THE CORPORATE ENTITY IN AN ERA OF MULTINATIONAL CORPORATIONS

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I. Introduction

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

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

Discussion of the corporate personality accordingly requires re-examination and fundamental reorientation. Of central importance in any such re-examination of the corporate juridical entity in the modern world is the extent to which the legal consequences of the actions of any subsidiary corporation should extend to its
parent and affiliated companies in order to implement effectively the policies and objectives of the law in the area involved. What is at stake (in most, but not all legal questions of this nature) is the continued acceptability of the principle of limited liability for each of the separate controlled constituent companies, for each entity that is part of a corporate group. Although entity law does not inevitably involve limited liability, limited liability cannot exist without acceptance of entity law. ¹

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

¹ Numerous modern courts unaware of the early historic origins of entity law long before the relatively recent triumph of limited liability incorrectly assume that the two doctrines are essentially interrelated. See Blumberg, Limited Liability and Corporate Groups, 11 J. CORP. L. 573 (1986) [hereinafter Blumberg, Limited Liability].
³ See 1 S. KYD, A TREATISE ON THE LAW OF CORPORATIONS 69-70, 103 (1793).
⁴ See W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND §§ 475-476 (1st ed. 1765).
⁵ The English commentaries invariably refer to corporate existence as perpetual. In fact, the early American statutes generally limited corporate life to fixed terms of 20, 30, or 50 years. See Liggett Co. v. Lee, 288 U.S. 517, 548 n.3 (1933) (Brandeis, J., dissenting). Thus, the New York General Incorporation Act in 1811 fixed a maximum term of 20 years for manufacturing corporations. N.Y. Act of Mar. 22, 1811, ch. 67. Modern statutes generally permit incorporation for a fixed term of years. E.g., CAL. CORP. CODE § 204(a)(4) (West 1977); DEL. CODE ANN. tit. 8, § 102(b)(5) (1983 repl. vol.); MODEL BUSINESS CORP. ACT § 2.02(b)(2)(iii), Official Comment 3c (1984).
that underlie all Western legal systems, the corporation is conceptualized as a separate legal right-and-duty-bearing unit.

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

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

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


8. In an area of lesser importance, the same factors make desirable an examination of the expansion of corporate legal rights to constituent companies of corporate groups in certain areas of procedure. See P. Blumberg, The Law of Corporate Groups: Procedural Problems of Parent and Subsidiary Corporations (1983) [hereinafter Blumberg: Procedure].

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

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

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

Statutory regulatory law, in particular, has widely abandoned the traditional perception and has significantly moved from an entity to an enterprise frame of reference. Many regulatory statutes utilize such standards as "control," "controlling," and "controlled" or employ numerical standards of stock ownership in order to extend the regulatory program to all component companies of corporate groups. American common law, too, is beginning to recognize the
inadequacy of entity law in dealing with the special problems presented by complex multi-tiered corporate structures. In cases involving the construction of statutes not expressly extending their reach to all affiliated companies of a group, courts have construed the statutes, particularly remedial statutes, liberally to do so. In the process of construing the statutes, a special variant of “piercing the veil jurisprudence” has emerged applying the doctrine free of some of the significant restrictions applicable to common law controversies.\(^\text{10}\) Thus, the courts are moving at varying paces in different areas of the law to acknowledge that “shareholder” protection for parent corporations and sub-holding companies in corporate groups may be very different from that accorded public shareholders of the parent corporations or shareholders in small corporations. These signs of transformation in the traditional perception of the corporation represent the early stages in the development of enterprise law. While such departures are beginning to occur, respect for the legal insulation of the public shareholder continues unabated. Thus, in no case, to the knowledge of the author, has liability been imposed on the public shareholders of a parent corporation of a corporate group.\(^\text{11}\) Despite the departures, limited liability has in all cases been preserved for the very persons sought to be protected when the traditional concept became fully accepted centuries ago.

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


\(^{11}\) A possible exception is Anderson v. Abbott, 321 U.S. 349, reh’g denied, 321 U.S. 804 (1944), imposing statutory double liability on public shareholders in bank holding companies in an effort to prevent evasion of the double assessment provisions of the Banking Act by the organization of holding companies. See Blumberg: General Statutory Law, supra note 10, § 2.03.
“Piercing the veil jurisprudence” has provided the safety valve in American law for American courts in “exceptional” cases to avoid unacceptable results arising from the rigid application of entity law in situations in which third parties have been injured by the substantial departure of controlling shareholders from accepted corporate mores. “Piercing the veil jurisprudence” has, however, typically hopelessly muddled together the problem of the small businessperson, simultaneously conducting his or her business both personally and in corporate form, and the issues raised by the largest corporations of our time conducting integrated enterprises consisting of hundreds of affiliated corporations in innumerable countries around the world.

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

Thus, contemporary consideration of enterprise law, like the historical discussion of the nature of the corporate personality, involves an examination in particular cases of the attribution of rights and imposition of duties in particular cases on constituent companies of corporate groups. It does not yet undertake a basic challenge of the separate corporate existence of the controlled company for other purposes. It has, however, abandoned the earlier philosophy that emphasized the universality of the relationship of all corporations to their shareholders, irrespective of whether the shareholders were the ultimate public investors in the enterprise or affiliated companies, themselves engaged in the conduct of the enterprise, particularly affiliated companies collectively engaged with their parent corporation in the conduct of a unitary business under common control. Instead of automatically
insulating the parent corporation and its sub-holding companies and affiliated subsidiary companies from all legal consequences for acts of a subsidiary corporation in accordance with traditional entity law, the newer enterprise view makes the attribution of rights and imposition of duties with respect to related corporations under common control turn, in the particular case, on the extent of the interrelationship between the group and its component controlled companies. This will reflect the extent of organizational direction (that is, the exercise of group control), economic interdependence and economic integration, administrative and financial interdependence, and use of a common public persona. It will also turn on whether enterprise or entity law most effectively implements the underlying objectives of the law in the case at hand.

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

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

II. Traditional Theories of the Nature of the Corporate Personality

Although recognition of the separate legal personality of the corporation—separate from that of the shareholders—goes back centuries,
there has been intensive controversy on the jurisprudential level as to the exact nature of the corporation as a legal institution. The discussion has been worldwide with an enormous bibliography,\textsuperscript{12} described, as long ago as 1911, to be of "appalling size."\textsuperscript{13}

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

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

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


\textsuperscript{13} See Machen, *supra* note 12, at 254 n.3.

\textsuperscript{14} See *supra* notes 2-4.

\textsuperscript{15} These form sub-sets of the theory with differing emphasis, but as Professor Dewey said in distinguishing between the fiction and concession theories: "In spite of their historical and logical divergence, the two theories flowed together." See Dewey, *supra* note 12, at 668.
of law, it possesses only those properties which the charter
of its creation confers upon it, either expressly, or as incidental
to its very existence.\textsuperscript{16}

The essence of this view is that the corporation is a separate
juridical unit created by state action, an artificial creature of the state
possessing in addition to its essential "core" attributes only such limited
powers as are granted by the state. While a separate legal entity, its
legal capacity beyond its "core rights" depends on its charter and
thereby differs decisively from the fuller panoply of legal rights possessed
by natural persons. (We shall accordingly refer to it as the "artificial
person"\textsuperscript{17} or "weak entity" theory.) This Anglo-American view of the
corporation also prevailed on the continent in the same period.\textsuperscript{10}

In early Supreme Court cases considering the application of the
new Constitution to corporations, a second, more complex theory of
the corporate personality emerged. Facilitating the attribution to a
corporation of constitutional rights protecting the interests of share-
holders to supplement its common law "core" attributes, this theory
perceived the corporation as an association of individuals contracting
with each other in organizing the corporation. The subsequent growth
of general incorporation statutes making corporate status freely available\textsuperscript{19}
moved the predominant role in corporate organization from the state
to the incorporators and shareholders. This development made reliance
on the associational view even more appealing.

As Justice Field said in \textit{The Railroad Tax Cases}:

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


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

\textsuperscript{18} See, e.g., G. Heinan, Otto Gierke: \textit{Associations and Law} 27-33 (1977)
(reviewing views of Savigny). See also Machen, supra note 12, at 255.

\textsuperscript{19} New York enacted the first general incorporation statute as early as 1811;
this was the first in the world. N.Y. Act of Mar. 22, 1811, ch. 67. However,
general incorporation did not become the norm until the 1870s. See W. Hurst,
the states, should cease to exert such protection the moment
the person becomes a member of a corporation.\textsuperscript{20}

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

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

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

\begin{itemize}
  \item \textsuperscript{20} The Railroad Tax Cases, 13 F. 722, 743-44 (C.C.D. Cal. 1882), \textit{writ of
error dismissed as moot sub nom}. San Mateo County v. Southern Pac. R.R., 116 U.S.
138 (1885); Santa Clara v. Southern Pac. R.R., 18 F. 385 (C.C.D. Cal. 1883),
aff'd, 118 U.S. 394 (1886).
  \item \textsuperscript{21} \textit{See id.} at 744-58; V. Morawetz, \textit{Law of Private Corporations} § 1
(1882) ("the rights and duties of an incorporated association are in reality the rights
and duties of the persons who compose it, not of an imaginary being").
  \item \textsuperscript{22} \textit{The Railroad Tax Cases}, 13 F. at 744.
  \item \textsuperscript{23} Thus, in \textit{The Railroad Tax Cases}, Justice Field adopted the following
argument of John Norton Pomeroy, counsel for the railroad:
Whatever be the legal nature of a corporation as an artificial, metaphysical
being, separate and distinct from the individual members, and whatever
 distinctions the common law makes, in carrying out the technical legal
conception, between property of the corporation and that of the individual
members, still, in applying the fundamental guarantees of the constitution,
and in thus protecting the rights of property, these metaphysical and
technical notions must give way to the reality. The truth cannot be evaded
that, for the purpose of protecting rights, the property of all business and
trading corporations is the property of the individual corporators.
\textit{Id.} at 758.
  \item \textsuperscript{24} \textit{See Bank of Augusta v. Earle}, 38 U.S. (5 Pet.) 517, 586 (1839) (Taney,
C.J.); \textit{infra} text accompanying notes 83-87.
  \item \textsuperscript{25} After the firm tilt towards limited liability climaxed by the adoption
of a limited liability statute by Massachusetts in 1830, the political struggle over the
issue continued for another two decades or so. There were repeated attempts to
revise limited liability but they ultimately failed. Michigan in 1837, New Hampshire

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

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

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

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

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

27. See Machen, supra note 12, at 261-62 (a real and natural entity); Vinogradoff, Juridical Persons, 24 Colum. L. Rev. 594, 602 (1924). See also E. Freund, The Legal Nature of Corporations (1897); O. Gierke, Political Theories of the Middle Ages (1958).

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

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

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

30. Id. (citing M. Weber, Economy and Society 13 (1978)). (When we examine the American decisions and see how the courts variously appeal to one theory or another to support their result, we will appreciate more fully the power of such ‘ideas’ in the heads of judges.”)


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


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

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

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

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

36. Corporations are not protected by the privileges and/or immunities clauses
American law is now entering a fourth stage. In American statutory law, in particular, traditional theories of the corporate personality are being increasingly supplemented by newer doctrines emphasizing enterprise over entity. This development is a response to the fundamental need to establish effective legal controls over the very large corporations that dominate the economic system. These very large corporations typically operate as multi-tiered multinational groups of parent and subsidiary corporations collectively conducting worldwide economically integrated enterprises that for legal or political purposes have been fragmented among the constituent companies of the group.

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

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


38. In "piercing the veil jurisprudence," the crucial factor is the intimate interrelationship of the component companies of the group and their operation under common control. Thus, it does not generally matter whether the litigation seeks to impose liability upon a parent corporation for the acts of its subsidiary or upon a subsidiary for acts of its parent or upon one subsidiary for the acts of a sister subsidiary. Intragroup liability extends to all members of the group conducting fragmented portions of an enterprise under common control. See P. Blumberg, The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations §§ 8.03, 21.01, 21.02 (1987) [hereinafter Blumberg: Substantive Common Law]; Blumberg: Procedure, supra note 8, §§ 21.01-21.03.

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

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

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

III. THE CORPORATE PERSONALITY IN THE COURTS

A. Constitutional Applications

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

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

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40. See Blumberg: Procedure, supra note 8; Blumberg: Bankruptcy, supra note 39; Blumberg: Substantive Common Law, supra note 38; Blumberg: General Statutory Law, supra note 10. The fifth volume, being written in collaboration with Professor Kurt A. Strasser, deals with statutory law directly applicable to parent and subsidiary corporations and will appear in 1992.
to corporations. However, the process of constitutional construction inevitably involved consideration of various theories of the corporate personality in determining the extent to which corporations could invoke constitutional provisions and obtain constitutional rights in addition to their unchallenged "core rights" at common law.

The new Republic knew little about corporations. At the time of the adoption of the Constitution, there were very few corporations. As late as 1801, there were only 317 corporations in the entire country. 41 These were almost entirely in banking, insurance, and public service areas; only a handful were manufacturing corporations. This condition began to change with the growth of the textile industry following the introduction of the power loom, the embargo laws against manufactured imports, and the War of 1812. 42 However, not until the 1830s did charters for manufacturing corporations exceed those for banking, insurance, and public service corporations. 43 Determining constitutional meaning and intent with respect to a class of parties with which neither the society nor the law had had much experience rendered the problem of constitutional construction even more difficult.

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

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


42. In contrast to only seven Arkwright loom mills in the United States in 1800, the number of New England textile workers skyrocketed to 100,000 by 1815. The number of spindles increased from 8,000 in 1807 to 191,000 in 1820 and to 1,250,000 in 1831. See Blumberg: Substantive Common Law, supra note 38, § 1.04.3. The number of corporations increased from 317 in 1801 to 1,500 in 1816. See R. Wiebe, The Opening of American Society 153 (1984); Blumberg, Limited Liability, supra note 1.

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


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


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


1. **“Citizens”**

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

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

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

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


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

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


62. Cases not involving federal questions or admiralty matters may be heard in the federal courts only under diversity-of-citizenship jurisdiction.
scended the impact on the immediate parties. It involved the role of the new federal judicial power over major areas of law affecting the new corporate society.

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

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

63. Marshall acknowledged that "our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books ...." Deveaux, 9 U.S. (5 Cranch) at 88.
64. Id.
65. Id. at 86.
66. Id. at 87.
67. Id. at 91.
68. Id. at 86-87.
Decades later in *Louisville, Cincinnati & Charleston Railroad v. Letson*, 69 decided in 1844, and *Marshall v. Baltimore & Ohio Railroad*, 70 decided in 1855, the Court abandoned this technique of looking through corporate parties to the citizenship of their shareholders for the purpose of determining corporate citizenship for diversity jurisdiction purposes. 71 While recognizing that a corporation was not a "citizen" for this purpose, it, nevertheless, insisted on preserving the "valuable privilege" of federal jurisdiction for corporations. 72 The Court held that irrespective of the actual citizenship of shareholders, it would be conclusively presumed that the shareholders of a corporation were citizens of the state of incorporation. 73 Through this "bizarre" legal fiction, 74 the corporation received the jurisdictional opportunities open to citizens without the Court having to accord "citizenship" to it. 75

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

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

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

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

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


73. *Id.* at 328-29.


75. American law today recognizes the state of incorporation as decisive for diversity jurisdiction purposes. Section 1332(c) of title 28 of the United States Code provides: "[A] corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Through the provision for a corporation to be a citizen of more than one state, the Congress was restricting diversity citizenship. 28 U.S.C. § 1332(c) (1982). *See* BLUMBERG: *Procedure, supra* note 8, §§ 9.02-.08.
law, both in the United States and in England, dealing with such matters as status as an enemy alien or as a charitable corporation. While these decisions characterize the corporation as a "citizen" or as an "enemy" or as "charitable" by reference to the shareholders, such characterization and attribution only determine certain rights and liabilities of the corporation. They do not transfer such rights or liabilities to the shareholders.

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

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

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

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

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

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

An Irish commentator correctly has concluded that the English decisions do not in any way disregard the separate legal personality of the corporation. See R. Keane, Company Law in the Republic of Ireland §§ 10.19-.20 (1985).

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

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

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

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

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

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

80. 9 U.S. (5 Cranch) 61 (1809).
81. U.S. CONST. art. IV, § 2.
82. 38 U.S. (13 Pet.) 517 (1839).
83. Id. at 587.
84. Id. (quoting Head v. Providence Ins. Co., 6 U.S. (2 Cranch) 127 (1804)).
85. Id. at 588. See also Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1868).
sociational theory also reaffirmed the traditional view. In Bank of Augusta, Chief Justice Taney, however, realized that reliance on shareholder interests to attribute constitutional rights to corporations in addition to their traditional common law "core" rights might well lead to the reverse process of attributing corporate duties to shareholders and thus destroy limited liability. Until the early nineteenth century, the law had in fact recognized both traditional entity law and unlimited liability of shareholders.87 Chief Justice Taney, writing fresh on the heels of the triumph of limited liability and at a time when not all states had embraced the principle,88 evidently did not want to contribute to possible reversal of this development.

Almost thirty years later, the issue came again before the Court in Paul v. Virginia89 decided in 1868. By this time under Letson and Marshall, corporations were deemed "citizens" for purposes of the Diversity-of-Citizenship Jurisdiction clause. The Court, however, reaffirmed its conclusion in Bank of Augusta and again held that a corporation was not a "citizen" for purposes of the privileges and immunities clause of article four. Justice Field stated: "The term citizens ... applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."90

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

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

87. See Blumberg: Substantive Common Law, supra note 38, § 1.02.
88. See Blumberg: Limited Liability, supra note 1.
89. 75 U.S. (8 Wall.) 168 (1868) (Field, J.).
90. Id. at 177.
92. Article IV, § 2, clause 1 refers to "Privileges and Immunities of Citizens in the several States" while the fourteenth amendment, § 1 refers to "privileges or immunities of citizens of the United States" (emphasis added).
States.” However, unlike articles III and IV, the new amendment
declared “citizen” as “persons born or naturalized in the United
States,” terms difficult to adapt and apply to corporations. In
Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania,
declared in 1888, involving the applicability of this fourteenth amend-
ment clause to a discriminatory Pennsylvania tax on foreign
corporations, Justice Field, writing for the Court and quoting from
his opinion in Paul v. Virginia that restricted “citizens” in article
four to natural persons, had no difficulty in holding that in the
fourteenth amendment, like the fourth amendment, the term “cit-
izens” applied only to natural persons, not to corporations.

2. “Person”

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

a. Equal Protection of the Laws: Fourteenth Amendment

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

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93. The Amendment provides: “All persons born or naturalized in the United
States . . . are citizens of the United States and of the State wherein they reside.”
U.S. Const. amend. XIV, § 1.
94. 125 U.S. 181 (1888).
95. 75 U.S. (8 Wall.) 168, 177 (1868).
96. Pembina Consolidated Silver Mining & Milling Co., 125 U.S. at 187-88. Accord
United States v. Hague, 307 U.S. 496, 514 (1939); Western Turf Ass’n v. Green-
berg, 204 U.S. 359, 363 (1907).

Article IV refers to “Citizens of each State” while the fourteenth amendment
refers to “citizens of the United States.” Although Pembina did not focus on this
distinction, the Court in the Slaughter House cases construed the reference so re-
strictively that the provision has become the “almost forgotten . . . clause of the
Fourteenth Amendment.” Colgate v. Harvey, 296 U.S. 404, 443 (1935) (Stone,
J., dissenting) (citing Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873)). Thus,
the clause has been described as “practically a dead letter.” Morrison, Does the
Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 140, 144 (1949).
See also R. Berger, Government by Judiciary ch. 3 (1977).
97. 118 U.S. 994 (1866).
decided in 1886. Although the question had been argued at length in the various briefs, the Court surprisingly announced:

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

The Court’s brief announcement threw no light on the rationale for the conclusion.\(^\text{99}\)

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

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\(^{98}\) Id. at 396.

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

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


\(^{102}\) Horwitz, supra note 12, at 178. Professor Hovenkamp suggests that the constitutional problem of corporate "personhood" was twofold. First, it involved the preservation of the same constitutional protection of property held in the name of a corporation as the owners of property had had in their own name. Second was the question of standing: who could assert the constitutional rights in corporate property? Relying on a dictum of Justice Field in his circuit court opinion in Santa Clara, among other matters, he concludes that if the corporation had not received
or "'real entity'" theory was still "'nowhere to be found'" and that the Court was not deciding that "'the corporate entity was no different from the individual in its constitutional entitlements.'"^{103}

b. Due Process of Law: Fourteenth Amendment

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

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

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

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

103. Horwitz, _supra_ note 12, at 174, 223.
104. 125 U.S. 181 (1888).
106. Id. The language is borrowed from Justice Story's concurring opinion in the _Dartmouth College_ case. Trustees of Dartmouth College, 17 U.S. (4 Wheat.) at 666.
Eight years later in *Covington & Lexington Turnpike Road Co. v. Sanford*,107 decided in 1896, the Court felt able to say without further explanation: "It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."108

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

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

107. 164 U.S. 578 (1896).
110. Id. at 412.
111. Id. at 412-13. The quotation from *Pembina* appears four paragraphs earlier in the text of this article. See supra text accompanying note 106.
112. See infra note 115.
113. See Horwitz, supra note 12, at 216; Schane, supra note 12, at 590.
corporation—received very much the same constitutional protection.114 The development of business institutions would not be distorted by a pressure to adopt a particular form of business organization in order to claim constitutional protection.

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

c. Self-Incrimination: Fifth Amendment

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

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

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


115. In Northwestern Life Ins. Co. v. Riggs, decided in 1906, the Court stated flatly: "The liberty referred to in [the Fourteenth] Amendment is the liberty of natural, not artificial persons." 203 U.S. 243, 255 (1906). In Western Turf Ass'n, 204 U.S. at 363, the Court reaffirmed this conclusion. However, the decision in First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), protecting corporate freedom of speech against state action in reliance on the first amendment incorporated into the fourteenth amendment, clearly looks the other way. See Near v. Minnesota, 283 U.S. 697 (1931); Fiske v. Kansas, 274 U.S. 380 (1927); L. Tribe, AMERICAN CONSTITUTIONAL LAW § 11-2 (1989).

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

117. U.S. Const. amend. V.

118. Hale, 201 U.S. at 74-75.
This markedly contrasts with Justice Brown’s utilization of the associational theory to apply the unreasonable searches and seizures clause of the fourth amendment to a corporation in the very same case.  

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

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

d. *Double Jeopardy: Fifth Amendment*

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

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

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119. *See infra* text accompanying note 131.
121. 322 U.S. 694 (1944) (trade union defendant).
122. *Id.* at 698.
123. U.S. Const. amend. V.
clauses use the same term "person." In addition, the self-incrimination clause follows immediately after the double jeopardy clause in the text of the fifth amendment, and, indeed, is grammatically part of the prior clause, sharing with it the same subject, "person."

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

3. The "People"

a. Unreasonable Searches and Seizures: Fourth Amendment

_Hale v. Henkel_ not only involved the applicability to corporations of the constitutional protection to "person[s]" against self-incrimination in the fifth amendment as discussed above, it also involved the applicability to corporations of the constitutional protections extended to "the people" against "unreasonable searches and seizures" in the fourth amendment.127 Not without difficulty, the Court in _Hale v. Henkel_128 held that the term "people" protected corporations against the production of corporate records seized under circumstances violating the provision.129

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

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127. The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.
128. 201 U.S. 43 (1906).
129. Id. at 76. See also, e.g., Silverthorne Lumber Co. v. United States, 351 U.S. 385 (1920). See Blumberg: General Statutory Law, supra note 10, § 3.06.
130. The Court also emphasized the importance of the economic interests at stake. The Court stated in further support of its conclusion: "Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises." _Hale_, 201 U.S. at 76.
as a collective body it [the association of individuals] waives no constitutional immunities appropriate to such body."\textsuperscript{131} This invocation of the associational theory contrasts with Justice Brown’s refusal to look beyond the artificial person view in refusing to protect corporations under the self-incrimination clause in the very same case.\textsuperscript{132}

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

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

4. General Constitutional Prohibitions on Governmental Power

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

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

\textsuperscript{132} Id. at 75.
\textsuperscript{133} Id., at 82.
\textsuperscript{134} Id. at 78.
\textsuperscript{135} Id. at 76.
\textsuperscript{136} Id. at 74-75.
on governmental action: the prohibitions against impairment of contracts and abridging freedom of speech or press.

a. Impairment of Contracts: Article I

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

b. Freedom of Speech: First Amendment

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

137. 17 U.S. (4 Wheat.) 518 (1819).
138. 9 U.S. (5 Cranch) 61 (1809).
139. Id. at 642-44. See also Providence Bank v. Billings, 29 U.S. (6 Pet.) 514, 558 (1830) (Marshall, C.J.) ("[I]t is not denied, that a charter incorporating a bank is a contract.").
140. U.S. Const. art. I, § 10[1], cl. 5 provides: "No State shall . . . pass any . . . law impairing the obligation of contracts . . . ."
141. This appears plainly in Justice Story's concurring opinion: "An aggregate corporation . . . is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective character, which do not belong to the natural persons composing it." Trustees of Dartmouth College, 17 U.S. (4 Wheat.) at 667.
In *First National Bank v. Bellotti*,\(^1\) decided in 1978, the Court held by a 5-4 vote that a Massachusetts statute restricting corporate political expenditures to influence public referenda or issues, except on matters materially affecting the corporation,\(^2\) was unconstitutional because it violated the guaranty of free speech of the first amendment.\(^3\)

Writing for the majority of the Court, Justice Powell stated that the issue was a narrow one not involving theories of corporate personality: "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 [of the Massachusetts statute] abridges expression that the First Amendment was meant to protect."\(^4\) Justice Powell characterized as "extreme" the conclusion of the dissenters that the corporation was only a creature of the state possessing only those rights granted it by the State.\(^5\) However, he did not find it necessary to articulate his own theory of the nature of the corporation in order

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144. The statute provided: "No corporation . . . shall directly or indirectly give, pay, expend or contribute . . . for the purpose of influencing or affecting the vote on any question submitted to the voters, other than one materially affecting . . . the property, business or assets of the corporation." *Id.* at 768 n.2 (quoting Mass. Gen. Laws Ann. ch. 55, § 8 (West Supp. 1977)). In *Bellotti*, the parties disagreed whether the statute would have a significant effect on the appellants' businesses. *See id.* at 770.
145. *Id.* at 795. The first amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I, cl. 2.
146. *Bellotti*, 435 U.S. at 776.
147. *Id.* at 778 n.14. However, in *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637 (1987), Justice Powell seemed to retract this conclusion. *CTS Corp.* involved the constitutionality under the commerce clause of an Indiana statute regulating corporate take-overs and creating procedures involving difficulties and delays for acquiring companies. While the issue did not involve the personality of the corporation, it presented sharply the conflicting roles of state and federal law.

Writing for the Court, Justice Powell said: "[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." *Id.* at 1649. Justice Powell then quoted Chief Justice Marshall's description in the *Dartmouth College* case of the corporation as an "artificial being" created by the state. *CTS Corp.*, 107 S. Ct. at 1649-50 (quoting *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 638). Justice Powell also pointed to the portion of Justice Rehnquist's dissent in *Bellotti* quoting from the *Dartmouth College* case that the constitutional rights of a corporation were those "incidental to its very existence." *Bellotti*, 435 U.S. at 824. This is the very passage which he criticized as "extreme" in *Bellotti*. *Id.* at 778 n.14.
to dispose of the case. Instead, he relied on the fundamental value of "the right of public discussion" from the societal point of view and he held that the corporation, as well as its officers or directors, could not be constitutionally barred from discussion of public issues.

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

5. Terminology or Nature of Interest

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

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

149. Id. at 792.
150. Id. at 824-26.
151. Id. at 809.
B. Shareholder Unanimity in State Corporation Law

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

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

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

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

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

Id. at 217 (citations omitted).
In the absence of unanimous shareholder approval, waste is barred by contemporary law.\(^{156}\)

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

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

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\(^{156}\) Although waste resembles the “ultra vires” problem, its essential difference is that state interests as reflected in a narrow construction of the corporate charter are not concerned at all.

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


\(^{160}\) See Folk, Ward, & Welch, supra note 159, § 242.2.
C. "Piercing the Veil Jurisprudence"

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

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

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

161. This development is reviewed in the author's volumes in the series constituting The Law of Corporate Groups to which readers are referred. See supra notes 8, 10, 38, 39 & 40.
“Piercing the veil jurisprudence” and statutory enterprise law are being comprehensively discussed in the author’s series of volumes on *The Law of Corporate Groups*. The scale of the topic has already led to the publication of four volumes in the Series dealing with such matters in the areas of procedure, bankruptcy, common law disputes (particularly contracts, torts, property, and conflict of laws), and federal statutes of general application. Several additional volumes remain to be written. This article will seek to do no more than explore their implications for newer dimensions in formulations of the corporate personality and for the development of enterprise law.

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

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

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

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

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


164. See *supra* notes 2-4.
In the subsequent development of the law, a case-by-case resolution of the conflicting interests before them led courts to consider whether additional rights should also be attributed to the corporation. The universally accepted "core" rights of the corporations remained unchallenged; the issue was whether other rights should be attributed as well. In this resolution, concepts of the corporate personality "in the heads of the judges" obviously influenced their thinking, but clearly did not lead to any ultimate conclusion as an inexorable logical deduction from the concept.

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

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

165. See Bellotti, 435 U.S. at 778-79 n.14 (Powell, J.); supra note 147 and accompanying text.
166. Blumberg: Substantive Common Law, supra note 38, §§ 1.03.1, 1.04.1, 1.04.2.
167. See id. at ch. 1; Blumberg, Limited Liability, supra note 1.
not judicial decision, was required to bring about limited liability.\textsuperscript{168}

\textbf{E. Summary}

Discussion of the nature of the corporate personality flourished for decades before it was at last set in perspective by Professor John Dewey in 1926.\textsuperscript{169} Professor Dewey dismissed the debate as an academic exercise without larger reality. He emphasized that corporate rights and liabilities were the product of the law and that the legal implications or meaning of the corporation was "whatever the law makes it mean."\textsuperscript{170} Thereafter until the rise of the libertarians a half century later, discussion of the nature of the corporate personality languished.

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

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


\textsuperscript{169} Dewey, supra note 12.

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

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

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

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

\textsuperscript{172} \textit{See} Machen, supra note 12, at 263.

\textsuperscript{173} \textit{See} Schane, supra note 12, at 594-95.
separate juridical entity, separate from its shareholders, possessing its traditional "core" attributes recognized long ago. Each of the theories of the nature of the corporation that has been advanced in the United States has accepted entity law without challenge. Where debate about various theories of the nature of the corporate personality has played a lively role, it has been about the constitutional rights to be accorded to the corporate entity in addition to such "core" common law rights. Whatever the theory utilized to support the outcome or the constitutional rights attributed to the corporation or the shareholder interests recognized in such attribution, the traditional concept of entity law has remained unimpaired. The debate has related only to the details of the superstructure erected on a universally accepted foundation.

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

IV. Economic Development and the Rise of Corporate Groups

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

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

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

The traditional concept of the corporation as a separate juridical
unit clashes violently with reality when applied, not merely to simple
corporations with shares owned by individual investors, but to cor-
porations that are members of a corporate group. In such cases, the
"corporation" and the enterprise are no longer identical. The en-
terprise is no longer being conducted solely by a single corporation
but collectively by the coordinated activities of numerous interrelated
corporations under common control. The law thus asserts that Mobil
Oil Corporation consists of hundreds of separate and distinct corpo-
rations176 while the economic reality is that it is a single en-
terprise.177 Recognizing this reality, economists are concerned, not
with the corporation, but with the firm or the enterprise. In their
analysis corporate legal structures are not merely unimportant; they
are irrelevant.

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

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

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

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

conducting worldwide businesses often through "incredibly complex" structures of holding companies, sub-holding companies, subsidiaries, and affiliates, involving scores, if not hundreds or even a thousand, of constituent corporations.\textsuperscript{179} An examination of the corporation that is not concerned with the significance of such corporate groups is largely irrelevant. While a parent corporation is indeed the shareholder of its subsidiaries, it differs radically from the original shareholder in the older stereotype. Unlike the shareholder-investors in the simple corporation, or the public shareholder-investors in the modern parent corporation, the parent corporation is typically not a passive investor. Instead, it is a major part of the enterprise, engaged along with its subsidiaries in the collective conduct of a common business under centralized control; in brief, the parent and subsidiaries constitute a group. The parent company's relationship to the subsidiary corporations of which it holds the shares is profoundly different from that of public shareholder-investors.\textsuperscript{163}

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

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

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

\textsuperscript{180} With respect to investment in new business opportunities, particularly in a different industry (that is, the so-called conglomerate group), the group may present problems with respect to limited liability, risk evaluation, and entrepreneurial risktaking resembling those presented by the simple corporation and its individual shareholders.
affiliated corporations to determine whether the related corporations are collectively conducting an enterprise that has been fragmented among the component companies of the corporate group. 

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

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

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

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

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

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

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

Further, the conceptual standards of entity law are frequently regarded as universal principles and applied indiscriminately across the entire range of the law. Courts applying "piercing the veil jurisprudence" frequently rely on such decisions arising in very different areas of the law. See Blumberg: Substantive Common Law, supra note 38, § 6.01; Hamilton, The Corporate Entity, 49 TEX. L. REV. 979, 985 (1971) (failure of courts to distinguish contracts from torts cases termed "astonishing").
The time is ripe for consideration of alternate doctrinal approaches to rectify the inadequacies of entity law as applied to corporate groups. The various concepts developed thus far in the American judicial decisions and governmental regulatory programs involving corporate groups provide the obvious starting point for suggesting standards that might most effectively serve such a purpose. Of the standards already utilized in American law, "control," "unitary business," "integrated enterprise," and "economic integration" are the most prominent. "Enterprise" itself serves as a standard in isolated American statutes, but not in a particularly useful context.

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

\textbf{A. "Control"}

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

1. "Control" as a Statutory Standard

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

\textsuperscript{184} Let us defer for the moment the fundamental issue whether any alternate doctrine should replace entity law entirely, or whether it should have the more limited objective of supplementing traditional concepts with a new legal standard for the attribution of legal duties and obligations of one entity within a corporate group to affiliates conducting with it a common business under common control.
the ability of the group to coordinate and to integrate the operations and resources of the controlled constituent companies for the benefit of the group as a whole that is primarily responsible for the corporate group’s development into the prevailing business institution of our time.

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

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

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

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


