THE FALLACY OF COMPLETE CORPORATE SEPARATENESS

Mariana Pargendler*

Legal discourse about business entities has displayed a logical fallacy regarding the consequences of corporate separateness. A fallacy of equivocation occurs when a term is used with one meaning in the premise and with another meaning in the conclusion. Legal personality undoubtedly provides a separate—in the sense of distinct—nexus for the imputation of legal rights and duties. This, however, does not mean that corporations are or should be treated as legally separate—in the sense of insulated—from shareholders in all contexts. Moreover, legal insulation between corporations and shareholders for some purposes (e.g., limited liability) does not necessarily entail insulation for other purposes (e.g., the application of a contractual or regulatory scheme). In effect, there is significant, if varying, permeability between the legal spheres of corporations and shareholders across different areas of law, including corporate law. Rather than a nonconductor that always isolates the legal spheres of the corporation and related parties, legal personality operates as a semi-permeable membrane. Nevertheless, the recurrent fallacy of complete corporate separateness has obscured and hampered the development of legal doctrine in several contexts.

---

* Full Professor of Law, Fundação Getulio Vargas School of Law in São Paulo; Global Professor of Law, New York University School of Law. I am grateful to Henrique Arake, George Georgiev, Carlos Portugal Gouvêa, Burt Neuborne, Elizabeth Pollman, Mario Schapiro, Richard Squire, Robert Thompson, and participants in the workshop on "Hidden Fallacies in Corporate Law and Financial Regulation," the Bocconi-Oxford Junior Scholars Workshop on Corporate Law and Finance, the Droit & Croissance Workshop, and the Wharton Legal Studies Seminar for helpful comments and suggestions.

Table of Contents

Introduction . . . 3
I. The Fallacy in Action . . . 4
II. The Different Meanings and Manifestations of Separateness . . . 7
A. Legal Capacity . . . 7
B. Asset Partitioning . . . 7
C. Regulatory Partitioning . . . 9
III. Exceptions to Corporate Separateness . . . 9
A. Asset Departitioning (Veil Piercing and Other Techniques) . . . 10
B. Regulatory Departitioning (Veil Peeking) . . . 11
IV. Conclusion . . . 17

Introduction

Legal discourse has often displayed a logical fallacy regarding the consequences of the separate legal personality attributed to corporations. The fallacy of equivocation occurs when a term is used with one meaning in the premise and with another meaning in the conclusion.[1] Legal personality undoubtedly provides a separate—in the sense of *distinct*—nexus for the imputation of legal rights and duties. However, this does not mean that corporations are or should be treated as legally separate—in the sense of *insulated*—from shareholders in all contexts.

Scholars and practitioners have repeatedly engaged in the fallacy of equivocation in discussing the legal consequences of corporate separateness. Because the corporation is a separate legal person under the law, the argument goes, shareholders must enjoy limited liability for corporate obligations, the jurisdictional connections of a subsidiary must not be imputed to its corporate parent, and corporations must not enjoy constitutional protection as vessels for the exercise of shareholder constitutional rights. Although prevalent in writings of prominent scholars, this type of argument is a logical *non sequitur* and does not describe the actual functioning of the law.

Corporations are actually treated as legally connected to shareholders, especially controlling shareholders, across a wide variety of legal rules and areas of law, including corporate law. The creation of a separate nexus for the imputation of rights and duties—a new "right-and-duty bearing unit,"[2] to use Frederic Maitland's terminology—does not and should not beget complete legal insulation from other persons. This should be unsurprising given the legal treatment of natural persons: although different human beings are also recognized as separate persons under the law, their legal spheres are also connected in various ways. Many jurisdictions impose vicarious liability on parents for torts committed by their children, as well as on employers for wrongful acts of employees during the scope of employment; spouses, close family, and business partners are often not deemed independent from one another in the assessment of potential conflicts of interest. Examples of interconnectedness abound.

Justice Oliver Wendell Holmes once argued that a leading purpose behind the use of corporations "is to interpose a nonconductor, through which in matters of contract it is impossible to see the men behind."[3] While such

[1] For an example of the fallacy of equivocation outside of the legal context: "A traffic jam is a real headache. Two aspirins will make a headache go away. Therefore, two aspirins will make a traffic jam go away."

[2] Frederic Maitland, *Moral Personality and Legal Personality*, 6 J. Compar. Leg. & Int'l L. 192, 193 (1905).

[3] Donnell v. Herring-Hall-Marvin Safe Co., 208 U.S. 267, 273 (1908).

insulation—which I call regulatory partitioning[4]—is indeed a key driving force behind the creation of corporations, it does not apply equally in all contexts. Another decision by Justice Holmes years later discounts the relevance of this separation in order to implement the policy of a statute.[5] A more apt metaphor is in order: rather than a nonconductor, legal personality operates as a semi-permeable membrane.

The remainder of the exposition is structured as follows. Part I unpacks the different meanings and functional dimensions of corporate separateness, distinguishing between the creation of a new nexus for the imputation of rights and duties (legal capacity), the separation between the entity's assets and those of its members (asset partitioning), and the separation of the legal sphere of the entity and that of its members for purposes of the imputation of legal consequences (regulatory partitioning). Part II shows how legal personality coexists with a multitude of exceptions to asset partitioning and especially regulatory partitioning across different areas of law. Part III demonstrates the prevalence of the fallacy of equivocation in high-profile legal contexts. Part IV concludes that the degree of legal insulation afforded by corporate personhood is not a matter of logical syllogism, but of policy choices across different substantive questions.

I. The Fallacy in Action

Consider the following arguments advanced by prominent scholars and practitioners in amici briefs or commentaries to high-profile cases before the U.S. Supreme Court:

---

[4] *See* Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. Pa. L. Rev. 717 (2021) [hereinafter Pargendler, *Veil Peeking*]; Mariana Pargendler, *Regulatory Partitioning as a Key Function of Corporate Personality*, *in* Research Handbook on Corporate Purpose and Personhood 263 (Elizabeth Pollman & Robert B. Thompson eds., 2021) [hereinafter Pargendler, *Regulatory Partitioning*].

[5] Flink v. Paladini, 279 U.S. 59, 62–63 (1929). The case in question concerned the application of a statute limiting the liability to shipowners to the shareholders of a corporation that owned the ship. The opinion by Justice Holmes concludes as follows:

> For this purpose no rational distinction can be taken between several persons owning shares in a vessel directly and making the same division by putting the title in a corporation and distributing the corporate stock. The policy of the statutes must extend equally to both. In common speech the stockholders would be called owners, recognizing that their pecuniary interest did not differ substantially from those who held shares in the ship. We are of opinion that the words of the acts must be taken in a broad and popular sense in order not to defeat the manifest intent. This is not to ignore the distinction between a corporation and its members, a distinction that cannot be overlooked even in extreme cases . . . .

Id. (citing Behn, Meyer & Co. v. Miller, 266 U.S. 457, 472 (1925)).

> "Because of the separate legal personality of corporations and shareholders, the constitutional interests of shareholders should not be projected onto the corporation."[6]

> "The essence of a corporation is its "separateness" from its shareholders. It is a distinct legal entity, with its own rights and obligations, different from the rights and obligations of its shareholders. . . . Because the corporation is a separate entity, its shareholders are not responsible for its debts."[7]

> "[L]imited liability is a consequence of the entity theory of the corporation . . . ."[8]

> "[T]he benefit of corporate organization is that corporations are treated as separate legal entities, which means that investors enjoy limited liability."[9]

> "Rather, formally distinct corporations should presumptively be regarded as separate for jurisdictional purposes. Commercial and investment activity in this country relies on a widely shared understanding, now firmly embodied in law, that parent and subsidiary corporations possess separate juridical personalities. See *Anderson*, 321 U.S. at 362 ("Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.")."[10]

The fallacy of equivocation regarding corporate separateness hinges on the polysemy of the term "separate."[11] The adjective separate has different meanings, but two of them are most relevant for our purposes. *Separate as distinct with independent existence*[12] is not to be confused with *separate as*

[6] Brief of Amici Curiae Corporate Law Professors in Support of Respondents at 3, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Masterpiece Cakeshop Amicus Brief].

[7] Amicus Curiae Brief of Corporate and Criminal Law Professors Supporting Petitioners at 2, 6, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (Nos. 13-354, 13-356) [hereinafter Hobby Lobby Amicus Brief].

[8] Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 Wis. L. Rev. 451, 480 (2019).

[9] Joshua C. Macey, *What Corporate Veil?*, 117 Mich. L. Rev. 1195, 1213 (2019).

[10] Brief for the United States as Amicus Curiae Supporting Petitioner at 29, Daimler AG v. Bauman, 571 U.S. 117 (2014) (No. 11-965). For a critique arguing against a "sacrosanct principle of 'corporate separateness,'" *see* Burt Neuborne, *General Jurisdiction, "Corporate Separateness," and the Rule of Law*, 66 Vand. L. Rev. En Banc 95, 100 (2013).

[11] According to the Oxford English Dictionary (2023), separateness is "[t]he quality, state, or fact of being separate."

[12] One meaning of separate is precisely "II.3.a. Withdrawn or divided from something else so as to have an independent existence by itself." *Id.*

insulated or impermeable.[13] One thing is to say that, as a legal person, a corporation constitutes a distinct nexus for the imputation of legal rights and duties, which is indeed the very definition of legal personality.[14] Another is to argue that, by logical imperative, the legal sphere of the corporation must be completely detached from that of shareholders in all respects.

On top of the fallacy of equivocation, there is frequent resort to all-or-nothing and slippery slope fallacies, with the suggestion that a corporation may not logically provide legal insulation to shareholders for some purposes, but not for other purposes, or disaster will ensue:

> "Petitioners want to argue, in effect, that the corporate veil is only a one-way ratchet: its shareholders can get protection from tort or contract liability by standing behind the veil, but the corporation can ask a court to disregard the corporate veil whenever the company is required by law to act in a way that offends a shareholder's beliefs. Petitioners cannot have their cake and eat it too."[15]

> "Allowing a corporation, through either shareholder vote or board resolution, to take on and assert the religious beliefs of its shareholders in order to avoid having to comply with a generally-applicable law with a secular purpose is fundamentally at odds with the entire concept of incorporation. Creating such an unprecedented and idiosyncratic tear in the corporate veil would also carry with it unintended consequences, many of which are not easily foreseen. For example, adopting a 'values pass-through' theory or 'reverse veil piercing' in this case could make the raising of capital more challenging, recruitment of employees more difficult, and entrepreneurial energy less likely to flourish."[16]

The point here is not to endorse or counter any particular attribution of constitutional and statutory rights to corporations in U.S. Supreme Court jurisprudence and beyond. There are strong legal and policy reasons not to attribute shareholder rights to corporations, and especially for-profit corporations, in a wide variety of contexts.[17] Instead, the point is that legal personality is logically and functionally compatible with different levels of legal

---

[13] Other meanings of separate are "II.2.a. Parted, divided, or withdrawn from others; disjoined, disconnected, detached, set or kept apart" and "II.2.b. Of persons, a dwelling, etc.: Withdrawn from society or intercourse; shut off from access." *Id.*

[14] Maitland, *supra* note 2; *see also* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW 50 (Bonnie Litschewski Paulson & Stanley L. Paulson trans.) (1997).

[15] Masterpiece Cakeshop Amicus Brief, *supra* note 6, at 11.

[16] Hobby Lobby Amicus Brief, *supra* note 7, at 7–8.

[17] For a defense of a tailored approach to this topic, *see, e.g.*, Margaret Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

permeability to the legal rights, duties and status of related persons. As we shall see below, the fallacy of complete separateness does not reflect the operation of the legal system, for good functional reasons.

II. The Different Meanings and Manifestations of Separateness

A. Legal Capacity

Separate legal existence allows a person to hold assets in her own name, to assert rights and assume obligations in her own name, and to sue and be sued in her own name. As a legal person, the corporation can do all of these things. The same is true of natural persons. Unlike ancient regimes, modern legal systems recognize each human being as a separate legal person under the law.[18] For this reason, Austrian jurist Hans Kelsen has described legal personality of both legal and natural persons as essentially a "point of imputation."[19]

Given the corporation's distinct legal existence and capacity, the actual insulation between the legal sphere of the company and that of shareholders can take different forms and serve distinct functions. Asset partitioning is the separation between the assets of the corporation and those of shareholders for purposes of shareholder and creditor rights. Regulatory partitioning is the separation between other legal rights, duties and characteristics of the corporation and shareholders beyond the segregation of assets. Moreover, both asset partitioning and regulatory partitioning have different manifestations and gradations depending on the type of organization and the rule of law in question.

B. Asset Partitioning

Henry Hansmann and Reinier Kraakman have famously argued that the provision of asset partitioning—the separation between the assets of the entity from those of its members—is "the essential role of organizational law."[20]

[18] Henry Hansmann, Reinier Kraakman & Richard Squire, *Incomplete Organizations: Legal Entities and Asset Partitioning in Roman Commerce*, *in* 1 Roman Law and Economics: Institutions and Organizations 199, 201 (Giuseppe Dari-Mattiacci & Dennis P. Kehoe eds., 2020) ("[T]here is nothing inevitable about endowing individual human beings with the powers to own assets and make contracts. Rather, individuals have these powers only if the law recognizes them. And often it has not. Ancient Rome is an example.")

[19] Kelsen, *supra* note 14, at 50.

[20] Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387, 387 (2000). For additional works on the importance of asset partitioning as the critical role of organizational law, see, for example: Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1333 (2006); George Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and*

In this view, legal personality is but one legal mechanism to achieve asset partitioning, which also results from legal institutions such as marriage, security interests, and other forms of organization that formally lack legal personality, such as the trust.[21] Moreover, asset partitioning is not a unitary category, but a broad genus with different species.

First, the most fundamental element of *entity shielding* protects the corporation's assets from shareholder creditors. Second, the celebrated attribute of *limited liability* shields shareholder assets from corporate creditors, and shareholder creditors from attaching the corporation's assets. Third, *capital lock-in* (or liquidation protection) prevents shareholders from withdrawing corporate assets prior to liquidation.[22] Hansmann and Kraakman distinguish between legal entities offering weak, strong, and super-strong forms of asset partitioning, depending on whether creditor priority is coupled with liquidation protection or an exclusive claim to the entity's assets.[23]

Asset partitioning is not an all-or-nothing attribute, and stronger forms of asset partitioning, such as limited liability, are not a necessary corollary of legal personality. Corporate personality has historically preceded the advent of shareholder limited liability from a historical perspective.[24] The first corporations to enjoy limited liability did not have controlling shareholders nor did they belong to corporate groups – the context in which the costs of asset partitioning are higher and the benefits are lower.[25] While asset partitioning performs fundamental economic functions, law-and-economics scholars have long recognized that strong forms such as limited liability and capital lock-in might not be efficient in all contexts.[26] In fact, Hansmann and Kraakman

---

Trusts in Commercial and Charitable Enterprises, 117 Harv. L. Rev. 1102 (2004); Morgan Ricks, *Organizational Law as Commitment Device*, 70 Vand. L. Rev. 1303 (2017); Henry Hansmann & Richard Squire, *External and Internal Asset Partitioning: Corporations and Their Subsidiaries*, *in* Oxford Handbook of Corporate Law and Governance (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

[21] Hansmann & Kraakman, *supra* note 20.

[22] *See* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. Rev. 387 (2003) (for a discussion on the importance of capital lock-in). *See also* Lynn Stout, *On the Nature of Corporations*, 2005 U. Ill. L. Rev. 253 (2005).

[23] Hansmann & Kraakman, *supra* note 20, at 395.

[24] *See, e.g.*, Ron Harris, *A New Understanding of The History of Limited Liability: An Invitation for Theoretical Reframing*, 16 J. Inst. Econ. 643 (2020); Morton J. Horwitz, The Transformation of American Law 1870-1960, at 94 (1992) ("[T]ruly limited shareholder liability was far from the norm in America even as late as 1900."); Jonathan Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: History and Implications*, 27 Wake Forest L. Rev. 3 (1992); Mark I. Weinstein, *Share Price Changes and the Arrival of Limited Liability in California*, 32 J. Legal Stud. 1 (2003).

[25] Pargendler, *Regulatory Partitioning*, *supra* note 4, at 276–77.

[26] *See* Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Corporate Governance and the Plight of Minority Shareholders in the United States before the Great Depression*, *in* Corruption and Reform: Lessons from America's Economic History, 125, 125–152 (Edward L. Glaeser & Claudia Goldin eds., 2006) (describing the costs of capital lock-in in the absence of strong

themselves have famously argued that efficiency requires the elimination of shareholder limited liability for corporate torts.[27]

C. Regulatory Partitioning

Beyond asset partitioning, legal personality also confers regulatory partitioning, which is the segregation of the legal spheres of the entity and its members for purposes of the imputation of other legal rights, duties, and consequences.[28] Regulatory partitioning ensures that the legal obligations, sanctions, and legal characteristics of shareholders do not affect the entity, and vice versa. For instance, regulatory partitioning means that the nationality, non-compete obligations, and debarment sanctions applicable to Emily, a minority shareholder of Widget Inc., do not affect the legal status of the company.

Regulatory partitioning vis-à-vis noncontrolling shareholders is essential to the operation of firms with numerous shareholders. Just like entity shielding ensures that a shareholder's debts will not put the company's existence at risk, regulatory partitioning shields the corporation from the contractual obligations, sanctions, and other relevant legal characteristics applicable to shareholders. Nevertheless, the strict upholding of regulatory partitioning vis-à-vis controlling shareholders can easily frustrate the purpose of the applicable regulatory regime in a variety of contexts, given the economic significance of control. Precisely for this reason, exceptions to regulatory partitioning vis-à-vis controlling shareholders are pervasive, as examined below.[29]

III. Exceptions to Corporate Separateness

The legal spheres of different persons – both legal persons and natural persons – are often permeable, rather than fully insulated. The communication between the legal spheres of corporations and controlling shareholders is a routine policy choice in legal systems worldwide, rather than an exceptional outcome associated with fraud or outright abuse. This legal permeability is not limited to companies within corporate groups, but also appears with respect individual controlling shareholders and among natural persons. To better

investor protection); Hansmann & Squire, *supra* note 20, at 1343–56. (The authors discuss the higher costs and lower benefits of asset partitioning within corporate groups.).

[27] Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879, 1879–80, 1882 (1991).

[28] On the function and operation of regulatory partitioning and its exceptions, see Pargendler, *Veil Peeking*, *supra* note 4. *See also* Pargendler, *Regulatory Partitioning*, *supra* note 4.

[29] For a more detailed discussion, see Pargendler, *Veil Peeking*, *supra* note 4.

grasp this phenomenon, it is useful to distinguish between exceptions to asset partitioning and to regulatory partitioning.

A. *Asset Departitioning (Veil Piercing and Other Techniques)*

Asset partitioning is also subject to various exceptions, the most famous of which is veil piercing to hold shareholders liable for corporate obligations. Veil piercing doctrine is remarkably messy, but generally requires fraud, abuse, compromise of a statutory goal or lack of *de facto* asset partitioning.[30] Other doctrines aimed at asset departitioning, such as substantive consolidation in bankruptcy, are also subject to relatively stringent, if muddled, requirements in most jurisdictions.

While entity shielding is essential for large firms, the strength of limited liability is a policy choice, not a logical corollary of legal personality nor an economic imperative. Many early corporations did not have limited liability. Various legal systems impose "enterprise" liability in specific contexts. At one end of the spectrum, Brazil has greatly eroded limited liability in labor, consumer, and environmental laws, as well as in financial regulation.[31] Vicarious liability of legal and natural persons for acts of employees is also a norm in numerous jurisdictions, a feature that is not in any way incompatible with the separate personality of all parties involved. Moreover, vicarious liability is generally on the rise even among parties that lack both share ownership and employment ties.[32]

It is beyond the scope of this chapter to discuss the benefits and costs of limited liability vis-à-vis controlling shareholders. Suffice it to say that the case for limited liability of controlling shareholders is weaker than for minority shareholders and even weaker within corporate groups.[33] Even the fiercest opponents of veil piercing concede that policy reasons require the doctrine to subsist in the context of corporate groups given the incentive for excessive risk taking created by limited liability.[34] The central point, if often misunderstood, is that the existence and contours of limited liability is also a policy choice and not a logical corollary of distinct personality.

---

[30] For an empirical study on veil piercing as asset departitioning, *see* Peter B. Oh, *Veil-Piercing,* 89 Tex. L. Rev. 81, 90–91 (2010); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036 (1991).

[31] Bruno Meyerhof Salama, O Fim da Responsabilidade Limitada no Brasil (Malheiros ed., 2014); Mariana Pargendler, *How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil*, 58 Colum. J. Transnat'l L. 1, 4 (2019).

[32] Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 Geo. L.J. 141 (2020); Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 Cornell L. Rev. 99, 102 (2014).

[33] *See*, *e.g.*, Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 Colum. L. Rev. 1203 (2002); Hansmann & Squire, *supra* note 20.

[34] Stephen M. Bainbridge & M. Todd Henderson, Limited Liability: A Legal and Economic Analysis 293–94 (2016).

B. Regulatory Departitioning (Veil Peeking)

Exceptions to regulatory partitioning vis-à-vis controlling shareholders are – and have long been – commonplace, but the absence of a doctrinal label has prevented scholars and courts from appreciating the pervasiveness of the phenomenon. In previous work, I coined the term *veil peeking* to describe the various instances when lawmakers and courts *look behind* the corporate veil to attribute legal rights, duties, and characteristics of controlling shareholders to the corporation. Veil peeking, as regulatory departitioning, is formally and functionally different from veil piercing as an exception to asset partitioning, but both phenomena have long been conflated by scholars.[35]

The prevailing conflation between asset and regulatory (de)partitioning has led scholars to conclude that the attribution of legal rights, duties or characteristics of shareholders to the corporation is exceptional in the law, requiring fraud or other rare circumstances.[36] While courts have intuitively grasped the distinction with surprising frequency, a few opinions have fallen into this trap. In refusing to peek behind the corporate veil to extend sovereign immunity to indirect subsidiaries controlled by a foreign government under the Foreign Sovereign Immunity Act of 1976, the majority U.S. Supreme Court opinion in *Dole Food Co. v. Patrickson* stated that "[t]he doctrine of piercing the corporate veil… is the rare exception, applied in the case of fraud or certain other exceptional circumstances."[37] In fact, the opposite is true, as veil peeking by both lawmakers and courts is pervasive irrespective of fraud, abuse or commingling of assets.

Consider the following illustrative examples:

1. The U.S. Supreme Court decided that a parent company and its wholly owned subsidiary do not count as two separate persons for purposes of a conspiracy under the Sherman Act.[38]
2. A U.K. court found that a film produced by a company incorporated in the United Kingdom but ninety percent owned and controlled by a U.S. company could not be deemed "British" under the language of the U.K. Cinematograph

---

[35] In 1980, Herbert Wiedemann, a prominent German jurist, conceptually distinguished between "liability penetration" (Haftungsdurchgriff) and "imputation penetration" vis-à-vis shareholders (Zurechnungsdurchgriff). The distinction, however, was not accompanied by a theory of different criteria to guide the distinct modes of exceptions to corporate separateness. *See* Herbert Wiedmann, *GESELLSCHAFTSRECHT: EIN LEHRBUCH DES UNTERNEHMENS-UND VERBANDSRECHTS* (1980).

[36] *See*, *e.g.*, Hobby Lobby Amicus Brief, *supra* note 7, at 7 (relying on the impermeability of the corporate veil against shareholder liability "absent significant misconduct or fraud" to advocate against the attribution of religious views to corporations).

[37] Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 468, 475 (2003).

[38] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 777 (1984).

Films Act of 1938 requiring the maker of the film to be a "British subject or a British company."[39]

3. The U.S. Supreme Court held that, unlike a corporation under private ownership, a corporation owned and controlled by the federal government is subject to the First Amendment of the U.S. Constitution, even though its charter specifically disclaims its status as a government entity.[40]
4. The International Centre for Settlement of Investment Disputes (ICSID) Convention provides that a legal person that is a national of the host state, but subject to "foreign control," should be treated as a national of another contracting state.[41]
5. The Paris Court of Appeal recognized its jurisdiction over the suit by Congolese workers against the Gabonese Mining Company (COMILOG) following the acquisition of COMILOG's majority shares by French company ERAMET, finding that COMILOG's status as a subsidiary of ERAMET provided sufficient connection to France.[42]
6. Numerous tax statutes condition the legal regime applicable to the corporation on the legal identity of shareholders,[43] or apportion tax obligations in view of the underlying "unitary business" irrespective of legal entity boundaries.[44]
7. The Public Works and Employment Act of 1977 requires that, absent an administrative waiver, at least ten percent of federal funds granted to public works should be used by state or local grantees to procure services from business owned by certain minorities.[45]

---

[39] *Re* FG (Films) Ltd., [1953] 1 All ER 615 (Ch) at 616 (Eng.).

[40] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400 (1995).

[41] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25(2)(b), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. Similarly, a number of bilateral investment treaties permit a local company to invoke treaty protection as a constructive foreign investor if the company itself would qualify as a covered investment under the treaty. Julian Arato, *The Private Law Critique of International Investment Law*, 113 Am. J. Int'l L. 1, 36 (2019).

[42] Cour d'appel [CA] [regional court of appeal] Paris, 2e ch., Sept. 10, 2015, 11/05955.

[43] A prominent example is the use of check-the-box regulation in the United States, which permits corporations to choose to be treated as pass-through vehicles for tax purposes, provided they have no more than 100 shareholders who are all individuals and do not qualify as nonresident aliens. *See* 26 U.S.C. § 1361 (defining an S corporation); 26 U.S.C. § 1366 (allowing for pass-thru taxation).

[44] Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 438 (1980) ("The argument that the source of the income precludes its taxability runs contrary to precedent.").

[45] Public Works Employment Act of 1977, Pub. L. No. 95-28, sec. 103, § 106(f)(2), 91 Stat. 116, 117 (1977) (codified as amended at 42 U.S.C. § 6705(f)(2)).

8. A corporation entirely owned by African Americans and certified by the United States Small Business Act as a firm owned by socially and economically disadvantaged individuals can raise a discrimination claim under § 1981.[46]

9. Several jurisdictions allow shareholders of parent companies to file "double derivative suits" against directors of corporate subsidiaries.[47]

10. Among other jurisdictions, Delaware and Japanese law explicitly allow shareholders of parent companies to request books and records of corporate subsidiaries.[48]

11. The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) rules extend international sanctions to all companies that are fifty percent owned by sanctioned persons.[49]

12. Securities regulations typically require consolidated financial statements, as well as the provision of various pieces of information on a consolidated basis.[50]

In the various contexts mentioned above, a corporation's legal status hinges on the identity or legal sphere of shareholders, or the legal boundaries between corporations and shareholders are disregarded for purposes of the application of certain legal rights and duties. While some instances involve explicit instances of veil peeking by lawmakers, others concern veil peeking by courts when the relevant legal source – be it a constitution, statute, treaty, or contract – is silent on the treatment of related legal persons and controlling shareholders. In these cases, courts do not look only at whether there is fraud or abuse, but also consider if upholding regulatory partitioning would be inconsistent with the purposes of the legal regime in question.

Judicial veil peeking appears to have historically preceded veil piercing as an exception to limited liability and appears to be more frequently used up to this day. The first prominent case of veil peeking was the 1809 U.S.

---

[46] Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1053–58 (9th Cir. 2004).

[47] *See*, *e.g.*, Note, *Remedies of Stockholder of Parent Corporation for Injuries to Subsidiaries*, 50 Harv. L. Rev. 938, 963 (1937); Universal Project Management Services Ltd v. Fort Gilkicker Ltd & Ors [2013] EWHC (Ch) 348 [49], [2013] Ch 551, 564 (Eng.) (describing acceptance in Hong Kong, Singapore, Canada, Australia and New Zealand).

[48] Del. Gen. Corp. L. § 220 (1899) (amended 2023); Tomotaka Fujita, *National Report on Japan*, *in* Group of Companies: A Comparative Law Overview 183 (Rafael Mariano Manóvil ed., 2020).

[49] Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked, 79 Fed. Reg. 47,726, 47,726 (Aug. 14, 2014).

[50] Mariana Pargendler, *The New Corporate Law of Corporate Groups*, (forthcoming Harv. Bus. L. Rev., June 2024).

Supreme Court decision in *The Bank of United States v. Deveaux*.[51] Justice Marshall refused to declare that corporate personhood meant "the members of the corporation were, *to every intent and purpose*, *out of view*, and merged in the corporation."[52] Instead, the opinion found it appropriate to "*look* to the character of the individuals who compose the corporation," who were citizens of Pennsylvania, thereby attributing their citizenship to the corporation and finding constitutional grounds for federal diversity jurisdiction.[53]

More than a century later, the U.K. House of Lords engaged in veil peeking in the seminal case of *Daimler Co. v. Continental Tyre and Rubber Co.*,[54] finding that a company incorporated in the U.K. but controlled by German citizens should be deemed German for purposes of statutory trading prohibitions enacted during World War I. Interestingly, the *Daimler* opinion explicitly avoided the fallacy of complete corporate separateness. While citing with approval the famous precedent of *Salomon v. A. Salomon & Co*.[55] for the proposition that a company is an independent person with its own rights and liabilities, Lord Parker of Waddington argued that "it is [not] a necessary corollary of this reasoning to say that the character of its corporators must be irrelevant to the character of the company."[56] Citing Chief Justice Marshall's opinion in *Deveaux*, the court found that it was compatible with common law principles "*to look*, *at least for some purposes*, behind the corporation and consider the quality of its members."[57] As in *Deveaux*, the key issue in *Daimler* was not to curb abuse in the use of legal entities, but to give full effect to the purpose of the law given the functional significance of corporate control.

To be sure, parties are often tempted to use the corporate form to obtain regulatory partitioning and thereby evade various laws and regulations. Many veil peeking cases, both old and new, clearly respond to the use of legal personality as a device for regulatory arbitrage. In the 1905 case of *United States v. Milwaukee Refrigerator Transit Co.*, defendants had formed a corporation to conceal their receipt of rebates in violation of the rate regulations against rate discrimination.[58] The court found the argument that the corporation in question was a separate legal person for purposes of the regulations was "neither new, nor deserving of new success."[59]

---

[51] Bank of U.S. v. Deveaux, 9 U.S. 61 (1809), *overruled by* Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. 497 (1844).

[52] *Id.* at 91 (emphasis added).

[53] *Id.* at 91–92 (emphasis added).

[54] 53 S.L.R. 845, 856 (appeal taken from Eng.).

[55] [1897] AC 22 (HL) 44, 51 (appeal taken from Eng.).

[56] 53 S.L.R. 845, 855 (appeal taken from Eng.).

[57] *Id.* at 856 (emphasis added).

[58] *See* United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 250 (E.D. Wis. 1905).

[59] *Id.* at 256.

Veil peeking is also commonplace in private law, as illustrated by the U.K. contract law case of *Jones v. Lipman*.[60] After entering into a sales agreement with plaintiffs, the seller transfers the property in question to a newly created wholly owned corporation with the aim of avoiding an order of specific performance. The court engaged in veil peeking to attribute the seller's obligation to the company, finding it "a device and a sham, a mask which [seller] holds before his face in an attempt to avoid recognition by the eye of equity."[61]

Examples of veil peeking are legion across various areas of law. The entire field of antitrust laws operates largely on the basis of veil peeking, focusing on corporate control irrespective of legal boundaries among different legal persons within a group. It is of course no defense in antitrust law that the acquired subsidiary has a separate personality and is therefore insulated from its parent. Interestingly, not only the law, but also social behavior repeatedly connects the spheres of controlling shareholders to the corporation for purposes of economic support or sanctions. Aiming to achieve racial justice, both investors and consumers have launched initiative to favor black-owned corporations.[62] Consumer boycotts often target corporations to protest misdeed by their controllers.[63]

Although veil peeking is an old phenomenon, its application appears to be on the rise. In separate work, I have documented the rise of entity transparency in corporate law from a historical perspective. Corporate law rules often – and increasingly – disregard legal entity boundaries that could jeopardize their application to the detriment of investor protection.[64] While U.S. law has long mandated consolidated accounting and permitted double derivative suits, veil peeking in corporate law gained further ground in the 21st century. In an article written half a century ago, Melvin Eisenberg warned that regulatory partitioning in corporate groups could compromise shareholder rights and called for "pass-through shareholder rights."[65] In a silent evolution, Eisenberg's dream has largely come true in the last few decades.

It was not until the early 2000s that the Delaware statute came to explicitly grant shareholders access to the books and records of subsidiaries, as well as require shareholder approval for major asset sales conducted by subsidiaries.[66] In

[60] [1962] 1 All E.R. 442 (Eng. Ch.).

[61] *Id.* at 445.

[62] Paul Vigna & Mischa Frankl-Duval, *Stocks of Black-Owned Companies Surge on Juneteenth Holiday*, WALL ST. J. (June 19, 2020), https://www.wsj.com/articles/stocks-of-black-owned-companies-surge-on-juneteenth-holiday-11592603641#.

[63] Brian Ries, *Owner of SoulCycle and the Miami Dolphins Faces Outrage and Calls For Boycott Over Trump fundraiser*, CNN POLITICS (Aug. 8, 2019), https://www.cnn.com/2019/08/07/politics/equinox-soulcycle-trump-fundraiser-boycott-trnd/index.html.

[64] Pargendler, *supra* note 50.

[65] Melvin Aron Eisenberg, *Megasubsidiaries: The Effect of Corporate Structure on Corporate Control,* 84 HARV. L. REV. 1577, 1619 (1971).

[66] The changes D.G.C.L. §§ 220 and 271 to extend inspection of books and records and the requirement of shareholder approval of major asset sales conducted by subsidiaries took place in

1999, Japan amended its Commercial Code, granting parent company shareholders access to the books and records of subsidiaries to avoid "reduction of shareholder's rights," a strategy that was subsequently extended to double derivative suits in 2014.[67] Although other jurisdictions have been slower in mitigating regulatory partitioning in corporate law, there is a clear global trend in that direction around the globe.[68] This is significant: not even corporate law itself treats corporations as fully separate from controlling shareholders in a wide range of ordinary contexts that have nothing to do with fraud or abuse.

Nevertheless, the reigning fallacy of complete corporate separateness continues to serve as shield against corporate accountability. Policymakers and business advocates have successfully invoked it to shield parent companies from liability and jurisdiction in connection with human rights abuses. The testimony of John Ruggie (who served as the U.N.'s Secretary General Special Representative for Business and Human Rights and is the mastermind behind the influential 2011 U.N. Guiding Principles on Business and Human Rights) illustrates this point. In justifying his rejection of earlier proposals to impose liability on parent companies for human rights abuses, Ruggie quotes a corporate law scholar for the view that "as a matter of domestic law in most states, the autonomous legal personality of a corporation matters."[69] Nevertheless, such proclaimed "autonomy"— understood as entailing legal insulation—is neither a logical imperative nor an accurate description of the law in action. For good policy reasons, neither corporate law nor other areas of law recognize complete legal independence between corporations and controlling shareholders in all contexts.

2003 and 2005, respectively. *See* 74 Del. Laws, c. 84, §§ 5-8 (current version at D.G.C.L §271) and 75 Del. Laws, c. 30, § 28 (current version at D.G.C.L. §220) respectively.

[67] Fujita, *supra* note 48, at 183–84.

[68] Pargendler, *supra* note 50.

[69] John Ruggie, Just Business: Multinational Corporations and Human Rights 188–89 (2013), quoting Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 Colum. H.R. Rev. 101, 169–70 (2005) ("The [previously proposed] Norms internationalize and adopt an enterprise liability model as the basis for determining the scope of liability for groups of related companies. This approach does, in a very simple way, eliminate one of the great complaints about globalization through large webs of interconnected but legally independent corporations forming one large economic enterprise. The problem, of course, is that, as a matter of domestic law in most states, the autonomous legal personality of a corporation matters. Most states have developed very strong public policies in favor of legal autonomy"). For a more recent reiteration of the same argument, *see* Virginia Harper Ho et al., *Toward Corporate Group Accountability*, *in* Research Handbook on Corporate Liability 292, 292 (Martin Petrin & Christian Witting eds., 2023) ("[a]ttributing liability for the conduct of any one entity within the group to its parent, to another affiliate, or to the group as a whole is therefore in tension with the basic attributes of legal personhood that define each constituent company within the group").

IV. Conclusion

This Chapter aims to debunk the prevailing fallacy of complete corporate separateness, which has obscured the law's actual functioning, muddled legal reasoning, and hampered legal developments in a variety of contexts. Legal personality affords a distinct nexus for imputation of rights and duties. Rather than a nonconductor that completely insulates the company from the legal spheres of related parties, legal personality operates as a membrane that is more or less permeable to rights and duties of shareholders depending on the issue in question. The level of permeability in any given case does not hinge on a logical syllogism, but is rather a matter of public policy.