." It then specified seven different classes of cases:

- (1) when the fiction is used as a means of perpetuating fraud;
- (2) where a corporation is organized and operated as a mere tool or business conduit for another corporation;
- (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation;
- (4) where the corporate fiction is employed to achieve or perpetuate monopoly;
- (5) where the corporate fiction is used to circumvent a statute;
- and
- (6) where the corporate fiction is relied on as protection of crime or to justify wrong.

Inadequate capitalization was advanced as the seventh type.³²²

It should be evident that the analysis, while helpful, does not go very far. The court has particularized certain types of wrongful conduct without dealing with the fundamental issue of shaping the doctrine to serve the underlying objectives of the law in the particular

320. *Mesler v. Bragg Management Co.*, 39 Cal.3d 290, 702 P.2d 601 (1985). See Comment, *Mesler v. Bragg Management Co., A Dramatic Change in the Application of the Alter Ego Doctrine*, 18 PAC. L.J. 293 (1986).

321. 721 S.W.2d 270 (Tex. 1987).

322. *Id.* at 272 n.3 (footnotes omitted).

area involved in the case at hand. Nor does it grapple with the problems presented by multi-tiered corporate enterprises.

Thus, to establish a more satisfactory level of social control over multinational groups and their constituent companies, enterprise law would have to reach the normal, not the exceptional, aspects of multinational conduct. It would have to rest on the economic reality of the integrated operations of the constituents of the controlled group without regard to the existence of particular occasions of "inequitable" or other "morally culpable" conduct. There are some signs that the law is moving in this direction.

In the area of American statutory law in particular, the "piercing the veil" decisions are increasingly recognizing that the stringent requirements of the traditional doctrine must be significantly relaxed in order to implement statutory objectives and prevent evasion or frustration of the statutory program.³²³

In identifying the possible content of enterprise law, "control" obviously plays a central role. What additional factors are necessary to provide an adequate unifying standard for the attribution of liability and other legal consequences to affiliated companies of the group?

The first two elements of "piercing the veil jurisprudence"—lack of indicia of separate existence and lack of compliance with corporate formalities—reflect absence of legal advice and are overwhelmingly found in small businesses. They rarely arise in cases involving corporate groups and should occupy no significant role in the formulation of enterprise law for corporate groups. While financial misconduct does occur on occasion in corporate groups as in other businesses, it represents a departure from the norm of acceptable financial conduct and similarly is not useful in formulating enterprise law for application to corporate groups generally. The foregoing factors may, of course, provide their own basis for imposition of intragroup liability but should not be a necessary part of any general principle.

Thus, if enterprise law is to emerge from its unsystematic and fragmentary beginnings in American law and be something other

323. See BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, § 2.05.3. See also, e.g., *United States v. Advance Mach. Co.*, 547 F. Supp. 1085, 1092-94 (D. Minn. 1982) (corporate entity can be disregarded if failure to do so would allow corporate device to be used to circumvent the statutory scheme); *United Paperworkers Int'l Union v. Penntech Papers, Inc.*, 439 F. Supp. 610, 620-21 (D. Me. 1977), *aff'd sub nom. United Paperworkers Int'l Union v. T.P. Property Corp.*, 583 F.2d 33 (1st Cir. 1978) ("Federal policies are not to be defeated by [relying] on the impenetrability of the corporate veil.").

than a variant of "piercing the veil jurisprudence," formulation of an enterprise standard for corporate groups would have to build on the elements of "control" supplemented by such factors increasingly recognized in the cases as economic integration, administrative and financial interdependence, and utilization of a common public persona. These are the very factors that overwhelmingly characterize the modern transnational corporation and thereby provide a sound basis for enterprise law of general application. Such a standard would obviously fall somewhere between the all-inclusive reach of the "control" standard and the too limited sphere of the "unitary business" doctrine.

While resolution of the conflicting factors at work is not easy, the development of a general enterprise law and prevention of lawyers' use of corporate structure to externalize costs³²⁴ seem sufficiently important to offset the adverse impact on risk taking. However, further evolution of the statutory and case law and further ripening of the problem and better understanding of the costs and consequences lurking in the alternatives should ultimately permit a more informed resolution of the problem.

This is a dynamic area of law. Unsatisfying as it is not to have a clear blueprint for the future development of enterprise principles to deal with the profound problems presented by corporate groups, the present level of understanding is still inadequate. In terms familiar to the judiciary, the issue is not "ripe" for final doctrinal definition. However as previously emphasized, the factors of control, economic integration, administrative and financial interdependence, and utilization of a common public person considered against the background of the underlying policies and objectives of the law in the area in question undoubtedly play a central role in any final resolution.

G. Enterprise Law: Supplement to Entity Law or Universal Rule?

A fundamental remaining issue is whether enterprise law—whether resting on "control" or "enterprise" or "economic entity"—should replace entity law for all purposes, or whether entity law

324. Products liability lawyers advise segregation of group activities in subsidiary companies exposed to such liability as a technique to reduce the possibility of group liability. See Heitland, *Survival of Products Liability Claims in Asset Acquisitions*, 34 BUS. LAW. 489, 498 (1979); Kaden, *Practitioner's Guide to Treatment of Seller's Product Liabilities in Asset Acquisitions*, 11 U. TOL. L. REV. 1, 41-42 (1978); Schwartz, *Product Liability, Corporate Structure and Bankruptcy: Toxic Substances and the Remote Risk Relation*, 14 J. LEG. STUD. 689, 717 (1985).

with at least its "core" attributes of the corporate personality should continue to co-exist in a limited area with some form of enterprise law.

1. Enterprise Law as a Universal Rule

At the present time, consideration of enterprise law as a universal rule of law to replace entity law in the case of corporate groups is not realistic. Entity law underlies our legal system. If enterprise law were ever to be universal, such a monumental change would manifestly be feasible only in the distant future.

Abandonment of entity law and substitution of enterprise law to determine even such "core" corporate attributes as capacity to sue and be sued, to contract, to hold and to transfer property, and to exist perpetually would present the most difficult problems and defy contemporary solution in national legal systems. From a global perspective, universal reliance on enterprise law is also impractical in a world with national legal systems overwhelmingly resting on entity law. Enterprise law as a universal rule would require a world legal order to develop legal rules for worldwide groups. Piecemeal national introduction of unconditional enterprise law would inevitably lead to serious conflict between such countries and other countries continuing to be wedded to entity law. Extraterritorial application of enterprise law by the home countries of parent corporations of groups determining the fundamental legal rights and obligations of constituent companies all over the world, irrespective of the national policies of host governments, would produce international confrontation.

Entity law, accordingly, may be expected to continue for the indefinite future. The realistic question is the extent to which it may be supplemented by enterprise law as the corporate law evolves. In the development of enterprise law as a supplement to entity law, two theoretical approaches are possible: (a) a more sweeping supplemental approach utilizing enterprise law to impose general group liability with respect to *all* duties and obligations of *all* constituent companies of the group; and (b) a more limited selective approach utilizing enterprise law only in restricted areas of the law.

2. General Utilization of Enterprise Law for Imposition of Group Liability for Group Obligations

An alternative to enterprise law as a universal rule supplanting entity law in all respects is a supplemental approach in which equity

law survives but is subject to enterprise law in particular areas. One variation might be called the general supplemental approach. Under this approach, entity law would continue unchanged insofar as substantive and most procedural *rights* are concerned. This area is not controversial and the continuance of entity law for this purpose should present no problems. However, in the area of corporate *duties*—the area of overwhelming concern in corporate law today—enterprise law would wholly replace entity law. The corporate group would be held to stand behind every act of every one of its constituent companies. Group assets would be available to pay group liabilities. Limited liability for subsidiaries would come to an end. Economic organization, not legal forms, would prevail. Utilization of a particular form of corporate structure, such as the organization of a subsidiary rather than a branch, would no longer produce different legal results.

This broad policy is essentially the approach utilized by the Federal Republic of Germany in the *Konzernrecht*³²⁵ and by the European Economic Community in its proposed Ninth Directive for Harmonization of Company Law³²⁶ and its proposal for a European Company law (*Societas Europea*).³²⁷

In the area of contract law, such a system need not mean the end of subsidiary obligations not binding on the parent. Parties could continue to bargain over credits. Non-recourse would merely become a more complex concept. Entity law presumptively excludes personal liability for the borrower and requires the creditor to look exclusively to designated assets. In a system of enterprise law, by contrast, the parties would have to contract expressly in order to achieve restriction of recourse to the group component dealing with the lender while providing for non-recourse against the parent corporation or other affiliated companies of the group.

325. Law of Sept. 6, 1965, BGBI 1089 (1965); Common Mkt. Rep. (CCH), German Stock Corporation Act (F. Juenger & L. Schmidt trans. 1967). See BLUMBERG: BANKRUPTCY, *supra* note 39, § 17.11, app. 747-81.

326. C.E.E. Doc. No. XV 593/75-E, arts. 7, 29 (draft document). An English version appears in Bohlhoff & Budde, *Company Groups—The EEC Proposal for a Ninth Directive in the Light of the Legal Situation in the Federal Republic of Germany*, 6 J. COMP. BUS. & CAP. MKT. L. 163, 181-92 (1984). See BLUMBERG: BANKRUPTCY, *supra* note 39, at app. 789-94.

327. Proposal for a Council Regulation on the Statute for European Companies, Bull. Eur. Comm. Supp. 4/75, art. 239 (May 13, 1975). See BLUMBERG: BANKRUPTCY, *supra* note 39, at app. 783-88.

In such a system of modified enterprise law, there would be no need for general attribution of *substantive* rights of constituent companies to each of the affiliated companies within the group. That would serve no useful purpose. However, as in existing American law in some areas of *procedure*, an attribution of certain procedural rights and duties to parent and other affiliated companies of the group would continue to implement more effectively the underlying policies and objectives of the law in the particular area. This is evident today in areas such as discovery, *res judicata*, collateral estoppel, and injunctions.³²⁸ In such restricted procedural areas, enterprise law would supplement entity law in the very way it is currently occurring, or beginning to occur, in the developing American law of corporate groups.

It should be recognized that reliance on enterprise law to replace entity law for the imposition of duties, however serviceable for groups operating in only one country, would not be without problems when applied to far-flung multinational groups. The courts of each host country around the world in which a group operated might seek to impose the duties of a local subsidiary directly (or through extension of bankruptcy proceedings) upon its parent corporation and affiliated sister subsidiaries located anywhere in the world. This is exactly what transpired through the application of enterprise law in the celebrated *Deltec* case.³²⁹

This forbidding prospect, however, loses much of its frightening mien when one takes into account the vast difference between obtaining a judgment in one nation and seeking to enforce it in another. While a third world country may seek to impose liability for the debts of a local affiliate upon affiliated group members around the world, enforcement of such a judgment might still be feasible only within the borders of the host country. Thus, as in the *Deltec* litigation itself,³³⁰ other countries might refuse to recognize the judgment. Such a refusal would be particularly likely in the case of countries still

328. See BLUMBERG: PROCEDURE, *supra* note 8, at ch. 10, 11 & 15.

329. *Compania Swift de La Plata, S.A. Frigorifica s/convocatoria de acreedores*, 19 J.A. 579, 151 La Ley 516 (1973). See BLUMBERG: BANKRUPTCY, *supra* note 39, § 17.16; Gordon, *Argentine Jurisprudence: The Parke Davis and Deltec Cases*, 6 LAW AM. 320 (1974); Gordon, *Argentine Jurisprudence: Deltec Update*, 11 LAW AM. 43 (1979).

330. *Deltec Banking Corp. v. Compania Italo-Argentina de Electricidad, S.A.*, 171 N.Y.L.J. 18, at col. 1, Apr. 3, 1974 (Sup. Ct.), *aff'd mem.*, 46 A.D.2d 847, 362 N.Y.S.2d 391 (1st Dep't 1974), 68 Am. J. Int'l L. 741 (1974).

wedded to entity law. Even where the home country or forum state did recognize enterprise law in some form, such foreign judgments would still have to satisfy the traditional requirements of international law for enforcement of foreign judgments.³³¹

Since the traditional debate over corporate personaltiy assumes entity law, it has little to contribute to consideration of whether entity law should be generally replaced by enterprise law with respect to the obligations of constituent companies of corporate groups so as to impose on parent and affiliated companies liability for all the duties and obligations of every affiliate of the group. The modern "strong entity" theory of the corporation that looks upon it as an organic institution with an existence transcending its changing shareholders readily describes the modern large corporation with its thousands, tens of thousands, or even hundreds of thousands of public shareholders. However, in a world of corporate groups, it does not assist in a competing evaluation of entity and enterprise law.

Such an evaluation involves an analysis of the costs and benefits of the existing recognition of multiple layers of limited liability to the parent corporation and sub-holding companies insulating them from the debts of dozens, if not hundreds, of junior companies of the group³³² even where they are all engaged in the collective conduct of a common enterprise in which any one subsidiary is merely a controlled fragment. However, insofar as public investors in the parent corporation of the group were concerned, an enterprise view treating the group as the legal unit would make no change in their insulation from liability.³³³

Application of enterprise law imposing group liability on corporate groups would not be without its costs.

The elimination of limited liability for subsidiary companies of corporate groups should on the margin theoretically lead to the deferral of some risky undertakings that might otherwise have been undertaken by a parent corporation protected by limited liability. Any such loss of new investment would be undesirable. However, the extent to which the elimination of intra-group limited liability

331. See BLUMBERG: BANKRUTPCY, *supra* note 39, §§ 17.23, 17.24.

332. See BLUMBERG: PROCEDURE, *supra* note 8, at Table 5; Hadden, *supra* note 9, at 274.

333. Since the elimination of intragroup limited liability would prevent the group from externalizing unsatisfied subsidiary obligations in the event of the insolvency of a subsidiary, it would make groups as a whole less profitable and, accordingly, indirectly affect shareholders.

would deter some new investment by the parent corporation requires further inquiry into the type of subsidiary obligation in question: institutional debt, trade debt, employee obligations, tax and statutory obligations, and tort (and other involuntary) obligations. These present very different problems.

So long as bargains over credit are permitted and the subsidiary can borrow on its own credit without recourse to the group, the change in legal standards should have no impact on the economic position of the subsidiary or the parent insofar as institutional and other negotiated debt is concerned.

Insofar as trade debt is concerned, major purchases, like borrowed debt transactions, could contractually exclude liability for parent corporations. Such a provision might well become standard boilerplate in the purchase order forms of such corporations and thereby introduce credit as one of the terms of the bargain to be negotiated. Only minor trade purchases where such use of purchase order forms and reliance on such express exclusionary provisions would be impractical would present increased risk for the parent corporation desiring to minimize its own liability. This is not a significant area of concern.

The impropriety of the use of subsidiary corporations as techniques for avoiding obligations to employees should be clear. If argument were needed in support of such an observation, it would be readily found in the public policy underlying the statutes making non-payment of wages criminal,³³⁴ imposing liability for payment of wages on shareholders,³³⁵ assigning a high priority to wage claims in the distribution of assets in bankruptcy,³³⁶ and in providing for enterprise pension termination and withdrawal liability for controlled groups in the Employees Retirement Income Security Act (ERISA).³³⁷ Accordingly, to whatever extent the development of enterprise law would prevent avoidance of employee obligations, it would be socially useful rather than disadvantageous.

The adoption of rules of legal liability to permit a corporate group to escape liability for unpaid taxes of subsidiaries conducting

334. *E.g.*, CONN. GEN. STAT. § 31-71g (1989); N.Y. LAB. LAW § 198-a (McKinney 1986).

335. N.Y. BUS. CORP. LAW § 630 (McKinney 1963 & Supp. 1989); WIS. STAT. ANN. § 180.40(6) (West 1957).

336. 11 U.S.C. § 507(a)(3) (1982).

337. 29 U.S.C. §§ 1301(b)(1), 1362, 1381 (1982). *See* BLUMBERG: GENERAL STATUTORY LAW, *supra* note 10, §§ 16.04, 16.05.

part of the group enterprise is similarly not likely to elicit any significant support as desirable social policy. Furthermore, in the law of regulated industries, where the Congress has established a comprehensive regulatory program not expressly restricted to the directly regulated company, construction of the underlying statute on an entity rather than an enterprise basis risks weakening the effectiveness of the regulatory program, frustrating the purpose of the regulation, and permitting ready evasion.

Torts present a more complex picture, but the result is the same. Potential tort liability could be a major economic problem because removal of the limited liability of parent corporations and sub-holding companies with respect to tort liability for the activities of subsidiaries could be a serious disincentive to new group investment. However, such limited liability of the parent is deemed attractive only because it permits the group to externalize costs of the enterprise to third party victims. Such externalization of costs is almost universally regarded as highly undesirable.³³⁸ Thus, even economists generally supporting the social usefulness of limited liability concede that in the case of corporate groups, the use of limited liability is unsound insofar as tort claimants and other involuntary creditors are concerned.³³⁹

Thus, in the end, concern over the elimination of limited liability as costly and undesirable because of its potential for reduced investment must rest mainly on the additional group costs represented by the minor trade debts of an insolvent subsidiary. These are only an insignificant factor in the total picture.

Whatever its theoretical appeal, however, a radical change from entity law to a general imposition of group liability for all group obligations would inevitably require legislative action. It would involve a political decision involving an issue that in the United States is not as yet on the political agenda. Accordingly, it is of limited immediate practical interest.

338. See *Bonee v. L & M Constr. Chems., Inc.*, 518 F. Supp. 375, 381 (M.D. Tenn. 1981). See also Calabresi, *supra* note 236; Klemme, *supra* note 236; Priest, *supra* note 236.

339. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 372 (3d ed. 1986); Clark, *The Regulation of Financial Holding Companies*, 92 HARV. L. REV. 789, 875 (1979); Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 103, 107, 112 (1985).

3. Selective Utilization of Enterprise Law

The general approach described above would require legislative enactment. The alternative of expansion of entity law to include some form of enterprise law through judicial evolution inevitably means a more selective approach. The judicial decisions to date constituting the growing American law of corporate groups have already taken the first steps to such a selective approach. This is another alternative.

Contemporary concerns with corporate groups, whether or not multinational, are evident in specialized areas of particular tension. These are the areas in which judicial development of enterprise law has been occurring. Group liability as a result of enterprise law has great contemporary relevance in a number of areas: in statutes, expansive enterprise construction in order to achieve effective systems of regulation; in torts, to prevent externalities and to match costs with the enterprise creating them; and in bankruptcy, to achieve equality and fairness in the distribution of a debtor's assets to creditors. Similarly, in certain areas of procedure, attribution both of rights and of legal consequences on a group basis has already achieved some recognition.

As I have attempted to show in the volumes comprising the series on *The Law of Corporate Groups*, a selective legal solution to the problem of the attribution of the legal consequences of the activities of one controlled company to the others in the group requires a multi-dimensional analysis. Such an analysis requires consideration of the policies and objectives of the law in the area under consideration in light of the structure, functioning, and other aspects of the particular group in the case. Enterprise law has been utilized to supplement entity law where attribution or imposition of such legal consequences would more effectively implement such policies and objectives. Imposition of liability in matters involving substantive common law differs fundamentally from procedural problems. Entirely different policies and objectives are involved. Further, contract matters differ from tort, matters involving genuine bargains over credit differ from matters lacking such bargains, and even more so from matters not involving bargains at all, particularly involuntary matters such as torts. Similarly, liability in tort or contract differs from the recognition of rights in property. Finally, cases involving the application of statutes raise issues very different from those involved in common law controversies; such cases require courts to implement statutory objectives and to prevent the frustration or

evasion of regulatory programs, rather than to allocate costs between private parties.

Even a selective new law of corporate groups would have a very different content from traditional "piercing the veil jurisprudence," although it would serve much the same strategic purpose in the corporate legal system. It would provide a framework in which the legal system committed to the entity principle of corporate law as a general rule could adapt on a case-by-case basis appropriate principles to achieve socially acceptable results in those areas of law where entity law as applied to corporate groups no longer serves the needs of society.

VI. CONCLUSION

The elaborate debate over the nature of the corporate personality over the past century is of limited usefulness in the formulation of a new doctrine of "control" or "economic entity" or "enterprise" to supplement the traditional concepts of entity law. In three major respects, this debate is a prisoner of the experience of the past because it assumes the continuation of entity law in its present form, without its further evolution or replacement. It ignores the realities of the times in failing to consider the crucial significance of corporate groups in the global economy. Finally, it is concerned primarily with the *rights* of the corporation, at a time when the most pressing societal concerns involve the imposition of *duties* on corporations.

The judicial decisions involving the nature of the corporate personality also have only limited utility. As noted, the decisions are hopelessly inconsistent insofar as some grand view of the "true" nature of the corporation is concerned.

However, the traditional debate can usefully be seen as an essential first step in the judicial formulation of a new supplementary enterprise law. Further, the judicial decisions beginning to grapple with the problems presented by corporate groups have unmistakably demonstrated that control, economic integration, administrative and financial interdependence, and use of a common group persona are the fundamental building blocks for the development of supplementary enterprise law. In the common law tradition, such judicial experience supports the feasibility of a gradual case-specific solution to the serious problems pertaining to corporate groups.

Each of the classical theories in the traditional debate of the corporate personality captures *some* of the attributes of the corporation. None captures them all. In this, there is a parallel in science—the

protracted debate over the nature of light. After decades of controversy over whether light consisted of waves or of particles—a debate not entirely dissimilar to that over the nature of the corporate personality—light was finally accepted as having features of both, particles in the form of waves.³⁴⁰ Similarly the corporation is simultaneously the creature of the state, a complex of contracts among the associated parties, and an institution with a real life of its own, distinct from its members. Thus, although useful in highlighting some aspect of the corporation—whether the essential predicate of state action; or, the interests of shareholders reflected in corporate operations; or, the independent institutional quality of the modern corporation—each theory is inadequate in itself to provide a comprehensive understanding of the corporation as contemplated in entity law. In addition, and most seriously, the theories do not even attempt to deal with the consequences of the newer world of corporate groups.

It is neither surprising nor disturbing that the law has been unable to emerge with a generally accepted unified corporate theory embracing all of the elements discussed—state action, contract and “real” entity—in the traditional discussion of entity law or of “control” or “unitary business” or “integrated enterprise” or some other comprehensive standard of enterprise law. General concepts about the nature of the corporate personality should not be expected to determine the outcome of individual cases.³⁴¹ In the place of unyielding reliance on universal concepts as the decisive factor in judicial analysis, the law should respond flexibly in responding to the infinite varieties of corporate existence presented by modern economic society. It should be primarily concerned with the interests and values represented by the parties in the particular controversy and should evaluate whether one approach or the other will more effectively implement the underlying objectives of the law in the particular area in question. In this process, transcendental concepts can usefully provide frames of references for the examination of legal problems, but should not rigidly control the outcome. Simplicity, of course, has its advantages, but it also has severe limitations.

340. See N. HERBERT, *QUANTUM REALITY: BEYOND THE NEW PHYSICS* 66-67 (1985); A. MARCH & I. FREEMAN, *THE NEW WORLD OF PHYSICS* 125-31 (1962).

341. As noted, the indiscriminate universal application of the closely allied concepts involved in “piercing the veil jurisprudence” irrespective of the nature of the controversy has properly been much criticized and is being increasingly rejected. See BLUMBERG: *SUBSTANTIVE COMMON LAW*, *supra* note 38, § 6.01.

The debate of the past over the nature of the corporate personality has focussed on the implications of the theories to the attribution of certain rights, particularly constitutional rights, to the corporation in particular cases. In that process, the existence of the corporate entity, with its traditional "core" attributes, has been unchallenged and the significance of corporate groups, which did not exist during most of this incubation period in the development of the American law, ignored.

Since then, the economic society has dramatically changed. Corporate structure has evolved from the simple model of the corporation conducting a small business for shareholder-investors to the complex world of corporate groups with parent corporations and sub-holding companies and their subsidiaries (in which the senior companies in the complex are shareholders) all collectively conducting fragments of a world enterprise, divided and subdivided among the constituent companies of the group to serve the convenience of the group.

As a result, the legal system developed long ago to deal with the problems and to realize the objectives of those very different times has become doubly anachronistic. It no longer responds effectively to the very different form of corporate organization within each country's own borders. In addition, national legal systems based on entity law have been confronted with newer problems arising from the development of the corporation from its local origins to a multinational force. Nation states are now forced to deal with multinational corporations.

Newer judicial concepts of corporate personality reflecting group operations need not uproot the historic structure of entity law that has been the foundation of corporation law for centuries past, at least at the present stage in the development of the law. It seems more productive, instead, to apply an enterprise view of corporate personality insofar as corporate groups are concerned on a case-by-case basis. Selective use of enterprise law furnishes the legal framework for the imposition of duties and obligations of individual constituents of the group on its affiliated constituent companies as appropriate for the more effective implementation of the underlying policies and objectives of the law in the particular area involved in the case at hand.

As the relevant case law emerges, over the decades to come, succeeding generations of legal scholars will have to decide whether the development of enterprise law has ripened to the point where it will then at last be productive to consider a radical contemporary theory of the corporate personality to replace entity law. Then,

perhaps there will come a time when enterprise law will serve as the fundamental principle of corporation law governing corporate groups. Such a development would clearly require a world legal order in order to permit its application to each of the subsidiaries of worldwide multinational groups.³⁴²

342. A substantially condensed version of this article is being presented as a paper on *The Corporate Personality in American Law: A Summary Review* at the XIII International Congress of Comparative Law; it will appear in the supplement to 38 Am. J. Comp. L. (1990).

