ARTICLE

VEIL PEEKING: THE CORPORATION AS A NEXUS FOR REGULATION

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Legal and economic scholarship views the provision of asset partitioning (the separation between the assets of the corporation and its shareholders) as the essential economic role of corporate personality. This Article contends that this view is incomplete. First, it identifies the provision of regulatory partitioning (the separation between the legal spheres of the corporation and its shareholders for purposes of the imputation of legal rights and duties) as another fundamental function of the corporate form. Second, it shows that regulatory partitioning is not absolute. In various areas of law and for different purposes, the law "peeks" behind the corporate veil to ascribe legal rights or duties of shareholders to the corporation.

Although veil piercing (asset departitioning) and what I term veil peeking (regulatory departitioning) serve different functions and entail distinct tradeoffs, they have been almost universally conflated by scholars and courts. This Article examines the economic benefits and costs of regulatory partitioning, provides a taxonomy of its different exceptions, and argues that veil piercing and veil peeking claims should be subject to different criteria. This analysis illuminates and offers normative implications for controversies in a variety of legal fields, including constitutional, international, tax, corporate, contract, and antitrust law. The reconceptualization of the corporation as a "nexus for regulation" as well as a "nexus for contracts" offers an

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additional, and heretofore overlooked, rationale for the organization of economic activity under the corporate form in the United States and around the world.

INTRODUCTION

As a legal person or entity, a corporation is the repository of rights and duties in its own name. It is legally separate from its shareholders and managers. Current scholarship has come to regard asset partitioning—the separation between the assets of the corporation and those of its shareholders—as the essential economic role performed by legal personality.[1] The law also recognizes exceptions to asset partitioning and provides for "de-partitioning remedies,"[2] of which veil piercing is the most prominent.[3] Through veil piercing, courts overcome the attribute of limited liability to hold shareholders liable for corporate debts in certain circumstances.[4]

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1 Business corporations exhibit a strong form of asset partitioning. The attribute of limited liability or entity shielding prevents corporate creditors from reaching shareholders' assets. The attribute of capital lock-in or strong entity shielding prevents shareholders and their creditors from reaching the corporation's assets. Scholars have argued that entity shielding is more important and fundamental to the rise of the firm than limited liability. *See generally* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 394, 434-35 (2000) (discussing the protection of corporate assets against liquidation); Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 440-41 (2003) (describing the shift to, and motivations behind, incorporation during the nineteenth century, and explaining that the pursuit of limited liability was not the sole cause); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1338 (2006) ("[E]ntity shielding is the sine qua non of the legal entity"). Others have described legal personality as asset partitioning in mitigating agency costs and shaping capital structure. *See* George G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 HARV. L. REV. 1102 (2004); Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 VA. L. REV. 515, 520-21 (2007); *see also* Giuseppe Dari-Mattiacci, *The Theory of Business Organizations* 10, 23 (Amsterdam L. Sch. Legal Stud. Rsch. Paper, Paper No. 2018-32, 2018), https://ssrn.com/abstract=3296232 (positing that organizational law serves "to depersonalize business" by detaching a pool of assets from the individuals behind it); Morgan Ricks, *Organizational Law as Commitment Device*, 70 VAND. L. REV. 1303, 1306 (2017) (arguing that organizations serve the role of property relinquishment by owners, a feature that is complementary to asset partitioning).

2 Henry Hansmann & Richard Squire, *External and Internal Asset Partitioning: Corporations and Their Subsidiaries*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 251, 252 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

3 Other doctrines that operate to mitigate asset partitioning are substantive consolidation in bankruptcy and the use of agency law to treat subsidiaries as agents of the parent company in certain circumstances. *Id.*

4 There is a voluminous literature on veil piercing. *See generally* Peter Oh, *Veil Piercing*, 89 TEX. L. REV. 81, 90-91 (2010) (discussing empirical research on veil piercing); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991) (offering an empirical study of veil-piercing cases); Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP.

Yet asset partitioning is but one dimension of corporate separateness. Asset partitioning mostly affects creditor and shareholder rights and is particularly well suited to the prevailing economic conception of the corporation as a "nexus of contracts"[5] (or, more accurately, as a "nexus *for* contracts"[6]). But beyond its fundamental role as a nexus for contractual relationships with private counterparties, the corporation also operates as a distinct nexus for the imputation of legal rights and duties vis-à-vis the state, including in ways that do not directly implicate asset partitioning.[7] The corporation is best described as a "nexus of imputation"[8] that serves both as a "nexus for contracts" *and* as a "nexus for regulation."

To operate as a nexus for both regulation and contracts, the corporate form provides for regulatory partitioning, which is the separation between the legal spheres of the corporation and its shareholders for purposes of the imputation of legal rights and duties beyond the attribution of assets. To illustrate, let us look at the example of Alice, a prominent entrepreneur who also holds a small number of shares in Apple Inc., a publicly traded company. Alice is a French citizen, while Apple is a U.S. company incorporated in California. Regulatory partitioning means that Apple is not bound by the non-compete covenants that Alice has signed in connection with her business. If Alice is convicted of a crime and is therefore debarred from contracting with the federal government, Apple is not affected by this sanction. This form of separation between the legal spheres of Alice and Apple is essential to the

L. 479 (2001) (advocating the replacement of veil piercing doctrine with direct liability); 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) (conducting an empirical study and suggesting that veil piercing serves three distinctive policy goals).

5 The conception of the firm as a nexus of contracts comes from Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). This conception built on A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 778 (1972) (emphasis omitted), which described the firm as "the centralized contractual agent in a team productive process." The phrase "nexus of contracts" comes from Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 293 (1980).

6 John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *What Is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 5 (3d ed. 2017).

7 This Article refers to rights and duties as a short form for the various related legal concepts described in Hohfeld's classic work, such as disabilities, immunities, privileges, and powers. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913–14) (noting the breadth of the term "rights" and its indiscriminate use to cover different concepts).

8 Legal theorist Hans Kelsen famously described the nature of natural persons and legal persons as essentially a point of "imputation" or "central imputation." HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 50 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Oxford Univ. Press 1992) (1934).

operation of large-scale enterprise with multiple shareholders and transferable shares.[9]

This Article identifies the role of regulatory partitioning as an essential, but thus far overlooked, form of legal separation supplied by the corporate form. A significant portion of corporations around the world are formed for regulatory rather than contracting reasons. Importantly, this Article also shows that regulatory partitioning is not absolute. In various fields and for different purposes, the law engages in what I term *veil peeking* by looking at shareholder characteristics to impute certain rights or duties of shareholders to the corporation without compromising the attribute of limited liability to reach the personal assets of shareholders. In our example, if Alice were a controlling shareholder of Apple, lawmakers and courts would sometimes extend Alice's non-compete obligations and debarment sanctions to Apple, as well as deem Apple to be French.

Regulatory partitioning comes under pressure when there are potential differences in the legal regime applicable across natural persons, between natural persons and legal entities, or across different legal entities. These differences raise important questions. Which legal rights should individuals, firms, or states be able to obtain through incorporation? Which legal rights should individuals, firms, or states be deemed to forfeit through incorporation? To what extent should individuals, firms or states retain their legal status despite incorporation?

The tension between regulatory partitioning and veil peeking lies at the heart of key contemporary and perennial controversies involving the corporate form. The issues are diverse and momentous. Should the fundamental rights of individuals (such as free speech and religious liberty) apply to corporations as a vehicle for their exercise? Do a parent and a wholly owned subsidiary count as separate entities for purposes of a conspiracy under antitrust law? Can a subsidiary be sued based on jurisdictional grounds applicable to its parent? Can the race of individual shareholders be imputed to the corporation for purposes of antidiscrimination laws? Does the nationality of corporate shareholders matter for the application of international investment treaties or wartime restrictions? Can citizens raise constitutional rights against a corporation whose shares are owned by the government? When is it lawful to adopt the corporate form to circumvent

9 In the absence of regulatory partitioning, either destructive legal instability would ensue or share transferability would be significantly impaired. This form of regulatory shielding is functionally analogous to the key economic role of entity shielding (or affirmative asset partitioning), which prevents shareholders' creditors from attaching corporate assets. *See generally* Hansmann & Kraakman, *supra* note 1, at 390; Hansmann et al., *supra* note 1, at 1338 (discussing three types of entity shielding).

legal constraints applicable to individuals or other legal entities, ranging from homestead exemptions to non-compete covenants?

In response to these questions, lawmakers and courts have sometimes decided to "peek"—or look behind the corporate veil—to ascribe legal rights or duties of shareholders to the corporation, thereby mitigating regulatory partitioning.[10] Although veil peeking is deep-rooted and recurrent, it has largely escaped dedicated analysis.[11] From the first article on veil piercing in the early twentieth century to countless judicial decisions and pieces of scholarship (old and new), veil peeking has been improperly equated with, or subsumed under, veil piercing doctrine, which generally holds shareholders liable for corporate obligations.[12]

10 Veil peeking is not to be confused with the regulation of shareholder rights and conduct in their own name. Regulatory partitioning separates the legal spheres of shareholders and the corporation, but certainly does not eliminate the role of shareholders in corporate governance.

11 German scholarship has usefully distinguished between the related concepts of "liability penetration" (*Haftungsdurchgriff*) and "imputation penetration" (*Zurechnungsdurchgriff*) without, however, theorizing about their scope, attributes, criteria, and implications. *See infra* notes 89–90 and accompanying text.

12 This conflation dates back to Maurice Wormser's seminal article coining the term "piercing the veil," which analyzes, in equal proportion, several instances of both veil peeking and veil piercing as an exception to limited liability. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 498-502, 518 (1912) (collecting cases indicating the courts' "willingness to adjust the entity theory to the evergrowing complexities and constantly increasing problems of the modern business corporation"). Today, while both regulatory departitioning and asset departitioning continue to be treated under the umbrella of veil piercing, the latter is undoubtedly the dominant conception of the term. *See, e.g.*, Thompson, *supra* note 4, at 1036 ("'Piercing the corporate veil' refers to the judicially imposed exception to this principle by which courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own."); Bainbridge, *supra* note 4, at 481 ("From a litigation standpoint, veil piercing allows creditors to satisfy their claims out of the personal assets of shareholders."). For a representative example of the prevailing conflation of veil piercing and veil peeking, see Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners at 6-7, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (Nos. 13-354, 13-356) [hereinafter Amicus Brief]. The central issue in *Hobby Lobby* was whether a business corporation qualified as a person for purposes of the broad protection of religious liberty provided under the Religious Freedom Restoration Act of 1993—a quintessential veil peeking question. *See id.* at 2 (discussing Hobby Lobby's argument "that the religious values of its present controlling shareholders should pass through to the corporation itself"). In their Amicus Brief, forty-four corporate and criminal law professors cited veil piercing authorities for the existence of "very narrow" exceptions to corporate separateness and the requirement of a showing of "significant misconduct and fraud" to argue against Hobby Lobby's assertion of religious rights as "reverse piercing." *Id.* at 6-7, 16; *see also* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 52-62 (2018) (describing the U.S. Supreme Court jurisprudence in attributing constitutional rights to corporations as veil piercing). A recent review of Winkler's book points out that the Supreme Court's corporate rights jurisprudence differs sharply from veil piercing as a doctrinal exception to limited liability, but incorrectly assumes that by engaging in veil peeking, "the Supreme Court's [approach] is radically at odds with the existential theory of the corporation it adopts in every other area of the law." Joshua C. Macey, *What Corporate Veil?*, 117 MICH. L. REV. 1195, 1199 (2019). Instead, this Article demonstrates that veil peeking is pervasive.

This Article examines veil peeking from a legal and economic perspective as a separate category of exceptions to corporate separateness that is analytically and functionally distinct from veil piercing. Veil piercing tempers asset partitioning by imposing shareholder *liability* for contracts, torts, or regulatory claims. Veil peeking mitigates regulatory partitioning by enabling the *imputation* of shareholder rights or duties to the corporation.[13] Because asset partitioning and regulatory partitioning serve different functions, veil piercing (as asset departitioning) and veil peeking (as regulatory departitioning) are subject to distinct tradeoffs.

In dissociating the regulatory status of the corporation from its shareholder composition, regulatory partitioning has important benefits. First, it permits shares to be priced and firms to be valued independently of shareholder identity. This form of depersonalization of firms—which is also aided by limited liability—facilitates share transfers, enhances liquidity, and promotes the market for corporate control. Second, regulatory partitioning offers a bright-line rule that is easy to apply, which reduces regulatory costs. Nevertheless, regulatory partitioning may at times undermine the effectiveness of the regulatory scheme in question by encouraging regulatory arbitrage, and is therefore set aside through veil peeking.

By tracing their use in the United States and in other jurisdictions throughout history, this Article maps the relative role of regulatory partitioning and the broad incidence of veil peeking across different legal fields. It also shows that, although clearly distinct from veil piercing along several dimensions, veil peeking is not a unitary category. It then advances a taxonomy to unpack the different manifestations of veil peeking, which can originate from legislatures or courts, benefit or harm shareholder interests, and operate in a categorical or tailored fashion. Finally, it examines the extent to which veil peeking promotes the use of the corporate form or compromises its core attributes, offering guidance for courts and policymakers.

This analysis produces clear normative implications. It challenges a recurrent argument about the effects of corporate personhood, which goes as follows: because the corporation is a separate legal person and enjoys limited liability, it should be treated as legally separate from its shareholders in all areas of law. Scholars have gone as far as to derive concrete normative implications from the concept of legal personality, from a stakeholder

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13 Alternatively, one could refer to asset departitioning as "liability veil piercing" and to regulatory departitioning as "regulatory veil piercing." Veil peeking (or regulatory veil piercing) is not to be confused with liability veil piercing in connection with the enforcement of government regulations backed by monetary penalties, as when the state goes after the assets of a parent company to collect fines for the violation of environmental law. *See infra* note 99 and accompanying text.

orientation in corporate law to a critique of corporate constitutional rights grounded on the individual rights of shareholders.[14]

By contrast, this Article shows that exceptions to regulatory partitioning through veil peeking are pervasive across history and legal fields, which makes corporate separateness an "on-and-off" construct depending on the purpose of any given form of regulation. Unlike veil piercing, which is inevitably anti-shareholder and pro-regulation, veil peeking has no clear partisan connotation: it can be used both to augment and to frustrate the privileges of shareholders and the regulatory power of the state.[15] Moreover, asset partitioning and regulatory partitioning are not necessarily subject to the same boundaries, nor is regulatory partitioning subject to uniform boundaries across legal issues or areas of law.

The Article also offers concrete guidance for courts in adjudicating veil peeking cases. It shows that judicial veil peeking essentially concerns the interpretation or gap filling of legal texts. It comes into play when the constitution, statute, treaty, or contract in question is unclear about the treatment of corporate entities. In deciding such controversies, courts should rely on the classical tenets of construction or interpretation, and consider the extent to which upholding regulatory partitioning would serve to frustrate the purpose of the regulatory scheme in question.

This proposed approach differs sharply from some of the prevailing criteria required for veil piercing as an exception to limited liability, whose application is deemed to be exceptional, invariably dependent on a fact-intensive inquiry, and subject to restrictive requirements, such as fraud or commingling of assets. Veil peeking does not necessarily pose a threat to the core economic functions of the corporation, as frequently assumed. While some courts have intuitively grasped the distinction between asset departitioning and regulatory departitioning, many others have unduly applied inappropriate veil piercing tests to veil peeking controversies.

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14 *See* Jonathan R. Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law* 4-5 (U. of Pa. Inst. for L. & Econ. Rsch. Paper, Paper No. 18-28, 2018), https://ssrn.com/abstract=3233118 (relying on the conception of the corporation as a juridical entity with limited liability to criticize the attribution of constitutional rights to corporations as "associations of citizens"). *See generally* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 27 (2018) (linking corporate personhood to a vision of pluralistic governance of corporations); LYNN STOUT ET AL., THE MODERN CORPORATION: STATEMENT ON COMPANY LAW 2 (2016), https://ssrn.com/abstract=2848833 (claiming that the concept of legal personhood is incompatible with the assertions that shareholders own corporations and that directors are obligated to maximize profits for shareholders).

15 The recurrent uses of veil peeking to augment the regulatory power of the state raise doubt about the common reliance on corporate separateness and institutional ("social entity") conceptions of the corporation as a strategy to accomplish progressive objectives.

The remainder of this Article proceeds as follows. Part I introduces the critical role of regulatory partitioning and the resulting conception of the corporation as a nexus for regulation. Part II describes the emergence of veil peeking in the history of the corporate form. Part III presents the key structural differences between veil peeking and veil piercing. Part IV unpacks the concept of veil peeking by outlining its main functions and offers a taxonomy of its different modalities. Part V examines the economic properties of regulatory partitioning and veil peeking, evaluating their interaction with the core elements of the corporate form. Part VI shows the ubiquity and significance of veil peeking controversies in different areas of contemporary law, including constitutional, antitrust, international, tax, corporate, and contract law. I conclude by highlighting the importance of unbundling incorporation to recognize the different functions performed by legal personality.

I. THE CORPORATION AS A NEXUS FOR REGULATION

A leading economic conception of the corporation, which has been particularly influential in legal scholarship, emphasizes "the essential contractual nature of firms."[16] It views the corporation as a nexus for contractual relationships, including those with workers, suppliers, financial creditors, shareholders, and even government bodies.[17] This nexus-of-contracts conception, however, fails to mention the key non-contractual relationships between the corporation and the state. Such neglect is likely attributable, at least in part, to the focus on markets and private ordering that characterizes economics as a discipline.[18]

16 Jensen & Meckling, *supra* note 5, at 311.

17 *Id.* at 310.

18 The privatized nexus-of-contracts conception of the corporation deliberately served to undermine the defense of corporate social responsibility in the 1970s by offering an alternative to the competing concession theory, which viewed incorporation as a favor from the state, and the real entity theory, which appeared to support a stakeholder orientation of corporate activities. In their seminal work advancing the nexus-of-contract theory, Jensen and Meckling explicitly highlight its normative implications in delegitimizing corporate social responsibility. In their words,

> [v]iewing the firm as the nexus of a set of contracting relationships among individuals also serves to make it clear that the personalization of the firm implied by asking questions such as "what should be the objective function of the firm?", or "does the firm have a social responsibility" is seriously misleading.

Id. at 311. In another article in the same period, Jensen and Meckling warned about the destruction of the large corporation due to what they viewed as mounting government regulation. *See* Michael C. Jensen & William H. Meckling, *Can the Corporation Survive?*, FIN. ANALYSTS J., Jan.–Feb. 1978, at 31, 32 (arguing that, due to growing government intervention in the economy, "[t]he corporate form of organization . . . is likely to disappear completely").

Economic theories of the firm often proceed in an institutional and legal vacuum, downplaying the role of law and state institutions.[19] However, Henry Hansmann and Reinier Kraakman have famously showed that law is essential for the functioning of the corporate form. It is law, rather than private contracting alone, that endows business entities with strong asset partitioning, enabling the firm to operate as an effective nexus for contracts.[20] It is also law that endows corporations with regulatory partitioning, which is an equally essential, though thus far neglected, attribute of the corporation's role as a nexus for contracts.

Yet the economic conception of the firm as a nexus for contracts and the economic conception of legal entities as a tool for asset partitioning are certainly complementary. The key economic function of asset partitioning is to economize on contracting costs.[21] In fact, law-and-economics scholarship has long questioned the efficiency of shareholder limited liability vis-à-vis non-contractual creditors, such as tort claimants and the state.[22] The legal

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19 An exception is the seminal work of Ronald Coase, which mostly equates the economic concept of the firm with the legal concept of an employer and employee relationship. R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 403-05 (1937) ("[T]he definition [of a firm] we have given is one which approximates closely to the firm as it is considered in the real world."). For recent defenses of the constitutive role of law in the economic concept of the firm, see generally ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM (2013); Simon Deakin, David Gindis, Geoffrey M. Hodgson, Kainan Huang & Katharina Pistor, *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. COMPAR. ECON. 188, 194 (2017) (arguing that firms "have to be treated as creatures of the law, where law itself is irreducible to custom or private ordering").

20 Hansmann & Kraakman, *supra* note 1, at 393. The authors' definition of legal entities includes organizational forms that lack formal legal personality, such as marriage and the common-law trust, but which provide for strong or weak forms of asset partitioning. *Id.* at 390. Although the present Article focuses on business corporations, it is important to note that other organizational forms also offer regulatory partitioning to varying degrees. For instance, partnerships often do not provide for regulatory partitioning with respect to tax and jurisdictional matters, but are treated as "collective entities" not subject to the Fifth Amendment privilege against self-incrimination. Similarly, gun trusts were used until recently to avoid identification and background check requirements for the purchase of firearms. For a discussion of the varying degrees of regulatory partitioning across different legal entities, including partnerships, the trust, and marriage, see Mariana Pargendler, *Regulatory Partitioning as a Key Role of Corporate Personality*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds., forthcoming 2021) (manuscript at 16-20), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3719913. The longstanding tension between "entity" and "aggregate" conceptions of partnerships mostly reflect varying levels of regulatory partitioning across different areas of law. *Id.*

21 *See* Hansmann & Kraakman, *supra* note 1, at 408 ("Organizational law eliminates the need for . . . elaborate contracting and thereby avoids the transaction costs and moral hazard it involves.").

22 The very scholars who coined the term asset partitioning have cast doubt on the efficiency of limited liability with respect to corporate torts. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1879-80, 1882 (1991) (arguing that limited liability for corporate torts may promote inefficient behavior and questioning such protection). Earlier arguments also questioned the efficiency of limited liability vis-à-vis involuntary creditors. *See* Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 519-20 (1976) (noting that pursuing separate incorporations for purposes of evading tort

relationships between a corporation and the state, however, far transcend the liability issues associated with asset partitioning.

The role of the corporation as a separate nexus for the imputation of rights and duties vis-à-vis the state, rather than vis-à-vis contracting parties alone, has been central throughout its history. Early corporations required specific governmental approval and formed a distinct nexus for regulation, which conferred both benefits and costs on this organizational form compared to the legal regime governing natural persons and other business associations. A key feature of corporate charters up until the mid-nineteenth century was the concession of monopoly privileges by the state, an important advantage of incorporation that is distinct from asset partitioning.[23]

Interestingly, the corporation of the early nineteenth century was not only a nexus for regulation, but corporate charter provisions were the technique par excellence for state regulation of economic activity. Corporate charters commonly regulated the rates to be charged by incorporated firms, especially for companies dealing in public utilities and infrastructure.[24] Indeed, before the U.S. Supreme Court decided *Munn v. Illinois*[25] in 1877, it was unclear if states even had authority to regulate unincorporated firms.[26]

The status of the corporation as a distinct locus for regulation was consequential in differentiating the corporate legal regime from the one applicable to natural persons and other organizational forms. On the one hand, corporations were more likely to be regulated by the state both because of explicit charter provisions and because incorporation provided authorities

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liability permits the externalization of costs and is socially inefficient); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 111 (1985) (arguing that the asymmetrical costs and benefits of absolute limited liability would lead to excessive risk-taking by corporations).

23 It was not until 1837 that the U.S. Supreme Court held that a corporate charter does not necessarily imply a grant of monopoly privileges. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 451 (1837). Moreover, entrepreneurs continued to seek special legislative charters for purposes of obtaining explicit legal privileges long after general incorporation dispensing with state approval became available. *See* Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 143 (1985) (interpreting the continued supply of special charters conferring legal privileges after the advent of general incorporation as a strategy of market segmentation and price discrimination by rent-seeking legislatures).

24 *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L. J. 1593, 1628-29 (1988) ("No pre-Civil War American classicist argued that rate regulation should be administered by general statute rather than special charter.").

25 94 U.S. 113, 126 (1877) ("When . . . one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good . . . .").

26 HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937, at 126 (1991).

with more information about the firm's existence and operations.[27] On the other hand, corporations often enjoyed monopoly rights and benefited from constitutional protection against subsequent state impingement on the rights conferred by its charter.[28] The special regulatory status of business corporations vis-à-vis the state may well help explain the attractiveness of the corporate form, even as the trust allowed entrepreneurs to obtain most corporate attributes (such as lock-in, delegated management, and share transferability) without the need for incorporation.[29]

However, as special charters granting corporate privileges fell out of favor toward the end of the nineteenth century, the locus for state regulation and protection shifted from the corporate charter to the general legal regime. Three different problems then emerged, giving rise to paradigmatic challenges to regulatory partitioning. First, could corporations receive more or less favorable regulatory treatment than natural persons or other organizational forms? Second, when natural persons were subject to different regimes of legal rights or duties, to what extent would this special regime transfer to business corporations those persons controlled? Third, when would the law treat legal persons as truly separate from their members for purposes of legal rights and duties?

II. THE ORIGINS OF VEIL PEEKING

Before examining the distinctive features and categories of veil peeking, I will briefly describe some of its early manifestations in the history of the corporate form. The examples that follow are illustrative, rather than exhaustive. They are meant to demonstrate the historical roots, operation, and breadth of this phenomenon. I will then dissect its features and evaluate its consequences.

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27 *See* Gary M. Anderson & Robert D. Tollison, *The Myth of the Corporation as a Creation of the State*, 3 INT'L REV. L. & ECON. 107, 112 (1983) ("By incorporating, a firm was effectively announcing its existence to the regulatory authorities, who would otherwise most probably have ignored it.").

28 One reason why the limited partnership was less attractive than the corporate form in the United States was that, in lacking a state-granted charter, it did not benefit from constitutional Contract Clause protection against subsequent regulation. Hovenkamp, *supra* note 24, at 1596. For a discussion of constitutional Contract Clause protection as an instance of veil peeking, see *infra* notes 44–45 and accompanying text.

29 *See* John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2196-97 (2016) (describing the role of the trust as a functional substitute for the corporation's attributes but leaving open the reasons for seeking incorporation). Interestingly, the trust itself also emerged in significant part to help individuals evade legal obligations vis-à-vis feudal authorities, such as death taxes and military obligations, by manipulating the nexus for imputation. *Id.* at 2152 ("The trust helped a landowner avoid the feudal incidents by allowing him to manipulate the way the law applied. Since the tax only applied to land that a man owned in his own name at death, the tax did not apply if the land legally belonged to a trustee . . . .").

The role of business organizations in segregating and abstracting a shareholder's legal status has a long historical pedigree. The concealment of investor identity was central to the *commenda* business form of medieval city-states and the limited partnership (*société en commandite simple*) of seventeenth- and eighteenth-century France, which are prominent precursors of limited liability in commercial law.[30] In a time of profound Christian distaste for commerce and formal bans on its exercise by the nobility, these forms permitted noblemen and magistrates to invest in business enterprise as passive partners whose identities were hidden.[31] This historical experience illustrates that the concealment of shareholder identity and legal status—even if in deliberate circumvention of existing laws or social norms—may well have beneficial economic effects.[32]

If the use of business organizations for purposes of regulatory partitioning has a long history, so does veil peeking. Veil peeking appears to have preceded veil piercing, which should not be surprising given the relatively late appearance of limited liability as a universal attribute of the corporate form of organization.[33] In the famous 1897 decision in *Salomon v. A. Salomon & Co.*, the House of Lords vehemently declined to pierce the corporate veil and overcome the protection of asset partitioning provided by the corporate form.[34] By contrast, the U.S. Supreme Court engaged in veil peeking as early as 1809 in *Bank of the United States v. Deveaux*.[35]

A. *Early Constitutional Cases*

The *Deveaux* case concerned a tax lawsuit brought by a Georgia tax collector against the first Bank of the United States.[36] Created by the U.S. government after much dispute over the existence of federal powers to charter corporations, the Bank remained controversial and was resented by Thomas Jefferson and his allies in Georgia, who then sought to impose hefty taxes on

30 *See* Amalia D. Kessler, *Limited Liability in Context: Lessons from the French Origins of the American Limited Partnership*, 32 J. LEGAL STUD. 511, 524-28 (2003) (arguing that limited liability in this context was essentially a corollary of limited partners' passivity and concealment).

31 *Id.*

32 Interestingly, since the enactment of the Commercial Code in 1807, the corporate form in France is known as "anonymous company" (*société anonyme*), an expression that carried over to French-, Spanish-, and Portuguese-speaking jurisdictions to this day. *See* Code de Commerce [C. Com.] [Commercial Code] art. 29 (Fr.) (1807).

33 *See, e.g.*, 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."). California law did not provide for limited liability until 1931. Mark I. Weinstein, *Share Price Changes and the Arrival of Limited Liability in California*, 32 J. LEGAL STUD. 1, 2 (2003).

34 Salomon v. A. Salomon & Co. Ltd. [1897] AC 22 (HL) 44, 51 (appeal taken from Eng.).

35 9 U.S. (5 Cranch) 61, 91-92 (1809).

36 For a description of the case and its background, see WINKLER, *supra* note 12, at 36-37.

the institution.[37] Seeking to avoid the likely prejudice of the Georgia judiciary, the Bank filed suit in federal court based on Article III, Section 2, of the U.S. Constitution, which grants federal courts authority to decide disputes "between Citizens of different States."[38]

In the words of Chief Justice Marshall, "[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name."[39] The Court nevertheless engaged in veil peeking to find diversity of citizenship, refusing to declare that "the members of the corporation were, to every intent and purpose, *out of view*, and merged in the corporation."[40] It decided, instead, to "*look* to the character of the individuals who compose the corporation," who were citizens of Pennsylvania, thereby authorizing federal diversity jurisdiction.[41]

Considering the facts before the Court, the decision in *Deveaux* may well have been functional from a constitutional and corporate law perspective. It avoided concerns about the partisanship of state courts that underlie the constitutional provision for diversity jurisdiction, while in no way compromising asset partitioning or other attributes of the corporate form. However, the application of the broad method of veil peeking proposed by *Deveaux* to future cases was clearly dysfunctional, leading to its eventual abandonment.

Given the requirement of *complete* diversity of citizenship, the presence of a single director with the same citizenship as the counterparty was enough to defeat the authority of federal courts. This criterion was therefore easily manipulated, permitting corporations to avoid diversity jurisdiction through opportunistic director appointments before the commencement of litigation.[42] Starting in 1844, the Supreme Court put an end to veil peeking for jurisdictional purposes, instead relying on the state of incorporation for the attribution of citizenship.[43] Given its dysfunctionality in view of share

37 *Id.*

38 U.S. CONST. art. III, § 2.

39 *Deveaux*, 9 U.S. (5 Cranch) at 86.

40 *Id.* at 91 (emphasis added).

41 *Id.* at 91-92 (emphasis added). Justice Marshall, however, did not actually investigate the Bank's membership, which remained "abstract, undefined, and unexamined." WINKLER, *supra* note 12, at 67.

42 *See* WINKLER, *supra* note 12, at 106-07 ("[W]hen railroads wanted to escape federal court they would add a director from the same state as the plaintiff, thus destroying the necessary diversity of citizenship.").

43 *See* Louisville, Cincinnati, & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) ("[A] corporation created by and doing business in a particular state, is to be deemed to all intents and purposes . . . an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person."); Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 328-29 (1853) (imposing a conclusive presumption that all shareholders are citizens of the state of incorporation).

tradability and the mutability of corporate directors, there seems to be no other examples of veil peeking based on the identity of non-controlling shareholders or of a singular corporate director.

Another early instance of veil peeking appeared a decade later in the prominent U.S. Supreme Court decision of *Trustees of Dartmouth College v. Woodward*.[44] The Court qualified the charter of Dartmouth College as a contract between the donors, the trustees, and the state, holding subsequent state laws impinging on charter provisions as an unconstitutional violation of the Contracts Clause of the U.S. Constitution.[45] The practical significance of the case, however, gradually declined with the rise of general incorporation and the demise of special charters susceptible to being legally qualified as contracts with the state.

B. *Enemy Corporations in the World Wars*

Wartime constraints also called into question the strict regime of regulatory partitioning provided by the corporate form. While British courts have been generally reluctant to pierce the corporate veil to impose liability on shareholders,[46] the House of Lords engaged in veil peeking as early as 1916 against the backdrop of World War I in *Daimler Co. v. Continental Tyre and Rubber Co. (Great Britain).*[47] The question in *Daimler* was whether a company incorporated in England, but whose managers and virtually all of whose shareholders were German and resided in Germany, qualified as an enemy under existing trading prohibitions enacted during World War I.[48] 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."[49]

The *Daimler* opinion by Lord Parker of Waddington effectively distinguished between veil piercing and veil peeking without naming names. It cited with approval the famous precedent of *Salomon v. A. Salomon & Co.* for the proposition that a company legally incorporated is an independent person with its own rights and liabilities.[50] However, Lord Parker of

44 17 U.S. (4 Wheat.) 518 (1819).

45 *Id.* at 654 ("[I]n these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.").

46 Tan Cheng-Han, Jiangyu Wang & Christian Hoffmann, *Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives*, 16 BERKELEY BUS. L.J. 140 (2019) (describing the cautious approach to veil piercing in the United Kingdom).

47 [1916] 2 AC 307 (HL) (appeal taken from Eng.).

48 *Id.* at 308-09.

49 *Id.* at 341-42 (emphasis added).

50 *Id.* at 338 (citing Salomon v. A. Salomon & Co. [1896] AC 22 (HL) 30 (appeal taken from Eng.)).

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; and this is crucial, for the rule against trading with the enemy depends upon enemy character."[51] In making this distinction, Lord Parker suggested that his veil peeking was justified, at least in part, by the case's wartime context.[52]

The *Daimler* opinion focused on reconciling the legal regimes governing legal persons and natural persons, given that the latter could become enemies by engaging in active aid or living in enemy territory.[53] It held that, for an artificial person, the analogue to voluntary residence in enemy territory was to be found in corporate control.[54] The court thus refused to permit

> the paradoxical result that the King's enemies, who chance during war to constitute the entire body of corporators in a company registered in England, thereby *pass out of the range of legal vision*, and, instead, the corporation, which in itself is incapable of loyalty, or enmity, or residence, or of anything but bare existence in contemplation of law and registration under some system of law, takes their place for almost the most important of all purposes, that of being classed among the King's friends or among his foes in time of war.[55]

The United States initially followed a different approach to veil peeking in wartime. The original Trading with the Enemy Act of 1917 defined as an enemy any corporation constituted in enemy territory or established in any country other than the United States and doing business in enemy territory.[56] The U.S. Supreme Court reasoned that this statutory language was deliberately "considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders."[57] Because the statutory language specifically addressed enemy corporations and appeared to preclude the *Daimler* solution, the Court therefore permitted regulatory partitioning and refused to attribute enemy character to corporations in view of enemy ownership.[58]

Congress would eventually amend the Act in 1947 to provide for legislative veil peeking by imputing enemy character to corporations that

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51 *Id.*

52 *See id.* at 344 ("[T]he truth is that considerations which govern civil liability and rights of property in time of peace differ radically from those which govern enemy character in time of war.").

53 *See id.* at 339 (describing how a natural person can take on "enemy character").

54 *See id.* at 340 (describing how an artificial person can adopt enemy character through the "acts of a company's organs").

55 *Id.* (emphasis added).

56 *See* Behn, Meyer & Co. v. Miller, 266 U.S. 457, 463 (1925) (quoting Trading with the Enemy Act, ch. 106, § 2(a), 40 Stat. 411, 411 (1917) (codified at 50 U.S.C. § 4302(a)).

57 *Id.* at 472.

58 *Id.* at 472-73.

were at least fifty percent owned or controlled by enemies.[59] However, a different veil peeking question also emerged. Should courts engage in reverse veil peeking[60] to protect the rights of innocent (non-enemy) shareholders in an enemy corporation whose assets were seized? In a split decision, the U.S. Supreme Court answered in the affirmative "not based on any technical concept of derivative rights appropriate to the law of corporations," but "based on the [Trading with the Enemy] Act which enables one not an enemy as defined in § 2 to recover any interest, right or title which he has in the property vested."[61] The dissenting opinion by Justice Reed, in turn, denounced the majority's "disregard of the ordinary incidents of the relation of a stockholder to a corporation," for "[a] stockholder has no present interest in the physical property of an unliquidated corporation."[62]

Beyond the early constitutional law and wartime cases, most of the early veil peeking controversies dealt with blunt attempts at regulatory arbitrage, with parties invoking regulatory partitioning to circumvent certain legal restrictions, as examined below.

C. *Early Antitrust and Regulatory Enforcement*

Early antitrust cases produced some of the most conspicuous instances of veil peeking as a response to regulatory arbitrage. Take the prominent precedent of *State v. Standard Oil*, decided by the Supreme Court of Ohio in 1892.[63] In that lawsuit, the state attorney general sought to dissolve the Standard Oil Company of Ohio for abusing its franchise in entering into and performing a monopolistic trust agreement against public policy.[64] The Standard Oil Trust was constituted in 1882 to own and control the stocks of forty separate competing companies for the benefit of the shareholders of the Standard Oil Company of Ohio.[65] By 1892, the Standard Oil Trust held the stocks of eighty-four companies.[66] However, the parties to the trust agreement were the shareholders of the companies involved and not the companies themselves.[67]

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59 Act of Aug. 5, 1947, ch. 499, sec. 2, § 32(a)(2), 61 Stat. 784, 784-85 (codified at 50 U.S.C. § 4329(a)(2)(E)).

60 *See infra* Part III (describing reverse veil peeking).

61 Kaufman v. Societe Internationale, 343 U.S. 156, 160 (1952); *see also* Trading with the Enemy Act, ch. 106, § 2, 40 Stat. 411, 411 (1917) (codified at 50 U.S.C. § 4302).

62 *Kaufman*, 343 U.S. at 166 (Reed, J., dissenting).

63 30 N.E. 279 (Ohio 1892).

64 *Id.* at 279.

65 H. L. Wilgus, *The Standard Oil Decision; The Rule of Reason*, 8 MICH. L. REV. 643, 648 (1911).

66 *Id.*

67 *Standard Oil*, 30 N.E. at 280.

This raised the question of whether the shareholders' execution of the unlawful trust agreement could be attributed to Standard Oil of Ohio to punish the company for its unlawfulness.[68] Answering in the affirmative, the Ohio Supreme Court maintained that corporate separateness, while a useful fiction for purposes of asset partitioning and contracting, should be disregarded when used for other purposes.[69] The court held that

> where all, or a majority, of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company . . . and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity *for the purpose of concealing their real purpose and object*, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the state . . . .[70]

While the court found that the forfeiture of Standard Oil's Ohio charter was barred by the statute of limitations,[71] it engaged in veil peeking to prevent the company from making and performing the trust agreement. The Standard Oil Trust was then liquidated and the shares were transferred back to the several companies, which were later regrouped as the Standard Oil Company of New Jersey, a holding company formed under New Jersey's new liberal corporation law.[72] It took the U.S. Supreme Court's decision in *Standard Oil*

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68 In Justice Minshall's words, "the real question we are now to determine is whether . . . the execution of the agreement set forth in the petition should be imputed to the association of persons constituting the Standard Oil Company of Ohio, acting in their corporate capacity." *Id.* at 288.

69 As the *Standard Oil* court stated:

> The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company *in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders by distinguishing between the corporate debts and property of the company and of the stockholders in their capacity as individuals*. All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice . . . . But when they are urged to an intent and purpose not within the reason and policy of the fiction, they have always been disregarded by the courts.

Id. at 287 (emphasis added).

70 *Id.* at 289-90. (second emphasis added).

71 *Id.* at 291.

72 *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 38-42 (1911) (describing how, following the Ohio Supreme Court's decision, Ohio instituted contempt proceedings against the Standard Oil Trust for failing to dissolve, only after which the several companies reorganized under a holding corporation in New Jersey).

Co. of New Jersey v. United States in 1910, applying the Sherman Antitrust Act of 1890, to ultimately break up Standard Oil.[73]

The Ohio *Standard Oil* decision was not unique in mitigating regulatory partitioning to ensure the enforcement of competition laws. Two years before, New York had also sought to dissolve a company based on illegal trust agreements signed by its members. In the leading case of *People v. North River Sugar Refining Co.*,[74] the New York Court of Appeals decided to "look beneath [the entity] at the actions of the individuals upon whom the franchise was conferred" in view of attributing such action to the company.[75] These early cases are emblematic of the great willingness to look behind the corporate veil in the antitrust context—a trend that would prove lasting.[76]

Early courts also engaged in veil peeking to punish dummy corporations created to evade rate regulations. In *United States v. Milwaukee Refrigerator Transit Co.*, defendants formed a corporation to conceal their receipt of rebates in violation of the rate regulations in the form of rate discrimination against other shippers.[77] The court found the argument that the corporation in question was a separate legal person for purposes of the regulations "neither new, nor deserving of new success,"[78] holding, as described by Maurice Wormser, that "people cannot obtain legal immunity for deliberate wrongdoing by a resort to the 'entity bath.'"[79]

D. *Jim Crow Discrimination*

The segregationist laws of the Jim Crow era provide a blatant example of discriminatory legal treatment across natural persons. In this context, formal incorporation by Black corporators as a separate legal person could offer regulatory partitioning, and thereby help circumvent some of these odious restrictions. The case of *People's Pleasure Park Co. v. Rohleder* involves precisely this scenario, in which Major Joseph B. Johnson, who had formerly been enslaved, formed a business corporation to avoid the application of a restrictive covenant barring the transfer of property to "colored persons."[80] Despite the obvious attempt to use the corporate form for evading legal

73 *Id.* at 79.

74 24 N.E. 834 (N.Y. 1890).

75 Wormser, *supra* note 12, at 510.

76 *See infra* Section VI.B.

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

78 *Id.* at 256.

79 Wormser, *supra* note 12, at 508. As described by Elvin Latty, the court "d[id] not say that a corporation is a separate entity—that the stockholders are shut off from legal view" in this particular context. Elvin R. Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597, 602 (1936).

80 61 S.E. 794, 795-96 (Va. 1908). For an extensive discussion of the case, see Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006).

constraints, the Virginia Supreme Court of Appeals declined to engage in veil peeking and did not attribute Johnson's race to the company. Instead, it held that "in law, there can be no such thing as a colored corporation."[81]

In embracing a strict approach of regulatory partitioning by declining to attribute a racial identity to the corporation, the *People's Pleasure Park* decision had the benefits of promoting the civil rights of shareholders and reducing the monitoring costs of the corporation's creditors.[82] However, Richard Brooks posited that perhaps the fundamental reason why the court refused to attribute race to legal person was that "[d]oing so would have revealed the unadorned legal construction of race and undermined the political and social regime of that period."[83]

Whatever the real reasons for the *People's Pleasure Park* decision, the "fancied compulsion of the entity concept" is probably not the most persuasive.[84] At any rate, while veil-peeking claims would continue to appear in the context of race-based laws, courts subsequently departed from the strict adoption of regulatory partitioning in *People's Pleasure Park*.[85]

III. VEIL PEEKING VS. VEIL PIERCING

Before proceeding to examine the economic role of regulatory partitioning and its exceptions, as well as the prevalence and range of veil peeking claims in contemporary law, I conceptualize and categorize the key structural properties of veil peeking. Up until now, scholarly works and judicial opinions have consistently conflated veil piercing and veil peeking.[86] Studies focusing on limited liability commonly cite veil peeking precedents without ever acknowledging that they do not affect shareholder liability.[87]

Existing mentions of the different exceptions to corporate separateness are few, perfunctory, and untheorized, which likely helps to explain their

81 Brooks, *supra* note 80, at 2024 (citation omitted).

82 *See id.* at 2046-47 (describing how racializing the corporation would expose "Black" corporations and their creditors to greater liability, and how potential creditors would have had to incur additional expenses to determine how corporations would be racialized before contracting with them).

83 *Id.* at 2047.

84 *See* Latty, *supra* note 79, at 609-10 (arguing that the decision in *People's Pleasure Park* should have been based on the invalidity of racial covenants, rather than the strict regulatory partitioning adopted by the court).

85 *See infra* Section VI.A.

86 *See supra* note 12 and accompanying text. Some decisions, however, make *implicit* distinctions between these modalities. *See, e.g.*, *supra* notes 50–52 and accompanying text.

87 *See, e.g.*, STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 190-91 (2016) (examining the U.S. Supreme Court decision in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), as a case about reverse veil piercing). For my analysis of this case as one of veil peeking, see *infra* Section VI.o.

limited impact.[88] German scholarship (and international scholarship building on German scholarship)[89] offers different labels for the "penetration" of the corporate veil for purposes of imposing liability on shareholders (*Haftungsdurchgriff*) and of attributing certain legal characteristics of shareholders to the corporation (*Zurechnungsdurchgriff*), but it does not articulate different grounds for, or implications of, these separate categories.[90] A few decisions by U.K. courts in the 1990s have similarly distinguished between "piercing the corporate veil" for purposes of liability and "lifting the corporate veil" for other legal purposes,[91] though this distinction also failed to take off.[92] Israel's Companies Law provides the exception that proves the rule. While Section 6(a) of the Israeli statute requires fraud or subversion of the company's purpose for the imposition of liability on shareholders (asset departitioning), Section 6(b) permits courts to ascribe attributes, rights, or obligations of shareholders to the company or vice-versa (regulatory departitioning) "if it is just and right to do so, having taken into account the intention of the statute or of the agreement that applies to the matter before it."[93]

Yet, despite the prevailing doctrinal confusion in most jurisdictions, the differences between veil piercing and veil peeking are clear and numerous. This Part endeavors to map these differences and fill the existing gap.

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88 For an interesting Italian monograph covering certain manifestations of what the author calls "the external relevance of shareholders," see ALBERTO MUSSO, LA RILEVANZA ESTERNA DEL SOCIO NELLE SOCIETÀ DI CAPITALI (1996).

89 *See, e.g.*, CALIXTO SALOMÃO FILHO, O NOVO DIREITO SOCIETÁRIO 259-60 (2011); 2 JORGE MANUEL COUTINHO DE ABREU, CURSO DE DIREITO COMERCIAL: DAS SOCIEDADES 174-76 (6th ed. 2019).

90 The concept of *Zurechnungsdurchgriff* is similar, though not identical, to the concept of veil peeking used here. The distinction between "liability penetration" (*Haftungsdurchgriff*) and "imputation penetration" (*Zurechnungsdurchgriff*) comes from the work of prominent German corporate law scholar HERBERT WIEDEMANN, GESELLSCHAFTSRECHT: EIN LEHRBUCH DES UNTERNEHMENS- UND VERBANDSRECHTS (1980). Although pioneering and highly illuminating in labeling the different types of exceptions to corporate separateness, Wiedemann's useful categorization has had limited impact on legal scholarship and practice, both in Germany and internationally.

91 For example, one Justice of the Court of Appeal wrote that

> [l]ike all metaphors, this phrase [the corporate veil] can sometimes obscure reasoning rather than elucidate it. There are, I think, two senses in which it is used, which need to be distinguished. To *pierce* the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or *look behind it*, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose.

Atlas Mar. Co. SA v. Avalon Mar. Ltd. [1990] 4 All ER 769 (AC) at 779 (Staughton LJ).

92 *See, e.g.*, Jennifer Payne, *Lifting the Corporate Veil: A Reassessment of the Fraud Exception*, 56 CAMBRIDGE L.J. 284, 284 n.2 (1997) (using lifting the corporate veil as a synonym of piercing the corporate veil as an exception to limited liability).

93 Companies Law, 5759–1999, *reprinted in* COMPANIES LAW 5759-1999 (Aryeh Greenfield trans., A.G. Publications 9th ed. 2015).

A. *Directional and Structural Difference*

As depicted in Figure 1 below, there is a directional and structural difference in the operation of veil piercing and veil peeking. Veil piercing overcomes limited liability to allow corporate creditors to reach shareholders' assets. Reverse veil piercing, which is rarer, overcomes entity shielding by allowing shareholders' creditors to reach the corporation's assets.

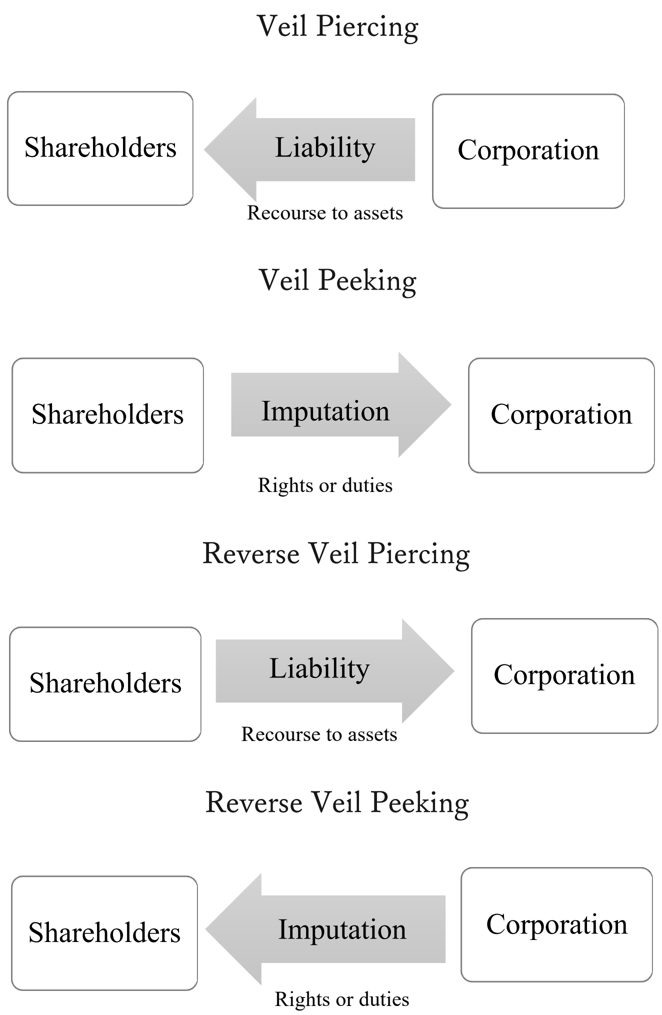
Veil peeking, in turn, serves to impute certain legal rights or duties of shareholders to the corporation. Reverse veil peeking imputes certain rights or features of the corporation to its shareholders, who are allowed to claim them in their own name.[94] Examples of reverse veil peeking are given by corporate law rules requiring the parent company's shareholders to approve a substantial sale of assets by a subsidiary,[95] and the international investment law regime permitting foreign shareholders to sue host states for the reflective losses they suffered due to unfair or inequitable treatment of the corporation.[96]

94 Scholars have implicitly noted this directional difference. *See* Amicus Brief, *supra* note 12, at 17 (discussing "reverse piercing" by corporate insiders).

95 *See infra* notes 303–303 and accompanying text.

96 *See infra* Section VI.C.

Figure 1: Directional Differences Between Veil Piercing and Veil Peeking



B. *Distributional and Ideological Implications*

Veil piercing and veil peeking differ in their distributional implications and ideological connotations. Veil piercing has invariably anti-shareholder and pro-regulatory consequences, granting creditors remedies that exceed those expressly bargained for or imposing liabilities (such as for torts or regulatory violations) that were not consensually assumed. Veil peeking, by contrast, may be pro- or anti-shareholder, as well as pro- or anti-regulation, depending on whether one looks behind the corporate veil to impute legal advantages or detriments to the corporation.

Veil peeking can be used to level the legal playing field in ways that are beneficial or detrimental to shareholder interests compared to the baseline of absolute regulatory partitioning. Shareholders may benefit from the attribution of free speech, religious, and due process rights to corporations on a pass-through basis, all of which can have the effect of frustrating the state's regulatory efforts.[97] However, veil peeking can also hurt shareholder interests and boost regulation by foreclosing the use of the corporate form to evade legal mandates or an unfavorable regulatory regime.

C. *Frequency of Application*

Although veil peeking problems are more circumscribed, they seem to be more easily accepted than veil piercing claims. Even jurisdictions that are reluctant to pierce the corporate veil to impose liability on shareholders, such as the United Kingdom, have engaged in veil peeking with some frequency.[98] The greater palatability of veil peeking would not be surprising given the nature of the constitutional and regulatory interests involved, as analyzed next, as well as the different costs and benefits of asset and regulatory partitioning, as examined in Part V below.

D. *Areas of Law*

There is a likely difference in the fields of law giving rise to most veil piercing and veil peeking claims. Veil piercing claims seem to be more common in private law disputes concerning contract and tort law claims, while veil peeking cases frequently appear in public law cases testing the permissibility of legal discrimination by the state, or tackling parties'

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97 Admittedly, the attribution of free speech and religious rights to corporations may increase agency costs between shareholders and managers (or among shareholders) having different views of beliefs. *See infra* note 158 and accompanying text.

98 In fact, the recent reconceptualization of veil piercing by the U.K. Supreme Court is in large part about veil peeking. According to the court, the U.K. jurisprudence on veil piercing can be explained in terms of what Lord Sumption termed the "concealment principle" and the "evasion principle," both of which are often about peeking, not piercing. *Prest v. Petrodel Res. Ltd.* [2013] UKSC 34, [28] (Lord Sumption SCJ) (appeal taken from Eng.). The United Kingdom is also a leader in the global movement toward public disclosure of beneficial ownership, which supports veil peeking as well as veil piercing. *See* JOHN GITHONGO, BENEFICIAL OWNERSHIP: THE GLOBAL STATE OF PLAY 2019, at 3-4 (2019), https://cic.nyu.edu/sites/default/files/beneficial_ownership_githongo_final_july_1.pdf [https://perma.cc/8Y3G-3U63] (describing a 2009 scandal in Britain and subsequent initiatives by the British government to increase ownership transparency).

attempts at regulatory arbitrage, often emerging in constitutional, antitrust, regulatory, tax, or international law disputes.

Nevertheless, the correlation between veil piercing and veil peeking and areas of private and public law is far from absolute. Numerous public law rules and regulations are enforced by financial penalties to be satisfied against an entity's assets. Veil piercing as an exception to asset partitioning can and does often appear in connection with regulatory claims and criminal law, as when the state goes after the assets of a parent company to sanction violations of environmental laws by a subsidiary.[99] Conversely, as further illustrated below, veil peeking also applies in private law as a gap-filling method to avoid the circumvention of contract, property, and corporate law rules.

E. *Different Boundaries*

As different functional phenomena, veil piercing and veil peeking are subject to distinct boundaries. Regulatory partitioning itself is also subject to different boundaries across legal fields and rules, a phenomenon that also holds to a lesser extent for asset partitioning. This means that the imposition of liability on corporate shareholders in a given veil piercing case does not necessarily put an end to regulatory partitioning (or asset partitioning, for that matter) in other areas of law, such as tax and jurisdictional matters. Conversely, the use of veil peeking in a certain regulatory context does not compromise asset partitioning or regulatory partitioning across the board.

Furthermore, contrary to existing assumptions, there appears to be no necessary correlation between courts' general willingness to engage in veil piercing and veil peeking.[100] Veil piercing and veil peeking provide exceptions to distinct components of corporate separateness and are treated differently by courts. If anything, there might be a reverse relationship between a given court's willingness to engage in veil piercing and shareholder-friendly veil peeking.

U.S. courts have repeatedly engaged in veil peeking to attribute constitutional rights to corporations but generally have been reluctant to impinge on limited liability by piercing the corporate veil. Commentators have pointed to a contradiction in this approach,[101] but the tension is only apparent. The reluctance to engage in veil piercing and the willingness to

99 *See* Thompson, *supra* note 4, at 1058 n.117 (describing the incidence of veil piercing in the context of criminal law and regulatory law); Macey & Mitts, *supra* note 4, at 115 (finding that veil piercing is particularly common to uphold the purpose of a regulatory or statutory scheme, as when courts impose liabilities on parent companies under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)).

100 Some commentators have posited such a connection. Macey & Strine, *supra* note 14, at 42 (warning about the implications of the U.S. Supreme Court veil peeking decision in *Citizens United* for the concept of limited liability).

101 *See, e.g.*, *id.*

engage in veil peeking to attribute shareholder rights to the corporation are consistent in their pro-shareholder and anti-regulatory orientation.

Contrast this to Brazilian law, which has adopted an exceptionally expansive approach to veil piercing, effectively eliminating the protection of limited liability with respect to labor, environmental, and consumer claims.[102] At the same time, the Brazilian Supreme Court has been reluctant to attribute constitutional rights to corporations through veil peeking. In 2015, it found that the existing statute permitting campaign contributions from legal persons was unconstitutional as a violation of the general principles of equality and democracy.[103] This decision stands in contrast to the U.S. Supreme Court stance in *Citizens United v. FEC*,[104] which recognizes corporations' free speech rights to make independent campaign expenditures.

IV. UNPACKING VEIL PEEKING

This Part scrutinizes the different forms of veil peeking by mapping out the main functions performed by veil peeking and offering a taxonomy of its different modalities. This effort will reveal that, although sufficiently distinctive as a category, veil peeking is not a unitary phenomenon. This categorization of different veil peeking strategies will have repercussions for the economic analysis of regulatory partitioning and veil peeking, as presented in the following section.

A. *The Types of Veil Peeking Problems*

Veil peeking questions concern one of three related problems:

1. The Problem of Permissible Regulatory Differentiation

The question here is whether individuals and legal persons (or different types of legal persons) ought to be subject to the same or different legal regime. Prominent examples include the U.S. Supreme Court decision in *Santa Clara County v. Southern Pacific Railroad*, which is credited for concluding that the disparate tax treatment afforded to railroad corporations

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102 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).

103 S.T.F., Ação Direta de Inconstitucionalidade 4.650, Realtor: Min. Luiz Fux, 17.09.2015, http://portal.stf.jus.br/processos/downloadPeca.asp?id=308746530&ext=.pdf [https://perma.cc/FEQ5-M9B6]. The Brazilian Supreme Court (STF) decision concerns campaign contributions rather than independent political expenditures as does *Citizens United*. In fact, the STF opinion mentions *Citizens United* but distinguishes its decision by referring to the U.S. Supreme Court decision in *Buckley v. Valeo*, 424. U.S. 1, 22 (1976), which differentiates the protection of campaign contribution and political expenditures on First Amendment grounds.

104 558 U.S. 310, 319 (2010).

in California compared to individual landowners violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution,[105] and the U.S. Supreme Court decision in *First National Bank of Boston v. Bellotti*, which held the corporate identity of the speaker did not affect its protection under the First Amendment.[106]

2. The Problem of Permissible Regulatory Arbitrage

The issue here pertains to the legality of using the corporate form to evade or modify existing legal restrictions. Examples include the formation of a corporation by a Black founder to evade the racial covenants in *People Pleasure's Park*,[107] the transfer of real property to a wholly owned corporation to avoid homestead exemptions against creditors,[108] and the incorporation in a foreign jurisdiction covered by a bilateral investment treaty to obtain enhanced legal protection against one's home state.[109]

3. The Problem of Aggregation and Pass-Through Imputation

This problem concerns whether and how certain rights, duties or qualities of shareholders that are subject to disparate legal treatment should be imputed to the legal persons owned or controlled by them. Examples include the imputation of enemy character of shareholders or managers to the corporation for purposes of the application of wartime restrictions.[110]

Although analytically distinct, these problems are interrelated. While the first problem relates to the permissibility of regulatory differentiation, the latter two emerge only when the legal regime effectively distinguishes between the legal status of different natural persons, of natural persons and legal persons, or of different legal persons. Regulatory arbitrage always presupposes the existence of regulatory differentiation. Pass-through imputation at times presupposes the existence of regulatory differentiation and at times determines whether such regulatory differentiation is permissible.

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105 118 U.S. 394, 394-95 (1886). *But see infra* notes 251–53 and accompanying text (for the controversy surrounding the holding of *Santa Clara* due to the misleading syllabus).

106 435 U.S. 765, 776 (1978). While veil peeking often pertains to the problem of permissible regulatory differentiation across different organizational forms, not all questions of regulatory differentiation concern veil peeking. *See, e.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1405, 1408 (2018) (holding that, unlike foreign individuals, foreign corporations may not be sued under the Alien Tort Statute in the absence of clear congressional instructions).

107 *See supra* Section II.D.

108 *See infra* note 312 and accompanying text.

109 *See infra* note 224 and accompanying text.

110 *See supra* Section II.B.

B. *A Taxonomy of Veil Peeking*

For each of the problems outlined above, there can be different forms of veil peeking or regulatory partitioning responses.

1. Explicit Veil Peeking by Lawmakers vs. Judicial Veil Peeking as Gap Filling

The first and most fundamental distinction concerns the source of veil peeking. Veil peeking may be the result of the explicit language of the constitution, statute, treaty, or contract in question (lawmaker veil peeking), or it might be the product of a judicial determination when the legal source in question does not provide an explicit solution for the classical veil-peeking problems (judicial veil peeking). Explicit veil peeking by lawmakers is commonplace. A few examples include tax rules that condition the applicable regime on the identity of shareholders in the corporation, the corporate law requirement that shareholders of the parent company approve asset sales conducted by a subsidiary, and the statutory imposition of enemy treatment on corporations that are fifty percent enemy owned or controlled under the amended Trading with the Enemy Act.[111]

Most veil peeking controversies, however, relate to situations in which the legal text in question is not explicit about (1) the permissibility of regulatory differentiation, (2) the permissibility of regulatory arbitrage, or (3) the criterion for aggregation or pass-through imputation. This means that veil-peeking controversies, including the ones examined here, are essentially about interpretation or gap filling of constitutional, statutory, treaty, or contractual texts that do not explicitly address the treatment of corporate entities. As a question of constitutional, statutory, treaty, or contractual construction, the standard tenets of interpretation apply, and the purpose of the regulatory scheme in question assumes major importance.

2. Shareholder-Friendly vs. Shareholder-Unfriendly Veil Peeking

Veil peeking can also be categorized according to its effects. Shareholder-friendly veil peeking restricts the scope of government intervention on corporations by permitting the assertion of shareholder rights against the state. Shareholder-unfriendly veil peeking magnifies the regulatory power of the state over business corporations by preventing regulatory arbitrage, or ascribing to corporations some of the regulatory constraints applicable to the individuals that control them.

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111 *See supra* note 59 and accompanying text.

Shareholder-friendly veil peeking increases the attractiveness of the corporate form, while shareholder-unfriendly veil peeking reduces it. Shareholder-friendly veil peeking generally limits the state's power, and shareholder-unfriendly veil peeking generally augments it. There are, however, exceptions to this pattern. The opposite result holds when the state itself is a shareholder—as in a citizen's free-speech lawsuit against government-owned railroad company Amtrak[112]—so that shareholder-unfriendly veil peeking reduces state power, but also decreases the attractiveness of the corporate form to the state. The use of veil peeking to permit corporations to raise antidiscrimination claims, as examined below, simultaneously enhances the state's regulatory power and favors shareholder interests, thereby increasing the attractiveness of the corporate form.

Indeed, both veil peeking and the strict upholding of regulatory partitioning can promote shareholder-friendly and shareholder-unfriendly outcomes, depending on the question at issue. Take, for instance, the interaction between race and regulatory partitioning. The strict regulatory partitioning commitment to "colorless corporations" in the face of racial covenants was clearly shareholder friendly,[113] as is the veil peeking approach permitting corporations to claim a racial identity for the purposes of antidiscrimination laws.[114]

3. Untailored (Categorical) vs. Tailored Veil Peeking

Veil peeking can be implemented in a categorical or tailored fashion.[115] Veil peeking is categorical when the relevant decision about regulatory partitioning is made without regard to the characteristics of the corporation in question. Tailored veil peeking occurs when the imputation of rights or characteristics to the corporation takes into account the particular ownership structure of the corporation or other case-specific factors. Tailored approaches to veil peeking can take place through legal rules (e.g., depending on non-profit vs. for-profit status or the ownership of a certain percentage of voting shares) or standards (such as the existence of corporate control). In the choice

112 *See infra* notes 283–87 and accompanying text.

113 *See supra* Section II.B.

114 *See infra* Section V.o.

115 This categorization draws loosely on Ayres and Gertner's seminal work on default rules in contract law, which distinguishes between "tailored" defaults (which aims to apply the rule that the parties before the court would have wanted), "untailored" defaults (which applies the regime that most parties would have wanted), and "penalty" default rules (which provide a regime that the parties would not have contracted for). *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

between rule-based or standard-based tailoring, the familiar tradeoffs between rules and standards apply.[116]

The famous syllabus of *Santa Clara*, stating that corporations are persons for purposes of the Fourteenth Amendment as a form of protection for the rights of individuals, is an instance of categorical veil peeking.[117] So is the U.S. Supreme Court decision in *Copperweld* holding that a parent and a wholly owned subsidiary do not count as separate entities for purposes of a conspiracy under the Sherman Act.[118] Although the categorical recognition of regulatory partitioning is well known—as in the commitment to "colorless corporations" in *People's Pleasure Park*[119]—or in the U.S. Supreme Court's refusal to extend the Fifth Amendment privilege against self-incrimination to corporations[120]—scholars, practitioners, and courts often do not appreciate the broad use of categorical veil peeking.[121]

A key question in the U.S. Supreme Court decision in *Dole Food Co. v. Patrickson*[122] was whether a company *indirectly* owned by the Israeli government through intermediate corporate entities qualified as an instrumentality of the state for purpose of federal jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA). The FSIA grants instrumentality status to an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."[123] In declining to find federal jurisdiction, the unanimous opinion, written by Justice Kennedy, noted that "[t]he doctrine of piercing the corporate veil . . . is the rare exception, applied in the case of fraud or certain exceptional circumstances" and "usually determined on a case-by-case basis."[124] It added that the companies had "no authority for extending the doctrine so far that, *as a categorical matter*, all subsidiaries are deemed to be the same as the parent corporation."[125] Yet the very jurisprudence of the

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116 *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557 (1992) (explaining how legal rules are more costly to create while standards are more costly to interpret); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592 (1988) (distinguishing rules from standards by describing how rules allow malicious actors to act within the acceptable yet harmful limits on their conduct).

117 *See infra* notes 251–53 and accompanying text.

118 Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 777; *see also infra* Section VI.0.

119 *See supra* Section II.D.

120 Hale v. Henkel, 201 U.S. 43, 57 (1906).

121 *See, e.g.*, Macey, *supra* note 12, at 1200 (criticizing the Supreme Court's attribution of shareholders' constitutional rights to corporations as "a radical departure from the Court's treatment of corporations in all other areas of law").

122 538 U.S. 468, 471 (2003).

123 28 U.S.C. § 1603(b)(2).

124 *Dole Food Co.*, 538 U.S. at 475.

125 *Id.* at 475-76 (emphasis added).

Supreme Court recognizes several instances of categorical veil peeking in other contexts.[126]

Conversely, factual inquiries into control structures in *Daimler* and *Standard Oil* of Ohio reflect a tailored approach to veil peeking. However, the distinction between tailored and untailored approaches to veil peeking do not represent a sharp dichotomy, but rather a continuum of approaches that are more or less tailored. This is well illustrated by the analysis of the prominent (if controversial) decision of the U.S. Supreme Court in *Citizens United v. FEC*.[127]

In that case, Citizens United, a nonprofit corporation, sought to release and publicize a documentary critical of presidential candidate Hillary Clinton through video-on-demand.[128] The issue was whether a federal statutory rule prohibiting unions and corporations from making certain political expenditures constituted a violation of the guarantee of freedom of speech contained in the First Amendment of the Constitution.[129]

Justice Kennedy's majority opinion deemed the statutory restrictions unconstitutional based on (1) the unconstitutionality of restrictions based on the identity of the speaker, as the text of the First Amendment refers to "speech,"[130] and (2) the pass-through imputation on a *categorical* basis of citizens' rights to corporations, which are described as "associations of citizens."[131] In my taxonomy, the Court's majority opinion engages in judicial gap filling to embrace shareholder-friendly veil peeking on a categorical basis, thereby forbidding regulatory differentiation to the detriment of corporations as a whole.[132]

The dissenting opinion by Justice Stevens, by contrast, sought to sanction regulatory differentiation between the rights of humans and artificial entities by preserving regulatory partitioning.[133] It endorsed the different treatment

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126 *See, e.g.*, *supra* notes 117-118 and accompanying text; *infra* note 251 and accompanying text (presenting examples of court cases in which the Supreme Court employed a categorical approach to veil peeking).

127 558 U.S. 310 (2010).

128 *Id.* at 319-20.

129 *Id.* at 321.

130 *See id.* at 341 ("The First Amendment protects speech and the speaker, and the ideas that flow from each.").

131 *Id.* at 356

132 As one scholar described it, "[t]he change [in *Citizens United*] was that the Court rejected the taxonomy-based approach distinguishing among organizations" and "abandoned the nuanced approach involving the application of narrow tailoring and compelling state interest law that had developed over the prior decades." Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 118 (2014).

133 *See Citizens United*, 558 U.S. at 428 (Stevens, J., concurring in part and dissenting in part) ("Unlike our colleagues, [the Framers] had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.").

of corporate political expenditures given that "[i]n the context of election to public office, the distinction between corporate and human speakers is significant."[134] Both the majority and the dissenting opinions in *Citizens United* are categorical in that they do not condition veil peeking or regulatory partitioning on the particular characteristics of the legal person in question, in terms of ownership structure or for-profit versus non-profit status, among other factors.

Scholars such as Margaret Blair and Elizabeth Pollman have advocated precisely such a tailored peeking approach that distinguishes between organizational forms of for-profit and not-for-profit corporations, as well as between firms with different ownership structures.[135] In defending such a tailored approach, they suggest that, in view of the derivative nature of corporate constitutional rights, it is imperative "to identify the specific group of natural persons from whom the corporate right is derived," so that categorical, "[b]road rulings as to all corporations do not suffice."[136] Despite certain potential advantages, however, such a tailored veil-peeking approach generates obvious difficulties of line drawing, as its supporters concede.[137]

In any case, the distinction between tailored and categorical approaches to veil peeking is not rigidly binary, but rather part of a spectrum. Even the majority opinion in *Citizens United* acknowledged the potential need for subsequent tailoring of veil peeking to constrain foreign interference in elections.[138] It refused, however, to categorically embrace regulatory

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134 Garrett, *supra* note 132, at 118.

135 Margaret Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1733 (2015) ("[F]or some purposes, some corporations can usefully and functionally be regarded as aggregates of their members from whom rights could be derived, while other corporations serve other purposes, and cannot be regarded as representing any particular natural person or group of natural persons.").

136 *Id.* at 1735.

137 *See id.* at 1738; *see also* Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. 597, 600-02 (2016) (discussing why the diversity in corporate organizations is grounds for a tailored approach to determining corporate rights); Margaret M. Blair, *Corporations and Expressive Rights: How the Lines Should Be Drawn*, 65 DEPAUL L. REV. 253, 253-54 (2016) (arguing that the Supreme Court should clearly define corporate rights for specific types of organizations).

138 Justice Kennedy wrote:

> We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process . . . . Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.

Citizens United, 558 U.S. at 362; *see also* Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1046 (suggesting that future efforts to regulate campaign expenditures by foreign corporations will likely rely on the locus of corporate management control, rather than on partitioning as a solution to this problem, as proposed by Justice Stevens in his dissenting opinion.[139]

V. THE LAW AND ECONOMICS OF REGULATORY PARTITIONING AND VEIL PEEKING

Asset (de)partitioning and regulatory (de)partitioning serve fundamentally different functions and entail distinct tradeoffs. While the literature provides ready answers regarding the economic properties of asset partitioning and veil piercing, it has thus far ignored the role of regulatory partitioning and veil peeking. Up until now, regulatory partitioning had not been explicitly identified, much less theorized. This Part first examines the economic benefits and costs of regulatory partitioning and how they differ from those of asset partitioning. It then offers guidance to courts in adjudicating veil peeking controversies.

A. *The Costs and Benefits of Asset and Regulatory (De)partitioning*

Asset partitioning in the form of limited liability and entity shielding offers several benefits, which veil piercing and reverse veil piercing then potentially compromise. By limiting shareholders' economic exposure, limited liability (1) reduces monitoring costs of shareholders and creditors, (2) encourages delegated management and thereby promotes diversification, and (3) facilitates share tradability, liquidity, and the market for corporate control by permitting shares to be priced irrespective of the identity of their owners. Entity shielding, which is compromised by reverse veil piercing, helps (4) preserve going concern value, (5) facilitate bankruptcy administration, and (6) correct debt overhang. At the same time, however, asset partitioning produces two new forms of costs: (1) an increased agency cost of debt and (2) higher accounting costs.[140]

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the nationality of the majority of shareholders, for "the same reasons that forced the Court to abandon the aggregate view for diversity jurisdiction").

139 Justice Stevens wrote:

> If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could "'enhance the relative voice'" of some (*i. e.*, humans) over others (*i. e.*, nonhumans).

Citizens United, 558 U.S. at 424 (Stevens, J., concurring in part and dissenting in part) (quoting *id.* at 379-80 (Roberts, C.J., concurring).

140 *See* Hansmann & Squire, *supra* note 2, at 266 tbl. 11.1.

Compared to veil piercing, veil peeking compromises only a fraction of the benefits of asset partitioning listed above and, even so, only to a limited extent. Because veil piercing does not influence asset partitioning, it does not at all affect going concern value, the ease of bankruptcy administration, and the solutions to debt overhang as important advantages of asset partitioning. Nor does it mitigate, for that matter, the costs of asset partitioning.

Regulatory partitioning does share with asset partitioning the key benefit of promoting share transferability, liquidity, and the market for corporate control. By isolating the legal regime applicable to the corporation from the identity and regulatory status of its shareholders, it permits corporations to be valued and shares to be priced irrespective of shareholder identity. Just like a regime of unlimited liability conditions the value of corporate shares on the wealth of shareholders, veil peeking conditions the value of the firm on certain regulatory advantages or drawbacks triggered by the identity of shareholders.[141] Veil peeking can thereby discourage control transfers that could be optimal from an agency cost or industrial organization perspective. While some forms of veil peeking intentionally seek to restrict share transfers, as in nationality and foreign ownership restrictions, in other contexts reduced transferability is an accidental byproduct of veil peeking.[142]

Crucially, regulatory partitioning also carries benefits and costs that are distinct from those of asset partitioning. In upholding the separation between the legal spheres of the corporation and its non-controlling shareholders, regulatory partitioning is essential for the proper functioning of enterprises with numerous and changing members. The corporation is prima facie shielded from the variety of legal obligations and disabilities affecting its shareholders, from non-compete obligations and disqualification from government contracts to international sanctions. By contributing to the stability and foreseeability of the legal regime applicable to the corporate entity, this form of *regulatory shielding* with respect to non-controlling

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141 A related argument is that unlimited liability hampers share transferability. *See* Paul Halpern, Michael Trebilcock & Stuart Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117, 130 (1980) (positing that, in the absence of limited liability, the purchase price of equity securities would depend on the wealth of shareholders); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 42 (1991) (observing the same). However, there are important differences in the ways veil piercing and veil peeking impinge on share pricing and transferability. Veil piercing reduces the price wealthy shareholders are willing to pay for corporate shares, but it does not affect shareholders who are judgment proof or the operation of the corporation itself other than by increasing its cost of capital. By contrast, veil peeking can easily affect the status and operation of the firm for the detriment or benefit of all shareholders.

142 Consider, for instance, how the legal regime established in the COMILOG case may deter control transfers to parent companies located in more developed jurisdictions. *See infra* notes 249–50 and accompanying text (discussing the COMILOG case finding jurisdiction in France for unlawful conduct in Congo after control of the Congolese company was transferred to a French company).

shareholders is as fundamental to the viability of firms with numerous shareholders as entity shielding.[143]

Precisely for this reason, the actual operation of veil peeking is invariably premised not on the ownership of a single share or minority stake in a corporation, but on the existence of corporate control.[144] Just as veil piercing is not used to reach the assets of a corporation's workers, consumers, creditors, or minority shareholders,[145] veil peeking applies exclusively vis-à-vis controlling shareholders or, less frequently, top managers. While scholars have questioned the choice of shareholders as the relevant target for veil peeking,[146] the relationship between veil peeking and corporate control is remarkably strong and for good functional reasons. Corporate control effectively blurs the boundaries of the firm.[147]

Although less existential, the upholding of regulatory partitioning vis-à-vis controlling shareholders also offers important benefits. Importantly, it reduces regulatory costs, since control-based regulations can be costly to implement. Not only do they hinder share transferability as a key attribute of the corporate form, as discussed above, but adjudicating control begets legal mud. Corporate control is a key legal and economic concept that is exceptionally difficult to define ex ante and can also be quite costly to verify ex post.[148]

143 For the key economic role of entity shielding (or affirmative asset partitioning), see Hansmann & Kraakman, *supra* note 1, at 390; Hansmann et al., *supra* note 1, at 1336.

144 The exception is categorical shareholder-friendly veil peeking which levels the organizational playing field by attributing fundamental rights to corporations.

145 *See, e.g.*, Pargendler, *supra* note 102, at 22 (describing how Brazilian labor courts often pierce the corporate veil to hold minority shareholders liable for corporate obligations).

146 *See* Blair & Pollman, *supra* note 135, at 1730 (criticizing the U.S. Supreme Court decision in *Hobby Lobby* for not explaining "why the shareholders were the appropriate persons from whom to derive a religious exemption from an employee health benefit requirement for the corporation, despite one of the corporations involved having more than 13,000 employees, whose religious beliefs were not considered").

147 *See infra* note 258 and accompanying text.

148 The continued expansion of the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) to review transactions that could pose a threat to national security illustrates the difficulties in defining control. Following the changes introduced by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), CFIUS review now encompasses not only controlling stakes but also "[o]ther investments" that give foreign persons access to material technical information, board membership, or observer rights or involvement in substantive decision-making in connection with critical infrastructure, critical technology, or sensitive personal data. 50 U.S.C. § 4565(a)(4)(D). Another fundamental difficulty is that control may to some extent take place through means other than stock ownership, which could help defeat veil peeking inquiries. *See, e.g.*, Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 307 (Del. 2015) (finding that a contractual management agreement that limits a corporation's strategic options does not characterize control in the absence of significant stock ownership and voting power). Interestingly, Chinese firms have channeled massive foreign investment through contractual (rather than equity) rights in "variable interest entities" (VIEs) holding operating licenses and other sensitive assets—a structure aimed at

Existing attempts to create rule-based definitions of control—such as linking it to the holding of a majority of the voting stock or of a certain threshold of shares—can be easily over- or underinclusive in identifying actual instances of corporate control. On the other hand, the type of open-ended inquiry into actual corporate control can be costly, unpredictable, and prone to error. This is one reason why corporate law rules are often not tailored to ownership and control structure, even though scholars seem to agree that firms with different ownership structures are best served by different corporate law regimes.[149]

The high cost of open-ended control inquiries is also a key reason why the law so often refuses to peek despite the importance of corporate control, resorting instead to objective criteria for the attribution of legal consequences, such as the principal place of business or place of incorporation. In other words: because control inquiries are costly, they are used only when the stakes are high, control inherently matters to accomplish the regulatory objective, and the legal problems in question are not routine. For routine matters, veil peeking is eschewed in favor of more objective criteria. Conversely, veil peeking is often used when the regulatory question at hand is both non-routine and consequential, as in antitrust and national security matters.[150]

Despite its benefits, regulatory partitioning can also be costly in frustrating the state's regulatory efforts. Precisely because the corporation serves as a separate nexus for regulation, it operates as a chief instrument for purposes of regulatory arbitrage.[151] This means that the essential tradeoff between regulatory partitioning and veil peeking relates to the benefits of reducing regulatory costs and facilitating share transfers, on the one hand, and the potential harm to regulatory effectiveness, on the other.

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circumventing Chinese regulations that restrict foreign investment in certain industries through veil peeking. *See* Schumpeter, *A Legal Vulnerability at the Heart of China's Big Internet Firms*, THE ECONOMIST (Sept. 16, 2017), https://www.economist.com/business/2017/09/16/a-legal-vulnerability-at-the-heart-of-chinas-big-internet-firms [https://perma.cc/8X8T-BSP8] (discussing the use of VIEs to own assets in "politically sensitive sectors" of China's economy).

149 *See, e.g.*, Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1280 (2009) (arguing there are different corporate governance best practices for companies with concentrated and dispersed ownership structures).

150 For examples, see *supra* Section II.B (national security during wartime) and *infra* Section VI.B (antitrust).

151 *See* Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229 (2010) (outlining a theory of regulatory arbitrage that reveals how it ultimately "undermines the rule of law"); Frank Partnoy, *The Law of Two Prices: Regulatory Arbitrage Revisited*, 107 GEO. L.J. 1017, 1018-19 (2019) (arguing that regulatory arbitrage warrants caution because, unlike financial arbitrage, it can lead to the persistence of different prices for economically equivalent transactions). To be sure, the use of the corporate form for purposes of regulatory arbitrage can at times lead to results that are both fair and efficient, as in the recognition of "colorless corporations" in *People's Pleasure Park*. *See supra* Section II.D.

Nevertheless, because veil peeking is not a unitary phenomenon, its precise effects will depend on the modality involved. Tailored veil peeking is both costlier to apply and potentially more disruptive to share transferability than categorical veil peeking, though—as the name suggests—more tailored to the realization of the regulatory objectives in a particular case. Categorical veil peeking that levels the organizational playing field by attributing fundamental rights to all corporations, as in *Citizens United*, is easy to adjudicate and does not hinder share transferability in a meaningful way.

Although various commentators have chastised the U.S. Supreme Court decision in *Citizens United* as insufficiently tailored,[152] the categorical approach has the overlooked benefit of achieving organizational neutrality and promoting share transferability.[153] However, even fairly categorical veil peeking rules, as in the U.S. Supreme Court's *Copperweld* decision, holding there can be no antitrust conspiracy between a parent and a wholly owned subsidiary,[154] can discourage share transferability by muddying the legal regime applicable to partial subsidiaries.

Shareholder-unfriendly veil peeking may increase monitoring costs by shareholders and creditors. By linking a corporation's regulatory status to the composition of its shareholder base, shareholder-unfriendly veil peeking increases regulatory risk and makes it more difficult to evaluate it. In a world where veil peeking is permitted, non-controlling shareholders and creditors must worry about legal disadvantages stemming from the status of controlling shareholders. To be sure, non-controlling shareholders and creditors can and do, to some extent, protect themselves by contracting for change-of-control provisions in credit agreements,[155] or through share transfer restrictions and tag-along rights in corporate charters or shareholder agreements.[156] These

152 *See, e.g.*, Blair & Pollman, *supra* note 135, at 1733; Randall P. Benzanson, *No Middle Ground? Reflections on the* Citizens United *Decision*, 96 IOWA L. REV. 649, 652-53 (2011) (contending that the Court could and should have reached a narrower holding based on the characteristics of the organization in question).

153 For an account of the constitutional jurisprudence on corporate rights in terms of organizational neutrality, see Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 503 (2016), which argues that the U.S. Supreme Court's seemingly inconsistent approach to questions concerning the nature of the firm are actually unified in a theory of organizational neutrality, which "stands for the idea that the burden of actual or potential regulation should not affect the mode of organization through which entrepreneurs choose to coordinate group activity."

154 *See infra* Section VI.B.

155 *See, e.g.*, Ningzhong Li, Yun Lou & Florin P. Vasvari, *Default Clauses in Debt Contracts*, 20 REV. ACCT. STUD. 1596, 1609 (2015) (finding that a change in control constitutes an event of default in seventy-one percent of loan agreements in their sample).

156 *See, e.g.*, XAVIER RUIZ & MARTA GARCIA, IBA GUIDE ON SHAREHOLDER AGREEMENTS (DELAWARE, NEW YORK AND FLORIDA, USA) 4 (2018), https://perma.cc/C22L-NPDQ (referring the lawful use of transfer restrictions and tag-along rights in shareholder agreements).

protections, however, often come at the cost of decreased liquidity and potentially higher agency costs.[157]

Moreover, even categorical veil peeking that is beneficial to shareholders may at times increase agency costs. This argument has been raised in the context of the *Citizens United* decision, since heterogeneous, welfare-maximizing shareholders may not uniformly favor a given firm's political contributions. There are, however, less drastic corporate law solutions to this problem beyond banning veil peeking, assuming they were constitutionally permissible.[158]

Importantly, the magnitude of liquidity, monitoring, and agency costs raised by veil peeking is likely much lower than that of veil piercing. This is because (1) the legal scenarios leading to detrimental veil peeking are relatively circumscribed and (2) such regulatory risk may be a second-order consideration compared to the first-order credit risk and related monitoring costs that exist in the absence of asset partitioning.

To put it differently: it is one thing to risk having a corporation exposed to an undesirable rule or regulation. It is quite another to have one's entire wealth at risk due to corporate obligations which could ensue in the absence of limited liability, or to have the corporation at risk because of individual shareholder debts, which could ensue in the absence of entity shielding. Veil piercing relates to credit risk, which is all-encompassing. Veil peeking pertains only to some forms of regulatory risk, at times reducing it (shareholder-friendly veil peeking) and at times increasing it (shareholder-unfriendly veil peeking).

One peculiarity is that shareholder-unfriendly veil peeking can harm innocent, non-controlling shareholders via the imputation of legal detriments to the corporation based on the actions or identity of the controlling shareholders. This contrasts with veil piercing, where the imposition of liability for corporate obligations can, and usually does, affect only controlling shareholders. This means that ownership structure should matter more for veil peeking than for veil piercing, since the latter can more easily leave

157 All of these mechanisms operate as entrenchment devices that can hamper the transfer of control to more effective managers, thereby enhancing agency costs. For the economic tradeoffs associated with tag-along rights that grant minority shareholders the right to sell in a sale-of-control transaction, see, for example, Lucian Arye Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q.J. ECON. 957, 960 (1994), which explains how premium-sharing rules can block efficient as well as inefficient control transfers.

158 *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., Comment, *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 97-111 (2010) (discussing how special corporate rules could remedy the interest divergence between management and shareholders on decisions related to corporate political speech and addressing the associated constitutional concerns).

minority shareholders unscathed.[159] All else being equal, the case for veil peeking is generally far stronger with respect to closely held corporations compared to widely held firms, and stronger still with respect to wholly owned or nearly wholly owned subsidiaries.

Shareholder-friendly veil peeking, by contrast, increases the attractiveness of the corporate form to entrepreneurs. In its absence, entrepreneurs would need to trade off the economic benefits associated with the corporate attributes against a disfavored regulatory treatment imposed on the corporate form. By foreclosing regulatory differentiation between natural persons and corporations, or between corporations and other organizational forms, shareholder-friendly veil peeking eliminates this tradeoff and encourages incorporation.

Finally, reverse veil peeking involves distinct costs and benefits. Take, for instance, the regime allowing shareholders to claim in their own name compensation for losses suffered by the corporation. Contrary to existing critiques,[160] reverse veil peeking of this kind is shareholder friendly; it does not compromise the economic benefits of asset partitioning, since the shareholder's claim is filed against a third-party and not the corporation.

This form of reverse veil peeking appears to be useful precisely when, for imputation reasons, the corporation is prevented from exercising its rights. A classic scenario is when a foreign-owned, but locally-incorporated company, is the victim of expropriation by a host state.[161] However, reverse veil peeking also creates the risk of duplication in claims and double recovery when both the corporation and foreign investors are allowed to sue host states.[162] Other forms of reverse veil peeking, as in the attribution of shareholder approval rights at the parent level for transactions carried out by subsidiaries, appear to be less detrimental, at most posing difficulties of line drawing.

B. *Criteria for the Application of Veil Peeking*

Veil piercing doctrine is muddy and notoriously indeterminate. The literature typically cites several factors that courts supposedly take into account when deciding to pierce the corporate veil and render shareholders liable for corporate obligations, including undercapitalization, commingling of assets, the failure to observe corporate formalities, unity of interest, fraud,

159 Scholars have similarly argued that asset partitioning provides fewer benefits in the context of wholly owned subsidiaries. *See, e.g.*, Hansmann & Squire, *supra* note 2, at 266 tbl. 11.1 (listing the reduced benefits of internal asset partitioning).

160 *See infra* note 235 and accompanying text.

161 *See infra* note 222 and accompanying text.

162 *See* Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1, 37 (2019) ("Tribunals' tendency to view corporate claims and claims by discrete shareholders as completely independent raises two specters: double recovery and multiple bites at the apple.").

and the operation of the company as the "alter ego" of shareholders, among others.[163] Jonathan Macey and Joshua Mitts have questioned whether these oft-repeated factors accurately describe the criteria used by courts. Their empirical study suggests that, in practice, veil piercing is used to achieve three different statutory objectives that are consistent with efficiency: (1) realizing the purpose of a statute or regulation; (2) avoiding misrepresentation by shareholders; and (3) avoiding favoritism and maximizing firm value in the bankruptcy context.[164]

Following the current state of the doctrinal literature, existing empirical studies do not distinguish between veil piercing and veil peeking.[165] A systematic mapping of the criteria used in veil peeking cases—and how they differ from veil piercing cases—would therefore require further research. The existing conflation between veil piercing and veil peeking is arguably one reason why veil piercing doctrine is so muddled.

Both logic and some of the actual cases examined throughout this Article suggest that veil peeking at times is, as it should be, subject to different criteria from veil piercing.[166] Nevertheless, it also appears that courts and scholars frequently err in applying restrictive veil piercing criteria for veil peeking claims,[167] which is understandable given the prevailing doctrinal conflation. The time has come to distinguish the relevant criteria for veil piercing and veil peeking disputes.

While factors such as commingling of assets and fraud are relevant for veil piercing, they should not be required for veil peeking, which concerns the effectiveness of a given regulatory scheme. Veil peeking should not be deemed to be necessarily exceptional nor to require a showing of willful abuse. Conversely, criteria such as the existence of "domination or control" is absolutely critical for veil peeking, but less so for veil piercing.[168]

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163 *See* Macey & Mitts, *supra* note 4, at 100.

164 *Id.* at 102.

165 For empirical studies on veil piercing that do not distinguish between exceptions to asset and regulatory partitioning, see generally, for example, *id.*; Thompson, *supra* note 4; Oh, *supra* note 4.

166 *See, e.g.*, *supra* notes 47–51 and accompanying text.

167 *See, e.g.*, *supra* notes 122–24 and accompanying text and *infra* note 224 and accompanying text.

168 Some have critiqued the use of the control or domination criterion in veil piercing claims. *See, e.g.*, Franklin A. Gevurtz, *Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 OR. L. REV. 853, 854 (1997) (finding that the significance of domination is "often misunderstood," while control tends to be a "red herring" for justifying veil piercing); Jonathan R. Macey, *The Central Role of Myth in Corporate Law* 37 (Eur. Corp. Governance Inst., Working Paper No. 519, 2020), https://ssrn.com/abstract=3435676 (arguing that the use of corporate control or domination as a possible criterion for veil piercing leads to a general myth that "parent companies operate their subsidiaries in a manner that is wholly independent of the operations of both the parent corporation and the subsidiaries' affiliates"). Insofar as traditional veil piercing doctrinal criteria such as "alter ego," "unity of interest," and "control and domination" effectively serve as proxies for corporate control, they should be part of the test for veil peeking.

Because judicial veil peeking fundamentally concerns gap filling of legal texts, courts should consider the purposes of the law in question, and the extent to which upholding regulatory partitioning may compromise the law's desired effectiveness.[169] At any rate, the costs and benefits of veil peeking must be assessed in view of the particular objectives of a given legal rule and area of law. As correctly argued nearly a century ago, "the question whether a corporation is an entity separate and distinct from the stockholders cannot be asked, or answered, *in vacuo*."[170]

VI. Veil Peeking in Contemporary Law

Veil peeking remains prevalent and controversial in a broad range of fields. This Part explores a representative sample of veil peeking cases to demonstrate the breadth and importance of this phenomenon, as well as its different manifestations and challenges.

A. *Incorporating Race*

After veil peeking cases of the Jim Crow era were resolved through the strict application of regulatory partitioning (leading to "colorless corporations"), various statutory initiatives sought to impose differential treatment on companies depending on the race of their members. These initiatives range from the odious, such as the Nazi's attempt to ascribe Jewish identity to legal persons,[171] to the well-intentioned but controversial, such as the granting of favorable treatment for minority-controlled businesses with the aim of remediating the effects of past discrimination and injustice.

Both federal and local laws in the United States have embraced statutory veil peeking to confer remedial advantages to business organizations owned and controlled by minorities. The Public Works and Employment Act of 1977 required 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.[172] Similarly, the city of Richmond adopted a Minority Business Utilization Plan requiring city

169 Considerations of "justice" traditionally mentioned in veil piercing cases may help provide the doctrinal rubric for this assessment.

170 Latty, *supra* note 79, at 603; *see also id.* at 621 ("The defects of the intransigent conceptualism which apparently accompanies the entity technique are of themselves a source of danger in legal thinking.").

171 For instance, the Nuremberg laws qualified as Jewish a legal person if any of its legal representatives, members of the supervisory board, or controlling shareholders were Jews. Although Hitler initially sought to limit corporate anonymity by banning bearer shares, the proposal faced resistance from the corporate community and was ultimately abandoned. Brooks, *supra* note 80, at 2079-80.

172 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)).

contractors to subcontract at least thirty percent of the dollar amount of each contract to enterprises that were at least fifty-one percent owned and controlled by the same minority groups.[173]

These are cases of explicit veil peeking by lawmakers, as opposed to judicial veil peeking as gap filling. The question, then, concerns the constitutional permissibility of such differential regulatory treatment based on race. Interestingly, the U.S. Supreme Court sanctioned the favorable treatment afforded to minority-owned businesses in the federal Public Works and Employment Act in *Fullilove v. Klutznick*[174] but invalidated the Richmond program as unconstitutional under the Fourteenth Amendment's Equal Protection Clause in *City of Richmond v. J.A. Croson Co*.[175] However, the *City of Richmond* opinion arguably departed from precedent about colorless corporations by tacitly resorting to veil peeking, in that it "implicitly recognized that corporations can have racial characteristics by allowing white owned corporations to challenge contractor set asides on reverse discrimination grounds."[176]

There are also traditional cases of judicial veil peeking where the relevant statute is silent. One prominent such statute is 42 U.S.C. § 1981 (originally section 1 of the Civil Rights Act of 1866), which protects the equal rights of "[a]ll persons within the jurisdiction of the United States . . . to make and enforce contracts" without respect to race.[177] The issue here is whether corporations can claim a racial identity in § 1981 claims based on the racial identity of its members. Various courts have answered in the affirmative.[178]

In *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.*, the Ninth Circuit engaged in veil peeking to hold that 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 could raise a discrimination claim under § 1981.[179] While acknowledging the "anti-anthropomorphic truism" that a corporation generally has no racial identity, the court concluded that a corporation can acquire an "imputed racial identity" in certain cases so as not to leave it and its shareholders without remedies.[180] The court reasoned that "if a

173 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477-78 (1989).

174 448 U.S. 448, 492 (1980).

175 488 U.S. at 511.

176 Brooks, *supra* note 80, at 2056 n.150 (quoting Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1058 (9th Cir. 2004) (internal quotation marks omitted)).

177 42 U.S.C. § 1981(a); *see also* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

178 *See, e.g.*, Carnell Constr. Corp. v. Danville Redevelopment & Housing Auth., 745 F.3d 703, 715 (4th Cir. 2014); Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc., 295 F.3d 1065, 1072 (10th Cir. 2002); Des Vergnes v. Seekonk Water Dist., 601 F.2d 9, 14 (1st Cir. 1979).

179 368 F.3d at 1059.

180 *Id.* at 1058-59.

corporation can suffer harm from discrimination, it has standing to litigate that harm."[181] This instance of veil peeking extends the reach of state regulations but in a way that is shareholder friendly and increases the attractiveness of the corporate form.

While the U.S. Supreme Court has not ruled on the possibility of veil peeking in this context, its decision in *Domino's Pizza, Inc. v. McDonald* foreclosed the use of reverse veil peeking by denying shareholders standing to raise § 1981 claims in connection with contracts signed by the corporation in its own name.[182] In that case, plaintiff John McDonald, a Black man, was the president and sole shareholder of JWM Investments (JWM), which entered into several contracts with Domino's Pizza.[183] JWM subsequently filed for bankruptcy, and the bankruptcy estate settled with Domino's Pizza without raising a discrimination claim through veil peeking.[184]

The Ninth Circuit recognized the sole shareholder's standing to sue for the wrongful breach of contract due to racial animus by conceding the existence of "injuries distinct from that of the corporation" (such as pain and suffering, emotional distress and humiliation).[185] However, the unanimous decision of the Supreme Court, in an opinion written by Justice Scalia, reversed the Ninth Circuit and found no standing.[186] In refusing to extend the reach of the statute, Scalia wrote that "it is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts"[187] and that "nothing in the text of § 1981 suggests that it was meant to provide an omnibus remedy for *all* racial injustice."[188] The holding can be understood as seeking to uphold a restrictive interpretation of the statute and avoid the administrative challenges associated with reverse veil peeking. However, as examined above,[189] a plaintiff victory in the case would not in fact have compromised the functionality of the corporation's core elements.

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181 *Id.* at 1060 (quoting Gersman v. Grp. Health Ass'n, 931 F.2d 1565, 1568 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992)).

182 546 U.S. 470, 476-77 (2006).

183 *Id.* at 472.

184 *Id.* at 473.

185 *Id.* at 474 (quoting McDonald v. Domino's Pizza, Inc., 107 F. App'x 18, 18 (9th Cir. 2004)).

186 *Id.* at 480.

187 *Id.* at 477.

188 *Id.* at 479.

189 *See infra* Section V.A.

B. *Antitrust*

Veil peeking has a long pedigree in competition law, a field that has from the outset witnessed the use of legal entities for regulatory arbitrage. The use of the trust form—leading to the field's name antitrust—was itself an attempt to evade the competition-driven constraints of early corporation laws.[190] Nevertheless, as *State v. Standard Oil* and similar cases made clear, courts were willing to engage in veil peeking to restrict such arbitrage opportunities.[191]

Perhaps more than any other field, antitrust law has fiercely disregarded separate legal personalities in favor of veil peeking. While certain jurisdictions at times also resort to veil piercing in the antitrust context (such as by imposing liability on parent companies for antitrust violations by their subsidiaries)[192], veil peeking for purposes of imputation of legal restrictions is even more prevalent. The relevant tests for the application of antitrust laws tend to be economic rather than formalistic in nature, thereby valuing corporate control and the identity of shareholders and disregarding separate legal personalities.

As is usually the case with veil peeking, such an approach is not unambiguously pro- or anti-regulation, but instead can cut either way. Although early instances of veil peeking served to strengthen state authority over market activities, more recent cases operate to restrict the scope of antitrust laws.[193] However, unlike other fields, the circumvention of regulatory partitioning in antitrust law has only rarely been conceptualized as "veil piercing," and antitrust has benefited greatly by avoiding the doctrinal confusion associated with the misleading label.[194]

In the leading case of *Copperweld Corp. v. Independence Tube Corp.*, the U.S. Supreme Court ruled that a wholly owned subsidiary is incapable of conspiring with its parent under Section 1 of the Sherman Act,[195] which requires a "contract, combination . . . or conspiracy" between separate persons.[196] The majority opinion by Chief Justice Burger reasoned that the provision in question does not reach conduct that is "wholly unilateral," a

190 *See* HOVENKAMP, *supra* note 26, at 63-64 (explaining the origin of the term).

191 *See supra* Section II.C.

192 *See generally* Karl Hofstetter & Melanie Ludescher, *Fines Against Parent Companies in EU Antitrust Law: Setting Incentives for 'Best Practice Compliance*,' 33 WORLD COMPETITION 55 (2010) (discussing the EU's imposition of fines on parent companies for their subsidiaries' violations of competition law).

193 *See, e.g.*, *infra* Section VI.B.

194 One exception is the seminal paper by Maurice Wormser. *See* Wormser, *supra* note 12, at 509-10 (citing the early antitrust precedents of *Standard Oil* and *North River Sugar Refining Co.* discussed in *supra* Section II.C).

195 467 U.S. 752, 777 (1984).

196 15 U.S.C. § 1.

conclusion that relies on the irrelevance of separate legal personalities for antitrust purposes.[197]

For the Court, the relevant factor for the purposes of Section 1 was not the formal presence of multiple persons (commonly referred to as the "plurality" requirement in antitrust law), but the functional characterization of "separate economic actors pursuing separate economic interests," the conspiracy between whom "deprives the marketplace of the independent centers of decisionmaking."[198] This element is notably absent in the relationship between a parent and a wholly owned subsidiary.[199] In adopting a veil peeking approach that excludes the possibility of "intra-enterprise conspiracy" between a parent and a wholly owned subsidiary, the Court's opinion explicitly supports a principle of organizational neutrality by seeking to level the playing field between enterprises adopting different legal entity structures.[200] It reasons that antitrust laws should not prevent firms from enjoying other benefits of separate incorporation, such as facilitating management, avoiding tax problems, or "serv[ing] other legitimate interests."[201] In Justice Burger's words, "[i]f antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions."[202]

Justice Stevens's dissenting opinion, by contrast, argued that the veil peeking approach embraced by the majority detracted from the underlying statutory objectives.[203] It reasoned that the requirement of a plurality of actors under Section 1 results from "the plain statutory language, not [from] any economic principle."[204] Justice Stevens further contended that the unreasonable restraint requirement of Section 1 already protects parent-subsidiary structures because such affiliation often enhances efficiency and is thus procompetitive.[205] Consequently, the categorical peeking of the majority "leaves a significant gap in the enforcement of § 1 with respect to anticompetitive conduct that is entirely unrelated to the efficiencies associated with integration."[206]

Following *Copperweld*, the question became the scope of the Court's categorical veil peeking approach beyond the context of wholly owned

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197 *Copperweld Corp.*, 467 U.S. at 768 (quoting Albrecht v. Herald Co., 390 U.S. 145, 149 (1968), *overruled on other grounds by* State Oil Co. v. Khan, 522 U.S. 3 (1997)).

198 *Id.* at 769.

199 *See id.* at 771 ("A parent and its wholly owned subsidiary have a complete unity of interest.").

200 *Id.* at 772.

201 *Id.* at 772-73.

202 *Id.* at 773.

203 *Id.* at 787 (Stevens, J., dissenting).

204 *Id.* at 789.

205 *Id.*

206 *Id.*

subsidiaries, hence illustrating how categorical approaches to veil peeking may compel subsequent tailoring. Are subsidiaries with de minimis departure from whole ownership by the parent exempted from Section 1 scrutiny under *Copperweld*? Is the exercise of corporate control over the subsidiary the relevant test? If so, how should courts draw the line?

In *American Needle, Inc. v. National Football League*, the Supreme Court addressed whether the agreement between members of the National Football League, a joint venture of the football teams, was categorically excluded from scrutiny under Section 1 of the Sherman Act.[207] The Court, once again, affirmed the prevalence of "competitive reality," privileging economic function over legal entity boundaries.[208]

The unanimous opinion authored by Justice Stevens held that just as the presence of "legally distinct entities" is not determinative, "nor . . . is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture."[209] Consequently, the joint venture was not categorically excluded from Section 1 and was therefore allowed to be scrutinized further under antitrust law's Rule of Reason.[210] In view of such radical veil peeking, it has been said that the "corporate form under state law does not matter" in the U.S. Supreme Court antitrust jurisprudence.[211]

C. *Nationality*

Differences in the legal treatment conferred on nationals vis-à-vis foreigners are a central source of legal discrimination in modern law. The attribution of nationality to corporations usually entails a bundle of legal consequences. These include the determination of the internal rules of corporate law applicable to the company; legal privileges bestowed on nationals such as access to government subsidies; restrictions imposed on certain foreign nationals such as wartime rules on trading with the enemy and national security rules, or foreign nationals generally such as foreign ownership restrictions in certain industries; access to diplomatic protection; coverage under international treaties; the application of tax laws; and the existence of state jurisdiction for legal disputes involving the company.

Jurisdictions around the world generally opt for one of two criteria for the attribution of nationality: (1) the place of incorporation, or (2) the principal

207 560 U.S. 183, 186 (2010).

208 *Id.* at 196.

209 *Id.*

210 *Id.* at 186.

211 Herbert Hovenkamp, American Needle *and the Boundaries of the Firm in Antitrust Law* 14 (Working Paper, 2010), https://ssrn.com/abstract=1616625.

place of business ("real seat doctrine").[212] Jurisdictions embracing the real seat doctrine typically require local incorporation of companies headquartered in the state.[213] Both criteria are objective and do not consider the company's shareholder base or control structure, which is often fluid in business corporations given the attribute of transferable shares. In other words, the two general approaches to corporate nationality both shun veil peeking.

Because the place of incorporation can be altered at less cost than corporate headquarters, it is more often the object of choice, enabling the phenomenon known as regulatory competition. While the corporate law component of the bundle has been traditionally viewed as the primary driver of regulatory competition, companies have increasingly considered other legal consequences when engaging in nationality shopping, such as tax laws[214] and legal protection under international investment treaties.[215] Of course, the utilization of a single doctrinal hook for such varied purposes may not be functional in all circumstances.

In a well-known incident in 2018, a U.S. presidential decree prevented technology firm Broadcom from acquiring its rival Qualcomm based on the risk the transaction posed to U.S. national security.[216] Broadcom was deemed to be a foreign buyer and subject to regulatory scrutiny based on its incorporation in Singapore.[217] It was deemed to be foreign even though it had been previously chartered in the United States, was in the process of reincorporating in the United States, was headquartered in California, most of its directors were U.S. citizens, and more than fifty percent of its workers and of ninety percent of its shareholders were based in the United States.[218] Had Broadcom never moved its statutory domicile to Singapore for tax purposes, or had reincorporated in the United States with greater speed, it

212 For the origins of these criteria and their exceptions, see generally Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 IND. L.J. 533, 541, 564 (2020).

213 *Id.* at 538.

214 This is exemplified by the recent wave of corporate inversions. *See* Colleen Walsh, *Getting a Handle on Inversion: A Q&A with Mihir Desai*, HARV. L. TODAY (Aug. 15, 2014), https://today.law.harvard.edu/harvard-gazette-mihir-desai-getting-handle-inversion [https://perma.cc/E9H5-FHW5] (attributing a higher frequency of U.S. corporations shifting their headquarters for tax purposes to the American worldwide tax regime and high corporate tax rate).

215 *See infra* notes 223–28 and accompanying text.

216 Presidential Order Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11,631 (Mar. 15, 2018).

217 *See* Jason Benitez, CFIUS: The Next Poison Pill? 3 (2019) (unpublished manuscript) (on file with author).

218 *See id.* at 3, 44-45. However, Broadcom's CEO Tan Hock Eng is Malaysian. Amir Hisyam Rasid, *Malaysian Is US' Best-Paid CEO*, NEW STRAITSTIMES (May 15, 2008, 6:50 AM), https://www.nst.com.my/business/2018/05/369778/malaysian-us-best-paid-ceo [https://perma.cc/L8KB-JYY2]. To the extent that this fact played a part in the incident, it would represent a form of implicit veil peeking with respect to managers rather than shareholders.

would have likely escaped regulatory scrutiny.[219] Nevertheless, in view of the threat posed by the technological rise of China, the Committee for Foreign Investment in the United States (CFIUS) and President Trump refused to peek and treat Broadcom as a domestic company.

Veil peeking regarding nationality is not limited to the sensitive considerations of wartime or peacetime national security described above. In a prominent 1953 decision, a U.K. court engaged in veil peeking to deny the benefits of quotas under the Cinematograph Films Act of 1938 to a film produced by a U.K.-incorporated subsidiary that was ninety percent owned and controlled by a U.S. company and had no significant assets or employees of its own.[220] The court found that the U.K. company was a mere agent or nominee of the U.S. parent, so that the film could not be deemed "British" under the statutory language requiring the maker of the film to be a "British subject or a British company."[221]

The field of international investment law is premised on the need to provide enhanced legal protection to foreign investors at the international level, with the aim of counteracting the protectionist tendencies of host states to expropriate foreigners once their investment is "sunk."[222] Regulatory differentiation between nationals and foreigners is therefore central to the field. Predictably, the disparate legal regime gives rise to various forms of veil peeking controversies, due both to the design of international treaties and to attempts at regulatory arbitrage.

The rising phenomenon of "nationality shopping" in international investment law illustrates the arbitrage opportunity. This strategy takes place when investors who would not be protected under international investment law—either because they are nationals of the host state or because they are citizens of a country that is not a signatory—employ a corporation formed in a jurisdiction with broad treaty coverage to benefit from enhanced investment protection. One manifestation of this trend is the so-called "Dutch sandwich" strategy, which refers to the formation of foreign (often Dutch) intermediary subsidiaries in states with ample bilateral investment treaty (BIT) coverage to obtain enhanced investment protection at home or abroad.[223]

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219 For an in-depth discussion of this transaction, see generally Benitez, *supra* note 217, which examines the deal in the context of the changing role of the CFIUS in cross-border transactions.

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

221 *Id.* (internal quotation marks omitted).

222 *See, e.g.*, Beth A. Simmons, *Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment*, 66 WORLD POL. 12, 18 (2014).

223 *See* George Kahale, III, *The New Dutch Sandwich: The Issue of Treaty Abuse*, COLUM. FDI PERSPS., Oct. 2011, at 1 ("Companies from all over the world having little if anything to do with the Netherlands seek to acquire Dutch nationality to take advantage of the protections offered by Dutch BITs."); *see also* ROOS VAN OS & ROELINE KNOTTNERUS, DUTCH BILATERAL INVESTMENT

Arbitral tribunals have generally upheld such arbitrage attempts based on the absence of the traditional requirements for veil piercing, such as fraud or commingling of assets. In *Tokios Tokelés v. Ukraine*, for instance, the arbitral panel ruled that a company that was ninety-nine percent owned by Ukrainians but incorporated in Lithuania could pursue investor-state dispute settlement (ISDS) arbitration against the shareholders' home state of Ukraine under the Lithuania-Ukraine BIT.[224] Such a case upholding strict regulatory partitioning encourages organizational arbitrage.

The dissenting opinion in the *Tokios Tokelés* case emphasizes that the controversy in question was not ultimately about *international* investment.[225] Similarly, commentators have decried the arbitrators' reliance on "an inapposite presumption against veil piercing derived from the very different context of limited shareholder liability, without considering the different interests and values at stake across these varied situations."[226] While exceptions exist,[227] investment tribunals have generally indicated a "deep unwillingness to look through" the corporate veil to restrict the application of BITs.[228]

However, the use of the state of incorporation as the determinant of international law protection is not always a boon for investors. In the case of *Barcelona Traction*, the Belgian government filed suit in the International Court of Justice seeking reparations from Spain.[229] Belgium alleged that Spain violated international law in causing damage to the Belgian shareholders who controlled Barcelona Traction, a company incorporated in

TREATIES § 1.1 (2011) (observing that there are around 20,000 "holding and financial companies" in the Netherlands and that the country has approximately ninety-five BITs in force).

224 ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 38 (Apr. 29, 2004), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C220/DC639_En.pdf [https://perma.cc/ZT7Q-695J]. Other tribunals have followed a similar approach. *See* Aguas del Tunari, SA v. Republic of Bol., ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶ 323 (Oct. 21, 2005), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C210/DC629_En.pdf [https://perma.cc/BXB5-FDNW] (permitting a Dutch incorporated corporation controlled by U.S. company Bechtel to invoke the Bolivia-Netherlands BIT, which covers entities "controlled directly or indirectly" by a national of the Netherlands).

225 Tokios Tokelés v. Ukr., ICSID Case No. ARB/02/18, Dissenting Opinion of President Prosper Weil, ¶ 27 (Apr. 29, 2004), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C220/DC640_En.pdf [https://perma.cc/QY7J-C799].

226 Arato, *supra* note 162, at 43.

227 *See, e.g.*, TSA Spectrum de Arg. S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, ¶ 147 (Dec. 19, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0874.pdf [https://perma.cc/2C9T-39M9] (looking past the corporate veil to determine whether an entity was under foreign control).

228 Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 275 (2015).

229 Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 1 (Feb. 5).

Canada.[230] Belgium also claimed that Spanish authorities had improperly discriminated against the company, thereby harming its Belgian shareholders, with the purpose of transferring control over its property to the hands of a private Spanish group.[231] The International Court of Justice, however, refused to peek as advocated by Belgium, instead holding that it could not seek to exercise diplomatic protection on behalf of Belgian shareholders of a company incorporated in a foreign jurisdiction when it was the company that suffered the direct harm.[232]

Moreover, for a variety of tax, regulatory, and convenience reasons, it is common for foreign investors to operate in host countries through local subsidiaries, which would in principle qualify as national companies of the host state based on the place of incorporation. Recognizing this reality, some U.S. BITs expressly provide for veil peeking by permitting 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.[233]

The International Centre for Settlement of Investment Disputes (ICSID) Convention also adopts a veil peeking approach in providing 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.[234] Moreover, international investment law provides for the noteworthy possibility of foreign shareholder claims for reflective losses, which represents one of the rare instances of reverse veil peeking. This regime allows foreign shareholders to file claims against host states, in the shareholders' own names, to recover the reflective loss they suffered due to the expropriation of a domestic corporation. The availability of claims for shareholder reflective loss has attracted much scholarly criticism.[235] While this form of reverse veil peeking

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230 *Id.* ¶ 25.

231 *Id.*

232 *Id.* ¶ 100.

233 Arato, *supra* note 162, at 36. There are also other potential solutions, as exemplified by NAFTA's explicit authorization of derivative suits. *Id.*

234 The ICSID Convention defines a "National of Another Contracting State" as

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

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.

235 *See, e.g.*, Arato, *supra* note 162, at 34-35 ("As in domestic law, the scope and limits of shareholder suits reflect judicial choices. The difference is that, in ISDS, tribunals have placed little emphasis on policy, relying more on (assumed) textual mandate and arbitral precedent.").

does create problems of administration, it does not upend the core tenets of the corporate form.[236]

While apparently contradictory, the strict regulatory partitioning approach of *Tokios Tokelés* and the bold approaches of veil peeking (in attributing the shareholders' nationality to the domestic company) and reverse veil peeking (in permitting direct shareholder lawsuits) of investment treaties are actually consistent in their pro-investor results. Veil peeking and reverse veil peeking are broadly employed to expand treaty coverage, while arbitral tribunals eschew veil peeking to restrict the scope of protection provided by international investment treaties. This landscape may reflect the purposive interpretation of the international investment regime, which aims precisely to protect investors, or the self-interest of arbitrators, who stand to gain by expanding the number and scope of international investment claims.

D. *Jurisdiction*

The attribution of jurisdiction is another critical legal consequence of incorporation, or the creation of a separate legal person. Most states recognize both the place of incorporation and the principal place of business as grounds for the assertion of general jurisdiction with respect to legal persons. The broad veil peeking criterion of individual corporate membership used in *Bank of the United States v. Deveaux* has been abandoned since the mid-nineteenth century due to its ease of manipulation and dysfunctional results.[237]

However, veil peeking continues to be used for jurisdictional purposes in the corporate group context. One question is whether a plaintiff may impute to a corporate parent the jurisdictional grounds that exist with respect to one of its subsidiaries, or vice-versa. The 2013 U.S. Supreme Court decision in *Daimler AG v. Bauman*[238] deals precisely with such a use of veil peeking. In that case, Argentinean plaintiffs filed suit in California against Daimler, a Germany public company, under the U.S. Alien Tort Statute.[239] The suit alleged that Daimler's subsidiary, Mercedes-Benz Argentina, collaborated with the Argentinean government to kill and torture workers in the 1976–1983 "Dirty War."[240] Plaintiffs sought to assert personal jurisdiction over Daimler in California based on the distribution of vehicles by Mercedes-Benz USA LLC, a Delaware corporation, in California.[241]

236 *See supra* Section V.A.
237 *See supra* notes 42–43 and accompanying text.
238 571 U.S. 117 (2014).
239 *Id.* at 122.
240 *Id.*
241 *Id.* at 123.

The *Daimler* opinion received much attention for the Court's narrowing of all-purpose jurisdiction to the paradigmatic grounds of place of incorporation and principal place of business, finding the existence of "continuous and systematic" business in the state to be insufficient.[242] However, the veil peeking move of Daimler's plaintiffs in relying on a parent's jurisdictional ground for a lawsuit against the subsidiary (provided that it meets the stricter criteria) was not addressed by the decision and continues to be used.[243] In this case of veil peeking—to impute jurisdiction to the parent without imposing liability on it—courts have focused on control based on agency and alter ego theories, without, however, requiring a showing of fraud or injustice as in typical veil piercing claims.[244]

France's COMILOG case, which has been celebrated in human rights circles, provides another instance of veil peeking for jurisdictional purposes. In 1991, the Gabonese Ougooué Mining Company (COMILOG) dismissed 995 workers without notice or compensation and filed for bankruptcy following a deadly train accident.[245] In 2003, COMILOG and the governments of Congo and Gabon reached an agreement by which the company would pay the states over one million euros as settlement for the workers' claims.[246] However, the workers were not consulted regarding the agreement and did not receive any compensation.[247]

Following the acquisition of a majority of COMILOG's stock by French company ERAMET (which was headquartered in France and twenty-six percent owned by the French government[248]) in the late 1990s, the Congolese workers filed suit in France.[249] The Paris Court of Appeals found that COMILOG's status as a subsidiary of ERAMET provided sufficient connection to France to exercise jurisdiction and held COMILOG liable to

242 *Id.* at 138-39 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

243 *See, e.g.*, *In re* Commodity Exch., Inc., 213 F. Supp. 3d 631, 680 (S.D.N.Y. 2016) ("The Supreme Court's concern regarding the Ninth Circuit's 'sprawling view of general jurisdiction' does not apply where there are allegations that the subsidiary was in fact the alter ego of a corporation over which jurisdiction is proper." (internal citation omitted))

244 Jana Jobes Wozniak & Teri H. Peeples, *Personal Jurisdiction Considerations for Non-U.S. Parent Companies Facing Product Liability Litigation*, IN HOUSE DEF. Q., Winter 2018, at 54, 59 ("Once the court finds that the U.S. subsidiary is the alter ego of the parent company, the court then looks at the subsidiary's contacts with the forum to determine jurisdiction over the parent.").

245 For a summary of the case in English, see *COMILOG lawsuit (Re Gabon, Filed in France)*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/comilog-lawsuit-re-gabon [https://perma.cc/CJM4-QQPP].

246 *Id.*

247 *Id.*

248 *L'incroyable Victoire des Travailleurs Congolais*, LE PARISIEN (Sept. 14, 2015, 7:00 AM), https://www.leparisien.fr/archives/l-incroyable-victoire-des-travailleurs-congolais-14-09-2015-5088893.php [https://perma.cc/S7JX-5MAM].

249 *See COMILOG lawsuit (Re Gabon, Filed in France), supra* note 245.

the Congolese workers.[250] While admirable for permitting the compensation of past victims of human rights violations, the COMILOG case illustrates how veil peeking may discourage share transferability, as discussed in Part V above.

E. *Tax Laws*

Taxation is another fertile field for veil peeking. One line of cases concerns the constitutionality of disparate tax treatment conferred on different legal entities. The famous case of *Santa Clara County v. Southern Pacific Railroad*,[251] which is widely credited for recognizing that corporations are persons under the Fourteenth Amendment, dealt with California tax rules that treated corporations less favorably than individuals. Although the U.S. Supreme Court ultimately decided the case on narrow grounds despite the misleading syllabus and headnotes,[252] Circuit Justice Field's opinion described the discriminatory treatment of corporations as "the very essence of tyranny."[253]

To be sure, not all instances of disparate regulatory treatment of corporations are unconstitutional. The U.S. Supreme Court sanctioned the constitutionality of the corporate income tax as "an excise upon the particular privilege of doing business in a corporate capacity."[254] Other jurisdictions, such as Brazil and, increasingly, the United States, tax legal persons more

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250 Cour d'appel [CA] [regional court of appeal] Paris, 2e ch., Sept. 10, 2015, 11/05955, at 9; *see also* Daniel Augenstein & Nicola Jägers, *Judicial Remedies: The Issue of Jurisdiction*, *in* HUMAN RIGHTS IN BUSINESS: REMOVAL OF BARRIERS TO ACCESS TO JUSTICE IN THE EUROPEAN UNION 7, 30-31 (Juan José Álvarez Rubio & Katerina Yiannibas eds., 2017) (describing how "avoiding a denial of justice" served as a ground for the recognition of French jurisdiction).

251 118 U.S. 394, 394-95 (1886).

252 WINKLER, *supra* note 12, at 150-53 (describing the curious origins of the syllabus and headnotes in the United States Reports describing the case as attributing constitutional rights to corporations under the Fourteenth Amendment, which is in conflict with the narrow ruling and content of the Court's opinion).

253 He continued:

> Strangely, indeed, would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities; and so on, making a discrimination whenever there was any difference in the character or pursuit or condition of the owner.

Cnty. of Santa Clara v. So. Pac. R.R., 18 F. 385, 396 (Field, Circuit Justice, C.C.D. Cal. 1883), *aff'd*, 118 U.S. 394 (1886).

254 Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911).

favorably than natural persons, thereby encouraging incorporation of service providers as a form of tax shelter.[255]

The place of incorporation is often a relevant hook for the application of tax laws, even if it is at times complemented by other criteria such as headquarters location and shareholder control. Such reliance on incorporation as the relevant hook for taxation creates opportunities for regulatory arbitrage, which, in turn, tempts tax authorities to engage in veil peeking.

U.S. courts curb the evasion of tax laws based on fictitious transactions that serve no economic purpose beyond tax savings.[256] Courts have applied veil peeking to question the economic benefits of the creation of a subsidiary as a tax shelter when the company initiating the transaction retains full control.[257] As an economic expert in these cases, Nobel laureate Oliver Hart has argued that the boundaries of the firm are determined by control rights, not by legal entity distinctions.[258] According to this view, reorganizations that create a new legal person but do not meaningfully change the allocation of control rights have no economic substance under the "property rights theory of the firm," which disqualifies it for favorable tax treatment.[259]

Similarly, Brazilian laws apply a simplified tax regime with lower tax rates to small enterprises whose revenue falls below certain thresholds.[260] Entrepreneurs may want to take advantage of the favorable treatment to smaller firms by constituting several legal persons for different parts of the business. The Brazilian tax statute, however, engages in veil peeking to ignore the legal entity boundaries and consider the combined revenue of the

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255 *See, e.g.*, Sérgio Wulff Gobetti & Rodrigo Octávio Orair, *Taxation and Distribution of Income in Brazil: New Evidence from Personal Income Tax Data*, 37 BRAZILIAN J. POL. ECON. 267, 272 (2017) (discussing incentives for the creation of tax shelters under Brazil's tax laws); David Kamin, David Gamage, Ari Glogower, Rebecca Kysar, Darien Shanske, Reuven Avi-Yonah, Lily Batchelder, J. Clifton Fleming, Daniel Hemel, Mitchell Kane, David Miller, Daniel Shaviro & Manoj Viswanathan, *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439, 1452 (2019) (discussing incentives for the creation of tax shelters under post-2017 U.S. tax laws).

256 For a description of the different doctrines to counteract abuse, see T. Christopher Borek, Angelo Frattarelli & Oliver Hart, *Tax Shelters or Efficient Tax Planning? A Theory of the Firm Perspective on the Economic Substance Doctrine*, 57 J.L. & ECON. 975, 975-76 (2014).

257 *Id.* at 986-95 (discussing *Black & Decker Corp. v. United States*, 219 F.R.D. 87 (D. Md. 2003) and *WFC Holdings Corp. v. United States*, No. 07-3320, 2011 WL 4583817 (D. Minn. Sept. 30, 2011), as cases in which subsidiaries were treated as mere divisions (from an economic perspective) given the maintenance of complete control).

258 *Id.* at 975, 996 ("[F]rom an economic substance perspective, control is the defining characteristic of ownership . . . .")

259 *See id.* at 977, 996; *see also* Oliver Hart, Dep't of Econ., Harv. Univ., Nobel Prize Lecture: Incomplete Contracts and Control (Dec. 8, 2016), https://www.nobelprize.org/uploads/2018/06/hart-lecture.pdf [https://perma.cc/2EGT-WNUH] (referring to the uses of the property theory of the firm to inquire into control in the context of tax disputes).

260 Lei Complementar No. 123, de 14 de Dezembro de 2006, Diário Oficial da União [D.O.U.] de 15.12.2006 (Braz.).

different companies whenever they are subject to common control.[261] Brazilian tax laws also offer favorable treatment to foreign investors and, as such, have encouraged Brazilian citizens to incorporate abroad, thus also triggering veil peeking efforts by the tax authorities.[262]

Veil peeking is also relevant for the application of international tax treaties. The issue is whether an intermediate holding company may qualify for an international tax treaty or if tax laws should instead look for beneficial ownership. In view of a "Dutch sandwich" providing for an intermediary Dutch company, Canadian courts have applied the Canada-Netherlands Income Tax Treaty, even though the Dutch vehicle was controlled by Swedish and U.K. companies.[263] Commentators have criticized this approach by implicitly calling for a distinction between veil piercing and veil peeking, arguing that the Canadian courts erred in applying the demanding tests for veil piercing in cases where the verification of beneficial ownership should have sufficed.[264]

Finally, tax statutes at times explicitly adopt a veil peeking approach by conditioning the legal regime on the identity of shareholders. One 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.[265] Another instance is the common practice of offering corporate income tax exemptions or deductions to intercorporate dividends paid by companies within the same corporate group.[266] Finally, certain tax statutes embrace veil peeking by apportioning tax obligations in view of the underlying "unitary business," irrespective of legal entity boundaries.[267]

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261 *Id.* art. 3º, § 4º, IV.

262 Fabio Graner & Fábio Puppo, *Receita Aponta Indícios de Fraude em Investimento de Não Residentes*, VALOR (Oct. 30, 2017), https://valor.globo.com/financas/noticia/2017/10/30/receita-aponta-indicios-de-fraude-em-investimento-de-nao-residentes-1.ghtml [https://perma.cc/Q2CF-6BHY].

263 *See* Saurabh Jain & John Prebble, *Conceptual Problems of Beneficial Ownership and the Corporate Veil*, 73 BULL. INT'L TAX'N 3 (2019) (describing the decisions of Canadian courts in *Prévost Car Inc. v. The Queen*, [2008] D.T.C. 3080 (Can. Tax Ct.) and *Velcro Can. Inc. v. The Queen*, [2012] 4 C.T.C. 2029 (Can. Tax Ct.)).

264 *Id.* § 13 ("It is illogical to draw an analogy between the beneficial ownership test and the doctrine of piercing the corporate veil.").

265 *See* I.R.C. § 1361 (defining an S corporation); *id.* § 1366 (allowing for pass-thru taxation). For an additional example of veil peeking in U.S. tax legislation, see I.R.C. §§ 951-965, which taxes foreign corporations controlled by U.S. shareholders on certain corporate income earned and not distributed.

266 For a description of the evolution of the taxation of intercorporate dividends in the U.S. tax legislation, see Eugene Kandel, Konstantin Kosenko, Randall Morck & Yishay Yafeh, *The Great Pyramids of America: A Revised History of U.S. Business Groups, Corporate Ownership, and Regulation, 1926–1950*, 40 STRATEGIC MGMT. J. 781 (2018).

267 *See, e.g.*, 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.").

F. *International Sanctions*

Another veil peeking scenario in the international context pertains to whether and how international sanctions imposed on individuals should be extended to the corporations they control. Take, for instance, the recent sanctions imposed by the U.S. government on Russian parties as punishment for Russian interference with the 2016 U.S. election and aggressions in Crimea, eastern Ukraine, and Syria.[268] The sanctions not only covered Russian government officials, state-owned enterprises, and oligarchs close to President Vladimir Putin, but also adopted a veil peeking approach to reach the companies controlled by these oligarchs.[269]

The sanctions covered twelve companies controlled by Oleg Deripaska (including the EN+ Group and aluminum company RUSAL, which accounts for seven percent of global aluminum production), and extended to any foreign businesses who attempted to do businesses with the designated entities.[270] The extension of the sanctions to the companies was highly consequential. Rio Tinto declared force majeure on a major contract to supply bauxite to RUSAL, aluminum prices rose, and Russian stock prices dropped following the announcement of the sanctions.[271] In view of RUSAL's market share for aluminum, the effects of the sanctions on global supply chains were likely to be significant.[272]

To escape the sanctions, the affected companies implemented various corporate governance reforms aimed at insulating the entities from Deripaska's control. The new governance arrangements included a reduction in Deripaska's stake in the firm to below fifty percent, restrictions on voting rights to thirty-five percent, the assignment of voting rights of related parties

268 The very imposition of sanctions against Deripaska, deemed to be a close ally of Putin is premised on his "having acted or purported to act for or on behalf of, directly or indirectly, a senior official of the Government of the Russian Federation" and the fact that "he does not separate himself from the Russian state." Press Release, U.S. Dep't of the Treasury, Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity (Apr. 6, 2018), https://home.treasury.gov/news/press-releases/sm0338 [https://perma.cc/S9Q8-D9E5].

269 *Id.*

270 *Id.*

271 *Rio To Call Force Majeure on Some Rusal-Linked Contracts*, REUTERS, https://www.reuters.com/article/us-usa-russia-sanctions-rio-tinto/rio-to-call-force-majeure-on-some-rusal-linked-contracts-idUSKBN1HK274 [https://perma.cc/QT29-R5VY] (Apr. 13, 2013, 11:17 AM); Fred Imbert, *Russian Stocks Crash on New Sanctions; Aluminum Prices Soar on Penalties to Global Producer Rusal*, CNBC, https://www.cnbc.com/2018/04/09/russian-stocks-crash-on-new-sanctions-aluminum-prices-soar-on-penalties-to-global-producer-rusal.html [https://perma.cc/PW8M-9JVV].

272 For an excellent discussion of the imposition of sanctions on companies controlled by Deripaska and the use of corporate governance to avoid them, see Daniel K. Phillips, The Development of Corporate Governance in Post-Soviet Russia and Its Instrumentalization by a Post-Soviet Russian (2018) (unpublished manuscript) (on file with author).

to an independent third party, and an independent board of directors, among other measures.[273] The U.S. Department of the Treasury eventually agreed to lift the sanctions in response to these changes.[274]

Nevertheless, critics of the sanctions' lifting have argued that insulation from Deripaska was illusory, given that the shares were transferred to a trust for the benefit of his children.[275] The controversy illustrates well the difficulty of ascertaining control for purposes of veil peeking. Deripaska, on his part, has sued the U.S. government, arguing that the sanctions had made him "radioactive" in international business circles, an effect largely attributable to the veil peeking approach.[276]

Even when controlled companies are not specifically designated for sanctions, as was the case in the Russia-Deripaska sanctions above, they can still be subject to rule-based veil peeking in accordance with the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) rules. Under the OFAC 50 Percent Rule, all companies that are fifty percent owned by sanctioned persons are automatically subject to the same sanctions.[277] Adopting a bright-line rule approach, the 50 Percent Rule applies to ownership, which is more easily verifiable than control, so controlled companies that are less than fifty percent owned need to be specifically designated for sanctions.[278]

G. *Government Corporations*

The question of regulatory differentiation across legal entities has two dimensions when applied to corporations. First, there is the question of whether the state may treat corporations less favorably than natural persons or whether the rights of natural persons can instead be attributed to the legal persons they own and control. Second, there is the question of whether corporations, as major organizations rivaling or surpassing governments in

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273 *Id.* at 28.

274 *See* Kevin Bohn, *Treasury Department Lifts Sanctions on Three Russian Firms with Ties to Oleg Deripaska*, CNN POL. (Jan. 27, 2019, 8:14 PM), https://www.cnn.com/2019/01/27/politics/trump-admin-lifts-sanctions-oleg-deripaska/index.html [https://perma.cc/UV9U-A2ME] (showing how corporate governance mechanisms can serve as an antidote to veil peeking).

275 *See* Kenneth P. Vogel & Alan Rappeport, *Russian Oligarch Sues the U.S. Over Sanctions*, N.Y. TIMES (Mar. 15, 2019) https://www.nytimes.com/2019/03/15/us/politics/oleg-deripaska-russia-sanctions.html [https://perma.cc/2PKD-RP34].

276 Complaint at 17, Deripaska v. Mnuchin, No. 1:19-CV-00727 (D.D.C. Mar. 15, 2019).

277 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).

278 *Frequently Asked Questions: Entities Owned by Blocked Person (50% Rule)*, U.S. DEP'T OF THE TREASURY (Aug. 11, 2020), https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1521 [https://perma.cc/7ZDL-9AR7].

economic importance,[279] should be subject to legal duties comparable to those governing the state. This latter question is increasingly the object of debate, especially in the international law sphere,[280] but it is not a question of veil peeking, as it does not entail the attribution of shareholder legal characteristics to the corporation.

Veil peeking questions are, however, critical in the context of state-owned enterprises (SOE). Should state-owned enterprises be treated as state actors, given the state's equity ownership and control? Or should they be subject to the general private legal regime applicable to business corporations, given their legal form? To put it differently, can the state avoid some of its public law constraints by employing the corporate form to perform certain activities?

Legal arbitrage aimed at avoiding the more cumbersome legal regime applicable to the state is, in fact, a key practical justification for the use of government-controlled corporations. President Franklin Delano Roosevelt boasted the creation of the Tennessee Valley Authority in 1933 as "a corporation clothed with the power of government but possessed of the flexibility and initiative of a private enterprise."[281] By adopting the corporate form, the state becomes not only subject to corporate law but also to other components of the legal regime governing private organizations.

However, the use of the corporate form is not a complete shield against the public law regime, as courts often peek through the corporate veil to apply the state's legal regime to SOEs.[282] The U.S. Supreme Court decision in *Lebron v. National Railroad Passenger Corp.*[283] provides a useful example. Amtrak, a railroad corporation owned and controlled by the U.S. government, had prohibited the display of political advertising messages at New York's Penn Station.[284]

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279 See *69 of the Richest 100 Entities on the Planet are Corporations, not Governments, Figures Show*, GLOB. JUST. NOW (Oct. 17, 2018), https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show [https://perma.cc/7BEG-GD6J] (demonstrating the relative economic power of corporations relative to governments).

280 *See, e.g.*, Off. of the High Comm'r, U.N. Hum. Rts. Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, U.N. Doc. HR/PUB/11/04, at 1, (2011) (differentiating between the state's duty to protect human rights and businesses' duty to respect human rights).

281 *The 1930s*, TENN. VALLEY AUTH., https://www.tva.com/about-tva/our-history/the-1930s [https://perma.cc/U5WS-2F7R] (internal quotation marks omitted).

282 For an early discussion of several veil peeking controversies regarding government-owned corporations in the United States, see Robert H. Schnell, *Federally Owned Corporations and Their Legal Problems*, 14 N.C. L. REV. 337, 366 (1936), which concluded that "the corporations have been reduced to the status of an ordinary suitor before the courts, and the principles of law as applied to private litigants have controlled when there would be no disadvantage to the federal government by so doing." *See also, e.g.*, Lebron v. Nat'l R.R. Passenger Corp. 513 U.S. 374, 400 (1995) (ruling that a corporate entity owned and controlled by the U.S. government was subject to the First Amendment).

283 513 U.S. 374 (1995).

284 *Id.* at 377.

In *Lebron*, the question was whether Amtrak, whose company's charter explicitly disclaimed its status as a government entity, violated the First Amendment.[285] Answering in the affirmative, the majority opinion engaged in veil peeking to attribute the government's legal regime to Amtrak in view of its governmental objectives and the government's ability to appoint a majority of its directors.[286] Justice O'Connor's dissenting opinion, by contrast, qualified the question on which the Court granted certiorari as essentially a distinct one of reverse veil peeking, that is, "[w]hether the alleged suppression of Lebron's speech by Amtrak, as a concededly private entity, should be imputed to the Government."[287]

More frequently, however, national constitutions and statutes expressly incorporate a veil peeking approach by subjecting government-controlled corporations to at least some of the public law constraints applied to the state. Examples of such constraints are the application of public law mechanisms of supervision such as controls by accounts tribunals and parliament and a special labor and contracting regime.[288] The result is that most SOEs, including those whose shares are traded in public markets, are subject to a distinctively hybrid regime; they are governed by roughly the same corporate laws applicable to private firms and by a host of public law exceptions in various areas.

In other realms, such as the application of sovereign immunity, the legal regime is even less deferential to legal entity boundaries, privileging instead the nature and purpose of the activity in question. Although the law is murky, most legal instruments in this area embrace veil peeking to recognize that separately incorporated SOEs nevertheless enjoy sovereign immunity if they exercise governmental functions.[289] Conversely, the same laws also establish another form of asset partitioning in the absence of a separate legal person,

285 *Id.* at 392.

286 *Id.* at 386, 391.

287 *Id.* at 400 (O'Connor, J., dissenting).

288 For a description of various components of such a hybrid regime, see generally Mariana Pargendler, Aldo Musachhio & Sergio G. Lazzarini, *In Strange Company: The Puzzle of Private Investment in State-Controlled Firms*, 46 CORNELL INT'L L.J. 569 (2013) (demonstrating constraints of the application of public law mechanisms of supervision such as controls by accounts tribunals and parliament); Curtis J. Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform*, 50 CORNELL INT'L L.J. 473 (2017) (discussing the various components of a hybrid special labor and contracting regime).

289 *See* Clifford Chance, STATE IMMUNITY AND STATE-OWNED ENTERPRISES (2008) (relying on the United States Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.), the United Kingdom State Immunity Act 1978, https://www.legislation.gov.uk/ukpga/1978/33 [https://perma.cc/B6U7-XH7R], and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res A/59/508 (Dec. 2, 2004), to assert that the acts that an entity performs are determinative of an entity's treatment in court proceedings).

by providing that assets used by the state for commercial activities are subject to creditor enforcement, while those used for government purposes are not.[290] Interestingly, this is an area in which regulatory status and asset partitioning are primarily based on the character and purpose of the activity performed by the state rather than on legal entity formalities.[291]

H. *Corporate Law*

Veil peeking is also common in corporate law. In assessing conflicts of interest of controlling shareholders, courts habitually look behind the corporate structure to find the ultimate controller, thus ignoring the legal personality of intermediate holding companies for imputation purposes.[292] As in other fields, courts have also engaged in veil peeking to determine the scope of application of specific corporate law statutes.

The Delaware Chancery Court's decision in *Hollinger Inc. v. Hollinger International, Inc.*[293] exemplifies this approach. Here, the court had to decide whether the requirement that shareholders approve a sale of substantially all of a company's assets under § 271 of the Delaware General Corporation Law (DGCL) applied when the asset sale in question was conducted by a corporation's wholly owned subsidiary.[294] The defendant Hollinger International advanced a "technical statutory defense" based on the subsidiary's separate legal personality, finding that "§ 271 would have no application unless the selling subsidiary has no corporate dignity under the strict test for veil piercing."[295]

The opinion by then-Vice Chancellor Leo Strine articulates the policy implications of both the reverse veil peeking approach advanced by the plaintiffs and the regulatory partitioning approach proposed by the defendants. The position upholding regulatory partitioning "has the virtues that accompany all bright-line tests, which are considerable, in that they provide clear guidance to transactional planners and limit litigation."[296] In

290 *Id.* at 16.

291 *See id.* at 2 ("[T]he form and structure of an entity and the nature of its legal and economic relationship to the State, is now less important than the character of the acts which the entity performs, and which form the subject matter of proceedings.").

292 *See, e.g.*, *In re* EZCORP Inc. Consulting Agreement Derivative Litig., No. 9962-VCL, 2016 WL 301245, at *9 (Del. Ch. Jan. 25, 2016), *reconsideration granted in part*, 2016 WL 727771 ("An ultimate human controller who engages directly or indirectly in an interested transaction with a corporation is potentially liable for breach of duty, even if other corporate actors made the formal decision on behalf of the corporation, and even if the controller participated in the transaction through intervening entities.").

293 858 A.2d 342 (Del. Ch. 2004) (Strine, V.C.).

294 *Id.* at 346.

295 *Id.* at 348.

296 *Id.* at 374.

addition, "[t]hat approach also adheres to the director-centered nature of our law, which leaves directors with wide managerial freedom subject to the strictures of equity, including entire fairness review of interested transactions,"[297] and "[i]t is through this centralized management that stockholder wealth is largely created, or so much thinking goes."[298] On the other hand, regulatory partitioning engenders the familiar risk of evasion, in that "§ 271's vote requirement will be rendered largely hortatory—reduced to an easily side-stepped gesture."[299]

The decision also stresses that the role of legal persons as a distinct nexus of imputation does not operate in an "all-or-nothing" manner, instead holding in certain contexts but not in others:

> These [reasons for the creation of subsidiaries] include the desire to limit liabilities to third parties involved in operating certain business lines to those lines and to minimize tax liability. That the law recognizes the separate existence of wholly owned subsidiaries for purposes like this does not necessarily mean that it should recognize their separate existence for all purposes. Yet, that is exactly what International's argument is: that a wholly owned subsidiary is either without any legal dignity at all in the sense that it fails the severe test required to pierce the corporate veil or else its separate existence must be recognized in all contexts. The utility of this stark, binary approach is not immediately clear and does not comport with the approach Delaware has taken in other areas of its corporate law.[300]

The Court, however, did not ultimately rule on the question of whether the application of § 271 authorizes a veil peeking approach to encompass a sale of assets by the subsidiary.[301] Instead, Vice Chancellor Strine engaged in a form of preliminary peeking of sorts by tentatively imputing the subsidiary's assets to the parent and then finding that, as a matter of "economic substance," the transaction in question did not qualify as a sale of substantially all of its assets.[302] Following the decision, the Delaware legislature amended the DGCL to fill in the existing gap. It did so by embracing reverse veil peeking at the statutory level to (1) provide that the assets of a wholly owned and controlled subsidiary would be considered assets of the parent corporation for purposes of the shareholder approval requirement set forth in § 271 and (2) exempt asset

297 *Id.*
298 *Id.*
299 *Id.*
300 *Id.* at 374-75.
301 *Id.* at 371.
302 *Id.* at 375-85.

sales, leases, and exchanges to and from a subsidiary from the requirement of a shareholder vote.[303]

I. *Contract Law*

Veil peeking is also common in contract disputes. Unlike contractual veil piercing claims, which center on the assets available to satisfy contractual obligations, contractual veil peeking focuses on the meaning and scope of contractual duties. Most contractual veil peeking cases concern regulatory arbitrage, as when one contract party establishes a separate legal person to evade existing contractual duties. The textbook example is the creation of a corporation by party A to carry out a type of business that party A is prohibited from pursuing due to a contractual covenant not to compete. Faced with this scenario, courts have often agreed to peek and find a contractual violation.[304] Similarly, in the prominent UK case of *Jones v. Lipman*, Lipman had sold a property to plaintiffs, but subsequently, thinking better of the deal, sold the property to a newly created company wholly owned by him in order to prevent an order of specific performance.[305] The Court engaged in veil peeking to order specific performance both against Mr. Lipman and the company, calling the company "a device and a sham, a mask which [seller] holds before his face in an attempt to avoid recognition by the eye of equity."[306]

As in other fields, veil peeking in contract law is usually a matter of contract construction or gap filling. A classic example is whether a contractual right of first refusal in connection with a sale of shares applies to indirect share transfers (e.g., through the sale of shares in a holding company) when the contract language in question is silent in this regard.[307]

In other cases, veil peeking can also be used for purposes of contract interpretation in determining the will of the parties. Take, for instance, a network of three related contracts entered into by Company A on one hand, and each of Companies X, Y, and Z, on the other, with Y and Z being wholly owned subsidiaries of parent Company X. If these contracts use the same defined terms, and Company X adopts a certain interpretation of a given defined term under its contract with Company A, veil peeking could serve to

303 *See* DEL. CODE ANN. tit. 8, § 271(c) (2005).

304 For the U.K. law precedents, see, for example, *Gilford Motor Co., Ltd. v. Horne* [1933] Ch 935 and *Jones v. Lipman* [1962] 1 All ER 442.

305 *Jones*, [1962] 1 All ER at 442-44.

306 *Id.* at 445.

307 *See, e.g.*, T.J.S.P., Apelação Cível No. 0217635-30.2011.8.26.0000, Relator: Enio Zuliani, 11.10,2011 (Braz.), https://tj-sp.jusbrasil.com.br/jurisprudencia/20658629/agravo-de-instrumento-ai-2176353020118260000-sp-0217635-3020118260000-tjsp/inteiro-teor-110045232 [https://perma.cc/47EN-BR5M].

impute the same interpretation for the contracts between Company A and Company Y. This is still another form of veil peeking without any prejudice to asset partitioning. Such interpretation would be based on the economic reality that wholly owned subsidiaries are subject to the parent's control and are not independent economic actors with independent wills—the same rationale that underlies veil peeking in antitrust jurisprudence.[308]

Moreover, just as lawmakers often embrace veil peeking explicitly, leaving little room for judicial gap filling, contracting parties may choose to attribute shareholder-related events to the legal persons that are party to the contract. Change-of-control clauses, a common feature of commercial practice, provide a prominent example of explicit veil peeking by contracting parties. By including a change-of-control clause, contracting parties essentially opt out of the default legal regime of regulatory partitioning by making any change in the control structure of the company an event of default under the relevant agreement. The prevalence of change-of-control clauses in commercial contracts shows that the identity of the controlling shareholder is often a relevant business consideration for the contracting parties, which are not always best served by the regime of strict regulatory partitioning.[309]

J. *Miscellaneous Regulations and Social Sanctions*

Beyond the various fields examined above, veil peeking also appears in numerous controversies concerning the interpretation of specific statutes and regulations, as illustrated by the prominent U.S. Supreme Court case of *Burwell v. Hobby Lobby Stores, Inc*.[310] One area in which veil peeking can be used to compromise creditors' rights without impinging on limited liability or entity shielding is that of homestead exemptions. Various jurisdictions grant special exemptions to the home of individual debtors against creditor claims.[311] Homestead exemptions are effectively a form of asset partitioning imposed by law without the creation of a separate legal person. However, a veil peeking question then emerges when the real property in question, which serves as the home for natural persons, is formally owned by legal persons controlled by such individuals. Many U.S. courts have engaged in veil peeking by finding that the corporation is a sham engineered by creditors to circumvent

308 *See supra* notes 197–200.

309 *See generally*, Li et al., *supra* note 155 (examining events of default in debt contracts).

310 134 S. Ct. 2751 (2014). A majority of the Supreme Court held that closely held corporations could assert religious beliefs under the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000BB to -4)—a statute that was silent on the treatment of corporate entities—in order to avoid complying with the requirement of contraceptive coverage under the Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (codified at 42 U.S.C. §§ 18001-18122). *Burwell*, 134 S. Ct. at 2785.

311 *See generally* George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289 (1950).

homestead protection or have otherwise held that homestead protection attaches to the possessory interest, rather than ownership of the property.[312]

Finally, veil peeking is not necessarily limited to the application of legal rules, but may also extend to social sanctions. In 2019, consumers have proposed to boycott luxury gym chains Equinox and SoulCycle after Stephen Ross, a major shareholder and board chair of their parent company, hosted a fundraiser for Donald Trump.[313] Predictably, the companies sought to rebut the boycott premised on veil peeking by asserting their independent values and disclaiming control by Ross, which they described as a "passive investor" who "is not involved in the management of either business."[314] More recently, consumers and investors' "buy Black" initiatives in 2020 exemplifies veil peeking by social movements to favor Black-owned corporations and their shareholders.[315]

CONCLUSION

The dominant view among legal and economic scholars is that the corporation is a nexus for contracts, and that asset partitioning is the essential function of corporate legal personality. This view is, however, incomplete. Regulatory partitioning is critical in allowing the corporation to serve as a nexus for contracts *and* regulation. The legal advantages and disadvantages bestowed on this separate nexus are critical for the success and development of the corporate form. A significant portion of corporations existing in the real-world appear to be formed for regulatory rather than contracting reasons.

Even more so than asset partitioning, the form of regulatory partitioning provided by legal personality does not operate in an all-or-nothing fashion but is rather "on and off." As in John Dewey's classical formulation, "for the purpose of law the conception of 'person' is a legal conception; put roughly,

312 *See, e.g.*, *In re* Perry, 345 F.3d 303, 316 (5th Cir. 2003) (finding that Texas homestead protection attaches to an individual's possessory interest in property owned by a corporation); Ritter v. Citizens Bank (*In re* Ritter), No. 07-61071, 2009 WL 1024656, at *4 n.24 (Bankr. E.D. Tex. Mar. 26, 2009) (surveying cases including *In re Perry*, *supra*, and concluding that "across-the-board" rules for "homogeniz[ing] the Texas homestead decisions" have proven unhelpful).

313 *See* Brian Ries, *Owner of SoulCycle and the Miami Dolphins Faces Outrage and Calls for Boycott over Trump Fundraiser*, CNN POL. (Aug. 8, 2019, 9:52 AM), https://www.cnn.com/2019/08/07/politics/equinox-soulcycle-trump-fundraiser-boycott-trnd/index.html [https://perma.cc/7PVU-H3QH].

314 Ries, *supra* note 313; *see also* Jordan Valinsky, *Equinox: Trump Fundraiser Stephen Ross Doesn't Run Our Company*, CNN BUS. (Aug. 15, 2019, 10:07 AM), https://www.cnn.com/2019/08/15/business/equinox-letter-stephen-ross/index.html [https://perma.cc/K3Y5-NYGB].

315 *See, e.g.*, *180 Black-Owned Businesses to Support*, N.Y. MAG. (June 18, 2020), https://nymag.com/strategist/article/black-owned-businesses-support-shop.html [https://perma.cc/7H27-MJ6K]; Paul Vigna & Mischa Frankl-Duval, *Stocks of Black-Owned Companies Surge on Juneteenth Holiday*, WALL ST. J. (June 19, 2020, 5:54 PM), https://www.wsj.com/articles/stocks-of-black-owned-companies-surge-on-juneteenth-holiday-11592603641 [https://perma.cc/9R5S-Q8VV].

'person' signifies what law makes it signify."[316] The state frequently sticks to the corporation as a separate nexus for regulation for the attribution of legal rights, duties, powers, privileges, disabilities, and immunities. However, when the phenomenon of corporate control is critical to the efficacy of the regulatory scheme at hand, lawmakers and courts engage in veil peeking, overcoming regulatory partitioning to attribute the identity or legal status of shareholders to the corporation. In other circumstances, veil peeking is used to level the regulatory playing field across different organizational forms.

Just as asset partitioning and regulatory partitioning constitute different categories of corporate separateness subject to different tradeoffs, the exceptions to asset partitioning and regulatory partitioning are equally distinct. Veil piercing and veil peeking are driven by different considerations and fulfill different functions, but have been conflated in legal scholarship and practice. This Article unpacked veil peeking, showing that it is distinct from veil piercing, but not a unitary category unto itself. It also offered normative guidance for the resolution of veil peeking disputes. Courts should not condition veil peeking on restrictive criteria such as fraud or commingling of assets, but should instead consider the purpose of the regulatory scheme in question.

The ongoing relevance of veil peeking casts doubt on the syllogistic approaches that seek to derive precise legal consequences from the different theories of corporate personality—concession or artificial entity theory, contractual theory, or real entity theory. The continued relevance of this particular form of doctrinalism in U.S. legal thought is both surprising and unwarranted. Incorporation serves diverse functions that cannot be captured by a single theoretical rubric. Corporate separateness is an "on-and-off" mechanism used to achieve different transactional and regulatory purposes. The time has come to unbundle them.

316 John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 655 (1926).