

FEDERALIZING THE FOREIGN CORPORATE FORM

SARAH C. HAAN[†]

TABLE OF CONTENTS

INTRODUCTION	926
I. ENTITY LAW FUNDAMENTALS	931
II. CHOICE OF ENTITY LAW FOR DOMESTIC CORPORATIONS	938
A. The “Well-Settled” Rule for Domestic Firms	940
1. The Internal Affairs Doctrine.....	940
2. Other Bases for the Rule	946
B. Some Exceptions to the “Well-Settled” Rule	947
III. CHOICE OF ENTITY LAW FOR FOREIGN ENTITIES	950
A. Foreign Commercial Entities.....	951
B. Treaty-Chartered Entities	954
C. The Double Standard	955
D. Why Do American Courts Employ a Double Standard?.....	960
1. The Unsound Principles Underlying the Domestic Rule	961
2. Practical Difficulties in Ascertaining Foreign Veil-Piercing Laws	964
3. Agreement of the Parties that American Law Applies.....	967
4. Entity Law Problems that Span Multiple Nations	968

[†] J.D., 2000, Columbia Law School; B.A., 1995, Yale College. In 2012, Sarah Haan will join the faculty of the University of Idaho College of Law. This Article was written with the support of a Careers in Law Teaching Fellowship at Columbia University School of Law.

IV. A CRITIQUE OF THE CURRENT CHOICE-OF-LAW REGIME.....	970
A. The Unfairness and Economic Costs of a Double Standard	971
B. Applying the Law of the Foreign Chartering Jurisdiction	973
1. The Treaty-Chartered Entity	974
2. The "Race to the Bottom"	974
3. The Limited Benefit of Jurisdictional Competition	976
C. Applying State Law.....	977
1. Differences Among State Veil-Piercing Laws	978
2. The Limits of State Regulation of Out-of-State Commercial Entities.....	981
V. THE CASE FOR FEDERAL ENTITY LAW FOR FOREIGN ENTITIES	987
A. Current Federal Common-Law Veil-Piercing Standards.....	989
B. The Treaties that Govern the Juridical Status of Foreign Firms	995
C. Constitutional Considerations.....	999
1. Uniformity, Economic Efficiency, and the Foreign Commerce Power	1000
2. The Dormant Foreign Relations Power	1002
CONCLUSION.....	1009

INTRODUCTION

Today, more than at any time in history, a business entity chartered by one sovereign government is likely to operate within the territory of a different sovereign government and to achieve multiple layers of "citizenship" through pyramidal ownership arrangements and corporate groups. At the same time, American courts are exercising the power to "disregard" or "look through" the corporate form for more purposes than ever before, utilizing veil-piercing doctrines that span procedural and substantive law, common law and statutory law, and even constitutional law. Modern veil piercing has sprinted past the time-worn, archetypical case of shareholder liability for corporate debts as, increasingly, corporations attempt to self-pierce—to

enforce contracts executed by affiliated companies, or to reach parent company coffers—as adversaries employ novel veil-piercing theories (for example, to compel discovery of documents possessed by affiliated firms), and as courts evaluate corporate ownership and control to determine the reach of their own personal jurisdiction or the scope of a corporation’s constitutional rights.¹

Yet the most fundamental questions about entity choice-of-law remain unresolved. For example, when a business entity appears in an American courtroom, which government’s laws govern its legal existence and powers? American courts have two different answers to this question, depending on whether the business entity was chartered domestically or abroad. Courts will generally apply the entity law of the jurisdiction of incorporation (*lex incorporationis*) to American firms, but not to foreign firms.² Where a corporation’s juridical status is at stake, American courts are weighing the policy arguments and governmental interests that form the basis of this conflict-of-laws analysis differently for domestic and foreign firms.

Most courts and commentators treat entity law questions as if they fall within the scope of the “internal affairs doctrine,” a choice-of-law doctrine that applies to matters “peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders”³ and rejects case-by-case interest balancing in favor of a more predictable, and therefore more economically-efficient, rule. Upon closer examination, however, it is clear that a corporation’s juridical status does not fall within the scope of the internal affairs doctrine because it concerns a corporation’s external, rather than its internal, affairs. And in practice, when American courts must choose a government’s entity laws to apply to a foreign corporation, these courts are rejecting the *lex incorporationis* and applying the law of an American state. Thus most American courts recognize implicitly, if not explicitly, that choice-of-law questions about the

¹ See *infra* pp. 933–34.

² In this Article, I use the phrase “foreign corporation” to refer to any corporation organized under the laws of a foreign government. Many state legislatures and courts use the phrase to refer to corporations that are chartered by other American states, but I am not adopting that definition.

³ *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

foreign corporate form do not truly implicate the internal affairs doctrine.

Yet American courts and commentators have missed an essential facet of the choice-of-law problem: In most cases, the correct choice of law is *federal* law. This Article contends that courts routinely ignore national governmental interests, including United States foreign relations interests, when addressing entity choice-of-law questions concerning companies organized under the laws of foreign governments. It argues that national interests, including economic policy interests in support of international commerce, would be best served by uniform federal veil-piercing standards, fashioned by federal judges with the consent and supervision of Congress.

In advocating federal entity law standards for foreign firms, this Article addresses the debate over the authority of the federal courts to fashion federal common law. It finds the restrictive theories that are currently popular with the legal academy insufficient here, where federal interests strongly outweigh state interests and where law has been judge-made by tradition and practical necessity. Only federal institutions have a full scope of lawmaking authority over entity law questions involving foreign firms because the Dormant Commerce Clause prohibits state law from distinguishing among entities chartered by different foreign governments, or between American and foreign firms. Thus, in practice, companies chartered by different foreign governments enjoy the same legal “personhood” under the law of any American state, regardless of differences between those foreign governments’ own entity laws. Moreover, the federal courts *already* create and apply federal veil-piercing standards in support of federal laws. They are thus well equipped to do so more broadly. This Article argues that the entity laws that define the legal status of foreign firms in American courts should not be fashioned exclusively by parochial lawmaking authorities—state courts and legislatures—that are hamstrung by Dormant Commerce Clause constraints. The federal government, which uniquely possesses a full scope of lawmaking options, and which has experience crafting federal veil-piercing laws, should be the primary lawmaker.

Importantly, the United States has signed bilateral commercial treaties with many foreign nations that address issues of corporate juridical personhood, essentially “federalizing”

the matter for covered companies.⁴ Exceptions to these companies' treaty-mandated juridical status must be determined under federal law. Entity law for foreign firms involves intersecting foreign commerce and foreign relations interests, areas that the Constitution commits to the federal government. And national economic interests favor a uniform national approach. A choice-of-law regime that applies American state law to foreign entities creates agency costs because a foreign firm will not know which state's law applies to it. The very nature of the problem, and the constitutional and economic interests at stake, require a federal solution.

The issue of which jurisdiction's law should define the identity of foreign corporations in American courts relates to one of the most important and enduring questions in modern American law: Can businesses evade laws simply by the act of strategic incorporation? *Erie Railroad Co. v. Tompkins*⁵ addressed this issue for interstate incorporation, but the last chapter in the *Swift-Erie* story—the chapter addressing strategic incorporation at a global level—has not yet been written. This Article contends that federal institutions should play the dominant role in determining the ability of foreign entities to enforce legal norms—such as contractual rights, constitutional rights, and limited liability—in their favor in American courts. And the best way to accomplish this is to consolidate authority over the foreign corporate form in the federal institution that, time and again, finds itself on the front line of defining it: the federal courts.

Part I of this Article establishes the significance of choice-of-entity-law analysis in our twenty-first-century legal system by exploring the breadth and variety of judicial doctrines in which American courts disregard the corporate form. Legal scholars tend to dismiss veil piercing as a narrow issue about shareholder liability, but a corporation's status as a legal entity separate from its owners is an essential—and much-litigated—issue in a very wide scope of legal areas. By establishing the widespread

⁴ See *infra* Part IV.B.1. As discussed in more detail in Part IV.B.1 below, this Author has not found a single case in which a litigant has argued that a treaty was relevant to a veil-piercing choice-of-law determination. Not only are these commercial treaties relevant to veil-piercing choice-of-law for companies chartered by treaty signatories, however, but where they apply, the treaties can change the choice of law outcome. See *infra* Part IV.B.1.

⁵ 304 U.S. 64 (1938).

importance of analyses that disregard or look through the corporate form, this Part shows that veil-piercing choice-of-law is more significant than is generally understood.

Part II describes the basic choice-of-law regime for questions about the juridical status of domestic firms. It shows that most state and federal courts assume that the law of the state of incorporation applies to veil-piercing claims for domestic corporations, regardless of what sort of veil-piercing analysis is involved—with the exception of jurisdictional veil-piercing.

Part III contrasts the approach for domestic firms with the approach for foreign firms. It shows that when questions about the juridical status of foreign business entities arise, courts occasionally discuss the internal affairs doctrine and choice-of-law principles that favor the law of the jurisdiction of incorporation, but they rarely apply foreign entity law. Part III also looks briefly at the rise of treaty-chartered entities, a category of stateless or supranational foreign entities that confound traditional entity choice-of-law analysis. Finally, Part III asks why the double standard exists, and it concludes that the unsound basis for the domestic rule, coupled with practical problems with applying *lex incorporationis* to foreign entities, have led courts to reject the application of the law of the foreign chartering jurisdiction for foreign firms.

Part IV offers a critique of the current state/foreign choice-of-law regime. It argues that the existence of different approaches for domestic and foreign firms effectively discriminates against foreign firms and creates agency costs for those firms that put them at an economic disadvantage. It contends that a rule that favors balancing domestic *state* interests is no improvement, because it potentially subjects foreign firms to fifty or more veil-piercing standards while domestic entities continue to enjoy the benefits of having only a single jurisdiction's veil-piercing laws apply to them. Finally, it explains why the potential for a global entity law "race to the bottom" is real and must be guarded against.

Part V argues that the recognition or disregard of the juridical status of foreign corporations is a matter of federal law. It addresses the current debate about the legitimacy of federal common law and shows why the debate cuts in favor of federal judge-made entity law standards for foreign firms. It shows how the United States has signed many bilateral treaties that directly

address the juridical “personhood” of foreign entities, effectively federalizing the issue for companies covered by these treaties. It also finds that by committing matters of foreign relations and foreign commerce to the federal government, the Constitution gives strong support to federal entity law for foreign firms. And it argues that the federal government has a significant interest in fashioning uniform, federal veil-piercing standards for foreign firms, to facilitate international commerce and to establish federal authority in an increasingly important area in which state laws have traditionally reflected parochial state interests, and have been limited by the Dormant Commerce Clause.

I. ENTITY LAW FUNDAMENTALS

Legislatures create corporations and define their juridical status but, in the American legal tradition, judges make the rules by which they will reject a corporation’s juridical status.⁶ No state has enacted comprehensive legislation to instruct its judges when and how to pierce the corporate veil.⁷ So basic is the equitable power of courts to disregard the corporate form in our legal system that the Supreme Court recently suggested in dicta that judge-made veil-piercing law stands as a “background principle []” against which Congress legislates.⁸

The archetypical veil-piercing case involves a contract or tort claim in which a plaintiff seeks to hold a shareholder or corporate

⁶ See Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1041 (1991) (“Almost all state corporations statutes simply ignore the whole idea of piercing the corporate veil.”).

⁷ In 1989, Texas’s legislature responded to a controversial judicial veil-piercing decision by codifying certain exceptions to traditional, judge-made veil-piercing standards, but it otherwise left both the primary role of judges in defining the standard and the remaining aspects of the judge-made standard intact. See TEX. BUS. ORGS. CODE ANN. § 21.107 (West 2011) (excepting shareholders from liability “by disregarding the separate existence of the corporation,” even where corporate formalities are not observed); *id.* § 21.223 (limiting shareholders’ liability for contractual obligations on the basis of actual or constructive fraud).

⁸ Arthur Andersen L.L.P. v. Carlisle, 129 S.Ct. 1896, 1902 (2009). Veil-piercing is an equitable doctrine in which a court decides whether it can fairly enforce an aspect of juridical personhood under the specific circumstances of the controversy before it. The use of the word “veil” in the veil-piercing metaphor was probably derived from a maxim of equity that held that “[e]quity regards substance rather than form.” NORMAN FETTER, HANDBOOK OF EQUITY JURISPRUDENCE 23 (1895). A leading equity treatise at the turn of the twentieth century explained that the maxim meant that “[e]quity will in no case permit the veil of form to hide the true effect or intent of the transaction.” *Id.* at 23.

parent liable for corporate debts via judge-made exceptions to statutory limited liability.⁹ In fact, when most corporate law scholars speak of veil piercing, they are referring exclusively to issues of shareholder or corporate parent liability.¹⁰ But there are many other types of cases in which courts will “lift” or “look behind” the corporate veil by disregarding an entity’s status as legally separate from its shareholders or corporate parents. They include many common-law doctrines, such as:

- When, in contract law, a court applies an “alter ego” principle to bind a shareholder or parent corporation

to a contract it has not signed,¹¹ or to enforce a contract on behalf of a nonsignatory corporate “alter ego.”¹²

⁹ Today this sort of veil-piercing is in poor repute among legal academics, who decry the doctrine’s “extremely discretionary” nature and its “vagueness.” STEPHEN PRESSER, *PIERCING THE CORPORATE VEIL* § 1:1 (2011). Philip I. Blumberg has called veil-piercing a “failure”: “Rigid in its formulation and yielding great uncertainty in any attempt to predict its outcome, ‘piercing’ has led to hundreds, if not thousands, of irreconcilable cases in each year.” Phillip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 *CONN. L. REV.* 605, 611–12 (2005). It is not difficult to find law professors who argue that courts should abandon veil-piercing altogether. *See, e.g.*, Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 *J. CORP. L.* 479 (2001); Douglas C. Michael, *To Know a Veil*, 26 *J. CORP. L.* 41, 50 (2000) (suggesting that veil-piercing doctrine should be replaced with a “duty to sufficiently capitalize”).

¹⁰ Liability veil-piercing can arise in several different procedural postures. One is when a plaintiff sues a corporate insider on a veil-piercing claim; a second is when a victorious plaintiff finds that a corporate defendant is judgment-proof and seeks to add a corporate insider as a judgment debtor on a veil-piercing theory. In other cases, a party may seek to have two or more entities that are controlled by the same person or people treated as alter egos of each other, so that the plaintiff can reach the assets of all controlled entities. *See, e.g.*, *D. Klein & Son, Inc. v. Good Decision, Inc.*, 147 F. App’x. 195 (2d Cir. 2005) (holding that two corporations controlled by the same husband-and-wife team effectively operated as a single company, and thus both were liable for breach of contract).

¹¹ *See, e.g.*, *Graves v. BP Am., Inc.*, 568 F.3d 221, 223 (5th Cir. 2009) (federal common law of contracts); *TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 340, 703 N.E.2d 749, 752, 680 N.Y.S.2d 891, 894 (1998) (setting forth the New York law of contracts).

¹² In a number of recent cases, a corporation has sought to pierce its own corporate veil to enforce a noncompetition agreement between a different, affiliated corporation and its employee. *See PharMethod, Inc. v. Caserta*, 382 F. App’x. 214, 219 (3d Cir. 2010) (suggesting that Pennsylvania law may allow a court to enforce a noncompetition agreement on behalf of a nonsignatory “sister” corporation by

- When an issue litigated by a corporation is held to be *res judicata* against its shareholder or parent company on an “alter ego” theory;¹³
- When incorporation inserts a “nonconductor” into a legal relationship so that, for example, the sole shareholder of a one-person corporation does not stand in the position of principal to an agent hired by the corporation;¹⁴
- When a bankruptcy court combines the assets and liabilities of separate but related legal entities as if they constituted a single enterprise under the bankruptcy doctrine of “substantive consolidation;”¹⁵
- When, in a discovery dispute, a court finds that a corporation controls a document that is in the possession of an affiliated entity with which it has a “strong interconnection;”¹⁶
- When a party urges the corporate form to be disregarded to hold the corporation liable for the debts of the shareholder, or for some other reason, in an act of “reverse veil-piercing;”¹⁷
- When a corporation seeks to pierce its own corporate veil to reach its parent company coffers;¹⁸

disregarding the corporate form); *see also* Del Monte Fresh Produce, N.A., Inc. v. Chiquita Brands Int'l Inc, 616 F. Supp. 2d 805, 814 (N.D. Ill. 2009) (declining to enforce a noncompetition agreement on behalf of a nonsignatory “sister” corporation).

¹³ *See, e.g.*, Dudley v. Smith, 504 F.2d 979, 982–83 (5th Cir. 1975).

¹⁴ *See, e.g.*, Meyer v. Holley, 537 U.S. 280, 290–91 (2003) (holding that the sole shareholder and president of a California real estate corporation was not vicariously liable for a corporate employee’s violation of the Fair Housing Act on an agency theory).

¹⁵ *See, e.g.*, *In re Huntco, Inc.*, 302 B.R. 35, 40 n.2 (Bankr. E.D. Mo. 2003) (“[B]oth veil piercing and substantive consolidation involve disregarding separate corporate structures.”).

¹⁶ *See, e.g.*, *In re Global Power Equip. Group Inc.*, 418 B.R. 833 (Bankr. D. Del. 2009); *see also* Gerling Int'l Ins. Co. v. Comm’r, 839 F.2d 131, 141 (3d Cir. 1988) (stating that when two sister corporations act as one in the transaction giving rise to the litigation, it may be presumed that there is control by one sister of the documents in possession of the other).

¹⁷ *See, e.g.*, Semiconductor Energy Lab. Co. v. Samsung Elecs. Am., Inc., No. 97-1217, 1997 WL 357907, at *3 (Fed. Cir. 1997) (“[T]his is the unusual case where the corporation is sought to be held to the actions of its shareholders”); Elham Youabian, *Reverse Piercing of the Corporate Veil: The Implications of Bypassing “Ownership” Interest*, 33 SW. U. L. REV. 573, 577 (2004).

¹⁸ *See, e.g.*, Rochester Gas & Elec. Corp. v. GPU, Inc., 355 F. App’x 547 (2d Cir. 2009).

- When a corporation effectively denies its separate legal personality in order to have a status of a parent company attributed to it (or vice versa);¹⁹
- When a family court uses “veil-piercing” analysis to determine whether corporate assets are part of the community estate for purposes of calculating and dividing the estate in divorce, where one spouse is a shareholder in a corporation;²⁰ and
- When a court determines that, as a matter of law and pursuant to the “intracorporate conspiracy doctrine,” a conspiracy cannot be accomplished solely by the officers, managers, agents, and employees of a single corporate entity.²¹

Most states apply the same essential standards to this entire range of common-law veil-piercing claims.²²

Some state statutes also call for courts to disregard the corporate form, either by express command or by implication.²³ Jurisdictional veil piercing, which may be authorized implicitly or explicitly by a state’s civil procedure laws, is one example.²⁴ Jurisdictional veil piercing includes two separate inquiries. One occurs when a court asserts personal jurisdiction over an out-of-state shareholder or parent company by imputing to it the

¹⁹ See, e.g., *Netherlands Shipmortgage Corp., v. Madias*, 554 F. Supp. 375, 382 (S.D.N.Y. 1983) (declining to attribute Dutch parent company’s “bank” status to its Bermuda non-bank subsidiary), *rev’d on other grounds*, 717 F.2d 731 (2d Cir. 1983).

²⁰ For a discussion of Texas law regarding the doctrine of corporate entity and divorce, see *Lifshutz v. Lifshutz*, 61 S.W.3d 511 (Tex. Ct. App. 2001) (refusing to disregard the corporate entity and distribute assets of corporation in a divorce because the husband’s conduct as C.E.O. did not reflect “egregious circumstances”).

²¹ See, e.g., *Solla v. Aetna Health Plans of N.Y. Inc.*, 14 F. Supp. 2d 252, 257 (E.D.N.Y. 1998). For many years, the Supreme Court also endorsed a rule that parent and subsidiary corporations that were legally separate entities under state corporate law could form a conspiracy under the Sherman Act. See *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 141–42 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951). In 1984, in a 5-3 split, the Supreme Court renounced the intra-enterprise conspiracy doctrine on the rationale that “substance, not form, should determine whether a separately incorporated entity is capable of conspiring” under the Sherman Act. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 n.21 (1984).

²² See Franklin A. Gevurtz, *Piercing Piercing: An Attempt To Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 OR. L. Rev. 853, 856 (1997) (describing the widely-used “template” approach to veil-piercing); see also *supra* notes 11–22.

²³ See *infra* notes 24–27 and accompanying text.

²⁴ For another example of a state statute that commands a court to pierce the corporate veil, see OKLA. STAT. ANN. tit. 68, § 1212(c) (West 2011).

jurisdictional contacts of the corporation.²⁵ Another form of jurisdictional veil piercing takes place when service of process on a corporation's "alter ego" is held to effect service of process on the corporation, or vice versa.²⁶ In both types of jurisdictional veil piercing, a court's decision to disregard the corporate form means that it can assert jurisdiction over a party. If the corporate form is not disregarded, there is no jurisdiction.²⁷

Federal statutes are also regularly interpreted to permit or require veil piercing. For example, ERISA's remedial provisions entitle plaintiffs to enjoin conduct that violates the act and "to obtain other appropriate equitable relief."²⁸ Some federal circuits, including the Second Circuit of the United States Court of Appeals, have held that this authorizes the fashioning of federal veil-piercing standards specific to ERISA.²⁹ A more obscure example is the Trading with the Enemy Act³⁰, which allows the seizure of enemy-controlled property during wartime.³¹ The Act is silent about the corporate form, but the Supreme

²⁵ Under the alter-ego theory of personal jurisdiction, a corporation's alter-ego is viewed as the same entity as the corporation itself, and the jurisdictional contacts of one are imputed to the other. *See, e.g.,* *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 412 n.7 (5th Cir. 2004) ("[p]ersonal jurisdiction may be established over a corporate officer by establishing that the individual is an alter ego of a corporation over which the district court has established personal jurisdiction"); *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 648–49 (8th Cir. 2003) (When the defendant is a nonresident parent corporation, "personal jurisdiction can be based on the activities of the nonresident corporation's in-state subsidiary, but only if the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego"); *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1069 n.17 (9th Cir. 2000) ("[a]lthough jurisdiction over a subsidiary does not automatically provide jurisdiction over a parent, where the parent totally controls the actions of the subsidiary so that the subsidiary is the mere alter ego of the parent, jurisdiction is appropriate over the parent as well") (citations omitted).

²⁶ *See, e.g.,* *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009) (noting the "well-established New York law that 'service on the alter ego of a corporation constitutes effective service on the corporation'" (quoting *King v. Galluzzo Equip. & Excavating, Inc.*, No. 00-CV-6247, 2001 WL 1402996, at *6 (E.D.N.Y. Nov. 8, 2001)).

²⁷ *See Compaq Computer Corp.*, 387 F.3d at 412 n.7; *Transfield ER Cape Ltd.*, 571 F.3d at 224.

²⁸ 29 U.S.C.A. § 1132(a)(3) (West 2011).

²⁹ *See Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987) ("Neither the separate corporate status of the three corporations nor the general principle of limited shareholder liability afford protection where exacting obeisance to the corporate form is inconsistent with ERISA's remedial purposes.").

³⁰ 50 U.S.C. app. § 5 (2006).

³¹ *See Draeger Shipping Co. v. Crowley*, 55 F. Supp. 906, 908 (S.D.N.Y. 1944).

Court has interpreted it to require veil piercing when the corporation in question has enemy shareholders, in a search for “enemy taint.”³²

Courts will also disregard the corporate form in analyzing constitutional claims.³³ For example, in 2009, the Court of Appeals for the Second Circuit held that a corporation that is controlled by a foreign government cannot not claim Fifth Amendment protections.³⁴ The Second Circuit fashioned its own veil-piercing standard for such cases, rejecting Due Process protections for any foreign business entity that is “so ‘extensively control[ed]’” by a foreign government “‘that a relationship of principal and agent is created.’”³⁵ And the Supreme Court’s decision in *Citizens United v. Federal Election Commission*³⁶ has opened the floodgates to political speech cases in which the identity of first amendment “speakers” within the corporation—including shareholders, managers, employees, and creditors—may help determine a corporation’s First Amendment rights.³⁷

³² See *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488–89 (1947).

³³ Jurisdictional veil-piercing is often an exercise of constitutional veil-piercing. Most states’ long-arm statutes extend personal jurisdiction to the maximum extent permitted by the Due Process Clause, and thus jurisdictional veil-piercing is most commonly a constitutional exercise running in one direction: The decision of a state court to disregard the corporate form and extend personal jurisdiction over a corporate insider will be overturned if the Constitution effectively protects their separate identities. The Due Process Clause will not be invoked, however, on the basis that the state law provides too strong a presumption in favor of corporate separateness.

³⁴ See *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 400 (2d Cir. 2009) (citing *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626–27, 629, 632 (1983)).

³⁵ *Id.*

³⁶ 130 S.Ct. 876 (2010).

³⁷ Constitutional veil-piercing arguably dates back to the early nineteenth century and a line of cases concerning corporate “citizenship” for purposes of diversity jurisdiction. See *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 499–500 (1844); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), *overruled as stated in Hughes v. A.H. Robins Co.*, 490 A.2d 1140 (D.C. Cir. 1985); *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 63–64 (1809), *overruled as stated in E. Sav. Bank v. Walker*, 775 F. Supp. 2d 565 (E.D.N.Y. 2011). A court’s choice to disregard the corporate form and take shareholders’ identities into account can implicate the constitutional rights of third parties as well, as the Supreme Court found in 2009 when it held that a state court appellate judge violated due process by failing to recuse himself in an appeal by a coal corporation whose chief executive officer spent millions of dollars of his personal money to secure the judge’s election. See *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009).

All of this suggests that veil piercing—the act of disregarding or looking “through” the corporate form—has been utilized by courts in an expanding body of legal doctrines that go well beyond typical questions about shareholder or parent company liability for corporate debts. Veil piercing occurs in many different areas of law, and as corporate activity plays an increasing role in the commercial and legal spheres, it is likely to cross more doctrinal boundaries. Veil piercing is a more significant legal doctrine than is commonly understood, and thus questions about veil-piercing conflicts-of-law should also be understood as important to a wide scope of legal disputes, with significant conceptual and practical implications.

The widespread use by courts of veil-piercing analyses also suggests that it is a fundamental judicial function to lift the corporate veil, if doing so will reveal the “true” substance of a transaction or dispute. State legislatures, and Congress, have consented to an entity law regime in which courts play this important lawmaking role. There are many reasons that may explain why courts are viewed as the right institution to develop detailed veil-piercing doctrines, including (1) because veil-piercing standards, traditionally judge-made, constitute the legal “background principles” upon which Congress legislates;³⁸ (2) because the doctrine is fact specific and turns on equitable considerations that are best resolved case-by-case by judges;³⁹ and (3) because legislatures respect the inherent power of the judiciary to create doctrines that allow it to fulfill its basic functions, such as recognizing and defining the parties that appear before it.⁴⁰ At any rate, it is a fact of American veil-piercing jurisprudence that courts make the veil-piercing laws that apply across a very wide range of common law, statutory analysis, and constitutional analysis, with rare legislative intervention.

³⁸ Arthur Andersen L.L.P. v. Carlisle, 129 S.Ct. 1896, 1902 (2009).

³⁹ Commentators often remark that veil-piercing is a very fact-specific doctrine. See, e.g., Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. Rev. 77, 77; Mark Wu, Comment, *Piercing China's Corporate Veil: Open Questions from the New Company Law*, 117 YALE L.J. 329, 335 (2007).

⁴⁰ See, e.g., *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (inherent judicial powers exist “which cannot be dispensed with in a Court, because they are necessary to the exercise of all others”).

II. CHOICE OF ENTITY LAW FOR DOMESTIC CORPORATIONS

When the juridical status of a domestic firm is in question, courts and commentators generally agree about which jurisdiction's law should apply: the law of the state of incorporation. This Part shows how this rule dominates choice of law across American states and identifies the internal affairs doctrine, a unique choice-of-law rule that applies exclusively to corporations, as the main basis of the rule. It also finds two less common bases for the rule: statutes in a small number of states that require the application of the law of the chartering jurisdiction in limited circumstances involving specific types of veil piercing, and the Restatement (Second) of Conflicts of Law, which recommends the application of the law of the chartering state for questions about "the existence and extent of a shareholder's liability to . . . its creditors for corporate debts."⁴¹

The general rule for domestic firms, and the exceptions to the rule, highlight a fundamental tension in the way American courts conceptualize the corporate form. On one hand, some courts, such as the federal courts of the Southern District of New York, seem close to adopting the contractarian view that the corporate charter is a private contract and the jurisdiction of incorporation is a choice of entity law by the parties to that contract.⁴² These courts tend to be particularly firm in applying the veil-piercing law of the chartering state to domestic entities. Some have gone so far as to hold that the court's own personal jurisdiction over a business entity turns on the alter ego law of its state of incorporation, a decision which can strip the state's own legislature and courts of the power to determine the reach of the state's long-arm jurisdiction over out-of-state corporations and their shareholders.⁴³

On the other hand, most courts exempt jurisdictional veil piercing from the general rule.⁴⁴ And a number of courts, particularly in tort cases involving injuries committed in-state, have refused to apply the veil-piercing law of the state of

⁴¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (1971).

⁴² See *infra* note 91. Delaware is another such jurisdiction. See *Morris v. Am. Pub. Utils. Co.*, 122 A. 696, 700 (Del. Ch. 1923) ("That a corporate charter is a contract has been long settled.").

⁴³ See, e.g., *Mega Tech Int'l Corp. v. Al-Saghyir Establishment*, No. 96 CIV 8711 LBS, 1999 WL 269896, at *8 (S.D.N.Y. May 3, 1999).

⁴⁴ See *infra* note 89.

incorporation to out-of-state firms.⁴⁵ In these situations, by asserting the power of the state to define the corporate form of out-of-state firms for in-state purposes, courts implicitly reject the private-contract theory of the corporation. Thus, the choice-of-law debate perfectly frames the unresolved conflict between competing theories of the corporation's relationship with government authority.⁴⁶

A. *The "Well-Settled" Rule for Domestic Firms*

Overwhelmingly, state courts apply the veil-piercing law of the state of incorporation to out-of-state domestic companies.⁴⁷ This is because legal scholars and courts generally assume that the internal affairs doctrine applies to veil piercing,⁴⁸ and many courts that apply the law of the state of incorporation to veil-

⁴⁵ See *infra* notes 90–91.

⁴⁶ Although the vast majority of American courts will apply the veil-piercing law of the chartering state to American corporations, there are some exceptions to the rule. The most important of these is jurisdictional veil piercing, in which most courts apply the law of the forum state to out-of-state domestic firms. See *infra* note 89. Less commonly, courts sometimes apply the veil-piercing law of the state where an injury occurred in a tort case. Gregory Scott Crespi, *Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice-of-Law Principles*, 64 N.Y.U. ANN. SURV. AM. L. 85, 86 n.3 (2008). And though, as a rule, courts hold that a contractual choice-of-law provision does not influence veil-piercing choice of law, a small number of courts have held that a contractual choice-of-law provision determines the choice of law for a veil-piercing inquiry related to a contract. See *infra* note 90 and accompanying text.

⁴⁷ See, e.g., *Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 646–47 (5th Cir. 2002) (Louisiana law); *Echostar Satellite Corp. v. Ultraview Satellite, Inc.*, No. 01-cv-00739-JLK, 2009 WL 1011204, at *7 (D. Colo. Apr. 15, 2009) (Colorado law); *Guinan v. A.I. duPont Hosp. for Children*, 597 F. Supp. 2d 485, 495 (E.D. Pa. 2009) (Pennsylvania law), *rev'd on other grounds sub nom. M.G. v. A.I. duPont Hosp. for Children*, 393 F. App'x 884 (3d Cir. 2010); *Sparton Elecs. Fla., Inc. v. Electropac Co.*, No. 8:05-cv-1495-T-30TBM, 2006 WL 2711842, at *2 (M.D. Fla. Sept. 21, 2006) (Florida law); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (New York law); *Retzler v. Pratt & Whitney Co.*, 723 N.E.2d 345, 354 (Ill. App. Ct. 1999) (Illinois law).

⁴⁸ See, e.g., *Gulley v. Moravec*, No. 1:07-cv-788-DFH-TAB, 2008 WL 596002, at *5 (S.D. Ind. Feb. 29, 2008) (“The issue of shareholder liability for debts of the corporation is one of the core topics covered by the internal affairs doctrine.”); Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 411 (1992) (“The internal affairs doctrine responds to the need for a uniform law governing the structural relationships of corporations that act in numerous states. To permit each state to impose unlimited shareholder liability through its tort law would make uniformity impossible . . .”).

piercing claims against out-of-state domestic firms perfunctorily cite the doctrine.⁴⁹

1. The Internal Affairs Doctrine

The internal affairs doctrine is a unique conflict-of-laws principle that is applied exclusively to questions of corporate law.⁵⁰ In the past century, the doctrine has undergone some important changes.⁵¹ Today, a hornbook would define the doctrine as asserting that matters concerning a corporation's "internal affairs" should be governed by the law of a single jurisdiction, typically—but not necessarily—the jurisdiction that chartered the entity. The internal affairs doctrine is thought by some to have constitutional "underpinnings,"⁵² but its true basis

⁴⁹ See, e.g., *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345, 349 (M.D.N.C. 1995) ("[M]ost, if not all, jurisdictions . . . use the 'internal affairs doctrine' as their choice of law for piercing the corporate veil.")

⁵⁰ Uniquely among the states, New York typically applies the law of the state of incorporation to veil-piercing claims without invoking the internal affairs doctrine. See, e.g., *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (applying New York law); *Flake v. Alper Holdings USA, Inc.* (*In re Alper Holdings USA, Inc.*), 398 B.R. 736, 757 (S.D.N.Y. 2008) (applying New York law). New York courts have suggested that they use this choice-of-law rule because it harmonizes governmental interests; as the Second Circuit put it in connection with a contract dispute in 1993, "[b]ecause a corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away." *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) (quoting *Soviet Pan Am Travel Effort v. Travel Comm., Inc.*, 756 F. Supp. 126, 131 (S.D.N.Y. 1991)); see also *Mikropul Corp. v. Desimone & Chaplin-Airtech, Inc.*, 599 F. Supp. 940, 942 (S.D.N.Y. 1984) ("New York has a paramount interest in preserving the integrity of the corporate form under New York law by regulating the standards which control piercing the veil of New York corporations."). This suggests that New York has not fully rejected an interest-balancing approach for veil-piercing conflicts, but that it views the chartering government's interest in protecting shareholders from liability as almost absolute.

⁵¹ See Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 75 (2009) ("[U]nder modern law the [internal affairs doctrine] is best understood merely as a choice of law regime. The roots of the [doctrine], however, lead back to a very different historical reality and set of legal concerns.")

⁵² *McDermott Inc. v. Lewis*, 531 A.2d 206, 209 (Del. 1987); see also *Draper v. Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 867 (Del. 1993) (identifying constitutional "underpinnings" of the doctrine). In 1987, Delaware's Supreme Court analyzed the constitutional basis for the doctrine and concluded that it was compelled by the Due Process Clause, the Commerce Clause, and the Full Faith and Credit Clause. See *McDermott*, 531 A.2d. at 216–17 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46 (1982)). Some corporate law scholars find these arguments unpersuasive, and the Supreme Court has never weighed in on the issue. See, e.g.,

is economic: It promotes efficiency and enhances wealth creation. In *CTS Corp. v. Dynamics Corp. of America*,⁵³ the Supreme Court made the bold assertion that the entire free market system “depends at its core” upon a legal regime that governs corporations by the law of a single jurisdiction, “traditionally . . . the State of its incorporation.”⁵⁴ The state’s interest, the Court explained, is in “promoting stable relationships among parties involved in the corporations it charters,” an aim that makes sense when the interests at stake are those belonging to parties involved in the corporation.⁵⁵ A corporation’s “internal affairs” have been held to include a wide range of activities and relationships, including the election and appointment of officers and directors, the fiduciary duties owed to shareholders,⁵⁶ the adoption and amendment of by-laws, shareholder voting, mergers and reorganizations, the issuance of stock pursuant to stock option plans,⁵⁷ and the declaration and payment of dividends.⁵⁸ The Supreme Court has characterized corporate internal affairs as those matters “peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.”⁵⁹

The doctrine was once widely construed not merely to mean that a court should apply the law of the state of incorporation, but that *only the courts of the state of incorporation* were competent to interpret and apply a state’s corporate law to its corporations. In a 1933 case, *Rogers v. Guaranty Trust Co. of New York*,⁶⁰ the Supreme Court endorsed this version of the doctrine, reversing the judgment of a circuit court of appeals that decided a case on the merits by applying New Jersey corporate law and reinstating the New York district court’s decision to decline jurisdiction. The Supreme Court explained:

It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to

ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 126 (2009) (asserting that the doctrine does not have “special constitutional status”).

⁵³ 481 U.S. 69 (1987).

⁵⁴ *Id.* at 90.

⁵⁵ *Id.* at 91.

⁵⁶ See *Harrison v. NetCentric Corp.*, 744 N.E.2d 622, 627–28 (Mass. 2001).

⁵⁷ See *Mariasch v. Gillette Co.*, 521 F.3d 68, 71–72 (1st Cir. 2008).

⁵⁸ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. a (1971).

⁵⁹ *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

⁶⁰ 288 U.S. 123 (1933).

interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of the domicile.⁶¹

This abstention doctrine reflected the Court's adherence to the "state action," "grant," or "concession" theory of the corporation, which was predominant from the time the United States Constitution was written until the mid-twentieth

century.⁶² It also suggested widespread agreement that, in deciding corporate law controversies, a court exercised what amounted to lawmaking powers.⁶³

Over time, with the rise of American legal positivism, the internal affairs doctrine was transformed. The notion that only a state's own courts could "interfere with" or "control" a state's corporations disappeared, and courts interpreted the doctrine to

⁶¹ *Id.* at 130.

⁶² The "concession theory" originated during a time when corporate charters were special acts of legislation and characterizes the corporation as a privilege granted by the legislature to the shareholders. For an overview of the theory, see PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 25–26 (1993). Under this view, the corporate privilege includes: (1) perpetual life; (2) management by a board of directors; (3) the "sanction of the state"; (4) limited powers and purposes; (5) limited liability; and (6) a separate legal identity from its owners. I. MAURICE WORMSER, *DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS* 11–15 (1981). Professor Wormser, who catalogued these elements in his 1927 treatise, held a view of the corporation that was typical for corporate law professors of his time: He believed that the corporation's juridical personhood was an "extraordinary privilege" and must therefore be used only for legitimate business purposes. *Id.* at 8–9. Implicit in the state action model is the notion that a corporation enjoys state-granted privileges in exchange for some benefit to the state, such as an economic benefit. *Id.*

⁶³ See Thompson, *supra* note 6 ("Resolution of a piercing question is almost always left to a judge's determination of corporate illegitimacy. Almost all state corporations statutes simply ignore the whole idea of piercing the corporate veil.").

mean that any court could apply the corporate law of the state of incorporation to an out-of-state corporation.⁶⁴

Yet, even before *Guaranty Trust Co. of New York* was decided, the state action theory of the corporation had begun to give way to an emerging law-and-economics ethos.⁶⁵ By this time, the enactment of general incorporation statutes had made the role of the state in corporate formation less important, and corporate managers had assumed the primary role in creating corporate enterprise.⁶⁶ Corporate law theorists re-imagined the firm as a set of private contractual relationships. This developed into the “nexus of contracts” theory, which views the firm as a collection of contractual relationships between “factors of production” who seek to reduce agency costs.⁶⁷ Today, the “nexus of contracts” theory dominates the corporate law academy.⁶⁸

In 1997, the Supreme Court recharacterized the internal affairs doctrine. In *Atherton v. F.D.I.C.*,⁶⁹ the court was confronted with an important post-*Erie* corporate law paradox: Not all corporations are created by state law. *Atherton* involved a federally chartered entity, and the case required the Supreme Court to identify the source of law for duties of care for its officers and directors.⁷⁰ Had the firm been chartered by a state, the duties of care would have been governed by state common law;⁷¹ by analogy, then, federal common-law duties of care might have applied to a firm chartered by the federal government. But

⁶⁴ See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (“So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one state.”).

⁶⁵ See, e.g., *Farmers’ Loan & Trust Co. v. Pierson*, 130 Misc. 110, 119, 222 N.Y.S. 532, 543–44 (Sup. Ct. N.Y. Cnty. 1927) (“a corporation is more nearly a method than a thing” and is “a name for a useful and usual collection of jurial relations”).

⁶⁶ By 1875, more than ninety percent of states had general incorporation statutes. See Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations*, 49 AM. U. L. REV. 81, 87 (1999).

⁶⁷ See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 312–13 (1976).

⁶⁸ Nexus of contracts theorists tend to support the enforcement of global corporate choice-of-law as efficient and wealth enhancing, and Larry E. Ribstein and Erin A. O’Hara have taken the contractarian theory to its logical extreme by advocating a “market” for law that includes the default liabilities of shareholders and corporate parents to creditors. See O’HARA & RIBSTEIN, *supra* note 52, at 10.

⁶⁹ *Atherton v. FDIC*, 519 U.S. 213, 215–16 (1997).

⁷⁰ *Id.*

⁷¹ *Id.* at 218.

the Supreme Court balked at creating federal common law duties of care for the officers and directors of federally-chartered entities. It cautioned against “substitut[ing] analogy or formal symmetry for the controlling legal requirement, namely, the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest.”⁷² The Court then substituted analogy for the rule of decision: In the case of a federally-chartered entity, the Court explained, the applicable law was the law of the state “closest analogically to the State of incorporation.”⁷³ The Court thus recharacterized the internal affairs doctrine as a rule requiring the application of the law of a single jurisdiction—but not necessarily the jurisdiction of incorporation.

This version of the doctrine makes little sense, because the internal affairs of a federally-chartered entity is governed by its federal charter in all material respects; only corporate law traditionally falling into common law spheres, such as the duties of officers and directors, would be decided by state law. The result was, counterintuitively, the opposite of the holding the Court purported to make: The internal affairs of federally-chartered entities are governed by federal law in some respects and state law in others, and thus are *not* governed by the law of a single jurisdiction. The *Atherton* rule has swiftly become incorporated into choice-of-law concerning the corporate form. In 2010, in a case of first impression, a federal district court in the Eastern District of New York held that a federally-chartered bank was governed by the veil-piercing laws of the state in which it was headquartered, citing to *Atherton*.⁷⁴

As courts redefined the internal affairs doctrine and strengthened their commitment to it, they left corporate law out of the choice-of-law revolution that took place in the United States in the second half of the twentieth century.⁷⁵ Scholars have written widely about a revolution in American conflicts law, in which rigid choice-of-law rules gave way to a flexible approach

⁷² *Id.* at 224.

⁷³ *Id.*

⁷⁴ See *Gunther v. Capital One, N.A.*, 703 F. Supp. 2d 264, 278 (E.D.N.Y. 2010).

⁷⁵ See Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161, 162 (1985); Onnig H. Dombalagian, *Choice of Law and Capital Markets Regulation*, 82 TUL. L. REV. 1903, 1904 (2008); P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 17–18.

that balances policy and governmental interests.⁷⁶ The reluctance of courts to apply a flexible, interest-balancing approach to the most basic matters of cross-border corporate status, authority, and liability has “exceptionalized” this area of law domestically at a time when international commerce has increasingly put the interests of chartering and nonchartering governments in conflict. The application of the internal affairs doctrine to questions about the juridical status of domestic firms is, if nothing else, a noteworthy way in which the interests of corporations and their participants have enjoyed special protection from competing state interests.

2. Other Bases for the Rule

Other grounds for utilizing the *lex incorporationis* are sometimes asserted. A very few states have gone beyond the common law internal affairs doctrine by codifying choice-of-law in traditional, liability veil piercing for out-of-state firms. In Massachusetts, for example, following a number of cases in which the courts used a flexible choice-of-law rule,⁷⁷ a state law went into effect in 2004 requiring that “the liability of [an out-of-state corporation’s] stockholders and directors shall be governed by the laws of the jurisdiction under which it is organized.”⁷⁸ Thus, Massachusetts’s current law codifies the internal affairs doctrine rule for veil piercing in questions of shareholder and director liability.⁷⁹ Texas has a similar statute.⁸⁰ The California

⁷⁶ See, e.g., Symeon C. Symeonides, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 9–35 (2006).

⁷⁷ See, e.g., John T. Callahan & Sons, Inc. v. Dykeman Elec. Co., 266 F. Supp. 2d 208, 230 (D. Mass. 2003) (“The place of incorporation is only one of several factors that Massachusetts courts consider in deciding what law to apply to piercing the corporate veil involving a contractual dispute.”); Evans v. Multicon Constr. Corp., 574 N.E.2d 395, 400 n.7 (Mass. App. Ct. 1991) (applying Massachusetts veil-piercing law to an Ohio corporation in a contract dispute); Cahaly v. Benistar Prop. Exch. Trust Co., No. 01-0116BLS2, 2003 WL 25316218, at *7 n.11 (Mass. Super. Sept. 23, 2003) (applying Massachusetts veil-piercing law to Delaware corporations in state law claims including breach of fiduciary duty, misrepresentation, conversion, and breach of contract, based on the dispute’s significant Massachusetts connection).

⁷⁸ MASS. GEN. LAWS ANN. ch. 156D, § 15.05(c) (West 2011).

⁷⁹ See *id.* § 15.05. The law does not address choice-of-law for non-traditional veil-piercing inquiries, such as reverse veil-piercing, or for veil-piercing outside the liability context, such as questions about the legal separation between the shareholder or parent and the corporation in contract enforcement, evidence law, or personal jurisdiction.

Corporations Code states that the liability of the director of an out-of-state corporation to creditors is governed by the laws of the "state or place" of incorporation.⁸¹ And a New Jersey law codifies the internal affairs rule for out-of-state limited liability companies.⁸² None of these statutes addresses veil piercing outside the classic question of shareholder or parent company liability for corporate debts.

The Restatement (Second) of Conflict of Laws addresses choice-of-law for veil piercing, but only in claims of shareholder or parent company liability for corporate debts. Section 307 states: "The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts."⁸³

Few courts rely on this Restatement (Second) section and, indeed, courts sometimes cite to other sections of the Restatement (Second) in analyzing veil-piercing choice-of-law, particularly the sections concerning choice-of-law in tort and

⁸⁰ See TEX. BUS. ORGS. CODE ANN. § 1.104 (West 2011) ("The law of the jurisdiction that governs an entity . . . applies to the liability of an owner, a member, or a managerial official of the entity . . . for an obligation, including a debt or other liability, of the entity . . .").

⁸¹ See CAL. CORP. CODE § 2116 (West 1990) ("The directors of a foreign corporation transacting intrastate business are liable to the corporation, its shareholders, creditors, receiver, liquidator or trustee in bankruptcy for [various wrongs] according to any applicable laws of the state or place of incorporation or organization, whether committed or done in this state or elsewhere.").

⁸² See N.J. STAT. ANN. § 42:2B-52 (West 2004) ("The laws of the state . . . under which a foreign limited liability company is organized govern . . . the liability of its members and managers . . .").

⁸³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (1971). At least one scholar has argued that a "comprehensive textual analysis" of the Restatement text, comment, and reporter's note reveals that "it was not the intent of the drafters of section 307 to mandate the application of the law of the state of incorporation to all piercing claims," and some courts seem to agree. Crespi, *supra* note 46, at 111. Professor Crespi argues that a "general choice-of-law approach that considers and balances the interests of all jurisdictions that are involved" is superior to "summary application of the law of the state of incorporation under the internal affairs doctrine" because it is "more equitable to both corporate tort judgment and contract creditors" and "removes the ability of corporations and their shareholders to limit the shareholders' exposure to piercing claims merely by selectively incorporating or reincorporating in jurisdictions such as Delaware or New York that have a relatively restrictive piercing jurisprudence, and thereby externalizing the consequences of their inequitable conduct . . ." *Id.* at 125.

contract cases.⁸⁴ The Restatement does not address veil-piercing choice-of-law outside the liability context.

B. *Some Exceptions to the “Well-Settled” Rule*

Only rarely do courts decline to apply the veil-piercing law of the chartering state to American firms. For example, in one unusual case, a New York court refused to apply Arkansas veil-piercing law to two corporations that had been chartered by Arkansas but had their corporate certificates revoked; since the entities were not “presently” incorporated in Arkansas, the court held, Arkansas law did not govern.⁸⁵ In jurisdictional veil piercing, courts may apply a specific state “alter ego” standard to corporations chartered by other American states.⁸⁶ In tort and contract cases, some courts apply a version of the “significant relationship” test.⁸⁷ And in some contract cases, if a contractual choice-of-law provision exists, the court might apply that choice-of-law provision to the veil-piercing claim. In the last five years, the New Jersey courts have held that *both* the law of the jurisdiction of incorporation and a flexible “governmental interest analysis,” are valid methods for determining choice of law in veil-piercing claims.⁸⁸

In most situations, and with most types of veil piercing, courts apply the law of the state of incorporation to domestic entities. They do so to adhere to the internal affairs doctrine, which most courts and commentators assume includes matters relating to a corporation’s juridical status. In only a few limited circumstances—some jurisdictional veil-piercing cases,⁸⁹ a

⁸⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (noting that “place of incorporation” is only one of several factors to be considered in the “most significant relationship” test for a tort case); *id.* § 188 (1971) (same for a contract case).

⁸⁵ *Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 A.D.2d 341, 342, 645 N.Y.S.2d 786, 787–88 (1st Dep’t 1996).

⁸⁶ See *infra* note 89.

⁸⁷ *Milliken & Co. v. Haima Group Corp.*, No. 08-22891-MC, 2010 WL 1286462, at *3 (S.D. Fla. Mar. 1, 2010); *John T. Callahan & Sons, Inc. v. Dykeman Elec. Co.*, 266 F. Supp. 2d 208, 230–31 (D. Mass. 2003).

⁸⁸ See *Las Vegas Sands Corp. v. Ace Gaming, L.L.C.*, 713 F. Supp. 2d 427, 443 (D.N.J. 2010); *D.R. Horton Inc.-N.J. v. Dynastar Dev., L.L.C.*, No. MER-L-1808-00, 2005 WL 1939778, at *20–21 (N.J. Super. Ct. Law. Div. Aug. 10, 2005).

⁸⁹ Jurisdictional veil-piercing cases always involve at least one out-of-state party, often an out-of-state corporation, and they are an important exception to the rule: Most states apply their own “alter ego” standards to out-of-state firms, domestic or foreign, in connection with their long-arm statutes. *But see, e.g., Inter-*

minority of contract disputes involving choice-of-law provisions,⁹⁰ and a handful of torts cases⁹¹—will courts employ a different

Med, Inc. v. ASI Med., Inc., No. 09-CV-383, 2010 WL 3063014, at *7 (E.D. Wis. Aug. 2, 2010) (applying the law of the state of incorporation for veil-piercing). Moreover, a state's jurisdictional "alter ego" standard often varies from the standards it uses for other types of veil piercing. *See, e.g.,* Dorfman v. Marriott Int'l Hotels, Inc., No. 99 CIV 10496(CSH), 2002 WL 14363, at *18 (S.D.N.Y. Jan. 3, 2002) (using different veil-piercing standards for liability veil-piercing claim and personal jurisdiction veil-piercing claim). In 2010, the Court of Appeals for the Fifth Circuit questioned whether choice-of-law for jurisdictional veil piercing is fundamentally different from choice-of-law for liability veil piercing and concluded that "this complicated choice of law question is an open issue." Jackson v. Tanfoglio Giuseppe, S.R.L., 615 F.3d 579, 587 (5th Cir. 2010).

It should be clear, however, that jurisdictional veil piercing *is* different from liability veil piercing, and thus the choice-of-law issues are different. Liability veil piercing is an equitable power that courts assert where limited liability might otherwise leave an injured party without a remedy. Limited liability is not a necessary feature of the corporation; even today, state laws provide for shareholder liability in many circumstances. Ann K. Wooster, Annotation, *Construction and Application of Limited Liability Company Acts—Issues Relating to Formation of Limited Liability Company and Addition or Disassociation of Members Thereto*, 43 A.L.R.6th 611 (2009). Where a government has provided limited liability for a business entity, the courts of that government generally assert the power to recognize or reject that limited liability in the interest of justice. *See, e.g.,* Williamson v. Recovery Ltd. P'ship, 542 F.3d 43, 53 (2d Cir. 2008) (noting that the general principle for piercing the corporate veil is to impose liability when doing so would achieve an equitable result); HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927, 935–36 (8th Cir. 2007). And by applying *lex incorporationis*, these courts encourage other jurisdictions to protect shareholders of in-state entities to the same extent that in-state courts would.

⁹⁰ A number of courts become sidetracked by the question of how contractual choice-of-law provisions affect the veil-piercing analysis, particularly when both parties agree that it should apply. Most courts hold that veil piercing is collateral to a contract and thus, because it was not part of the parties' negotiations and expectations, a choice-of-law provision does not bind the parties on a veil-piercing issue that arises in a contract dispute. *See, e.g.,* Davaco, Inc. v. AZ3, Inc., No. 3:07-cv-803, 2008 WL 2243382, at *1 (N.D. Tex. May 30, 2008) (applying the veil-piercing law of the "state of incorporation," Quebec, although the contract at issue had a choice-of-law provision selecting Texas law, because "a choice of law provision in a contract does not alter the rule that the law of the state of incorporation governs the alter ego analysis"); Schlumberger Logelco Inc. v. Morgan Equip. Co., No. C-94-1776 MHP, 1996 WL 251951, at *3 (N.D. Cal. May 3, 1996) ("the alter ego theory of liability does not 'arise from' or 'relate to' the contracts"); Dassault Falcon Jet Corp. v. Oberflex, Inc., 909 F. Supp. 345, 348 (M.D.N.C. 1995) ("the issue of piercing the corporate veil is collateral to and not part of the parties' negotiations or expectations with respect to the contract"); United Trade Assocs. Ltd. v. Dickens & Matson (USA) Ltd., 848 F. Supp. 751, 759 (E.D. Mich. 1994) ("the issue of piercing the corporate veil is collateral to the contract, and thus this Court is not bound by the choice of law provision"). *But see* Duffy v. Vision Hardware Group, Inc., No. 01-1281, 2001 WL 1301407, at *3 (4th Cir. Oct. 26, 2001) (applying New York veil piercing law because both parties agreed that it applied pursuant to a choice-of-law provision in a

choice-of-law rule.⁹² There is thus no mystery that veil-piercing choice-of-law has created little controversy and attracted little attention from scholars of either corporate law or conflicts of law.

contract). A minority of courts have simply applied the veil-piercing law of the jurisdiction selected in the choice-of-law provision. *See, e.g.,* IGEN Int'l, Inc. v. Roche Diagnostics GMBH, 335 F.3d 303, 308 (4th Cir. 2003) (suggesting that Delaware veil-piercing law should be applied to a Swiss company because a contract giving rise to the claim was governed by Delaware law but holding that it need not decide the veil-piercing question because the parent corporation did not appeal it). Clearly that approach is wrong since the choice-of-law provision should have prompted the court to apply that state's choice-of-law rule, which in most cases would have resulted in the application of the law of the state of incorporation. *See* Sofi Classic S.A. de C.V. v. Hurowitz, 444 F. Supp. 2d 231, 240 (S.D.N.Y. 2006) (interpreting contractual choice-of-law provision selecting New York law to require the application of New York choice-of-law rules, leading the court to apply the law of the states of incorporation—Massachusetts and South Carolina—to veil-piercing claims).

⁹¹ Infrequently, a court will apply the veil-piercing law of the jurisdiction where a tort injury occurred if the application of the chartering government's law would foreclose liability. In *Yoder v. Honeywell*, 104 F.3d 1215, 1218 (10th Cir. 1997), for example, a Colorado resident brought a tort claim in federal district court in New York against a Delaware corporation for injuries sustained from a computer keyboard in Colorado. The case was transferred to a federal court in Colorado, and thus, on appeal, the Tenth Circuit of the United States Court of Appeals acknowledged that the law of the state in which the transferor court sat—New York—provided the relevant choice-of-law rule in a veil-piercing claim against the parent company of the keyboard's manufacturer. *Id.* at 1219.

New York law required the court to apply the law of the state of incorporation. *Id.* at 1219–20. The Tenth Circuit of the United States Court of Appeals nonetheless decided that it would apply the veil-piercing law of the forum state, Colorado:

If we were to apply [the New York rule] the law of Delaware, the state of [the defendant's] incorporation, would apply to the corporate veil issue. Because the substantive tort law of Colorado applies here, however, we question whether New York would apply Delaware law to this related issue. In any event, our review of Delaware law indicates it is similar to Colorado, although Delaware may require somewhat more to pierce a corporate veil. Thus, we analyze the corporate veil issue under Colorado law.

Id. at 1220 (citations omitted).

The Court's explanation suggests that it was wary of applying Delaware law because the Delaware standard was more difficult to satisfy than the Colorado standard. *Yoder* and similar cases indicate that courts are reluctant to apply the veil-piercing laws of other jurisdictions if this will insulate out-of-state entities from liability for harming in-state residents. This rationale makes sense, of course, because in-state residents have not agreed to the limited liability schemes of other states, and a state has an interest in ensuring that its residents will not be left bearing the costs of out-of-state liability schemes. Nonetheless, even in tort cases, only a small minority of courts depart from the general rule.

⁹² *See supra* notes 89–91.

III. CHOICE OF ENTITY LAW FOR FOREIGN ENTITIES

The preceding Part described choice-of-law for questions about the juridical status of domestic corporations. It showed that the predominant choice-of-law rule is the application of the *lex incorporationis*, and that many courts and commentators consider veil piercing to fall within the scope of the internal affairs doctrine, a choice-of-law principle that applies uniquely to a corporation's internal affairs. This Part shows that when the juridical status of a foreign corporation is in question, state and

federal courts routinely abandon this approach and reject the law of the chartering jurisdiction. Instead, they generally apply the veil-piercing law of an American state to the foreign firm.

This Part first describes what types of business entities are chartered outside the United States, and thus fall within the scope of the term "foreign corporation." It highlights treaty-chartered corporations, which are created by international agreements between sovereign nations, and which exist above or outside the legal frameworks of their nation creators. The legal status and activities of treaty-chartered entities pose unique choice-of-entity-law challenges and have received little scrutiny from the corporate law academy.

Next, this Part examines how American courts approach veil-piercing choice-of-law for foreign corporations. It contends that in such cases, most American courts balance governmental interests and conclude by applying the law of an American state. This Part catalogs a significant body of case law in which American courts apply American veil-piercing laws to foreign-chartered firms, notes a small number of exceptions, and underscores its findings with several important empirical studies of veil piercing in the United States. In doing so, this Part demonstrates that a double standard exists in choice-of-law for domestic and foreign firms, and that the consistency and predictability that domestic corporations enjoy in choice-of-law questions concerning veil piercing are not enjoyed by corporations chartered abroad.

A. *Foreign Commercial Entities*

Virtually all foreign nations charter business organizations and treat them as legal persons for at least some purposes. This is true of democracies in first-world economies, single-party

socialist states, authoritarian regimes, and even military dictatorships.⁹³ Many entities created by these governments operate in streams of commerce that intersect with American interests. It is not uncommon to find entities that incorporate abroad but operate principally or exclusively in the United States, are wholly owned or controlled by American interests, and even function hand-in-glove with the United States military in theaters of war.⁹⁴ Most nations offer limited liability to some, if not all, of their juridical entities.⁹⁵

There is a strong political facet to the legal recognition of corporations operating transnationally, and this is reflected in the work of the judicial branch. In theory, a corporation chartered under the laws of an unrecognized government does not have standing in federal court in a diversity case, on the basis that such an entity is not a “citizen[] or subject[] of a foreign state” for jurisdictional purposes.⁹⁶ In 2002, the Supreme Court identified this issue as a problem but did not resolve it.⁹⁷

⁹³ The United States, of course, is an example of a first-world democracy that charters numerous corporations each year. China is a single-party socialist state that incorporates business entities under its 2006 Company Act. *See* Zhonghua Renmin Gongheguo Gongsì Fa (中华人民共和国公司法) [Company Law of the People’s Republic of China] (promulgated by the Standing Comm. of the 10th Nat’l People’s Cong., Oct. 27, 2005, effective Jan. 1, 2006) 2006 China Law LEXIS 7956, available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=50878. Saudi Arabia is an example of an authoritarian regime that charters business entities under its companies law. *See* BOARD OF CAPITAL MARKET AUTHORITY, CORPORATE GOVERNANCE REGULATIONS IN THE KINGDOM OF SAUDI ARABIA (2006), available at <http://www.cma.org.sa/En/Documents/CORPORATE%20GOVERNANCE%20REGULATIONS-2011.pdf>. Fiji is an example of a military dictatorship that charters business entities under its Companies Act. *See* Companies Act of the Republic of Fiji, available at http://www.paclii.org/fj/legis/consol_act_OK/ca107/.

⁹⁴ For an example of the last of these, see *McManaway v. KBR, Inc.*, 695 F. Supp. 2d 883, 890–91 (S.D. Ind. 2010) (discussing subsidiaries of Kellogg, Brown & Root Services, Inc. that were organized under the laws of the Cayman Islands and headquartered in Dubai and were alleged to have tortiously injured forty-seven members of the Indiana National Guard at a water-treatment facility in southern Iraq during the war).

⁹⁵ For a concise history of the spread of limited liability across the Western World, see Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 577–605 (1986).

⁹⁶ 28 U.S.C. § 1332 (2006).

⁹⁷ *See* *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 92 (2002) (noting that it “need not decide” whether “a foreign state must be diplomatically recognized by our own Government to qualify as such under” 28 U.S.C. § 1332(a)(2), which provides district courts with diversity jurisdiction over citizens or subjects of a foreign state).

American courts tend to assert jurisdiction over entities regardless of the political sovereignty of the governments that create them. For example, the United States does not recognize the Republic of China (Taiwan) as a sovereign nation, but courts regularly treat Taiwanese corporations as proper subjects for personal jurisdiction under Article III.⁹⁸ However, courts have occasionally refused to grant standing to some corporations that are chartered by foreign nations without diplomatic recognition by the State Department.⁹⁹ Foreign governments are savvy to the political dimension of corporate law. Several foreign governments that are not recognized by the State Department have incorporated corporations in the United States, through which they have conducted government business and brought lawsuits in American courts that they could not have done as sovereigns or, presumably, as corporations organized under their own laws.¹⁰⁰

Throughout modern history, courts have taken the lead role in integrating foreign business entities into our legal system. For example, Article III grants federal courts original jurisdiction over cases involving citizens or subjects of foreign states.¹⁰¹ Congress has provided alienage diversity jurisdiction to disputes

⁹⁸ See, e.g., *Everflow Tech. Corp. v. Millenium Elecs., Inc.*, No. C 07-05795 JF (HRL), 2008 WL 4793410 (N.D. Cal. Nov. 3, 2008) (stating that Plaintiff Everflow Technology Corp. is incorporated under the laws of the Republic of China (Taiwan)).

⁹⁹ See, e.g., *Fed. Republic of Ger. v. Elicofon*, 358 F. Supp. 747, 757 (E.D.N.Y. 1970) (holding that the Weimar Art Collection was an instrumentality of the German Democratic Republic, a government that the United States did not recognize, and thus did not have standing to sue in American courts). In an 1814 case, Justice Story suggested that a corporation established under the laws of a foreign government could become hostile in character if the country that incorporated it became hostile. See *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 764 (C.C.N.H. 1814) (“[W]here a corporation is established in a foreign country, by a foreign government, it is undoubtedly an alien corporation, be its members who they may; and if the country become hostile, it may, for some purposes at least, be clothed with the same character.”).

¹⁰⁰ See, e.g., *Republic of Transkei v. I.N.S.*, 923 F.2d 175, 176 (D.C. Cir. 1991) (detailing how the Republic of Transkei created a “small non-profit corporation” known as its “Washington Bureau” to “disseminate[] trade, tourism, and political information and [to encourage] investment in and trade with Transkei”); *Achievers Invs., Inc. v. Karalekas*, 675 A.2d 946, 947 (D.C. Ct. App. 1996) (detailing how the Republic of Bophuthatswana incorporated Achievers Investments, Inc. in the District of Columbia, installed government officials as directors and officers, and assigned a contract claim to the corporation so that it could prosecute the claim in a U.S. court).

¹⁰¹ U.S. CONST. art. III, § 2, cl.1.

between citizens of American states and “citizens or subjects of a foreign state” and has specified that “a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.”¹⁰² The word “State” in this provision referred to states of the United States of America; both the statute and its legislative history are silent on the subject of foreign corporations.¹⁰³ In the face of this silence, the federal courts have construed the Act as applying to foreign corporations but have split, for example, on whether a foreign corporation with its principal place of business within the United States is, for purposes of diversity jurisdiction, a dual citizen of both the nation in which it was incorporated and the state of its principal place of business.¹⁰⁴ Such threshold issues about foreign corporate identity, citizenship, and standing under the Judiciary Act historically have been resolved by judge-made rules.¹⁰⁵

B. Treaty-Chartered Entities

One relatively new form of foreign corporation is the treaty-chartered corporation. These are entities created by joint ventures of multiple nations, in which a treaty constitutes the entity’s articles of incorporation.¹⁰⁶ For example, United Arab Shipping Company, an international shipping corporation, was created by a treaty among Bahrain, Saudi Arabia, Kuwait, Qatar, United Arab Emirates, and Iraq in 1976, and has incorporated a subsidiary, United Arab Agencies, Inc., in the

¹⁰² 28 U.S.C. § 1332(a)(3), (c)(1) (2006).

¹⁰³ 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3628 (3d ed. 2011).

¹⁰⁴ Compare *Trans World Hosp. Supplies Ltd. v. Hosp. Corp. of Am.*, 542 F. Supp. 869, 871 (M.D. Tenn. 1982) (treating a Cayman Islands corporation with its principal place of business in Tennessee as a citizen of Tennessee so as not to defeat diversity jurisdiction), with *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990–91 (9th Cir. 1994) (treating a Bermudan corporation with its principal place of business in Oregon as a citizen of both Bermuda and Oregon so as to defeat diversity jurisdiction).

¹⁰⁵ See James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1445 (1964) (discussing the “judicially created fiction” of corporate citizenship).

¹⁰⁶ See generally Note, *Corporations Formed Pursuant to Treaty*, 76 HARV. L. REV. 1431 (1963) (describing corporations formed using treaties in place of articles of incorporation).

United States.¹⁰⁷ The Emirate of Abu Dhabi, Bahrain, Qatar, and Oman created Gulf Air, Inc., an airline and “joint stock company with limited liability,” by treaty; the airline has claimed to be governed by the laws of all four treaty partners.¹⁰⁸ Both of these entities have appeared as litigants in United States courts.¹⁰⁹

Treaty-chartered corporations may have both government and private investors, but they are not “creatures” of any particular nation’s laws and are essentially stateless. They raise issues of sovereignty and international law that have received little attention from legal scholars. For example, upon what theory do the federal courts have jurisdiction over disputes involving stateless commercial entities? Federal courts have had trouble integrating such entities into the legislative scheme of the Foreign Sovereign Immunities Act.¹¹⁰ The existence of international corporations that are, in many respects, above the laws of their nation creators suggests that when such entities share streams of commerce with American interests, American governmental institutions may have a particularly assertive role to play in supervising the interface between the stateless corporation, its participants, and American law.

C. *The Double Standard*

In veil-piercing analysis of any sort, American courts infrequently apply the law of the foreign chartering government

¹⁰⁷ See *United Arab Shipping Co. v. Eagle Sys., Inc.*, No. CV408-067, 2008 WL 4087121, at *1 (S.D. Ga. Sept. 2, 2008); *Mangattu v. M/V IBN Hayyan*, 35 F.3d 205, 208 (5th Cir. 1994); *Company Profile*, UASC, <http://www.uasc.net/company-profile> (last visited Jan. 20, 2011) (stating that UASC operates out of Cranford, New Jersey, among other locations).

¹⁰⁸ See *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1402, 1406 (E.D. Va. 1988).

¹⁰⁹ See *id.*; *United Arab Shipping Co.*, 2008 WL 4087121, at *1.

¹¹⁰ Commercial entities created by charter or intergovernmental agreement do not fit squarely within the sovereign immunity framework created by the Foreign Sovereign Immunities Act of 1976, and federal courts have not taken a uniform approach to the so-called “pooled” interests of multiple foreign governments. Thus, for example, federal courts have held that the United Arab Shipping Co. was an instrumentality of a foreign state—or, rather, six foreign states—under the FSIA, but that *Industries Chimiques du Senegal*, a chemical company organized under the laws of Senegal by intergovernmental agreement among Senegal, India, Ivory Coast, Nigeria, and Cameroon, and sixty-five percent owned by those nations, was not an instrumentality of a foreign state under the FSIA. See *id.* at *2; see also *Sea Transp. Contractors, Ltd. v. Indus. Chimiques du Senegal*, 411 F. Supp. 2d 386, 392 (S.D.N.Y. 2006).

to foreign entities. Instead, courts generally apply the entity law of some American state to such firms after engaging in a choice-of-law analysis that balances governmental interests.¹¹¹ This section begins by establishing this trend and then notes a small number of exceptions, the majority of which have been decided by the federal courts in the Southern District of New York.

Any review of choice-of-law decisions in veil-piercing cases reveals that foreign firms are generally held to domestic legal standards. This is true for simple cases of shareholder or parent company liability for corporate debts in contract and tort cases, as well as for less common types of veil-piercing cases. For example:

- In 2010, a district court in Florida applied Florida veil-piercing law to a Chinese corporation in a garnishment proceeding after concluding that Florida had the “most significant relationship” with the issue.¹¹²
- In 2008, the Delaware Chancery Court applied Delaware alter-ego law to a Dutch limited liability company in analyzing a jurisdictional veil-piercing claim.¹¹³ The court noted that Dutch law should have been applied to the Dutch entity, but proceeded to apply Delaware law because neither of the parties had briefed Dutch law.¹¹⁴
- In 2008, in a tort case, a district court in the Western District of New York applied Nebraska veil-piercing law to corporations chartered in Massachusetts, Hong Kong, and France.¹¹⁵ The court gave no explanation for its choice of law and merely noted that Nebraska law governed all aspects of the case.¹¹⁶
- In 2005, a district court in Delaware applied Delaware veil-piercing law to the wholly owned Spanish subsidiary of a Delaware corporation on an

¹¹¹ See *infra* notes 112–18.

¹¹² See *Milliken & Co. v. Haima Group Corp.*, No. 08-22891-MC, 2010 WL 1286462, at *3 (S.D. Fla. Mar. 1, 2010).

¹¹³ See *EBG Holdings L.L.C. v. Vredezicht’s Gravenhage 109 B.V.*, No. 3184-VCP, 2008 WL 4057745, at *11 (Del. Ch. Sept. 2, 2008) (applying Delaware veil-piercing test to a Dutch limited liability company).

¹¹⁴ *Id.*

¹¹⁵ See *Playwell Toy, Inc. v. Bureau Veritas Consumer Prods. Servs., Inc.*, No. 03-CV-0704C(SC), 2008 WL 4372654, at *2 n.1 (W.D.N.Y. Sept. 19, 2008).

¹¹⁶ *Id.*

“agency” veil-piercing theory in a case alleging fraud claims under Delaware law.¹¹⁷

- In 2004, the Ninth Circuit for the United States Court of Appeals applied California “alter-ego” law to hold that due process was violated when the sole shareholder of a Canadian corporation was added as a judgment debtor to a default judgment against the corporation.¹¹⁸

Numerous similar cases, most of which were decided after 1990, apply domestic veil-piercing laws to foreign firms.¹¹⁹ By

¹¹⁷ See *Ethypharm S.A. Fr. v. Bentley Pharm., Inc.*, 388 F. Supp. 2d 426, 432 (D. Del. 2005).

¹¹⁸ *Katzir's Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1150 (9th Cir. 2004).

¹¹⁹ See, e.g., *Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1017–19 (10th Cir. 1990) (applying Oklahoma veil-piercing test to corporations chartered in Venezuela and the Cayman Islands); *Culbreth v. Aмоса (Pty) Ltd.*, 898 F.2d 13, 14–15 (3d Cir. 1990) (applying Pennsylvania veil-piercing law to claims against a United Kingdom corporation that owned a majority of shares in a United Kingdom corporation that wholly owned an Illinois subsidiary); *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 152 (3d Cir. 1988) (applying New Jersey veil-piercing law to a corporation organized under United Kingdom law in a case removed to federal district court in Pennsylvania, alleging personal injury claims under New Jersey law); *Poyner v. Lear Siegler, Inc.*, 542 F.2d 955, 958 (6th Cir. 1976) (applying the veil-piercing law of Kentucky to a German GmbH in a tort case); *TSS Sportswear, Ltd. v. Swank Shop (Guam) Inc.*, 380 F.2d 512, 523 (9th Cir. 1967) (applying Guam veil-piercing law to corporation chartered in Hong Kong); *Miramax Film Corp. v. Abraham*, No. 01 CV 5202(GBD), 2003 WL 22832384, at *6–7 (S.D.N.Y. Nov. 25, 2003) (applying New York jurisdictional alter ego test to corporations chartered in Denmark and the Island of Guernsey); *Accordia Ne., Inc. v. Thesaurus Int'l Asset Fund*, 205 F. Supp. 2d 176, 181–82 (S.D.N.Y. 2002) (applying New York veil-piercing test to a corporation chartered by the Netherlands Antilles); *Dorfman v. Marriott Int'l Hotels, Inc.*, No. 99 CIV 10496(CSH), 2002 WL 14363, at *18–19 (S.D.N.Y. Jan. 3, 2002) (applying generalized American veil-piercing test to a corporation chartered in Hungary in a tort case); *RNB Garments Phil., Inc. v. Lau*, No. 98 CIV 4561(DLC), 1999 WL 223153, at *3–4 (S.D.N.Y. Apr. 16, 1999) (applying New York veil-piercing law to a corporation chartered in Hong Kong); *Curiale v. Tiber Holding Corp.*, No. CIV. A. 95-5284, 1997 WL 713950, at *3 (E.D. Pa. Nov. 10, 1997) (applying New York veil-piercing test to a corporation chartered in Bermuda); *M & R Marking Sys., Inc. v. Top Stamp, Inc.*, No. CIV. 96-828(WGB), 1996 WL 805485, at *7 (D.N.J. Nov. 20, 1996) (applying generalized American veil-piercing test to four corporations chartered in Hong Kong); *Costamar Shipping Co. v. Kim-Sail, Ltd.*, No. 95 CIV. 3349 (KTD), 1995 WL 736907, at *3–4 (S.D.N.Y. Dec. 12, 1995) (applying generalized American veil-piercing test to corporations chartered in Greece and the Cayman Islands); *Lowndes v. Falcon*, No. 90-4829, 1992 WL 73198, at *5–7 (E.D. La. Mar. 30, 1992) (applying Texas veil-piercing test to a corporation chartered in Belgium); *Foster v. Berwind Corp.*, No. 90-0857, 1991 WL 21666, at *2 (E.D. Pa. Feb. 13, 1991) (applying Pennsylvania law to a corporation chartered in Bermuda); *Mothersill D.I.S.C., Corp. v. Petroleos Mexicanos, S.A.*, 112 F.R.D. 87, 89–90 (E.D. Tex. 1986) (applying generalized American veil-piercing test to a

comparison, far fewer cases applied the foreign chartering jurisdiction's veil-piercing laws, all of them having been decided since the mid-1990s.¹²⁰

The existence of a double standard is corroborated by the empirical work of several scholars of veil piercing. Robert B. Thompson published an empirical study in 1991 that analyzed corporate law veil-piercing cases for all years prior to 1986 and documented which jurisdiction's law was being applied; he identified *no* cases that applied the law of a jurisdiction outside the United States.¹²¹ In 2009, John H. Matheson published a study of 360 veil-piercing cases involving parent-subsidary corporate relationships from 1990 to 2008 and again identified no cases that applied the law of a jurisdiction outside the United

corporation chartered in the Netherlands Antilles), *rev'd on other grounds*, 831 F.2d 59 (5th Cir. 1987); *Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 732–35 (S.D.N.Y. 1986) (applying indeterminate American veil-piercing test to a corporation chartered in the United Kingdom); *Pauley Petroleum Inc. v. Cont'l Oil Co.*, 239 A.2d 629, 632 (Del. 1968) (affirming the application by the Delaware Chancery Court of Delaware veil-piercing law to a Mexican corporation); *Eckel Indus., Inc. v. Verson Europa S.A.*, No. 966340, 1999 WL 818604, at *3–4 (Mass. Super. Ct. Aug. 30, 1999) (applying Massachusetts veil-piercing law in an analysis of whether to disregard the corporate form of two affiliated subsidiaries, one incorporated in Belgium and the other in the United Kingdom); *Serio v. Ardra Ins. Co.*, 304 A.D.2d 362, 362, 761 N.Y.S.2d 1, 1 (1st Dep't 2003) (applying New York veil-piercing law to a closely-held reinsurance company chartered in Bermuda); *Stockacre Ltd. v. PepsiCo Inc.*, 265 A.D.2d 398, 399, 696 N.Y.S.2d 500 (2d Dep't 1999) (applying New York veil-piercing law to a corporation chartered in Denmark).

¹²⁰ See, e.g., *Davaco, Inc. v. AZ3, Inc.*, No. 3:07-cv-803, 2008 WL 2243382, at *1 (N.D. Tex. May 30, 2008) (applying the veil-piercing law of the “state of incorporation,” Quebec, to a corporation chartered there); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 683–84 (S.D.N.Y. 2006) (applying the veil-piercing laws of the jurisdictions of incorporation to corporations chartered in the United Kingdom, the Netherlands, and Mauritius); *Sunnyside Dev. Co. v. Ophys, Ltd.*, No. C 05-0553 MHP, 2005 WL 1876106, at *3 (N.D. Cal. Aug. 8, 2005) (applying British veil-piercing law to a British corporation); *Kingdom 5-KR-41, Ltd. v. Star Cruises PLC*, No. 01 Civ. 2946(AGS), 2003 WL 262507, at *4 n.2 (S.D.N.Y. Feb. 7, 2003); *Mega Tech Int'l Corp. v. Al-Saghyir Establishment*, No. 96 CIV 8711 LBS, 1999 WL 269896, at *8 (S.D.N.Y. May 3, 1999) (applying Saudi Arabian veil-piercing law to two Saudi Arabian companies on a jurisdictional veil-piercing theory); *Schlumberger Logelco Inc. v. Morgan Equip. Co.*, No. C-94-1776 MHP, 1996 WL 251951, at *3 (N.D. Cal. May 3, 1996) (applying Austrian law to an Austrian corporation); cf. *Kempe v. Ocean Drilling & Exploration Co.*, 683 F. Supp. 1064, 1072 (E.D. La. 1988) (asserting in dicta that a Louisiana court would apply Bermuda veil-piercing law to a Bermuda corporation).

¹²¹ See Thompson, *supra* note 6, at 1051 tbl 6. Unfortunately, Professor Thompson did not reveal the extent to which courts were applying domestic state laws to entities chartered abroad.

States.¹²² Most recently, Christina Boyd and David Hoffman surveyed veil-piercing complaints and counterclaims filed in district courts from 2000 to 2005 and categorized targeted corporations by jurisdiction of incorporation.¹²³ They found that foreign corporations accounted for roughly five percent of all corporations targeted for veil piercing; only the states of Illinois, Florida, Delaware, and New York chartered more corporations that were targeted for veil piercing in American courts than did foreign governments.¹²⁴ Taken together, these empirical studies suggest that a meaningful number of foreign corporations are being sued on veil-piercing claims, and that courts are applying domestic veil-piercing laws to them.

Most of the handful of cases in which American courts have applied the foreign chartering jurisdiction's entity laws to a foreign entity are found in the federal courts in the Southern District of New York.¹²⁵ By no means, however, is this the clear cut choice-of-law rule in New York; the trend, even in the state's federal courts, is to apply domestic law to foreign firms.¹²⁶

¹²² See John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1119 tbl. 5 (2009). Matheson probably did not find cases applying foreign entity laws because he focused on corporate groups with American subsidiaries. When piercing the corporate veil to reach the parent of an American subsidiary, the choice of law turns on the jurisdiction of incorporation of the American entity.

¹²³ Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 N.W. U. L. REV. 853, 856, 882 (2010).

¹²⁴ *Id.* at 885 fig. 6. Unfortunately, Professors Boyd and Hoffman do not disclose which jurisdictions' veil-piercing laws were applied to these foreign-chartered entities.

¹²⁵ See, e.g., *Davaco, Inc.*, 2008 WL 2243382, at *1 (applying the veil-piercing law of the "state of incorporation," Quebec, to a corporation chartered there); *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 683, 686–87, 689 (applying the veil-piercing laws of the jurisdictions of incorporation to corporations chartered in the United Kingdom, the Netherlands, and Mauritius); *Sunnyside Dev. Co.*, 2005 WL 1876106, at *3 (applying British veil-piercing law to a British corporation); *Kingdom 5-KR-41, Ltd.*, 2003 WL 262507, at *4 n.2; *Mega Tech Int'l Corp.*, 1999 WL 269896, at *8 (applying Saudi Arabian veil-piercing law to two Saudi Arabian companies on a jurisdictional veil-piercing theory).

¹²⁶ See, e.g., *Miramax Film Corp. v. Abraham*, No. 01 CV 5202(GBD), 2003 WL 22832384, at *6 (S.D.N.Y. Nov. 25, 2003) (applying New York jurisdictional alter ego test to corporations chartered in Denmark and the Island of Guernsey because the parties' briefs "rely exclusively on New York law"); *Accordia Ne., Inc. v. Thesaurus Int'l Asset Fund*, 205 F. Supp. 2d 176, 181–83 (S.D.N.Y. 2002) (applying New York veil-piercing test to a corporation chartered by the Netherlands Antilles); *RNB Garments Phil., Inc. v. Lau*, No. 98 CIV 4561(DLC), 1999 WL 223153, at *3 (S.D.N.Y. Apr. 16, 1999) (applying New York veil-piercing law to a corporation chartered in Hong Kong); *Costamar Shipping Co. v. Kim-Sail, Ltd.*, No. 95 CIV. 3349

Outside New York, very few courts have applied foreign law to foreign firms.¹²⁷ For example, although a 2006 Massachusetts law requires the application of the law of the foreign chartering government to veil-piercing questions involving shareholder liability, the law has never been cited in a case involving a foreign firm.¹²⁸

D. *Why Do American Courts Employ a Double Standard?*

Why might American courts reject the veil-piercing choice-of-law rule that they apply to domestic corporations when a foreign corporation is involved? A main reason is that the principles underlying the domestic rule are unsound. Questions about the juridical status of business entities do not fit squarely within the internal affairs doctrine. It may be easy to overlook this fine point within our domestic system of horizontal federalism—particularly since many American courts and commentators wrongly assume that veil-piercing laws are the same from state to state—but it is difficult to ignore when a court is asked to apply the entity law of a foreign government that is meaningfully different from its American counterpart.

Other factors may also be responsible for the choice-of-law double standard, including the practical difficulty of ascertaining the veil-piercing law of a foreign jurisdiction, and the fact that some foreign jurisdictions lack equitable veil-piercing laws that are similar to those found in the United States. Both factors make it easier to apply American laws to foreign entities. It is also common for both parties to agree that a domestic law should apply, which can circumvent the conflict of laws analysis. Finally, some veil-piercing inquiries involve tiers of corporate

(KTD), 1995 WL 736907, at *3–4 (S.D.N.Y. Dec. 12, 1995) (applying indeterminate American veil-piercing test to corporations chartered in Greece and the Cayman Islands); *Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 732–33 (S.D.N.Y. 1986) (applying indeterminate American veil-piercing test to a corporation chartered in the United Kingdom); *Serio v. Ardra Ins. Co.*, 304 A.D.2d 362, 362, 761 N.Y.S.2d 1, 1 (1st Dep’t 2003) (applying New York veil-piercing law to a closely-held reinsurance company chartered in Bermuda).

¹²⁷ See *Davaco, Inc.*, 2008 WL 2243382, at *1 (applying the veil-piercing law of the “state of incorporation,” Quebec, to a corporation chartered there); *Sunnyside Dev. Co.*, 2005 WL 1876106, at *3 (applying British veil-piercing law to a British corporation); *Schlumberger Logelco Inc. v. Morgan Equip. Co.*, No. C-94-1776 MHP, 1996 WL 251951, at *3 (N.D. Cal. May 3, 1996) (applying Austrian law to an Austrian corporation).

¹²⁸ See MASS. GEN. LAWS ANN. ch. 156D, § 15.05(c) (West 2004).

ownership that span as many as four or five sovereign jurisdictions and would require the application of the veil-piercing laws of many different governments.¹²⁹ Such “compound” analysis may be avoided by rejecting the *lex incorporationis* rule. Cases involving tiers of corporate ownership that span multiple jurisdictions are typically resolved by the application of the law of a single American jurisdiction.

1. The Unsound Principles Underlying the Domestic Rule

The “well-settled”¹³⁰ rule that the law of the jurisdiction of incorporation governs veil piercing is based on the presumption that veil piercing falls within the internal affairs doctrine,¹³¹ that the government with the greatest interest in defining the juridical status of an entity is the government that created it,¹³² or that economic and contractarian values require shareholders’ expectations about a firm’s juridical status to be enforced. All of these ideas are logically unsound, a fact that becomes clear when they are proffered to justify the application of the entity law of a foreign chartering government. The widely-held presumption that issues of corporate form fall within the internal affairs doctrine is mistaken: Veil piercing, in all its forms, is outside the scope of the internal affairs doctrine. The disregard of the corporate form by a court exercising its equitable powers does not exclusively implicate a corporation’s internal relationships, nor does it frustrate the legitimate expectations of the shareholders, even when it relates specifically to issues of shareholder liability.

Judicial decisions to pierce the corporate veil always implicate the interests of third parties. As we have seen, the reach of the internal affairs doctrine has been limited to corporate governance and to transactions that occur between or among corporate insiders, and it has excluded actions such as tender offers that involve third parties. Issues about a corporation’s juridical status concern the relationship between the corporation, its insiders, and those outside the corporation.

¹²⁹ See *infra* Part III.D.4.

¹³⁰ See, e.g., Alexander, *supra* note 48, at 410.

¹³¹ See, e.g., Matheson, *supra* note 122, at 1096; O’HARA & RIBSTEIN, *supra* note 52, at 115 (“The IAD only covers creditor protection rules that affect *shareholders’* financial rights, including shareholders’ personal liability for corporate harms . . .”).

¹³² See *Schlumberger Logelco Inc.*, 1996 WL 251951, at *3 (applying Austrian law to an Austrian corporation because “Austria has a substantial interest in determining whether to pierce the corporate veil of one of its corporations.”).

Courts only disregard the corporate form when the interest of some third party is at stake. In jurisdictional veil piercing, for example, the issue is not merely the relationship of the shareholders to the corporation, but the relationship of both to the state and to the scope of the court's personal jurisdiction.¹³³ Jurisdictional veil piercing is not a private law issue, and the shareholders could not agree to exempt each other, or anyone else, from a court's exercise of long-arm jurisdiction.¹³⁴

Likewise, in questions of shareholder liability, veil-piercing analysis deals with the relationship between the shareholders, the corporation, and some third party, typically a tort victim or a contractual party. The importance of the third party to the veil-piercing analysis is exemplified by the element of fraud required by most American veil-piercing standards, which must be satisfied by proof that a *third party* has been defrauded.¹³⁵ The fraud requirement highlights the centrality of third-party interests to the veil-piercing inquiry.

Veil piercing's equitable nature is essential in understanding why it falls outside the internal affairs doctrine, and thus why courts typically balk at extending the doctrine to require the application of the veil-piercing law of foreign governments. A court's decision to disregard the corporate form is a singular exercise of equitable discretion that applies only to a specific facet of the legal case before it. It does not actually affect the corporation's operations, activities, or affairs in any way. By disregarding the corporate form in a case, the court does not dissolve the corporation, or even make it likely that a second court will pierce the same corporation's veil in a different case. It does not affect the relationship among the interested parties in any context outside the narrow dispute before the court, and the corporation need not change its operations to comply with the court's decision or to continue to operate. This, of course, is significantly different from judicial decisions that *do* implicate a corporation's internal affairs, such as the election of directors,

¹³³ Cf. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1574–75 (2002) (analyzing sovereign immunity as a doctrine of personal jurisdiction because it reflects a lack of power by the courts to command the appearance of a foreign sovereign).

¹³⁴ Cf. *Red Bull Assocs. v. Best W. Int'l Inc.*, 862 F.2d 963, 967 (2d Cir. 1988) (on a motion to transfer venue, private parties' contractual choice of forum did not have "dispositive effect" on where the case was tried).

¹³⁵ See *infra* note 188 and accompanying text.

the adoption of by-laws, shareholder voting, or the declaration of dividends, which generally impose real and often permanent changes on an entity's operation or the composition or activities of its stakeholders. Moreover, a court's decision to pierce the corporate veil to establish shareholder or parent company liability does not make all shareholders or all parent companies liable for all corporate debts; it merely makes a specific shareholder or parent company liable for a specific debt.

Shareholder expectations about a corporation's juridical status are not entitled to special deference. Corporate shareholders cannot reasonably expect that the entity laws of the chartering government will be applied to the corporation abroad. The contractarian view conceives of the charter as a private contract in which the state's role is minimal.¹³⁶ But under basic contract principles, third parties are not bound by a contract.¹³⁷ There is no good basis to bind a tort victim to an agreement to apply a foreign jurisdiction's law if the tort victim was not party to the agreement. Shareholders' expectations must also be limited by reality: As this Part has shown, most courts apply American entity laws to foreign corporations, and thus, under the current choice-of-law regime, shareholders of foreign corporations have no reasonable expectation that *lex incorporationis* will apply.

The Supreme Court has said that veil-piercing questions fall outside the internal affairs doctrine. In *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("Bancec"), the Court pierced the veil of a Cuban credit union that was established and wholly owned by the Cuban government.¹³⁸ The Supreme Court specifically addressed the application of the internal affairs doctrine to the veil-piercing issues in the case:

As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in

¹³⁶ See Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 782-84 (2006); William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 439-42 (1989).

¹³⁷ See, e.g., *MBIA Ins. Corp. v. Royal Bank of Can.*, 706 F. Supp. 2d 380, 396 (S.D.N.Y. 2009).

¹³⁸ 462 U.S. 611 (1983).

the corporation. Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue.¹³⁹

The Court went on to reject an approach that required Cuban law to govern the juridical status of the Cuban entity in question.¹⁴⁰ *Bancec* should have ended all debate that the internal affairs doctrine applies to veil piercing, or that the shareholders' interests in certainty and predictability are of paramount importance in veil-piercing choice-of-law. However, courts continue to cite the internal affairs doctrine as they apply the *lex incorporationis* to domestic firms.¹⁴¹ *Bancec's* reasoning remains strong, a fact that probably goes a long way toward explaining why lower courts have been reluctant to adopt *lex incorporationis* as the veil-piercing choice-of-law rule for *all* firms.

2. Practical Difficulties in Ascertaining Foreign Veil-Piercing Laws

A number of courts have endorsed the application of the internal affairs doctrine to a foreign corporation but then declined to apply the foreign law because the foreign law had not been briefed by the parties or was unascertainable.¹⁴² In other

¹³⁹ *Id.* at 621 (citations omitted).

¹⁴⁰ *Id.* at 622.

¹⁴¹ *See, e.g.*, Gully v. Moravec, No. 1:07-cv-788-DFH-TAB, 2008 WL 596002, at *5 (S.D. Ind. Feb. 29, 2008), *aff'd*, Whitely v. Moravec, 635 F.3d 308 (7th Cir. 2011).

¹⁴² *See* Platten v. HG Berm. Exempted Ltd., 437 F.3d 118, 128 n.5 (1st Cir. 2006) (explaining that the district court had originally applied Bermudan law to a Bermudan corporation and then changed its mind, stating, “[w]here ‘there is at least a reasonable relation between the dispute and the forum whose law has been selected by the parties, we will forego an independent analysis of the choice-of-law issue and apply’ the state substantive law selected by the parties”) (quoting Fed. Ins. Co. v. Raytheon Co., 426 F.3d 491, 496 n.3 (1st Cir. 2005)); Fen Hin Chon Enters., Ltd. v. Porelon, Inc., 874 F.2d 1107, 1115 (6th Cir. 1989) (questioning “whether Tennessee [veil-piercing] law can or should be applied to these Hong Kong corporations” and concluding that the petitioner “has made no effort to show that the requirements of Hong Kong corporate law were not complied with here”); Lehman Bros. Commercial Corp. v. Minmetals Int’l Non-Ferrous Metals Trading Co., No. 94 CIV. 8301 (JFK), 1996 WL 346426, at *3–4 (S.D.N.Y. June 25, 1996) (analyzing alter ego claim against a Chinese corporation under both Chinese and New York veil-piercing law and hedging about which will apply, noting that the parties had submitted contradictory expert opinions on Chinese law); EBG Holdings L.L.C. v. Vredezicht’s Gravenhage 109 B.V., No. 3184-VCP, 2008 WL 4057745, at *11 (Del. Ch. Sept. 2, 2008) (in analyzing personal jurisdictional under an alter-ego theory, the Delaware Chancery court noted that Dutch alter ego law should apply to a Dutch

cases, the courts have asserted that the foreign veil-piercing law was not distinguishable from the relevant domestic law, a conclusion that is generally not well-supported and probably reflects the courts' frustration with ascertaining the foreign law.¹⁴³ It can be difficult to ascertain foreign veil-piercing law.¹⁴⁴ Some foreign nations simply do not permit veil piercing where American law allows it. The veil-piercing laws of civil law nations are sometimes not easily translated to claims in American courts.¹⁴⁵ In such cases, these nations might be said to not "recognize" a particular type of veil piercing. If a court concludes that the foreign jurisdiction rejects veil piercing in those circumstances, it effectively terminates substantive rights and remedies that exist under American law, something that courts may be reluctant to do.

Courts that seek to apply foreign law can face a unique challenge when that law lacks the equivalent of equitable veil-piercing doctrines. For example, while New York law will allow a non-signatory to be liable for the breach of a contract on a veil-

limited liability company, but the parties did not brief Dutch law, and thus the Court would apply Delaware alter ego law).

¹⁴³ See, e.g., *Semiconductor Energy Lab. Co. v. Samsung Elecs. Am., Inc.*, No. 97-1217, WL 357907, at *3 (Fed. Cir. 1997) (noting that Japanese law might apply, but finding that the Japanese and federal standard "are essentially the same"); *Great Lakes Overseas, Inc. v. Wah Kwong Shipping Group, Ltd.*, 990 F.2d 990, 996 (7th Cir. 1993) (analyzing veil-piercing issues relating to an Australian firm under both Illinois law and United Kingdom law, in a contract dispute involving a United Kingdom choice-of-law provision, and concluding that the outcome would be the same under either law); *Phillips v. United Heritage Corp.*, 319 S.W.3d 156, 168 (Tex. App. 2010) (declining to decide whether the law of Texas or Turks & Caicos applied to a veil-piercing claim against the officers and directors of an "exempt company" in the Turks & Caicos Islands because the disposition of the claim would have been the same under either law).

¹⁴⁴ For example, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006), a class action under the federal Alien Tort Statute, veil-piercing claims were asserted against commercial entities organized under the laws of the Mauritius, the Netherlands, and the United Kingdom. The District Court for the Southern District of New York had difficulty ascertaining the proper standard under the law of the Republic of Mauritius, a small island in the Indian Ocean. *Id.* at 681-83. The court found that Mauritian law allowed for the corporate veil to be pierced "when it can be proved that a company conducts business with the intent to defraud creditors or as a mere façade," but noted that there were no Mauritian court decisions that provided guidance on what it meant to operate as a façade. *Id.* at 683. Ultimately, utilizing more guesswork than legal analysis, the court chose to borrow a definition from English law. *Id.*

¹⁴⁵ See, e.g., *Mega Tech Int'l Corp. v. Al-Saghyr Establishment*, No. 96 CIV 8711 LBS, 1999 WL 269896, at *8 (S.D.N.Y. May 3, 1999) (noting that Saudi Arabian veil-piercing law does not permit jurisdictional veil-piercing).

piercing theory, English law will not.¹⁴⁶ As another example, Chinese law does not recognize reverse veil piercing.¹⁴⁷ Two recent cases further demonstrate how substantive legal principles of American entity law can be forfeited by the application of foreign entity law. In *Kingdom 5-KR-41, Ltd. v. Star Cruises, PLC*, the Bank of New York sought to pierce the corporate veil of a Norwegian company in connection with breach-of-contract claims in District Court for the Southern District of New York.¹⁴⁸ The contract had a New York choice-of-law provision, but both parties agreed that Norwegian law applied to the veil-piercing claim, and the district court applied Norwegian law.¹⁴⁹ The choice of law essentially decided the matter, the court discovered, because “[g]enerally, the concept of corporate veil piercing is not recognized under Norwegian law.”¹⁵⁰ The court explained that if veil piercing were “possible” under Norwegian law, it could only be done if failure to pierce the veil would be “utilbphirlig”—a very strong word for unfairness that apparently has no English translation.¹⁵¹

In another case, a plaintiff asked the District Court for the Southern District of New York to assert personal jurisdiction over a company chartered by Saudi Arabia on an “alter ego” theory, essentially asking the court to disregard the juridical status of a second Saudi Arabian company and impute its American contacts to the first company.¹⁵² The District Court applied the entity law of the chartering jurisdiction, Saudi Arabia, to the jurisdictional veil-piercing issue and concluded that “Saudi Arabian law does not recognize the concept of veil-piercing in these circumstances.”¹⁵³ The District Court thus held

¹⁴⁶ See *MBIA Ins. Corp. v. Royal Bank of Can.*, No. 12238/09, 2010 WL 3294302, at *24 (N.Y. Sup. Ct. Westchester Cnty. Aug. 19, 2010) (citing expert testimony that “under English law, only the parties to a contract may be liable for its breach,” and “there are no exceptions to this rule, as there are in New York”).

¹⁴⁷ See *Milliken & Co. v. Haima Group Corp.*, No. 08-22891-MC, 2010 WL 1286462, at *2 (S.D. Fla. Mar. 1, 2010) (citing the expert opinion of a Chinese lawyer).

¹⁴⁸ *Kingdom 5-KR-41, Ltd. v. Star Cruises, PLC*, No. 01 Civ. 2946 (AGS), 2003 WL 262507, at *4 (S.D.N.Y. Feb. 7, 2003).

¹⁴⁹ *Id.* at *2, 4 n.2.

¹⁵⁰ *Id.* at *4.

¹⁵¹ *Id.* at *4 (citing *Inkassoservice Advokatfirma Mitsem v. Park Holding v. Park Holding AS*, Rt.-1996-672 (204-96) (Sup. Ct. Norway 1996)).

¹⁵² *Mega Tech Int’l Corp. v. Al-Saghyir Establishment*, No. 96 CIV 8711 LBS, 1999 WL 269896, at *8 (S.D.N.Y. May 3, 1999).

¹⁵³ *Id.*

that the foreign entity law insulated the Saudi firm from the reach of the American court's authority on a veil-piercing theory.¹⁵⁴

The fact that many civil law jurisdictions conceptualize veil piercing differently than courts in the Anglo-American legal tradition makes it difficult for American courts to "apply" foreign laws without concluding that some foreign jurisdictions do not permit certain types of veil piercing. Unfortunately, such an approach effectively destroys equitable rights and remedies that are available under American law. And one might be left to conclude that incorporating an entity in Norway, or in Saudi Arabia, insulates shareholders, parent companies, and affiliated companies from certain American laws.

3. Agreement of the Parties that American Law Applies

If both parties agree that a particular American jurisdiction's veil-piercing law should apply to a foreign corporation, a court often will not engage in an independent choice-of-law analysis. This is because the rule in most jurisdictions is that the parties can agree to a choice-of-law determination; it also serves the interests of both the parties' lawyers and the court in keeping the issue within the familiar American legal framework.¹⁵⁵ It is, however, a strong rejection of

¹⁵⁴ *Id.* The court held that it had personal jurisdiction over the Saudi entity on another basis. *Id.* A third example is *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006), in which veil-piercing claims were asserted against a Dutch entity, among others. The District Court found that "[u]nder Dutch law, the corporate veil may only be pierced to hold the shareholders of a company liable for claims against the company in limited circumstances which relate to insolvency and are not relevant to this litigation." *Id.* at 686. The court then described the Dutch "doctrine of equation," under which a parent corporation may be held liable for its subsidiary's misconduct. *Id.* at 686-87. The court asserted that the doctrine required the plaintiff to show that "the corporate form has been abused to avoid a legal obligation." *Id.* at 687. After finding that the Dutch law had a "remarkable similarity" to New York law, the court stated that the Dutch Supreme Court had only once upheld a judgment of liability under the doctrine of equation. *Id.* at 687 & n.107. The district court then declined to pierce the veil. *Id.* at 687.

¹⁵⁵ The law in most federal circuits is that a court need not analyze a choice-of-law issue if the parties agree about the governing law. *See, e.g.*, *Texaco A/S (Den.) v. Commercial Ins. Co. of Newark, NJ*, 160 F.3d 124, 128 (2d Cir. 1998) ("where the parties have agreed to the application of the forum law, their consent concludes the choice of law inquiry." (quoting *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997)). Only the Fifth Circuit for the United States Court of Appeals routinely engages in a conflicts analysis if the parties do not dispute the choice of law. *See Caton v. Leach Corp.*, 896 F.2d 939, 942 (5th Cir. 1990).

the contractarian view of the corporation, which holds that a court should enforce the shareholders' choice of law. To adherents of the contractarian view, there is no basis for an American lawyer to bind her client's shareholders to a different veil-piercing standard than the one they believed they were agreeing to when they selected the jurisdiction of incorporation. Thus, although this approach—allowing a foreign corporation's lawyer to agree to ignore *lex incorporationis* in a dispute—comports with the conflicts law in most jurisdictions, it is in tension with any notion that the corporate charter reflects a selection of veil-piercing law by the shareholders.

4. Entity Law Problems that Span Multiple Nations

Pyramidal ownership arrangements are common in corporate groups, and they can complicate the veil-piercing analysis.¹⁵⁶ In some cases, multiple tiers of corporate ownership must be pierced to reach an ultimate parent company or shareholder, and multiple chartering governments are involved.¹⁵⁷ In other cases, entities organized under the laws of many different sovereign nations form part of the same corporate group, and a piercing claim asks the court to treat them as a single entity for some purpose—such as discovery veil piercing.¹⁵⁸

In these cases, a rule requiring the application of the law of the jurisdiction of incorporation makes the veil-piercing inquiry cumbersome and complicated.

In cases involving such “compound” entity law analysis, American courts have generally rejected *lex incorporationis* and applied the law of a single American jurisdiction. For example, in 2006, the First Circuit for the United States Court of Appeals addressed a veil-piercing claim against a Pennsylvania

¹⁵⁶ Lucian Arye Bebchuk, Reinier Kraakman, & George G. Triantis, *Stock Pyramids, Cross-Ownership, and Dual-Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, in CONCENTRATED CORPORATE OWNERSHIP 295, 299 (Randall K. Morck ed., 2000).

¹⁵⁷ See, e.g., *Playwell Toy, Inc. v. Bureau Veritas Consumer Prods. Servs., Inc.*, No. 03-CV-0704C(SC), 2008 WL 4372654, at *1 (W.D.N.Y. Sept. 19, 2008).

¹⁵⁸ See, e.g., *id.* (applying Nebraska veil-piercing law to corporations chartered in Massachusetts, Hong Kong, and France that were alleged to have held themselves out as a “single global entity”); *InterGen N.V. v. Grina*, 344 F.3d 134, 148–50 (1st Cir. 2003) (applying federal veil-piercing standard to determine whether a Dutch entity was the alter ego of two entities chartered in the Cayman Islands).

corporation, which was wholly owned by a Delaware corporation, which was wholly owned by a Dutch corporation, which was wholly owned by a Bermudan corporation.¹⁵⁹ If the court had chosen to apply the veil-piercing laws of the jurisdictions of incorporation, it would have needed to analyze each of the four layers of corporate ownership according to each nation's separate laws. Instead, the court took a more practical approach: It simply applied Massachusetts law to each entity in the organizational pyramid.¹⁶⁰

The opposite approach, requiring the satisfaction of multiple nations' veil-piercing standards, would allow corporate parties to manipulate choice of law because it would permit the most restrictive jurisdiction's veil-piercing law to control. Thus, a party could easily insulate itself from veil piercing in the United States by creating a pyramidal ownership arrangement in which a single parent tier is incorporated in a foreign jurisdiction with very high veil-piercing standards. Such a regime would contribute to the risk of a global entity law "race to the bottom," which is discussed in more detail in Part IV(B)(2) below.

To sum up, there is good evidence of a double standard: Courts apply one choice-of-law rule to veil-piercing claims against domestic firms, but they balk at applying the same rule to foreign firms. This double standard reflects an implicit recognition by courts that the principles underlying the rule for domestic corporations are analytically unsound. And the different rule for foreign firms is justified by some courts by the practical difficulties of applying *lex incorporationis* to them. Whatever the reason for the double standard, its existence should prompt us to reexamine the grounds for applying either state law or foreign law to questions about the juridical status of foreign firms in American courts.

¹⁵⁹ *Platten v. H.G. Berm. Exempted Ltd.*, 437 F.3d 118, 123 (1st Cir. 2006). In footnote five, the First Circuit of the United States Court of Appeals noted the choice-of-law issue, explained that the district court had originally applied Bermudan law, and then changed its mind, concluding that "where 'there is at least a reasonable relation between the dispute and the forum whose law has been selected by the parties, we will forego an independent analysis of the choice-of-law issue and apply' the state substantive law selected by the parties." *Id.* at 128 n.5 (quoting *Fed. Ins. Co. v. Raytheon Co.*, 426 F.3d 491, 496 n.2 (1st Cir.2005)).

¹⁶⁰ *See Platten*, 437 F.3d at 127.

IV. A CRITIQUE OF THE CURRENT CHOICE-OF-LAW REGIME

Part II showed that American courts apply different choice-of-law principles to domestic and foreign entities in questions of corporate form. Veil-piercing analysis of *domestic* firms is guided by the internal affairs doctrine and governed by the law of the jurisdiction of incorporation. But veil-piercing analysis of *foreign* firms is different. Instead of applying the law of the foreign chartering jurisdiction, most courts will analyze the foreign corporate form by applying the law of some American state. Even federal courts in the Southern District of New York, which hear many international disputes and have shown the greatest commitment to applying the entity law of the foreign chartering jurisdiction, can be found regularly applying domestic entity law standards to foreign entities.¹⁶¹ All of this amounts to a double standard in the way courts analyze the separate legal personhood of domestic and foreign corporations.

This Part critiques the existing choice-of-law regime. First, it criticizes the double standard itself by highlighting its unfairness and economic costs to foreign firms. The current regime discriminates against foreign business entities because it allows domestic firms to enjoy a predictable choice of law but subjects foreign firms to uncertainty. As a result of this uncertainty, foreign firms absorb agency costs that domestic firms are spared.

Next, this Part argues that there are significant problems both with a choice-of-law regime that applies the entity law of the foreign chartering jurisdiction to a foreign company, and with one that applies the entity law of an American state. In addition to noting the important practical problems that Part II identified as contributing to the choice-of-law double standard, this Part argues that there are other significant problems with applying the law of one or more foreign jurisdictions in a veil-piercing analysis. For example, the rule of *lex incorporationis* will not resolve the choice-of-law inquiry for treaty-chartered firms. And enforcement of foreign entity law risks creating a global “race to the bottom” in which foreign jurisdictions compete to offer investors the most favorable laws at the expense of everyone else.

This Part argues that the double standard we see at work in most jurisdictions actually reflects a better—but still

¹⁶¹ See *supra* note 126 and accompanying text.

problematic—approach in applying the entity law of one of fifty American states to a foreign firm. The use of domestic law in such cases resolves some practical problems, such as the need to apply multiple foreign jurisdictions' laws, and it eliminates the potential for an entity law “race to the bottom.” However, such an approach does not reduce the unfairness and economic costs to foreign firms of a double standard because domestic firms continue to enjoy the certainty and predictability of the *lex incorporationis* rule. Moreover, state entity laws are shadowed by Dormant Commerce Clause constraints that prohibit states from “discriminating” against out-of-state businesses. These constraints prevent the states from treating out-of-state firms differently from in-state firms, even where such treatment might be warranted. Thus, for example, state veil-piercing laws sometimes provide greater shareholder liability protection for foreign closely-held firms than the foreign chartering government would provide. In such cases, state law protects the shareholders of the foreign entities at the potential expense of domestic interests.

A. *The Unfairness and Economic Costs of a Double Standard*

American corporate law places a high value on economic efficiency.¹⁶² Yet the choice-of-law double standard identified in this Article creates economic inefficiency because of the information costs of uncertainty. Investors in foreign corporations face uncertain risks in American courts because they do not know what jurisdiction's veil-piercing laws will apply to them. They face uncertainty about whether they will be subject to the personal jurisdiction of a particular state's courts, or whether a plaintiff can successfully serve them with legal

¹⁶² The myriad of cases that consider economic efficiency in corporate law matters include, for example: *Simmonds v. Credit Suisse Sec. (USA) L.L.C.*, 638 F.3d 1072, 1093 (9th Cir. 2011) (quoting *Yaw v. Talley*, No. 12882, 1994 WL 89019, *8 (Del. Ch. 1994)) (“efficient use of corporate resources” in the investigation of claims in demand letters); *NoDAK Bancorporation v. Clarke*, 998 F.2d 1416, 1422–23 (8th Cir. 1993) (efficiency in consolidation or merger transactions); and *RCM Sec. Fund, Inc. v. Stanton*, 928 F.2d 1318, 1335 (2d Cir. 1991) (“the elimination of dissidence that reduces efficiency” as a “proper business purpose”). It is not surprising that courts place great value on economic efficiency in matters of business, since they strongly value efficiency in their own business, the administration of justice. *See, e.g.*, FED. R. CIV. P. 23(b)(3); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343–44 (4th Cir. 1998) (analyzing whether a putative class action is “the most economical and efficient means of litigation”).

process to get at the company. They face uncertainty about whether a shareholder or parent company can be bound by an entity's contracts, or whether it may be held to stand in a principal-agent relationship with the corporation's agents. In short, they face uncertainty with respect to all types of veil piercing.

In response to all this uncertainty, investors in foreign firms must engage in more intensive, and more costly, monitoring of the corporation's managers. They may also incur agency costs in monitoring the entity laws of many different jurisdictions, because all are potentially applicable to the firm. Because of the risk of shareholder liability, this uncertainty may deter potential investors from choosing to invest in foreign corporations that operate in American streams of commerce and face unpredictable veil-piercing laws.

By contrast, American firms enjoy the certainty and predictability of *lex incorporationis* for matters of corporate form when they operate anywhere in the United States. And American corporations facing veil-piercing analysis abroad generally do not face the uncertainty of fifty potentially applicable standards because most nations that have cognizable entity law have formulated it at the national level.¹⁶³ Thus, American firms enjoy an entity law advantage both at home and abroad. Not only is this advantage unfair—and in potential violation of foreign firms' due process rights,¹⁶⁴ as well as in violation of provisions in some treaties that require foreign businesses to be treated on equal terms with American firms¹⁶⁵—but it puts foreign companies at an economic disadvantage. The entire regime effectively discourages international commerce.

B. Applying the Law of the Foreign Chartering Jurisdiction

There are a great many reasons that courts should not choose the *lex incorporationis* to govern entity law questions concerning a foreign-chartered business entity. Some of these reasons, as we saw above in Part II, already appear to form the basis of a widespread double standard in American choice of law.

¹⁶³ China, for example, set its veil-piercing standards at the national level in its 2006 Company Law.

¹⁶⁴ See U.S. CONST. amend. XIV, § 1.

¹⁶⁵ See, e.g., Treaty of Friendship, Commerce and Navigation, U.S.-Japan, art. XXII, Apr. 2, 1953, 4 U.S.T. 2063.

As discussed above in Part II, some of these reasons already appear to form the basis of a widespread double standard in American choice of law. Moreover, applying the *lex incorporationis* to veil-piercing questions involving tiered ownership arrangements or corporate groups that span multiple foreign jurisdictions can involve the application of the laws of four, five, or even more foreign governments. Since there is evidence that veil-piercing cases are increasingly involving such complex, tiered ownership arrangements and complex corporate groups, the *lex incorporationis* is likely to become increasingly disfavored by courts.

In addition to these factors, several others argue against a choice-of-law rule that calls for the application of the law of a foreign chartering government in veil-piercing inquiries. Treaty-chartered corporations are not created within a single sovereign's legal system, and thus the rule of *lex incorporationis* provides no guidance for how to resolve a veil-piercing matter involving a treaty-chartered entity. Moreover, allowing shareholders to choose which nation's veil-piercing law will apply to them advances the shareholders' interests at the expense of third parties, and may contribute to a global "race to the bottom" in entity law.

Finally, the benefits of allowing shareholders to choose which veil-piercing law will apply to them may be less significant than the benefits of allowing shareholders to select other aspects of corporate law, at least in the global context, because veil piercing reflects judge-made, equitable analysis that is insulated from political pressure at the federal court level, where most cases involving foreign firms will be brought. Advocates of a corporate "law market"—who want courts to enforce shareholders' choice of corporate law by enforcing the law of the jurisdiction of incorporation—argue that protecting shareholders' choice of law fosters competition among corporate law jurisdictions, and that this competition serves to optimize those laws. But federal courts are unlikely to respond to pressure from interest groups to "optimize" veil-piercing law.¹⁶⁶ Even if federal courts were to respond to such pressure, they would likely find it one-sided, favoring corporate interests, and thus it would be unlikely to result in optimized veil-piercing law.

¹⁶⁶ See *infra* Part III.B.3.

1. The Treaty-Chartered Entity

As discussed in Part III above, treaty-chartered entities are formed by international agreement and are not organized under the laws of any particular nation. There is no clear choice of law for veil-piercing analysis to be applied to such entities, and *lex incorporationis* does not apply, since there is no jurisdiction of incorporation. A court engaged in a veil-piercing dispute over a treaty-chartered entity would, theoretically, have no choice but to engage in an interest-balancing analysis to determine which jurisdiction's veil-piercing law governs. However, to date, no court has addressed this emerging choice-of-law issue.

2. The "Race to the Bottom"

An extensive academic debate exists about the corporate "race to the bottom" among American states. According to the "race to the bottom" theory, states compete against each other to "sell" corporate law to firm managers.¹⁶⁷ States seeking to drum up revenue from corporate sources compete to attract firms by offering increasingly management-friendly corporate laws.¹⁶⁸

Managers move their firms to these jurisdictions and take advantage of lax laws by appropriating wealth from the firms they manage to themselves.¹⁶⁹

A countervailing theory, sometimes called the "race to the top," has commanded support in the corporate law academy.¹⁷⁰ This theory argues that instead of hurting investors, competition incentivizes managers to offer investor-friendly corporate governance, and corporate laws evolve to favor investor interests.¹⁷¹ Proponents of the "race to the top" contend that Delaware dominates state incorporations because it offers

¹⁶⁷ See Daniel L.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Top/Bottom*, 23 YALE L. & POL'Y REV. 381, 384 (2005) (discussing the "race to the bottom" theory).

¹⁶⁸ See William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 664 (1974).

¹⁶⁹ See *id.* at 668–69.

¹⁷⁰ See Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254 (1977).

¹⁷¹ See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 4–5 (1991); ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 2 (1993); Winter, *supra* note 170.

wealth-maximizing corporate law for investors.¹⁷² Mark Roe has made an important contribution to the debate by arguing that the real “race” is between the states and the federal government, and that it is the threat of federal regulation of corporations that keeps the states from adopting abusive laws.¹⁷³

The routine enforcement of foreign entity laws by American courts risks fostering a global “race to the bottom” in entity law. The main reason is investor demand: As the advocates for the “race to the top” have shown, competition allows investors to call the shots.¹⁷⁴ Since strict entity law protections favor investors, investors will seek them out. In fact, there is already evidence that information about the relative ease or difficulty of piercing the corporate veil under various American state laws is used by business managers to make strategic incorporation decisions.¹⁷⁵

Another reason to worry about a global entity law “race to the bottom” is the lack of a global supervisory authority to step in if the law evolves in an undesirable direction. Unlike in the American system, where the federal government can act to preempt flawed state corporate laws, the global “market” for law lacks a supreme authority. There is no international institution with the power to stop entity laws from evolving across jurisdictions to favor investor interests at the expense of others, such as creditors, tort victims, contractual partners, and governments. Legislatures and courts should be wary of the potential for an entity law “race to the bottom” when they consider whether a rule favoring the law of a foreign chartering government serves American interests.

¹⁷² See Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2497–98 (1995).

¹⁷³ *Id.* at 2498 (arguing that Delaware has “good reason to fear federal preemption” of corporate law matters, and this keeps Delaware law in line).

¹⁷⁴ See *id.* at 2497.

¹⁷⁵ See Boyd & Hoffman, *supra* note 123, at 855 (noting that a Nevada firm has relied on Robert Thompson’s empirical findings about the ease or difficulty of piercing the corporate veil to persuade companies to incorporate in Nevada instead of California); Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations*, 27 J.L. ECON. & ORG. 79, 79 (2011) (finding “statistically significant and robust evidence that corporations are more likely to migrate away from states where the risk of veil piercing is high”); *cf.* Roe, *supra* note 172, at 2527 (noting that section 630 of the New York Business Corporations Law, which makes the ten largest shareholders of certain New York corporations personally liable for employee wages, “has been described as ‘the single most important reason why New York shareholders decide to incorporate in Delaware’”).

3. The Limited Benefit of Jurisdictional Competition

Because veil-piercing standards are judge-made, they are not subject to jurisdictional competition in the same way that most corporate law is. Advocates of the internal affairs doctrine and the contractarian model of the firm often suggest that when shareholders select a jurisdiction in which to incorporate, they are “consuming” law in a sort of “law market.”¹⁷⁶ These commentators typically include veil-piercing doctrine within the set of corporate laws that are selected by shareholders in this market-driven process.¹⁷⁷

However, because veil-piercing law is almost exclusively judge-made and equitable, a state’s veil-piercing law may be slower to respond to political pressures than corporate laws made by legislatures. And state judges, many of whom are elected, are less politically insulated than federal judges, who have lifetime tenure. Thus, we might expect to see that veil-piercing doctrines fashioned by federal judges are less favorable toward corporate interests than those fashioned by state judges, and there is some evidence to suggest that federal veil-piercing standards are more lenient.¹⁷⁸ If state judges are more politically insulated than legislatures, and federal judges are more politically insulated than state judges, there is little basis to believe that federal judges, applying the equitable veil-piercing doctrines of various states and foreign nations in diversity cases, will optimize veil-piercing law, or that jurisdictional competition will be fostered among the various judges who craft these highly fact-specific, equitable standards.

For all these reasons, the law of the foreign chartering jurisdiction is a poor choice for governing the juridical status of foreign firms in American courts. In addition to increasingly-common tiered ownership arrangements and corporate groups that span multiple jurisdictions, another innovation in corporate organization—the treaty-chartered entity—requires an exception to the *lex incorporationis* rule. The risk of an entity law “race to the bottom” is real and must be guarded against. And a global “market” for entity law is unlikely to result in entity law

¹⁷⁶ See, e.g., O’HARA & RIBSTEIN, *supra* note 52, at 3–5.

¹⁷⁷ See, e.g., *id.* at 5.

¹⁷⁸ See, e.g., PRESSER, *supra* note 9, § 3:2 n.22 (asserting that federal veil-piercing standards are more lenient than state veil-piercing standards).

advances that optimize the balance of power between corporate participants and other people, organizations, and governments.

C. *Applying State Law*

Most American courts employ a choice-of-entity-law double standard that requires the application of the law of an American state to a foreign entity.¹⁷⁹ This choice of law is preferable to applying the entity law of the foreign chartering government for several reasons. First, it eliminates many of the practical problems, such as the difficulty of ascertaining the proper foreign law standard, the need to apply multiple foreign governments' laws where tiered ownership arrangements span multiple jurisdictions, and the problem of the treaty-chartered entity. It also forecloses an international entity law "race to the bottom," in which foreign jurisdictions compete to offer the most shareholder-friendly entity laws at the expense of third parties around the globe.

However, this Part argues that there are significant drawbacks to a choice-of-law regime that applies one rule to domestic firms and a different rule to foreign firms, even if this approach results in the application of American state law to both types of firms. The double standard itself has significant costs for foreign firms that wish to do business with American parties.

Moreover, there are constitutional constraints on the flexibility with which domestic state laws can address the breadth and variety of foreign business entities. The Dormant Commerce Clause places limits on a state's regulation of out-of-state firms, and these limits extend to the regulation of corporate personhood and juridical status in the state's own courts.

1. Differences Among State Veil-Piercing Laws

Commentators often downplay or fail to recognize the real differences that exist among state veil-piercing standards. Because state laws vary in some important ways,¹⁸⁰ the threat to a foreign firm of being held to fifty or more different state veil-piercing standards is significant. It means that foreign firms must monitor multiple state standards, and their own activity,

¹⁷⁹ See Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61, 66 (1999).

¹⁸⁰ See, e.g., Crespi, *supra* note 46, at 87–88.

with care. A choice-of-entity-law regime that favors the application of state law to a foreign firm has agency costs for the foreign firm because of these information and monitoring costs. And since American courts uniformly apply the entity law of the state of incorporation to domestic firms, such a choice-of-entity-law regime perpetuates a double standard that puts foreign firms at an economic and legal disadvantage.

Commentators have noted many differences among state veil-piercing laws. For example, the veil-piercing doctrines of Delaware, New York, and Pennsylvania are considered particularly favorable to shareholders desiring protection from liability.¹⁸¹ Massachusetts is also known to have a “somewhat more ‘strict’ ” respect for the corporate form.¹⁸² In contrast, the veil-piercing doctrines of Texas and California are generally characterized as more easily satisfied.¹⁸³ In 2009, a federal bankruptcy court that compared the veil-piercing laws of New York and Colorado found that they were not interchangeable, and identified a number of differences.¹⁸⁴ Professor Thompson’s 1991 empirical study analyzed veil-piercing cases by state and found widely varying rates of successful piercing.¹⁸⁵ Almost eighty percent of veil-piercing cases that applied Kansas law resulted in successful piercing; the rate for cases applying Delaware law was zero.¹⁸⁶ Among the jurisdictions with the most veil-piercing cases, rates of successful piercing ranged from thirty-five percent in New York, to forty-five percent in

¹⁸¹ *Id.* at 94; see PRESSER, *supra* note 9, §§ 2.8, 2.33, 2.34; see also Yoder v. Honeywell Inc., 104 F.3d 1215, 1220 (10th Cir. 1997) (“Delaware may require somewhat more [than Colorado] to pierce a corporate veil.”); Thompson, *supra* note 6, at 1052 (“As a group, the New York decisions seem somewhat more restrictive on piercing than cases from the rest of the country.”).

¹⁸² *Birbara v. Locke*, 99 F.3d 1233, 1238 (1st Cir. 1996).

¹⁸³ *Yoder*, 104 F.3d at 1220; see also PRESSER, *supra* note 9, § 2.45 (“Texas [is] somewhat more lenient than other jurisdictions in disregarding the corporate entity.”).

¹⁸⁴ *Pereira v. Grecogas Ltd. (In re Saba Enters., Inc.)*, 421 B.R. 626, 651 (S.D.N.Y. 2009).

¹⁸⁵ See Thompson, *supra* note 6, at 1051 tbl. 6.

¹⁸⁶ *Id.* It is important to note that the sample sizes for the two states were different—nineteen for Kansas law (of which fifteen resulted in successful piercing) and eleven for Delaware law (of which none resulted in successful piercing). *Id.* Thompson himself points out that the small number of cases in each jurisdiction make generalizations difficult. See *id.* It is also likely that Delaware’s role as the jurisdiction of choice for widely-held corporations means that a higher proportion of its veil-piercing cases involved widely-held corporations, which better withstand veil-piercing scrutiny. See *id.* at 1052–53.

California.¹⁸⁷ Professor Thompson's work suggests that there may be real practical differences among state veil-piercing tests.

State entity law standards vary in some specific ways. One is the requirement of fraud. Most states require fraud to be established before the veil will be pierced, but a minority of jurisdictions, such as the District of Columbia, do not.¹⁸⁸ Maryland stands alone among the states with its unique approach to one-person corporations.¹⁸⁹ In the late nineteenth century, Maryland courts took a stand against the majority view of states by holding that a one-person corporation should not be recognized as separate from its owner.¹⁹⁰ To this day, in certain contexts, this approach persists in Maryland, and thus, for example, a mortgage executed by the sole shareholder of a one-person corporation on the corporation's behalf is enforceable against him personally.¹⁹¹

Other differences among the states involve relatively recent veil-piercing innovations, such as reverse veil piercing and a subsidiary's effort to pierce its own veil.¹⁹² Some states allow "outsider reverse [veil] piercing," in which a creditor of a shareholder who seeks to disregard the corporate form to obtain corporate assets in satisfaction of the shareholder's debts, and other states do not.¹⁹³ Some jurisdictions allow a subsidiary corporation to pierce its own corporate veil and reach its parent

¹⁸⁷ See *id.* at 1051.

¹⁸⁸ Compare TEX. BUS. ORGS. CODE ANN. §§ 21.223–26 (West 2011) (requiring proof of actual fraud), with *Groves v. Dakota Printing Servs., Inc.*, 371 N.W.2d 59, 62–63 (Minn. Ct. App. 1985) (“[P]roof of strict common law fraud is not required, but, rather, evidence that the corporate entity has been operated as a constructive fraud or in an unjust manner must be presented.”) (citing *White v. Jorgenson* 322 N.W.2d 607, 608 (Minn. 1982)), and *Labadie Coal Co. v. Black*, 672 F.2d 92, 99 (D.C. Cir. 1982) (in a contract case, the “errant” party” need not have “engaged in anything amounting to fraud” to justify piercing the veil).

¹⁸⁹ See *Swift v. Smith*, 5 A. 534, 539 (Md. 1886).

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 539; *The Bellona Company's Case*, 3 Bland, 442, 442 (Semble) (Md. 1831); 6 MARYLAND LAW ENCYCLOPEDIA: CORPORATIONS § 210 (2010). Although *Swift* remains good law, it has not been cited since 1933.

¹⁹² *LFC Mktg. Group, Inc., v. Loomis*, 8 P.3d 841, 846 (Nev. 2000).

¹⁹³ See Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33, 37 (1990). Reverse veil-piercing occurs when the corporate form is disregarded to hold the corporation liable for the shareholder's debts. See *id.* “Insider” reverse veil-piercing cases involve a controlling insider who seeks to disregard the corporate form to “avail the insider of corporate claims against third parties,” or to shelter corporate assets from the claims of third parties. *Id.*

company, while other state courts reject such an action.¹⁹⁴ And a minority of states allows certain types of veil-piercing claims to go to the jury, a procedure that no doubt affects the likelihood of successful piercing.¹⁹⁵

All of these differences among state veil-piercing laws mean that a rule that favors the application of state entity law to foreign firms subjects foreign firms to real uncertainty and thus to agency costs. In such a choice-of-entity-law regime, domestic firms will continue to enjoy the certainty and predictability of *lex incorporationis*, while foreign firms will be unfairly burdened with the costs of uncertainty.

2. The Limits of State Regulation of Out-of-State Commercial Entities

A regime that applies domestic state entity laws to foreign firms has another problem: It is governing a critical facet of international commerce with laws designed to address parochial state interests, in a system that largely constrains state lawmakers from treating out-of-state firms differently from in-state firms. State judge-made veil-piercing standards developed in the twentieth century to address the juridical status of local business entities. For example, no American state distinguishes with its entity laws among widely-held, closely-held, and one-person corporations. Thus all three types of firms are treated identically under veil-piercing law.¹⁹⁶ This practice puts the courts at odds with the political branches in some respects; for example, Congress has enacted federal sentencing guidelines that treat the shareholder of a closely-held corporation as the entity's alter ego.¹⁹⁷ It also puts the states at odds with the laws

¹⁹⁴ See, e.g., *RDM Holdings, Ltd. v. Cont'l. Plastics Co.*, 762 N.W.2d 529, 545 (Mich. Ct. App. 2008) (concluding that a subsidiary may not bring an alter ego claim against its parent under Michigan law).

¹⁹⁵ See *Gevurtz*, *supra* note 22, at 905.

¹⁹⁶ *Thompson*, *supra* note 6, at 1041–42 (stating that almost all corporations statutes ignore the idea of piercing the veil and that the model idea behind corporate liability is that shareholders of a corporation, unless otherwise noted or by their own doing, are not liable for the acts or debts of the corporation).

¹⁹⁷ The United States Sentencing Commission has noted that “[f]or practical purposes, most closely held organizations are the alter egos of their owner-managers.” U.S. SENTENCING GUIDELINES MANUAL § 8C3.4 cmt. 2 (2011). For purposes of this provision, the individual shareholder must own at least five percent of the corporation's stock. *Id.* § 8C3.4.

of many foreign nations, which distinguish among different types of business entities with their veil-piercing laws.¹⁹⁸ Thus, although state veil-piercing laws have developed in conformity with the laws and practices concerning state-chartered corporations, they do not always square well with the laws and practices governing corporations chartered abroad.

Importantly, there are constitutional limits on the ability of the states to regulate out-of-state companies, and these limits extend to laws regulating the companies' juridical statuses. The states are prohibited by the Dormant Commerce Clause from discriminating against out-of-state entities by, for example, regulating the corporate governance of out-of-state firms, even if they operate principally in-state.¹⁹⁹ This prohibition extends to regulating these firms' juridical statuses in a way that is less favorable than the state's regulation of the juridical statuses of in-state entities. Moreover, the Dormant Commerce Clause may limit the ability of the states to regulate the juridical status of entities in a way that would depart from the general approach of other states if they would "burden" interstate commerce by doing so.²⁰⁰

The Dormant Commerce Clause prohibits states from discriminating against interstate or foreign commerce.²⁰¹ It

¹⁹⁸ See, e.g., *Zhonghua Renmin Gongheguo Gongsì Fa* (中华人民共和国公司法) [Company Law of the People's Republic of China] (promulgated by the Standing Comm. of the 10th Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) 2006 China Law LEXIS 7956, available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=50878.

¹⁹⁹ See, e.g., *Rocket Acquisition Corp. v. Ventana Med. Sys., Inc.*, No. CIV 07-1278-PHX-MHM, 2007 WL 2422082, at *6 (D. Ariz. Aug. 22, 2007) (rejecting Arizona antitakeover statutes that regulated voting rights of out-of-state firms headquartered in Arizona on Commerce Clause grounds). The out-of-state entities must be operating in interstate or foreign commerce, not merely in intrastate commerce, for the Commerce Clause to apply. See *id.*

²⁰⁰ See *C & A Carbone, Inc. v. Town of Clarkstowne, N.Y.*, 511 U.S. 383, 389 (1994) ("It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow."); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937).

²⁰¹ See *supra* note 200 and accompanying text; see also, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) ("The principal objects of [D]ormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce."). Discrimination, in the Commerce Clause context, means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 99 (1994). For a discussion of the Commerce Clause limitations on state

effectively prohibits states from applying different entity law standards to in-state companies and out-of-state companies operating in interstate or foreign commerce.²⁰² For example, the clause has featured prominently in a line of cases concerning the right of an “unqualified” out-of-state corporation—one that has not complied with a state’s laws authorizing it to do business in the state—to have access to the state’s courts.²⁰³ Under this line of cases, the Dormant Commerce Clause prohibits a state from using its courts to reject an out-of-state company as a legal person merely because the company is not authorized under state law to conduct business in the state.²⁰⁴ These cases effectively command state courts to recognize the juridical status of an out-of-state business, and to enforce its juridical rights—such as property and contractual rights—even if it has failed to comply with state laws and therefore cannot legally operate in the state.²⁰⁵

The Commerce Clause has also limited the ability of states to regulate the in-state conduct of out-of-state firms. For example, the Supreme Court struck down an Ohio statute that tolled the statute of limitations for contract or fraud claims for any period that a corporation was not “present” in the state.²⁰⁶ To be “present” in Ohio for purposes of the statute, an out-of-state corporation had to appoint an agent for service of process, which would have subjected the corporation to the general jurisdiction of the state’s courts.²⁰⁷ The Supreme Court held that Ohio’s rule, which withheld the benefits of a statute of limitations to an out-of-state corporation because it failed to appoint an agent for service of process, did not advance Ohio’s “legitimate sphere of regulation” but rather subjected interstate commerce to “substantial restraints.”²⁰⁸ The Court reasoned that Ohio could not justify its statute as a means of protecting its residents from

choice-of-law doctrines, see generally Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806 (1971).

²⁰² See *supra* note 201 and accompanying text.

²⁰³ See *infra* notes 204–05 and accompanying text.

²⁰⁴ See, e.g., *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 34 (1974); *Radio WHKW, Inc., v. Yarber*, 838 F.2d 1439, 1440–41 (5th Cir. 1988); cf. *Neth. Shipmortgage Corp. v. Madias*, 717 F.2d 731, 732 (2d Cir. 1983) (discussing this issue in connection with a New York “door closing” statute).

²⁰⁵ See *Allenberg Cotton Co.*, 419 U.S. at 33–34.

²⁰⁶ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 894 (1988).

²⁰⁷ *Id.* at 889.

²⁰⁸ *Id.* at 891.

corporations who commit tortious acts within the state but later withdraw from the jurisdiction, since the state's long-arm statute would generally permit service on such out-of-state firms.²⁰⁹ Under the Court's analysis, the Commerce Clause did not permit Ohio to protect its citizens from the *difficulties* of serving an evasive, out-of-state entity under such circumstances.

A key facet of the Court's Commerce Clause jurisprudence is its tendency to force all state laws concerning interstate or foreign commerce to converge. For example, in *Kassel v. Consolidated Freightways Corp. of Delaware*, the Supreme Court held that Iowa could not prohibit sixty-five foot double trucks from its highways, because its law was "out of step with the laws of all other Midwestern and Western States" and therefore "substantially burden[ed] the interstate flow of goods by truck."²¹⁰ The Dormant Commerce Clause likewise imposes a strange sort of standardization over a state's treatment of in-state and out-of-state firms, even when differences between the two types have real consequences. As a result of Dormant Commerce Clause limits, all state laws regulate the juridical status of foreign business organizations in the same way that they regulate in-state organizations. And no state law could do the following without encroaching on Commerce Clause limits:

- Set a lower bar for piercing the corporate veil of a foreign corporation owned and controlled by a single American citizen than for other types of corporations;
- Create a rule rejecting the juridical status of a corporation organized under a foreign government's laws, where the foreign government has created the entity with the express requirement that it not operate within its own territory;²¹¹
- Put the initial burden of proof on a foreign corporation (but not an in-state one) to prove that it is a separate legal entity with limited liability under the laws of the foreign government that chartered it;
- Eliminate the fraud requirement in a veil-piercing analysis applied to any firm chartered by a foreign

²⁰⁹ *Id.* at 894.

²¹⁰ *Kassel v. Consol. Freightways Corp. of Del.* 450 U.S. 662, 671 (1981); *see also* *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 530 (1959).

²¹¹ Such a rule might also encroach on the dormant foreign relations power. *See* *Zschemig v. Miller*, 389 U.S. 429, 440–41 (1968); *supra* Part IV.C.

government that does not require fraud in its own veil-piercing standard.

The merits of any of these rules are debatable. The point is that by prohibiting states from “discriminating” against out-of-state firms, the Dormant Commerce Clause discourages states from experimenting with veil-piercing laws that may better address developments in corporate law around the world.

There is a real question as to whether Commerce Clause constraints have contributed to stagnant veil-piercing law. Veil-piercing doctrines have been criticized for years by courts and commentators, but have undergone virtually no changes. One improvement that states might make, for example, would be to develop different veil-piercing standards for widely-held, closely-held, and one-person corporations, as a number of foreign nations now do. Some legal scholars have proposed liability for controlling shareholders,²¹² and others for all shareholders of closely-held corporations.²¹³ Many courts and commentators would no doubt support the revision of veil-piercing standards along any of these lines, but such revisions would treat some out-of-state firms differently from in-state firms, and put a state’s laws “out of step” with the laws of neighboring states, making the laws vulnerable to a Commerce Clause challenge.

In contrast to the stagnant approach of the American states, foreign nations that have written twenty-first century veil-piercing laws have not taken a one-size-fits-all approach. For example, China’s 2006 revisions to its Company Law provides a veil-piercing standard for one-person corporations that is much easier to satisfy than the standard applicable to other types of

²¹² See, e.g., George W. Dent, Jr., *Limited Liability in Environmental Law*, 26 WAKE FOREST L. REV. 151, 151 (1991) (arguing for controlling-person shareholder liability in cases brought under CERCLA); Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1203 (2002) (arguing that shareholders with a capacity to control corporate activity should be fully responsible for corporate torts and statutory violations).

²¹³ See, e.g., Paul Halpern, Michael Trebilcock, & Stuart Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L. J. 117, 148 (1980) (arguing for unlimited liability for small, closely-held corporations); Note, *Should Shareholders Be Personally Liable for the Torts of Their Corporations?*, 76 YALE L.J. 1190, 1196 (1967) (arguing for unlimited liability for closely-held corporations). *But see* David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1569 (1991) (finding that “in some circumstances limited liability may be more justified in closely held firms than in widely held firms”).

companies.²¹⁴ Yet, because entity law is state law, and the Dormant Commerce Clause limits how the states can regulate the legal personhood of out-of-state firms, there is little chance that any state will change its law, or that the new law would survive a constitutional challenge if one did. In the meantime, paradoxically, Chinese one-person firms enjoy greater veil-piercing protections in American courts than they would enjoy in

Chinese courts because, as Part III above showed, American courts are unlikely to apply Chinese veil-piercing laws to Chinese firms.

All of this suggests that the limits on the ability of the states to regulate the foreign corporate form are significant. They are limited by their local interests, of course; state veil-piercing law developed to apply to in-state firms and to balance the interests of in-state actors. But they are also limited by the Dormant Commerce Clause to treat in-state and out-of-state firms similarly, and to keep their laws similar to the laws of other states, so as not to “burden” interstate or foreign commerce. These limits should cause us to ask whether national governmental interests require greater power and flexibility in adapting entity laws to the realities of modern global commerce.

The analysis above suggests that the application of the law of an American state is preferable to the application of foreign law in questions concerning the juridical status of foreign corporations. Yet the application of state law creates significant problems. One problem is agency costs for foreign firms that cannot be certain which state’s law will be applied to them. A choice-of-law regime that allows the juridical status of *domestic* firms to be governed by the law of the state of incorporation, but requires American law to govern *foreign* firms’ juridical status, creates a problematic double standard and reduces economic efficiency for foreign firms. Another problem is the inability of state law to distinguish between in-state and out-of-state companies due to Dormant Commerce Clause restraints, and the related concern that state veil-piercing doctrines are likely to be

²¹⁴ Zhonghua Renmin Gongheguo Gongsifa (中华人民共和国公司法) [Company Law of the People’s Republic of China] (promulgated by the Standing Comm. of the 10th Nat’l People’s Cong., Oct. 27, 2005, effective Jan. 1, 2006) 2006 China Law LEXIS 7956, available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=50878.

fashioned with parochial state interests, and certainly local businesses, in mind.

But the application of foreign law presents a more troubling picture. Once we understand that entity law issues implicate third party interests and are outside the internal affairs doctrine, there is no basis to enforce shareholder choice of entity law at the expense of third parties. And the benefits of jurisdictional competition, heralded by advocates of global choice-of-law, are unlikely to develop where the law is applied by federal judges who are insulated from political pressure. There are difficulties in ascertaining veil-piercing standards in some jurisdictions, as well as the problem of translating American veil-piercing concepts to foreign legal systems. Corporate groups and pyramidal ownership arrangements make the application of the foreign chartering nation particularly cumbersome and even prone to abuse. And this leads to a final problem—the possibility that enforcing the veil-piercing law of the jurisdiction of incorporation will prompt a global “race to the bottom” in which nations compete to offer increasingly restrictive veil-piercing laws that favor corporate interests at the expense of everyone else.

As all this suggests, both choices of law available to courts in the current paradigm—the law of a foreign chartering government under *lex incorporationis*, and the law of one of fifty American states, chosen through an approach that balances governmental interests—have significant problems. Neither choice succeeds at providing foreign firms with a fair, predictable, and economically-efficient rule that can be applied with practical ease, and that beneficially regulates intersecting streams of American and foreign commerce. The next Part proposes a choice of law that better optimizes these factors: federal law.

V. THE CASE FOR FEDERAL ENTITY LAW FOR FOREIGN ENTITIES

Part IV above showed that there are significant drawbacks to the current conflicts-of-law paradigm and its choice of state and foreign entity laws. This Part argues that the current paradigm fails to acknowledge the potential applicability—and, in fact, the already-existing role—of *federal* law in regulating the juridical status of foreign business entities. This Part begins by establishing that the federal courts already create and apply

federal, common-law veil-piercing standards in a range of situations. It then argues that a number of bilateral treaties address the juridical status of foreign entities in American courts and thus “federalize” the issue for covered entities. As we shall see, some treaties explicitly contemplate that American judges will pierce the corporate veil of a foreign nation’s entities in specific circumstances. Since treaties are federal law, their interpretation by the federal courts supersedes state law.

This Part then explains how uniform, federal veil-piercing standards for foreign-chartered entities successfully address the problems posed by the current double standard. It argues that the authorization for federal entity law standards for foreign corporations should be understood to arise from three sources. The first is the existence of the bilateral treaties addressing some foreign firms’ juridical status. This does not end the matter, however, because the United States has signed such treaties with only slightly more than a dozen nations.²¹⁵ With other nations—including some, like Bermuda and the Cayman Islands, that are popular jurisdictions for the incorporation of firms that operate in the United States²¹⁶—the authority for federal judge-made entity law is less obvious. Nonetheless, such authority should be understood to arise from the Constitution’s commitment of matters relating to foreign commerce and foreign relations to the federal government: “[T]he United States act[s] through a single government with unified and adequate national power” in matters concerning foreign trade and international relations.²¹⁷ Where questions about the integration of foreign business entities in our legal system arise, they implicate both foreign trade and international relations, and the federal government unquestionably has the power to address them.²¹⁸

The existence of Dormant Commerce Clause limits on the states’ ability to regulate the juridical status of out-of-state firms creates a clear federal governmental interest in this area. Our constitution authorizes federal law, the Supreme Court has held, where the “international nature of the controversy makes it

²¹⁵ See discussion *infra* Part V.B.

²¹⁶ See John D. McKinnon, *Lower-Tax Shores Draw U.S. Firms*, WALL ST. J. (June 24, 2011), <http://online.wsj.com/article/SB10001424052702304906004576367451807842440.html>.

²¹⁷ *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434, 448 (1979) (quoting *Bd. of Trs. v. United States*, 289 U.S. 48, 59 (1933)).

²¹⁸ See discussion *infra* Part V.C.

inappropriate for state law to control.”²¹⁹ The states are not free to craft any sort of entity law applicable to foreign companies; rather, they are prohibited from “discriminating against” out-of-state companies.²²⁰ The mere fact of such a limit threatens the federal interest in flexible, twenty-first-century entity laws governing the interface of foreign entities with American commerce. The Constitution should not be read to allow state law to govern a matter with a strong foreign relations dimension if the exercise of state law cuts off a whole range of lawmaking options.

This Part engages the debate among courts and commentators over the legitimacy of federal common law and argues that veil-piercing standards for foreign entities are an example of valid federal judge-made law. It points out that there are already many areas of federal judge-made law, and veil-piercing standards for foreign entities fit comfortably in the existing paradigm. Certainly they are within the domain of intersecting foreign relations and foreign commerce interests, an area in which the courts have occasionally asserted lawmaking powers. Veil-piercing standards are historically judge-made and fundamentally equitable, calling upon the unique skills of judges to resolve fact-intensive disputes on a case-by-case basis according to subjective notions of fairness.²²¹ They relate to specific judicial functions, such as the power to determine who the proper parties are in a dispute. It would be virtually impossible for a legislature to craft a statute with sufficient detail to address all relevant factors, and any such statute would require frequent revision and amendment. Thus, federal judges are in the best position to craft effective entity law standards attuned to national governmental interests.

²¹⁹ *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981); accord *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 27 (2004) (“[W]hen state interests cannot be accommodated without defeating a federal interest . . . then federal substantive law should govern.”).

²²⁰ See discussion *supra* Part IV.C.2.

²²¹ See discussion *infra* Part V.C.2.

A. *Current Federal Common-Law Veil-Piercing Standards*

In our federal system, corporate law is state law.²²² The Supreme Court has repeatedly held that corporate law is uniquely the province of the states: It is “an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.”²²³ Since *Anderson v. Abbott* was decided in 1944, however, controversy has brewed over the authority of the federal courts to develop federal veil-piercing standards in connection with federal statutes. In *Anderson*, the Supreme Court pierced the veil of a Delaware corporation on the basis of federal law, holding that “no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat” federal policy.²²⁴ Since *Anderson*, many federal courts have articulated veil-piercing standards in connection with various federal statutes. In 1982, an influential note in the *Harvard Law Review* described “chaos” in the choice-of-law regime for veil piercing in connection with federal statutes, and that chaos largely remains.²²⁵

Federal common-law veil-piercing standards exist in connection with the following statutes: the Packers and Stockyards Act,²²⁶ the Sherman Act,²²⁷ the Trading With the Enemy Act,²²⁸ the Foreign Sovereign Immunities Act of 1976

²²² Although in “certain areas” federal legislation authorizes the federal courts to fashion a complete body of federal law, corporate law “is not such an area.” *Burks v. Lasker*, 441 U.S. 471, 477 (1979); *cf.* *Price v. Gurney*, 324 U.S. 100, 107 (1945).

²²³ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987).

²²⁴ *See Anderson v. Abbott*, 321 U.S. 349, 365 (1944) (“[N]o State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced.”); *see also Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) (“When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.”).

²²⁵ *See Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 859 (1982).

²²⁶ *See* 7 U.S.C. § 209 (2006).

²²⁷ *See* 15 U.S.C. § 1 (2006); *Nat'l Soc'y of Profl Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

²²⁸ *See, e.g., Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156, 159. (1952); *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 486 (1947).

(“FSIA”),²²⁹ and federal labor laws, including ERISA,²³⁰ the Worker Adjustment and Retraining Notification Act of 1988,²³¹ COBRA²³², and the Railway Labor Act.²³³ In addition, courts have applied federal veil-piercing standards to determine whether to impose on shareholders liability for monetary claims and civil fines under Medicare²³⁴ and the Safe Drinking Water Act.²³⁵ In 1998, the Supreme Court noted, but did not resolve, “significant disagreement” among courts and commentators about whether a federal common-law veil-piercing standard should be applied in cases brought under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”).²³⁶ The Supreme Court has never repudiated the authority of the federal courts to articulate federal, common-law veil-piercing standards in service to federal legislation,²³⁷ and, thus, where there is federal law, there exists a potential delegation of entity-lawmaking authority to the federal courts.

The Supreme Court has required only the finest thread of connection between federal law and judge-made entity law. In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, the Supreme Court was asked to determine whether the plaintiff, an American bank, could set off the value of assets seized from it by the Cuban Government against a claim by a

²²⁹ See 28 U.S.C. § 1603(a)–(b) (2006).

²³⁰ See, e.g., *Sigmon v. Recovery Equity Investors, L.P. (In re Shelby Yarn Co.)*, 306 B.R. 523, 537 (W.D.N.C. 2004).

²³¹ See, e.g., *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 495–96 (3d Cir. 2001); *Sigmon*, 306 B.R. at 537.

²³² See, e.g., *Mandeville v. Quinstar Corp.*, 109 F. App'x. 191 (10th Cir. 2004); *Shuck v. Wichita Hockey, Inc.*, 356 F. Supp. 2d 1191, 1194 (D. Kan. 2005) (applying a federal standard to determine whether to pierce the corporate veil for a claim of COBRA liability); *Sigmon*, 306 B.R. at 537.

²³³ See *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (1st Cir. 2000).

²³⁴ See *United States v. Bridle Path Enters., Inc.*, No. Civ.A 99-11051-GAO, 2001 WL 1688911, at *2–3 (D. Mass. Dec. 4, 2001) (applying a federal standard to determine whether to pierce the corporate veil to satisfy a monetary claim under Medicare).

²³⁵ See *United States v. Dakota Wings Corp.*, No. 04-4002-KES, 2005 WL 2218881, at *2 (D.S.D. Sept. 12, 2005).

²³⁶ See *United States v. Bestfoods*, 524 U.S. 51, 63 n.9 (1998).

²³⁷ On the contrary, the Supreme Court has said that the presumption in favor of separate corporate identity ends when treating the corporate entity as a separate legal “person” will do “violence to the [federal] legislative purpose.” *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

Cuban bank on a letter of credit.²³⁸ The Cuban bank was wholly-owned by the Cuban Government,²³⁹ but it was a separate juridical entity under Cuban law.²⁴⁰ In determining whether the set-off was proper, the Supreme Court was required to determine the contours of Bancec's juridical existence; if Bancec was a legal entity separate from its owner, there could be no set-off. At its essence, *Bancec* was a traditional veil-piercing case.

The defendant, Bancec, argued that the law of Cuba, the chartering state, governed its juridical status.²⁴¹ The Supreme Court declined to apply Cuban law, noting that Bancec's legal status, which involved "the rights of third parties external to the corporation," did not fall within the scope of the internal affairs doctrine.²⁴²

The Court was thus left to decide the case under international law, as Bancec urged in the alternative, or under federal common law, which the plaintiff argued was controlling.²⁴³ The Court attempted to side-step the choice-of-law issue, writing that "the principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies."²⁴⁴ Later in its opinion, the Court identified the Foreign Sovereign Immunities Act²⁴⁵ as the source of the "articulated congressional policies," although the Act, which is purely jurisdictional, was irrelevant to the substance of the case.²⁴⁶

The Supreme Court resolved the dispute by creating a new veil-piercing standard: The presumption in favor of the foreign bank's separate legal status could be "overcome" where adhering

²³⁸ 462 U.S. 611, 613 (1983). An earlier case involving the same named parties: *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

²³⁹ There was disagreement between the district court and the court of appeals about Bancec's status as a wholly-owned instrumentality of the Cuban Government, but the Supreme Court found that the Cuban Government supplied all of Bancec's capital, owned all of its stock, and received all of its profits. *See id.* at 613-14.

²⁴⁰ *Id.* at 613.

²⁴¹ *Id.* at 621-22.

²⁴² *Id.* at 621. *See supra* Part II(A)(1) regarding the Internal Affairs Doctrine and veil-piercing.

²⁴³ 462 U.S. at 622.

²⁴⁴ *Id.* at 623.

²⁴⁵ 28 U.S.C. §§ 1602-11.

²⁴⁶ *Id.* at 627.

“blindly” to the corporate form would cause an “injustice.”²⁴⁷ In devising this rule, the Court cited with approval several post-*Erie* precedents that applied “the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.”²⁴⁸ *Bancec* thus expanded the federal common law to include equitable veil-piercing law, at least in questions involving a foreign business entity wholly-owned by a foreign government.

The Supreme Court’s constitutional authority to make this federal common law has not been challenged by legal scholars, nor repudiated by Congress.

Bancec is particularly noteworthy because of the strained connection between the federal statute that served to authorize federal common law—the Foreign Sovereign Immunities Act—and the substance of the federal common law that was made—an equitable veil-piercing standard. The Foreign Sovereign Immunities Act is a jurisdictional statute. It does not address any substantive law issue, and in *Bancec* it was actually irrelevant to the outcome of the case.²⁴⁹ Yet the Court took the position that the defendant’s qualification for a special, but irrelevant, jurisdictional status under the Foreign Sovereign Immunities Act authorized federal common law that addressed the substance of the case.²⁵⁰ By analogy, then, the Supreme Court might just as easily conclude that 28 U.S.C. § 1332(c)(1), which states that a corporation is a citizen of the U.S. state in which it has its “principal place of business,” authorizes federal common law veil piercing in a legal dispute involving a foreign corporation to which this jurisdictional rule applies; that is, one with a principal place of business inside the United States.

In fact, in the years since *Bancec* was decided in 1983, the Supreme Court has clarified that a foreign government need not

²⁴⁷ *Id.* at 628, 632.

²⁴⁸ *See id.* at 628–30 (quoting *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939)).

²⁴⁹ The Supreme Court acknowledged as much in its opinion, noting that “[t]he language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state.” *Id.* at 620.

²⁵⁰ *See id.* at 627–32.

own *all* of a foreign entity's shares for the foreign entity to qualify as an "instrumentality of a foreign government" under the Foreign Sovereign Immunities Act.²⁵¹ In practice, the federal courts now apply the "articulated congressional policies" of the FSIA to entities with less than a majority of direct foreign government ownership.²⁵² Thus, logically, the *Bancec* veil-piercing standard would apply today to foreign entities with partial, or indirect, foreign government ownership.²⁵³ There are radically different principles at stake in granting an entity sovereign immunity in our courts—cutting off liability completely—versus piercing the entity's corporate veil, and thereby shifting liability, and therefore no reason to believe that the contours of the two doctrines should be coterminous, or that Congress intended the two doctrines to be coterminous. In other words, today, the federal common law veil-piercing standard articulated in *Bancec* could be applied to a foreign entity with a small or attenuated foreign government ownership interest while remaining true to the congressional policies, as well as to the foreign relations and foreign commerce interests, that animated the *Bancec* decision.

The current existence of federal common law veil-piercing standards is significant for two reasons. First, it shows that the federal courts are frequently challenged by cases that require equitable veil-piercing analysis, where the source of the veil-piercing law is not clear. In these cases, the court's obligation to decide the dispute is in tension with its responsibility to avoid

²⁵¹ See *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003).

²⁵² See, e.g., *Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008) (FSIA instrumentality status satisfied by an entity *indirectly* owned by the Canadian government); *United Arab Shipping Co. v. Eagle Sys., Inc.*, No. CV408-067, 2008 WL 4087121 (S.D. Ga. Sept. 2, 2008) (FSIA instrumentality status satisfied by an entity with pooled ownership interests of Saudi Arabia, Kuwait, Qatar, United Arab Emirates, and Iraq).

²⁵³ This Article does not imply that *Bancec* identified FSIA "instrumentality" status as a prerequisite for the federal common law veil-piercing standard to apply. It did not. It thus remains an open question whether the Supreme Court would apply a federal common law veil-piercing standard to a foreign entity with foreign government ownership that fell short of the FSIA standard. Given the Supreme Court's established reluctance to apply the foreign jurisdiction's law, and the inappropriateness of applying parochial state law, it is likely that the Supreme Court would apply the federal common law veil-piercing standard articulated in *Bancec* to an entity indirectly owned by a foreign government, or one with a small but controlling interest of a foreign government.

“transcendental” standards.²⁵⁴ The fact that federal courts have often resolved these tensions by creating federal veil-piercing standards—at a time when federal common law has been condemned by judicial and academic criticism—proves that federal common law veil piercing standards are both necessary and appropriate sometimes, and perhaps uniquely so. Second, the weak delegation “hook” in many instances of federal common law veil-piercing shows that a strong delegation is not necessary. These precedents suggest that if equitable veil-piercing principles can be harmonized with “articulated Congressional policies” in substantively unrelated laws, federal veil-piercing rules are proper.

B. The Treaties that Govern the Juridical Status of Foreign Firms

Many foreign entity law issues are framed by federal law: bilateral treaties that address the juridical status of corporations chartered by specific nations. These treaties typically command the courts to recognize foreign corporations as litigants—even as parties with limited liability—and some contemplate a more significant role for the federal courts in policing the foreign corporate form by, for example, rejecting separate juridical status for a corporation whose charter is contrary to American public policy. Treaties, of course, are federal law, and these entity law provisions supersede state entity laws as applied to corporations chartered by the relevant treaty partners.²⁵⁵

The United States is party to more than a dozen bilateral treaties²⁵⁶ that contain language to the effect that companies “constituted under the applicable laws and regulations” of the treaty partner “shall have their juridical status recognized” within the United States.²⁵⁷ Nations with which the United

²⁵⁴ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938). Ironically, the governing principles identified by the Supreme Court in *Bancec*, “common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies,” sound a lot like “transcendental” law.

²⁵⁵ *See Burks v. Lasker*, 441 U.S. 471, 477 (1979) (“Legal rules which impact significantly upon the effectuation of federal rights must . . . be treated as raising federal questions.”).

²⁵⁶ *See infra* notes 257–70 and accompanying text.

²⁵⁷ *See, e.g.*, Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. III ¶ 1, Aug. 15, 1955, 8 U.S.T. 899.

States has signed such treaties include Belgium,²⁵⁸ Denmark,²⁵⁹ France,²⁶⁰ Japan,²⁶¹ Korea,²⁶² Luxembourg,²⁶³ the Netherlands,²⁶⁴ Nicaragua,²⁶⁵ Oman,²⁶⁶ Pakistan,²⁶⁷ Thailand,²⁶⁸ Togo,²⁶⁹ and Vietnam.²⁷⁰ Most of these treaties include provisions that require each nation to recognize the juridical status of the other country's companies "whether or not with limited liability," and provide that such entities will have access to "courts of justice and administrative tribunals" in each nation "in all degrees of jurisdiction."²⁷¹ None of the treaties selects a choice-of-law approach for issues relating to the internal affairs or juridical status of covered companies.

Thus, the treaties direct the federal courts to open their doors to companies that are created by specific foreign sovereigns and acknowledge that some of the companies may possess limited liability. But they provide incomplete or ambiguous direction to the courts about what standards to apply. They do not guide the courts in enforcing the companies' limited liability, other than to specify that the entities' access to American courts "shall be allowed upon terms no less favorable than those applicable to nationals and companies of [the United States] or of any third

²⁵⁸ Treaty of Friendship, Establishment and Navigation, U.S.-Belg., Feb. 21, 1961, 14 U.S.T. 1284 [hereinafter U.S.-Belgian Treaty].

²⁵⁹ Treaty of Friendship, Commerce and Navigation, U.S.-Den., Oct. 1, 1951, 12 U.S.T. 908.

²⁶⁰ Convention of Establishment, U.S.-Fr., Nov. 25, 1959, 11 U.S.T. 2398.

²⁶¹ Treaty of Friendship, Commerce and Navigation, U.S.-Japan, Apr. 2, 1953, 4 U.S.T. 2063.

²⁶² Treaty of Friendship, Commerce and Navigation, U.S.-Korea, Nov. 28, 1956, 8 U.S.T. 2217.

²⁶³ Treaty of Friendship, Establishment and Navigation, U.S.-Lux., Feb. 23, 1962, 14 U.S.T. 251 [hereinafter U.S.-Luxembourg Treaty].

²⁶⁴ Treaty of Friendship, Commerce and Navigation, U.S.-Neth., Mar. 27, 1956, 8 U.S.T. 2043.

²⁶⁵ Treaty of Friendship, Commerce and Navigation, U.S.-Nicar., Jan. 21, 1956, 9 U.S.T. 449.

²⁶⁶ Treaty of Amity, Economic Relations and Consular Rights, U.S.-Muscat & Oman and Dependencies, Dec. 20, 1958, 11 U.S.T. 1835.

²⁶⁷ Treaty of Friendship and Commerce, U.S.-Pak., Nov. 12, 1959, 12 U.S.T. 110.

²⁶⁸ Treaty of Amity and Economic Relations, U.S.-Thai., May 29, 1966, 19 U.S.T. 5843 [hereinafter U.S.-Thailand Treaty].

²⁶⁹ Treaty of Amity and Economic Relations, U.S.-Togo, Feb. 8, 1966, 18 U.S.T. 1.

²⁷⁰ Treaty of Amity and Economic Relations, U.S.-Viet., April 3, 1961, 12 U.S.T. 1703.

²⁷¹ See, e.g., U.S.-Belgian Treaty, *supra* note 258, 14 U.S.T. at 1288, 1306.

country,²⁷² and to prohibit each nation from discriminating against the rights and interests of companies of the other nation.²⁷³

The treaties typically specify that courts should recognize companies' juridical status provided that "nothing in their charter or corporate purposes is contrary to the public policy of such other Party."²⁷⁴ A 1932 treaty signed with Norway specifies that:

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws.²⁷⁵

²⁷² See, e.g., U.S.-Thailand Treaty, *supra* note 268, 19 U.S.T. at 5846 ("Nationals and companies of either Party shall have free access to courts of justice and administrative agencies within the territories of the other Party, in all degrees of jurisdiction, both in the defense and in the pursuit of their rights. Such access shall be allowed upon terms no less favorable than those applicable to nationals and companies of such other Party or of any third country, including the terms applicable to requirements for deposit of security. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication.")

²⁷³ See, e.g., U.S.-Belgian Treaty, *supra* note 258, 14 U.S.T. at 1291 ("Neither party shall take unreasonable or discriminatory measures that would impair the acquired rights and interests within its territories of nationals and companies of the other Party in the enterprises which they have established . . .").

²⁷⁴ U.S.-Belgian Treaty, *supra* note 258, 14 U.S.T. at 1293.

²⁷⁵ Treaty of Friendship, Commerce, and Consular Rights and Exchange of Notes Concerning the Tariff Treatment of Norwegian Sardines, U.S.-Nor., art. XII, Feb. 25, 1929, 47 Stat. 2135 [hereinafter U.S.-Nor. Treaty]. A treaty with Liberia, signed several years later, contains the same essential language. See Treaty of Friendship, Commerce and Navigation, U.S.-Liber., art. XVII, Aug. 8, 1938, 54 Stat. 1739, T.S. No. 956.

Such provisions are important because, by necessity, they contemplate that the courts will assess a foreign corporation's charter provisions, corporate purposes, or operations to determine if they are contrary to American public policy or law. In fact, as written, these treaties would require a court to disregard the corporate form of an entity that contravened American public policy—or, in the case of Norway, American law.²⁷⁶ In other words, these treaties contemplate an active role for the courts in policing the corporate form of foreign entities and command the disregard of their corporate form in certain situations. They federalize the juridical status of covered companies, and thus render the disregard of that juridical status a matter of federal law.

Some of the treaties also allow each nation to deny the advantages of the treaty to companies directly or indirectly controlled by nationals of any third country, an act that would require the disregard of the corporate form of the foreign corporation to accomplish.²⁷⁷ Thus, a federal agency could conclude that a Thai corporation was indirectly controlled by nationals of a hostile nation and deny the Thai corporation the benefits of the Thailand-United States Treaty. If the Thai corporation sued to enforce the Treaty, the federal court would have to identify a control standard and apply it by disregarding the corporate veil of the Thai corporation to evaluate the nature of its ownership. This, again, authorizes federal, judge-made veil-piercing standards.

The current choice-of-entity-law regime violates the provisions in these treaties that require foreign corporations' access to American courts on terms "no less favorable" than those applicable to American or other foreign corporations, as well as the provisions that prohibit each nation from discriminating against the rights and interests of companies of the other

²⁷⁶ U.S.-Nor. Treaty, *supra* note 275, 47 Stat. at art. XII.

²⁷⁷ *See, e.g.*, U.S.-Thailand Treaty, *supra* note 268, 19 U.S.T. at 5857-58. Article XII of the treaty also addresses juridical personhood:

The present Treaty shall not preclude the application of measures . . . (f) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts of justice and to administrative tribunals and agencies.

Id.

nation.²⁷⁸ A state's veil-piercing standard may over- or undervalue factors that are prevalent or absent in the corporate law practices of a particular nation, thereby effectively discriminating against corporations on the basis of their national origin. And the lack of a unified approach serves to favor domestic corporations over foreign ones because domestic firms will be subject only to the entity law of a single jurisdiction, the one in which they were incorporated, while foreign firms are potentially subject to the laws of all fifty states. Thus, in a broad sense, the double standard of the choice-of-law regime itself is discriminatory. The federal government has an interest in changing the regime to comply with our treaty obligations and to facilitate international commerce.

C. Constitutional Considerations

There exists a significant debate in the legal academy about the authority of the federal courts to make common law.²⁷⁹ A number of scholars and judges take the view that federal judges have a very narrow power to craft common law, and thus most forms of federal common law are illegitimate.²⁸⁰ Yet federal common law continues to exist and develop, particularly in certain areas, and the Supreme Court has been careful to preserve its common-law-making ability.²⁸¹

²⁷⁸ See, e.g., U.S.-Luxembourg Treaty, *supra* note 263, 14 U.S.T. at 261 (“National treatment accorded under the provisions of the present Treaty to companies of the Grand Duchy of Luxembourg shall, in any State or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States and possessions of the United States of America.”)

²⁷⁹ See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1248–51 (1996); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 740–41 (2010); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805–06 (1989); Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1640–41 (2008).

²⁸⁰ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 740–43 (2004) (Scalia, J., concurring); Clark, *supra* note 279; Weinberg, *supra* note 279, at 806.

²⁸¹ See *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23, 27–28 (2004) (creating “decisional law for the interpretation of maritime contracts”); *Sosa*, 542 U.S. at 729–30 (concluding that the “door is still ajar” to “further independent judicial recognition of actionable international norms”); Monaghan, *supra* note 279, at 759–60 (“[F]ar more federal common law exists than the currently restrictive theories can account for . . .”).

The question of whether federal courts should craft common-law veil-piercing standards for foreign entities directly implicates this debate. Assuming that the commercial treaties described above constitute a delegation of substantive lawmaking power to the federal courts, where is the delegation of lawmaking power to be found for firms created by governments that have *not* signed such treaties with the United States? This Section argues that the delegation derives from constitutional sources, including the constitution's commitment of matters relating to foreign commerce and foreign relations to the federal government, and from certain structural imperatives, including the important need to preserve and consolidate national lawmaking power where state law would be limited, weak, or compromised in ways that federal law would not. In short, when all the interests are weighed, this is a context in which federal judge-made law is constitutionally authorized.

1. Uniformity, Economic Efficiency, and the Foreign Commerce Power

"Foreign commerce is pre-eminently a matter of national concern."²⁸² The Commerce Clause gives to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"²⁸³ and the Supreme Court has suggested that "a more extensive constitutional inquiry is required" under the foreign commerce power than under the interstate commerce power to prevent state encroachment.²⁸⁴ The regulation of business organizations is today one of the most powerful tools for regulating commerce, since most commerce involves the participation of at least one business organization. Thus, issues concerning the juridical status of foreign corporations and other commercial entities are significant matters of foreign commerce that go to the heart of these entities' ability to make contracts, own property, and enforce contractual, property, and other rights in court. In a

²⁸² *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434, 448 (1979); *cf. Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851) (matters that "are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress").

²⁸³ U.S. CONST. art. I, § 8, cl. 3.

²⁸⁴ *Japan Line*, 441 U.S. at 446.

sense, the law that defines foreign entities' juridical status defines foreign commerce itself.

Although the Commerce Clause gives Congress the power to regulate foreign commerce, it, like the foreign relations power, has been held to possess a dormant power that displaces state law. In *Japan Line, Ltd. v. County of Los Angeles*,²⁸⁵ the Supreme Court established the dormant foreign Commerce Clause power when it invalidated a California state tax that applied to shipping companies incorporated under the laws of Japan, citing the long-standing doctrine that, in matters of foreign commerce, constitutional design required "the people of the United States [to] act through a single government with unified and adequate national power."²⁸⁶ The adequacy of the national power—the adequacy of the power of the federal judiciary—is assumed to exist in such matters by constitutional design.

Japan Line emphasized a national interest in uniformity of approach to matters of foreign commerce, and the issue of uniformity has arisen several times in the context of taxation of business entities operating transnationally.²⁸⁷ Tax matters, of course, involve overlapping state and federal interests; a single foreign entity can be taxed by both a state and the federal government.²⁸⁸ With issues of corporate form, however, only one government's law can provide the veil-piercing standard in a particular dispute. Moreover, as we have seen, economic efficiency requires the certainty and predictability that is best achieved by a uniform standard. Both the nature of veil piercing itself, as well as the federal interest in promoting economic efficiency, augur in favor of a uniform approach as much as possible. Although the concern for uniformity in matters of international dimension—the so-called "one-voice" test—has been limited by language in subsequent Supreme Court decisions,²⁸⁹

²⁸⁵ 441 U.S. 434 (1979).

²⁸⁶ *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933); *see also Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875) (regulation must be "national in its character" when it concerns "a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected").

²⁸⁷ *See Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 320–23 (1994); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 430–31 (1946).

²⁸⁸ *Barclays Bank*, 512 U.S. at 317–19.

²⁸⁹ *See, e.g., id.* at 320–31 (1994).

entity law presents a particularly strong case for uniformity of approach.

Thus, the application of one state's parochial entity law standard to a foreign firm represents a threat to important federal interests. Congress, of course, can authorize the states to take action that would violate the Dormant Commerce Clause,²⁹⁰ but that is not the case here and, in fact, where Congress has expressly delegated authority to the courts to pierce the corporate veil of foreign entities—as it has in the Foreign Sovereign Immunities Act²⁹¹—it has delegated the authority to the federal courts. If state veil-piercing standards are to apply to foreign entities—in fact, different state standards depending on the circumstances—the Congressional authorization for such a patchwork scheme should be explicit, not implied by that body's silence. *Japan Line* established that in a matter concerning foreign commerce in which Congress has remained silent, the Supreme Court serves as “the final arbiter of the competing demands of state and national interests.”²⁹² That is, in matters of foreign commerce, the federal judiciary possesses the power to displace state law.

2. The Dormant Foreign Relations Power

In 2002, the Supreme Court held that a judicial decision excluding corporations organized under the laws of the British Virgin Islands from the definition of “citizens or subjects of a foreign state” for purposes of diversity jurisdiction “implicate[d] serious issues of foreign relations.”²⁹³ The Court expressed concern that “expulsion” of British Virgin Islands corporations from the United States federal courts “would cloud investment opportunity and raise the sort of threat to ‘the security of the public tranquility’ that the Framers hoped to avoid.”²⁹⁴ The

²⁹⁰ See *Prudential Ins. Co.*, 328 U.S. at 429–36; Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1480–85 (2007) (concluding that Congress's power to authorize such state action “follows from respecting Congress's constitutionally allocated powers as well as from structural differences between Congress and the states”).

²⁹¹ 28 U.S.C. § 1330 (2006).

²⁹² *Japan Line, Ltd. v. Cty. of L.A.*, 441 U.S. 434, 454 (1979) (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)).

²⁹³ *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002).

²⁹⁴ *Id.* at 97.

Supreme Court's view that a foreign corporation's access to the courts of the United States was a matter of foreign relations was certainly correct, and the governments of the United States and the United Kingdom both submitted *amicus curiae* briefs that affirmed it.²⁹⁵ The understanding that the federal courts' role in matters of foreign commerce vitally affects United States foreign affairs was shared by the Framers.²⁹⁶ And the fact that bilateral treaties address the juridical status of foreign corporations, and that some nations have created corporations by treaty, demonstrates that such issues are widely held to be a proper subject for international diplomacy.

Legal scholars agree that our Constitution commits matters that are important to United States foreign relations to the

²⁹⁵ Brief of the Government of The United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner, JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002) (No. 01-651), 2002 WL 257562, at *2-3; Brief for The United States as Amicus Curiae Supporting Petitioner, JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002) (No. 01-651), 2002 WL 316661, at *20, 23.

²⁹⁶ Three events during or immediately following the Revolutionary War convinced the Framers that a federal judiciary was necessary to adjudicate international commercial disputes, which they viewed as vitally important to American foreign affairs and thus properly subject to federal power. The first event was the creation of the nation's first federal court, the Court of Appeals in cases of capture, which adjudicated what were essentially commercial disputes over the disposition of maritime seizures of enemy vessels during the Revolution. See generally HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775-1787* (1977). The second was the Longchamps Affair, in which Congress found that it was unable to control the exercise of jurisdiction of the Pennsylvania courts in a diplomatic crisis that involved an assault on a French commercial minister. The Longchamps Affair also forced Congress to confront its inability to influence state court interpretations of the law of nations, a politically unpopular body of international law that governed diplomatic and commercial relations between nations. The Longchamps Affair and its significance are ably documented in two articles by G.S. Rowe and Alexander W. Knott. G.S. Rowe & Alexander W. Knott, *Power, Justice, and Foreign Relations in the Confederation Period: The Marbois-Longchamps Affair, 1784-1786*, 104 PENN. MAG. OF HIST. & BIOGRAPHY 275 (1980); G.S. Rowe & Alexander W. Knott, *The Longchamps Affair (1784-86), the Law of Nations, and the Shaping of Early American Foreign Policy*, 10 DIPLOMATIC HIST. 199, 214 (1986) ("Congressmen were extremely sensitive to their impotence in foreign affairs and their inability to persuade the thirteen states to follow their lead."). The third was Congress's failure to persuade state legislatures and courts to enforce provisions of the Jay Treaty that were intended to facilitate the recovery of American debts by British creditors. See Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1461.

federal government.²⁹⁷ Naturally, not all matters that infringe on foreign relations must be governed by federal law; a state may tax a foreign corporation, for example, or fine it for a violation of state law.²⁹⁸ But a “dormant” foreign relations power operates to prevent the states from infringing on the federal government’s key role in foreign affairs. Two cases, *Banco Nacional de Cuba v. Sabbatino*²⁹⁹ and *Zschernig v. Miller*,³⁰⁰ form the basis of the dormant foreign affairs doctrine.

In *Sabbatino*, the Supreme Court adopted the act of state doctrine as federal common law and applied it as the basis to decline to review the validity of an act of the Cuban government under customary international law.³⁰¹ The act of state doctrine, which originated in English law and was endorsed in American Supreme Court jurisprudence prior to *Erie*, had no source in the Constitution or an act of Congress.³⁰² *Sabbatino* had arisen under diversity jurisdiction, and thus the Court was obliged, under *Erie*, to apply state law.³⁰³ The Court expressly noted that the outcome under New York and federal law regarding the act of state doctrine was essentially the same.³⁰⁴ Nonetheless, the Court proceeded to hold that “an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”³⁰⁵ The Court then elaborated the federal common law act of state doctrine by

²⁹⁷ See, e.g., Drew Tedford, *Silent No More: The Logan Act as a Constitutionally Enforceable Tool in Foreign Policy*, 33 HOUS. J. INT’L L. 733, 738 (2010) (“[I]t is generally accepted that the Constitution does confer exclusive power over foreign affairs to the federal government rather than individuals or states.”).

²⁹⁸ See, e.g., *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 330–31 (1994) (holding that California’s method of calculating taxes on foreign corporations does not violate Due Process or Commerce Clauses).

²⁹⁹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

³⁰⁰ *Zschernig v. Miller*, 389 U.S. 429 (1968).

³⁰¹ *Sabbatino*, 376 U.S. at 426.

³⁰² *Id.* at 416, 423.

³⁰³ *Id.* at 424–25.

³⁰⁴ *Id.* at 425.

³⁰⁵ *Id.* In a footnote, the Court added, “[a]t least this is true when the Court limits the scope of judicial inquiry.” *Id.* at 425 n.23. The Court further explained, “[W]e need not now consider whether a state court might, in certain circumstances, adhere to a more restrictive view concerning the scope of examination of foreign acts than that required by this Court.” *Id.*

explaining that no exception to the act of state doctrine existed for acts of state that violated international law.³⁰⁶

The *Sabbatino* Court found constitutional and statutory law in “indirect” support of its holding that the act of state doctrine was a matter of federal common law.³⁰⁷ The thrust of these laws, the Court wrote, reflected “a concern for uniformity in this country’s dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions.”³⁰⁸ The Supreme Court identified itself as the federal institution with the power to supervise the country’s judicial dealings with foreign nations and, thus, the proper source of the doctrine.³⁰⁹

In *Zschernig*, the Supreme Court invalidated an Oregon statute that had denied inheritance to the East German heirs of an Oregon resident.³¹⁰ The statute placed the burden on the heirs to establish that East Germany provided reciprocal inheritance rights to United States citizens, and that the East German government would not confiscate the inheritance.³¹¹ The United States government submitted an *amicus curiae* brief in the case contending that the Oregon statute did not “unduly interfere” with the conduct of U.S. foreign relations, but the Court nonetheless held that the statutory provision was “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”³¹²

Legal scholars have been quick to eulogize the *Zschernig* doctrine.³¹³ Yet even a restrictive reading of *Sabbatino* and *Zschernig* supports the displacement of a state, judge-made standard by a federal, judge-made standard in an area of law—

³⁰⁶ *Id.* at 430–31.

³⁰⁷ *Id.* at 427 n.25. The Court cited U.S. CONST., art. I, § 8, cls. 3, 10; U.S. CONST. art. II, §§ 2, 3; U.S. CONST. art. III, § 2; 28 U.S.C. §§ 1251(a)(2), (b)(1), (b)(3), 1332(a)(2), 1333, 1350, 1351.

³⁰⁸ *Sabbatino*, 376 U.S. at 427 n.25.

³⁰⁹ *Id.* at 427–28.

³¹⁰ *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968).

³¹¹ *Id.* at 430–31.

³¹² *Id.* at 432, 434.

³¹³ *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 865 (1997).

like veil piercing—that, by long tradition, is exclusively judge-made, and that impacts our relationships with virtually every nation on the globe. The question is not whether federal, judge-made entity law standards can properly supersede laws crafted by state legislatures through democratic processes, but whether national judge-made standards are more likely than state judge-made standards to strike a balance in our national interest. The answer must be that they are.

The shadow of the dormant foreign relations power is particularly strong where, as here, the imposition of any state law serves to tie the hands of federal institutions and to limit the power of the federal government to craft laws that serve our national interests. The states, as we have seen, are prohibited by the Dormant Commerce Clause from discriminating against out-of-state business entities operating in interstate or foreign commerce. In a choice-of-law regime in which state entity law governs, all foreign entities are equal, and foreign and domestic entities are equal. Thus the President has nothing to bargain when the United States negotiates commercial treaty provisions on the subject with foreign nations; the Dormant Commerce Clause has secured for all foreign entities—including, presumably, those chartered by nations with whom we have hostile relations—and without any meaningful democratic debate, the most-favored-nation status that is reflected in the bilateral commercial treaties discussed in Section B above.

One can easily imagine circumstances in which the national interest might be served by treating the juridical status of American firms differently from the juridical status of some kinds of entities chartered abroad. One example, involving a specific type of corporation chartered by Bermuda, has arisen already.³¹⁴ Bermuda, like several Caribbean nations, charters a category of “exempt” business corporations that are expressly prohibited from conducting business with the nation’s own residents and corporations.³¹⁵ In two cases involving veil-piercing

³¹⁴ In addition to the example in the text, two other ideas come easily to mind. First, one-person corporations chartered abroad by American citizens might be treated differently, particularly if they operate exclusively in the United States. Second, it might make sense to create different veil-piercing standards for widely-held, closely-held, and one-person corporations organized under the laws of nations that distinguish among these categories.

³¹⁵ See, e.g., *Bermuda Offshore Company Information*, OCRAWORLDWIDE, <http://www.ocra.com/jurisdictions/bermuda.asp> (last visited Jan. 24, 2012).

claims against Bermuda “exempt” corporations, federal courts in the Eastern District of Pennsylvania have held that this prohibition affects the veil-piercing choice-of-law inquiry. One district court, applying New York choice-of-law, held that a Bermuda entity’s status as an “exempt” corporation “greatly diminished” Bermuda’s interest in governing the veil-piercing analysis, and factored this into its decision to apply New York veil-piercing law to the Bermuda company.³¹⁶ An earlier case came to a similar conclusion and applied Pennsylvania law.³¹⁷

Yet it is clear that the American interests at stake in these cases are national interests, not merely the interests of Pennsylvania, and that the interference of Pennsylvanian institutions in such matters threatens national interests.³¹⁸ The fact that federal courts were forced to balance national interests by invoking state law further underscores how convoluted the veil-piercing choice-of-law regime for foreign entities has become. If Bermudan corporate law is to be singled out for disfavored treatment by American courts—perhaps with good reason—the decision should be made by national governmental institutions, not by the courts of Pennsylvania.

Consolidating the power to fashion entity law standards in the federal judiciary will solve this problem while retaining supervisory power for Congress. Although many legal scholars are avowedly critical of lawmaking by federal judges, veil piercing is an area in which such lawmaking makes sense. Historically and by practical necessity, veil-piercing standards are judge-made. Veil-piercing claims involve fact-intensive disputes that are best resolved by judges on a case-by-case basis, using equitable principles of fairness, and exercising a fundamental judicial power to determine who the proper parties are in a dispute. No American legislature has successfully crafted a statute with sufficient detail to define all the

³¹⁶ *Curiale v. Tiber Holding Corp.*, No. CIV. A. 95-5284, 1997 WL 713950, at *3 (E.D. Pa. Nov. 10, 1997).

³¹⁷ *See Foster v. Berwind Corp.*, No. 90-0857, 1991 WL 21666, at *3 (E.D. Pa. Feb. 13, 1991).

³¹⁸ *Cf. Kernel Records Oy v. Mosley*, No. 09-21597-Civ., 2010 WL 2812565, at *7 (S.D. Fla. July 5, 2010) (“Florida and the United States as a whole have a significant interest in ensuring that international corporations do not engage in fraudulent conduct within our jurisdiction so as to shield themselves from liability.”) In fact, these decisions probably violate the Commerce Clause as well as the dormant foreign relations power under *Zschernig*.

circumstances under which the corporate form should be disregarded. The balance of power over laws integrating foreign

entities into our legal system should be shifted from state legislatures and courts to federal legislatures and courts, with federal courts expanding their current role.

Federal law offers the best solution to the complex choice-of-law problem this Article has explored. The application of uniform entity-law standards to all foreign firms in most circumstances³¹⁹ will end the unfair, economically inefficient approach that now exists, and which possibly violates foreign firms' due process rights and some American treaty obligations. It will obviate practical problems, such as the need to ascertain foreign nations' laws, the unique concerns raised by treaty-chartered entities, and the complex challenges posed by pyramidal ownership arrangements or corporate groups that span numerous foreign jurisdictions. Perhaps most importantly, it will vest lawmaking authority in governmental institutions with a full scope of lawmaking power, and with a constitutional grant of authority over the intersecting domains of foreign commerce and foreign relations. For all these reasons, clear federal interests are at stake in the choice-of-law debate, and the fact that the federal courts already create and apply federal common-law veil-piercing standards strengthens the case for federal common law in this area of law.

Since federal entity law standards for foreign firms would create a break from precedent, however, and would be controversial in the debate over federal common law, Congress could resolve the matter by enacting legislation that grants explicit authority for judge-made veil-piercing standards for foreign companies. Although such legislation is not necessary for the creation of federal common-law veil-piercing standards for foreign firms, it would reflect the benefits of the democratic process and provide clear direction to the federal courts.

³¹⁹ One type of veil-piercing that may not be appropriate for federal common-law standards is jurisdictional veil-piercing where either a state or a federal court must apply state jurisdictional law. Although a full exploration of this issue is not possible here, an argument could be made that each state should have the power to define its own long-arm jurisdiction, within constitutional parameters.

CONCLUSION

This Article has identified a choice-of-law double standard of great significance in our increasingly global economy: American courts apply different choice-of-law rules to domestic and foreign firms when deciding whether to disregard the corporate form.

The existence of the double standard itself is problematic. It suggests that courts are imposing agency costs on foreign firms that are not imposed on domestic firms, thus hindering international commerce. It also suggests that the United States is violating certain bilateral treaties that prohibit discrimination against the rights and interests of covered foreign companies. And it means that the federal government has improperly ceded matters of national importance—matters committed by the constitution to federal institutions—to the states. Importantly, it reveals that courts do not agree about the basic assumptions that underlie veil-piercing choice-of-law, a fact that should lead us to rethink those assumptions.

Courts in all states generally hew to a choice-of-law rule that calls for the application of the law of the chartering jurisdiction to domestic firms. These same courts typically do *not* apply this rule to foreign firms. They either engage in a choice-of-law analysis that balances governmental interests, or they simply acquiesce in the agreement of the parties as to choice of law. In either case, the court typically applies the law of an American state to a company chartered abroad. In only a minority of cases have courts applied the law of the foreign chartering jurisdiction, often to find that the foreign law does not “recognize” American-style, equitable veil-piercing.

This Article has shown that the choice between state and foreign veil-piercing law is a false choice. The correct choice of law is *federal* law. Questions about the juridical status of foreign firms are a matter of federal law because bilateral treaties have “federalized” companies’ juridical statuses, at least for covered nations. And the foreign relations and foreign commerce powers both should be understood to commit questions about the juridical status of foreign firms to the federal government.

The juridical status of foreign business organizations should be governed by uniform federal standards, fashioned by federal judges with national interests in mind. The dormant foreign relations and dormant foreign commerce powers prohibit a patchwork of state laws from controlling matters that are

important to United States foreign relations and foreign commerce, in which uniformity is crucial. The federal government has the greatest interest in governing the juridical status of foreign firms because it is not constrained by the Dormant Commerce Clause to treat in-state and out-of-state entities similarly, as the states are. The lawmaking flexibility of federal institutions must be understood to trump the states' ability to impose laws designed to protect local interests on foreign firms.

The federal courts are the right institution to supervise the juridical status of foreign entities, using the time-honored, case-by-case equitable analysis that veil piercing has always required. Because the Constitution gives subject matter jurisdiction to the federal courts in cases in which there is alienage diversity, the federal courts can expect to adjudicate many disputes involving foreign entities. But as this Article has emphasized, Congress has the ultimate power to control the integration of foreign firms into our system, and it should act to retain the authority of federal institutions, and federal interests, over this important area of law.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.