

THE BOGALUSA EXPLOSION, “SINGLE BUSINESS ENTERPRISE,” “ALTER EGO,” AND OTHER ERRORS: ACADEMICS, ECONOMICS, DEMOCRACY, AND SHAREHOLDER LIMITED LIABILITY: BACK TOWARDS A UNITARY “ABUSE” THEORY OF PIERCING THE CORPORATE VEIL

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I. INTRODUCTION: A THREAT TO LIMITED LIABILITY POSED BY A BOGALUSA EXPLOSION

On October 23, 1995, in Bogalusa, Louisiana, a railcar exploded at the Gaylord Chemical Corporation facility. Gaylord Chemical is a wholly owned subsidiary of Gaylord Container Corporation, and while Gaylord Container’s plant is situated geographically adjacent to Gaylord Chemical’s facility in Bogalusa, the two corporations carry on separate manufacturing and sales activities. Gaylord Container operates a paper mill and manufactures paper products. Gaylord Chemical manufactures several specialty chemicals. Nevertheless, some of Gaylord Chemical’s production activities are conducted using waste byproducts of Gaylord Container’s paper mill operations, the byproducts of which are piped to Gaylord Chemical from the adjacent Gaylord Container Plant. The two businesses are also physically connected by utility and telephone wires.

Pursuant to its ongoing manufacture of a particular chemical, Gaylord Chemical had ordered a railcar of N_2O_4 (nitrogen tetroxide) from Vicksburg

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Chemical Corporation; that railcar arrived at Gaylord's plant on October 10, 1995. Employees of Gaylord Chemical, though, "soon discovered that the railcar's contents were contaminated with water" and "knew [that] the contaminated N_2O_4 had to be removed from the railcar."¹ Plans were then made "for the transfer of the contaminated N_2O_4 to stainless steel tank trucks, which could [safely] hold nitric acid."² At the direction of Vicksburg's hazardous materials team, Gaylord Chemical employees flooded the railcar with water. During the next ten days, however, the gauge on the railcar continued to indicate that the pressure [of the gas still] in the car was rising until "[a]t approximately 4:45 p.m. on October 23, 1995, the railcar's south end cap blew off," releasing the gaseous contents of the railcar, "primarily in a massive brown and orange cloud" that slowly settled on land in Louisiana and nearby Mississippi.³

In the months following the chemical release at Gaylord Chemical Company, 172 lawsuits, involving over 26,000 plaintiff class members from Louisiana and 4000 individual plaintiffs from Mississippi, each of whom "alleged bodily injury, personal injury, and property damage," were filed in state and federal courts.⁴ The majority of these lawsuits were tort actions "for compensatory and punitive damages arising out of [plaintiffs'] alleged exposure to the chemical released from the railroad tank car"⁵ and were founded on Louisiana negligence law.⁶

For our purposes, the most interesting part of the plaintiffs' case was the allegation that Gaylord Chemical and Gaylord Container were a "single business enterprise," so that if any employees of the subsidiary, Gaylord Chemical, had committed negligence, the parent company, Gaylord Container, should be liable for any damages sustained. There was no allegation that Gaylord Chemical (or its insurer) would not be able to pay the damages. If Gaylord Container (which was a much more substantial business than Gaylord Chemical) could be treated as a defendant for the purposes of figuring punitive damages, however, recovery might be considerably higher, since punitive damages can be based on the amount of business done by a defendant.

Gaylord Container had decided to form Gaylord Chemical as a separate corporation to isolate the risk of the separate chemical operation in a separate entity and to protect the rest of its considerable investment in Gaylord Container from any potential creditors of Gaylord Chemical. Louisi-

¹ Gaylord Container Corp. v. CNA Ins., 807 So. 2d 864, 866 (La. Ct. App. 2001).

² *Id.*

³ *Id.* at 867.

⁴ *Id.* The figures for the number of lawsuits and plaintiffs were supplied by Thomas Kuhns, counsel to Gaylord Container.

⁵ Cotton v. Gaylord Container Corp., 691 So. 2d 760, 763 (La. Ct. App. 1997).

⁶ Walker v. City of Bogalusa, No. 96-3470, 1997 U.S. Dist. LEXIS 18853, at *21 (E.D. La. Nov. 24, 1997).

ana law—like the law of every other American jurisdiction—permits separate incorporation for the very purpose of limiting liability. In at least some Louisiana courts, though, the “single business enterprise”⁷ doctrine is a tempting tool that can be used to eliminate the protection of limited liability for a parent or an affiliate.⁸

It is, or at least once was and ought again to be, hornbook law that a shareholder or a parent corporation should not lose the protection of limited liability unless that shareholder or parent has somehow “abused” the corporate form. As a frequently invoked statement of the formula has it:

[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.⁹

Louisiana, other jurisdictions, and some federal courts, this Essay argues, are wrongly jettisoning this “abuse” requirement.¹⁰

In their argument that Gaylord Container and Gaylord Chemical were a “single business enterprise,” plaintiffs in the Bogalusa explosion case made no real attempt to suggest that the parent company Gaylord Container “abused” the privilege of separate incorporation. Plaintiffs instead emphasized the business and physical connections between the two plants, their common ownership, and the various means by which the two were operated in a coordinated manner. The plaintiffs’ reading of Louisiana law regarding “single business enterprise” was plausible, and their attempted use of this doctrine is typical of what is happening in other courts across the nation.

⁷ See *infra* note 76 for a discussion of the Louisiana courts’ use of the “single business enterprise” doctrine. A precursor of the “single business enterprise” doctrine appears in the famous article in which A.A. Berle argues that creditors ought to be able to recover from any member of a group of corporations that act in tandem and are deemed to constitute an “enterprise.” Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343 (1947). Since the publication of Berle’s article, courts have occasionally cited it in support of the imposition of liability on corporate affiliates for each other’s debts. See, e.g., *State Dep’t of Env’tl. Prot. v. Ventron*, 468 A.2d 150, 164 (N.J. 1983); *Walkovsky v. Carlton*, 223 N.E.2d 6, 8–10 (N.Y. 1966). Although citation to Berle has been infrequent of late, his legacy lives on through an ever-growing number of courts invoking the “single business enterprise” doctrine. See *infra* text accompanying notes 74–104.

⁸ See generally Kyle M. Bacon, *The Single Business Enterprise Theory of Louisiana’s First Circuit: An Erroneous Application of Traditional Veil-Piercing*, 63 LA. L. REV. 75 (2002) (criticizing the Louisiana courts of the First Circuit that have adopted a “single business enterprise” theory to pierce corporate veils).

⁹ *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905).

¹⁰ See *infra* text accompanying notes 99–104. Even Louisiana has some cases that demonstrate a clear understanding of the “abuse requirement.” See, e.g., *Haywood v. La. Sugar Cane Prods.*, 692 So. 2d 524, 530 (La. Ct. App. 1997) (relying on the leading “abuse requirement” case of *Milwaukee Refrigerator*), discussed *infra* at note 109.

But does this use of “single business enterprise” to undermine the now traditional protections of limited liability for parents and shareholders make sense?

II. WHY DO WE HAVE SHAREHOLDER LIMITED LIABILITY? IS IT WORTH PRESERVING?

What is the basis for the prevailing rule that limits shareholder liability to amounts invested in the firm? How do we explain the fact that the rule of limited shareholder liability clearly shifts risk to both voluntary and involuntary creditors? Limited shareholder liability is a relatively recent invention,¹¹ and we can understand the rationale for it by examining the debates of the American state legislatures that changed the preexisting common law rule of unlimited shareholder liability. These debates reveal two reasons for the change.

First, legislatures wanted to encourage investment in the chronically capital-scarce economies of the states of the young republic. According to the most basic laws of economics, by lowering the costs of investment, demand for that investment would rise, and capital that might not otherwise be forthcoming would flow into the states’ emerging enterprises.¹²

Second, shareholder limited liability was understood as a means to promote republican government. Without limited liability, legislative proponents of the doctrine argued, only the very wealthy could afford to invest in corporations because only the very wealthy could self-insure against catastrophic loss. Those who understood that corporations could be important vehicles for the economic development that the country needed in the finance, transportation, and manufacturing industry were concerned that corporations were often perceived as potentially antidemocratic monopolies. By diversifying the ownership of corporations, they could be made servants—not enemies—of popular sovereignty. In this respect, the idea that wealth should be diversified through widespread ownership of corporations was similar to the Jeffersonian ideal of land-owning yeoman farmers. Both theories shared the insight that a republican government would function properly only if citizens had wealth and an investment in the commu-

¹¹ For further comments on the history of limited liability, see, for example, Janet Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 415 (1992). Alexander indicates that “unlimited shareholder liability was the general American rule until the early nineteenth century. [But b]y 1850, most states had enacted statutes providing for limited liability,” though some states retained provisions for “double shareholder liability,” and, “[i]n California, pro rata shareholder liability survived until 1931.” *Id.*

¹² In the succinct words of one academic, “[l]imited shareholder liability certainly has its theoretical flaws. It is not a thing of perfect beauty, but at least it works.” Joseph Grundfest, *The Limited Future of Unlimited Liability*, 102 YALE L.J. 387, 420 (1992).

nity sufficient to enable them to exercise independent judgment in the choice of leaders and public policy.¹³

Creating parent and affiliate corporations is a now common strategy employed by large, publicly held corporations in an effort to minimize risks for their shareholders. These shareholders, who now constitute a majority of the American people,¹⁴ stand to benefit from a rule that protects their investments. There are democratic reasons, then, for favoring limited liability even for corporate shareholders.

In 1911, the President of Columbia University, Nicholas Murray Butler, stated that the invention of the “limited liability corporation” was “the greatest single discovery of modern times.”¹⁵ Limited shareholder liability was of a piece with other transformations in the nineteenth-century formative period of American law, including the substitution of the rule of negligence for the rule of nuisance in torts, the demise of the “ancient lights” and the rise of the “reasonable use” rules in property, and the substitution of the requirement of express warranties for the early common law “sound price” rule in contracts. All of these shifts altered the aristocratic early rules of the English common law in a manner that encouraged American entrepreneurship and shifted wealth and influence from the owners of landed property to those investing and participating in commerce and manufacturing.¹⁶

And yet many of these torts, property, and contract rules have come under some attack in the twentieth and twenty-first centuries. The rule of negligence in torts has been replaced in part by strict products liability, and the rule of caveat emptor has been replaced by the UCC’s implied warranty of merchantability. The traditional prerogatives of property owners, at least

¹³ The English political philosopher James Harrington in *Oceana* argued that it was necessary to distribute wealth equitably among private individuals in order to preserve a republican form of government. JAMES HARRINGTON, *OCEANA* (S.B. Liljegren ed., C. Winter 1924) (1656). See, for example, J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 127–47 (1967) for a more detailed discussion of Harrington’s theories and their impact upon Anglo-American republicanism. For an American homespun variation on Harrington’s theme, involving small yeoman businessmen, see also the wonderful thoughts of Supreme Court Associate Justice Rufus Peckham in *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897) (“Trade or commerce [involving large organizations who might lower prices because of economies of scale] may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class.”).

¹⁴ These holdings can take the form of direct investment in corporate shares or indirect investment through mutual funds, retirement and pension funds, the purchase of insurance, or attendance at, or employment by, endowed universities, among other forms. According to data contained in a relatively recent article, “households [are] ‘the largest single direct holders of equities,’ owning approximately \$2.3 trillion, or fifty-three percent, of equity securities valued as of year-end 1990. The median value of portfolios held by America’s 51.4 million shareholders is \$11,400 with an average of 3.2 issues per portfolio.” Grundfest, *supra* note 12, at 397 (footnotes omitted).

¹⁵ STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 1:1 (14th ed. 2004).

¹⁶ For additional historical details, see, for example, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977).

where urban property has been concerned, have eroded somewhat to better protect the interests of tenants. Similarly, the rule of shareholder limited liability recently has been under attack for what seem to be essentially redistributive reasons. Surprisingly, however, the property, tort, and contract rules of our formative era seem to have a vibrancy that has withstood most efforts to erode them, and the rule of shareholder limited liability seems entitled to an equally robust defense. Its critics have failed to prove that a rule of limited shareholder liability does not promote investment and promote democracy, and, until they do, the rule deserves the deference we have traditionally accorded to it.¹⁷

A single theme unites the critics of limited shareholder liability, and that is that by externalizing the costs of tortious behavior through limited liability, we will encourage corporations to engage in more hazardous behavior, which will represent a danger to society. This is far from clear, however. The personal liability of individuals who commit torts, such as corporate officials, remains unimpaired whatever the regime of shareholder liability, and that liability should still have a deterrent effect. While liability for tortious misconduct may be limited to monetary damages, some conduct also will be prohibited by the criminal law, which can involve the risk of imprisonment. This is a substantial deterrent, particularly in our current era of forcing executives to engage in the notorious “perp walk” before a television audience. Finally, those who make the “externalizing risk encourages hazardous conduct” argument appear to share an unduly pessimistic view of human nature. The assumption is one of continuing moral hazard, that if the cost to the shareholders of the commission of corporate torts is lowered, more torts will be committed.

By definition, the commission of a tort or a crime involves wrongdoing; ordinary investment, on the other hand, certainly does not. Corporate officers and actors are no different from their fellow humans in that few have completely dispensed with morality, so that engagement in wrongful behavior has costs that are not only economic. One’s standing in the community of one’s peers, one’s self-esteem, one’s religious or moral beliefs, one’s actual regard for potential harm to others, and many other factors will, to some extent, serve as a constraint on tortious behavior. Thus, the assumption that limited shareholder liability encourages the commission of more corporate torts is not self-evident.

There are other means of ensuring that tort creditors have a better chance of compensation, including mandatory capitalization laws, insurance requirements, product safety requirements, priority treatment in corporate

¹⁷ Indeed, as one of the most brilliant students of limited liability, Stanford Professor Joseph Grundfest, has concluded, “[L]imited liability may well be a necessary consequence of trading in modern capital markets rather than a discretionary rule that can be abandoned by the legal system if some other doctrine seems preferable.” Grundfest, *supra* note 12, at 425.

bankruptcy cases and employing “gatekeeper” liability.¹⁸ Before we abandon shareholder limited liability, its critics ought to demonstrate that none of these other means of protecting tort creditors are feasible. To date, limited liability’s critics have not yet done this.

But if limited liability is to be preserved, then we must do more than recognize the shortcomings of its critics. We also must recognize that the legal presumption against piercing the corporate veil is currently in danger. There are two problems that ought to be addressed. One is the half-hearted manner in which limited liability is protected in jurisdictions that allow too easy piercing of the corporate veil, through doctrines such as “single business enterprise.” A second is the failure of courts to articulate clearly veil-piercing standards. In an important, and much quoted, analysis, Frank Easterbrook and Daniel Fischel declared that veil piercing “seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled.”¹⁹ Another critic of the “piercing the corporate veil” doctrine, Stephen Bainbridge, observes that its use is now “rare, unprincipled, and arbitrary,”²⁰ and “[j]udicial opinions in this area tend to open with vague generalities and close with conclusory statements, with little or no concrete analysis in between. There simply are no . . . bright-line rules for deciding when courts will pierce the corporate veil.”²¹

The critics of the doctrine are wrong that cases raising veil-piercing issues are rare. In fact, the problem is one of the most frequently litigated in all of corporate law.²² They are correct that the current state of veil-piercing law is chaotic, but it ought to be possible to return the doctrine to a more sensible earlier state.²³ Three thoughtful commentators—reformers rather than critics of limited liability—have observed that the “classic case” for

¹⁸ As Professor Grundfest explains, it is preferable to regulate corporations’ hazardous activities rather than their capital structure because the market for goods and services is far more elastic than that for capital. In his article, he focuses on three primary methods for regulation of activities, namely: (1) minimum capitalization and insurance requirements, (2) product safety requirements, and (3) “gatekeeper liability.” Because all three methods target the markets for goods and services, they cannot be arbitrated away or otherwise avoided through actions taken in the capital markets. Further, all three methods clearly incentivize corporations to engage in a higher standard of care and “reduce the risk of events that threaten to generate liability in excess of corporate assets.” *Id.* at 419–23.

¹⁹ Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985).

²⁰ Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 535 (2001).

²¹ *Id.* at 513.

²² Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 154 (1992); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991).

²³ Even a critic of the doctrine, such as Bainbridge, is prepared to concede that there are some clear instances in which veil piercing is appropriate, for example when creditors are misled by the fraudulent behavior of shareholders or parent corporations, and when shareholders or parent corporations wrongly siphon off funds from the corporation, leaving insufficient funds to meet the obligations to creditors. See Bainbridge, *supra* note 20, at 517.

veil piercing is defined by the law of fraudulent conveyance: a shareholder, knowing the corporation is in a situation of potential insolvency, transfers corporate assets to him or herself without adequate consideration.²⁴ Moreover, two of these commentators, Robert Hamilton and Jonathan Macey, suggest that even if the doctrine of “piercing the corporate veil” is unclear, it is still wise to preserve it because “the very vagueness and uncertainty of the piercing doctrine encourages adequate capitalization (and the purchase of liability insurance) by corporations to begin with.”²⁵

Nevertheless, since the “vagueness and uncertainty” of the doctrine might lead to its abolition, it is imperative to clear up some of that “vagueness and uncertainty.” The first steps are to examine the doctrine itself, and then to evaluate related and competing doctrines that bid to replace and undermine common law “piercing.”

III. UNCERTAINTIES IN STATE COMMON LAW VEIL-PIERCING DOCTRINES

It is usually understood that to pierce the corporate veil some sort of abuse is required, but there is no consensus on what constitutes “abuse.” There are some jurisdictions that have made clear that where the case involves contractual creditors, there must be proof of actual fraud before the shield of limited liability is removed.²⁶ In other jurisdictions, fraud is not required, and some other “injustice,” “illegality,” or “inequity” is all that is necessary to pierce the corporate veil.²⁷ Still others have hinted that all that is necessary to pierce is that the corporation be operated as the “alter ego” of the individual shareholder or corporate parent. This “alter ego” test often seems not to turn on any clear abuse or injustice but merely upon the “domination” or “control” exercised by the individual shareholder or parent over the corporation or subsidiary.²⁸ Some jurisdictions use “alter ego”

²⁴ ROBERT CLARK, *CORPORATE LAW* 37–38 (1986) (viewing piercing-the-veil cases as springing from fraudulent conveyance law); *see also* ROBERT W. HAMILTON & JONATHAN R. MACEY, *CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES* 354 (8th ed. 2003) (finding that text of the Uniform Fraudulent Transfers Act does seem to cover siphoning off assets, a perennial justification for piercing the corporate veil).

²⁵ HAMILTON & MACEY, *supra* note 24, at 355.

²⁶ *See, e.g.*, NEV. REV. STAT. ANN. § 78.747(2) (West 2004) (“A stockholder, director or officer acts as the alter ego of a corporation if: . . . [a]dherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice”); TEX. BUS. CORP. ACT ANN. art. 2.21 (Vernon 2003) (providing that shareholders are not liable for contractual debts unless there is actual fraud by the shareholder involved).

²⁷ *See, e.g.*, *Jack LaLanne Fitness Ctrs., Inc. v. Jimlar, Inc.*, 884 F. Supp. 162, 164–66 (E.D.N.J. 1995) (providing a comprehensive examination of New Jersey law including explanation of procedural and substantive differences when veil-piercing claims are based on either “fraud” or “allegations of injustice or illegality”).

²⁸ There is a line of federal cases, applying New York law, in which this appears to be true. *See, e.g.*, *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int’l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993). Similarly, several other cases hold that either “fraud or wrong” or “domination and control” can support veil

seemingly independently of the “piercing the corporate veil” doctrine,²⁹ and still others, even in situations where corporations are not “alter egos” of each other, impose liability under an “agency” theory.³⁰ Other jurisdictions applying the “alter ego” doctrine make clear that it *does* require an abuse of the corporate form, and that, in fact, “alter ego” is simply another name to be used for the “piercing the corporate veil” doctrine itself.³¹

The most commonly targeted abuse or “injustice” seems to be the failure adequately to capitalize the corporation, to operate it in a manner where the corporation’s assets will not be sufficient to meet the obligations to creditors. The better reasoned cases do suggest that it is unlikely that undercapitalization alone is enough to remove the shield of limited liability. Even so, there is no universally agreed-upon conception of how much capital is adequate for a corporation, and the impossibility of articulating such a rule leads to uncertainty and costly litigation. Failures of businesses, usually because of an inability accurately to predict the risks involved, are to be expected. The opportunity to undertake a commercial venture, to have it come to failure, and then to start others that may prove successful benefits society.

Nevertheless, the notion of limited liability *is* potentially inconsistent with the idea expressed in a frequently cited corporate law treatise that investors, in order to enjoy the benefits of the corporate form, have an obligation at least to endow their corporations with capital reasonably adequate to meet anticipated obligations to creditors.³² Some courts have expanded this requirement of initial adequate capitalization into an obligation to continue to finance the corporation such that its capital remains adequate to meet an-

piercing. *See, e.g.*, Thomson-CSF, S.A. v. Am. Arbitration Ass’n, 64 F.3d 773, 777 (2d Cir. 1995); Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 137–39 (2d Cir. 1991); ITEL Containers Int’l Corp. v. Atlantrafik Express Serv. Ltd., 909 F.2d 968, 703 (2d Cir. 1990). Notwithstanding these cases, however, the leading New York authority clearly indicates that there must be *both* control *and* an abuse of the corporate form before the corporate veil may be pierced. *Morris v. State Dep’t of Taxation & Fin.*, 623 N.E.2d 1157, 1161 (N.Y. 1993).

²⁹ To meet the “alter ego” test in these jurisdictions, the sole requirement is merely a demonstration of shareholder control rather than the classic doctrinal requirements of *both* control and an abuse of the corporate form. *See, e.g.*, Pearson v. Component Tech. Corp., 247 F.3d 471, 485 (3d Cir. 2001) (“[T]o succeed on an alter ego theory of liability, plaintiffs must essentially demonstrate that in all aspects of the business, the two corporations actually functioned as a single entity and should be treated as such.”).

³⁰ *See, e.g., id.* at 487 n.5 (“Sometimes courts will impose liability on a parent for a subsidiary’s acts based on a theory of “agency,” i.e., that the subsidiary organization, although (unlike an alter ego) possessed of a distinct legal personality from the parent, has acted as the parent’s agent in a series of transactions and therefore has the power to bind the parent.”).

³¹ *See, e.g.*, XL Vision, LLC v. Holloway, 856 So. 2d 1063, 1066 (Fla. Dist. Ct. App. 2003) (“The corporate veil may be pierced if the plaintiff can prove both that the corporation is a mere instrumentality or alter ego of the defendant, and that the defendant engaged in improper conduct in the formation or use of the corporation.” (internal quotations omitted)).

³² HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS 302–03 (rev. ed. 1946).

anticipated obligations.³³ The wiser jurisdictions maintain that the “undercapitalization” question should be asked only for the time of incorporation. In the jurisdictions that have indicated that there is an ongoing obligation to furnish adequate capital to the corporation, a corporation could, of course, start out adequately capitalized initially, and then lose the privilege of limited liability if adequate capital is not maintained.³⁴ This makes no sense, since the reason for limited-liability protection is to allow shareholders to decide to abandon a business project and to limit their losses to what they have invested, rather than to be required continually to furnish funds.³⁵

The most confusing or exasperating jurisdictions, however, are those that eschew any single formulation for the decision to pierce the corporate veil, and simply generate lists of possible factors that may indicate a situation calling for piercing. These vary from the list of more than two dozen possibilities invoked in California,³⁶ the eleven-part list from a treatise published three generations ago,³⁷ to assorted four-,³⁸ five-,³⁹ six-,⁴⁰ eight-,⁴¹

³³ *Laya v. Erin Homes, Inc.*, 352 S.E.2d 93, 101 (W. Va. 1986) (“The obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter during the corporation’s operations.”); *see also* *Labadie Coal Co. v. Black*, 672 F.2d 92, 99 (D.C. Cir. 1982) (“It is far from clear in the present case that the initial \$5,000 investment in [the corporation] FAI, made over four years ago, and followed by several years of failure of corporate profit, remains an adequate capitalization of even this corporation.”).

³⁴ In an eloquent dissenting opinion, Texas State Court Judge Akin warned of the dangers of allowing veil piercing based solely on a failure to maintain “adequate capitalization.” *Tigrett v. Pointer*, 580 S.W.2d 375, 395–99 (Tex. Ct. App. 1978) (Akin, J., dissenting). Relying on the work of distinguished Texas law professor Robert Hamilton, Judge Akin admonished the majority for its misuse of “alter ego,” predicting that if uncorrected, it could eventually result in the extinction of Texas closely held corporations. *Id.*

³⁵ Accordingly, a few courts have recognized that the obligation to furnish adequate capital does not constitute a continual need to inject funds into a corporation that has suffered operating losses. *See, e.g.*, *CNC Serv. Ctr., Inc. v. CNC Serv. Ctr., Inc.*, 753 F. Supp. 1427, 1448–49 (N.D. Ill. 1991); *Consumer’s Co-op v. Olson*, 419 N.W.2d 211, 218–19 (Wis. 1988).

³⁶ *Associated Vendors, Inc. v. Oakland Meat Co.*, 26 Cal. Rptr. 806, 837–41 (Dist. Ct. App. 1962).

³⁷ FREDERICK POWELL, *PARENT & SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT CORPORATION FOR THE OBLIGATIONS OF ITS SUBSIDIARY* 9 (1931). For representative cases using Powell’s eleven-factor test, *see, for example*, *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir. 1963); *Taylor v. Standard Gas & Elec. Co.*, 96 F.2d 693, 704–05 (10th Cir. 1938), *rev’d on other grounds*, 306 U.S. 307 (1939); *Fidenas AG v. Honeywell, Inc.*, 501 F. Supp. 1029, 1035–36 (S.D.N.Y. 1981); *Duff v. S. Ry. Co.*, 496 So. 2d 760, 763 (Ala. 1986); *Jackson v. Gen. Elec. Co.*, 514 P.2d 1170, 1173 (Alaska 1973).

³⁸ *See, e.g.*, *Glenn v. Wagner*, 329 S.E.2d 326, 330–31 (N.C. 1985) (stating that the four factors are: (1) “inadequate capitalization”; (2) “non-compliance with corporate formalities”; (3) “complete domination and control of the corporation so that it has no independent identity”; and (4) “excessive fragmentation of a single enterprise into separate corporations”).

³⁹ *See, e.g.*, *Riggins v. Dixie Shoring Co.*, 590 So. 2d 1164, 1168 (La. 1991) (“Some of the factors courts consider when determining whether to apply the alter ego doctrine include, but are not limited to: (1) commingling of corporate and shareholder funds; (2) failure to follow statutory formalities for incorporating and transacting corporate affairs; (3) undercapitalization; (4) failure to provide separate bank accounts and bookkeeping records; and (5) failure to hold regular shareholder and director meetings.” (citations omitted)).

ten-,⁴² eleven-,⁴³ or twelve-part⁴⁴ tests. In almost every instance the court indicates that no single factor is determinative, and each case must be evaluated individually. This is a sad tendency of the common law method—that judges generate lists of factors to meet a particular policy aim, and then later judges apply the lists either without remembering the original policy aim or perhaps to implement a different policy.⁴⁵ There ought to be no objection to the listing and examination of even dozens of factors, however, so long as the reasons for the policy of limited liability are borne in mind, and so long as courts understand that limited liability should not be taken away unless there is some sort of miscreant conduct or abuse.

IV. AVOIDING TRADITIONAL DOCTRINE ALTOGETHER: AGENCY, FEDERAL LAW AND THE SINGLE BUSINESS ENTERPRISE THEORY

Whatever the dangers posed by the current uncertainties in “traditional” piercing doctrine, they pale beside the threat posed by the plethora of other doctrinal means of avoiding shareholder limited liability. One of these is the “agency” doctrine. As Benjamin Cardozo remarked in the classic piercing opinion *Berkey v. Third Avenue Railway Co.*,⁴⁶ to use agency concepts loosely—or to seek to impose liability by calling a subsidiary the “alias” or the “dummy” of the parent—was improperly to finesse the problem of limited liability by enveloping it in the “mists of metaphor.”⁴⁷ This was true, according to Cardozo, even in a case where there was ownership and use of the subsidiary as part of an integrated rail line. Since shareholders or parents always will have the potential to control, or will be controlling their corporations, to apply an agency or control test is to evaporate the protections of limited liability.

⁴⁰ See, e.g., *Baatz v. Arrow Bar*, 452 N.W.2d 138, 141 (S.D. 1990) (stating that the six factors are: “(1) fraudulent representation by corporation directors; (2) undercapitalization; (3) failure to observe corporate formalities; (4) absence of corporate records; (5) payment by the corporation of individual obligations; or (6) use of the corporation to promote fraud, injustice, or illegalities”).

⁴¹ See, e.g., *United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988) (stating that the eight factors are: “[1] whether the corporation was adequately capitalized for the corporate undertaking; [2] whether the corporation was solvent; [3] whether dividends were paid, [4] corporate records kept, [5] officers and directors functioned properly, and [6] other corporate formalities were observed; [7] whether the dominant shareholder siphoned corporate funds; and [8] whether, in general, the corporation simply functioned as a facade for the dominant shareholder”).

⁴² See, e.g., *Great Neck Plaza, L.P. v. Le Peep Rests., LLC*, 37 P.3d 485, 490 (Colo. Ct. App. 2001).

⁴³ See, e.g., *S. Elec. Supply Co. v. Raleigh County Nat’l Bank*, 320 S.E.2d 515, 523 (W. Va. 1984) (enumerating eleven factors).

⁴⁴ See, e.g., *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691–92 (5th Cir. 1985) (enumerating twelve factors).

⁴⁵ See Lecture One of OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881), for the tendency of Common Law courts to take old rules and turn them to new purposes. See also Bainbridge, *supra* note 20, at 506–13, for the misuse of lists of factors.

⁴⁶ 155 N.E. 58 (N.Y. 1936).

⁴⁷ *Id.* at 94–95.

A. Federal Law

There have been occasional attempts to formulate a national law of incorporation, since some commentators argue that the regulation of the internal affairs of large, publicly held corporations ought to be regarded as too important to leave to any one state.⁴⁸ For whatever reason, these attempts overtly to require federal incorporation have failed. But there has been a rearguard action in which federal courts have attempted to formulate particular piercing standards when matters of federal policy are implicated.⁴⁹

The United States Supreme Court addressed this matter in the significant *United States v. Bestfoods* case.⁵⁰ The Court indicated that even in important federal environmental law matters, absent a clear indication from Congress to the contrary, the common law principles about limited shareholder liability ought to govern.⁵¹ Even in that nine-to-zero decision, however, the Supreme Court failed to indicate whether, when federal legislation was involved, there ought to be created a federal common law to govern piercing matters.

Thus, there continue to be cases decided under the WARN Act,⁵² and under ERISA, where courts have held that where federal labor law is concerned⁵³ niceties of corporate form can be disregarded in the interest of protecting workers. This can be done even though there is no legislative

⁴⁸ William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974). For a recent discussion of Cary's concepts in this area, and the suggestion that the federal government is, through Sarbanes-Oxley and other measures, beginning to be the real force in the regulation of corporations, see, for example, J. Robert Brown, Jr., *The Irrelevance of State Corporate Law in the Governance of Public Companies*, 38 U. RICH. L. REV. 317, 319–20 (2004). For the suggestion that Delaware's real competition is not other states but the federal government, see Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003).

⁴⁹ See generally PRESSER, *supra* note 15, §§ 1–3:33.

⁵⁰ 524 U.S. 51 (1998).

⁵¹ *Id.* at 52–53.

⁵² The Worker Adjustment and Retraining Notification (WARN) Act of 1988, 29 U.S.C. §§ 2101–2109 (2000), requires certain employers, inter alia, to provide their employees with sixty days' prior notice before engaging in a plant closing or other large layoff. Because the WARN Act only applies to businesses with one hundred or more employees, veil piercing and "single business enterprise" issues (or, as they are often called in labor law cases, "single employer" issues) arise when affiliated corporations individually fall below the threshold but together aggregate the requisite number. See, e.g., *Administaff Cos., Inc. v. N.Y. Joint Bd.*, 337 F.3d 454 (5th Cir. 2003); *Hollowell v. Orleans Reg'l Hosp. LLC*, 217 F.3d 379 (5th Cir. 2000).

⁵³ For example, in analyzing WARN Act cases, the courts engage in an "integrated enterprise test" that

is not concerned with such traditional alter ego hallmarks as "nonpayment of dividends," because such aspects of a corporation's finances are not as directly related to management's labor policy as are other aspects of corporate functioning. . . . Rather, the test looks to four labor-related characteristics of affiliated corporations: interrelation of operations; common management; centralized control of labor relations; and common ownership or financial control.

Pearson v. Component Tech. Corp., 247 F.3d 471, 486 (3d Cir. 2001) (citations omitted). Notably missing from this test is an "abuse" or "injustice" requirement.

history to show that Congress, when it passed federal labor laws, made any kind of conscious choice to reject the traditional investment-inducing features of shareholder limited liability in favor of enhancing the economic status of workers.

An examination of an important recent WARN Act case, *Pearson v. Component Technology Corp.*,⁵⁴ illustrates this undermining of limited liability. The *Pearson* court displayed a subtle understanding of the current dilemmas in veil-piercing jurisprudence, recognizing that (1) courts differ on whether “fraud or injustice” (what this Essay calls the “abuse” test) must be found in order to pierce the corporate veil, and (2) courts differ over whether different standards should apply when the question is one of federal law.⁵⁵ But while the court recognized these problems, it failed to reach the conclusions reached in this Essay—namely, that since the policies regarding limited liability suggest there should be an “abuse” present before limited liability is denied, it makes sense to standardize the tests applied, and that federal courts should hesitate before favoring federal policy over state corporate law.

Instead, the Third Circuit in *Pearson* adopted the criticism offered by Professor Blumberg that courts have too often employed “the same formulations of the [veil-piercing] test[s] across the different contexts in which plaintiffs seek to impose liability.”⁵⁶ “It is often argued,” stated the court, referring to the work of another important veil-piercing scholar, Robert B. Thompson, “that because public policy varies from contract to tort to property, for example, veil-piercing standards should vary as well.”⁵⁷ The *Pearson* court claimed that “[t]hese concerns have been partially addressed through the ‘integrated enterprise’ test for the presence of a single employer, a sort of labor-specific veil-piercing test, first developed by the National Labor Relations Board.”⁵⁸ Instead of seeking carefully to examine a variety of factors and to determine whether there is present any inequity, injustice, or abuse by the parent or shareholder controlling the corporate entity in question, the “integrated enterprise” test looks only for the presence of “four labor-related characteristics of affiliated corporations: [1] interrelation of operations; [2] common management; [3] centralized control of la-

⁵⁴ *Id.* at 471.

⁵⁵ *Id.* at 485 n.2 (citations omitted).

⁵⁶ *Id.* at 485 (comparing PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW* § 6.01, at 107–08 (1987), with William H. Lawrence, *Lender Control Liability: An Analytical Model Illustrated with Applications to the Relational Theory of Secured Financing*, 62 S. CAL. L. REV. 1387, 1388 (1989) (criticizing use of similar “indicia of control” analysis for all lender liability cases regardless of context)).

⁵⁷ *Id.* (citing Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991)).

⁵⁸ *Id.*

bor relations; and [4] common ownership or financial control.”⁵⁹ “No single factor is dispositive,” according to the *Pearson* court; rather, “single employer status under this test ‘ultimately depends on all the circumstances of the case.’”⁶⁰

This “integrated enterprise” test, as I will argue below with regard to the “single business enterprise test,” improperly jettisons the traditional “abuse” requirement of veil-piercing law, and offers courts the opportunity to dispense with limited liability in a labor law context whenever they determine that a shareholder or parent corporation “controls” a particular corporate entity.⁶¹ Since shareholders or parents will always be in a position to exercise control through their ownership, this amounts to a license for veil piercing in any case of corporate affiliates where any federal labor law issues are involved.

The possibility of undercutting the presumption of limited liability of traditional veil-piercing doctrine did not seem to bother the *Pearson* court, which noted that “[t]he integrated enterprise test, with its focus only on labor relations and its emphasis on economic realities as opposed to corporate formalities, is demonstrably easier on plaintiffs than traditional veil piercing.”⁶² This was fine because “[u]ltimately, ‘the policy underlying the single employer doctrine is the fairness of imposing liability for labor infractions where two nominally independent entities do not act under an arm’s length relationship.’”⁶³ Still, when Congress passed the WARN Act, it did not weigh the “fairness of imposing liability for labor infractions” against the benefits of the state law of shareholder limited liability, so it is difficult to acquiesce in the *Pearson* court’s favoring of federal policy.

The *Pearson* court invoked the authority of the United States Supreme Court to warn against allowing state law to trump federal concerns, writing that “[t]he use of state law [veil-piercing] standards also has the potential to permit ‘[t]he policy underlying a federal statute’ to be ‘defeated by . . . an assertion of state power,’”⁶⁴ and using language from the Supreme Court case *Anderson v. Abbott*.⁶⁵ But *Anderson v. Abbott*, however frequently invoked to suggest that federal policy ought to trump state veil-piercing juris-

⁵⁹ *Id.* at 486 (citing *Radio & Television Broad. Technicians Local 1264 v. Broad. Serv.*, 380 U.S. 255, 256 (1965) (per curiam)).

⁶⁰ *Id.* (citing *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982)).

⁶¹ Notably, at least one federal court has suggested that evidence of “common ownership” may be enough to find a “single business enterprise” under the WARN Act and thereby expand any statutory liability to include corporate affiliates. See *Hollowell v. Orleans Reg’l Hosp. LLC*, 217 F.3d 379, 389 (5th Cir. 2000).

⁶² *Pearson*, 247 F.3d at 486 (citation omitted) (citing PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS UNDER STATUTORY LAW OF GENERAL APPLICATION* §13.03, at 398 (1989)).

⁶³ *Id.* (citing *Murray v. Miner*, 74 F.3d 402, 405 (2d Cir. 1996)).

⁶⁴ *Id.* at 489 (citing *Anderson v. Abbott*, 321 U.S. 349, 365 (1944)).

⁶⁵ 321 U.S. 349, 365 (1944).

prudence,⁶⁶ suffers from the same difficulty as the *Pearson* court itself. In *Anderson*, the Supreme Court gave no reason for inferring that federal law or the success of federal policy required ignoring the important state law policy of limited shareholder liability. Nor was there in the case of the legislation involved in *Anderson* any evidence of Congressional attention to the problem of overruling the state law of limited liability. Given the United States Supreme Court's *Bestfoods* decision—holding that Congressional silence cannot be interpreted as an attack on state law veil-piercing jurisprudence—*Anderson* should no longer be authoritative.

It is significant that the Department of Labor (“DOL”), when it issued regulations pursuant to the WARN Act and laid out still another set of five factors to be considered when the question of imposing liability on affiliated corporations arose,⁶⁷ claimed not to be creating “new law.”⁶⁸ Presumably, then, the “DOL Factors” were not meant to mount a new challenge to the state law of shareholder limited liability. In recognition of that fact, several federal courts, confronted with WARN Act or other labor law problems, have sought to use the “integrated enterprise” test and the DOL Factors in conjunction with state law standards for piercing the corporate veil. Thus, they have appropriately layered on to WARN Act piercing questions an “injustice,” “inequity,” “fraud,” or “abuse” requirement.

The *Pearson* court, however, proceeded to declare:

Given these variations in the methods by which courts determine when corporations shall be liable for the acts of their affiliates, we decline to interpret the Department of Labor's statement that it does not intend to create “new” law for WARN Act liability as a direction to courts to employ multiple tests [e.g. including state law veil-piercing standards] within a single case. Rather, we conclude that the most prudent course is to employ the factors listed in the Department of Labor regulations themselves. This approach not only has the virtue of simplicity . . . but also allows for the creation of a uniform standard of liability for the enforcement of a federal statute. . . . Finally, and most importantly, the DOL factors are the best method for determining WARN Act liability because they were created with WARN Act policies in mind and, unlike

⁶⁶ Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1261 n.240 (2002) (citing PRESSER, *supra* note 15, at § 3.01, for the view that federal common law veil-piercing standard is generally more flexible than state common law standard, yet noting that *Bestfoods* may have undermined this trend).

⁶⁷ Those factors were: “(i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.” 20 C.F.R. §639.3(a)(2) (2002).

⁶⁸ Said the DOL:

The intent of the regulatory provision relating to independent contractors and subsidiaries is not to create a special definition of these terms for WARN purposes; the definition is intended only to summarize existing law that has developed under State Corporations laws and such statutes as the NLRA, the Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA). The Department does not believe that there is any reason to attempt to create new law . . . when relevant concepts of State and federal law adequately cover the issue.

Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16,042, 16,045 (Apr. 20, 1989).

traditional veil-piercing and some of the other theories, focus particularly on circumstances relevant to labor relations.⁶⁹

One must conclude that the Third Circuit, in *Pearson*, was in the process of creating “new law,” and of prioritizing federal labor law over state common law of veil piercing without explicit Congressional direction, and in a manner rejected by the Department of Labor itself.

B. *Single Business Enterprise Theory*

Some federal cases involving labor issues use language regarding the corporate defendant’s “single business enterprise.” This looks like the same doctrine now being invoked as an alternative to “piercing the corporate veil” in several of the state jurisdictions, which is the principal concern of this Essay.⁷⁰ To a great extent, this “single business enterprise” language is traceable to the landmark article by Columbia law professor Adolf A. Berle, which advocated the removal of limited liability when there had been “excessive fragmentation” of a business into presumably artificial corporate forms. Berle’s article was part of his broader attack on the business corporation. Berle believed that the old era of the owner-manager of corporations had passed and that there was now a profound separation between passive shareholder owners and active managers. He believed that since shareholders no longer actually controlled the large publicly held corporations, it was incumbent on government to regulate them for the good of all.⁷¹

Berle’s ideas linger, and the emerging federal labor law allowing the ignoring of the corporate form and the emerging state doctrines of “single business enterprise” are reruns of Berle’s notions. A search of the law databases for the term “single business enterprise” reveals a variety of uses of the term,⁷² but it seems clear that there is movement toward its employment in the creation of an alternative to standard veil-piercing analysis.⁷³ Curi-

⁶⁹ *Pearson*, 247 F.3d at 489–90.

⁷⁰ See *infra* notes 71–73.

⁷¹ Berle’s article advocating unitary liability treatment for fragmented corporations is Adolf A. Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343 (1947). For his thoughts on the necessity for regulating corporations in the public interest, see, for example, Adolf A. Berle, Jr., *Foreword to THE CORPORATION IN MODERN SOCIETY* ix–xv (Edward S. Mason ed., 1959).

⁷² The principal use with which this Essay is concerned is when “single business enterprise” is employed as a tool for piercing the corporate veil of affiliate corporations. The same term is used, however, in the very different context of determining when two entities are engaged in a joint venture. See, e.g., *Scully Signal Co. v. Joyal*, 881 F. Supp. 727, 740 (D.R.I. 1995) (“A joint venture is an association of two or more persons to carry out a single business enterprise for profit.”).

⁷³ “Single business enterprise” is by no means a universally accepted solvent for dissolving limited liability. For example, a Michigan Court of Appeals recently refused either to apply “single business enterprise” or to extend the “economic reality test” from Michigan workers’ compensation cases as a means to find a parent and two subsidiaries to be “essentially the same entity” and thus liable. *Bennett v. Winn-Dixie Supermarkets, Inc.*, No. 236685, 2003 Mich. App. LEXIS 266, at *7 (Mich. Ct. App. Feb 4, 2003) (unpublished opinion which is not binding precedent “under the rules of stare decisis,” pursuant to the rules of the Michigan Court of Appeals).

ously, one of the first uses of “single business enterprise” as a means of determining what entities or shareholders ought to be liable to plaintiffs is the North Carolina case of *Glenn v. Wagner*, a leading veil-piercing decision in that state. While throwing off “single business enterprise” as a description of the facts before it, *Glenn* still applied traditional veil-piercing analysis and made clear that the corporate veil ought not to be pierced absent an “abuse” of the corporate form.⁷⁴

Perhaps this was an instance of what Morton Horwitz called those “casual asides that seem to have been so influential in forging the history of the common law.”⁷⁵ After all, later use of “single business enterprise”—particularly in places such as Louisiana⁷⁶ and Texas⁷⁷—appear to treat “sin-

⁷⁴ See *infra* note 76 for a discussion of *Glenn v. Wagner* and its treatment of “single business enterprise” as but a variant of the standard piercing the corporate veil doctrine.

⁷⁵ Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 945 (1974).

⁷⁶ The seminal Louisiana case adopting the “single business enterprise” theory, and also the most frequently cited Louisiana case on the theory, is *Green v. Champion Insurance Co.*, 577 So. 2d 249 (La. Ct. App.), *cert. denied*, 580 So. 2d 668 (La. 1991). *Green* held eight affiliated entities to be a “single business enterprise,” thus meriting the disregard of their separate identities. *Id.* The eighteen factors proclaimed by *Green* appear in the text *infra* note 103. Although *Green* contains facts that constitute classic abuses of the corporate form, namely initial undercapitalization and failure to deal at arm’s length among affiliates in a manner that may have prejudiced the creditors of some of the affiliates (i.e., “siphoning of funds”) designed to frustrate the enforcement of the Louisiana Insurance Code, these facts regrettably tend to get lost in the opinion. Unfortunately, so does the “element of injustice or abuse of corporate privilege” required by the North Carolina Supreme Court case on which *Green* relies for its holding. *Green*, 577 So. 2d at 259 (citing *Glenn v. Wagner*, 313 S.E.2d 832, 844 (N.C. Ct. App. 1984), *rev’d on other grounds*, 329 S.E.2d 326, 330 (N.C. 1985) (“Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff’s legal rights.”)). Similarly, the other primary case on which *Green* relies also contains evidence of “abuse.” *Green*, 577 So. 2d at 259 (citing *Paramount Petroleum Corp. v. Taylor Rental Ctr.*, 712 S.W.2d 534, 536 (Tx. Ct. App. 1986) (finding evidence of abuse of the corporate form, including possible siphoning of funds, a failure to keep corporate records and deliberate representations by officials of one corporation that they were acting for another)).

Taken on its facts, then, and in consideration of the cases on which it relies, it is improper to use *Green* as a means of dispensing with the “abuse” requirement for piercing the corporate veil. Subsequent Louisiana decisions, however, devote only haphazard attention to the requirement of abuse before disregarding the veils of corporate affiliates.

⁷⁷ The Texas doctrines on veil piercing, in general, and “single business enterprise,” in particular, are not models of clarity, though it can be said that the “single business enterprise” doctrine has been repeatedly invoked by the Texas inferior courts as a distinct doctrine. In a recent decision, the Texas Supreme Court declined to recognize “single business enterprise” as a distinct theory for veil piercing, but did indicate that whether or not it was, it was subject to the Texas statutory requirement that in contract cases there must be proof of actual fraud before the shield of limited liability is removed. *S. Union Co. v. Edinburg*, 129 S.W.3d 74, 86–87 (Tex. 2003).

A review of the Texas “single business enterprise” cases, especially the way that federal courts have construed them, suggests that the better reading of them is that some abuse of the corporate form is required in both contract and tort cases before affiliates in a “single business enterprise” may be held responsible for one another’s debts, but the language used in the cases throws this in some doubt. Relatively recently, for example, the Court of Appeals for the Fifth Circuit held that before the subsidi-

gle business enterprise” as a separate independent basis for ignoring limited liability, even if garden-variety veil-piercing cases may actually serve as the ultimate authority for the doctrine.⁷⁸

Texas and Louisiana may currently be the most visible jurisdictions developing the concept of “single business enterprise” as a means of undermining limited liability, but the road on which they are moving could soon have many fellow travelers. Other jurisdictions which have at least recognized the idea of imposing liability on or finding jurisdiction over a “single business enterprise” involving multiple corporations called by that name or something similar include Arkansas,⁷⁹ California,⁸⁰ Indiana,⁸¹ Massachusetts,⁸² Mississippi,⁸³ New Jersey,⁸⁴ New York,⁸⁵ North Carolina,⁸⁶

ary’s veil could be pierced, either through an “alter ego” or a “single business enterprise” theory, there had to be proof of injustice or abuse of the corporate form. *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 593 (5th Cir. 1999). “Like the alter-ego doctrine, the single business enterprise doctrine is an equitable remedy which applies when the corporate form is ‘used as part of an unfair device to achieve an inequitable result.’” *Id.* at 594 (quoting *Old Republic Ins. Co. v. Ex-Im Servs. Corp.*, 920 S.W.2d 393, 395 (Tex. Ct. App. 1996)); *see also* *Schimmelpenninck v. Byrne*, 183 F.3d 347, 355 (5th Cir. 1999).

⁷⁸ See *supra* note 76 for a discussion of *Green v. Champion Insurance Co.*, the Louisiana case which rests the Louisiana “single business enterprise” doctrine on *Glenn v. Wagner*, the leading North Carolina veil-piercing case. For the Texas courts’ development of “single business enterprise” and the sources on which their courts rely, see *supra* note 77. For confusion over whether “single business enterprise” is a variant of garden-variety veil piercing in Texas or something else, see, for example, *Flo Trend Sys. v. Allwaste, Inc.*, 948 S.W.2d 4, 7 (Tex. Ct. App. 1997), in which both the plaintiff and the court “referred to ‘single business enterprise’ theory as ‘alter ego’ or ‘piercing the corporate veil’ and [plaintiff] Flo Trend initiated the matter by advising the court that single enterprise was ‘just like piercing the corporate veil under another name.’”

⁷⁹ See, e.g., *Nursing Home Consultants, Inc. v. Quantum Health Servs., Inc.*, 926 F. Supp. 835 (E.D. Ark. 1996).

⁸⁰ See, e.g., *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 1 Cal. Rptr. 2d 301, 318 (Ct. App. 1991).

⁸¹ *Oliver v. Pinnacle Homes, Inc.*, 769 N.E.2d 1188, 1192 (Ind. Ct. App.); *Smith v. McCleod Distrib., Inc.*, 744 N.E.2d 459, 463 (Ind. Ct. App. 2000). Containing language mentioning “single business enterprise,” *Smith* was cited by the *Oliver* court. *Oliver*, 769 N.E.2d at 1192. In its discussion of the leading Indiana veil-piercing case, *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994), the *Smith* court states:

[W]e have previously approved piercing of a corporation’s veil in order to reach the assets of a so-called “brother-sister” corporation. See *Eden United, Inc. v. Short*, 573 N.E.2d 920, 933–34 (Ind. Ct. App. 1991), *trans. denied*.

Additionally, we observe that the reasons given by the *Aronson* court for the limited liability of corporate shareholders are inapplicable in the “brother-sister” corporation context. *Those reasons include furthering capital formation by encouraging shareholders to invest through limiting their liability, as a means of encouraging the small-scale entrepreneurs and of keeping entry into business markets competitive and democratic.* 644 N.E.2d at 867 (citing Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 155 (1992)).

Smith, 744 N.E.2d at 463 n.1 (emphasis added). Though the Indiana court apparently interpreted the “democratic” rationale for limited liability as inapplicable in the affiliate corporate context, this is precisely the argument which I have sought to make here.

⁸² *My Bread Baking Co. v. Cumberland Farms, Inc.*, 233 N.E.2d 748, 752 (Mass. 1968).

⁸³ In *Watts v. Marco Holdings, L.P.*, No. 3:95CV88-B-A, 1997 U.S. Dist. LEXIS 13483 (N.D. Miss. August 8, 1997), Judge Biggers applied Mississippi veil-piercing law, as well as tests peculiar to the

Puerto Rico,⁸⁷ Virginia,⁸⁸ and Washington.⁸⁹ A similar attempt at eroding the rule of limited liability for affiliate corporations appears to be made pursuant to the “instrumentality” or “identity” doctrine in Connecticut.⁹⁰

WARN Act, to determine whether the defendant affiliate corporations constituted a “single business enterprise.” The court held that both control and an abuse of the corporate form are required before the veil may be pierced. *Id.* at *10.

⁸⁴ In *Jack LaLanne Fitness Centers, Inc. v. Jimlar, Inc.*, 884 F. Supp. 162 (D.N.J. 1995), the plaintiff sought to impose contractual liability on a corporate parent for a lease its subsidiaries entered into based on the contention that the corporations operated as “a single business entity and enterprise.” The court followed New Jersey law, and, in particular, the leading case, *State v. Ventron*, 468 A.2d 150, 164 (N.J. 1983), where the New Jersey Supreme Court held that, “[e]xcept in cases of fraud, injustice, or the like, courts will not pierce a corporate veil.” *Jack LaLanne*, 884 F. Supp. at 165. The *Jack LaLanne* court then quoted the requirements of New Jersey law, as understood by the Court of Appeals for the Third Circuit, emphasizing that there must be some showing of “abuse, [or] a showing of fraud or injustice before a court may disregard the corporate form.” *Id.* (quoting *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 149 (3d Cir. 1988)). Since the party seeking to hold parents and affiliates alike liable had “simply alleged domination,” and “[b]ecause [that party had] not included even conclusory allegations as to fraud, injustice or any sort of illegality,” the *Jack LaLanne* court held that the corporate veils of the affiliates could not be pierced. *Id.* at 166.

⁸⁵ See, e.g., *Dorfman v. Marriot Int’l Hotels, Inc.*, 99 Civ. 10496 (CSH), 2002 U.S. Dist. LEXIS 72 (S.D.N.Y. Jan. 3, 2002). The court indicates that where a subsidiary is a “mere department” of a parent, a parent exercises “substantial control” over the subsidiary, or a subsidiary is engaged in a “common business endeavor,” a “common business enterprise,” or a “single business enterprise” with a parent, a court having jurisdiction over the subsidiary may assert it over the parent. *Id.* at *21–24. It should be noted, however, that the court recognized that despite the relative ease with which it permits piercing of the corporate veil for jurisdictional purposes, the standards are more rigorous for liability purposes. After finding that “plaintiff’s complaint does not allege any facts and plaintiff has not presented any evidence to show that [the affiliates in question] abused the corporate form to defraud or commit any wrong against the plaintiff,” the *Dorfman* court refused to allow the plaintiff to pierce the corporate veil. *Id.* at *57. According to the *Dorfman* court, the paradigmatic type of such abuse is the transfer of money from corporate accounts to avoid payment to a creditor, or, as it is more commonly referred to, the “siphoning off of funds.” *Id.* at *57–58.

Significantly, at least one court has construed the leading New York case, *Walkovsky v. Carlton*, 262 N.Y.S.2d 334 (App. Div. 1965), to support the statement that liability may be imposed on an affiliate corporation,

[i]f [a] plaintiff can show that there was such a unity of interest and ownership that the independence of the [multiple] corporations [in question] had in effect ceased or had never begun, [and] an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.

Angelo Tomasso, Inc. v. Armor Constr. & Paving, Inc., 447 A.2d 406, 411 (Conn. 1982) (internal quotations omitted). The court called this the “identity rule,” and cited *Zaist v. Olson*, 227 A.2d 552 (Conn. 1967), as Connecticut authority for that rule.

⁸⁶ See *supra* note 78 for its discussion of *Glenn v. Wagner*.

⁸⁷ See, e.g., *Ruiz v. Econ. Lab., Inc.*, 290 F. Supp. 701, 703 (D.P.R. 1968) (gaining jurisdiction over a corporate affiliate, although agency principles may have dictated the case’s actual result, by successfully invoking “single business enterprise”).

⁸⁸ See, e.g., *Regal Ware, Inc. v. Fidelity Corp.*, 550 F.2d 934 (4th Cir. 1977).

⁸⁹ See, e.g., *Morgan Bros., Inc. v. Haskell Corp.*, 604 P.2d 1294, 1297 (Wash. Ct. App. 1979) (engaging in a garden-variety veil-piercing approach to hold a parent liable for damages arising from its subsidiary’s allegedly defective materials, despite using “single business enterprise” language).

Most of these cases apply the new doctrine in the context of affiliate corporations, but there are occasional anomalies such as a recent federal district court case applying an old Kansas case that uses “single business enterprise” to describe two parties engaged in a “joint venture.”⁹¹ In that particular case, as in some language from Louisiana and Texas, it is possible to read what the court said as permitting the removal of the shield of limited liability even if there has been no “injustice” or no “abuse of the corporate form.”⁹² One can find some language in Texas jurisprudence which indicates that the “single business enterprise” doctrine is simply a subset of the common law doctrine of “piercing the corporate veil,” and thus requires that there be some misuse of the form, before limited liability can be disregarded.⁹³ There are other Texas cases, though, which suggest that “single business enterprise” is an independent basis for disregarding the corporate entity’s normal shield of limited liability and do not seem to impose such a strict “abuse” requirement.⁹⁴

The boldest application of the “single business enterprise” doctrine has occurred in some of the lower courts of Louisiana, triggering the similar attempt by the plaintiffs in the Bogalusa explosion litigation. The 2000 decision by the Louisiana Court of Appeals for the First Circuit, *Grayson v. R. B. Ammon & Assocs.*,⁹⁵ employs key language suggesting that when multiple corporations function as a “single business enterprise” a creditor can hold each corporate participant liable for the debts of other corporate participants. The *Grayson* court stated:

[T]he legal fiction of a distinct corporate entity may be disregarded when a corporation is so organized and controlled as to make it merely an instrumentality or adjunct of another corporation. If one corporation is wholly under the control of another, the fact that it is a separate entity does not relieve the latter

⁹⁰ See, e.g., *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298 (Conn. App. Ct. 2002) (invoking “instrumentality” test); *Angelo Tomasso*, 447 A.2d at 411 (discussing “instrumentality” and “identity” tests). The *Tomasso* case, and the “identity rule” are discussed *supra* note 85.

⁹¹ See *infra* note 92 for a discussion of “single business enterprise” in the joint venture context.

⁹² In *Cuiksa v. Hallmark Hall of Fame Products*, 252 F. Supp. 2d 1176, 1178–79 (D. Kan. 2003), the court explained that a “joint venture” was present “where two or more corporations associate to effectuate a for profit ‘single business enterprise’” and described such undertaking as similar to determining “alter ego status.” While the *Cuiksa* court clarified that the presence of an “injustice” such as “questionable capitalization” would be necessary to support veil piercing pursuant to an “alter ego” theory, it did not suggest that such a requirement was necessary to support such finding under a “joint venture” theory. *Id.* at 1178. See also *Freeland v. Henderson*, 252 So. 2d 899, 906 (Miss. 1971), where, since plaintiff could not show that veil piercing was proper, he sought instead to prove that a “joint venture” was involved. Perhaps these “joint venture” cases still serve as support for what is now becoming the broader and less clearly defined “single business enterprise” doctrine.

⁹³ See *supra* note 76.

⁹⁴ See, e.g., *N. Am. Van Lines v. Emmons*, 50 S.W.3d 103, 119 (Tex. Ct. App. 2001), where the court treated “alter ego” (i.e., “piercing the corporate veil”) as separate and distinct from “single business enterprise,” although the court acknowledged that they share similar purposes.

⁹⁵ 778 So. 2d 1 (La. Ct. App. 2000).

from liability. In such an instance, the former corporation is merely an alter ego or a business conduit of the latter.⁹⁶

The *Grayson* court further observed that “[w]hen corporations represent precisely the same single interest, the court is free to disregard their separate corporate identity.”⁹⁷ And, making clear that “single business enterprise” was a distinct doctrine, the *Grayson* court stated:

[C]ourts can pierce the veil of a corporation in order to reach the “alter egos” of the corporate defendant, especially where the corporations constitute a single business. Thus, in addition to the traditional “piercing the veil” theory to disregard a corporate identity, [we have previously] utilized the “single business enterprise” or “instrumentality” theory to extend liability beyond a separate entity⁹⁸

The *Grayson* court did concede that “because Louisiana considers the concept of the corporation beneficial, the principle that the corporation is a separate entity should be disregarded only in exceptional circumstances.”⁹⁹ Moreover, “[b]ecause the separateness of the corporate entity is disregarded in both the ‘single business enterprise’ theory and the ‘piercing the corporate veil’ theory, it is reasonable to conclude that the two theories should both be subjected to the same burden of proof, i.e., clear and convincing evidence.”¹⁰⁰

But even if the Louisiana court had thus indicated that the standards of proof were to be the same for both “piercing the corporate veil” and “single business enterprise,” the acknowledgment that the two were different “theories” for eliminating limited liability suggested differences in the substance of the theories. Most important, in explaining the multiple tests to be used for determining the existence of a “single business enterprise,” the court failed to include a clear articulation of a required “fraud,” “inequity,” or “injustice” element.

Somewhat later in its opinion the *Grayson* court repeated its interpretation of “single business enterprise,” writing:

[C]ourts have been unwilling to allow affiliated corporations that are not directly involved to escape liability simply because of business fragmentation. Thus, where a single corporation has been fragmented into branches that are separately incorporated and are managed by a dominant or parent entity, or have interlocking directorates, the courts have held the dominant or parent

⁹⁶ *Id.* at 14 (citing *Green v. Champion Ins. Co.*, 577 So. 2d 249, 257 (La. Ct. App.), *cert. denied*, 580 So. 2d 668 (La. 1991)).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

corporation liable for the obligations of its branches whenever justice requires protection of the rights of third persons.¹⁰¹

Pursuant to the lamentable Louisiana practice (similar to that of other jurisdictions) of substituting lists of factors for serious purposive analysis of when the veil should be pierced,¹⁰² the *Grayson* court then spelled out eighteen tests for “single business enterprise.”¹⁰³ A perusal of these eighteen factors indicates that they are about “control” of subsidiaries or affiliates by parents or shareholders, and that (with one or two possible exceptions, such as the “inadequate capitalization” or “unclear allocation of profits and losses” factors) they do not include or encompass the traditional “injustice,” “inequity,” or “abuse” “piercing the corporate veil” tests. In short, under “single business enterprise,” or the “instrumentality” test, as the *Grayson*

¹⁰¹ *Id.* at 15 (citing *Green*, 577 So. 2d at 257).

¹⁰² Commenting on a similar tendency in the courts of Alaska and Alabama, Robert Hamilton and Jonathan Macey, in their excellent business associations casebook, observe that “[t]he problems with the list of factors approach are that (1) it puts weight on some factors that appear relatively unimportant or at least less important than others, (2) it encourages a mechanical counting of factors, and (3) as a practical matter it probably does not improve the predictability of result.” ROBERT HAMILTON & JONATHAN MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 351 (8th ed. 2003).

¹⁰³ The court stated:

When determining whether a corporation is an alter ego, agent, tool or instrumentality of another corporation, the court is required to look to the substance of the corporate structure rather than its form. The following factors may be considered in determining whether a group of entities constitute a “single business enterprise”:

- (1) corporations with identity or substantial identity of ownership, that is, ownership of sufficient stock to give actual working control;
- (2) common directors or officers;
- (3) unified administrative control of corporations whose business functions are similar or supplementary;
- (4) directors and officers of one corporation act independently in the interest of that corporation;
- (5) corporation financing another corporation;
- (6) inadequate capitalization (“thin incorporation”);
- (7) corporation causing the incorporation of another affiliated corporation;
- (8) corporation paying the salaries and other expenses or losses of another corporation;
- (9) receiving no business other than that given to it by its affiliated corporations;
- (10) corporation using the property of another corporation as its own;
- (11) noncompliance with corporate formalities;
- (12) common employees;
- (13) services rendered by the employees of one corporation on behalf of another corporation;
- (14) common offices;
- (15) centralized accounting;
- (16) undocumented transfers of funds between corporations;
- (17) unclear allocation of profits and losses between corporations; and
- (18) excessive fragmentation of a single enterprise into separate corporations.

Green, 577 So. 2d at 257–258. This list is illustrative and is not intended as an exhaustive list of relevant factors. Moreover, no one factor is dispositive of the issue of “single business enterprise.” *Green*, 577 So. 2d at 258. . . . Whether an affiliated group of entities constitutes a “single business enterprise” is a question of fact to be decided by the trial court. *Brown v. Automotive Casualty Insurance Company*, 644 So. 2d 723, 728 (La. Ct. App. 1994).

Grayson, 778 So. 2d. at 15.

court also called it,¹⁰⁴ the only requirement seems to be one of “control”: The “abuse” requirement appears to have been dropped.

The problem with disregarding the “abuse” element, and simply looking to see whether the shareholder or parent exercises “control” over the corporation or subsidiary as the “single business enterprise” doctrine and the arguments of some scholars¹⁰⁵ do, is that such control will always be potentially present in the case of shareholders or parents, and thus “single business enterprise,” much like the discredited “agency” theory that Cardozo condemned, becomes a handy, always available means of doing away with shareholder limited liability.¹⁰⁶ As indicated, the goal of seeking to do away with limited liability in the torts context is a project of some legal academics, and the method followed by the Louisiana courts, of splitting off “single business enterprise” from standard veil-piercing doctrine, and then pushing it to the point where it appears that no abuse is required to remove the shield of limited liability from affiliate enterprises, could easily be employed by many other jurisdictions. If shareholder limited liability is a good thing, then the “single business enterprise” doctrine should be killed while it is still in its infancy.

V. WHAT THE CRITICS DO NOT UNDERSTAND: REASONS FOR PRESERVING THE LIMITED LIABILITY RULE

Perhaps those who would favor an expanded use of the “single business enterprise” doctrine simply have reservations about limited liability in the corporate affiliate context. Thus one can read a great old chestnut of the literature, *Insulation from Liability Through Subsidiary Corporations*,¹⁰⁷ and Justice William O. Douglas’ opinion in *Anderson v. Abbott*, as frankly hostile to the use of affiliates, labeling it an abuse of “high finance.” This view is in stark contrast with that of scholars applying principles of the economic analysis of law who have concluded that permitting parents, subsidiaries, and affiliates separate corporate existence will result in the owners of those entities actually being able to put more resources and adequate insurance coverage at their disposal, since they will be in a position to take advantage of economies of scale.¹⁰⁸

¹⁰⁴ See also *supra* note 85 (citing the Connecticut cases).

¹⁰⁵ See, e.g., Mendelson, *supra* note 66, at 1271–79.

¹⁰⁶ See Bacon, *supra* note 8.

¹⁰⁷ William Douglas & Carrol Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193 (1929). Douglas and Shanks’s article is cited with approval in the important Texas veil-piercing cases of *State v. Swift & Co.*, 187 S.W.2d 127, 134 (Tex. Ct. App. 1945), and *Bell Oil & Gas v. Allied Chemical Corp.*, 431 S.W.2d 336, 339–40 (Tex. 1968), as Judge Grady Jolly observed in *Edwards Co. v. Monogram Industries, Inc.*, 700 F.2d 994, 1003 n.19 (5th Cir. 1983), *rev’d* 730 F.2d 977 (5th Cir. 1984) (en banc).

¹⁰⁸ See, e.g., Easterbrook & Fischel, *supra* note 19, at 101–04.

Given that the opponents of such limited liability have failed to furnish persuasive evidence that it is socially harmful, it seems better to defer to the rule of limited liability that has been promulgated by the peoples' representatives in the legislature, accepted by most of our common law judges, and recently endorsed by the Supreme Court. We should be wary of the creation of doctrinal approaches, involving picturesque terms such as "mere instrumentality," "business conduit," "single business enterprise," or "alter ego," and their attendant lengthy check-off lists, which might obscure the purposes of the doctrine of limited liability. It would be wiser for judges to understand all of these doctrinal approaches as involving the same issues as the classical "piercing the corporate veil" doctrine. All are concerned with the elimination of limited liability, and none should be applied absent an abuse of the corporate form.

Reinvigorating the "abuse" requirement will not remove all uncertainty from veil-piercing doctrine, since it is difficult precisely to define the requisite "abuse" for veil-piercing purposes. The problem here is the same as that regarding fraud. Just as the definition of common law "fraud" has never been precisely enunciated, lest ingenious and nefarious fraud-feasors calculate some means of exploiting definitional loopholes, so there is something to be said for not too precisely defining the requisite abuse required for veil piercing. On the other hand, since fraud itself will always be one clear instance of the possible type of requisite "abuse" for veil-piercing purposes, the common law refusal to define fraud will capture automatically some needed flexibility for the veil-piercing rule. Other possible abuses ought to be capable of relatively clear definition—for example, use of the corporate form to avoid a clear statutory duty, or siphoning off assets in a manner clearly designed to frustrate the expectations of creditors. Even the tricky problem of defining the abuse of "undercapitalization" can be solved partially by emerging formulas that emphasize that undercapitalization should only be found where at the time of incorporation the amount of capital provided is "trifling" in light of the debts to creditors expected to be incurred. Finally, it ought not to be too difficult to achieve general acceptance of some basic statements of the abuse requirement, such as the famous one from *United States v. Milwaukee Refrigerator Transit Co.* that defines it as an attempt "to defeat public convenience, justify wrong, protect fraud, or defend crime."¹⁰⁹

Perhaps it is fanciful to think that it might be possible to accomplish a pulling-back on the creation of new doctrines that threaten shareholder limited liability. Perhaps nothing can be done about a dynamic common law system's tendency to create new means of dealing with what are, after all,

¹⁰⁹ *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905).

competing (if not antinomial¹¹⁰) concerns, some favoring the encouragement of investment, some favoring the protection of involuntary creditors, or, perhaps, redistribution generally. And yet, perhaps there is still something left of the traditional belief that if there is to be reconciliation of competing concerns, if there is to be a balancing that takes into account the complex variety of economic factors in twenty-first century domestic and global markets, then the articulation of the balance might best be done by legislatures rather than the courts.

In Louisiana, at least, as the “Bogalusa Explosion” case suggests, “single business enterprise” doctrine, which was invoked by the plaintiffs without any “abuse” of the corporate form save the attempt to use its limited-liability feature, may simply have been a tool by the plaintiffs’ attorneys potentially to increase punitive damages. The United States Supreme Court and others have suggested difficulties with our current state of punitive damage law, and an argument such as the one that was presented to the Louisiana jury in the *Gaylord* case was essentially an argument for the redistribution of wealth from corporate shareholders to a local population. If such redistribution is to take place it seems more a matter for the politics of the legislature and the procedural protections of the tax imposition process, than the ad hoc machinations of plaintiffs’ counsel.

Happily, in the Bogalusa Explosion case itself, the judge, while he did not make as clear as he might have the need for an “abuse” requirement, did instruct the jury that even under the “single business enterprise” doctrine, “Louisiana courts are reluctant to hold a shareholder liable for the acts of the corporation in the absence of fraud, malfeasance, or criminal wrongdoing.”¹¹¹ He also indicated that since the plaintiffs had not alleged any fraud, malfeasance or wrongdoing on the part of Gaylord Container, “plaintiffs bear a heavy burden of proving that Gaylord Container Corporation disregarded Gaylord Chemical Corporation as a corporate entity and that Gaylord Chemical Corporation is not distinguishable from Gaylord Container Corporation.”¹¹² The Judge did state that in order to pierce the corporate veil of Gaylord Chemical, the jury had to find “clear and convincing evidence.” Perhaps because there was clear evidence that the Gaylord Container and the Gaylord Chemical employees were different individuals, wore different uniforms, the two corporations had different customers and different products, corporate formalities were scrupulously followed, and there was no evidence of the things that usually pass for abuses of the cor-

¹¹⁰ On the problem of a legal system coming to grips with antinomies, see, for example, ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1976); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205 (1979).

¹¹¹ Jury Instructions, *In re* Chemical Release at Bogalusa, No. 73,341, at 9–10 (22nd Jud. Dist. Ct. of La. 2003) (on file with author).

¹¹² *Id.*

porate form, the jury declined to find that Gaylord Chemical and Gaylord Container were a “single business enterprise.”¹¹³

It is undeniable that in recent years there has been a divergence of approaches in the states to piercing the corporate veil, thus making general statements about the doctrine increasingly difficult. My experience as a potential expert witness in Louisiana suggests that this divergence may be driven, at least in part, by plaintiffs’ lawyers or by judges who, for whatever reason, have difficulties with the concept of limited shareholder liability and what it seeks to accomplish. They see a division of interest between the people and corporate shareholders, and they are prepared to argue that limited shareholder liability is antidemocratic, when its nineteenth-century authors believed that it was precisely the opposite.¹¹⁴

By reifying corporations,¹¹⁵ plaintiffs’ lawyers have been able to mount attacks on allegedly impersonal business vehicles, obscuring the fact that the shareholders of those businesses—even if they are corporations—also have been economic actors contributing to the welfare of the community, and, perhaps, democratically increasing the wealth of shareholder-citizens of that same community. If the divergence in the state law of piercing the corporate veil is the result of policy differences of this nature, there ought to be more appropriate fora for the conducting and resolution of such policy debates, and perhaps the doctrines applied in the courts can be returned to a more uniform condition. This would mute the charges of critics who find the law of piercing the corporate veil “unprincipled,” “arbitrary,” and “confusing.”¹¹⁶

Such a reinforcement of traditional veil-piercing doctrine, recognizing the benevolent policies behind it, could help in what is coming to be perceived as a necessary effort to restrain the current “litigation explosion.” It could help discourage frivolous actions by making it less likely that doctrinal difficulties would lead defendants to settle meritless suits for their nuisance value. It might even aid in the efforts to curtail the sensational rise in punitive damages (by restricting the ability to link affiliates’ revenues for

¹¹³ *Id.*

¹¹⁴ For an interesting argument that even large corporations still serve a democratic function as a check on possible abuses by government, see Martin H. Redish & Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 237 (1998) (“Regardless of the speaker’s motive for the expression, corporate speech may serve a vital role in checking potential governmental excesses.”).

¹¹⁵ *Cf. id.* at 294 (“[F]rom the perspective of free speech theory, one should view corporations not as mindless, faceless organizations that are robotically driven by profit-maximization but rather as devices created and organized to facilitate human self-realization.”).

¹¹⁶ *See, e.g.,* Bainbridge, *supra* note 21, at 513 (“There simply are no . . . bright-line rules for deciding when courts will pierce the corporate veil.”); Easterbrook & Fischel, *supra* note 19, at 89 (“Piercing” seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled. There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.”).

the calculation of punitive damage figures), and thus perhaps help minimize the risk that such damages compromise due process.¹¹⁷

States such as Texas and Nevada have recognized that there is a problem with permitting too easy piercing of the corporate veil, and perhaps they have also recognized that common law courts should not be making policy determinations in this area that, in effect, overrule determinations previously made by state legislatures. It is now commonly understood that judges, exercising their common law powers, alter the law. Indeed, there are even some who have claimed that it is appropriate for courts to be the “lawmaking partner[s]” of the legislature.¹¹⁸ This sort of an argument flows naturally from the classics of “legal realism,” such as Holmes’s *Common Law*,¹¹⁹ or Cardozo’s *Nature of the Judicial Process*.¹²⁰ Holmes claimed that this judicial legislation was virtually unconscious, as judges supplied new reasons for existing rules, and those new reasons (drawn from current policy needs) tended to turn rules of the common law into new directions, until the old rule accomplished something quite different from its original conception.¹²¹ Holmes appeared to be recommending that judges should become conscious of this, and, with their newly gained self-consciousness, proceed to embrace their legislative role.

What may have been more implicit than explicit in Holmes became clearly advocated by Cardozo, and by Jerome Frank.¹²² The development Holmes described actually did occur in the course of judicial decisions creating the “single business enterprise” doctrine for limiting shareholder li-

¹¹⁷ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 408–26 (2003) (holding punitive damages award of \$145 million, where full compensatory damages were \$1 million, excessive and unconstitutional as per the Due Process Clause of the Fourteenth Amendment); *see also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001) (“Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion.”); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991) (O’Connor, J., dissenting) (“Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category.”).

¹¹⁸ *See* Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 SETON HALL L. REV. 649, 659 (2001) (discussing Philip H. Corboy et al., *Illinois Courts: Vital Developers of Tort Law as Constitutional Vanguard, Statutory Interpreters, and Common Law Adjudicators*, 30 LOY. U. CHI. L.J. 183, 235 (1999)).

Corboy et al. argue that widespread judicial promulgation of strict products liability doctrine “represents tacit acceptance of the reality that judges make law—and judges should not apologize for making law. When judges make this type of policy, they are not abandoning judicial restraint, but are performing an accepted and necessary judicial function.”

Presser, *supra*, at 659 (quoting Corboy et al., *supra*, at 235).

¹¹⁹ HOLMES, *supra* note 45.

¹²⁰ BENJAMIN CARDOZO, *NATURE OF THE JUDICIAL PROCESS* (1921).

¹²¹ HOLMES, *supra* note 45, ch. 1.

¹²² JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

ability. The words “single business enterprise,” when first used in the case-law, appear to describe one-shot “joint ventures,” but the use of the term has somehow shifted to refer to a “single business,” rather than a “single business enterprise.” “Enterprise,” as originally used, referred to a single undertaking, not an integrated effort by multiple entities.¹²³ Holmes may have approved, indeed gloried in, the manner in which common law judges altered the law to meet the needs of the times by providing different policy formulations to support the rules they articulated. But even if this sort of legislative behavior in some instances is appropriate for judges, it is not at all clear that it is appropriate when the original policy basis for limited liability remains an important consideration.

VI. SUMMARY AND CONCLUSION

The traditional “abuse” test for piercing the corporate veil has few defenders among scholars. Further, federal and state courts have, in the past few decades, been creating alternatives to the traditional doctrine which dispense with the “abuse” test and look only to whether one entity or shareholder controls another in order to impose liability. The “abuse” test depends on the ability of courts to characterize conduct as reprehensible, and perhaps a test that measures misconduct is difficult to apply in an age that is uncomfortable with traditional concepts of evil.¹²⁴ Perhaps some judges and commentators find it easier to substitute greater wealth for evil, and are motivated by some kind of a desire to redistribute that wealth.

When judges allow plaintiffs’ lawyers to argue to juries that the great wealth of parent corporations ought to be available to redress purported injury by an affiliate, and when plaintiffs’ lawyers’ arguments imply that there is something wrong with the fact that shareholder or corporate defendants are possessors of substantial wealth, there has been a perversion of the traditional “abuse” test. At least one state, Nevada, appears to have realized this, and has, by legislation, provided that questions of the appropriateness of piercing the corporate veil should be matters of law for the judge rather than matters of fact for the jury. A similar result has recently been reached by the United States Court of Appeals for the Seventh Circuit.¹²⁵

The apparent opponents of “high finance,” such as Justice Douglas, and his followers, such as A.A. Berle and Philip Blumberg, who have argued for the imposition of “enterprise liability,” or “single business enterprise,” have not explained how their presumed redistributive aims are worth the costs to American industry and American democracy that the loss of corporate limited liability would impose. The presumption in favor of lim-

¹²³ In this connection, note that *Black’s Law Dictionary* defines enterprise as “a business venture or undertaking.” BLACK’S LAW DICTIONARY (6th ed. 1990).

¹²⁴ See generally SUSAN NEIMAN, *EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY* (2002).

¹²⁵ See *Int’l Fin. Servs. Corp. v. Chromas Techs. Can., Inc.*, 356 F.3d 731 (7th Cir. 2004).

ited liability, the bulwark of the common law “piercing the corporate veil” doctrine, is of a piece with the attitude of nineteenth-century American common law to encourage investment, for the purported benefit of all. Nevertheless, the idea of limited shareholder liability has come under attack, on the grounds that it increases moral hazard by lowering the costs of tortious conduct. It is not at all clear that this is the case, even though academics have rather blithely assumed that it is.¹²⁶

Still, one might argue that the assumptions of the old common law are no longer valid. For example, the common law never anticipated torts of a kind that could wreak havoc on a whole town—as it was argued the Bogalusa tank car explosion did. Does it make sense, then, to worry more about tort victims than the common law did? On the other hand, the common law never anticipated finance capitalism and the fact that encouraging investment could aid huge numbers of ordinary people, so that its original conception of aiding the active entrepreneur now serves an even more democratic function.

For the last few decades in the academy it has been open season on the common law and its attitudes, and virtually all American law professors have accepted Holmes’s set of notions that judges should alter the common law to meet judicial perceptions of current needs in society, particularly in a manner that encourages restraining corporations and that “protects workers.” This may not actually have appealed to Holmes himself, who was probably somewhat sanguine about such efforts at redistribution. Moreover, we have recently learned that Holmes’s amoral presentism and pragmatism may not be all that it was cracked up to be.¹²⁷ Nonetheless, there does seem to be considerable merit in adhering to the essentially twentieth-century creation of a conservative set of common law rules for when the corporate veil ought to be pierced, of which the “abuse” test is a part. In an era when our capricious tort system annually imposes a “tort tax” of up to hundreds of billions of dollars on American business, we should be cautious

¹²⁶ See, e.g., Paul Halpern et al., *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117, 126 (1980) (“[I]t is claimed that a limited liability regime is inefficient because it [creates] incentives for excessive (inefficient) allocations of social resources to risky economic activities.”); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1879 (1991) (“[I]ncentives [for excessive risk taking] are conventionally assumed to be the price of securing efficient capital financing for corporations.”); Mendelson, *supra* note 66, at 1204 n.2 (citing and quoting, inter alia, Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. LAW 573, 576 (1986) (“[E]ven economists convinced of the utility of limited liability . . . concede that limited liability raises serious problems because it enables the enterprise to externalize its costs.”); see also David Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1620 (1991) (noting that some arguments “suggest that all shareholders that are corporations . . . should be subject to unlimited liability”).

¹²⁷ ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* (2000).

about increasing that tax by eroding corporate affiliate limited liability.¹²⁸ The nineteenth century torts, property, and contract doctrines, of which limited shareholder liability was a part, had as one of their principal purposes the encouragement of investment in a capital-scarce economy.¹²⁹ We are no longer troubled by the severe scarcity of capital that we faced in the beginning of our industrial development, but American legal doctrines such as strict products liability, the easy availability of discovery, the use of juries in civil litigation, and the availability of punitive damages, still impose costs on American capital that our European and Asian competitors may be able to avoid.¹³⁰ This puts American industry at a potential disadvantage in competition in an increasingly global market. Reduction of corporate affiliate limited liability would increase that potential disadvantage.¹³¹

Moreover, corporations, as centers for economic and even political power in America, serve as a check on the abuse of power by the government. Berle and Means's theory, as Marx claimed to do with Hegel's, might need to be set back on its feet in order to suggest that it would be wrong to have too great governmental supervision of corporations, because this might lead to unchecked abuse by government. As Martin Redish and Howard Wasserman have recently argued,¹³² just as many scholars believe there is much to be gained by separating church and state, there is also something to be gained by preserving the separation between corporation and state. Limited liability and the protection of the integrity of the corporate form help preserve a separation between public and private, and the maintenance of that separation is of societal benefit.

Thus, the traditional doctrine discouraging "piercing the corporate veil," with its attendant "abuse" test is worth preserving. What I have here called the "abuse" requirement was conceived of as punishing miscreants, not as a means of redistributing resources from corporate shareholders to creditors, whether voluntary or involuntary. There are other, better, and less capricious means of compensating the vast majority of tort victims such as first-party insurance schemes or statutorily imposed requirements of adequate capital or adequate insurance coverage for risky undertakings, than allowing easy piercing of the corporate veil through doctrines such as "single business enterprise." Rather than discouraging corporate misconduct, doctrines such as "single business enterprise" in state law may simply have the effect of shifting wealth to a few lucky plaintiffs and trial lawyers through too easily applied punitive damages, or the threat of such litigation.

¹²⁸ WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991); Stephen B. Presser, *How Should the Law of Products Liability Be Harmonized?: What Americans Can Learn from Europeans*, MANHATTAN INSTITUTE, Feb. 2002, http://www.manhattan-insitute.org/html/gli_2.htm.

¹²⁹ See HORWITZ, *supra* note 16.

¹³⁰ See Presser, *supra* note 128.

¹³¹ *Id.*; see also Presser, *supra* note 118.

¹³² See *supra* note 114.

Given that allowing too easy piercing and eliminating the abuse requirement undercuts the laudable policies that lie behind shareholder limited liability, we should return to the simplicity and stricter standard of the original “abuse” rule.

