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SHAREHOLDERS' LIABILITY AND WORKERS' RIGHTS: PIERCING THE CORPORATE VEIL UNDER FEDERAL LABOR LAW

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Fundamental doctrine deems a corporation to be separate and distinct from its owners, so that shareholders — whether they be individual investors or a corporate parent — will not ordinarily be held responsible for corporate obligations.[1] This "corporate veil" is usually only "pierced," and shareholder liability imposed, when a corporation's owners have abused the privilege of limited liability in some manner.[2] Since the passage of the first federal labor laws,[3] fed-

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1. *See infra* notes 32-35, 43-44 and accompanying text.
2. *See infra* notes 24-25, 64 and accompanying text.
3. This article uses the term "federal labor law(s)" to refer to the panoply of federal statutes that regulate the rights of workers in the private sector, particularly those that involve unionization, employee benefits, and employment discrimination. The first major federal labor statutes were the Railway Labor Act, ch. 347, § 1, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-88 (1988)) [hereinafter "RLA"]; the Norris-LaGuardia Act, ch. 90, § 1, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-15 (1988))[hereinafter "Norris-LaGuardia Act"]; and, most important, the National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1988)) [hereinafter "NLRA"]. The subsequent laws that rapidly followed involving labor-management relations are considered in this article. *See, e.g.*, the Labor Management Relations Act, 1947, ch. 120, tit. I, § 1, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 151-87 (1988)) [hereinafter "LMRA"] (amending the NLRA and establishing the legal enforceability of collective bargaining agreements); *see also* the Employee Retirement Income Security Act, Pub. L. 93-406, Title I, § 2, 88 Stat. 832 (1974) (codified as amended at 29 U.S.C. §§ 1001-461 (1988)) [hereinafter "ERISA"] (addressing employee benefits); the Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060 (1937) (codified as amended at 29 U.S.C. §§ 201-62 (1988)) [hereinafter "FLSA"] (addressing employee wages and hours); the Worker Adjustment and Retraining Notification Act Pub. L. 100-379, § 2, 102 Stat. 890 (1988) (codified at 29 U.S.C. §§ 2101-09 (Supp. 1988)) [hereinafter "WARN"] (addressing plant closing notification); the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-78 (1988)) [hereinafter "OSHA"] (addressing workplace safety); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 701, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988)) [hereinafter "Title

eral courts and administrative agencies deciding labor cases have confronted this fundamental yet mysterious principle of corporate separateness in a broad variety of contexts, all of them substantially different from the commercial disputes in which the doctrine emerged.

Labor law veil-piercing questions may arise in a number of ways. Labor claimants, including trade unions, individual employees, and employee benefit trusts, have asserted for example, that parent corporations should accept responsibility for their subsidiaries' unfair labor practices or acts of employment discrimination, that individual shareholders should be held personally liable for corporate obligations to pay employee benefit contributions, and that collective bargaining agreements covering the employees of one corporation should be deemed to extend to other nominally separate, but commonly owned, entities.[4] The precise issues raised by these different labor claims vary considerably according to the particular legal and factual context, but in every instance the competing values of labor law and corporate law are paramount.

This article considers the numerous theoretical and doctrinal tangles that are presented by these veil-piercing problems of federal labor law.[5] In confronting these tangles, federal courts and adminis-

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VII"] (addressing employment discrimination on the basis of race, sex, religion or national origin); the Age Discrimination in Employment Act, Pub. L. No. 90-202, § 2, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-34 (1988)) [hereinafter "ADEA"] (addressing employment discrimination on the basis of age); the Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (1990) [hereinafter "ADA"] (addressing discrimination on the basis of handicap). The Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1988)) [hereinafter "FELA"] and the Jones Act, ch. 153, § 20, 38 Stat. 1185 (1915) (codified at 46 U.S.C. § 688 (1988)) [hereinafter "Jones Act"] are treated here only in passing, because these statutes provide tort recovery mechanisms for injured employees rather than regulating the employment relationship. The Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, § 2, 73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 401-531 (1988)), is not considered here because it only governs intraunion matters and thus does not give rise to veil-piercing problems; federal public-sector labor statutes, like the Federal Labor-Management and Employee Relations Act, Pub. L. No. 89-554, 80 Stat. 378 (1966) (codified as amended at 5 U.S.C. §§ 7101-903 (1988)), are excluded from discussion here because they do not involve private corporations in any way.

4. *See, e.g.*, Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1043 (8th Cir. 1976) (stating that parent corporations should accept responsibility for their subsidiaries' unfair labor practices or acts of employment discrimination); see also Alman v. Danin, 801 F.2d 1,4 (1st Cir. 1986) (holding that individual shareholders should be held personally liable for corporate obligations to pay employee benefit contributions); *see also* United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33,35 (1st Cir. 1978) (holding that collective bargaining agreements covering employees of one corporation should be deemed to extend to other nominally separate, but commonly owned entities).

5. This article uses the term "piercing the corporate veil" broadly, so as to include all variations on the diverse common law theories by which courts have held shareholders liable

trative agencies[6] have generally attempted to apply traditional principles of corporate law while simultaneously purporting to develop an appropriate body of federal labor law. The result has been an uneven patchwork in which specialized labor law doctrines are juxtaposed with rigid corporate law principles that rarely reflect the realities of labor relations or the policies of labor law. More disturbingly, courts and agencies have usually been reluctant to treat labor law questions involving the corporate entity as problems that differ from ordinary corporate law disputes, and they have consistently failed to consider whether the rationales of corporate law make intellectual or policy sense in the labor context.

The veil-piercing problem in labor law is also complicated by substantial issues of federalism. Given their extraordinary impact on interstate commerce, most of the federal labor statutes impose a powerful preemptive force, and the federal courts have assumed the task of formulating a federal common law of labor relations.[7] This task is an especially important one because preemption has left many aspects of the employment relationship subject to exclusive federal control and entirely immune from state regulation.[8] Accordingly, the

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for obligations of their corporations. *But see* Castleberry v. Baranscum, 721 S.W.2d 270, 272 (Tex. 1986) (criticizing the failure to distinguish between different bases for imposing shareholder liability).

6. The most important federal administrative agency in the labor arena is the National Labor Relations Board [hereinafter "NLRB"]. The NLRB is only responsible for adjudicating cases that arise under the NLRA, but because of the importance in the American labor law schema of the NLRA and the NLRB's decisions thereunder, the NLRB is appropriately considered a major actor in the formation of all labor law veil-piercing doctrines. *See infra* note 103 and accompanying text. Other federal administrative agencies consider various problems arising under different labor statutes; for example, the National Mediation Board [hereinafter "NMB"] is empowered to resolve representational questions and certain other disputes involving the RLA, and the Occupational Safety and Health Review Commission [hereinafter "OSHRC"] decides OSHA liability matters. *See infra* notes 194-206, 299-303 and accompanying text.

7. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957). Several federal labor laws, including the NLRA, the LMRA, and ERISA, have a broad preemptive effect that almost completely forecloses state regulation. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959) (holding that the states are generally forbidden from regulating acts "arguably protected" by Section 7 of the NLRA, 29 U.S.C. § 157 (1988), or "arguably prohibited" by Section 8 of the NLRA, 29 U.S.C. § 158 (1988)); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55 (1987) (noting that the "LMRA displaced all state actions for violation of contracts between an employer and a labor organization"); ERISA § 514(a), 29 U.S.C. § 1144(a) (1988) (providing that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"); *but see* Civil Rights Act of 1964 § 708, 42 U.S.C. § 2000e-7 (1988) (providing that Title VII does not preclude imposition of liability under state law); ADEA § 14(a), 29 U.S.C. § 633(a) (1988) (providing for concurrent federal and state jurisdiction over age discrimination claims).

8. Veil-piercing issues have also arisen under various state laws relating to employment,

veil-piercing doctrines developed under federal labor statutes can be an important determinant of workers' rights.

When federal interests are substantial and reliance on state law poses potentially serious risks, most courts have recognized that veil-piercing problems arising under federal statutes (both within and without the labor context) properly call for the development and application of federal common law rather than reliance on analogous principles of state corporate law.[9] Corporations, after all, are creatures of state law, and corporate law, with its keystone principle of limited shareholder liability, arises almost exclusively under state statutes and state court statutory interpretation.[10] Veil-piercing doctrines designed to effectuate federal labor policy, however, need not necessarily share the same goals and values as state law doctrines that seek to protect business investors rather than workers.[11]

This conflict is forced into particularly sharp relief in the federal courts' application of the long-established principle that the fiction of corporate separateness will not be permitted to frustrate the policies of a statute.[12] Although a state-chartered corporation's transgressions might be insufficient to permit shareholder liability under the laws of the state of incorporation, the corporation's conduct could nevertheless offend federal statutory policy.[13] When such an affront is found, a federal court may apply this statutory frustration theory to disregard the corporate entity and impose shareholder liability for the federal violation.[14]

To place these complex problems of federalism and labor policy

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but these problems are not addressed here. *See, e.g.*, Comment, *Adopting an Economic Reality Test When Determining Parent Corporations' Status for Workers' Compensation Purposes*, 12 J. CORP. L. 569 (1987); *see also* Piekarski v. Home Owners Sav. Bank, 759 F. Supp. 542, 546 n.6 (D. Minn. 1991) (holding that parent corporations were not liable for the wrongful termination of a subsidiary's employee); Anderson v. Kennebec River Pulp & Paper Co., 433 A.2d 752 (Me. 1981) (permitting a corporate subsidiary's employees to prosecute an action for unpaid severance pay against the parent corporation); Reynolds v. Burlington Northern, Inc., 621 P.2d 1028 (Mont. 1980) (imposing on a parent corporation the duty to provide a safe workplace for its subsidiary's employees).

9. *See infra* notes 49-79 and accompanying text.

10. *See infra* notes 22-25 and accompanying text.

11. Each of the principal federal labor laws is explicitly intended to rectify a perceived imbalance in power between labor and management; in this sense the federal labor laws may be considered as efforts to protect workers in one way or another. *See* NLRA § 1, 29 U.S.C. § 151 (1988); *see also* International Ass'n of Machinists v. Street, 367 U.S. 740, 759 (1961) (explaining that the RLA was intended to strengthen the position of employees and unions covered under the Act as against their carriers).

12. *See infra* notes 80-81 and accompanying text.

13. *See infra* notes 80-99 and accompanying text.

14. *See infra* notes 80-99 and accompanying text.

in its appropriate context, Part I, Section A of this article presents a background discussion of the current state of the common law of veil-piercing. Although this body of doctrine is notoriously confused in theory and unpredictable in application, certain fundamental principles have been established, and the deadly sins — undercapitalization, disregard of corporate formalities, and misrepresentation of corporate status — have been identified and accepted.[15]

Section B of Part I will consider the special veil-piercing problems that arise in federal question cases. In many instances, compelling federal interests demand that questions of shareholder liability for federal violations be determined through the application of federal rather than state law.[16] Even when federal courts have attempted to fashion federal common law in such cases, they have differed sharply in their assessments of the proper role of state corporate law and the appropriate specificity of federal decisional rules.[17] Most courts that purport to apply a federal rule invoke the general federal common law of veil-piercing that is unvarying in different statutory contexts.[18] Because the choice-of-law determination is always a context-sensitive problem, however, and because statutory policies necessarily vary according to the statute at issue, the federal courts should attempt to develop individualized veil-piercing doctrines that are designed to effectuate particular statutory policies and to resolve context-specific problems of corporate identity. In addition, the federal courts should adopt and expand the broad interpretation of the statutory frustration doctrine that has been adopted in certain recent cases, so that shareholder liability may be imposed whenever the fiction of corporate separateness would otherwise leave a federal statutory violation unremedied.

Part II presents a doctrinal analysis of the present state of veil-piercing doctrine under federal labor law. Interpretation of the National Labor Relations Act ("NLRA"), as the seminal labor statute, has been the most important source of this doctrine, and NLRA principles have been widely accepted in other labor law contexts, although numerous statute-specific doctrines have also been developed.[19] Despite the considerable homogeneity of the law, the range of labor law veil-piercing problems has been substantial, including questions concerning individual shareholders' liability for corporate

15. *See infra* notes 22-48 and accompanying text.
16. *See infra* notes 59-79 and accompanying text.
17. *See infra* notes 59-79 and accompanying text.
18. *See infra* notes 72-75 and accompanying text.
19. *See infra* notes 100-101 and accompanying text.

unfair labor practices or the applicability of the "single employer" doctrine, by which nominally separate corporations are deemed one for certain labor law purposes, given their common control and overlapping personnel management. Upon review of this body of law, however, this section concludes that existing labor law veil-piercing doctrines are excessively deferential to the common law notion of corporate separateness, and that the federal courts have not fulfilled their obligation to develop veil-piercing rules that advance congressional goals and prevent corporate fictions from frustrating the policies of federal labor statutes.

Accordingly, in Part III, this Article proposes a revised labor law veil-piercing doctrine that seeks to vindicate specific federal labor policies rather than general state corporate law. In view of federal labor law's emphasis on protecting workers rather than assuaging corporate investors, a substantially broader rule of shareholder liability would be appropriate in federal labor cases: that parent corporations and shareholders of closely held corporations should be liable for corporate violations of labor law as a matter of course.

Because this proposal involves a substantial modification of existing law, Part III, Section A considers contemporary scholarship to determine the appropriateness of such a shift. First, unlike most corporate creditors, labor claimants cannot be held to have assumed the risk of corporate insolvency and shareholder immunity, because these claimants lack bargaining power — a weakness imposed in some instances by labor law itself — and are often precluded from securing appropriate protections from shareholders.[20] Second, in assessing the current work of legal economists and other scholars, this section concludes that the limited liability rule retains decidedly modest policy importance in the context of close corporations and subsidiaries, and that the rule may be substantially curtailed at least for these classes of corporations, without incurring serious consequences.[21]

Given the importance of underlying federal labor policies and the irrelevance of corporate form in labor matters, a major doctrinal overhaul is warranted. Review of the policies of the specific labor laws, in Section B of Part III, suggests that congressional purpose is best advanced by less deferential veil-piercing doctrines.

20. *See infra* notes 309-336 and accompanying text.
21. *See infra* notes 337-373 and accompanying text.

I. AN OVERVIEW OF THE CONTEMPORARY DOCTRINE OF CORPORATE IDENTITY

A. The Common Law of Veil-Piercing

It is now a firmly rooted principle of corporate law that a corporation is deemed an entity separate from its owners, so that shareholders will not be held accountable for the obligations of the corporation beyond the amount of their investment.[22] Almost as well established, however, is the notion that this veil of corporate separateness may be pierced in certain unusual circumstances, so that shareholders may be subjected to liability for corporate obligations.[23]

The veil-piercing doctrine is justifiably renowned for its ambiguity and uncertainty. According to one pair of commentators, veil-piercing is "[l]ike lightning" — "rare, severe, and unprincipled."[24] Nonetheless, its basic paradigms are widely understood. An individual may form a corporation with insufficient capital and then run the enterprise like an ordinary proprietorship, comingling personal and corporate assets;[25] a new, putatively distinct corporation may arise

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22. See Kessler, *With Limited Liability For All: Why Not A Partnership Corporation?*, 36 FORDHAM L. REV. 235, 238 (1967)(explaining that the principle of limited corporate liability has been traced as far back as 1440). Later English common law generally continued to permit limited liability, and the doctrine was codified by statute in 1825. *See*, Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1651 (1988). The rule has flourished in the United States since the eighteenth century, but has frequently been controversial. *Id.*

23. *See* Comment, *Limited Limited Liability: A Definitive Judicial Standard for the Inadequate Capitalization Problem*, 47 TEMP. L.Q. 321, 323 (1974) (noting that veil-piercing may be traced back to the early nineteenth century) [hereinafter "Comment, *Limited Limited Liability*"].

In appropriate circumstances, even individuals who do not actually own stock may be held liable for corporate obligations. Courts "are concerned with reality and not form" in veil-piercing cases, and imposing liability upon a non-owner who maintains actual control of a corporation, for example, could be appropriate in certain circumstances. Establissement Tomis v. Shearson Hayden Stone, Inc., 459 F. Supp. 1355, 1366 n.13 (S.D.N.Y. 1978); *see* Labadie Coal Co. v. Black, 672 F.2d 92, 97 (D.C. Cir. 1982). *See also*, Krendl & Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DEN. L.J. 1, 24 (1978).

24. Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985).

25. In a widely cited decision, the Fourth Circuit summarized this basic principle in the following manner:

> [U]ndercapitalization, coupled with disregard of corporate formalities, lack of participation on the part of the other stockholders, and the failure to pay dividends while paying substantial sums, whether by way of salary or otherwise, to the dominant stockholder, all fitting into a picture of basic unfairness, has been regarded fairly uniformly to constitute a basis for an imposition of individual liability under the [veil-piercing] doctrine.

DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 687 (4th Cir. 1976).

from the ashes of a substantially identical entity that had accumulated undesirable obligations;[26] and an established corporation may form an empty new subsidiary to delve into a particularly risky venture, with the sole purpose of insulating the parent from liability.[27] In these paradigmatic circumstances, shareholder liability will usually be imposed fairly readily.

In considering veil-piercing problems, it is useful to divide corporations into three categories: those whose stock is publicly traded; those whose stock is not publicly traded but closely held by individual owners; and those whose stock is not publicly traded but owned by another corporation. Although veil-piercing doctrine does not actually establish formal distinctions between these different kinds of entities, the differences are nonetheless of considerable importance in both practical and theoretical terms. Courts are generally more reluctant to pierce the veil to impose liability upon individual than upon corporate shareholders, particularly parent corporations called to answer for their subsidiaries' obligations.[28] In addition, because the operation of a parent-subsidiary relationship is quite unlike that of a unitary corporate structure, veil-piercing inquiries necessarily emphasize different factors according to the type of corporation involved.

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26. *See, e.g.*, Castleberry v. Baranscum, 721 S.W.2d 270, 275 (Tex. 1986) (describing the paradigm):

> a closely held corporation owes unwanted obligations; it siphons off corporate revenues, sells off much of the corporate assets, or does other acts to hinder the on-going business and its ability to pay off its debts; a new business then starts up that is basically a continuation of the old business with many of the same shareholders, officers, and directors.

Id. In the labor law context, such disguised continuances are generally known as "alter egos." *See infra* notes 129-44 and accompanying text.

27. *See* Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986) [hereinafter "Note, *Liability of Parent Corporations*"]; United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110, 119 (D. Vt.), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

28. *See, e.g.*, Hackney & Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837, 873 (1982); Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 992 (1971); *but cf.* Gillespie, *The Thin Corporate Line: Loss of Limited Liability Protections*, 45 N.D. L. REV. 363, 373 (1969) (suggesting the existence of a trend toward distinguishing between different kinds of shareholders). The shift toward imposing liability upon parent corporations has been justified on the ground that the parent's shareholders are "really seeking a double insulation" through the use of the subsidiary mechanism. *See* Fuller, *The Incorporated Individual: A Study of the One-Man Company*, 51 HARV. L. REV. 1373, 1382 (1938).

Similarly, courts do not distinguish between the liability of parent corporations for the obligations of their subsidiaries and the liability of two commonly owned corporations for each other's acts (the so-called "brother-sister" situation). *See* Hamilton, *supra*, at 991. Brother-sister liability is relatively rare, however, with the important exception of the "double-breasting" labor context described below. *See infra* note 104 and accompanying text.

More importantly, publicly traded corporations are essentially irrelevant as far as veil-piercing is concerned. Case law reveals that every pierced veil has been that of a closely held corporation or a corporate subsidiary.[29] Further, as explained in Part III, contemporary scholarship suggests that, under existing joint and several liability principles, limited liability is only appropriate for publicly traded corporations, and that modifying the limited liability rule for close corporations and subsidiaries would not have serious negative consequences.[30]

1. *Piercing the Veil Against Individual Shareholders*

Courts have relied upon a panoply of factors in deciding whether to impose liability upon individual shareholders, but their analyses have usually failed to identify the criteria they consider most important and explain the bases for this perceived importance. Indeed, one scholar has observed that the typical laundry-list of justifications for piercing the corporate veil are "as if a patient died of poisoning and the autopsy reported the cause of death as ingestion of steak, carrots, arsenic, and squash."[31] Further, there is often little or no connection between the corporate acts that are invoked to justify veil-piercing and the acts that harm the plaintiff who thereby recovers from shareholders.[32]

This confusion notwithstanding, the basic principles are fairly clear. Veil-piercing remains the exception, not the rule, and a creditor is not entitled to reach shareholder assets merely because a single individual owns all the corporation's stock,[33] or because the corporation cannot satisfy the creditor's claim[34] — even if the corporation

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29. *See, e.g.*, Epperson & Canny, *The Capital Shareholder's Ultimate Calamity: Pierced Corporate Veils and Shareholder Liability in the District of Columbia, Maryland, and Virginia*, 37 CATH. L. REV. 605, 613 (1988); Barber, *Piercing the Corporate Veil*, 17 WILLIAMETTE L. REV. 371, 372 (1981).

30. *See infra* notes 360-73 and accompanying text. *Cf.* Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259 (1967) (proposing a "dual theory" of close and publicly traded corporations).

31. Dobbyn, *A Practical Approach to Consistency in Veil-Piercing Cases*, 19 U. KAN. L. REV. 185, 189 (1971).

32. *See* Clark, *The Duties of the Corporate Debtor To Its Creditors*, 90 HARV. L. REV. 505, 553 (1977).

33. *See, e.g.*, 1 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10, at 398 (C. Van Swearingen ed. 1983 rev. vol.)[hereinafter "FLETCHER CYCLOPEDIA"].

34. *See, e.g.*, Baldwin v. Matthew R. White Investments, Inc., 669 F. Supp. 1054, 1057 (D. Utah 1987):

> [A] claimant's inability to collect a judgment from a corporation is not enough to show that fraud or inequitable conduct resulted from the use of the corporate structure. . . . A decision to the contrary would totally eviscerate the doctrine of limited

clearly was formed for the express purpose of limiting its owners' liability.[35] Rather, the corporate veil will usually be pierced only when the shareholders have committed one or more particular kinds of abuse. Although these violations are often fraudulent in nature, it is now generally recognized that a veil may be pierced without evidence of actual fraud.[36]

First, the shareholders may have failed to treat the corporation as a separate entity, by commingling corporate and personal assets or by neglecting to observe the necessary procedural formalities, such as the obligations to maintain formal records and to conduct proper shareholders' and directors' meetings.[37] Second, they may have concealed the existence of the corporation as a distinct enterprise, or intimated that individual shareholders would be responsible for obligations actually owed by the corporation.[38] Third, and most

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> liability for corporate shareholders, and undermine a fundamental protection that encourages business venture.

Id.

35. *See, e.g.*, Zubik v. Zubik, 384 F.2d 267, 273 (3d Cir. 1967), *cert. denied*, 390 U.S. 988 (1968). The *Zubik* court noted an exception to this principle, however, where shareholders manifest the "specific intent to escape liability for a specific tort or class of torts." *Id.*

36. *See, e.g.*, Cunningham v. Rendezvous, Inc., 699 F.2d 676, 680 (4th Cir. 1983); *see also* United States v. Jon-T Chem., Inc., 786 F.2d 686, 692 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986) (suggesting that evidence of fraud should be required in veil-piercing cases involving contract creditors but not in those involving tort creditors).

37. For a detailed inventory of the specific improper acts that may permit veil-piercing on these grounds, *see* Barber, *supra* note 29, at 374-75.

Courts and commentators have differed over the importance of observance of corporate formalities in veil-piercing determinations. Those who favor directing attention to the formalities contend that attention to these rites provides "an excellent litmus of the extent to which the individuals involved actually view the corporation as a separate being." Labadie Coal Co. v. Black, 672 F.2d 92, 97 (D.C. Cir. 1982) (emphasis deleted). Others have suggested that this aspect of the veil-piercing doctrine is intended to create an incentive to comply fully with state corporation laws. 1 FLETCHER CYCLOPEDIA § 41.10, at 167 (J. Reinholtz & C. Keating eds. 1989 Cum. Supp.). In some cases, moreover, the shareholders' failure to observe formalities may directly harm a specific creditor. For example, the failure of a corporation's directors to meet and discuss the corporation's lack of insurance might be relevant to the claim of an accident victim whose injuries are not compensated by the insolvent corporation or by its unpurchased insurance policy. *See* Barber, *supra* note 29, at 378-79. Other commentators, in contrast, have suggested that corporate formalities are largely irrelevant, especially in cases involving tort creditors, and that courts invoke inattention to formalities as a " 'make-weight' argument to support the general conclusion that justice requires the court to provide a remedy." Downs, *Piercing the Corporate Veil — Do Corporations Provide Limited Liability?*, 53 U. MO. K.C. L. REV. 174, 177 (1985); *see also* Comment, *Limited Limited Liability*, *supra* note 23, at 342 (suggesting that the corporate formalities are "essentially meaningless").

38. *See, e.g.*, Barber, *supra* note 29, at 374-75. *But cf.*, DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 687 n.18 (4th Cir. 1976) (suggesting that veil-piercing was appropriate when shareholders indicated that they stood "personally behind the corporation and would see that its indebtedness was paid"). Robert Clark describes these kinds of misrepresentations as " 'soft-core' fraud," presumably to be distinguished from "hard-core"

important,[39] the owners may not have endowed the corporation with capital sufficient to sustain its business needs, or may otherwise have failed to operate the corporation as a genuinely viable business enterprise.[40] Every veil-piercing inquiry is fact-specific, and all criteria need not be satisfied in any particular case.[41] Most courts require an overall pattern of abuse and injustice before imposing liability on individual shareholders, but others have pierced the corporate veil solely on the ground of undercapitalization.[42]

2. *Piercing the Veil Against Corporate Shareholders*

Even when a corporation is wholly owned by another corporation rather than individual shareholders, the basic rule of limited lia-

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common law fraud. Clark, *supra* note 32, at 544.

39. *See, e.g.*, Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 214 (1929) (parent-subsidiary context).

40. *See* Barber, *supra* note 29, at 374-75. In assessing the adequacy of a corporation's capitalization, "the crucial factor is the sufficiency of the cushion provided creditors by means of the portion of total assets represented by equity capital." Note, *Liability of a Corporation for Acts of a Subsidiary or Affiliate*, 71 HARV. L. REV. 1122, 1128 (1958); *see also* In re Mobile Steel Co., 563 F.2d 692, 703 (5th Cir. 1977) (citing Rembar, *Claims Against Affiliated Companies in Reorganization*, 39 COLUM. L. REV. 907, 915-16 (1939)) ("Capitalization is inadequate if, in the opinion of a skilled financial analyst, it would definitely be insufficient to support a business of the size and nature of the [corporation in question] in light of the circumstances existing at the time the [corporation] was capitalized.").

Commentators have disagreed over the appropriateness of judicial scrutiny of the adequacy of capitalization. *Compare* Krendl & Krendl, *supra* note 23, at 37 (suggesting that such an inquiry exceeds courts' competence) and Downs, *supra* note 37, at 186 n.62 (suggesting that undercapitalization analysis presents too tempting an opportunity for excessively clear hindsight) *with* Dobbyn, *supra* note 31, at 191-92 (arguing that the vagueness of the existing standard encourages investors to err on the side of caution in capitalizing corporations). Commentators also differ as to whether the adequacy of a corporation's capitalization should be measured only at the time of incorporation or throughout the life of the corporation. *Compare* Downs, *supra* note 37, at 188 (suggesting that a continuing capitalization obligation would impose an excessive disincentive to investment, given that the great majority of new businesses fail) *with* Barber, *supra* note 29, at 396 (contending that a failure to require adequate ongoing capitalization could permit a corporation to maintain a dangerously weak capital foundation, even while it expanded rapidly, severely jeopardizing its creditors' interests). Finally, some commentators have argued that shareholders should not be held liable for the full amount of undercapitalized corporations' obligations, but rather, should only be required to compensate creditors up to the amount that would constitute adequate capitalization. *See* Comment, *Limited Limited Liability*, *supra* note 23, at 321.

41. *See* 1 FLETCHER CYCLOPEDIA, *supra* note 33, § 41.30, at 430.

42. *Compare* Barber, *supra* note 29, at 376 (quoting *Automotriz del Golfo de California v. Resnick*, 47 Cal.2d 792, 796 (1957)) (noting that most veil-piercing cases apply a two-prong test: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual [shareholders] no longer exist; and (2) that, if the acts [that lead to a creditor's successful veil-piercing claim] are treated as those of the corporation alone, an inequitable result will follow.") *with* Minton v. Cavaney, 56 Cal.2d 576 (1961) (piercing a corporation's veil based solely on its undercapitalization).

bility prevails, so that the stockholding corporation is immune from liability except in unusual circumstances.[43] Accordingly, the mere fact that a parent corporation owns all the stock of a subsidiary and exercises the authority ordinarily incident to ownership does not provide a basis for piercing the subsidiary's veil.[44]

Under the traditional rule, rather, a creditor may only recover from the parent by demonstrating that the parent has gone beyond the normal exercise of ownership control over the subsidiary, by preventing the subsidiary from operating as a genuinely independent entity, for example, or by interfering in its decision-making structures and procedures.[45] In such circumstances, a subsidiary is considered a mere "instrumentality" of its parent.[46] By the same token, a subsidiary's veil may be pierced if the subsidiary is not organized and managed to ensure that it maintains a realistic potential for profitability — as when it sells all its output to the parent at below-market prices or pays the parent excessive rent or interest — or if the opposite prevails, and the parent pays the subsidiary's rent or other operating expenses.[47] Finally, acts and omissions that would cause veil-piercing as against individual shareholders will also lead to liability for parents: when the subsidiary is undercapitalized or neglects corporate formalities, for example, or when creditors are misled into believing that the parent will assume the subsidiary's obligations.[48]

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43. Application of the limited liability principle in the context of the subsidiary corporation has been widely criticized. *See, e.g.*, Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 605, 607 (1986) (arguing that limited liability for parent corporations "emerged as a historical accident" and that the doctrine has been "applied unthinkingly and automatically to the parent corporation").

44. This principle is a venerable one. *See* United States v. Reading Co., 253 U.S. 26, 62-63 (1920).

45. *See* Douglas & Shanks, *supra* note 39, at 218. Interference of this kind may be wholesale in nature or may take place only in the particular transaction that gives rise to the dispute in question. *Id.* at 214; *see also* Esmark, Inc. v. NLRB, 887 F.2d 739, 757 (7th Cir. 1989) (explaining the doctrine). For a litigation-oriented summary of parent-subsidiary veil-piercing law, see Berzon, *Piercing the Corporate Veil: the Nuts and Bolts*, LAB. LAW EXCHANGE (AFL-CIO Lawyers Coordinating Comm.) No. 9, *Workplace Closure Issues*, at 7 (1991).

46. *See, e.g.*, United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986). For detailed enumerations of the factors that will support veil-piercing in the parent-subsidiary context, see United States v. Advance Machine Co., 547 F. Supp. 1085, 1093 (D. Minn. 1982); Krendl & Krendl, *supra* note 23, at 52-55.

47. *See* Landers, *A Unified Approach To Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 621-22 (1975); *see also* Krendl & Krendl, *supra* note 23, at 52-55.

48. *See, e.g.*, Krendl & Krendl, *supra* note 23, at 52-55 (noting that a subsidiary's veil may be pierced when its creditors are misled concerning the subsidiary's solvency or its rela-

B. Special Veil-Piercing Problems in Federal Question Cases

The great majority of veil-piercing cases arise under state contract or tort law, and veil-piercing determinations in these cases are made through application of the basic common law doctrines summarized previously. When a plaintiff's claim arises under a federal statute, however, the veil-piercing problem is complicated by substantial choice-of-law issues. As with other issues in federal question cases, federal courts are required to determine whether they should follow pertinent principles of state law or instead should, develop and apply federal common law. In many instances, however, federal courts have ignored the necessity of this determination and have applied state corporate law doctrine in their veil-piercing cases without giving any attention to the choice-of-law question. Even when courts have determined that a specific statutory context requires a federal rule of decision, moreover, they have often turned to a generalized mass of judge-made federal veil-piercing law rather than developing a specific doctrine that is attuned to the particular statutory concerns at issue.

The conflict between federal statutory policy and state corporate law may also arise through the federal courts' refinement of the long-established principle that the fiction of corporate separateness will not be permitted to frustrate public policy.[49] Under the prevailing federal modification of this principle, federal courts refuse to accept state law's deference to corporate form when doing so would frustrate the principles or policies of a federal statute.[50] Although the traditional common law "public policy" rule is more honored in the breach than in the observance,[51] this federal corollary is far from dormant, and federal courts have relied on it to impose shareholder liability under a wide variety of federal statutes. In recent years,

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tionship to the parent); *Advance Machine*, 547 F. Supp. at 1093 (suggesting that liability may be imposed on a parent when "the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.").

49. For a summary of the traditional doctrine, see, for example, Krendl & Krendl, *supra* note 23 at 29-31.

50. *See* United States v. Pisani, 646 F.2d 83, 89 (3d Cir. 1981); United States v. Normandy House Nursing Home, Inc., 428 F. Supp. 421, 424-25 (D. Mass. 1977).

51. *But see, e.g.*, Sundaco, Inc. v. State, 463 S.W.2d 528 (Tex. Civ. App. 1970) (piercing the corporate veil on the ground of statutory frustration). Unlike the federal statutory frustration doctrine, however, the common law public policy exception does not ordinarily provide an independent basis for piercing the corporate veil. *See* Comment, *Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough?*, 13 PAC. L.J. 1245, 1255 (1982) [hereinafter "Comment, *Circumvention of a Statute*"]. For examples of federal statutory frustration cases, *see infra* note 80.

moreover, several federal courts have broadened the doctrine, holding that any corporate failure to satisfy a federal statutory obligation constitutes a frustration of the statute sufficient to permit the imposition of shareholder liability.

1. Choice of Law Problems

Federal courts have demonstrated considerable confusion in determining the law applicable to veil-piercing questions. In diversity cases, state law properly provides the rule of decision,[52] but even in federal question cases, several courts have applied state law unquestioningly.[53] Other courts have avoided choice-of-law problems by asserting that state and federal veil-piercing law would produce an identical result in the particular case.[54] Indeed, many courts cite federal and state cases interchangeably, without explanation.[55]

Nonetheless, the proper approach is relatively easy to discern. The choice-of-law inquiry in federal question veil-piercing cases is a straightforward matter of federal common law; basic post-*Erie* choice-of-law principles apply.[56] Under this regime, state law "should apply when it is not inconsistent with federal interests for it to do so,"[57] but it "is inapplicable to those areas of judicial decision

52. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also* United States v. Peña, 731 F.2d 8, 12 (D.C. Cir. 1984) (reversing a veil-piercing decision on the ground that the district court had improperly applied federal precedents instead of considering the "distinct" question of whether the "corporate veil ought to be pierced for purposes of allocating state tort or contract liabilities"); DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 687 (4th Cir. 1976) (applying South Carolina law in a diversity case). *But see* C.M. Corp. v. Oberer Devel. Co., 631 F.2d 536, 538-39 (7th Cir. 1980) (applying federal veil-piercing law in a diversity case); Van Dorn Co. v. Future Chem. & Oil Corp., 753 F.2d 565, 571 (7th Cir. 1985) (criticizing earlier Seventh Circuit diversity cases' reliance on federal law to determine veil-piercing questions).

53. *See, e.g.*, United States v. Daugherty, 599 F. Supp. 671 (E.D. Tenn. 1984) (applying state corporate law in a case arising under the Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87, Title I, § 101, 91 Stat. 447 (1977) (codified at 30 U.S.C. §§ 1201-328 (1988)); Country Maid, Inc. v. Haseotes, 299 F. Supp. 633 (E.D. Pa. 1969) (applying state corporate law in a case arising under the Robinson-Patman Antidiscrimination Act, 15 U.S.C. § 13 (1988) [hereinafter "Robinson-Patman Act"].

54. *See, e.g.*, Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260, 268 (D. Del. 1989); United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 690 n.6 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

55. *See Jon-T Chemicals*, 768 F.2d at 690 n.6. For a discussion of federal courts' confusion concerning the choice-of-law problem in veil-piercing cases, see P. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY GROUPS §§ 18.01-18.08 (1987).

56. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

57. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 983 (1986) (emphasis deleted).

within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law."[58] As a number of courts have recognized, the appropriate analytic framework is based on the Supreme Court's decision in *United States v. Kimbell Foods, Inc.*,[59] which established a three-part test to determine whether state law should be followed or federal law developed in cases involving federal programs.

Under *Kimbell Foods*, a federal court should first ascertain whether a need for national consistency suggests the appropriateness of a uniform federal rule; second, it should consider the degree to which "application of state law would frustrate specific objectives" of a federal statute; and third, it should assess "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law."[60] Applying these basic principles to the problem of piercing the corporate veil, federal courts "must determine, as a matter of federal law, whether the federal interest at stake requires a uniform national [veil-piercing] rule," "whether application of a state rule would frustrate specific objectives of federal law," and whether application of a federal veil-piercing doctrine would upset commercial relationships structured on state law.[61]

Consideration of the first *Kimbell Foods* criterion in the veil-piercing context necessarily requires a different result according to the nature of the federal program or statute at issue. Some statutes, even though enacted at the federal level, may not necessarily require national uniformity in the applicable rules of decision. On the other hand, most federal statutes are responses to important nationwide concerns, and in particular, as explained in Part III, Section B, the

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58. Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942).

59. 440 U.S. 715 (1979).

60. *Id.* at 728-29.

61. Orloff v. Allman, 819 F.2d 904, 909 (9th Cir. 1987).

The *Orloff* court inexplicably failed to enumerate or consider the third *Kimbell Foods* criterion. *Id.*

> Among the factors to be considered in making this determination are the extent to which: (1) a need exists for national uniformity; (2) a federal rule would disrupt commercial relationships predicated on state law; (3) application of state law would frustrate specific objectives of the federal program; (4) implementation of a particular rule would cause administrative hardships or would aid in administrative conveniences; (5) the regulations lend weight to the application of a uniform rule; (6) the action in question has a direct effect on financial obligations of the United States; and (7) [a] substantial federal interest in the outcome of the litigation exists.

Id.; *See* Comment, *Circumvention of a Statute*, *supra* note 51, at 1249-50 (footnotes omitted); *see also* Field, *supra* note 57, at 953-62.

federal labor laws generally impose a strong preemptive effect and consistently require uniform national rules, so as to render fluctuations between states intolerable.

The second *Kimbell Foods* criterion also varies in impact in different contexts. Some federal statutes may advance policies similar to those of state corporate law, while others may have dramatically different, even contrary, purposes. In considering whether state veil-piercing rules would interfere with federal policies, federal courts should pay particular attention to whether the statute in question places importance upon the corporate form.[62] This inquiry involves analysis of the statute's language concerning the significance of incorporation and the degree of strictness of liability imposed by the statute.[63]

The third criterion is probably more constant. State interests in toughening corporate veils are not especially strong, and differing federal doctrines of shareholder liability cannot therefore be expected to disrupt important state commercial relationships. For veil-piercing does not implicate the heart of state corporate law, which defines the very existence of corporate institutions through the regulation of corporate formation and dissolution and controls the ongoing operation of corporations with rules concerning ownership and management structure. Although the states retain a substantial interest in matters relating to these internal corporate affairs, the limited liability principle is generally considered a peripheral doctrine intended only to buttress the basic corporate structure rather than define it.[64]

More importantly, federal veil-piercing doctrines cause minimal interference with state interests because imposing shareholder liability for the purposes of a particular federal statute does not necessarily lead to liability for other purposes.[65] A federal court's veil-piercing determination in favor of a federal regulatory agency, for example, would not redound to the benefit of the corporation's trade

62. *See* Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981).

63. *See* United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988).

64. *See* Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 862-63 (1982) [hereinafter "Note, *Piercing the Veil*"].

65. *Id.* at 865; *see* Corn Products Refining Corp. v. Benson, 232 F.2d 554, 565 (2d Cir. 1956); *see also* Amarillo Oil Co. v. Mapco, Inc., 99 F.R.D. 602, 603 (N.D. Tex. 1983).

> "'The' corporate veil has become something of a misnomer in recent times. Since the end accomplished by piercing a corporate veil has such an impact on whether to pierce, and because the courts have recognized that a corporate veil may be pierced for one purpose, but not another, today's corporation is multiveiled."

Id.

creditors, who would still be required to demonstrate the appropriateness of shareholder liability under traditional state law doctrines. As such, particularized federal veil-piercing doctrines cannot be said to interfere with state law or state commercial relationships to any substantial degree.

Although their holdings have not been expressed within the framework of *Kimbell Foods*, some courts have expressed a substantially different perspective on the problem of interference with state law. In this view, the limited liability principle must be considered a basic feature of the legal background against which Congress legislates.[66] Accordingly, these courts have contended that unless Congress explicitly establishes specific grounds for piercing the corporate veil within the text of a statute, federal courts must accord corporations and their owners the established privileges of state corporate law, upon which they may reasonably have relied.[67] However, upon closer examination, this alternative inquiry merely represents a short cut of the *Kimbell Foods* analysis: it implicitly preempts the first *Kimbell Foods* criterion by holding that dominant federal interests are only present when Congress expressly declares them, and obliterates the third by holding that federal veil-piercing doctrines will invariably and inevitably disrupt commercial relationships based on state law.

In contrast, courts that interpret *Kimbell Foods* to require specifically federal veil-piercing standards in appropriate situations take a less myopic view in shaping these federal rules of decision. If a statute and its legislative history are silent with respect to the problem of corporate form, these courts analyze the federal interests and policies underlying the statute to shape a veil-piercing standard.[68]

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66. *See, e.g.*, Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222, 226 (W.D. La. 1988) (stating that "the corporate form, including limited liability for shareholders, is a doctrine firmly entrenched in American jurisprudence that may not be disregarded absent a specific congressional directive"), *aff'd*, 893 F.2d 80 (5th Cir. 1990); DeBreceni v. Graf Bros. Leasing, Inc., 828 F.2d 877, 880 (1st Cir. 1987) (stating that "the principle of limited liability for corporate debts is longstanding enough and important enough to be considered a background norm, against which Congress may act of course, but which is controlling in the absence of such action."), *cert. denied*, 484 U.S. 1064 (1988).

67. *Cf.* Gibraltor Amusements, Ltd. v. Wurlitzer Co. (In re Gibraltor Amusements, Ltd.), 291 F.2d 22, 25 (2d Cir.), *cert. denied*, 368 U.S. 925 (1961) (stating that "[i]f Congress meant to alter ordinary judicial rules governing corporations, it should have so provided specifically.").

68. *See* Note, *Liability of Parent Corporations*, *supra* note 27, at 1001; Note, *Piercing the Veil*, *supra* note 64. When legislative history has addressed directly the matter of corporate form, however, courts have been known to rely upon this history. *See, e.g.*, Bruhn's Freezer Meats v. United States Dep't of Agric., 438 F.2d 1332, 1343 (8th Cir. 1971) (invoking legislative history to impose an injunction upon individual shareholders under the Packers and Stock-

This approach demonstrates a more realistic view of the legislative process, for congressional enactments simply cannot be expected to fill in every possible gap, and it is certainly more calculated to ensure the fulfillment of federal statutory policy.[69]

The *Kimbell Foods*-based veil-piercing analysis has now been applied in a wide variety of statutory contexts. In almost all instances, federal veil-piercing doctrines have accorded a lesser degree of respect to the corporate form than would parallel state doctrines.[70] In considering the appropriateness of shareholder liability to the federal government for unreimbursed overpayments to corporate Medicare[71] providers, for example, the Third Circuit held that a uniform federal veil-piercing rule was proper in light of Medicare's policy of paying health care providers only for the reasonable cost of services rendered, and the undesirability of subjecting the federal government's rights concerning Medicare to shifting state law doctrines.[72] An overly strict doctrine transferred from state law, the court of appeals reasoned, could impede fulfillment of Medicare's policy of prompt reimbursement.[73]

Similarly, several courts have applied *Kimbell Foods* to determine that a uniform federal common law rule is required to resolve veil-piercing problems arising under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[74] These courts have observed that attempts to ensure the cleanup of toxic sites should not depend on the vagaries of state corporate law or the domiciles of particular defendants, and that a fed-

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yards Act, 1921, ch. 64, § 1, 42 Stat. 159 (1921) (codified at 7 U.S.C. §§ 181-229 (1988)) [hereinafter "Packers and Stockyards Act"].

69. *See* Note, *Piercing the Veil, supra* note 64, at 857, 858 (suggesting that this conservative approach "ignores legal realities" because courts must necessarily close "unintentional loopholes" left by Congress).

70. *See* Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981); *but see* Audit Services, Inc. v. Rolfson, 641 F.2d 757, 764 (9th Cir. 1981) (holding that shareholder liability could not be imposed under the LMRA even when Montana corporate law would permit it).

71. "Medicare" is the common name for the Health Insurance for the Aged Act, Pub. L. 89-97, Title I, 79 Stat. 291 (1965) (codified at 42 U.S.C. § 1395 (1988 and 1990 Supp.)).

72. *See* United States v. Pisani, 646 F.2d 83, 86-87 (3d Cir. 1981). Having announced its intention to fashion a federal rule, however, the *Pisani* court proceeded to place heavy reliance upon DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 687 (4th Cir. 1976), a diversity case in which South Carolina law was applied. *See Pisani*, 646 F.2d at 88; *see also* United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 690 n.6 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986) (noting the *Pisani* court's error).

73. *See Pisani*, 646 F.2d at 86.

74. Pub. L. 96-510, Title I, § 101, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-75 (1988)). In the same manner, federal decisional rules have also been found applicable in the admiralty context. *See, e.g.*, Bergesen d.y. A/S v. Lindholm, 760 F. Supp. 976, 986-87 (D. Conn. 1991).

eral rule would not disrupt commercial relationships based on state law because shareholder reliance on state law properly involves only the corporation's internal affairs, rather than its dealings with third parties.[75]

Even among the courts that recognize the appropriateness of federal veil-piercing rules in federal question cases, however, there are substantial differences in approach. Some courts attempt to fashion a general body of federal veil-piercing law, whose principles are to be applied in all shareholder liability cases involving federal statutes, no matter what the actual federal statute at issue.[76] Others have attempted to devise more particularized legal tests that take into account the specific policies of the particular statutes in question.[77]

The former approach seems to misconstrue *Kimbell Foods* and upset its balance of federal and state interests. Without attention to the distinctions between different statutory contexts, federal courts will necessarily ignore the nature and significance of state interests in different areas of the law, thereby abdicating their obligation to fulfill the policies of federal statutes and to carefully assess the impact of federal decisional rules upon commercial relationships that rely on state law.[78] More important, if a court determines that application of a state rule might undermine the specific policies of a particular federal statute, or that a particular federal statute places no importance on the corporate form, it does not follow that a generic federal veil-piercing rule will necessarily assuage those concerns. A generic rule, after all, could be tailored to fit federal statutes that lack these exceptional characteristics. Such insensitivity might also eviscerate the crucial principle that piercing the veil in one context does not eliminate its protections in other situations; imposition of shareholder liability for one isolated federal violation could lead au-

75. *See In re* Acushnet River Proceedings, 675 F. Supp. 22, 31 (D. Mass. 1987); *see also* United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989); United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988). For a careful discussion of recent developments in the law of shareholder CERCLA liability, see Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 352-54 (D.N.J. 1991).

76. *See, e.g.*, Orloff v. Allman, 819 F.2d 904, 909 (9th Cir. 1987) (applying a veil-piercing test developed in federal labor cases in the securities fraud context); *see also Nicolet*, 712 F. Supp. at 1202 (analyzing CERCLA liability under "general" federal common law, but then proceeding to state a CERCLA-specific test as well).

77. *See, e.g.*, Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1542-44 (W.D. Mich. 1989); *Nicolet*, 712 F. Supp. at 1202 (suggesting a CERCLA-specific test); *Acushnet*, 675 F. Supp. at 31 (same).

78. *See* Note, *Piercing the Veil, supra* note 64, at 864; *see generally* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

tomatically to liability for all federal violations, because the rule of decision would be constant.[79]

The better approach, therefore, is to fashion specific veil-piercing doctrines that pay attention to the particular federal statutory policies involved. A veil might thus be pierced under one federal statute but not under another; the shape of the rule would likely depend on the importance of corporate form within a particular statutory framework. Part III, Section B, will develop this argument in the labor context and contend that a strict veil-piercing doctrine that seeks to protect corporate investors is especially inappropriate in the context of the labor laws, which, unlike state corporations laws, are not expressly designed to satisfy the needs of corporate investors.

2. *The Statutory Frustration Doctrine*

Problems of federalism also arise in the statutory frustration doctrine, which holds that the fiction of corporate separateness must not be permitted to frustrate the principles or policies of federal statutes, even in circumstances that would lead a court applying state law to defer to the corporate form. The statutory frustration doctrine has been applied in a wide variety of circumstances and under a panoply of federal statutes,[80] most commonly through the extension of

79. *See supra* note 65 and accompanying text.

80. For applications of the doctrine, *see, e.g.*, United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), *cert. denied*, 479 U.S. 1030 (1987) (applied to Department of Energy regulations); West v. Costen, 558 F. Supp. 564, 587 (W.D. Va. 1983) (applied to to Fair Debt Collection Practices Act, Pub. L. 90-321, Title VIII, 91 Stat. 874 (1977) (codified at 15 U.S.C. §§ 1692-6920 (1988)); United States v. Thomas, 515 F. Supp. 1351 (W.D. Tex. 1981) (applied to Medicare); United States v. Reserve Mining Co., 380 F. Supp. 11 (D. Minn. 1974), *modified*, 514 F.2d 492 (8th Cir. 1975) (applied to Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified at 33 U.S.C. § 1151)) [hereinafter "Federal Water Pollution Control Act"]; Zale Corp. v. FTC, 473 F.2d 1317 (5th Cir. 1973) (applied to Consumer Credit Protection Act, Pub. L. 90-321, Title I, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1600-667e) (1988)); United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110 (D. Vt.), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974) (applied to Rivers and Harbors Act, 33 U.S.C. § 403 (1988)); Casanova Guns, Inc. v. Connolly, 454 F.2d 1320 (7th Cir. 1972) (applied to Gun Control Act, Pub. L. 90-351, Title IV, § 902, 82 Stat. 226 (1968) (codified at 18 U.S.C. §§ 921-30 (1988)); Bruhn's Freezer Meats v. Dep't of Agric. 438 F.2d 1332 (8th Cir. 1971) (applied to Packers and Stockyards Act); H.P. Lambert Co. v. Secretary of Treasury, 354 F.2d 819 (1st Cir. 1965) (applied to the Tariff Act of 1930, codified at 19 U.S.C. §§ 1202-654 (1988)); Kavanaugh v. Ford Motor Co., 353 F.2d 710 (7th Cir. 1965) (applied to the Automobile Dealers' Franchise Act, ch. 1038, § 1, 70 Stat. 1125 (1956) (codified at 15 U.S.C. §§ 1221-25 (1988)) [hereinafter "Automobile Dealers' Franchise Act"]; Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785 (D.C. Cir. 1965) (applied to the Robinson-Patman Act); Sell v. United States, 336 F.2d 467 (10th Cir. 1964) (applied to the Commodity Credit Corporation Charter Act, ch. 704, § 2, 62 Stat. 1070 (1948) (codified at 15 U.S.C. § 714 (1988)); Corn Products Refining Co. v. Benson, 232 F.2d 554 (2d Cir. 1956) (applied to the Commodity Exchange Act, Ch. 369, § 1, 42 Stat. 998

injunctions to the owners of offending corporations, so as to bar shareholders from simply incorporating new entities and continuing unlawful conduct.[81]

Federal courts have justified the statutory frustration doctrine on the ground that state law protections of the corporate shield should not necessarily stand in the way of veil-piercing under federal law.[82] As the Supreme Court announced in *Anderson v. Abbott*,[83] the lead case, a state "may choose such rules of limitation on the liability of stockholders of her corporations as she desires . . . [b]ut no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy . . . which Congress has announced."[84] Because the states charter corporations, though, and deliberately shroud them with limited liability for the purpose of encouraging business investment, the states do retain an interest in protecting the corporate entity when its integrity is challenged in state court.[85] But federal courts are obliged to enforce and vindicate federal statutes, not state corporate law, and therefore need not defer to the states' attempts to protect their corporations, if doing so would jeopardize the federal courts' mission to enforce federal laws.[86]

In its practical application, the statutory frustration doctrine consistently involves a lesser degree of deference to the principle of limited liability than does state corporate law. When federal courts pierce the corporate veil on the ground of statutory frustration,

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(1936) (codified at 7 U.S.C. §§ 1-24 (1988)); Schenley Distillers Corp. v. United States, 326 U.S. 432 (1946) (per curiam) (applied to the Interstate Commerce Act, 49 U.S.C. § 309 (1988)); Alabama Power Co. v. McNinch, 94 F.2d 601 (D.C. Cir. 1937) (applied to the Federal Power Act, ch. 285, 41 Stat. 1077 (1920) (codified as amended at 16 U.S.C. § 797 (1988)); FTC v. Standard Education Society, 302 U.S. 112 (1937) (applied to the Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-77 (1988)).

For an interesting illustration of the genesis of the statutory frustration doctrine, see Linn & Lane Timber Co. v. United States, 236 U.S. 574 (1914) (Holmes, J.).

81. *See, e.g., Bruhn's Freezer Meats*, 438 F.2d at 1343 (extending an injunction to individual shareholders); *H.P. Lambert*, 354 F.2d at 822 (extending an injunction to a corporate affiliate).

82. *See* Anderson v. Abbott, 321 U.S. 349 (1944).

83. 321 U.S. 349 (1944).

84. *Id.* at 365.

85. *See, e.g.*, Pension Benefit Guar. Corp. v. Ouimet Corp., 711 F.2d 1085, 1093 (1st Cir.), *cert. denied*, 464 U.S. 961 (1983) (arising in the ERISA context); Sebastopol Meat Co. v. Secretary of Agric. 440 F.2d 983, 985 (9th Cir. 1971).

86. *See Ouimet*, 711 F.2d at 1093. However, some courts have failed to distinguish between these separate spheres. *See, e.g.*, Connors v. P & M Coal Co., 801 F.2d 1373, 1377 (D.C. Cir. 1986) (referring to the principle of limited liability as a feature of "our" corporate law and neglecting to observe that corporate law is a matter of state rather than federal law).

therefore, the plaintiff's burden of proof may be substantially decreased, so that the veil will be pierced in cases where state common law would almost certainly leave it intact.[87]

Although the statutory frustration doctrine has been developed as a distinct ground for piercing the corporate veil, separate and apart from application of the basic rule of decision that emerges from choice-of-law analysis, the necessary inquiry is probably not substantially different from that required under *Kimbell Foods*.[88] In practical terms, after all, there should be little difference between a rule designed to advance certain statutory policies and a rule designed to prevent their frustration. The statutory frustration doctrine may nonetheless permit shareholder liability more easily: several federal courts have interpreted the doctrine to allow veil-piercing whenever deference to the fiction of corporate separateness would cause a statutory violation to go unremedied. A corporation's inability to pay a particular debt, therefore, might justify shareholder liability in and of itself.[89] Courts engaging in choice-of-law analysis to shape appropriate federal veil-piercing doctrines, in contrast, have not yet expressed their willingness to enforce federal statutes with comparable vigor.

On the other hand, some commentators have attempted to confine the statutory frustration doctrine by distinguishing "between the situations in which a corporation is used in an attempt to evade a federal policy and those in which it is used merely to take best advantage of legal options available to it."[90] In this more restrictive view, courts should impose shareholder liability when "a violation of federal law has resulted from an abuse of the corporate form," but should not "use the violation as an excuse to justify piercing the corporate veil."[91]

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87. *See* Comment, *Circumvention of a Statute*, *supra* note 51, at 1255; Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch, 757 F.2d 184, 191 (8th Cir. 1985). Federal courts frequently refer to the inapplicability of "common law" principles when they explain the statutory frustration doctrine. *See, e.g.*, United States v. Firestone Tire & Rubber Co., 518 F. Supp. 1021, 1039 (N.D. Ohio 1981); P.F. Collier & Son Corp. v. FTC, 427 F.2d 261, 267 (6th Cir. 1970), *cert. denied*, 400 U.S. 926 (1971).

88. 440 U.S. 715 (1979); *see* United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1108 n.6 (D. Del. 1988), *aff'd*, 879 F.2d 860 (3d Cir. 1989) (noting that the statutory frustration "doctrine collapses to some extent into the *Kimbell Foods* choice-of-law analysis").

89. *See, e.g.*, United States v. Thomas, 515 F. Supp. 1351, 1357 (W.D. Tex. 1981); United States v. Normandy House Nursing Home, Inc., 428 F. Supp. 421, 425 (D. Mass. 1977).

90. Note, *Piercing the Veil*, *supra* note 64, at 868.

91. *Id.* at 870; *see* United States v. Firestone Tire & Rubber Co., 518 F. Supp. 1021, 1039-40 (N.D. Ohio 1981) (suggesting that veil-piercing on the basis of statutory frustration is

The case law does not present a coherent definition of statutory frustration or a determinate analysis of when shareholder liability should be imposed on this basis. At one extreme, shareholders have been held accountable for corporate statutory violations when they construct an artificial corporate structure that is deliberately and obviously designed for the express purpose of avoiding particular statutory obligations or prohibitions.[92] But the doctrine is clearly not limited to these extreme cases; courts have repeatedly held that a veil may be pierced to protect federal statutory policy even when the record contains no evidence of actual intent to circumvent the statute.[93] Although its theoretical underpinnings are clear, the doctrine itself is not well defined, and, like many other veil-piercing doctrines, it often appears as a rationalization rather than an explanation for the imposition of shareholder liability.

Other cases appear to have taken a substantially broader view of the statutory frustration principle, holding that a corporation's mere inability to satisfy obligations imposed by statute is sufficient to permit a creditor to turn to the defaulting corporation's shareholders. Such a principle modifies the common law rather substantially, for the traditional rule is firm that insolvency alone does not provide a ground for veil-piercing.[94]

This broader interpretation of the statutory frustration doctrine has been adopted in a number of recent cases, arising under a variety of federal statutes. Several decisions have held that when a corporate health care provider's insolvency renders it unable to reimburse the federal government for Medicare services for which the

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only appropriate where the corporate form is used to indirectly accomplish what otherwise would be prohibited and illegal).

92. *See, e.g.*, Kavanaugh v. Ford Motor Co., 353 F.2d 710 (7th Cir. 1965). In *Kavanaugh*, Ford structured a dealer franchise agreement with the plaintiff dealer so that the franchise was actually held by a dummy intermediate corporation controlled by Ford. When the plaintiff later brought suit alleging violations of the Automobile Dealers' Franchise Act, Ford contended that the intermediate corporation was the actual franchisee and that the plaintiff therefore lacked standing to sue under the Act. The Seventh Circuit rejected Ford's argument, holding that "the totality of facts reasonably supports the inference that the corporate format was deliberately adopted in order to defeat the legislative purpose" of the Act. *Id.* at 717. Ford's liability was proper because, regardless of intent, the format, if given recognition, would effectively insulate Ford from liability under the Act, insofar as the Ford-controlled intermediary would obviously never sue Ford. *Id.*

93. *Id.* at 717 ("[i]ntention is not controlling when the fiction of corporate entity defeats a legislative purpose"); *but see* Note, *Piercing the Veil*, *supra* note 64, at 868 (proposing a more intent-oriented test that considers "whether the corporation was created for a legitimate business purpose or primarily for evasion of a federal policy or statute").

94. *See, e.g.*, Baldwin v. Matthew R. White Invs. Inc., 669 F. Supp. 1054, 1057 (D. Utah 1987).

corporation had previously overcharged, this failure to pay constitutes a frustration of one of Medicare's central policies — that the government is not overcharged for services rendered — such that shareholder liability is appropriate.[95] Similarly, it has been held that a corporation's failure to pay back a government-sponsored mortgage for the construction of low-income housing improperly diverts federal assets and frustrates the federal housing laws, which were adopted to benefit inadequately housed citizens, not real estate developers.[96] Finally, courts have imposed sweeping shareholder liability under federal environmental statutes, suggesting that insolvency alone may provide a sufficient basis to pierce the corporate veil under the Federal Water Pollution Control Act.[97]

Although the Medicare cases have been most explicit in characterizing a corporation's mere failure to pay what it owes as a frustration of statutory policy, Medicare is not distinguishable from the panoply of federal programs that may require reimbursement or other payments to the federal government.[98] Nor is there a significant policy justification for limiting the doctrine to cases in which insolvent corporations leave the federal government out of pocket, while ignoring other situations in which payment is required to satisfy clear federal objectives, such as the Employee Retirement Income Security Act's ("ERISA") goal of assuring adequately funded

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95. *See, e.g.*, United States v. Thomas, 515 F. Supp. 1351, 1357 (W.D. Tex. 1981); United States v. Normandy House Nursing Home, Inc., 428 F. Supp. 421, 425 (D. Mass. 1977). Other similar Medicare cases have relied on state corporate law and have thus not developed the statutory frustration doctrine, although they have pierced the veil of particular corporate defendants. *See* Woodland Nursing Home v. Harris, 514 F. Supp. 110 (S.D.N.Y. 1981); United States v. Healthwin-Midtown Convalescent Hosp. & Rehabilitation Ctr., Inc., 511 F. Supp. 416 (C.D. Cal. 1981).

96. *See* United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1107-08 (D. Del. 1988), *aff'd*, 879 F.2d 857 (3d Cir. 1989) (contending that a diversion of federal housing funds to the shareholders of insolvent corporate debtors would "result[] in a diminution of assets that would otherwise have been available to pay other . . . claims, make emergency repairs, and advance funds to protect other [federal] projects" and "would fly in the face of . . . clear legislative policy"). The *Golden Acres* court noted, however, that the broadly interpreted statutory frustration doctrine has not generally provided the exclusive basis for veil-piercing decisions. 702 F. Supp. at 1108 n.6.

97. *See, e.g.*, United States v. Reserve Mining Co., 380 F. Supp. 11, 28 (D. Minn. 1974), *modified*, 514 F.2d 492 (8th Cir. 1975) (noting the insolvency of the offending subsidiary as one of several reasons to pierce its parent's veil and impose liability under the Federal Water Pollution Control Act); *see also* Valley Finance Co. v. United States, 629 F.2d 162, 171-72 (D.C. Cir. 1980) (holding that "the [federal] Government's inability otherwise to satisfy legitimate tax debts clearly may form a sound basis for . . . disregard of corporate form."), *cert. denied*, 451 U.S. 1018 (1981).

98. *See* Comment, *Circumvention of a Statute*, *supra* note 51, at 1263.

pensions.[99] Accordingly, this article contends in Part III, Section B that the federal labor laws should be protected from frustration by the imposition of liability on certain classes of shareholders whenever a labor law violation would otherwise go unremedied.

II. The Present State of the Law: Labor Law Veil Piercing Doctrines

The problem of limited corporate liability has arisen in a wide range of labor contexts. Although the fiction of corporate separateness is generally respected in labor cases, specialized veil-piercing doctrines have been developed under each of the various federal labor laws to tackle the diverse legal problems that arise in different statutory contexts.[100] In most cases, however, courts have adapted to all federal labor statutes the veil-piercing doctrines developed under the NLRA, applying principles developed by the National Labor Relations Board ("NLRB") and by courts deciding NLRA cases. The NLRA doctrines have therefore been widely used to resolve veil-piercing problems arising under both other statutes that implicate collective bargaining, such as ERISA and the Labor Management Relations Act ("LMRA"), and laws that involve individual employment rights, such as Title VII of the Civil Rights Act of 1964 ("Ti-

99. However, certain commentators have suggested such a limitation. *Id.* at 1270.

100. Individual shareholder liability has also been imposed under most of the federal labor statutes on the ground that a particular individual falls within the statutory definition of "employer" and thus shares statutory obligations with the corporation itself. *See, e.g.*, Donovan v. Agnew, 712 F.2d 1509 (1st Cir. 1983) (imposing liability for FLSA violations upon an individual shareholder as an "employer" within the meaning of FLSA Section 3(d), 29 U.S.C. § 203(d) (1988)). In these circumstances, liability is imposed without evidence of abuse of corporate form, as would be required in a traditional veil-piercing analysis based on corporate law principles. Here, rather, the "corporate veil [i]s, in effect, pierced by Congress" when the legislature enacts statutes containing such broad definitions. Pension Benefit Guar. Corp. v. Ouimet Corp., 711 F.2d 1085, 1093 (1st Cir.), *cert. denied*, 464 U.S. 961 (1983) (ERISA context). Although the application and interpretation of these definitions is of considerable importance, the inquiry tends to focus upon close statutory analysis rather than the nexus of labor law and corporate law, and accordingly falls outside the scope of this article.

See P. Blumberg, The Law of Corporate Group Problems of Parent and Subsidiary Corporations Under Statutory Law of General Application § 1.01.4 (1989) (describing such interpretations as examples of "enterprise law," by which courts follow statutory instruction to consider the reality of economic relationships, rather than pursuing traditional "entity law" and deferring to formal distinctions, such as the fiction of separateness between corporations and their owners). Although Blumberg is appropriately critical of the judiciary's inordinate deference to notions of "entity law," *id.* at 13, he overstates the degree to which existing labor law veil-piercing doctrines have followed an alternative course, guided by "enterprise law" principles. *Id.* As shown below, almost all such existing doctrines proceed from traditional assumptions and demonstrate an overwhelming degree of deference to the common law conception of the corporation.

tle VII") and the Age Discrimination in Employment Act ("ADEA").

As this pattern of deference to the NLRA would suggest, the federal courts have not properly fulfilled their responsibility to develop veil-piercing doctrines that are sensitive to the purposes and policies of the different federal labor statutes. Although all the federal labor laws involve workers' rights of one kind or another, their purposes and policies are rather less than identical, and doctrines that vindicate one statute might not necessarily serve another. Moreover, when courts have chosen not to apply specialized NLRA doctrines, most of them have failed to analyze the relationship between corporate law principles and labor law policy, and have relied instead on generic veil-piercing doctrines, either derived from state law or from an undifferentiated mass of federal common law.

More important, neither the NLRB nor the federal courts have ever taken their veil-piercing inquiries back to its foundation by considering whether the limited liability doctrine makes any real sense in the labor context. Instead, serious analysis of the function of limited shareholder liability is almost nonexistent, and the underlying principle of corporate separateness is consistently accepted without question, despite the apparent irrelevance of state corporate law and the persuasiveness of academic arguments concerning the doctrine's limited usefulness. These omissions are especially inappropriate in view of the special role of federal labor law in the American legal system: to some extent at least, this body of law is one that operates as a challenge to the ordinary rules of capitalism, for which unthinking deference to capitalist legal rules — such as corporate law doctrine — is inappropriate.[101]

A. The National Labor Relations Act

The NLRA, which defines the rights of workers to organize and fixes the entitlements of their unions, is America's central labor law.[102] Largely because of this historical and political primacy, NLRA veil-piercing doctrines have become widely accepted in other labor law contexts.

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101. *See* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 285 (1978) (suggesting that the NLRA's "plain language was susceptible to an overtly anticapitalist interpretation" and that the NLRA "by its terms apparently accorded a governmental blessing to powerful workers' organizations that were to acquire equal bargaining power with corporations, accomplish a redistribution of income, and subject the workplace to a regime of participatory democracy.").

102. *See* National Labor Relations Act, 29 U.S.C. §§ 151-69 (1988).

Almost immediately upon the passage of the NLRA in 1935, the NLRB and the federal courts reviewing its decisions began to fashion doctrines by which individual shareholders or nominally separate enterprises could be held responsible for corporate NLRA violations.[103] Imposition of individual shareholder liability under the NLRA has nevertheless been relatively rare, and the applicable legal principles have not been exhaustively considered. Over time, however, and especially in the last two decades, doctrines that regulate intercorporate NLRA liability — by which liability is imposed upon parent corporations or other enterprises linked to an offending corporation by common ownership — have received substantial attention and ignited serious controversy.

1. *Intercorporate Liability*

Under the NLRA, liability for a corporation's obligations is generally imposed upon an affiliated enterprise through the operation of two related but nonetheless distinct theories, the "single employer" and "alter ego" doctrines. Although both these doctrines may be traced back to the early years of the NLRA, their importance has grown dramatically in recent years with the rapid rise of the practice known as "double-breasting," by which employers, particularly construction contractors, divide their operations into two nominally separate business enterprises, one unionized and the other non-union, for the announced purpose of competing in different markets, but often with the intent of defeating unionization.[104] Largely

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103. The NLRA was originally passed in 1935 as the Wagner Act and was amended in 1947, 1959, and 1974. As used in this article, the term "NLRA" includes the original Wagner Act and all amendments thereto.

All cases involving violations of the NLRA pass through the NLRB in the first instance, but NLRB orders are only enforced with the concurrence of the courts of appeals and, through the exercise of its ordinary discretionary jurisdiction, the Supreme Court. *See* NLRA § 10, 29 U.S.C. § 160 (1988). Although NLRB cases thus provide the foundation of NLRA law, court decisions are often of considerable importance as well. Pursuant to its general power to interpret and enforce the NLRA, "the NLRB has been vested with primary authority to determine those situations in which 'piercing the corporate veil' to hold [shareholders] liable for [their corporations'] misdeeds is necessary and appropriate to effectuate the purposes of the federal labor laws." Esmark, Inc. v. NLRB, 887 F.2d 739, 753 (7th Cir. 1989) (citing NLRB v. Deena Artware, Inc., 361 U.S. 398, 403 (1960)); *but see* NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 343 (6th Cir. 1990) (Engel, J., concurring) (suggesting that the NLRB's rulings concerning shareholder liability are not entitled to the same judicial deference as its rulings concerning NLRA interpretation).

See also P. BLUMBERG, *supra* note 100, at sections 13.01-13.18 (discussing generally the veil-piercing doctrine under the NLRA and the LMRA).

104. *See* Comment, *Dual Companies — When Does a Union Have the Right to Expanded Representation?*, 12 U.S.F. L. REV. 89, 89 (1977)(advancing a management-oriented explanation of double-breasting); *see also* Pleasure & Gorman, *Extension of Bargaining*

because the NLRB and reviewing courts have proceeded from common law assumptions about the sanctity of corporate form, double-breasting is not inherently illegal under existing NLRA doctrine. Intercorporate NLRA liability is instead only imposed when the two enterprises become overwhelmingly integrated — something that may be easily avoided with a modicum of employer care. Similarly, although existing NLRA law purports to protect workers from manipulations of corporate form that transform unionized employers into non-union enterprises, the present doctrines incorporate common law assumptions so systematically that proper legal advice may easily facilitate such improper machinations.

a. The "Single Employer" Doctrine

The long-established NLRA "single employer" doctrine seeks to determine whether two or more nominally independent enterprises are sufficiently intertwined that they should be considered a single "employer" for NLRA purposes. In applying this doctrine, the NLRB and reviewing courts consider four basic factors: interrelation of the enterprises' operations; common management; centralized control of labor relations; and common ownership.[105] No one factor is determinative, however, and not all need necessarily be shown.[106] Centralized control of labor relations is usually deemed the most important criterion;[107] indeed, it has sometimes been held that a showing of such centralized control is an absolutely necessary element of a "single employer" finding.[108]

Rights and Contracts to Single Employer and Alter Ego Entities in the Construction Industry, 1984 LABOR LAW DEVELOPMENTS 213, 213-14 (advancing a union-oriented explanation). Double-breasting generally involves the formation of a "brother" and a "sister" corporation, each owned by the same individual shareholders. *See generally* Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 WIS. L. REV. 67, 68. The following discussion assumes this structure, but legal analysis is unaffected if the double-breasting scheme is actually designed with the two companies as subsidiaries of a common parent, or with one breast as the parent of the other. The "single employer" doctrine does not pay attention to the fact of corporate form, and may be applied against unincorporated and incorporated enterprises alike. In the vast majority of cases, however, the enterprises in question are in fact corporations, and the operation of the doctrine therefore usually involves substantial veil-piercing issues.

105. *See* Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam); *see also* Befort, *supra* note 104, at 75 (describing the history of the "single employer" doctrine).

106. *See, e.g.*, NLRB v. Don Burgess Constr. Corp., 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 440 U.S. 940 (1979).

107. *See, e.g.*, J.M. Tanaka Constr., Inc. v. NLRB, 675 F.2d 1029, 1034 (9th Cir. 1982).

108. *Cf.* Drukker Communications, Inc. v. NLRB, 700 F.2d 727 (D.C. Cir. 1983) (stating that to impose liability under an "integrated enterprise [i.e. "single employer"] theory, the

The "single employer" doctrine is ordinarily used to hold employers liable for the unfair labor practices of other, nominally independent enterprises, but it has also been invoked to determine whether or not union picketing is directed at a neutral "secondary" employer,[109] whether a union may properly seek to represent the employees of two enterprises in a single bargaining unit,[110] or whether an employer charged with an unfair labor practice employs enough workers to satisfy the NLRB's jurisdictional limits.[111] Application of the doctrine is similar in each of these different situations.[112]

In most unfair labor practice contexts, application of the "single employer" doctrine to impose liability upon a second enterprise is relatively straightforward. The second employer, for example, may easily be required to pay back wages to employees improperly discharged because of union activity.[113] However, when the unfair labor practice involves the second entity's failure to bargain with the union in good faith — the posture of the typical double-breasting case — the situation is more complex.[114] Even when the NLRB finds that two entities constitute a "single employer," they will not necessarily be bound to each other's collective bargaining agreements. Rather, before the NLRB orders the second company to bargain with the first company's union and accept its labor contracts, the NLRB is required to consider the sentiments of the second company's employees.[115]

[NLRB] *must* find that the parent involved itself in the labor relations of its subsidiary.") (emphasis added). *Id.* at 735.

109. *See, e.g.*, NLRB v. International Longshoremen's Ass'n, 764 F.2d 234 (4th Cir. 1985) (holding that two entities were not a "single employer" and that a union's picketing of the second company therefore constituted a secondary boycott in violation of NLRA Section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(d) (1988)); UFCW Local 1439, 271 N.L.R.B. 754, 756 (1984) (same).

110. *See, e.g.*, Safety Elec. Corp., 239 N.L.R.B. 40 (1978).

111. *See, e.g.*, Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam); Sakrete, Inc. v. NLRB, 332 F.2d 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

112. *But see* Befort, *supra* note 104, at 76 (contending that the NLRB has often demanded a stronger showing of commonly controlled labor relations in its secondary boycott "single employer" cases).

113. Such discrimination in hiring and firing is prohibited by NLRA Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1988), and may be remedied by, among other things, an award of backpay, as offset by interim earnings from other employment.

114. This obligation is imposed by NLRA Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1988). NLRA cases involving double-breasting typically proceed from an allegation that a non-union breast violated Section 8(a)(5) by failing to hire employees from a union hiring hall or to pay certain wages and benefits, and thus deviated from the terms and conditions of employment fixed by the union breast's collective bargaining agreement with the union.

115. *See, e.g.*, Carpenters Local 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 507 (5th

Instead of conducting an election, however, the NLRB considers these sentiments indirectly, by inquiring as to whether the employees of the two entities together constitute a single appropriate bargaining unit.[116] If and only if such a single unit is found will the non-union entity be required to bargain with the union and accept its affiliate's collective bargaining agreement. In making this bargaining unit determination, the NLRB considers a variety of factors, including the various parties' bargaining history, the functional integration of the two entities' operations, the differences in the employees' work and skills, the extent of contact between the two groups of employees, and the degree of centralization of management and supervision — particularly with respect to day-to-day operations and labor and personnel relations.[117] Through this inquiry, the NLRB seeks to determine the similarity of concerns between the two companies' *employees* — so as to protect their right to choose or decline union representation[118] — while the initial "single employer" analysis only seeks to determine the interrelatedness of the *employers*.[119]

Despite the complexity of the "single employer" theory, and its substantial deviation from common law veil-piercing analysis, neither the NLRB nor the courts reviewing its decisions has ever properly considered whether the doctrine provides an appropriate mechanism for resolving problems of intercorporate liability under the NLRA. Indeed, examination of NLRB and court "single employer" cases reveals that problems of federalism and the necessity of preventing statutory frustration have been ignored entirely. The NLRB has never recognized that its power to fashion appropriate

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Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

116. *See* South Prairie Const. Co. v. Local 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 805-06 (1976) (per curiam). This determination must be made by the NLRB in the first instance, rather than by a reviewing court. *Id.*

117. *See* Peter Kiewit Sons' Co., 231 N.L.R.B. 76, 77 (1977), *enforced sub nom.*, Local 627, Int'l Union of Operating Eng'rs v. NLRB, 595 F.2d 844 (D.C. Cir. 1979). Prior to the seminal *Kiewit* decision, the NLRB's bargaining unit inquiry in "single employer" cases was usually fairly perfunctory, such that a "single employer" determination was almost certain to result in a finding of a single appropriate bargaining unit. *See* Comment, *Double-Breasted Operations in the Construction Industry: A Search For Concrete Guidelines*, 6 U. DAYTON L. REV. 45, 56 (1981). Since *Kiewit*, however, "[t]he unit question [has been] approached as if the [NLRB] were dealing with a pristine, run-of-the-mill representation case rather than viewing it against the documented backdrop of an employer 'running' from his contract." King & LaVaute, *Current Trends in Construction Industry Labor Relations — The Double-Breasted Contractor and the Prehire Contract*, 29 SYRACUSE L. REV. 901, 916 (1978).

118. The original Wagner Act only guaranteed employees the right to choose unionization. The 1947 Taft-Hartley amendments provided the additional "right" to decline unionization. *See* NLRA § 7, 29 U.S.C. § 157 (1988).

119. *See Carpenters Local Union 1846*, 690 F.2d at 505-07.

veil-piercing doctrines need not be restricted by state law limitations, or that veil-piercing doctrines developed for NLRA purposes have no bearing on veil-piercing in other circumstances. The early formulations of the "single employer" doctrine, which have never been substantially modified, evidenced overwhelming reliance on traditional common law conceptions of the corporation, and when the NLRB has looked beyond NLRA precedent for guidance in subsequent cases, it has relied solely upon state corporate law doctrines and scholarly analysis of those doctrines.[120] Accordingly, the "single employer" doctrine is best considered an application of common law principles in the labor context, rather than a measured development of an NLRA-specific veil-piercing doctrine.[121]

Because the NLRB has accepted rigid common law constraints in fashioning its "single employer" doctrine, it has never seriously considered developing a rule that would hold all commonly owned corporations liable for each other's unfair labor practices.[122] Indeed, the NLRB has gone so far as to state that the fact that two nominally independent entities share common ownership — and, concomitantly, hold the ability to control each other's day-to-day affairs — is not even "a factor to be accorded weight" in considering the imposition of liability upon the putatively separate affiliate.[123] As argued below, the NLRB and federal courts should reject these false constraints and undertake a more sophisticated veil-piercing analysis that looks to protect the policies of the NLRA rather than deferring to irrelevant state law interests.

These inadequacies would be of merely academic concern if the "single employer" doctrine were nonetheless sufficient to protect NLRA policies. In fact, however, the doctrine is now of very limited practical use, because the NLRB's rigid four-part "single employer" inquiry and unrealistic bargaining unit analysis exalt form over sub-

120. *See, e.g.*, Parklane Hosiery Co., 203 N.L.R.B. 597, 614 (1973) (stating, "Both legal scholars and state courts have . . . noted when considering the basic rationale behind [veil-piercing] determinations that sole or dominant ownership, without more, will not warrant a determination that one business entity should be held liable for conduct arguably chargeable to another.").

121. *See, e.g.*, Sargent v. McGrath, 685 F. Supp. 1087, 1089 (E.D. Wis. 1988) (Title VII context) (noting that the "single employer" doctrine is based on "ordinary principles of corporate law").

122. *See, e.g.*, Western Union Corp., 224 N.L.R.B. 274, 275 (1976), *enforced sub nom.*, United Tel. Workers v. NLRB, 571 F.2d 665 (D.C. Cir.), *cert. denied*, 439 U.S. 827 (1978); *see also* Drukker Communications, Inc. v. NLRB, 700 F.2d 727, 735 (D.C. Cir. 1983) (holding that NLRB findings of common ownership and management between a parent and subsidiary "are inadequate to sustain the conclusion of liability" for the parent).

123. UFCW Local No. 1439, 271 N.L.R.B. 754, 756 (1984).

stance to such a degree that an employer seeking to escape its union obligations may easily do so with the aid of elementary legal advice.[124] If the two "breasts" maintain separate financial records, charge each other market prices for services, and assure that separate individuals are assigned responsibility for each breast's labor relations and general management, the NLRB is overwhelmingly likely to find that the entities are separate employers, even when the circumstances manifest a deliberate and obvious attempt by the employer to circumvent its union obligations.[125] And even when "single employer" status is found, so as to prompt a bargaining unit inquiry, almost any distinction between the two employee groups will lead the NLRB to hold that separate bargaining units are appropriate,[126] even if the distinction is the consequence of attorney-instigated manipulation or a reflection of the inherent differences between union and non-union employees.[127] As a result, the collective bargaining

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124. *See, e.g.*, Befort, *supra* note 104, at 71. As a result of this manipulability, union advocates have argued that the formalistic "single employer" analysis should be jettisoned in favor of the somewhat more flexible and realistic "alter ego" analysis. *See, e.g.*, ORGANIZER'S HANDBOOK 152 (Bldg. & Const. Trades Dept., AFL-CIO) (E. Gorman & M. Gittler eds. 1991). In contrast, this article contends that a broader doctrine of per se liability is warranted to ensure that NLRA policies are not frustrated. *See infra* Part III. *See infra* Part III.

See NLRB v. Bufco Corp., 899 F.2d 608, 609 n.2 (7th Cir. 1990) (affirming an NLRB "alter ego" finding and refusing to "waste ink on a boring recitation of [the respondent's] sophomoric attempt to use a corporate shell to avoid contractual liability.").

125. *See, e.g.*, Frank N. Smith Assoc's. 194 N.L.R.B. 212, 218-19 (1971); Gerace Constr., Inc., 193 N.L.R.B. 645, 645-46 (1971); *see also* Befort, *supra* note 104, at 86 (explaining the defects of the existing "single employer" doctrine).

126. *See, e.g.*, Alabama Metal Prods., Inc., 280 N.L.R.B. 1090, 1097 (1986) (finding substantial integration of operations between two enterprises, but dismissing an unfair labor practice complaint because the physical distance between them rendered separate bargaining units appropriate); *Gerace*, 193 N.L.R.B. at 646 (refusing to find "single employer" status because of the absence of employee interchange).

127. For example, the NLRB and courts have held that "[t]he frequency of employee interchange" is "a 'critical factor' in ascertaining a community of interest among employees." NLRB v. Carson Cable TV, 795 F.2d 879, 885 (9th Cir. 1986) (quoting Spring City Knitting Co. v. NLRB, 647 F.2d 1011, 1015 (9th Cir. 1981)). If interchange is artificially minimized, the NLRB will likely designate separate bargaining units. *See Gerace*, 193 N.L.R.B. at 646. More disturbingly, separate bargaining units may be found appropriate based on differences in the complexity of the work performed by the two employee groups, even when these differences are necessary concomitants of the difference between the higher-skill unionized construction market and the lower-skill non-union market. *See, e.g.*, Edenwald Constr. Co., 294 N.L.R.B. No. 22, 131 L.R.R.M. (BNA) 1732, 1733 (1989) (finding two separate bargaining units appropriate, despite a "single employer" finding, when the union company's employees did "complicated" work on heavy equipment and the non-union employees did less demanding work on smaller equipment); NLRB v. DMR Corp., 699 F.2d 788, 792 (5th Cir.), *cert. denied*, 464 U.S. 852 (1983) (suggesting that separate bargaining units would be appropriate when one company's employees worked on (high-skill) industrial electrical projects and the other's on (low-skill) residential projects). The NLRB has even found a single bargaining unit inappropriate because the non-union employees received lesser wages and benefits than the union em-

agreement will not be applied to the non-union breast, thus rendering the underlying "single employer" finding essentially meaningless, and the employer will achieve its objective of avoiding unionization. Workers' rights under the NLRA, meanwhile, are seriously frustrated.

b. The "Alter Ego" Doctrine

The "alter ego" doctrine is substantially similar in form to the "single employer" doctrine, but its purpose is fundamentally different. Where the "single employer" doctrine considers the functional integration of operations between different entities, "the focus of the alter ego doctrine . . . is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations."[128] As a result of this focus, "alter ego" analysis tends to assess the totality of the relationship between different entities rather than follow the formalistic, checklist approach of the "single employer" inquiry.[129]

In determining whether a second corporation is the "alter ego" of another, the NLRB and reviewing courts consider whether the two entities share substantially identical ownership, business purposes, operation, equipment, customers, and managerial and supervisory structure.[130] Although these criteria are akin to those considered in "single employer" cases, the NLRB has generally been careful to distinguish between the "single employer" and "alter ego" doctrines, even if reviewing courts have sometimes been less precise.[131]

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ployees — presumably the precise purpose of setting up the non-union breast. *See* Image Convention Servs., Inc., 288 N.L.R.B. 1036, 1038 (1988); *see also* ORGANIZER'S HANDBOOK, *supra* note 124, at 148.

128. Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 508 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *see also* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942) (approving the imposition of "alter ego" liability upon a new corporation that was the "disguised continuance of the old employer" rather than the result of "a bona fide discontinuance and a true change of ownership.").

129. *See* ORGANIZER'S HANDBOOK, *supra* note 124, at 153-57.

130. *See, e.g.*, Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305, 1310 (8th Cir.), *cert. denied*, 469 U.S. 1088 (1984); NLRB v. Al Bryant, Inc., 711 F.2d 543, 553-54 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984); Crawford Door Sales Co., 226 N.L.R.B. 1144, 1144 (1976).

The "alter ego" doctrine may be applied when the business entities in question are not incorporated, and may also be applied to hold individuals liable if they establish unincorporated businesses in a manner that suggests "alter ego" status. *See* NLRB v. Dane County Dairy, 795 F.2d 1313, 1322 (7th Cir. 1986).

131. *Compare, e.g.*, Alabama Metal Prods., Inc., 280 N.L.R.B. 1090, 1095 (1986) (not-

However, both the NLRB and the courts consistently recognize one key difference between the two doctrines: unlike a "single employer," an "alter ego" is automatically bound to the other entity's collective bargaining agreements, without the need for a full-scale bargaining unit determination.[132] Because of this important consequence of an "alter ego" finding, the NLRB has occasionally suggested that a stronger showing is required for the imposition of "alter ego" liability than for a determination of "single employer" status.[133]

Although "alter ego" cases typically arise when one corporation completely ceases operations and a new corporation appears in its place,[134] the NLRB and most courts have held that the doctrine should not be restricted to this factual context.[135] In particular, double-breasts may be considered "alter egos" in appropriate circumstances, as when both companies coexist and perform similar

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ing that the most important "single employer" criterion — centralized control of labor relations — is generally inapplicable in the "alter ego" context, because in most "alter ego" situations "there are no simultaneously existing entities over which centralized control of labor relations may be exercised") *with* Esmark, Inc. v. NLRB, 887 F.2d 739, 754 (7th Cir. 1989) (suggesting that "one corporation is the alter ego of another where the factors necessary to support a 'single employer' finding are met and, in addition, the [NLRB] finds that the second corporation was a 'disguised continuance' of the employing enterprise. . . ."). *But cf.*, A. Dariano & Sons, Inc. v. District Council of Painters No. 33, 869 F.2d 514, 519 (9th Cir. 1989) (LMRA context) (holding that the "alter ego" and "single employer" inquiries are sufficiently similar and that an "alter ego" finding may not be sustained where the NLRB has previously decided that no "single employer" relationship exists). The NLRB may be shifting its analysis somewhat, however, and beginning to consider the "alter ego" doctrine an "extension" of the "single employer" doctrine. *See* Befort, *supra* note 104, at 92.

132. *See, e.g.*, *Al Bryant*, 711 F.2d at 550; Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 26 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983). In the "alter ego" context, the NLRB need only determine that the bargaining unit that results from merging the two companies' employees is not "repugnant to any policy embodied in the NLRA." Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 509 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). This distinction between the two doctrines has been explained on the ground that an "alter ego" "is in reality the same employer." Howard Johnson Co. v. Detroit Local, Hotel & Restaurant Employees Int'l Union, 417 U.S. 249, 259 n.5 (1974).

133. *See, e.g.*, Victor Valley Heating & Air Conditioning, 267 N.L.R.B. 1292, 1296 (1983); *but see* Befort, *supra* note 104, at 93 (suggesting that despite the NLRB's stated position that "alter ego" status is more difficult to establish than a "single employer" relationship, "the alter ego doctrine as applied in practice is clearly the less rigorous of the two standards.").

134. *See Alabama Metal Products*, 280 N.L.R.B. at 1095.

135. *See* Crest Tankers, Inc. v. National Maritime Union, 796 F.2d 234, 238 (8th Cir. 1986) (LMRA context) (stating that "[t]o limit the ["alter ego"] doctrine's applicability to companies which have shut down entirely would allow anti-union employers a complete escape from alter ego liability, simply by keeping a small aspect of the predecessor operation alive."). The "single employer" doctrine, however, is normally applied against companies that operate simultaneously. *See* Gilroy Sheet Metal, Inc., 280 N.L.R.B. 1075, 1075 n.1 (1986).

services, but fail to deal with each other at arms' length, such as by maintaining below-market rental agreements and other unrealistic business arrangements.[136] In the most common of these alternative scenarios, an existing union operation will be kept alive but slowly starved to death by a parasitic non-union affiliate.[137]

A more substantial difference of opinion has developed with respect to the problem of employer intent: several courts have suggested that an "alter ego" finding is only valid when the NLRB demonstrates that the employer formed the alleged "alter ego" with an anti-union motivation.[138] The NLRB itself has wavered on this point.[139] The Fourth Circuit has taken the most restrictive position,

136. *See* Dist. 23, United Mine Workers, 271 N.L.R.B. 461, 461 n.1 (1984).

137. In this context, courts have disagreed as to whether evidence that work was transferred from the union breast to the non-union breast is required before liability can be imposed. *See, e.g.*, NLRB v. Al Bryant, Inc., 711 F.2d 543, 553 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984) (holding that such evidence is not necessarily required).

138. *Compare* Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305, 1310 (8th Cir. 1984), *cert. denied*, 469 U.S. 1088 (1984) *and* Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 26 (1st Cir. 1983), *cert. denied*, 464 U.S. 892 (1983) (showing of anti-union animus required) *with* NLRB v. Allcoast Transfer, Inc., 780 F.2d 576, 581 (6th Cir. 1986) *and* Goodman Piping Products, Inc. v. NLRB, 741 F.2d 10, 12 (2d Cir. 1984) (per curiam) (no such showing necessary); *see also* Comment, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U. L. REV. 624, 639 (1979) ("for an alter ego finding . . . the employer must act from anti-union animus").

The "substantially identical ownership" criterion of the "alter ego" inquiry has also proved controversial. Some courts have held that the NLRB need not necessarily demonstrate common ownership, while others have refused to enforce Board orders when common ownership is absent. *Compare* Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1420 (D.C. Cir. 1984) (per curiam) (stating that "common ownership is *not* an absolute prerequisite to a finding of alter ego status") *and* J.M. Tanaka Constr., Inc. v. NLRB, 675 F.2d 1029, 1035 (9th Cir. 1982) (same) *with* Haley & Haley, Inc. v. NLRB, 880 F.2d 1147, 1150 (9th Cir. 1989) (per curiam) (holding that consideration of common ownership is "a threshold determination" that "must be made in every alter ego case") *and* Amalgamated Meat Cutters, Local 576 v. NLRB, 663 F.2d 223, 227 (D.C. Cir. 1980) (same). The NLRB has held that overlapping ownership of just under twenty percent is not substantial enough to sustain an "alter ego" finding, but it does not require complete identity of ownership between the old and new entities. *See* Oklahoma City Eastern Express, Inc., 281 N.L.R.B. 921, 925 (1986). Although insistence on a showing of common ownership makes superficial sense in that a successor employer that acquires another company through a legitimate, arms' length transaction is not generally bound to a predecessor's collective bargaining agreement, *see* Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees Int'l Union, 417 U.S. 249 (1974). It makes no sense at all where unlawful motivation is found. Moreover, even a genuinely independent successor is required to bargain with its predecessor's union, even when it is not bound by the predecessor's collective bargaining agreement, whereas a failure to find common ownership in an "alter ego" case will generally permit the new entity to escape bargaining obligations altogether. Even if an alternative claim of successorship were made, see NLRB v. Burns Int'l Security Servs., 406 U.S. 272 (1972), the new entity would probably avoid the bargaining obligation if, as is usually the case, it did not hire the predecessor's employees after it jettisoned the unionized workforce.

139. *Compare* Kenton Transfer Co., 298 N.L.R.B. No. 61, 134 L.R.R.M. (BNA) 1111,

demanding evidence that "the transfer [of the old company's operations to the new company] resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations" before the court would prevent the old employer "from arranging its affairs as it sees fit."[140]

Even if an employer is found to have acted with an anti-union motivation, an "alter ego" determination will not necessarily result if the new entity effects sufficient separation under the remaining "alter ego" criteria.[141] Therefore, as with the "single employer" doctrine, management lawyers may avoid "alter ego" liability for their clients through careful structuring of the two operations, even when the resulting differences are the natural consequences of the new company's deliberate strategy to operate on a non-union basis.[142]

Moreover, as in its "single employer" cases, the NLRB has failed to develop a broad rule of intercorporate "alter ego" liability, and relying on principles of state corporate law, has expressly held that shared ownership of predecessor and successor corporations will not, in and of itself, permit an "alter ego" finding.[143] Once again, the NLRB's refusal to impose a per se rule of intercorporate liability is the unfortunate consequence of the agency's failure to consider the range of its discretion in fashioning veil-piercing rules for the exclusive purpose of NLRA enforcement, and its unjustified deference to irrelevant state corporate law doctrines.[144]

1112 (1990) (suggesting that in "alter ego" cases the NLRB "often" considers "whether there was an unlawful motivation for establishing the second entity,") *with* O. Voorhees Painting Co., 275 N.L.R.B. 779, 780 (1985) (contending that "the Board *must* consider the purpose behind the creation of the alleged alter ego.")(emphasis added).

140. Alkire v. NLRB, 716 F.2d 1014, 1020-21 (4th Cir. 1983). More recently, however, the Fourth Circuit appears to have modified its interpretation of *Alkire*. *See* NLRB v. McAllister Bros., Inc., 819 F.2d 439, 445 n.14 (4th Cir. 1987) (stating that "[t]he imposition of alter-ego status . . . does not hinge on proof that the employer intended to evade the labor laws.").

141. *See* Image Convention Servs. Inc., 288 N.L.R.B. 1036, 1039 n.10 (1988) (refusing to impose "alter ego" liability on a company that acquired the assets of a predecessor through a suspicious insider transaction, because there were sufficient distinctions between the two enterprises' operations).

142. For example, employers have argued that two companies are not "substantially identical" if one does business in the high dollar volume, high-skill union construction market and the other in the low dollar volume, low-skill non-union sector. *But see* Haley & Haley, Inc. v. NLRB, 880 F.2d 1147, 1152 (9th Cir. 1989) (per curiam) (rejecting this argument and holding that "[a]chievement of the proscribed purpose of an alter ego transfer cannot be used to support a finding that the two companies are distinct.").

143. *See* Parklane Hosiery Co., 203 N.L.R.B. 597, 614 (1973).

144. To a certain extent, of course, the "alter ego" doctrine does constitute a limited application of the statutory frustration doctrine, in that it prohibits a wrongdoer from continuing in the same business under a different corporate name. *See* Alkire v. NLRB, 716 F.2d

c. *Common Law Theories*

Despite the development of the specialized "single employer" and "alter ego" doctrines, a variety of more traditional veil-piercing theories also remain available under the NLRA, and the NLRB has been granted wide latitude to apply these theories. These modifications of common law doctrine are particularly appropriate in the context of parent-subsidiary relationships, especially when the entities in question are large-scale enterprises that are unlikely to achieve the overwhelming degree of functional integration required to support a "single employer" or "alter ego" determination, but when the parent may nonetheless have controlled certain operations of the subsidiary or interfered in particular transactions.

In *NLRB v. Deena Artware, Inc.*,[145] the Supreme Court held that the NLRB may properly impose liability upon a parent based on common law veil-piercing principles. Citing familiar corporate law doctrines, the Court ruled that intercorporate liability would be appropriate when a parent's " 'dominion' " over the subsidiary is " 'complete' " or its " 'interference . . . obtrusive,' " when the subsidiary is "operated as a division of" the parent, when the subsidiary is "only a shell, inadequately financed," or when "the affairs of the [corporate] group [are] so intermingled that no distinct corporate lines are maintained."[146]

Unfortunately, the underlying NLRB order that the Court affirmed in *Deena Artware* was a fairly traditional application of corporate law doctrine. In enforcing this order and approving the NLRB's authority to pierce corporate veils in such circumstances, the Court did not have occasion to consider the extent of the NLRB's authority to fashion more innovative doctrines specifically tailored to the NLRA and designed to uphold its policies. Similarly, although other Supreme Court veil-piercing cases have relied upon the principle of statutory frustration as a basis for piercing the corporate veil,[147] the *Deena Artware* Court merely invoked an amalgam of state and federal precedents and basic corporate law treatises, and did not itself undertake any consideration of the NLRA's particular policies and their impact upon the common law doctrine of corporate

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1014, 1018 (4th Cir. 1983) (stating that "easy evasion of [NLRA] obligations" through the creation of "alter ego" corporations "would frustrate [the NLRA's] objectives and render its protections illusory indeed.").

145. 361 U.S. 398 (1960).

146. *Id.* at 403 (quoting *Berkley v. Third Ave. Ry. Co.*, 244 N.Y. 84, 95 (1926) (Cardozo, J.))(footnotes omitted).

147. *See, e.g.*, Anderson v. Abbott, 321 U.S. 349 (1944).

separateness.[148] Unfortunately, no subsequent Supreme Court opinion has filled in *Deena Artware*'s gaps.

The "direct involvement" theory of parent-subsidiary liability has probably been more significant than the panoply of corporate law doctrines cataloged in *Deena Artware*.[149] Under this "direct involvement" theory, a parent will be held responsible for its subsidiary's NLRA unfair labor practices, even if the two enterprises generally maintain proper separation in their affairs, when the parent interferes in the particular transactions that led to the unfair labor practices in question.[150] Accordingly, "where a parent disregards the separate legal personality of its subsidiary (and the subsidiary's own decisionmaking 'paraphernalia'), and exercises direct control over a specific transaction . . . liability for the subsidiary's unfair labor practices will be imposed" upon the parent.[151] This theory is particularly notable because it confines its attention to dealings directly relating to the NLRA, rather than straying into irrelevant matters such as business strategy or observation of corporate formalities.

2. *Individual Liability*

Individual NLRA liability has rarely been imposed and doctrinal development is accordingly somewhat unsophisticated.[152] Al-

148. *See Deena Artware*, 361 U.S. at 403.

149. The "direct involvement" theory would likely be a more prominent fixture in NLRA cases if not for the existence of the "joint employer" doctrine, which holds that two or more employers are considered jointly to employ a particular group of employees if they share control of the terms and conditions of the employees' employment. *See, e.g.*, NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1122-23 (3d Cir. 1982); *see also* Hobbs & Eberg Mining Co., 297 N.L.R.B. No. 85, 133 L.R.R.M. (BNA) 1251, 1252-53 (1990) (imposing "joint employer" liability upon a parent corporation that directly participated in controlling the employment terms of its subsidiary's employees). In the great majority of cases, however, "joint employer" liability is imposed upon genuinely separate companies whose only point of contact is their shared control over a certain group of employees; as such, this doctrine generally has little to do with corporate law principles.

150. *See, e.g.*, Esmark, Inc. v. NLRB, 887 F.2d 739, 757 (7th Cir. 1989); *see also* Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1043 (8th Cir. 1976) (imposing liability upon a parent on the ground that it "possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries and whether its course of conduct encouraged or permitted the [subsidiaries'] negotiators to so represent the situation to union negotiators for the purpose of achieving a tactical or strategic objective."). A parent's interference in its subsidiaries' labor negotiations has also been taken into account in certain cases analyzed under the "single employer" rubric rather than the "direct involvement" theory. *See* Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1075 (1st Cir. 1981).

151. *Esmark*, 887 F.2d at 757.

152. Imposition of individual NLRA liability was considerably more common prior to the passage of the Taft-Hartley amendments to the NLRA in 1947, when the statutory definition of the term "employer" was changed from "any person acting in the interest of an employer, directly or indirectly" to the more restrictive "any person acting as an agent of an

though individual liability for NLRA violations has been found appropriate under a variety of theories, most of them are only refinements of conservative and long-established common law doctrines, without any discernible modification for the NLRA context. As in the context of intercorporate NLRA liability, neither the NLRB nor the reviewing federal courts has made any attempt to reconcile the policies of the NLRA with the state law doctrine of limited liability, and the NLRB has apparently never even recognized that such reconciliation is required.[153] Common law principles are instead accepted without question.

Most NLRB individual liability cases have therefore invoked the dusty common law formula of "unity of interest, ownership, and control" between corporation and shareholder to decide whether individual liability is appropriate.[154] In its lead case, *Riley Aeronautics Corporation*,[155] the NLRB relied upon a number of state corporate law cases and general corporate law articles to hold that "the corporate veil will be pierced whenever it is employed to perpetrate fraud, evade existing obligations, or circumvent a statute," or when the shareholder "was in active concert, . . . in a scheme or plan of evasion; or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay;[156] or so inte-

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employer, directly or indirectly." *Compare* NLRA § 2(2) *with* LMRA § 101(2), 29 U.S.C. § 152(2) (1988). The amendment was not made as a result of congressional antipathy to shareholder liability, but because the NLRB had "on numerous occasions held an employer responsible for the acts of subordinate employees and others although not acting within the scope of any authority from the employer." H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 31 (1947). Even after this amendment, however, liability has occasionally been imposed upon individual statutory "employers," particularly if the person acts as the "agent of an employer" in the commission of an unfair labor practice. *See, e.g.*, J.D. Jewell, Inc., 99 N.L.R.B. 61, 64 (1952) (imposing liability upon individual supervisors who assaulted union agents). Liability is generally imposed on such "agents" only for the purpose of assuring employer compliance with cease-and-desist orders, not monetary awards. *See* Carpet City Mechanical Co., 244 N.L.R.B. 1031, 1034 (1979) (citing Bon Hennings Logging Co., 132 N.L.R.B. 97 (1961)). Because these statutory "employers" are not necessarily shareholders, however, corporate law issues are not implicated in these cases.

153. *Cf. Esmark*, 887 F.2d at 755 n.26 (noting that the NLRB has not determined whether imposition of liability upon a parent is properly a matter of state or federal law, or, if federal, whether the question is governed by general federal common law or NLRA-specific doctrine).

154. Schieber Millinery Co., 26 N.L.R.B. 937, 965 (1940), *enf'd as modified*, 116 F.2d 281 (8th Cir. 1940). At least one appellate court has instead applied the "general" federal veil-piercing test that has been developed in LMRA and ERISA cases. *See* NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 340 (6th Cir. 1990); *see also infra* notes 170-81 and 216-22 and accompanying text (describing LMRA and ERISA veil-piercing doctrine).

155. 178 N.L.R.B. 495 (1969).

156. *See, e.g.*, Concrete Mfg. Co., 262 N.L.R.B. 727, 729 (1982) (holding individual shareholders liable when they "acted to frustrate [the NLRB's] directions by rendering Re-

grated or intermingled his assets and affairs that 'no distinct corporate lines are maintained.' "[157] Although *Riley* was only the decision of an administrative law judge, its holding has been consistently cited in subsequent cases as the definitive test for individual NLRA liability,[158] and neither the NLRB nor the federal courts has ever conducted a more sophisticated analysis that seeks to fashion an NLRA-specific rule designed to advance NLRA policies.[159] Indeed, some decisions suggest that the NLRB remains unaware of its authority to develop NLRA veil-piercing doctrines that are distinct from state common law rules.[160]

The absence of precision and sophistication in NLRA individual liability decisions means that, as with common law rulings, the cases can be difficult to reconcile: shareholders may or may not be subjected to personal liability despite maintaining substantially identical relationships to their corporations.[161] Indeed, individual liability has sometimes been imposed without evidence of the types of misbehavior suggested in *Riley*, but these decisions do not state their rationale clearly.[162] At the very least, such inconsistency does not promote

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spondent Company insolvent [by terminating its pension plan] and thus incapable of satisfying the [NLRB]-ordered backpay relief.").

157. *Riley*, 178 N.L.R.B. at 501 (citations omitted). For a typical case imposing liability upon individual shareholders on the basis enumerated in *Riley*, see D & I Trucking, Inc., 237 N.L.R.B. 55, 64 (1978).

158. *See, e.g.*, Redway Carriers, Inc., 301 NLRB No. 139, 137 L.L.R.M. 1368 (1991); Air Vac Indus. Inc., 282 N.L.R.B. 703, 711 (1987); Contris Packing Co., 268 N.L.R.B. 193, 194 (1983).

159. At least one appellate court has even relied on state law in making a NLRA veil-piercing determination. *See* NLRB v. Better Bldg. Supply Corp., 837 F.2d 377, 379-80 (9th Cir. 1988).

160. *See* Las Villas Produce, Inc., 279 N.L.R.B. 883, 885 (1986) (suggesting that imposing individual liability for NLRA backpay obligations only involves "gentle probing of the corporate veil," rather than full-scale piercing, because the individual shareholders in question are not "exposed" by such an order "to the full panoply of corporate liability, as they would be in a true piercing situation"). However, it is of course a fundamental rule that piercing the veil for one particular purpose does not mean wholesale piercing. *See supra* note 65 and accompanying text.

161. *Compare* Carpet City Mechanical Co., 244 N.L.R.B. 1031, 1034 (1979) (imposing liability on an individual who served as chief executive officer, ordered materials, controlled labor and customer relations, and orchestrated the corporate unfair labor practices in question) *and* Ski Craft Sales Corp., 237 N.L.R.B. 122, 122 (1978) (imposing liability upon the individual who "solely owned, managed, and controlled the corporations involved" and who "personally refused to bargain with the Union,") *with* Chef Nathan Sez Eat Here, Inc., 201 N.L.R.B. 343, 343 (1973) (refusing to impose liability on a sole shareholder who served as president, controlled corporate assets, business operations, and labor relations, and participated in the commission of the pertinent unfair labor practices).

162. *See, e.g.*, Certified Bldg. Prods., Inc., 208 N.L.R.B. 515, 518 (1974) (imposing liability upon an individual whose company admitted that he was the sole shareholder and president of the offending corporation and who failed to rebut evidence that he personally ran

statutory policy.

Despite the NLRB's suggestion in *Riley* that individual liability may be imposed to prevent circumvention of a statute, the reference seems to have been made merely for the sake of reciting common law doctrine, because the NLRB has never undertaken an analysis of what this principle might mean in the NLRA context — such as whether the NLRA is frustrated when shareholders of insolvent corporations rely on the fiction of corporate separateness to avoid liability for their corporations' unremedied unfair labor practices. Rather, the NLRB has accepted, without conducting its own independent analysis, the traditional but now-questionable rationale that imposing broader shareholder liability "would defeat one of the principal purposes of creating corporations — to shield stockholders from the debts and obligations of the corporation."[163]

Instead, the NLRB's artificially constrained and unreasonably simplistic analysis has led the NLRB to resist imposing a more sweeping liability upon shareholders. Relying on unquestioned state common law principles, and without assessing the matter independently, for example, the NLRB has stated that the fact "[t]hat a closed corporation loses money, has insufficient assets to pay its obligations, and ceases to operate is insufficient to impose personal liability" on its shareholders.[164] The agency has even gone so far as to declare that an individual's sole ownership of a corporation is of "minimal consequence" in an NLRA veil-piercing analysis.[165] Neither of these sweeping pronouncements was explained in terms of the policies of the NLRA.

Indeed, in some cases the NLRB has even gone beyond the common law's traditionally bitter antipathy to veil-piercing. In one unusually hostile decision, for example, the NLRB held that the fact that a shareholder personally decided to commit the corporate unfair labor practices in question was of no importance, because as president "he would be the only logical official to decide," and that a

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the corporation and made its policy decisions); *But cf.*, *Carpet City Mechanical*, 244 N.L.R.B. at 1034 (imposing individual liability with no more than an "inference" that the individual respondent was in fact a shareholder).

163. Commercial Cartage Corp., 268 N.L.R.B. 1036, 1041 (1984); *see also* NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 338 (6th Cir. 1990) (contending that a shareholder's "desire to limit liability" does not justify a more liberal veil-piercing rule because "[v]irtually all corporations are formed for the purpose of limiting liability."). For an analysis of the theoretical weakness of the limited liability doctrine, *see infra* notes 337-73 and accompanying text.

164. *Commercial Cartage*, 268 N.L.R.B. at 1041.

165. Contris Packing Co., 268 N.L.R.B. 193, 194 (1983).

second, non-shareholding individual should also be immune from liability, even though the corporate respondent had clearly siphoned off assets to another corporation affiliated with the second individual, because the "precise" relationship between the corporation and that individual was unclear.[166] Once again, this parsimonious decision was not justified or explained in terms of NLRA purposes and policies.

B. The Labor Management Relations Act

Among other provisions, the LMRA establishes federal jurisdiction for the enforcement of collective bargaining agreements between unions and employers.[167] Because almost all collective bargaining agreements provide that substantive disputes arising under the agreement are to be resolved through arbitration, and because the federal courts have assigned overwhelming importance to the arbitration process, the great majority of LMRA cases involve the application of contractual arbitration provisions.[168] LMRA veil-piercing cases therefore usually arise from arbitration disputes, including union attempts to force parent corporations or "double-breasts" to arbitrate grievances or accept arbitration awards under collective bargaining agreements signed by subsidiaries or "sister" corporations.[169] In addition, several cases involving individual LMRA liability have also appeared in recent years, principally when shareholders have been called to account for corporate failures to pay contractually required employee benefit contributions.

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166. *Id.* at 195.

167. *See* LMRA § 301(a), 29 U.S.C. § 185(a) (1988). The LMRA also establishes mechanisms for mediating labor disputes and avoiding national emergencies; *see* LMRA §§ 201-13, 29 U.S.C. §§ 171-83 (1988), prohibitions on certain interactions between labor and management; *see* LMRA § 302, 29 U.S.C. § 186 (1988), and jurisdiction for suits against unions to recover damages caused by their unfair labor practices, *see* LMRA § 303, 29 U.S.C. § 187 (1988). Veil-piercing issues have apparently only arisen in the Section 301 context, however.

168. *See* 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 51:5 (1990) (indicating that 98% of surveyed collective bargaining agreements contained an arbitration provision). For an explanation of the LMRA's emphasis on arbitration, see United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). *See also* Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (explaining the centrality of arbitration in the American labor law schema).

169. These cases often represent affirmative efforts by unions to extend collective bargaining agreements to signatory employers' nonunion affiliates, such as claims that a nonunion affiliate's failure to pay contract-scale wages or to hire employees from the union's hiring hall constitutes a breach of contract.

In the LMRA context, the federal courts have sometimes applied NLRA principles and sometimes relied on veil-piercing doctrines developed under general federal common law. Certain cases, moreover, discuss these veil-piercing doctrines with attention to LMRA policies. In almost all instances, however, these analyses have been superficial and unduly deferential to common law principles, so that the LMRA itself has not been protected.

1. *Intercorporate Liability*

Most courts deciding LMRA intercorporate liability cases rely on analogous NLRA veil-piercing principles, and both the "single employer" and "alter ego" doctrines have therefore been widely applied in LMRA cases.[170] The borrowing is usually justified on the grounds that the two statutes share a similar purpose — the regulation of union-management relations — and that judicial economy is well served by reliance on the large body of labor law developed by the NLRB, an agency with experience and expertise in labor matters.[171]

In the LMRA context, however, the "single employer" doctrine is applied in a slightly different manner than in NLRA cases. Once again, two nominally separate entities must first be found to constitute a "single employer" on the basis of their interrelated operations, common management, centralized control of labor relations, and common ownership. In addition, both entities' employees must then form a single appropriate bargaining unit.[172] In the LMRA context, however, a district court is permitted to conduct its own bargaining unit determination rather than refer the matter to the NLRB.[173]

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170. *See, e.g.*, International Union of Operating Engineers, Local 150 v. Centor Contractors, Inc., 831 F.2d 1309, 1312 (7th Cir. 1987) (noting the applicability of the NLRA "single employer" and "alter ego" doctrines in the LMRA context); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 510-11 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) (same). Some courts appear to bungle their analogies to NLRA law, however. In Carpenters' Dist. Council v. W.O. Kessel Co., 487 F. Supp. 54, 58 (W.D. Pa. 1980), for example, the court applied ordinary NLRA successorship doctrine to an "alter ego" situation, and failed to mention either "single employer" or "alter ego" principles.

171. *See, e.g.*, *Pratt-Farnsworth*, 690 F.2d at 510-11.

172. *See, e.g.*, Cuyahoga Wrecking Corp. v. Laborers Local Union #210, 644 F. Supp. 878, 882 (W.D.N.Y. 1986).

173. *See Pratt-Farnsworth*, 690 F.2d at 514-17. The *Pratt-Farnsworth* court rejected the contention that the Supreme Court's decision in South Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Engineers, 425 U.S. 800 (1976) (per curiam), vested exclusive jurisdiction in the NLRB over any and all bargaining unit determinations. *Id.* at 514. Prior to the Fifth Circuit's seminal *Pratt-Farnsworth* decision, other courts had held that district courts were completely precluded from making bargaining unit determinations in LMRA cases. *See, e.g.*, Teamsters Local No. 70 v. California Consolidators, Inc., 693 F.2d 81, 83 (9th Cir.

In some instances, however, courts have failed or refused to apply NLRA principles to LMRA veil-piercing problems. The Fourth Circuit has held, for example, that a union's attempt to force a parent corporation to arbitrate a grievance under its subsidiary's collective bargaining agreement should not be resolved by application of NLRA "single employer" principles, but instead by considering whether the subsidiary acted as a common law agent of the parent in negotiating the contract.[174] Similarly, in determining whether parent corporations should be held liable for subsidiaries' LMRA violations, several courts have relied on common law understandings of the parent-subsidiary relationship,[175] and some cases have even based their holdings on principles of state corporate law.[176]

Although the federal courts have almost never undertaken the appropriate veil-piercing analysis — that is, considering what federal policies embedded in the LMRA impact on the principle of corporate identity and what veil-piercing doctrines would best effectuate those policies — certain cases' efforts appear sharply restrictive. For example, in assessing a union's attempt to require a parent to arbitrate a grievance arising under a subsidiary's collective bargaining agreement, the First Circuit considered "whether any major federal policy required piercing . . . to bind the parent to its subsidiary's

1982), *cert. denied*, 469 U.S. 887 (1984). Even after *Pratt-Farnsworth*, courts deciding LMRA cases continue to defer to prior NLRB bargaining unit determinations, if unit determinations have been made, even if such deference requires that otherwise-valid arbitration awards will be vacated. *See, e.g.*, Local One, Amalgamated Lithographers v. Stearns & Beale, Inc., 812 F.2d 763, 771 (2d Cir. 1987); Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271, 1277-78 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985).

174. *See* A.T. Massey Coal Co. v. International Union, United Mine Workers, 799 F.2d 142, 147 (4th Cir. 1986), *cert. denied*, 481 U.S. 1033 (1987).

175. *See, e.g.*, Keffer v. H.K. Porter Co., 872 F.2d 60, 64-65 (4th Cir. 1989) (applying standard federal veil-piercing law in the LMRA context); United Steelworkers v. Connors Steel Co., 855 F.2d 1499, 1505-06 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989) (applying general Fifth Circuit veil-piercing law in the LMRA context); United Rubber Workers v. Great Am. Indus. Inc., 479 F. Supp. 216, 242-45 (S.D.N.Y. 1979) (holding parent corporation liable for its subsidiary's LMRA violations based on the corporations' common ownership, the parent's involvement in the subsidiary's labor relations, the subsidiary's undercapitalization, uneven observance of corporate formalities, and evidence suggesting that the parent had not dealt with the subsidiary at arm's length but had used it as a "mere instrumentality"). Prior to the passage of ERISA, a similar common-law test was used to determine a double-breast's liability for contractually required employee benefit contributions. *See* Plumbers Local Union No. 519 v. Service Plumbing Co., 401 F. Supp. 1008, 1013 (S.D. Fla. 1975).

176. *See, e.g.*, Carpenters' Dist. Council v. W.O. Kessel Co., 487 F. Supp. 54, 57 (W.D. Pa. 1980) (relying in part on Pennsylvania law in an LMRA case); Tishman Const. Corp. v. Elevator Constructors, Local No. 1, 80 Lab. Cas. (CCH) ¶ 11,960, at 22,749 (S.D.N.Y. 1976) (applying New York law); *see also, e.g.*, Directors Guild v. Garrison Productions, Inc., 733 F. Supp. 755 (S.D.N.Y. 1990) (applying New York law to impose LMRA liability upon an individual shareholder).

agreement."[177] The First Circuit found that an order requiring the parent to arbitrate "could only be based on a policy that a holding parent corporation should be bound to the arbitration agreement of its subsidiary whenever it controls the subsidiary's stock and participates in its management" — a policy the court claimed had not "been adopted by Congress or the courts."[178] The court of appeals justified its holding on the basis of various non-labor precedents, and did not continue to decide whether a more liberal veil-piercing policy *should* be adopted to effectuate the LMRA.[179]

The Third Circuit has adopted as its own these statements by the First Circuit and, in doing so, concluded rather simplistically that "[a] court may not disregard at will the formal differences between affiliated corporations."[180] According to the Third Circuit, the existence of a parent-subsidiary relationship "is not enough," in and of itself, to permit imposition of LMRA liability upon a parent.[181] The court of appeals did not consider, however, whether these formal differences could be disregarded in service of LMRA policy — rather than arbitrarily or "at will."

2. *Individual Liability*

Numerous cases have considered the circumstances under which individual shareholders may be held liable for corporate LMRA violations.[182] Although many of these cases purport to develop a federal common law for this purpose, most of them have relied on a general federal common law of veil-piercing rather than fashioning an LMRA-specific doctrine that is sensitive to the statute's particular

177. United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33, 35 (1st Cir. 1978).

178. *Id.* at 35-36.

179. *Id.* at 36.

180. American Bell, Inc. v. Federation of Telephone Workers, 736 F.2d 879, 887 (3d Cir. 1984); *see* Laborers' Intl. Union v. Foster Wheeler Corp., 868 F.2d 573, 576-77 (3d Cir. 1989) (per curiam).

181. *American Bell*, 736 F.2d at 887. The *American Bell* court indicated that it would require evidence of common law impropriety before piercing the veil. *Id.*

182. The great majority of these cases involve liability for unpaid employee benefit contributions. Prior to the 1980 amendment of ERISA to establish an ERISA cause of action to collect these delinquencies, *see* ERISA §§ 502(g), 515, 29 U.S.C. §§ 1132(g), 1145 (1988), this contribution obligation was only enforceable through an LMRA Section 301 action, on the ground that such failures to pay violate a collective bargaining agreement. Most of the cases subsequent to this amendment have been brought under both ERISA and the LMRA. The following discussion therefore considers only those cases that expressly arose under the LMRA rather than ERISA, but the body of ERISA individual liability case law, discussed in Section D below, may be considered largely an extension of LMRA doctrine rather than an entirely independent body of law.

purposes and policies. The statutory frustration doctrine has been almost completely ignored. Moreover, even though the federal law of veil-piercing is generally considered more liberal than state common law, some LMRA individual liability cases actually appear more restrictive.[183]

Although no doctrinal formula has become universally accepted, the Ninth Circuit's decision in *Seymour v. Hull & Moreland Engineering* has been widely influential.[184] Under *Seymour*, an attempt to impose LMRA liability on an individual shareholder involves a three-part inquiry into "the amount of respect given to the separate identity of the corporation by its shareholders, the degree of injustice visited upon the litigants by recognition of the corporate entity, and the fraudulent intent of the incorporators."[185] Although described as a statement of "a sort of generalized federal substantive law,"[186] this test essentially restates traditional corporate law principles, specifically those developed in California: the first criterion is satisfied when the corporation fails to observe proper formalities or when the shareholders commingle funds; the second primarily involves undercapitalization;[187] and the third provides a vessel of equity. Several other circuits have followed a similar approach.[188]

In determining whether an LMRA plaintiff had been subjected to "injustice," the *Seymour* court held that an employee benefit fund's inability to collect required contributions from the corporation did not constitute an "inequitable result" sufficient to permit pierc-

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183. *See, e.g.*, Audit Services, Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981). In *Rolfson*, the Ninth Circuit reversed a district court's imposition of individual shareholder liability under the LMRA, holding that the district court had erred in applying Montana law and that federal law as expressed in Seymour v. Hull & Moreland Engineering, 605 F.2d 1105, 1111 (9th Cir. 1979), would not permit personal liability. *See Rolfson*, 641 F.2d at 764.

184. 605 F.2d 1105, 1111 (9th Cir. 1979). *See, e.g.*, Trustees of UIU Health & Welfare Fund v. New York Flame Proofing Co., 649 F. Supp. 843, 847 (S.D.N.Y. 1986) (relying also on formulations of New York corporate law); NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 340 (6th Cir. 1990) (applying *Seymour* in the NLRA context).

185. *Seymour*, 605 F.2d at 1111.

186. *Id.*

187. Board of Trustees of the Mill Cabinet Pension Trust Fund v. Valley Cabinet & Mfg. Co., 877 F.2d 769 (9th Cir. 1989). In this ERISA case applying the *Seymour* doctrine, the Ninth Circuit clarified *Seymour*'s holding on this point by indicating that the incorporators' fraudulent intent need not necessarily have existed at the time the corporation was formed. *Id.* at 774. In reaching this result, the *Valley Cabinet* court made an explicit reference to ERISA policy, suggesting that this rule would "better promote[] the purposes of labor law and employee protection." *Id.*

188. The Third Circuit, for example, has chosen to apply a version of general federal veil-piercing doctrine that is itself taken wholesale from traditional state corporate law. *See* Carpenters Health & Welfare Trust Fund v. Kenneth R. Ambrose, Inc., 727 F.2d 279, 284 (3d Cir. 1984).

ing the corporate veil.[189] This interpretation of the term "injustice" stands in sharp contrast to certain recent Medicare cases, in which the courts have held that a corporation's mere inability to reimburse the government for overpayments constitutes a frustration of Medicare's statutory policy requiring reimbursement, and that the defaulting corporation's veil may be pierced accordingly.

Indeed, the *Seymour* court did not consider the statutory frustration doctrine at all, and appeared to dismiss the Supreme Court's application of that doctrine in *Anderson v. Abbott*[190] as an overbroad holding from which subsequent cases had retreated.[191] Rather, the *Seymour* court expressed its view that the "paramount policy" of the LMRA is "consistency in the enforcement of labor contracts" so as to achieve "industrial peace and productivity," and that state corporate law could properly be used except in those isolated circumstances where it might prove inconsistent with this policy.[192] Meanwhile, the Third Circuit has suggested that the LMRA contains a policy of maintaining limited liability for corporate officers as the quid pro quo "for the parallel insulation of officers and members of local unions from liability for [LMRA] violations."[193] As explained below, however, the purposes and policies of the LMRA are actually much broader than these decisions suggest, and are best served by a more realistic veil-piercing doctrine.

C. The Railway Labor Act

The Railway Labor Act ("RLA") was enacted in 1926 to regulate labor relations matters involving railroads, and was extended to airlines eight years later.[194] Surprisingly, given the statute's longevity, no cases appear to have imposed shareholder liability for RLA violations, although certain cryptic decisions involving corporate entity have emerged over the years. One court seems to have suggested that a subsidiary's mere inability to satisfy an RLA obligation does not provide a sufficient basis to impose liability upon its parent,[195]

189. *See Seymour*, 605 F.2d at 1113.
190. 321 U.S. 394 (1944).
191. *See Seymour*, 605 F.2d at 1111 n.6.
192. *Id.* at 1109, 1110.
193. Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc., 727 F.2d 279, 284 (3d Cir. 1983) (quoting Combs v. Indyk, 554 F. Supp. 573, 575 (W.D. Pa. 1982)). The analogy is imperfect: a more appropriate quid pro quo for the insulation of corporations' owners would be the insulation of international unions for their locals' acts — something not guaranteed in the LMRA, although established by other doctrines. *See*, United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).
194. *See* RLA § 201, 45 U.S.C. § 181 (1988).
195. *See* Local Union 808 v. P & W R. Co., 576 F. Supp. 693, 704 (D. Conn. 1983)

and it has also been held that a parent corporation is not a necessary or proper party in a union's action to compel a subsidiary to bargain in good faith under the RLA.[196] Neither of these decisions considered choice-of-law problems, however, or explained its reliance on traditional conceptions of corporate entity in terms of RLA policy.

In contrast, veil-piercing questions have arisen frequently in the context of RLA representational disputes. For example, the National Mediation Board ("NMB") has often been called upon to determine whether a particular employer, even though not obviously involved in the transportation industry, is nonetheless a "carrier" subject to RLA jurisdiction for representational purposes. To be deemed such a "carrier," an employer must satisfy two tests: first, it must be directly or indirectly owned or controlled by another "carrier;" and second, it must provide services that relate to transportation.[197]

In ascertaining whether or not an alleged "carrier" is under the control of another statutory "carrier," the NMB generally considers factors based on traditional intercorporate veil-piercing law. "Carrier" status has thus been found for a subsidiary when the subsidiary and its parent share common officers and facilities, consolidate their tax returns, interchange their employees, combine their payroll, and make financial and personnel decisions on a unified basis.[198] As in the NLRA context, centralization of labor relations and personnel matters appears the most important factor in determinations of "carrier" status,[199] and entities will be considered separate if their managerial and financial structures are kept distinct and labor relations matters are handled separately.[200]

Beginning in the 1930s, but especially during the 1980s, which witnessed a spate of mergers in the airline industry, the NMB has

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(granting a parent's motion to dismiss on the ground that although a subsidiary "may not be able to pay" for the consequences of an RLA violation, "the mere existence of a deeper pocket [in the form of a wealthier parent] is not a reason to make the owner of that pocket a party defendant.").

196. *See* Brotherhood of Railway Carmen, Lodge 886 v. Long Island R. Co., 267 F. Supp. 320, 324 (S.D.N.Y. 1967).

More recently, the Sixth Circuit has found the NLRA "alter ego" doctrine applicable in the RLA context, although the Court of Appeals found such liability inappropriate on the facts of the case. *See* International Longshoremen's Assn., Local Union No. 1937 v. Norfolk Southern Corp., 136 L.R.R.M. (BNA) 2746 (6th Cir. 1991).

197. *See* Cybernetics & Systems, Inc., 10 N.M.B. 334, 339 (1983) (interpreting RLA § 1, First, 45 U.S.C. § 152, First (1988)); *see also* Delpro Co. v. Brotherhood of Railway Carmen, 676 F.2d 960 (3d Cir. 1982).

198. *See, e.g.*, DHL Corp., 9 N.M.B. 67, 68 (1981); Air Cleveland, Inc., 8 N.M.B. 64, 64 (1980).

199. *See, e.g.*, *DHL Corp.*, 9 N.M.B. at 68.

200. *See* Mercury Services, Inc., 9 N.M.B. 104, 109-11 (1981).

also confronted a number of cases in which two or more entities are alleged to have integrated their operations and become a "single carrier" for purposes of the RLA.[201] The NMB's approach to these claims has been somewhat similar to that of the NLRB in its "single employer" cases, but unlike the "double-breasting" context, these cases usually involve contentions by the acquiring employer and its employees' union that the acquired employer has been absorbed and no longer exists as an independent entity; the acquired employer's union understandably tends to resist these efforts.[202]

In its seminal "single carrier" decision, the NMB announced that it considered proliferation of bargaining units undesirable and detrimental to the RLA's policy of minimizing disruptions in interstate commerce.[203] Accordingly, it determined that two airlines had become a "single transportation system" because they held themselves out to the public and the government as a single entity, combined their schedules and route systems, interlocked their officers and directors, assigned all maintenance and labor relations matters to the acquiring airline, and planned to integrate their payroll and reservations systems.[204] A finding that the acquired entity remained a separate carrier, the NMB concluded, "would exalt form over substance."[205] In more recent cases developing the "single carrier" doc-

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201. The NMB's first discussion of the veil-piercing problem came in its First Annual Report in 1935:

> The Board has ruled generally that where a subsidiary corporation reports separately to the Interstate Commerce Commission, and keeps its own payroll and seniority rosters, it is a carrier as defined in the act, and its employees are entitled to representation separate from other carriers who may be connected with the same railroad system. If the operations of a subsidiary are jointly managed with operations of other carriers and the employees have also been merged and are subject to the direction of a single management, then the larger unit of management is taken to be the carrier rather than the individual subsidiary companies.

NATIONAL MEDIATION BOARD FIRST ANNUAL REPORT (1935), *quoted in* Seaboard System Railroad-Clinchfield Line, 11 N.M.B. 217, 224 (1984). The NMB has indicated its belief that these traditional principles "remain sound" although "ritualistic adherence to past determinations" is not required. *Seaboard System*, 11 N.M.B. at 225.

For an account of recent developments in the airline industry, see Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1489-94 (1990).

202. *See* In re Trans World Airlines/Ozark Airlines, 14 N.M.B. 218, 236 (1987) (illustrating such three-way representation disputes in merger cases); In re Northwest Airlines, Inc., 13 N.M.B. 399 (1986) (illustrating similar three-way representation). *Compare with* In re Eastern Air Lines, Inc., N.M.B. CR-6053 (illustrating a "single carrier" case more similar to the double-breasting context, in which the union contends that two entities have been merged but management denies it).

203. *See* Republic Airlines, Inc., 8 N.M.B. 49, 54 (1980).

204. *See id.* at 55, 52-53.

205. *See id.* at 56.

trine, the NMB has established a two-part inquiry: first, it considers whether the two entities "are held out to the public as a single carrier;" and second, it seeks to "determine if the carriers have combined their operations from a managerial and labor relations perspective."[206]

Despite its careful analysis of these jurisdictional questions, the NMB has never considered the appropriate role for corporate law in RLA doctrine, although it has recognized that it retains the power to "pierce the corporate veil for purposes of rational labor-management relations," even if the veil were kept intact for other purposes, such as regulation by the (now-defunct) Civil Aeronautics Board.[207] Nevertheless, the NMB's insistence that formally separate entities will ordinarily be permitted to rely on the fiction of corporate entity suggests an excessively traditional approach. As discussed in Part III, Section B, a more flexible understanding, attentive to employee free choice and RLA policy, is warranted.

D. The Employee Retirement Income Security Act

The Employee Retirement Income Security Act creates a "comprehensive and reticulated" scheme that governs all matters relating to employee benefit plans.[208] Although several aspects of ERISA have little or nothing to do with labor relations, labor law veil-piercing questions arise in a wide variety of ERISA contexts. Several courts have imposed shareholder liability to remedy breaches of fiduciary duty,[209] but most ERISA veil-piercing cases arise from the failure of corporate employers to make payments to employee benefit plans.[210] These cases include attempts to hold corporate and individual shareholders responsible both for benefit contributions required under collective bargaining agreements[211] and for so-called "with-

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206. *Trans World Airlines*, 14 N.M.B. at 236.

207. *Republic Airlines*, 8 N.M.B. at 55.

208. Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980); *see* ERISA § 514(a), 29 U.S.C. § 1144(a) (1988) (providing that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan").

209. *See, e.g.*, Lowen v. Tower Asset Management, 829 F.2d 1209 (2d Cir. 1987); *see also* ERISA § 409, 29 U.S.C. § 1109 (1988) (establishing penalties for breaches of fiduciary duty under ERISA).

210. *See supra* note 207 and accompanying text; *see infra* notes 212, 218-223 and accompanying text.

211. This obligation became enforceable under ERISA with the incorporation of Sections 501 and 502(a) into ERISA with the passage of the Multiemployer Pension Plan Amendments Act of 1980 [hereinafter "MPPAA"]. *See* 29 U.S.C. §§ 1135 and 1132(a) (1988).

For a general discussion of ERISA veil-piercing law, see P. BLUMBERG, *supra* note 100, at

drawal liability," the statutory obligation of employers to pay their share of unfunded pension liabilities when they abandon multiemployer pension plans.[212] These different problems are considered sequentially.

1. Shareholder Responsibility for Benefits Contributions

a. Intercorporate Liability

The NLRA "single employer" and "alter ego" doctrines have been adopted wholesale in the ERISA contributions context, so that double-breasts or disguised continuances may be held responsible for contribution obligations in appropriate circumstances.[213] As in LMRA cases, however, certain NLRA problems are irrelevant: for example, courts deciding ERISA "single employer" cases are empowered to make their own determinations as to whether two companies' employees form a single appropriate bargaining unit.[214] Unlike the LMRA context, however, a prior NLRB determination that a single bargaining unit is inappropriate will not bind a court that seeks to determine whether both breasts of a "single employer" should be bound to a collective bargaining agreement's benefits contributions provisions. This is due to the fact that the plaintiff benefit fund is not considered to stand in privity with the union that was

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§§ 14.01-14.15.

212. ERISA Section 3(2)(A), 29 U.S.C. §1002(2)(A) (1988), defines a "pension plan" as follows:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the benefits under the plan or method of distributing benefits from the plan.

Id.

Under ERISA Section 3(2) (37)(a), 29 U.S.C. §1002(37)(A) (1988), a multiemployer plan is "a plan. . .(i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more employee organizations and more than one employer, and (iii) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation."

213. *See, e.g.*, Central States, S.E. and S.W. Areas Pension Fund v. Sloan, 902 F.2d 593 (7th Cir. 1990) (illustrating the "alter ego" doctrine); Operating Engineers Pension Trust v. Moulder Bros., Inc., 717 F. Supp. 697, 699 (C.D. Cal. 1989) (illustrating the "alter ego" doctrine); Plumbers Local No. 519 Health & Welfare Trust Fund v. Garcia, 677 F. Supp. 1554 (S.D. Fla. 1988) (discussing the "single employer" doctrine); *see also Plumbers Local No. 519*, 677 F. Supp. at 1558 (explaining ERISA courts' reliance on NLRA doctrine).

214. *See* Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 509, 519 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

party to the earlier representation proceeding.[215] Not surprisingly, application of these veil-piercing doctrines in the ERISA context has created problems similar to those encountered in NLRA cases. Because attentive employer planning can so easily prevent liability, their utility is decidedly questionable, and statutory frustration may easily result.[216]

Although most courts do not discuss bases for intercorporate ERISA contributions liability other than the NLRA-derived "single employer" and "alter ego" theories, at least one court has applied a version of the statutory frustration doctrine to hold a nominally separate corporation liable for delinquent contributions.[217] In that case, however, the defendants had devised a complex corporate structure that deliberately kept all valuable assets under the control of a dummy third-party corporation, and piercing the veil was therefore a fairly traditional application of the statutory frustration doctrine. In contrast, no court has ever considered whether a corporation's mere inability to pay benefit contributions constitutes a frustration of ERISA policy sufficient to permit imposition of liability upon parents and other corporate affiliates, or whether the appropriate veil-piercing rule in the ERISA contributions context would require such an element to fulfill statutory objectives.

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215. *See* Board of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc., 751 F.2d 1177, 1183 (11th Cir. 1985). ERISA trust funds are considered legally independent from both participating unions and participating employers. *See* NLRB v. Amax Coal Co., 453 U.S. 322, 334 (1981).

216. As in the NLRA context, an employer may sometimes defeat a "single employer" finding by the mere success of its artifice. *See, e.g.*, Brick Masons Pension Trust v. Industrial Fence & Supply, 839 F.2d 1333, 1337 (9th Cir. 1988) (holding that two companies were not an ERISA "single employer" because one breast worked on larger, high-skill (and therefore union-staffed) projects and the other breast on small, lower-skill (and thus non-union) projects). *But see Plumbers Local No. 519*, 677 F. Supp. at 1560-61 (finding a single bargaining unit appropriate because both breasts employed "plumbers installing irrigation systems," even though project size and skill levels differed and there was no interchange of employees between the two companies).

217. *See* Baker v. Caravan Moving Corp., 561 F. Supp. 337, 340 (N.D. Ill. 1983) (imposing ERISA liability upon a holding corporation that had no apparent function other than its ownership of the real estate upon which a nominally separate and otherwise assetless delinquent corporation conducted its operations). The *Baker* court held that "[w]hen an affiliated corporate structure is used as a shield to circumvent the intended purpose of legislation, courts will disregard the corporate entity and find a corporation liable for the debts of its affiliate," and that therefore a "sham corporation used to escape obligations under collective bargaining agreements and ERISA may be held liable for such contributions." *Id.* at 340-41.

More recently, the Seventh Circuit appears to have held, implicitly relying on personal ERISA liability decisions from that court, that state law should determine intercorporate veil-piercing questions in ERISA cases. *See* Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 460 (7th Cir. 1991); *see also infra* note 240 and accompanying text (discussing recent Seventh Circuit personal ERISA liability decisions).

b. Individual Liability

Of the existing labor law veil-piercing doctrines, judicial treatment of individual ERISA liability questions probably contains the most sophisticated analysis. The courts of appeals have taken widely divergent approaches to this problem, however, with some suggesting the appropriateness of a relatively broad liability rule designed to fulfill ERISA policy, some applying nominally federal but nonetheless traditional doctrines, and some relying on principles of state corporate law.

The First Circuit has undertaken the most sensitive analysis of individual ERISA liability. In *Alman v. Danin*,[218] the First Circuit applied the basic principle that "federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form,"[219] and held that ERISA "cannot be said to attach great weight to corporate form."[220] Indeed, the *Alman* court observed that "deferring too readily to the corporate identity may run contrary to the explicit purposes" of ERISA.[221] Three other circuits have cited *Alman* favorably.[222]

The *Alman* court further held that ERISA's key statutory policy with respect to payment of employee benefit contributions was "to ensure that employees were not deprived of promised benefits which they both expected and deserved" — that is, that contributions should simply be paid.[223] The court also suggested that under-

218. 801 F.2d 1 (1st Cir. 1986).

219. *Id.* at 3 (quoting Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981)).

220. *Id.*

221. *Id.*

222. *See* Lumpkin v. Envirodyne Indus., 933 F.2d 449, 460-61 (7th Cir. 1991)(discussing *Alman's* interpretation of ERISA policy); Laborers Pension Trust Fund v. Sidney Weinberger Homes, Inc., 872 F.2d 702, 705 (6th Cir. 1988)(per curiam)(relying on *Alman* to impose personal ERISA liability); Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1220-21 (2d Cir. 1987)(relying on *Alman* in a case involving breach of fiduciary duty).

223. *Alman*, 801 F.2d at 4. The Seventh Circuit has recently outlined an additional ERISA policy that is relevant to the veil-piercing problem: the unfair burden-shifting that will result if a delinquent employer is allowed to escape contribution obligations and thus force other participating employers to "bear the burden" of the delinquent employer's "failure to pay its share." Upholsterers' Int'l Union Pension Fund v. Artistic Furniture, 920 F.2d 1323, 1328 (7th Cir. 1990). In *Artistic Furniture*, liability was imposed upon a successor employer that acquired a delinquent employer's operations, rather than upon a shareholder. *Id.* Curiously, the Seventh Circuit's decisions in the veil-piercing context show a great deal less sensitivity to the policies underlying ERISA. *Compare Artistic Furniture with* Plumbers' Pension Fund v. Niedrich, 891 F.2d 1297 (7th Cir. 1989), *cert. denied*, _ U.S. _, 110 S.Ct. 2169 (1990) *and* Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186 (7th Cir. 1989). *Cf.* Mitzner, *The Art of Collection*, in 30 EMPLOYEE BENEFITS ISSUES — THE MULTIEMPLOYER PERSPECTIVE 368-69 (J. Lehman & D. Lyne eds. 1988) ("One of the major problems [unions and

capitalization alone might provide a sufficient basis to impose individual shareholder liability, because shareholders' interposition of an undercapitalized corporation would "tend to defeat ERISA's purposes and work a clear injustice."[224]

Other appellate courts have echoed *Alman*'s assertion that a corporation's inability to pay may constitute a form of shareholder "fraud" sufficient to impose personal liability under ERISA.[225] In addition an Illinois district court suggested that a corporation's insolvency and inability to pay ERISA contributions might be enough, in and of itself, to impose individual liability upon its shareholders.[226] Similarly, the Eighth Circuit has held individual shareholders liable for ERISA contributions in circumstances in which the shareholder's abuses of the corporation would not be sufficient to permit "at common law" veil-piercing.[227] In reaching its decision, the Eighth Circuit relied on the congressional policy expressed in ERISA "that employers make all of their required contributions to pension and health and welfare plans."[228] In other words, the court of appeals implied that mere nonpayment may constitute frustration of statutory policy, as has been held in the Medicare cases.[229] The Second Circuit has also invoked ERISA policy in its veil-piercing cases, relying on ERISA's basic purpose "to promote the interests of employees and their beneficiaries in employee benefit plans and to protect contractually defined benefits"[230] to hold that individual liability may be imposed under ERISA "even if the traditional conditions for piercing the corporate veil are not met."[231]

ERISA benefit funds] face today is that judges across the United States often come from corporate America, and they are extremely reluctant to impose personal liability on individuals or to pierce the corporate veil and hold one corporation accountable for the debts of another.").

224. *Alman*, 801 F.2d at 4. Despite these holdings, the *Alman* court also appeared to endorse the district court's reliance on narrower, LMRA-based veil-piercing principles, and the shareholders in question had committed a number of common-law transgressions. *Id.* (citing Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc., 736 F.2d 516, 524 (9th Cir. 1984)).

225. *See* Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch, 757 F.2d 184, 191 (8th Cir. 1985).

226. *See* Laborers' Pension Fund v. Litgen Concrete Cutting & Coring Co., 709 F. Supp. 140, 144 (N.D. Ill. 1989). The *Litgen* court also held, however, that individual ERISA liability may not be imposed merely because one individual owns all the insolvent corporation's stock. *Id.*

227. *See Hroch*, 757 F.2d at 191.

228. *Id.*

229. *Id.*

230. Leddy v. Standard Drywall, Inc., 875 F.2d 383, 388 (2d Cir. 1989) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989)).

231. *Leddy*, 875 F.2d at 388. The *Leddy* court indicated that such liability would be

Other courts of appeals, however, have taken a less careful and flexible approach. Several courts, for example, have relied on LMRA veil-piercing principles in the ERISA context.[232] Unfortunately, these LMRA doctrines have been adopted without analysis of whether or not the two statutes actually share common purposes and policies that should be reflected in the body of veil-piercing law developed to fulfill them.[233] Limiting shareholders' LMRA liability, for example, has sometimes been justified as the quid pro quo for limiting union officers' LMRA liability — a rationale that clearly makes no sense in the ERISA context.[234]

Various courts have chosen to apply "general" veil-piercing principles developed under other federal statutes instead of fashioning an ERISA-specific doctrine, again without justifying the maneuver.[235] The Third Circuit's "general" federal test, for example, considers such traditional factors as failure to observe corporate formalities, corporate insolvency, siphoning of corporate assets, and the status of the corporation as sham or facade.[236] In addition, one Sixth Circuit panel decision indicated that "a showing of fraud or injustice" would be required before an individual shareholder could be held liable for delinquent contributions, emphasizing that the corporation's mere inability to pay would not constitute such a showing.[237] This conclusion has also been expressed by at least two other circuits.[238]

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appropriate "at least to the extent that a controlling corporate official defrauds or conspires to defraud a benefit fund of required contributions." *Id.*

232. *See, e.g.*, Solomon v. Klein, 770 F.2d 352 (3d Cir. 1985); Audit Serv., Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981). In addition, the NLRA "alter ego" doctrine has also been applied to impose individual ERISA liability. *See* Laborers' Pension Trust Fund v. Family Cement Co., 677 F. Supp. 896, 898 (E.D. Mich. 1987).

233. This is partially the case because ERISA jurisdiction to collect delinquent contributions did not exist prior to the passage of the MPPAA. Before the MPPAA, ERISA trust funds were required to file suit under LMRA Section 301(a), 29 U.S.C. § 185(a) (1988), to collect such delinquencies. *See supra* note 182.

234. *See supra* note 193.

235. *See, e.g., Litgen*, 709 F.Supp. at 143. The differences between these various conservative approaches may be more apparent than real. *See also* P. BLUMBERG, *supra* note 100 § 13.11, at 440, 441-45 (contending that "[c]onventional state law notions of 'piercing the [corporate] veil' are, in fact, supreme" in the individual ERISA liability context, and that these conventional "doctrines may be regarded as virtually interchangeable.").

236. *See* Solomon v. Klein, 770 F.2d at 353-54.

237. Scarbrough v. Perez, 870 F.2d 1079, 1084 (6th Cir. 1989). Other Sixth Circuit decisions, however, have taken a substantially different view. *See, e.g.*, Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc., 872 F.2d 702, 705 (6th Cir. 1988) (per curiam)(stating that the corporate veil may be pierced without clear evidence of fraud).

238. *See* Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989); International Bhd. of Painters v. George A. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988); *see also Litgen*, 709 F.

Other appellate cases — including panel decisions from circuits that have rendered more favorable holdings in other cases — suggest an even more limited ERISA veil-piercing doctrine based on state corporate law. These intimations have generally emerged in cases holding that the pertinent ERISA definition of "employer" does not encompass individual corporate shareholders or officers and that shareholder liability may therefore only be imposed by veil-piercing.[239] Because these cases primarily involve close statutory interpretation, courts have apparently not devoted great attention to the secondary problem of shaping an appropriate veil-piercing doctrine. As a result, two circuits have reached the dubious conclusion that state corporate law should control. The Seventh Circuit, for example, has held that shareholders are liable for delinquent contributions only "to the extent [they are] liable for general corporate debts under state corporate law,"[240] and the First Circuit, having originally also held that state corporate law determines individual ERISA liability, modified its position by suggesting that the law in this area is only "technically" federal and "takes its content in part from related state law."[241]

Supp. at 144 ("The fact that [an ERISA defendant] is a closely held corporation is insufficient evidence standing alone to warrant piercing of [its] corporate veil.").

239. ERISA § 3(5), 29 U.S.C. § 1002(5) (1988), defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." Individual owners of unincorporated enterprises have been held liable for delinquent contributions as "employers" within the meaning of Section 3(5). *See* Painters Pension Fund v. Howard Painting Co., 8 E.B.C. (BNA) 2497, 2499 (D.C. Cir. 1987) (per curiam). Cases that have (quite inexplicably) refused to issue similar holdings against the owners of incorporated enterprises have generally analyzed the problem by considering ERISA's relationship to the FLSA, which contains a substantially identical definition of "employer" that has routinely been held sufficient to impose liability upon controlling officers and shareholders. *See infra* text accompanying notes 292-98.

240. Plumbers' Pension Fund Local 130 v. Niedrich, 891 F.2d 1297, 1300-01 (7th Cir. 1989), *cert. denied*, _ U.S. _, 110 S.Ct. 2169 (1990); Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186, 1193 (7th Cir. 1989); *see* Cornick v. Hi Grade Cleaners, Inc., 595 F. Supp. 718, 721 (N.D. Ill. 1984) (applying Illinois law in making an ERISA veil-piercing determination).

Most recently, the Seventh Circuit's perplexing decision in Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449 (7th Cir. 1991), a case involving inter-corporate ERISA liability, suggests both that state law should apply and that "the protection afforded by the corporate form might be undercut by the overriding federal legislative policy reflecting in ERISA." *Compare id.* at 462-63 *with id.* at 460-61.

241. Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving Corp., 845 F.2d 23, 27 (1st Cir. 1988).

In reaching their decisions about the scope of individual liability for delinquent ERISA contributions, several courts have relied upon an opinion letter of the Pension Benefit Guaranty Corporation [hereinafter "PBGC"] concerning the question of shareholder responsibility for withdrawal liability. *See, e.g., Levit*, 874 F.2d at 1193; Solomon v. R.E.K. Dress, 670 F. Supp. 96, 99 (S.D.N.Y. 1987). In that opinion letter, the PBGC opined that "ERISA has no special

Although the more conservative courts of appeals have not analyzed individual ERISA liability problems through the lens of the statutory frustration doctrine, and although ERISA would appear to point toward a broad veil-piercing rule,[242] some of these courts have suggested that a broad rule of liability would actually tend to work against the purposes of ERISA, because the threat of individual shareholder liability for delinquent contributions would discourage employers from participating in multiemployer trust funds.[243]

2. *Shareholder Responsibility for Withdrawal Liability*

Congress added the withdrawal liability provisions to ERISA in 1980. Under this withdrawal liability scheme, if an employer ceases to be obligated to contribute to a multi-employer ERISA pension plan, the employer is required to pay the plan an amount equal to its share of the plan's unfunded liability.[244] Determining whether such a withdrawal has taken place and calculating the amount of any such liability involves application of an unusually complex set of statutory and regulatory rules,[245] but these matters do not raise veil-piercing issues. If withdrawal liability is found to be owing, however, shareholders and corporate affiliates may sometimes be required to satisfy the obligation.

a. *Intercorporate Liability*

A maze-like series of provisions imposes joint and several ERISA withdrawal liability upon all members of a commonly owned

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rules regarding shareholder or officer liability. Accordingly, this issue is usually determined by state law, which generally provides that shareholders are not liable for the debts of a corporation." PBGC Opinion Letter 82-38 (December 14, 1982), as quoted in *Levit*, 874 F.2d at 1193. Judicial reliance on this opinion letter is extremely questionable, however, because the PBGC has no role whatsoever in the enforcement of employer contribution obligations. *See* ERISA §§ 4001-09, 29 U.S.C. §§ 1301-09 (1988) (establishing the powers of the PBGC); ERISA § 502, 29 U.S.C. § 1132 (1988) (listing the parties who are entitled to initiate civil actions to enforce ERISA contribution obligations). Moreover, reliance on this opinion letter to resolve the choice-of-law question appears to flout the mandate of *Kimbell Foods.*

242. *See* S. REP. No. 127, 93d Cong., 1st Sess. 18 (1973) ("It is intended that the coverage of [ERISA] be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose.").

243. *See Scarbrough*, 870 F.2d at 1084 (6th Cir. 1989); *see also* Rockney v. Blohorn, 877 F.2d 637, 642-43 (8th Cir. 1989); *see infra* text accompanying note 408 (critiquing this argument).

244. *See* ERISA § 4201(a), 29 U.S.C. § 1381(a) (1988) ("If an employer withdraws from a multiemployer [pension] plan . . . then the employer is liable to the plan in the amount determined . . . to be the withdrawal liability.").

245. *See* ERISA §§ 4201-25, 29 U.S.C. §§ 1381-405 (1988).

"controlled group" of corporations.[246] Several courts have applied these provisions to require "controlled group" members to satisfy other members' withdrawal liability obligations.[247] On the other hand, courts have disagreed as to whether this statutory framework provides the exclusive means of imposing intercorporate withdrawal liability or whether such liability may also be assessed against related corporate entities by application of the NLRA "single employer" doctrine or other veil-piercing principles.[248]

b. Individual Liability

As in the delinquent contributions context, several courts have refused to hold corporate officers or shareholders responsible for corporate withdrawal liability obligations as statutory "employers."[249] These courts have held further that the principle of limited corporate

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246. ERISA Section 4001(b)(1), 29 U.S.C. § 1301(b)(1) (1988), provides that "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." Section 4001(b)(1) further provides that the existence of "common control" is determined by reference to regulations promulgated under Section 414(c) of the Internal Revenue Code, 26 U.S.C. § 414(c) (1988). These regulations provide that "common control" will be found, for example, where a single shareholder or group of shareholders owns at least 80% of two or more corporations. *See* 26 C.F.R. § 1.414(c)-2(b)-(c) (1991). Accordingly, all members of the "controlled group" are jointly and severally liable for withdrawal liability obligations of other members.

247. *See, e.g.*, DeBreceni v. Bru-Jell Leasing Corp., 710 F. Supp. 15, 22 (D. Mass. 1989); IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118 (3d Cir. 1986); United Food and Commercial Workers Union v. Progressive Supermarkets, Inc., 644 F. Supp. 633 (D.N.J. 1986); Connors v. Calvert Dev. Co., 622 F. Supp. 877 (D.D.C. 1985).

248. *Compare* Connors v. Peles, 724 F. Supp. 1538, 1575 (W.D. Pa. 1989) (suggesting that "[t]he 'single employer' doctrine . . . is quite simply a creature of labor and the NLRB and has no application in an ERISA setting.") *with* In re Consolidated Litigation Concerning Int'l Harvester's Disposition of Wisconsin Steel, 681 F. Supp. 512, 519 (N.D. Ill. 1988) (suggesting that traditional veil-piercing principles may apply in intercorporate withdrawal liability cases).

Other courts have suggested that withdrawal liability may be imposed through application of the NLRA "joint employer" doctrine. *See* Refined Sugars, Inc., v. Local 807 Labor-Management Pension Fund, 632 F. Supp. 630, 634 (E.D.N.Y. 1986); Central Penn. Teamster's Pension Fund v. Service Group, Inc., 645 F. Supp. 998 (E.D. Pa. 1985); *see also supra* note 149 (explaining the "joint employer" doctrine).

The availability of the "alter ego" doctrine has apparently not been tested in the withdrawal liability context. However, the absence of such cases may be explained on the ground that any alleged "alter ego" would probably share sufficient common ownership with the withdrawing employer as to fall within the statutory "controlled group."

249. *See, e.g.*, Scarbrough v. Perez, 870 F.2d 1079 (6th Cir. 1989); DeBreceni v. Graf Bros. Leasing, Inc., 828 F.2d 877 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988); Connors v. P & M Coal Co., 801 F.2d 1373 (D.C. Cir. 1986). Subchapter III of ERISA, Subtitle E, which governs withdrawal liability, does not contain a definition of the term "employer," and several courts have refused to adopt the definition provided in Subchapter I. *See DeBreceni*, 828 F.2d at 879-80.

liability constitutes a "background norm," so that congressional silence on the question of shareholder liability requires a determination that a limited, common law doctrine of veil-piercing — attentive to standard corporate law factors like undercapitalization, disregard of formalities, and commingling of assets[250] — should prevail in this context.[251] As in the delinquent contributions context, some courts have even suggested, without careful analysis, that state corporate law should be applied to determine these problems.[252]

On the other hand, none of these courts has proceeded to conduct the next step of the inquiry: to determine the importance that ERISA's withdrawal liability provisions place upon the corporate form, and the extent to which nonpayment of withdrawal liability would undermine statutory purpose and policy. Although ERISA clearly expresses a policy that withdrawal liability should be paid to prevent the undermining of multiemployer pension plans,[253] the more conservative courts have suggested that a broad rule of shareholder liability would actually undermine a key purpose of the withdrawal liability system by discouraging employers from participating in multiemployer pension plans in the future.[254] Imposing individual shareholder liability would obviously have no effect upon employers already obligated to participate, however, because such employers would not be permitted to abandon the plan without risking the imposition of liability upon their shareholders.[255]

E. The Norris-LaGuardia Act

The Norris-LaGuardia Act, enacted in 1932 to remedy perceived abuses of the federal courts' power to enjoin strikes, prohibits federal courts from issuing labor injunctions unless strict safeguards are satisfied.[256] Because the Norris-LaGuardia Act prohibits rather

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250. *See Peles*, 724 F. Supp. at 1557-58 (citing Solomon v. Klein, 770 F.2d 353, 354 (3d Cir. 1985)).

251. *DeBreceni*, 828 F.2d at 880; *see P & M Coal*, 801 F.2d at 1376-77.

252. *See* Connors v. B.M.C. Coal Co., 634 F. Supp. 74 (D.D.C. 1986) (applying both Kentucky and federal law to determine whether an individual shareholder should be held responsible for a corporate withdrawal liability obligation).

253. *See supra* note 242.

254. *See DeBreceni*, 828 F.2d at 880; *P & M Coal*, 801 F.2d at 1376.

255. *See DeBreceni*, 828 F.2d at 880; *see infra* text accompanying note 407 (discussing this argument further).

256. Under the Norris-LaGuardia Act, a federal court may only issue an injunction in specifically enumerated classes of labor disputes, and then only when the court provides strict due process guarantees and makes detailed factual findings. *See* Norris-LaGuardia Act §§ 4, 7, 29 U.S.C. §§ 104, 107 (1988). In addition, the Act prohibits federal courts from enforcing "yellow-dog contracts," under which an employee agrees to refrain from union membership as

than authorizes federal court action, litigation under the Act has been fairly limited, and veil-piercing questions have almost never been raised.

In an unusually sensitive 1962 decision, however, the Second Circuit indicated that state corporate law should not be applied to Norris-LaGuardia Act veil-piercing problems, and that statutory policy required a more liberal rule in this context.[257] The court of appeals held that even if two corporations would be considered separate "in [state] contract or tort litigation," "it d[id] not follow that they ought to be so regarded for application of the Norris-LaGuardia Act."[258] The court explained that all veil-piercing questions "must be resolved in the light of the policy underlying the applicable legal rule,"[259] and that the strong anti-injunction policy of the Norris-LaGuardia Act was not "to be defeated by the fragmentation of an integrated business into a congeries of corporate entities."[260] Accordingly, the court of appeals held that a strike could not be enjoined when two nominally separate corporations were actually one employer engaged in a single industry for purposes of the Act, so that picketing conducted at the second corporation was considered part of a "labor dispute" and immune from injunction.[261]

F. Title VII

Title VII prohibits discrimination in employment on the basis of race, sex, color, religion, or national origin.[262] Although this purpose is somewhat different from those of labor relations statutes like the NLRA,[263] NLRA veil-piercing law has been widely applied to resolve intercorporate veil-piercing questions under Title VII. On the other hand, problems of individual Title VII liability have been consistently determined through application of Title VII's definition of the term "employer" rather than through veil-piercing doctrine.[264]

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a condition of employment. *See* Norris-LaGuardia Act § 3, 29 U.S.C. § 103 (1988).

257. Bowater Steamship Co. v. Patterson, 303 F.2d 369, 372 (2d Cir.), *cert. denied*, 371 U.S. 860 (1962).

258. 303 F.2d at 372.

259. *Id.*

260. *Id.* at 373.

261. *See id.* (citing Norris-LaGuardia Act § 13(a), 29 U.S.C. § 113(a) (1988)).

262. *See* Civil Rights Act § 703(a), 42 U.S.C. § 2000e-2(a) (1988).

263. The NLRA does, of course, prohibit discrimination in employment on the basis of union activity. *See* NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1988). Indeed, the great majority of cases involving individual NLRA shareholder liability arise from corporate failures to satisfy back pay obligations to victims of such discrimination.

264. Title VII defines "employer" as "a person engaged in an industry affecting commerce . . . and any agent of such a person." Civil Rights Act § 701e(b), 42 U.S.C. § 2000e(b)

Accordingly, in considering whether two or more nominally separate enterprises should be considered an "integrated enterprise" or a "single employer" for Title VII purposes, most courts have accepted and applied the NLRA "single employer" test.[265] As in the NLRA context, courts determining the appropriateness of intercorporate Title VII liability consider whether two entities share common ownership, management, and integrated operations,[266] and devote particular attention to the existence of centralized control over labor and personnel relations.[267] In the Title VII context, how-

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(1988). Courts have considered individuals to be Title VII "employers" when they " 'participate[] in the decision-making process that forms the basis of the discrimination,' " Hamilton v. Rodgers, 791 F.2d 439, 443 (5th Cir. 1986) (quoting Jones v. Metropolitan Denver Sewage Disposal Dist., 537 F. Supp. 966, 970 (D. Colo. 1982)), or " 'control some aspect of an individual's compensation, terms, conditions, or privileges of employment.' " Bostick v. Rappleyea, 629 F. Supp. 1328, 1334 (N.D.N.Y. 1985) (quoting Spirt v. TIAA, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *aff'd in part, rev'd in part on other grounds*, 691 F.2d 1054 (2d Cir. 1982), *cert. denied*, 469 U.S. 881 (1984)). Insofar as these statutory "employers" are not necessarily shareholders of corporate defendants, imposition of individual Title VII liability does not involve corporate law principles. *See, e.g.*, Hallquist v. Max Fish Plumbing & Heating Co., 46 F.E.P. Cases (BNA) 1855, 1859 (D. Mass. 1987) (imposing Title VII liability on a job site superintendent). In most cases in which the corporate defendant is a small business, of course, the responsible individual "employer" will be a shareholder. *See, e.g.*, Burns v. Terre Haute Regional Hosp., 581 F. Supp. 1301 (S.D. Ind. 1983). Courts have disagreed as to whether individual Title VII "employers" may be held personally responsible for monetary obligations, or, as in the NLRA context, may only be subject to injunctive orders. *See* House v. Cannon Mills Co., 713 F. Supp. 159, 160 (M.D.N.C. 1988).

265. As in the NLRA context, the "single employer" doctrine has been applied for both liability and jurisdictional purposes. *See* EEOC v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 571 n.1 (6th Cir. 1984).

The NLRA-based "single employer"/"integrated enterprise" doctrine has also been accepted in the context of Section 1981, 42 U.S.C. § 1981 (1988), a federal statute which can also relate to racial discrimination in employment but cannot properly be deemed a "labor law." *See* Musikiwamba v. ESSI, Inc., 760 F.2d 740, 748 (7th Cir. 1985)(distinguishing Section 1981 from labor laws like the NLRA and Title V11). For examples of such Section 1981 cases, see Sargent v. McGrath, 685 F. Supp. 1087, 1089 (E.D. Wis. 1988) and Greason v. Southeastern R.R. Assoc. Bureaus, 650 F. Supp. 1, 4-5 (N.D. Ga. 1986).

266. *See, e.g.*, Childs v. Local 18, IBEW, 719 F.2d 1379, 1382 (9th Cir. 1983); Armbruster v. Quinn, 711 F.2d 1332, 1337 (6th Cir. 1983); Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir.), *reh'g en banc denied*, 707 F.2d 515 (5th Cir. 1983); Mas Marques v. Digital Equip. Corp., 490 F. Supp. 56, 58 (D. Mass.), *aff'd*, 637 F.2d 24 (1st Cir. 1980); Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977). In the Sixth Circuit, however, the "common ownership" criterion has sometimes been interpreted as demanding "an inquiry into the legitimacy of the entities," so that single employer status will not be found unless one of the entities is revealed as a "sham." *Wooster Brush*, 727 F.2d at 572. Title VII intercorporate liability cases almost always involve parent-subsidiary relationships; brother-sister liability is much more rare, largely because double-breasting is not a feature of discrimination cases. Similarly, because employers have apparently not established new enterprises to escape liability for employment discrimination, no cognate of the NLRA "alter ego" doctrine has developed in Title VII or ADEA cases.

267. *See Trevino*, 701 F.2d at 404. Liability may nonetheless be imposed in the absence

ever, consideration of the centralization of labor relations frequently becomes an inquiry concerning the source of the key decisions relating to the plaintiff's employment, rather than an assessment of the entities' general structure.[268]

Despite this widespread acceptance of the "single employer" doctrine, several courts have suggested that various refinements of common law veil-piercing precepts are also appropriately invoked in Title VII cases.[269] Accordingly, nominally distinct entities, especially parents and subsidiaries, may be considered to form a single Title VII "employer" when one is shown to be "merely the agent or instrumentality of the other,"[270] or when a separate entity interferes in particular transactions.[271]

On the other hand, courts have refused to hold parent corporations liable for their subsidiaries' Title VII violations "in the absence of special circumstances,"[272] suggesting that neither the text nor the legislative history of Title VII supports such a maneuver.[273] However, no court has attempted to fashion a specific veil-piercing rule for Title VII cases that would seek to protect Title VII policy or prevent its frustration, and traditional corporate law doctrine invariably provides the benchmark for analysis.

G. The Age Discrimination in Employment Act

The ADEA imposes liability upon employers who discriminate in employment on the basis of age.[274] The statute is similar in purpose and policy to Title VII, and its veil-piercing doctrines are sub-

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of such centralized control. *See Armbruster*, 711 F.2d at 1337-38.

268. *See Trevino*, 701 F.2d at 404 (citing Odriozola v. Superior Cosmetic Distrib., 531 F. Supp. 1070, 1076 (D.P.R. 1982)).

269. Some courts have also suggested that Title VII's "single employer" test actually only involves "ordinary principles of corporate law." Sargent v. McGrath, 685 F. Supp. 1087, 1089 (E.D. Wis. 1988).

270. EEOC v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 571 (6th Cir. 1984); *see also* Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181, 1184 (E.D.N.Y. 1979).

271. *See* Brooms v. Regal Tube Co., 44 F.E.P. Cases (BNA) 1119, 1124 (N.D. Ill. 1987) (holding a parent corporation liable for its subsidiary's acts of sexual harassment because the subsidiary's sexual harassment policy was distributed on the parent's letterhead and the parent "actively participated in determining how to handle the discrimination charges").

272. Watson v. Gulf & Western Indus., 650 F.2d 990, 993 (9th Cir. 1981). The *Watson* court suggested that such special circumstances might be found where the parent "participated in or influenced the employment policies" of the subsidiary, or undercapitalized the subsidiary "in a way that defeated potential recovery by a Title VII plaintiff." *Id.*

273. *See, e.g.*, Hassell v. Harmon Foods, Inc., 336 F. Supp. 432, 433 (W.D. Tenn. 1971), *aff'd*, 454 F.2d 199 (6th Cir. 1972).

274. *See* ADEA §4(a), 29 U.S.C. § 623(a) (1988). The ADEA's prohibitions only protect employees over forty years of age. *See* ADEA § 12(a), 29 U.S.C. § 631(a) (1988).

stantially identical. Once again, however, no court has endeavored to develop an ADEA-specific veil-piercing doctrine that is designed to advance the statute's purpose and policies and to prevent their frustration.

By analogy to Title VII — and thus, derivatively, to the NLRA — the four-part "single employer"/integrated enterprise" test has been widely adopted in the ADEA context.[275] Here too, centralized control of labor relations provides the most important determinant, and courts usually emphasize the degree of parental involvement in the key decisions concerning the plaintiff's employment.[276] As in the Title VII context, though, traditional veil-piercing theories also remain viable, so that a parent corporation may be held liable for its subsidiary's ADEA violations if the parent "dominates" the subsidiary,[277] if the subsidiary is shown to be a mere "agent" or "instrumentality" of the parent,[278] or if basic common law corporate transgressions are found.[279] Because each of these inquiries assesses the "degree of integration" between parent and subsidiary, however, they may not properly constitute distinct tests.[280]

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275. *See, e.g.*, Wood v. Southern Bell Tel. & Tel. Co., 725 F. Supp. 1244, 1248-49 (N.D. Ga. 1989); EEOC v. KWMT, Inc., 718 F. Supp. 1425, 1427 (N.D. Iowa 1988) (applying the "single employer" test in the brother-sister context); Beckwith v. International Mill Serv., Inc., 617 F. Supp. 187, 189 & n.5 (E.D. Pa. 1985) (applying the "single employer" test in the parent-subsidiary context and noting that application of Title VII doctrine is appropriate in ADEA cases pursuant to Oscar Meyer & Co. v. Evans, 441 U.S. 750, 756 (1979)).

Individual ADEA liability has also been analyzed in a manner similar to Title VII: individuals have only been found liable on the ground that they are statutory "employers," usually supervisory employees to whom employment decisions have been delegated. *See* House v. Cannon Mills Co., 713 F. Supp. 159, 161-62 (M.D.N.C. 1988); York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982); *see also* ADEA § 11(b), 29 U.S.C. § 630(b) (1988) (defining "employer" as "a person engaged in an industry affecting commerce" and "any agent of such a person").

276. *See* Johnson v. Flowers Indus., 814 F.2d 978, 981 (4th Cir. 1987)(suggesting that a parent corporation may be liable under the ADEA if it "hired and fired the subsidiary employees, routinely shifted them between the two companies, and supervised their daily operations"); Leichihman v. Pickwick Int'l, 814 F.2d 1263, 1268 (8th Cir. 1987)(refusing to hold a parent corporation liable for its subsidiary's alleged ADEA violation in the absence of "evidence linking [the parent] to any of [the subsidiary's] individual employment decisions" concerning the plaintiff).

277. *Johnson*, 814 F.2d at 980.

278. *See* Kamens v. Summit Stainless, Inc., 586 F. Supp. 324, 327 (E.D. Pa. 1984); Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181, 1184 (E.D.N.Y. 1979).

279. *See Johnson*, 814 F.2d at 981 (suggesting that a parent corporation may be liable for a subsidiary's ADEA violations if finances are commingled, corporate formalities are ignored, or the subsidiary is undercapitalized); Zubik v. Zubik, 384 F.2d 267, 272 (3d Cir. 1967), *cert. denied*, 390 U.S. 988 (1968)(holding that parental ADEA liability is appropriate if "recognition of the corporate entity would defeat public policy or shield someone from liability for a crime.").

280. Berkowitz v. Allied Stores, 541 F. Supp. 1215 (E.D.Pa. 1982); *but see* Wood v.

H. The Fair Labor Standards Act

The Fair Labor Standards Act of 1938 ("FLSA") which regulates the payment of minimum and overtime wages, contains several rather unusual statutory definitions that have led to the development of equally unusual veil-piercing doctrines.[281] In most instances, however, liability is imposed on grounds unrelated to stock ownership, and to that extent veil-piercing concerns are not directly implicated. When veil-piercing is actually considered, traditional, restrictive doctrines appear to apply.

1. Intercorporate Liability

The FLSA contains a complex provision that establishes the Act's jurisdiction over particular employers. FLSA jurisdiction lies over any "enterprise" — "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, [including] all such activities whether performed in one or more establishments or by one or more corporate or other organizational units"[282] — that maintains a sufficient volume of business.[283] Although corporate lines are not respected, common ownership between entities is not sufficient in itself to create a single FLSA "enterprise," so that commonly held corporations will be considered independent under the FLSA if they maintain distinct business purposes.[284]

Southern Bell Tel. & Tel. Co., 725 F. Supp. 1244, 1248-49 (N.D. Ga. 1989) (suggesting the existence of four distinct tests for intercorporate ADEA liability).

The recently enacted ADA, which prohibits private employers from discriminating on the basis of disability, has not yet generated veil-piercing doctrines but it is likely that such doctrines will develop in a fashion similar to Title VII and the ADEA. The ADA is substantially identical in purpose to other anti-discrimination statutes like Title VII and the ADEA, and it contains a similar definition of the term "employer." *See* ADA § 101(5)(A) (defining "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person").

281. *See generally* P. BLUMBERG, *supra* note 100, at § 15.02 (discussing FLSA veil-piercing law).

282. FLSA § 3(r), 29 U.S.C. § 203(r) (1982); *see* Donovan v. Grim Hotel Co., 747 F.2d 965, 969 (5th Cir. 1984), *cert. denied*, 471 U.S. 1124 (1985) (holding that an FLSA "enterprise" exists "despite corporate fragmentation in operation," when "(A) the corporations perform related activities, (B) through unified operation or common control, (C) for a common business purpose.").

283. *See, e.g.*, Donovan v. Sideris, 688 F.2d 74, 75 (8th Cir. 1982).

284. *See* Donovan v. Shteiwi, 563 F. Supp. 118, 122 (S.D. Ohio 1983), *aff'd*, 738 F.2d 438 (6th Cir. 1984); *see also* Donovan v. Breaker of America, Inc., 566 F. Supp. 1016, 1021 (E.D. Ark. 1983) (finding that "[t]he fact of stock ownership by . . . [a single individual] in one or more [entities] . . . does not by itself demonstrate unified ownership or common control").

But this "enterprise" analysis is designed only to determine whether an offending entity falls under the coverage of the FLSA; it appears to have no bearing on actual FLSA liability for other members of the "enterprise." Accordingly, one court of appeals has concluded that assessment of intercorporate FLSA liability should differ from the jurisdictional analysis.[285] Although the court did not set forth the veil-piercing standard it considered appropriate, it refused to impose liability on one member of an "enterprise" for another member's FLSA violations because the first entity had no responsibility for the other corporation's labor relations or day-to-day affairs.[286] Similarly, another court has indicated that parent corporations are not automatically liable for their subsidiaries' FLSA violations but may be held liable only in appropriate (but not enumerated) circumstances.[287] In one early case, though, a parent was found to be an FLSA "employer" when its grip over a subsidiary's board allowed it to direct the subsidiary's management and control the terms and conditions of employment for its subsidiary's employees.[288]

In addition to the statutory "enterprise" theory, the "single employer" test may be applicable in the FLSA context. One district court invoked the doctrine in a case involving alleged violations of both the FLSA and the ADEA,[289] and several courts have held that two corporations are FLSA "joint employers" based on evidence of operational integration — evidence that is more appropriately used to sustain a "single employer" finding.[290] The "alter ego" doctrine does not yet seem to have been adapted to the FLSA context, although liability has been imposed under the related NLRA successorship doctrine.[291] Most important, no FLSA case has tried to for-

285. *See* Patel v. Wargo, 803 F.2d 632, 635-36 (11th Cir. 1986).

286. *See id.* at 637. The *Patel* court's attention to operational control and labor relations suggests the application of the NLRA-derived "single employer" doctrine, but the court did not make its reliance explicit.

287. *See* Gottschall v. Pennsylvania Hardwood Prods., 28 Wage & Hour Cas. (BNA) 620, 621 (M.D. Pa. Sept. 8, 1987) (denying a parent corporation's motion to dismiss an FLSA action involving its subsidiary's wage and hour violations, on the ground that the "precise relationship" between the parent and subsidiary "must be further examined after discovery is completed"). However, the *Gottschall* court did not indicate what standards it would apply to determine the parent's FLSA liability upon completion of discovery. *Id.*

288. *See* Dolan v. Day & Zimmerman, Inc., 65 F. Supp. 923 (D. Mass. 1946).

289. *See* Kamens v. Summit Stainless, Inc., 586 F. Supp. 324, 327 (E.D. Pa. 1984).

290. *See, e.g.*, McLaughlin v. Lunde Truck Sales, 714 F. Supp. 920, 924 (N.D. Ill. 1989); Brennan v. P.W.D. Mining Co., 76 Lab. Cas. (CCH) ¶ 33,215, at 46,890 (E.D. Ky. July 3, 1974).

291. *See* Brock v. LaGrange Equip. Co., 28 Wage & Hour Cas. (BNA) 780, 781-82 (D. Neb. July 14, 1987). The NLRA successorship doctrines provide that an employer that takes

mulate an FLSA veil-piercing rule that seeks to advance the particular statutory policies of the FLSA, and the specter of traditional corporate law appears to haunt judicial analysis.

2. *Individual Liability*

The FLSA contains an exceptionally broad definition of the term "employer" that has been interpreted to permit imposition of liability upon any individual that would be the likely object of a veil-piercing action.[292] Under this definition, individual FLSA liability may be imposed without evidence of common law transgressions; rather, any "corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA."[293] On the other hand, controlling shareholders are not automatically liable for corporate FLSA violations.[294]

As with other interpretations of statutory definitions of the term "employer," however, FLSA individual liability decisions do not necessarily implicate corporate law principles, and veil-piercing doctrine is thus almost never considered in the cases.[295] Even if they hold no

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over an existing business will inherit certain NLRA obligations from its predecessor if it maintains a substantially identical business operation and hires a majority of the predecessor's workforce. *See*, e.g., NLRB v. Burns Int'l Security Servs., 406 U.S. 272 (1972) (setting forth the parameters of a successor's obligation to bargain with a predecessor's union); Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973) (setting forth the parameters of a successor's liability for its predecessor's unfair labor practices).

292. FLSA Section 3(d), 29 U.S.C. § 203(d) (1988), defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Under this definition, nominally separate corporate entities may also be considered "employers" if they exercise the same kinds of operational control that would result in "employer" status for individuals. *See* Brock v. Hutto, 27 Wage & Hour Cas. (BNA) 573, 577 (M.D. Ala. Aug. 30, 1985); *see also* Hodgson v. Servomation-Ajax Co., 323 F. Supp. 1047 (N.D. Miss. 1971) (holding that a parent corporation was the "employer" of its subsidiary's employees for FLSA purposes, because the subsidiary was under the parent's domination and the parent maintained control of the subsidiary's books and accounts).

293. Donovan v. Agnew, 712 F.2d 1509, 1511-12 (1st Cir. 1983); *see also* Donovan v. Grim Hotel Co., 747 F.2d 965, 969 (5th Cir. 1984)(imposing individual FLSA liability through application of the *Agnew* test).

294. The FLSA's definition of "employer" will not be applied to hold liable every "corporate officer or other employee with ultimate operational control over payroll matters." *Agnew*, 712 F.2d at 1513. Similarly, courts have held that "mere common stock ownership and common directors is [not] sufficient to justify a ruling that a holding company is the employer of the [employees] employed by its subsidiary." Torres Romero v. American R. Co., 12 Lab. Cas. (CCH) ¶ 63,690, at 70,824 (D.P.R. Mar. 28, 1947).

295. *But see* Miller v. Tony and Susan Alamo Found., 924 F.2d 143 (8th Cir. 1991) (affirming the imposition of liability on individual shareholders for corporate violations of the FLSA and federal prevailing-wage law, based on district court findings of traditional corporate law transgressions).

ownership interest in the offending corporation, for example, dominant officers[296] or fellow employees[297] may be held liable as FLSA "employers" if the individual upon whom liability is imposed "had supervisory authority over the complaining employee and was responsible in whole or in part for the alleged violation."[298]

I. The Occupational Safety and Health Act of 1970

The Occupational Safety and Health Act of 1970 ("OSHA"), which regulates workplace safety, has not generated a substantial body of veil-piercing law, although various problems of shareholder liability have been raised.[299] Several decisions of the Occupational Safety and Health Review Commission ("OSHRC") have adapted the NLRA "single employer" doctrine to the OSHA context, holding that two companies will be considered one when they integrate their business operations, labor relations, management, and ownership.[300] In this context, however, the OSHRC focuses its attention on the particular location at which safety violations occur, by considering whether the two entities' employees share a common worksite and are exposed to the same hazardous conditions.[301] The OSHRC has also considered problems of individual OSHA liability, but it has neither expressed a willingness to impose automatic shareholder liability nor devised a clear alternative test.[302] Certain decisions indi-

296. *See* Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194-95 (5th Cir.), *cert. denied*, 463 U.S. 1207, *reh'g denied*, 463 U.S. 1249 (1983). The *Sabine* court specifically held that "neither the [FLSA] nor jurisprudence designates stock ownership in a corporate employer as the *sine qua non* of employer status where other forms of control of the employment relationship have been proven." *Id.* at 195.

297. *See* Riordan v. Kempiners, 831 F.2d 690, 694 (7th Cir. 1987).

298. *Id.*

299. *See* P. BLUMBERG, *supra* note 100, at § 15.03 (discussing OSHA veil-piercing law).

300. *See, e.g.*, Advance Specialty Co., 1975-76 O.S.H. Dec. (CCH) ¶ 20,490, at 24,484 (Mar. 5, 1976); Home Supply Co., 1973-74 O.S.H. Dec. (CCH) ¶ 17,521, at 21,978 (Mar. 28, 1974) (holding that three companies formed a "joint enterprise" on a work project when they integrated their work, shifted employees between entities, and assigned responsibility for all employees to a single supervisor); *see also* Lassiter Excavation, Inc., 13 O.S.H. Cas. (BNA) 1315, 1316 (April 2, 1987) (finding two entities to be separate, despite common ownership and control, because they did not interchange employees or equipment or work on the same projects); Bob McCaslin Steel Erection Co., 1974-75 O.S.H. Dec. (CCH) ¶ 19,755, at 23,568 (June 23, 1975) (affirming, in a decision without precedential weight, a commissioner's ruling that the purposes of OSHA were best effectuated by treating two companies as one when they worked on a single worksite, integrated their work and employees, and shared common ownership, management, and supervision). Recently, the OSHRC has held that a parent corporation will not be held liable for its subsidiary's OSHA violations simply because the two corporations share management personnel. *See* Hills Dept. Stores, 1989-90 O.S.H. Dec. (CCH) ¶ 29,075, at 38,853 (Aug. 13, 1990).

301. *See Advance Specialty Co.*, 1975-76 O.S.H. Dec. (CCH) at 24,484.

302. *See* Life Science Products Co., 1977-78 O.S.H. Dec. (CCH) ¶ 22,313 (Nov. 11,

cate, however, that the matter is considered a problem of federal law, and will be resolved in a manner that prevents the frustration of OSHA.[303]

J. *The Worker Adjustment and Retraining Notification Act*

The Worker Adjustment and Retraining Notification Act ("WARN") imposes penalties upon employers that fail to provide their employees with advance notice of plant closings or mass layoffs.[304] Because WARN only became effective in early 1989, no body of veil-piercing law has developed so far. In the only case yet to address veil-piercing questions, however, a New Jersey district court, acting through a magistrate, applied generic federal veil-piercing principles to hold that a parent corporation and a shareholder could be added as appropriate defendants in a WARN action.[305] The court made no attempt to consider the veil-piercing question in the light of WARN's particular purposes and policies.

Future WARN veil-piercing analysis will probably involve some degree of reliance on interpretive regulations issued by the Department of Labor.[306] However, these regulations indicate that existing labor law veil-piercing principles should be adopted in the WARN context. The regulations therefore provide that a parent and subsidiary should be considered a single "employer" for WARN purposes "depending upon the degree of [the subsidiary's] independence from

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1977), *aff'd sub nom.* Moore v. OSHRC, 1979 O.S.H. Dec. (CCH) ¶ 23,306 (4th Cir. Feb. 1, 1977) (imposing individual liability upon corporate officers based on a state statute relating to dissolved corporations and based on their status as OSHA "employers"); Vincent Rizzo, 1974-75 O.S.H. Dec. (CCH) ¶ 18,708, at 22,606 (Sept. 25, 1974) (holding that a corporate president was not an OSHA "employer" despite his power to sign contracts and paychecks and to exercise direction and control over employees). In *Life Science*, however, the OSHRC chairman's opinion noted that the holding in that case did not represent a decision to pierce the corporate veil. *See id.*, 1977-78 O.S.H. Dec. (CCH) at 26,876.

303. *See Life Science*, 1977-78 O.S.H. Dec. (CCH) at 26,874 n.12 (opinion of Commissioner Cleary).

In addition, a version of the "joint employer" theory has been applied in numerous OSHA cases, so that liability is imposed on companies that share a common worksite in such a way that work done by one company endangers the employees of another. *See, e.g.*, Beatty Equip. Leasing v. Secretary of Labor, 577 F.2d 534 (9th Cir. 1978). Once again, however, corporate law principles do not come into play in cases of this kind, because these entities generally share no ownership connection or any link other than their presence on a single worksite.

304. *See* WARN § 5(a), 29 U.S.C. § 2104(a) (Supp. 1990).

305. Finkler v. Elsinore Shore Assocs., Civ. Case No. 89-2330 (D.N.J. filed March 14, 1990).

306. *See* WARN § 8(a), 29 U.S.C. § 2107(a) (1990 Supp.). The mandate is especially unusual in that the Department of Labor apparently has no role in WARN enforcement. *See* 54 Fed. Reg. 16,043 (1989) ("all [WARN] enforcement will occur in the context of private civil lawsuits").

the parent," and based upon examination of whether the two entities share common ownership, common directors or officers, de facto exercise of control, unity of personnel policies emanating from a common source, and interdependent operations.[307] This provision is, of course, essentially a statement of the NLRA-derived "single employer" doctrine. Although the regulations themselves do not address the problem of individual shareholder liability for WARN violations, the Department of Labor's introductory analysis notes the Department's view that principles of state corporation law and federal labor law "adequately cover" veil-piercing issues under WARN and that no specialized body of WARN veil-piercing law is necessary.[308]

III. Vindicating The Labor Laws: Toward An Effective Veil-Piercing Doctrine

Review of existing labor law veil-piercing doctrine demonstrates that the federal courts have shown undue loyalty to traditional common law principles and have generally ignored their obligation to fashion veil-piercing rules that are designed to advance the policies of the federal labor laws. In most cases, courts have instead relied on theories developed in extraneous contexts, whether it be state corporate law doctrine or an undifferentiated mass of federal common law. The few labor-specific principles that have emerged, moreover,

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307. 20 C.F.R. § 639.3(a)(2) (1991).

308. 54 Fed. Reg. 16,045 (1989). Several other federal statutes involve workers' rights but only implicate the employment relationship in a tangential manner. The FELA permits tort recoveries from railroads by workers who are injured in the course of their employment. There have been few veil-piercing decisions under the FELA, but one Fifth Circuit case applied a decidedly unusual analysis to a plaintiff's attempt to impose FELA liability on a parent corporation. *See* Selser v. Pacific Motor Trucking Co., 770 F.2d 551, 554-55 (5th Cir. 1985). The court of appeals noted that liability could not be imposed under the prevailing legal rule — which it derived from Alabama corporate law — and that liability was only possible if limited liability could be considered a " 'rule' " or " 'device' " whose purpose was the avoidance of FELA liability. *See id.* at 554 (quoting FELA § 5, 45 U.S.C. § 55 (1988)). The FELA nullifies such "rules" and "devices." *See* FELA § 5, 45 U.S.C. § 55 (1988). Because the subsidiary tortfeasor had not been formed with the purpose of avoiding FELA liability, however, and because the parent had not committed common law transgressions such as subjecting the subsidiary to its "domination," liability was not imposed. *See Selser*, 770 F.2d at 554-55. As examples of other cases that discuss FELA veil-piercing problems, see Eddings v. Collins Pine Co., 140 F. Supp. 622 (N.D. Cal. 1956), and Southern R. Co. v. Crosby, 201 F.2d 878 (4th Cir. 1953).

The Jones Act establishes a tort recovery scheme for employees injured in maritime employment. There has been little Jones Act veil-piercing litigation, but in one case, the Ninth Circuit applied traditional corporate law principles to hold that a parent could not be held liable for its subsidiary's Jones Act violations in the absence of "total domination" of the subsidiary. *See* Kilkenny v. Arco Marine, Inc., 800 F.2d 853, 859 (9th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

have also assumed the restrictions imposed by traditional corporate law and have failed to take into account the effect of limited liability on the purposes and policies of the labor laws. As a result, federal labor laws are widely frustrated through unjustified deference to corporate law principles that are entirely irrelevant to labor policy. This article proposes that courts and administrative agencies abandon their current approach and begin to develop a body of labor-specific doctrine that seeks to vindicate federal labor policy rather than state corporate law.

Accordingly, I suggest a simple new rule: that corporate affiliates and shareholders of closely held corporations should be held responsible for all unsatisfied corporate labor law obligations. In the great majority of cases, such a rule would mean imposing liability for unpaid monetary obligations, such as back pay to victims of discrimination or contribution payments to employee benefit trusts. In other instances, it would involve binding commonly owned corporations to each other's collective bargaining agreements. Below, I analyze the purposes and policies of the various federal labor laws and argue that such a broad rule of shareholder liability would better serve those goals.

Because the principle of limited liability is so firmly established in American law, however, its erasure in any context, even a narrow and exceptional area such as labor relations, should not be undertaken lightly. Before embarking on an analysis of the appropriate contours of a revised labor law veil-piercing doctrine, therefore, I will consider the principal theoretical barriers to more worker-protective veil-piercing rules. I conclude that such revised rules make sense in light of contemporary corporate law scholarship, because workers are essentially involuntary creditors with little power to secure protections against corporate defaults, and because limited liability is of little value, except perhaps to corporations whose shares are publicly traded and widely diffused among different owners.

A. Potential Barriers to a Broader Rule of Shareholder Liability

Although the universal acceptance of the limited liability doctrine tends to induce recitation rather than explanation, the rule has been justified on a variety of grounds. First, numerous commentators have suggested that a change in the limited liability rule is unwarranted because corporations' creditors should protect themselves from the possibility of a corporate default by negotiating appropriate guarantees from shareholders. Creditors that fail to do so, the argument goes, should be considered to have assumed the risk of corpo-

rate insolvency. This position makes some sense with respect to sophisticated business creditors who have sufficient expertise and bargaining power to demand and receive shareholder guarantees or similar protections. For tort creditors, however, who have no opportunity to negotiate with the corporation before incurring their claims, or creditors whose lack of bargaining power effectively precludes such negotiation, the argument is unpersuasive. I consider these contentions in more detail below, and conclude that because employees generally lack bargaining power, and because many labor claims, such as those based on discrimination in employment, are tort-like in nature, this assumption of risk argument presents no obstacle to a more liberal labor law veil-piercing doctrine.

Second, the limited liability doctrine is frequently presented as an essential business incentive, such that modification or abrogation of the traditional rule would discourage investment. As explained below, however, scholarly analysis suggests that the importance of limited corporate liability is greatly exaggerated, because capitalist economies may flourish without such a regime and because most creditors —those with adequate bargaining power — can and do negotiate around the rule. On the other hand, because of its role in facilitating passive investment and stock markets, the limited liability principle may hold considerable importance for corporations whose shares are publicly traded. In contrast, eliminating limited liability for corporations whose stock is not publicly traded should not have a deleterious effect.

1. Classes of Creditors and the Assumption of Risk

The great majority of corporate creditors deal by contract, whether the contract takes the form of a complex, carefully negotiated financing agreement or a standard preprinted invoice. Because contracts are voluntary arrangements, creditors are theoretically able to determine the corporation's solvency in advance and to take appropriate protective measures, such as securing shareholder guarantees of the corporation's obligations or demanding a high rate of interest to compensate for the risk of default.[309] If a contract creditor

309. *See* Hackney & Benson, *supra* note 28, at 861-62; Downs, *supra* note 37, at 197 (suggesting that contract creditors "may demand corporate financial statements so that the corporation's financial condition may be evaluated"). *But cf.* Blumberg, *Limited Liability, supra* note 43, at 622 (noting that in assessing the appropriateness of a veil-piercing rule based on assumption of risk, it is necessary to consider whether the transaction costs involved in securing sufficiently complete and accurate information about a corporation would render such a rule inefficient).

fails to take advantage of these opportunities, many commentators argue, she may be said to have assumed the risk that the corporation will fail to repay the loan.[310]

In contrast, most tort creditors — such as pedestrians injured by corporate trucks — have no dealings with the corporation before incurring their claims, let alone an opportunity to investigate the corporation's solvency and obtain appropriate protections.[311] Accordingly, most commentators have suggested that a more liberal veil-piercing doctrine is appropriate in tort cases,[312] and some have proposed eliminating the limited liability rule with respect to most tort creditors.[313]

In practice, however, tort creditors have not actually achieved a more favorable position, because courts deciding veil-piercing cases have generally ignored the scholars' distinction between tort and contract claimants.[314] Indeed, judicial indifference may actually have

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310. *See, e.g.*, Labadie Coal Co. v. Black, 672 F.2d 92, 100 (D.C. Cir. 1982); *see also* Comment, *Disregarding the Corporate Entity: Contract Claims*, 28 OHIO ST. L.J. 441, 458-59 (1967). Such a rule could not be applicable to all cases. *See, e.g.*, Downs, *supra* note 37, at 197 (suggesting exceptions in circumstances that preclude effective credit negotiations, as when the existence of the corporation is concealed, creating the impression that the contract is made on behalf of individual shareholders, or when the corporation commits fraudulent acts such as misrepresenting its corporate status or its relationship to its parent).

311. *See* Zubik v. Zubik, 384 F.2d 267, 274 n.17 (3d Cir. 1967)(stating that "[a] person who travels on the river, like a person who travels on the highway, does not evaluate the financial responsibility or structure of each person who may collide with him."), *cert. denied*, 390 U.S. 988 (1968). Tort claimants are not the only group of involuntary creditors. *See, e.g.*, United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 693 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986) (noting that the federal government is essentially an involuntary creditor when it is required to extend subsidies to all financially qualified applicants, including undercapitalized, fraudulently mismanaged corporations).

312. *See, e.g.*, Gillespie, *supra* note 28, at 392.

313. *See, e.g.*, Halpern, Trebilcock & Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117, 145 (1980); Hansmann & Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991).

314. *See* Labadie Coal Co. v. Black, 672 F.2d 92, 100 (D.C. Cir. 1982); *see also* Epperson & Canny, *supra* note 29, at 633 (contending that "[d]espite extensive scholarship on the issue, however, most courts have failed to distinguish between tort and contract in deciding whether to disregard the corporate entity"); H. HENN & J. ALEXANDER, THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 146, at 348 (1983) (noting that "[c]ourts usually cite indiscriminately contract and tort cases as precedents."). Robert Clark has contended, however, that distinctions between contract and tort creditors, "in their essence, have been accepted by judges for decades," as seen in the actual outcomes of different veil-piercing cases. Clark, *supra* note 32, at 542 n.98. Indeed, some courts have accepted the contract-tort distinction. *See, e.g.*, West v. Costen, 558 F. Supp. 564, 586 (W.D. Va. 1983) (stating that "a victim of a statutory illegality or tort may be more entitled to pierce [a corporate veil] because, unlike a contractual creditor, the former's dealings with the corporation are involuntary and uninformed"); United Paperworkers Int'l Union v. Penntech Papers, Inc., 439 F. Supp. 610, 618 (D. Me. 1977), *aff'd sub nom.* United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33 (1st Cir. 1978) (suggesting that a contract creditor should only be able to reach a

placed tort creditors in a worse position than contract creditors: when a business is first incorporated, for example, many business creditors do in fact manage to secure shareholder guarantees, so that the limited liability principle is left to shield the corporation against tort claims alone.[315]

On closer examination, moreover, the rigid distinction between contract and tort claimants is a questionable one, because it assumes that all contract creditors' claims arise from genuinely consensual transactions and ignores the important variations in bargaining power between different kinds of contract creditors.[316] For example, many commentators group financial creditors and ordinary trade creditors together, even though a commercial lender that provides the lifeblood of a business is far more capable of investigating a corporate debtor's solvency and securing advantageous loan terms than is a small supply company.[317] When the creditor is an unskilled employee, the imbalance becomes a great deal more severe. Accordingly, most commentators suggest that the corporate veil should not be strictly protected in every case involving a facially "voluntary" transaction, but only in those involving claims by contract creditors with sufficient bargaining power to permit them successfully to obtain shareholder guarantees or similar protections.[318]

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parent corporation's assets when it can demonstrate actual fraud, "because contracts are private, consensual relationships in which each party has a clear and equal obligation to weigh the potential benefits and risks of the agreement"). In *Penntech*, the "contract creditor" was a labor union that sought to enforce a collective bargaining agreement — an indication that courts deciding "contract" veil-piercing cases may be insensitive to variations in bargaining power. *See* Barber, *supra* note 22, at 386; *see also infra* text accompanying notes 332-34 (explaining that collective bargaining agreements are not properly treated as ordinary contracts).

315. *See* Hazen, *The Decision to Incorporate*, 58 NEB. L. REV. 627, 632 (1979).

316. *See* Blumberg, *Limited Liability*, *supra* note 43, at 618-19. Some commentators applaud these omissions, suggesting that "distributional concerns" should be considered entirely irrelevant to veil-piercing questions. *See* Easterbrook & Fischel, *supra* note 24, at 106. As with other problems of bargaining power, differences in the parties' level of sophistication should also be taken into account. *See Labadie Coal*, 672 F.2d at 100 (quoting Barber, *supra* note 29, at 386) (noting that an assumption that contract creditors "lack [of] sophistication is equally tenable against the presumption that they knowingly assumed the risk of the corporation's undercapitalization"); *see also* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 614-24 (1982) (analyzing the theory of unequal bargaining power).

317. *See* Blumberg, *Limited Liability, supra* note 43, at 618; *see also* Krendl & Krendl, *supra* note 23, at 33-34 & n.120 (suggesting that small businesses should not be generally considered sufficiently sophisticated to have assumed the risk of corporate insolvency).

318. *See* Hackney & Benson, *supra* note 28, at 861; Gelb, *Piercing the Corporate Veil — The Undercapitalization Factor*, 59 CHI.-KENT L. REV. 1, 13 (1982). One commentator suggests in this regard that "[t]he crucial question is whether in the market, the injured party

Somewhat surprisingly, commentators have disagreed as to whether employees are sufficiently lacking in bargaining power to be spared the harsh "assumption of risk" principle. Some neoclassical economists suggest, rather fantastically, that employees bargain for wage premiums to compensate for the risk of corporate default, by means of collective bargaining agreements or (usually fictional) independent employment contracts.[319] Most analysts, however, recognize that employees are rarely powerful enough to protect themselves.[320] Of all creditors, "[e]mployees have the most severe informational disabilities," because their involvement with the corporation is generally extremely narrow in scope, permitting no contact with the corporation's business dealings that would allow assessment of its financial position.[321] More important, unlike the supplier who may deal with a hundred customers and thereby absorb the risk that a few of them will default, most employees are dependent on a single corporation to sustain their livelihoods, and cannot diversify their claims at all.[322] The consequences of a corporate employer's default will be particularly devastating to workers in a depressed job market in

had the economic strength to bargain on the terms of the transaction pertaining to the credit aspects, including a price adjustment to reflect the financial condition of the other party." Blumberg, *Limited Liability, supra* note 43, at 618.

319. *See* Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 506 (1976) (stating that "the wage rate can adjust to compensate the worker for the risk of nonpayment" of wages and workers' compensation claims); Halpern, Trebilcock, & Turnbull, *supra* note 313, at 128 (suggesting that workers will compensate for the risk of corporate default in setting their wage rates); *see also* Easterbrook & Fischel, *supra* note 24, at 104 (arguing that "[e]mployees, consumers, trade creditors, and lenders are voluntary creditors" and that all of them may effectively demand compensation or security from corporations or their shareholders in accordance with the risk). *But cf.* Musikiwama v. ESSI, Inc., 760 F.2d 740, 749 (7th Cir. 1985)("[e]mployees are not compensated, *ex ante*, for the risk that their employer might discriminate against them. . . . [B]y enacting the antidiscrimination laws, Congress has already determined that employment discrimination should be eradicated and that there should never be a risk of employment discrimination.").

320. *See* Hackney & Benson, *supra* note 28, at 863 (arguing that employees lack "the bargaining power . . . to be properly compensated or to insist that [corporate] obligation[s] be secured or guaranteed"); Hamilton, *supra* note 28, at 984-85 n.20 (suggesting that "[e]mployees often fall into" the class of contract creditors who "lack the bargaining power to insist that the [corporate] obligation be guaranteed by a solvent person"); *see also* Manne, *supra* note 30, at 263 (discussing the history of employee rights against insolvent corporations).

321. Blumberg, *Limited Liability, supra* note 43, at 619. *See* Halpern, Trebilcock & Turnbull, *supra* note 313 at 149 (suggesting that compared to other creditors, employees may sometimes have unusually good access to information about the corporation, and that they "can use this information in setting the terms and conditions of employment," but emphasizing that information of this kind is likely to be available only to accounting and marketing employees).

322. *See* Blumberg, *Limited Liability, supra* note 43, at 619; *see also* Halpern, Trebilcock & Turnbull, *supra* note 313, at 149.

which alternative employment opportunities are lacking.[323]

Given their severe informational disabilities, and their overwhelming dependence on the corporations to which they supply their labor, employees should properly be considered involuntary creditors. Indeed, the typical claimants in labor law veil-piercing cases — such as the individual victims of NLRA unfair labor practices or invidious employment discrimination — are most accurately considered tort creditors of a sort, because their injuries are not the consequence of consensual transactions.[324] It has also been suggested that labor claims like these are actually "public torts" and, accordingly, that there is an unusually strong government interest in assuring their correction.[325]

When employees unionize for mutual protection, their bargaining power and information-gathering abilities are probably enhanced to some degree.[326] Unionism emerged, after all, from workers' recognition that unity makes power and no "force on earth is weaker than the feeble strength of one." Under the amended NLRA, however, particularly as it has been interpreted in recent years, unions are effectively deprived of viable economic weaponry and bargaining

323. *See* Blumberg, *Limited Liability, supra* note 43, at 619; Halpern, Trebilcock & Turnbull, *supra* note 313, at 143. Halpern, Trebilcock & Turnbull contend that, in a perfect market, variations in employees' marketability in the event of a default by their corporate employer would be reflected in pay levels, with less marketable employees receiving a premium. *Id.*

Because the real world is highly imperfect, however, these commentators argue that employees' relative inability to absorb losses should permit at least partial relaxation of the limited liability rule with respect to their claims. *Id.* at 149-50.

324. In addition, many ERISA plaintiffs, such as multiemployer employee benefit funds, are third parties whose relationships to corporate employers are fixed by negotiations between outsiders, usually a union and the employer itself. *See* NLRB v. Amax Coal Co., 453 U.S. 322, 333-34 (1981) (explaining that ERISA trusts are legally separate from participating unions and employers).

325. *See, e.g.*, NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 424 (1968) ("A proceeding by the [NLRB] is not to adjudicate private rights but to effectuate a public policy"); In re Schieber Millinery Co., 26 N.L.R.B. 937, 965, *enf'd as modified*, 116 F.2d 281 (8th Cir. 1940) (citing NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938)) (characterizing NLRA unfair labor practices as "public torts").

326. *See* Easterbrook & Fischel, *supra* note 24, at 105 (suggesting that unions may understand the risks of certain corporate behavior better than individual employees); *see also* J. O'Reilly, Unions' Rights To Company Information (rev. ed. 1987) (describing management's obligation under the NLRA to supply certain kinds of information to unions). In some decidedly isolated contexts, unions may even come to achieve overwhelmingly greater bargaining power than a particular employer. *See, e.g.*, Operating Engineers Pension Trust v. Giorgi, 788 F.2d 620, 623 (9th Cir. 1986)(enforcing a collective bargaining agreement against a small sub-contractor even though the sub-contractor may have relied on misrepresentations made by the agent of a large union).

strength.[327]

Beyond this general lack of bargaining power, moreover, existing labor law doctrine imposes specific obstacles that prevent unions from negotiating to obtain protections such as shareholder guarantees of corporate obligations. Unlike commercial creditors, who may freely choose not to do business with a corporation that refuses to provide such protections, a union's attempt to cease doing business with such a corporation — by initiating a strike or even by refusing to conclude a collective bargaining agreement without safeguards of this kind — could easily be enjoined.[328] Similarly, a union is not even permitted to demand that a subsidiary agree to extend the terms of a collective bargaining agreement to its parent or to other commonly owned entities,[329] or to cease its relationship with a par-

327. *See* Hogler, *Critical Labor Law, Working-Class History, and the New Industrial Relations* (Book Review), 10 INDUS. REL. L.J. 116, 129 (1988) (noting that American labor law has "created an inequality in bargaining power by limiting or proscribing unions' economic weapons and the scope of subjects over which [unions] might bargain"); *see also, e.g.*, Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (holding that under the NLRA unions may not assure strike solidarity by disciplining strikebreaking members); First Nat'l Maintenance Co. v. NLRB, 452 U.S. 666 (1981) (holding that management has no NLRA obligation to bargain concerning most plant closing decisions); *cf.* Trans World Airlines v. International Fed. of Flight Attendants, 489 U.S. 426 (1989) (holding that under the RLA, and the NLRA, management is not required to return economic strikers to their jobs according to seniority but may retain senior positions for employees who crossed the picket line).

328. Under the NLRA, a union's proposal that shareholders guarantee corporate obligations would likely be considered a "permissive" subject of collective bargaining because it relates only indirectly to the "terms and conditions of employment." *See* NLRA §§ 8(a)(5), 8(d), 29 U.S.C. §§ 158(a)(5), 8(d) (1988) (providing that NLRA bargaining obligations only extend to the "terms and conditions of employment"); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349-50 (1958) (establishing the distinction between "mandatory" and "permissive" bargaining subjects under the NLRA); *cf.* NLRB v. International Union of Operating Engineers, Local 542, 532 F.2d 902, 907 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977) (holding that a union's proposal to bind a parent to its subsidiary's collective bargaining agreement is a permissive bargaining subject). Because employers and unions are forbidden from insisting on the adoption of permissive terms or from unleashing economic weapons to force their acceptance, any economic action to force a corporate employer to accede to such a provision would be considered illegal and would likely prompt the NLRB to seek injunctive relief under NLRA Section 10(j), 29 U.S.C. § 160(j) (1988). A union's refusal to conclude an agreement without shareholder guarantees would itself fall afoul of NLRA Section 8(b)(3), 29 U.S.C. § 158(b)(3) (1988), see *Operating Engineers, Local 542*, 532 F.2d at 907, and could also be enjoined under Section 10(j).

329. *See* D'Amico v. Painters & Allied Trades District Council No. 51, 120 L.R.R.M. (BNA) 3473, 3478 (D. Md. 1985); *Operating Engineers, Local 542*, 532 F.2d at 905-06. Such a provision has been held to violate the NLRA's "hot cargo" provision, Section 8(e), 29 U.S.C. § 158(e) (1988). *See* Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 111-19 (1988). Union conduct of this kind is only permitted if it is found to constitute an attempt to preserve existing work for the union's members. *See* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); *see also* R.B. Electric, Inc. v. IBEW Local 569, 119 L.R.R.M. (BNA) 2821, 2825 (S.D. Cal.

ticular corporation if the corporation becomes affiliated with a non-union enterprise.[330]

Labor law strictures also prohibit unions from using economic weapons against the shareholders who own and control a particular corporation. Only the corporation itself has a bargaining obligation. A union could thus face injunction proceedings, for example, if it picketed a parent corporation to attempt to force the parent to accept a subsidiary's collective bargaining agreement or to arbitrate a particular grievance arising under such an agreement — even if the grievance involved a parent-initiated decision to close the subsidiary's plant and sentence all the union's members to unemployment.[331]

Finally, under existing doctrine, it is inappropriate to treat unions' contract claims as conventional contract problems. Collective bargaining agreements between unions and employers are considered entirely different animals from ordinary commercial contracts; labor agreements are not memorializations of dry business deals but "effort[s] to erect a system of industrial self-government."[332] Accordingly, the "same old common-law concepts which control" commercial contracts are inapplicable to labor contracts,[333] which instead

1985), *aff'd*, 781 F.2d 1440 (9th Cir. 1986) (compelling an employer to arbitrate an alleged violation of the "model" anti-double breasting clause struck down in *D'Amico*, on the ground that an arbitrator might interpret the clause as a legitimate attempt at work preservation).

330. *See* Sheet Metal Workers Local No. 91 v. NLRB, 905 F.2d 417 (D.C. Cir. 1990) (invalidating under Section 8(e) an "integrity clause" that granted the union the right to terminate a collective bargaining agreement if the signatory company acquired any ownership interest in a non-union company).

331. *See, e.g.*, Local 2208, International Brotherhood of Electrical Workers, 285 N.L.R.B. 834 (1987) (holding that picketing for the purpose of coercing a parent company to pressure its subsidiary to resolve a labor dispute is "secondary" in nature and therefore violative of NLRA Section 8(b)(4), 29 U.S.C. § 158(b)(4) (1988)); *but see* United Steelworkers, 288 N.L.R.B. 1190 (1988) (holding, based on Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council, 485 U.S. 568 (1988), that union handbilling to urge a boycott against a parent corporation and various subsidiaries does not violate Section 8(b)(4)). Picketing a parent corporation would also leave the union open to a damages action under LMRA Section 303, 29 U.S.C. § 187 (1988). The factual scenario suggested in the text, it should be emphasized, has provided the setting for several LMRA veil-piercing decisions, in which the courts held that the parent would escape liability because it assured that the closure decision was made pursuant to the "ordinary" exercise of ownership control. *See, e.g.*, United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33 (1st Cir. 1978).

332. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960); *accord* Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157, 160-61 (1966).

333. *Union Pacific*, 385 U.S. at 160; *see* Darnel v. East, 573 F.2d 534, 537 (8th Cir. 1978) (stating that "collective bargaining agreements are not ordinary contracts and are not governed by the common law concepts which govern private agreements"); *cf.* Southern Cal. Retail Clerks Union v. Bjorklund, 728 F.2d 1262, 1265 (9th Cir. 1984) (stating that "tradi-

require the development of "a new common law — the common law of a particular industry or of a particular plant."[334]

Courts considering labor law veil-piercing cases have almost never considered the special nature of employees' dealings with corporations.[335] Although the plaintiffs in these cases present either tort claims or essentially involuntary contract claims, federal courts and agencies have consistently applied versions of state corporate law, which is based on the paradigm of the voluntary credit contract. Scholarly commentary demonstrates that such a rigid approach is unjustified, especially in view of the labor laws' express policy of rectifying the imbalance of power between workers and corporate employers.[336]

2. *Justifications for the Limited Liability Rule*

Courts and commentators have disagreed over the importance of limited corporate liability. Although the doctrine is often lauded with impassioned paeans — some have gone so far as to label it "the greatest single discovery of modern man"[337] — a number of more hard-headed analysts have come to question its significance.[338] Lim-

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tional contract law does not apply in full force in suits brought under the LMRA and ERISA to collect delinquent trust fund contributions.").

334. *Warrior & Gulf*, 363 U.S. at 579; *accord Union Pacific*, 385 U.S. at 161.

335. One appellate decision, however, relied on a version of the assumption of risk argument in attempting to justify a more restrictive rule of shareholder liability under ERISA than under the FLSA. *See* Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving Corp., 845 F.2d 23 (1st Cir. 1988). The effort revealed a dismaying unfamiliarity with the realities of labor relations and labor law. The court of appeals suggested that employees may have superior bargaining power against employers in their capacity as multiemployer pension plan participants than in their capacity as individual employees with claims against their employer for unpaid wages, and that as plan participants they, or their unions, could properly be expected to obtain shareholder guarantees through collective bargaining to protect their ERISA rights. *See id.* at 26. The argument is decidedly inappropriate. First, the only bargaining party was the participants' union, which is legally independent of the plaintiff trust fund which was seeking to vindicate its participants' rights. *See* NLRB v. Amax Coal Co., 453 U.S. 322, 334 (1981). Second, and perhaps more important, even if the trust could properly be bound by the union's negotiations, it would be unreasonable for the court to expect shareholder guarantees insofar as the NLRA bars unions from using economic weapons to secure such guarantees. *See supra* note 328 and accompanying text. The court's offhand suggestion gave no indication that it had considered the realities of the union's bargaining position.

336. For statements of this policy, see NLRA § 1, 29 U.S.C. § 151 (1988), and Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (1988).

337. 1 W. FLETCHER, CYCLOPEDIA § 21 (1917) (quoting President Nicholas Murray Butler of Columbia University); *see also* Cook, *"Watered Stock" — Commissions — "Blue Sky Laws" — Stock Without Par Value*, 19 MICH. L. REV. 583 n.4 (1921) (quoting President Charles Eliot of Harvard University describing limited liability as "the greatest legal innovation of the nineteenth century.").

338. *See, e.g.*, Meiners, Mofsky & Tollison, *Piercing the Veil of Limited Liability*, 4

ited shareholder liability has usually been justified in simplistic terms, particularly by courts,[339] but in recent years legal economists have begun to develop a more sophisticated analysis of the purposes and consequences of limited liability.[340]

Historical studies have demonstrated that capitalist economies — in both the United States and Britain — have managed to thrive even when investors were legally required to risk their personal assets when they purchased corporate stock.[341] During the nineteenth and early twentieth centuries, several different jurisdictions successfully adopted liability rules that made shareholders responsible for all corporate debts or assessed liability in proportion to their ownership of the corporation.[342]

Moreover, the historical evidence of limited liability's modest importance makes sense in economic terms. Applying the reasoning underlying the "assumption of risk" argument described above, commentators have contended that, in practice, the limited liability rule has a neutral effect because credit markets will account for any variations in corporations' legal privileges and immunities.[343] More par-

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DEL. J. CORP. L. 351 (1979).

339. *See, e.g.*, DeBreceni v. Graf Bros. Leasing, Inc., 828 F.2d 877, 879 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988) (ERISA context)(stating that "limited liability allows individuals to take a calculated risk when they engage in the investment and entrepreneurial ventures central to a capitalist economy"); Labadie Coal Co. v. Black, 672 F.2d 92, 96 (D.C. Cir. 1982) (explaining that "the common purpose of . . . limited shareholder liability is to offer a valuable incentive to business investment"); *see also* Johnson v. Flowers Indus., Inc., 814 F.2d 978, 980 (4th Cir. 1987) (ADEA context) (purporting to justify limited liability for corporate parents by arguing that imposition of liability on the parent would harm individual investors by reducing the value of their investment in the parent).

340. *See, e.g.*, Halpern, Trebilcock, & Turnbull, *supra* note 313; Blumberg, *Limited Liability*, *supra* note 43; Easterbrook & Fischel, *supra* note 24; Hansmann & Kraakman, *supra* note 313.

341. *See, e.g.*, Blumberg, *Limited Liability*, *supra* note 43, at 612; Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1378 (1948). Imposing broader shareholder liability does not mean abolishing the corporate entity, because corporations provide many other important advantages such as perpetual life, transferability of ownership interests, and specialized management that does not require active participation from owners. *See* Meiners, Mofsky & Tollison, *supra* note 338, at 357, 364 (citing A. DEWING, 1 FINANCIAL POLICY OF CORPORATIONS 14 (5th ed. 1953)). Similarly, refusing to recognize the separation between parent and subsidiary for liability purposes does not necessarily require similar disregard in matters of jurisdiction and choice-of-law. *See* Sommer, *The Subsidiary: Doctrine Without a Cause?*, 59 FORDHAM L. REV. 227, 259-73 (1990).

342. *See, e.g.*, Blumberg, *Limited Liability*, *supra* note 43, at 626-29. Pro rata liability has recently made something of a comeback, in academic discussion at least. *See, e.g.*, Hansmann & Kraakman, supra note 313, at 1896 (proposing a pro rata liability rule in tort cases); *see also infra* note 373 (discussing problems of pro rata liability in the labor context).

343. *See* Meiners, Mofsky & Tollison, *supra* note 338, at 359-62. Meiners, Mofsky and Tollison rest their argument on the Coase Theorem. *See* Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

ticularly, because any loan transaction necessarily requires a creditor to accept specific collateral and a specific rate of interest, creditors will tend to negotiate around legal obstacles that impose particular restrictions on loan terms, such as by charging unusually high interest rates if shareholder assets are to be kept beyond reach. As such, investors must pay a premium for the privilege of limited liability, and limited liability cannot be considered a business incentive in and of itself.[344]

Although the importance of limited liability is therefore decidedly questionable, a number of rationales have been advanced in its defense. Almost all these arguments relate to advantages that limited liability provides to passive shareholders, especially those who invest through the mechanism of stock markets. With respect to active shareholders who do not rely on stock markets to make their investments — such as parent corporations or the owners of closely held corporations — few rationales, if any, are persuasive.

First, the limited liability rule allows investors to stake a fixed amount in an enterprise without risking all their assets. As such, limited liability encourages risk-taking, whether by individual investors who are willing to gamble a safely limited sum on an unknown enterprise, or by corporations that seek to expand into unfamiliar new lines of business through the formation of subsidiaries.[345] Limited liability tends to shift the risks of these investments to creditors, a result whose merits are questionable;[346] where the risk-taking generates significant externalities, such as shifting costs to tort victims or involuntary contract creditors, however, the risk-shifting consequences of the limited liability rule are clearly harmful.[347] Overall, therefore, this feature of a limited liability regime cannot be consid-

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344. *See* Meiners, Mofsky & Tollison, *supra* note 338, at 360-61. Under this analysis, however, limited liability would continue to provide an advantage to shareholders with respect to contracts made with weak or unsophisticated parties who are effectively forced to accept the corporation's terms. Meiners, Mofsky, and Tollison avoid the problem of unsophisticated creditors by suggesting somewhat smugly that "[u]nder any liability rule, a creditor with poor judgment is likely to be less profitable than more astute lenders." *Id.* at 361. In any event, the limited liability rule is hardly worthy of preservation if it does no more than provide a mechanism by which investors may take advantage of the weak and unsophisticated.

345. *See* Blumberg, *Limited Liability, supra* note 43, at 616.

346. Posner applauds this shifting of risk to creditors, arguing that creditors may be less risk-averse and better capable of assessing risk than shareholders. *See* Posner, *supra* note 319, at 501-02. Easterbrook and Fischel disagree, arguing that by deciding to extend credit rather than acquire equity, creditors necessarily demonstrate risk aversion: shareholders will be the last to receive payment in the event of corporate insolvency, while they stand to gain the most from unexpectedly good corporate performance. *See* Easterbrook & Fischel, *supra* note 24, at 91.

347. *See* Blumberg, *Limited Liability, supra* note 43, at 616-18.

ered to militate strongly in favor of its preservation, at least with respect to involuntary creditors.

Second, because limited liability ensures that business failures cannot inflict financial losses on shareholders beyond the amount of their fixed investment in stock, the doctrine permits investors to avoid actively scrutinizing and participating in corporate affairs. Without limited liability, shareholders would be required to protect themselves by closely monitoring management decisions to assure that the corporation did not become insolvent and cause the diversion of shareholder assets to the corporation's creditors.[348] Instead, limited liability permits owners safely to remove themselves from managerial decisions and to use the corporation as a passive investment, thereby fostering the development of efficient large enterprises owned by a myriad of shareholders, entities whose potential liabilities exceed the amount any individual could pay.[349] Limited liability is therefore intimately connected with the separation of corporate ownership and control, and its celebrated division of labor between skilled investors and managers.[350] By its terms, of course, this advantage of limited liability only affects passive shareholders.

Third, the limited liability rule enables investors to diversify their portfolios, because their total possible liability from any one investment will be fixed by the value of their stock.[351] Disincentives to diversification, on the other hand, would result in more concentrated and entrenched corporate ownership, and, in turn, would tend to perpetuate the control of inefficient management.[352] Once again, however, this advantage of limited liability is of concern only to the

348. *See id.* at 613-14. As Blumberg notes, however, even under a limited liability regime shareholders have a significant incentive to monitor managerial behavior so as to determine the performance of their investment. *See id.* at 614; *but see* Meiners, Mofsky & Tollison, *supra* note 338, at 362-63 (arguing that shareholders lack such an incentive under the existing regime because information concerning corporate performance, other than inside information unobtainable even through monitoring, is already reflected in stock market prices).

349. *See* Blumberg, *Limited Liability, supra* note 43, at 612-13; P. BLUMBERG, *supra* note 100, § 4.02.2, at 68.

350. *See* Easterbrook & Fischel, *supra* note 24, at 94.

351. *See, e.g.*, P. BLUMBERG, *supra* note 100, § 4.02.3, at 68-69. Diversification of investments is generally considered more efficient than concentration, because it allows investors to spread their risks and permits firms to raise capital more easily. *See, e.g.*, Easterbrook & Fischel, *supra* note 24, at 96. The diversification rationale is less compelling when investors hold sufficient assets that the failure of any single investment would not inflict catastrophe. Because the contemporary United States capital market is dominated by extraordinarily well endowed institutional investors, therefore, the diversification rationale cannot be considered to provide an especially important reason to maintain the limited liability rule. *See* Blumberg, *Limited Liability, supra* note 43, at 613.

352. *See* Manne, *supra* note 30, at 262-65.

passive investor.

Fourth, without a limited liability rule, shareholders would be required to monitor the relative wealth of other shareholders so as to determine the likelihood that their own assets might be diverted to satisfy the corporation's creditors.[353] Because creditors would tend to seek out the deeper shareholder pockets, the likelihood of such diversion would necessarily vary according to the wealth of different shareholders. Under such circumstances, a wealthy investor, knowing that her wealth would make her a likely candidate for creditor pursuit in the event of a corporate default, would presumably not be willing to pay as much for corporate stock as a less wealthy individual who would probably escape creditor collection efforts. As a result, unless shareholders were to be held liable on a pro rata basis rather than jointly and severally,[354] eliminating limited liability would effectively preclude the existence of a single fixed share price and would thereby render stock markets unworkable.[355] Here too, however, this advantage of limited liability is irrelevant with respect to corporations whose shares are not traded on stock markets.

Fifth, commentators contend that the limited liability doctrine may assist in the collection of corporate obligations, because without such a rule, creditors might be forced to track down a large number of scattered shareholders to secure a recovery.[356] This argument is illogical, because even if shareholders could be held liable, creditors could continue to proceed against solvent corporations before attempting to round up their shareholders, whereas under the existing

353. *See* Blumberg, *Limited Liability, supra* note 43, at 614; P. BLUMBERG, *supra* note 100, Section 4.02.04, at 69-70. Meiners, Mofsky and Tollison downplay this argument, suggesting that in the absence of a limited liability rule creditors would rarely pursue all shareholders, given the procedural difficulties of any such action. *See* Meiners, Mofsky & Tollison, *supra* note 338, at 363. Unless the principle of joint and several liability were also discarded, however, a creditor could choose to sue any shareholder she liked. Nonetheless, a shareholder would still need to monitor other shareholders to determine whether her financial position and susceptibility to jurisdiction rendered her a likely target for suit.

In this regard, Hansmann and Kraakman argue that additional monitoring would be far less extensive if shareholders were held liable on a pro rata basis, because the possible consequences of inadequate monitoring would be limited to the monitor's percentage of ownership, and thus known in advance. In any event, Hansmann & Kraakman suggest that a moderate increase in shareholder attention would probably improve managerial performance. *See* Hansmann & Kraakman, *supra* note 313, at 1906.

354. *See* Hansmann & Kraakman, *supra* note 313, at 1903; *see also infra* note 373 (discussing the disadvantages of pro rata liability in the labor context).

355. *See* Halpern, Trebilcock & Turnbull, *supra* note 313, at 130-31. Blumberg notes, however, that stock markets flourished in England during the early modern era preceding the introduction of limited liability. *See* Blumberg, *Limited Liability, supra* note 43, at 615.

356. *See* Blumberg, *Limited Liability, supra* note 43, at 615; P. BLUMBERG, *supra* note 100, at § 4.02.6, at 71-72.

regime, creditors are effectively deprived of an alternative remedy if the corporation proves incapable of satisfying their claims.[357] More important, unless joint and several liability were also eliminated (as has sometimes been proposed),[358] creditors could pick and choose their shareholder targets according to the facility of suit. Nonetheless, because the present limited liability regime usually renders pointless creditor efforts to recover from shareholders, it may reduce the costs of resolving legal disputes when corporations become insolvent.[359]

Sixth, limited liability may reduce the transaction costs of credit negotiations by effectively adding an important standard term to all corporate credit contracts — a provision for shareholder immunity — whereas repeated negotiations to achieve this presumably desirable result would be inefficient.[360] Moreover, it is much easier for a sophisticated contract creditor to determine the financial stability of a single corporation rather than myriad shareholders when it fixes the terms for the extension of credit.[361] Assessing the validity of this argument requires an empirical assessment. If a significant proportion of credit contracts actually include shareholder guarantees, for example, it is of little moment.[362] In any event, it is certainly not persuasive with respect to involuntary creditors who, for one reason or another, do not negotiate at all.

A number of commentators have concluded that these diverse justifications for the limited liability rule are not persuasive in the context of parent and subsidiary corporations and do not impose significant barriers to broader parental liability.[363] First, limited liabil-

357. *See* Blumberg, *Limited Liability, supra* note 43, at 615.

358. *See, e.g.*, Hansmann & Kraakman, *supra* note 313, at 1903.

359. *See* Note, *Liability of Parent Corporations*, *supra* note 27, at 988.

360. *See* Blumberg, *Limited Liability, supra* note 43, at 615-16; *But see* Meiners, Mofsky & Tollison, *supra* note 338, at 364 (suggesting that if the limited liability rule were abolished, contracts containing limited liability provisions "would quickly emerge as standard forms costing only a few pennies to print and sign"). Moreover, insofar as shareholders already "pay" for limited liability, *see supra* text accompanying notes 343-44, the limited liability rule does not necessarily reduce transaction costs.

361. *See* Halpern, Trebilcock & Turnbull, *supra* note 313, at 134-35.

362. The argument is similarly unpersuasive in the parent-subsidiary context if, as Sommer asserts, creditors generally impose "de facto unitary organization" upon more complex corporate family structures by making all affiliates liable for each other's obligations. Sommer, *supra* note 341, at 234.

363. *See, e.g.*, Halpern, Trebilcock & Turnbull, *supra* note 313, at 130-31; Sommer, *supra* note 341, at 259-73; Landers, *supra* note 47, at 621-22; P. BLUMBERG, *supra* note 100, § 5.01, at 95-96. *But see* Posner, *supra* note 319, at 506. Posner contends that, among other things, elimination of the limited liability rule in the parent-subsidiary context would impose additional costs upon subsidiaries' contract creditors, who would be required to investigate and

ity's encouragement of parents' risk-taking is actually detrimental in most instances. Corporations are significantly less risk-averse than individuals and will generally invest in any enterprise with a positive net present value, even those that impose a significant risk of creating devastating losses such as environmental disasters.[364] Indeed, many subsidiaries are not operated with "profit-maximizing intent," but as part of a broader parental business strategy.[365] As such, limited liability tends to encourage the formation of inefficient subsidiaries that generate immediate financial gains for the parent while inflicting significant externalities.

Second, limited liability's facilitation of passive investment is irrelevant in the parent-subsidiary context, because parents necessarily monitor their subsidiaries' performance through their ordinary exercise of control over the subsidiary.[366] In addition, investment diversification is not relevant here because parents form and operate subsidiaries as part of an active business strategy rather than as a passive investment. Finally, because there are no other shareholders for a parent to consider in determining the potential risk of veil-piercing to its own assets, and because subsidiaries' shares are almost never publicly traded, concerns about a broader liability rule's effect upon capital markets are also unfounded.[367]

These rationales are equally unpersuasive in the context of close corporations, and various commentators have therefore proposed eliminating limited liability for the shareholders of such corporations.[368] Like parent corporations, the owners of close corporations

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monitor the financial stability of the parent as well as the subsidiary, given that the parent's assets would become available for the subsidiary's creditors in the event of the subsidiary's default. *See* Posner, *supra* note 319, at 516-17.

364. *See* Note, *Liability of Parent Corporations*, *supra* note 27, at 989-90; *see also* Landers, *supra* note 47, at 591 (suggesting that parent corporations have an incentive to create inefficient subsidiaries that generate helpful losses that the parent may claim for tax purposes).

365. Sommer, *supra* note 341, at 232.

366. *See* Blumberg, *Limited Liability*, *supra* note 43, at 623 (noting that a parent is "almost invariably engaged in [the subsidiary's] managerial functions of establishing policy, determining the budget, providing administrative support, and participating in the [subsidiary's] decisionmaking").

367. *See id.* at 623-24. These arguments concerning parents and subsidiaries assume that the parent holds a 100% ownership interest in the subsidiary. However, only about 72% of subsidiaries are in fact wholly owned, however, according to a 1975 study. *See id.* at 626 (citing J. CURHAN, W. DAVIDSON & R. SURI, TRACING THE MULTINATIONALS 143 (1977)). Alternative ownership structures among subsidiaries are likely to be joint ventures of one kind or another, however, rather than involving a block of shares that is publicly traded and widely held. As such, the principal arguments for limited liability appear equally invalid for non-wholly owned subsidiaries.

368. *See, e.g.*, Halpern, Trebilcock & Turnbull, *supra* note 313, at 148; *see also* Note, *Should Shareholders Be Personally Liable for the Torts of Their Corporations?*, 76 YALE

have an exceptionally substantial incentive to undertake high-risk activities, because a small group of individuals will see the entire benefit of a successful gamble while creditors will bear all the risk.[369] Second, because ownership and control are rarely separated in close corporations, abolition of limited liability would not cause shareholders to mount expensive efforts to monitor managerial performance and other corporate dealings that might affect the value of their investment, because their participation in management will already generate this information.[370] Third, because creditors may easily monitor the financial position of a small number of shareholders to determine the validity of their collateral for corporate debts, unlimited liability might be economically efficient.[371] Fourth, shareholders may easily learn about each other's financial position because the shareholders are few in number and they all participate actively in the ordinary mechanisms of corporate governance. Finally, concerns about the effectiveness of the capital market are irrelevant, since by definition close corporations' shares are not publicly traded.[372]

Corporate law scholarship demonstrates, therefore, that the limited liability doctrine provides no indispensable advantages to close corporations or corporate subsidiaries, and that shareholder immunity brings their owners something of a windfall. Because there are no theoretical obstacles to shareholder liability in these contexts, a more labor-protective doctrine does not appear objectionable as a

L.J. 1190, 1198-201 (1967) (proposing a mechanism for shareholder liability in the close corporation context).

369. *See* Halpern, Trebilcock & Turnbull, *supra* note 313, at 148. This incentive is exacerbated among highly leveraged close corporations that were taken private amid the merger-and-acquisition frenzy of the 1980's: "these firms, which have proportionately small net assets and are under great pressure to maximize cash flow, have an unusually strong incentive to engage in excessively risky behavior." Hansmann & Kraakman, *supra* note 313, at 1881. Financing through debt, rather than equity, increases these incentives still further, for unlike shareholders, secured debtholders will be paid ahead of tort claimants should the corporation go bankrupt as the result of its risky activities. *See id.* at 1884 (citing 11 U.S.C. Section 507 (1988)).

370. *See* Easterbrook & Fischel, *supra* note 24, at 110.

371. *See* Halpern, Trebilcock & Turnbull, *supra* note 313, at 135.

372. *See id.* at 148. As corporations become less closely held, distinctions between classes of shareholders might become appropriate. Under existing doctrine, for example, only those shareholders that actively participate in the wrongdoing that leads to veil-piercing will suffer personal liability. *See, e.g.*, Minton v. Cavaney, 56 Cal.2d 576, 579, 364 P.2d 473, 475 (1961) (holding that when a veil is pierced, liability is only properly imposed on those shareholders who "actively participate in the conduct of corporate affairs"). When undercapitalization is only one of several factors taken into account in a veil-piercing determination, however, this principle might allow passive shareholders with a substantial ownership interest to escape liability. *See* Gelb, *supra* note 318, at 19.

matter of corporate law policy.[373]

B. A Reconceptualized Labor Law Veil-Piercing Doctrine

Federal courts and agencies considering labor law veil-piercing cases have never made a serious attempt to determine whether the doctrine of limited shareholder liability makes sense in the labor context. Instead, labor cases present an unduly rigid and simplistic account of veil-piercing law that ignores both contemporary corporate

373. Eliminating limited liability for publicly traded corporations, as Hansmann and Kraakman have recently proposed, may not be warranted in the labor context. Hansmann and Kraakman's argument is based on the paradigm of the corporation whose activities involve a significant risk of inflicting catastophic economic disasters and thereby incurring massive damages far beyond *any* corporation's ability to pay. *See* Hansmann & Kraakman, *supra* note 313, at 1880. Working within this paradigm, Hansmann and Kraakman suggest that abolishing limited liability for publicly-traded corporations would be appropriate — provided the prevailing rule of joint and several liability were abolished in favor of a pro rata principle. *See id.* at 1896, 1903-06. Indeed, they contend that if publicly traded corporations retained the privilege of limited liability while close corporations and subsidiaries did not, investors would effect "partial or complete sales of risky subsidiaries to individual shareholders," thus reducing the benefits of the liability reform while simultaneously "bring[ing] the additional costs of inefficient ownership structures." *Id.* at 1932.

The corporations that incur labor law liabilities, and the nature of those liabilities, are so fundamentally different from the environmental risk-takers that Hansmann and Kraakman describe that their proposal may not be valid in the labor context. Simply put, labor law violators are much smaller and the damages involved are much smaller. In addition, most labor law liabilities — damages to a discriminatee, for example — are not foreseeable at the time the corporation is formed, unlike the possible damages faced by a chemical subsidiary organized for the sole purpose of undertaking risky activity.

As such, "going public" simply will not be a sensible evasion mechanism for the typical labor law violator. The initial and ongoing costs of such a maneuver would not be justified for a small business with no obvious liabilities looming on the horizon. On the other hand, a shift to pro rata liability might severely impede creditor collection efforts, for small family corporations could very easily manipulate stock ownership to shield assets. (Hansmann and Kraakman's suggestion that maneuvers of this kind would be difficult to arrange and easy to defeat, see *id.* at 1911-13, is again based on the environmental paradigm, where liabilities would be massive and widespread and decidely more likely to secure judicial willingness to invalidate chicaneries of ownership).

One labor law context in which undesirable liabilities would be foreseeable from the outset is that of double-breasting. If the law were reformed so that any closely-held or affiliated corporation were bound to its affiliate's collective bargaining agreements, an investor could only achieve its goal of double-breasting by forming a new corporation and offering at least some of its shares for public sale. Taking this course would only make sense if the benefits of operating a non-union division outweighed the costs of forming and operating a public company. Given the size of most entities that engage in double-breasting, it is unlikely that going public to avoid liablity would become a common course of action. Although Hansmann and Kraakman are dubious about the prospect of interstitial judical resolution of problems like these, I suggest that it is preferable to "rely on the ability of the [courts] to deal with [those] new situations in the light of what are called 'their own facts.'" O. KAHN-FREUD, LABOUR AND THE LAW 54 (2d ed. 1977). To the extent evasion develops into a significant problem, the law should be reexamined and reformed.

law scholarship and the policies of federal labor statutes. As explained above, however, corporate law scholarship reveals that the limited liability principle is largely irrelevant as an incentive to business investment and is primarily useful only as a regulator of the market for publicly traded corporate stock. A broader rule of shareholder liability for non-traded corporations, such as subsidiaries and close corporations, should therefore have no negative economic or policy effect.

Rather than continuing to accept traditional state law doctrine and the questionable assumptions upon which it is based, federal courts and administrative agencies should embark on a revised analysis of the role of corporate fictions in federal labor law. In doing so, they should seek to determine whether specialized federal veil-piercing rules are appropriate in labor cases and how such doctrines should be tailored in different contexts to advance the purposes of particular labor statutes. Their analysis should also recognize the tenuous importance of limited liability and the irrelevance of state corporate law interests in matters involving federal statutes.

1. *The Necessity of Federal Decisional Rules in the Labor Law Veil-Piercing Context*

Application of the Supreme Court's three-part *Kimbell Foods* choice-of-law analysis suggests that specialized and specifically federal veil-piercing rules are especially appropriate in labor cases. First, federal interests militate strongly in favor of uniform federal rules in labor matters. All the federal labor laws are intended to regulate social problems of national dimension or major issues relating to interstate commerce.[374] The NLRA, for example, controls the use of economic weapons that may disrupt the national economy, and establishes the ground rules for collective bargaining that sets the terms and conditions of employment for millions of workers. Most of the federal labor statutes, moreover, impose a strong preemptive effect, such that state regulation of labor matters is substantially foreclosed. Given these special attributes of labor law, it is singularly inappropriate to apply ordinary state corporate law, which is devised to deal with entirely unrelated problems such as business disputes, to labor matters in which the states have no proper role.[375]

Second, application of state law to labor law veil-piercing ques-

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374. *See* Note, *Piercing the Veil*, *supra* note 64, at 859; *See also* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

375. *See* Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund, 632 F. Supp. 630, 633 (S.D.N.Y. 1986).

tions would clearly frustrate specific objectives of federal law. Although the *Kimbell Foods* Court did not define or explain the term "frustrate" as used in that decision, the two most readily available interpretations strongly suggest that application of state corporate law should be considered to frustrate labor law policies. The first of these interpretations requires attention to the role of corporate entity in the particular statutory framework.[376] The federal labor laws clearly place no weight on the corporate form: they establish no distinctions of any kind between the obligations of incorporated and unincorporated employers. State corporate law's distinction between proprietors, who are personally liable for their businesses' obligations, and corporate shareholders, who are not, would therefore appear to interfere with enforcement of the uniform federal scheme.

The second interpretation of the term "frustration" is the meaning that has been applied in the statutory frustration cases. Under this interpretation, the labor laws should be considered to have been frustrated whenever a corporation is unable to satisfy a labor law obligation and provide compensation to its victim. If state corporate law assures such intolerable outcomes — as it inevitably will given its general rigidity and its firm principle that corporate insolvency does not create a basis for veil-piercing — then federal interests will be frustrated. State corporate law would permit the shareholders of insolvent corporations consistently to avoid labor law liability unless they commit particular corporate law offenses — a result that frustrates federal labor policy.[377]

Finally, application of federal veil-piercing rules in labor cases would not disrupt commercial relationships predicated on state law. The federal labor laws do not in any way implicate the formation, regulation, or preservation of private corporations.[378] They seek to control only the relationships between employers and employees, not employers and their owners.[379] The allocation of responsibilities between state and federal courts is such that federal courts have no obligation to weigh state corporate law policies against federal labor law policies: their only mission is to enforce the federal labor laws. This division of responsibilities is particularly apparent in the con-

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376. *See supra* notes 62-63 and accompanying text.

377. *See supra* notes 73-90 and accompanying text.

378. *See* In re Acushnet River Proceedings, 675 F. Supp. 22, 31 (D. Mass. 1987) (noting that federal veil-piercing rules do not interfere with commercial relationships predicated on state law, because shareholders are only properly entitled to rely on state law insofar as it involves internal corporate affairs).

379. *Id.*

text of business regulation: the states imbue their corporations with certain rights and entitlements and the federal government establishes the commercial relationship between the states.

As a policy matter, of course, it is appropriate for the federal courts to pay attention to state interests, unless doing so would thwart federal objectives. Both the statutory frustration doctrine and prevailing principles of federal common law attempt to preserve this balance. When interference appears, as in the labor law context, federal courts must give primacy to the federal interest, by requiring that shareholders who are immune from responsibility for other corporate obligations ensure that their corporations satisfy their labor law responsibilities.

As explained in Part II, most existing labor law veil-piercing rules are nominally federal in nature, so that assessment of the appropriateness of federal decisional rules for labor law veil-piercing problems might appear unnecessary or redundant. Nonetheless, existing labor law veil-piercing doctrines incorporate the assumptions and restrictions of state corporate law so completely that they cannot properly be considered truly federal doctrines.[380] The NLRA "single employer" doctrine, for example, is so tightly constrained by traditional state law conceptions of corporate entity, and so scrupulously devoted to form rather than reality, that collective bargaining relationships and employees' unionization rights may be subverted almost at the employer's will with their current approach to veil-piercing, the federal courts have subordinated federal labor policy to state corporate law to the same degree as they would if they had applied state law without question.

2. *Shaping A Reconceptualized Labor Law Veil-Piercing Doctrine*

The determination that uniform federal veil-piercing rules are required when courts enforce federal labor statutes is essentially a preliminary question. The more important problem arises in shaping the substantive content of veil-piercing doctrines that are attuned to the individual policies of the various labor statutes. These rules may differ according to the particular policies and interests of different statutes.

Nonetheless, I suggest a single basic guideline: corporate em-

380. As several commentators have observed, federal labor law has consistently absorbed assumptions from other areas of the law in a manner that deflects and deradicalizes labor law. *See* Klare, *supra* note 101; J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1985).

ployers should comply with the labor laws, and their shareholders should be required to shoulder these obligations when the corporations fail to do so. The overriding policy, therefore, is that labor statutes should simply be obeyed. An exception seems appropriate for the shareholders of publicly traded corporations, however, because imposition of liability on these shareholders could have serious negative ramifications, as explained above. Detailed analysis suggests that a per se rule of liability for other classes of corporate shareholders is appropriate for all federal labor statutes, although the particular statutory policies that suggest this result vary in different statutory contexts.[381]

This principle is essentially the same as that advanced in the more broad-reaching "statutory frustration" cases. In those cases, courts have held that Medicare requires that reimbursement payments must be made, and that corporate veils will not block this mandate. ERISA's requirement that employee benefit contributions be paid provides the clearest labor law analogy: here too, corporate shields should not be permitted to permit employer nonpayment.

This principle is most easily applied when a labor statute imposes a monetary obligation on a corporate employer: victims of anti-union discrimination should receive NLRA backpay, victims of racial discrimination should receive Title VII backpay, and workers illegally deprived of overtime premiums should receive FLSA compensation. When the veil-piercing question involves the applicability of a collective bargaining agreement to a corporate affiliate, as in the double-breasting context, the contract should simply be extended to include all employees performing work of the kind covered by the contract that are employed by corporate affiliates.[382]

381. The policies underlying the labor laws are something less than unambiguous and are certainly susceptible to competing interpretations. *See* Klare, *supra* note 101 (explaining the ambiguity of the NLRA and the courts' "deradicalizing" interpretation).

382. *Cf.* Gorman, *supra* note 104, at 259-60 (contending that NLRA policy requires a consistent prohibition on employers' formation of nonunion entities during the terms of collective bargaining agreements). On its surface, my proposal automatically to extend collective bargaining agreements to corporate affiliates appears to create substantial labor law problems. Although the employees of non-union affiliates could choose to decertify the signatory union upon the agreement's expiration, the affiliates' employees would nonetheless be forced to work under that agreement and to accept a limited association with the signatory union pending the agreement's expiration. As amended, the NLRA protects both the right to choose unionization and the "right" to decline it; this article proposes that the conflict between these two principles be reconciled through the temporary compromise described above. The existing system, which extends employers broad discretion to subvert employee choice, is intolerable. Several other problems, whose resolution is beyond the scope of this article, might also arise. For example, two affiliates might both be unionized, with each affiliate's employees working under a separate collective bargaining agreement with a different union; in such circumstances, the problem

The equation of noncompliance with statutory frustration is especially appropriate when violations of labor law are inherently intertwined with corporate employers' business difficulties. If particular kinds of labor law violations are usually only committed by insolvent entities, traditional corporate law would permit systematic avoidance of liability. Under any definition, such wholesale circumvention of legal burdens constitutes a frustration of statutory purpose and policy.

ERISA withdrawal liability is only incurred, for example, when an employer ceases its obligation to contribute to a multiemployer pension plan. Although such a withdrawal may arise from a viable employer's decision to discard its union obligations, many, perhaps most, withdrawals are made when a corporate employer simply goes out of business.[383] In other words, the statutory withdrawal liability obligation does not ordinarily arise until the corporate employer has placed itself in a position of insolvency such that it will, in all likelihood, be unable to satisfy the obligation.[384] Moreover, ERISA's basic policy of protecting benefit plans is especially pressing in the withdrawal liability context, because only weak and underfunded plans — those which would be hurt the most by corporate nonpayment — are entitled to assess withdrawal liability.

Under WARN, the situation is even more severe, because a plant closing is perhaps the single most characteristic act of a failing employer. Although a major corporation will remain solvent after shutting down a single plant, in many instances WARN will become a dead letter unless shareholders may be held accountable for violations that generally occur only when corporations fall on hard times.

Within these parameters, I now consider the policies of the particular labor statutes and attempt to determine whether these policies are best advanced by a broad rule of shareholder liability for corporations whose shares are not publicly traded. In some instances, the statutory text is explicit; in others legislative history provides the clearest statements of policy. Courts have occasionally considered statutory purpose in devising veil-piercing rules, but these analyses are generally questionable and reveal excessive reliance on state law

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could be treated in the same manner as a merger.

383. *See, e.g.*, DeBreceni v. Graf Bros. Leasing, 828 F.2d 877, 880 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988).

384. Curiously, some courts have twisted this problem into an argument against broader shareholder responsibility for withdrawal liability. *See id.* at 881 (contending that a broader rule would make "personal liability for withdrawal payments . . . a routine accompaniment to corporate bankruptcy proceedings.").

conceptions of the corporate entity.

The most striking feature of the federal labor statutes is the total absence of any indication of congressional solicitude for corporations and their owners. No labor statute contains any exception for incorporated entities or any suggestion that corporate law policies should be balanced against labor law objectives. Several statutes enumerate specific countervailing policies that are to be taken into account in enforcement, but limited corporate liability is never found on the list. In fact, the opposite is true: the labor laws express concern with the excessive power of employers that are organized as corporate entities and reveal an intention to strengthen the position of employees as against such powerful employers.

1. *The NLRA*

The NLRA's central policy is undoubtedly the preservation of industrial peace.[385] Protecting employees' rights to organize and bargain, Congress found, tends to "safeguard commerce from injury, impairment, or interruption" and to "remov[e] certain recognized sources of industrial strife and unrest" such as the employer unfair labor practices Congress prohibited in the NLRA.[386]

When an employer's unfair labor practice is left unremedied as the result of its perpetrator's reliance on the fiction of corporate separateness, interstate commerce is threatened in the same manner as if Congress had never adopted the NLRA. An unremedied unfair labor practice is permitted to fester, provoking the victimized workers and threatening interstate commerce in a manner Congress specifically identified as dangerous. If corporate fictions permit such a result, the purpose and policy of the NLRA are clearly frustrated.

Further, the NLRA contains no indication that Congress intended to place weight on the corporate form. Although Congress did specify, in the Taft-Hartley amendments, that various competing interests — those of unions, employers, and individual employees — should be taken into account and balanced against each other,[387] nothing in the NLRA suggests that its policies and obligations should somehow be tempered by the principles of state corporate law.

Finally, one of the announced purposes of the NLRA is to rem-

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385. *See, e.g.*, Carey v. Westinghouse Elec. Corp., 375 U.S. 261,271 (1964). This is not necessarily a neutral goal. *See, e.g.*, Stone, *supra* note 168, at 1565.

386. NLRA § 1, 29 U.S.C. § 151 (1988). Employer unfair labor practices are enumerated in NLRA Section 8(a), 29 U.S.C. § 158(a) (1988).

387. *See* NLRA § 1, 29 U.S.C. § 151 (1988).

edy the "inequality of bargaining power" between employer and employee — inequality that is particularly acute when the employer is "organized in the corporate or other forms of ownership association."[388] In this regard at least, the NLRA suggests that corporate employers are subject to stricter scrutiny, not special deference. This statutory goal of rectifying the imbalance of power is surely undermined when employers take advantage of this inequality by hiding behind corporate veils; as such, NLRA veil-piercing doctrine should attempt to rectify these abuses.

Under prevailing state corporate law doctrine and labor law veil-piercing rules that defer to it, however, unions' inability to bargain from a position of strength actually leaves them worse off than ordinary business creditors, who may be able to secure shareholder guarantees of corporate obligations. NLRA obligations are statutory rather than contractual in nature, but this policy of strengthening employee bargaining power should be considered in other labor law contexts, particularly LMRA cases in which unions seek to obtain the benefit of collective bargaining rights assured by the NLRA.

2. *The LMRA*

As with the NLRA, the most important policy of the LMRA is the preservation of industrial peace.[389] By assuring that collective bargaining agreements could be enforced in federal court, Congress intended to establish a labor relations system that fixed the obligations of labor and management for a certain period of time rather than subjecting labor-management relations to constant struggle and flux. In particular, Congress intended to prevent disruptions of industrial peace that might arise through the use of economic weaponry to resolve interstitial labor conflicts such as employee grievances.[390]

If a contractual regime is to assure labor peace, however, it must be perceived as fair; veil-piercing doctrines that allow corporate fictions to defeat employee expectations can hardly be expected to build harmonious labor-management relationships or to encourage union acceptance of the contractual system.[391] Furthermore, as in

388. *Id.*

389. *See, e.g.*, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

390. *See generally* Stone, *supra* note 168. Although the LMRA itself did not establish a substitute mechanism to resolve such matters, arbitration is now almost universally accepted for this purpose. *See supra* note 168 and accompanying text.

391. In recent years, for example, numerous labor leaders have called for the abolition of the NLRA, arguing that its pro-employer bias renders it worse than nothing, and many

the NLRA context, an unremedied LMRA violation presents the same threat to industrial peace no matter what causes it to remain unremedied. Shareholder immunity may therefore lead to industrial lawlessness — a result directly contrary to the goals of the LMRA.

Surprisingly, courts have not considered these central LMRA policies in fashioning LMRA veil-piercing doctrines. The Ninth Circuit, for example, has intimated that the only LMRA policy pertinent to veil-piercing is its emphasis on national uniformity in the enforcement of collective bargaining agreements.[392] Proceeding from this interpretation, the court of appeals found that application of traditional veil-piercing law would not interfere with LMRA policy.[393] However, the court completely ignored the underlying purpose of the LMRA's attempt to ensure national uniformity.[394] It would hardly advance labor peace, for example, to devise a consistent, uniform national rule that permitted employers to breach collective bargaining agreements at will while subjecting unions to mandatory punitive damages for their contract violations. Permitting shareholders to escape their LMRA obligations with corporate shields does a similar disservice, despite the uniformity and consistency of a rule that gives them such leeway.[395]

major unions now avoid the NLRA's election procedures, citing similar abuses and failures.

392. *See* Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1109 (9th Cir. 1979). The Ninth Circuit suggested rather weakly that this "overriding federal policy . . . is best effectuated if collective bargaining agreements are interpreted and enforced in a uniform manner." *Id.* at 1109.

393. *Id.* at 1111. The *Seymour* court suggested that because veil-piercing rules are only important when corporations are insolvent, and because traditional rules provide for recovery from undercapitalized corporations and those stripped by fraud, the common law doctrine would be sufficient "in most cases." *Id.* But the court did not consider what would happen in cases other than "most" and whether a failure to permit shareholder recovery would frustrate the LMRA. *Id.*

394. The Ninth Circuit's emphasis on the LMRA's formal, rather than substantive goals, echoes the Supreme Court's division during the 1950s as to whether the LMRA merely established federal jurisdiction in labor contract cases, but implied the continuing applicability of state contract law, or whether the jurisdictional grant also included the power to shape federal law concerning collective bargaining agreements. *Compare* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) *with* Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955). The latter view, adopted in *Lincoln Mills*, became and remains the law, of course.

395. See United Paperworkers International Union v. T.P. Property Corp., 583 F.2d 33, 36 (1st Cir. 1978) (confronting the question of whether the LMRA requires a general rule binding parent corporations to arbitration clauses contained in their subsidiaries' collective bargaining agreements, the First Circuit held that "[n]o such policy has yet been adopted by Congress or the courts."). The court of appeals did not consider whether such a policy should be adopted, or whether, regardless of the existence of explicit policies, the LMRA would be frustrated without such a rule.

3. *The Railway Labor Act*

The Railway Labor Act is intended to advance a number of congressional policies: prevention of disruptions to interstate commerce and industrial peace, protection of railroad and airline employees' right to organize, and development of orderly mechanisms for the resolution of labor disputes.[396] In addition, the RLA was intended to strengthen the position of workers and their unions as against railroad and airline employers.[397] Accordingly, nothing in the RLA evidences any intention to protect corporate law interests or policies. As with other statutes relating to collective bargaining, moreover, the RLA's goal of assuring labor peace is jeopardized if unremedied RLA violations are permitted to fester because corporate shareholders successfully interpose the fiction of corporate separateness.

4. *ERISA*

ERISA's key purpose is to assure that employees' rights concerning employee benefit plans are protected.[398] In this regard, ERISA expresses a clear policy that promised contributions should be paid and promised benefits should be received.[399] Legislative history demonstrates, moreover, that Congress considered that a broad interpretation of ERISA is appropriate so as to provide "the maximum degree of protection for working men and women."[400] Like other labor statutes, ERISA was also intended to rectify the imbal-

396. *See* 45 U.S.C. § 151a (2) (1988); *see also* Republic Airlines, Inc., 8 N.M.B. 49, 54 (1980) ("The purpose of the [RLA] is [to] foster stable labor relations in the railroad and airline industries in order to minimize disruptions to interstate commerce.").

397. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 759 (1961).

398. *See, e.g.*, H.R. REP. No. 889, 96th Cong., 2d Sess. 51 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2919 ("The primary purpose of [the MPPAA amendments to ERISA] is to protect retirees and workers . . . against the loss of their pensions"); *see also* 29 U.S.C. § 1001, 1001a, and 1001b (1988) (setting forth Congress' formal statements of ERISA policy).

399. *See* ERISA § 515, 29 U.S.C. § 1145 (1988); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 374 (1980); *see also* Alman v. Danin, 801 F.2d 1, 4 (1st Cir. 1986) (noting that ERISA's central purpose is "to ensure that employees [a]re not deprived of promised benefits which they both expect[] and deserve[]"). For an especially clear explanation of ERISA's policies concerning the payment of contributions, see Upholsterer's Int'l Union Pension Fund v. Artistic Furniture, 720 F. 2d 1323, 1327-29 (7th Cir. 1990).

400. S. REP. No. 127, 93d Cong., 1st Sess. 18 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4383 ("It is intended that the coverage of [ERISA] be construed liberally to provide the maximum degree of protection for working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose.").

ance of power between workers and employers.[401] Finally, ERISA's legislative history makes it "abundantly clear" that in passing ERISA, "Congress was unconcerned with the actual corporate form of a business."[402] In accordance with these policies, several courts deciding ERISA cases have suggested that a corporation's noncompliance with ERISA requirements — such as fiduciary duties[403] or contribution obligations[404] — provides a sufficient basis for piercing its veil.[405]

Surprisingly, other courts appear to ignore ERISA's basic policies or manage to derive supposed statutory policies that contravene ERISA's apparent objectives. For example, although section 515 of ERISA expresses an unambiguous policy that benefits contributions should be paid,[406] some courts have diverted attention from this mandate by arguing that assuring such payment through shareholder liability would actually work against the policy of ERISA by discouraging corporate employers from participating in multiemployer benefit funds.[407] In reality, however, the threat of shareholder liability would merely prompt corporate employers to ensure that their ERISA contributions were paid before their lenders' notes and suppliers' bills — an allocation of priorities that clearly serves congressional policy.

Other courts have performed a similar sleight-of-hand in considering the policies of ERISA's withdrawal liability scheme, which seeks to hold employers accountable for their past acts with respect to multiemployer pension funds. Imposing individual liability on the

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401. *Id.*, at 4850 (explaining Congress' view that ERISA is a law "which, like the National Labor Relations Act, the wage-hour laws and other labor standards laws, brings the workers' interests up to parity with those of employers").

402. Robbins v. Pepsi-Cola Met. Bottling Co., 636 F. Supp. 641, 659 (N.D. Ill. 1986); *see Alman*, 801 F.2d at 3.

403. *See* Lowen v. Tower Asset Management, 829 F.2d 1209, 1221 (2d Cir. 1987) (stating that "ERISA Section 406(b) prohibitions would be empty rhetoric if the corporate form might . . . easily shield those who profit from prohibited transactions"); *see also* ERISA Section 406(b), 29 U.S.C. § 1106(b) (1988) (enumerating specific prohibited transactions that may lead to liability for breach of fiduciary duty).

404. *See* Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch, 757 F.2d 184, 191 (8th Cir. 1985) (holding that it is appropriate to pierce the corporate veil in deference to "the congressional policy reflected in sections 306(a) and 306(b) of the [MPPAA] [29 U.S.C. §§ 1145 and 1132(g) (1988)] that employers make all of their required contributions to pension and health and welfare funds").

405. *See, e.g.*, Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 461 (7th Cir. 1991)("[t]he underlying congressional policy clearly favors the disregard of the corporate entity in cases where employees are denied their pension benefits"); *Alman*, 801 F.2d at 4.

406. *See supra* note 399 and accompanying text.

407. *See, e.g.*, Rockney v. Blohorn, 877 F.2d 637, 643 (8th Cir. 1989); Scarbrough v. Perez, 870 F.2d 1079, 1084 (6th Cir. 1989).

shareholders of withdrawing corporate employers would appear to discourage withdrawals, and thereby advance statutory policy, because employers would not be permitted to abandon the plan without risking shareholder liability.[408] Some courts have suggested, however, that the withdrawal liability system is actually intended to grant employers incentives to enroll in multiemployer pension plans in the future, so that a broad rule of shareholder liability would actually undermine ERISA policy by discouraging employers from enrolling and risking shareholder liability.[409] In contrast, other courts have suggested that the broad rules of intercorporate withdrawal liability actually encourage new employers to enroll in multiemployer plans, because they may be sure that large conglomerates will not abandon the plan and escape liability through the manipulation of corporate fictions.[410] The same rationale applies to individual shareholder liability: responsible employers may safely enroll knowing that other corporations will not rely on shareholder immunity to impose their unfunded liabilities upon the remaining participating employers.

5. The Norris-LaGuardia Act

The Norris-LaGuardia Act's statement of policy is somewhat unusual, but it demonstrates a clear legislative purpose to reduce the federal government's protection of employer interests. The Act declares that "prevailing economic conditions, developed with the aid of governmental authority to organize in the corporate and other forms of ownership association" have led to a variety of improper results, which the Act sought to rectify.[411] This express reference to the dangers of corporate power and the impropriety of government assistance to employers that are "organized in the corporate . . . form[]" can hardly be read as an intent to further state corporate law policy and to protect business investors.[412]

6. Title VII and the ADEA

The congressional purposes underlying Title VII and the ADEA are substantially identical. Title VII is designed to eliminate discrim-

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408. *See* DeBreceni v. Graf Bros. Leasing, Inc., 828 F.2d 877, 880-81 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988).

409. *DeBreceni*, 828 F.2d at 880; Connors v. P & M Coal Co., 801 F.2d 1373, 1376 (D.C. Cir. 1986).

410. *See* Robbins v. Pepsi-Cola Met. Bottling Co., 636 F. Supp. 641, 659 (N.D. Ill. 1986).

411. Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (1988).

412. *Id.*

ination in "employment based on race, color, religion, or national origin,"[413] and to eliminate practices, devices, or barriers that permit such discrimination.[414] Similarly, the ADEA announces its policies as the promotion of older persons' employment on the basis of ability rather than age and the prohibition of arbitrary age discrimination in employment.[415]

Like other labor statutes, neither Title VII nor the ADEA contains any indication that their mandates should be tempered by attention to state corporate law doctrine or the needs of business investors.[416] Indeed, both Title VII and the ADEA are particularly deserving of an expansive interpretation because the victims of employment discrimination are often individuals with very little education or sophistication, and because eradicating discrimination is generally considered a social policy of the very highest order.[417]

7. *Other Labor Statutes*

Other labor statutes also express unambiguous policies and mandates, with no suggestion of solicitude for corporate investors. The FLSA's statement of policy is unusually clear and specific. Congress identified various "labor conditions" that it considered "detrimental to the maintenance of the minimum standard of living" and intended "to correct and as rapidly as practicable to eliminate" these conditions.[418] As with the NLRA, the FLSA's statement of policy suggests that this basic goal should be balanced against other policies — the preservation of employment and earning power — but says nothing about moderating the basic statutory aim so as to accommodate policies of corporate law.[419]

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413. *See* H.R. REP. No. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S. CODE CONG & ADMIN. NEWS 2391, 2401 ("The purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin.").

414. *See* Alexander v. Gardner Denver Co., 415 U.S. 36, 44 (1974) (analyzing the policies of Title VII); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (also analyzing the policies of Title VII).

415. *See* ADEA § 2(b), 29 U.S.C. § 621(b) (1988); H.R. REP. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2214 ("It is therefore the purpose of [the ADEA] to promote the employment of older persons based on their ability.").

416. *See* H. R. REP. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2223-24 (analyzing the ADEA's definition of the term "employer" without suggestion of any distinctions involving corporate entity).

417. *See* P. BLUMBERG, *supra* note 100, § 14.06, at 508-09.

418. FLSA § 2, 29 U.S.C. § 202 (1988); *see* United States v. Darby, 312 U.S. 100, 109 (1940).

419. *See* FLSA § 2(b), 29 U.S.C. § 202(b) (1988).

The purpose of OSHA is to minimize work-related accidents and illnesses.[420] Once again, OSHA makes no reference to corporate form, and neither the statute, nor its legislative history suggests that its policies are to be compromised by attention to corporate law doctrine.[421] Like other labor laws, OSHA represents a balance between competing interests — workers' interest in workplace safety and employers' interest in unfettered management — but nothing indicates that corporate law policy should somehow be placed on the scale.[422]

WARN provides no explicit statement of its purpose, but it clearly seeks to protect employees from unannounced disruptions to their employment.[423] Even more than most labor statutes, the legislative history suggests no special exception for corporate employers.[424]

CONCLUSION

The entropy of the law is one of its defining qualities. The doctrine of limited shareholder liability has become so widely accepted that calls for its elimination reek of heresy. Nonetheless, persuasive analysis suggests that the existing law of corporate form relies on unwarranted assumptions and often serves no useful policy goals. If circumstances suggest that limiting shareholder liability may have harmful consequences, therefore, the existing law of corporate entity should not be maintained simply because it is there.

In the context of federal labor law, substantial reform is especially appropriate. Labor law deals with a complex and distinct set of legal problems, and its existing veil-piercing doctrines already reflect a number of innovative adaptations. More important, labor law expresses a range of societal values that cannot be reconciled with

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420. *See* S. REP. NO. 91-1282, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5177 ("The purpose of [OSHA] is to reduce the number and severity of work-related injuries and illnesses which, despite current efforts of employers and government, are resulting in ever-increasing human misery and economic loss.").

421. *See* 1970 U.S. CODE CONG. & ADMIN. NEWS 5202 (analyzing OSHA's definition of the term "employer" without suggestion of any distinctions involving corporate entity).

422. *See, e.g.*, Titanium Metals Corp. v. Usery, 579 F.2d 536, 543 (9th Cir. 1978) (per curiam) (quoting LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, *Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 1st Sess., at 435 (remarks of Senator Williams)) (noting that OSHA "is designed to require 'a good faith effort to balance the need of workers to have a sa[f]e and healthy work environment against the requirement of industry to function without undue interference.").

423. *See* H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 1548, 2078.

424. *See* 1988 CODE CONG. & ADMIN. NEWS at 2079. The House Conference Report indicates that the statutory term "employer" means "a business enterprise," and is to "be deemed synonymous with the terms company, firm or business." As such, the term "employer" should "consist of one or more sites of employment under common ownership or control." *Id.*

the corporate law policies that led to the development of the limited liability doctrine. Because corporate law policy has been grafted onto labor law, existing veil-piercing doctrines have failed to assure that the labor laws are properly enforced and their beneficiaries assured satisfaction.