**How Universal Is the Corporate Form?**

**Reflections on the Dwindling of Corporate Attributes in Brazil**

Mariana Pargendler\*

**Abstract**

The standard history of the business corporation is one of continued success and inevitable expansion to different contexts. This Article seeks to complicate this view by showing how recent legal developments in Brazil have significantly watered down the canonical elements of the corporate form, namely (i) legal personality and capital lock-in, (ii) limited liability, (iii) delegated management, (iv) transferable shares, and (v) investor ownership. It then examines these developments in view of efficiency and distribution considerations. In particular, it explores whether “decorporatization” of enterprise in Brazil may constitute a second-best response to a deficient institutional environment.

**Introduction**

The business corporation is a central institution of modern capitalism. Since its origins several centuries ago, the reported history of the corporate form is one of continued proliferation and diffusion to different contexts, including developing and formally communist economies. Remarkably, the business corporation displays the same core characteristics around the world. These are (i) legal personality, (ii) limited liability, (iii) delegated management, (iv) transferable shares, and (v) investor ownership.[[1]](#footnote-1) These characteristics, in turn, generate three types of agency problems—between managers and shareholders, controlling shareholders and non-controlling shareholders, and shareholders and creditors. Most of corporate law is devoted to mitigating these agency problems.[[2]](#footnote-2)

The booming field of comparative corporate governance has documented significant variation in the contours and effectiveness of the legal mechanisms that different jurisdictions use to mitigate agency problems and protect outside investors.[[3]](#footnote-3) In fact, scholars have suggested that such variation is highly consequential in predicting levels of capital market development and, ultimately, economic growth.[[4]](#footnote-4) Other works have posited that the considerable differences in the protection of investors and workers track fundamental aspects of national history, political economy, and economic structure.[[5]](#footnote-5) A recurring theme of corporate law scholarship in the last decades is the divergence (and, more recently, partial convergence) in the ownership structures of business corporations around the globe, with the traditional view being that only Anglo-Saxon jurisdictions boast significant levels of dispersed ownership, while controlling shareholders remain the norm elsewhere in the world.[[6]](#footnote-6)

These efforts have painted a clear picture: the corporate form itself is universal, but ownership structures and the legal strategies used to protect investors and other constituencies are not. This Article seeks to complicate this understanding. It draws attention to considerable, but largely overlooked, divergences with respect to the scope and strength of the core defining elements of the corporate form in Brazil—the largest emerging economy of the West. This means that, beyond important differences in the content of corporate law and the protection it affords to investors, the existing wedge can be more profound.

The Brazilian version of the business corporation (the *sociedade anônima* or *S.A.*) is, in its current form, not as “corporatized” as conventional understandings would imply. Whereas most analyses focus on the glass half full in asserting the universality of the business corporation,[[7]](#footnote-7) I here explore the view of the glass half empty. Specifically, while the Brazilian S.A. formally presents the five canonical elements of the business corporation described above, all of them take a much watered-down form, with potentially significant practical implications.

First, closely-held corporations in Brazil no longer provide for a strong form of separation between the assets of the corporation and of its shareholders—what scholars have termed “capital lock-in” or “strong entity shielding.” Despite the initial absence of statutory authorization, Brazilian courts have granted minority shareholders the right to withdraw at will by seeking a partial dissolution of the firm. Second, through a combination of statutory and case law, Brazil has significantly eroded, if not eliminated, the attribute of limited liability in a variety of contexts, ranging from labor and environmental law to consumer protection and the failure of financial institutions. Third, the element of delegated management to a board of directors looks quite frail from a comparative perspective, as shareholders enjoy an unusual amount of power. Fourth, the attribute of share transferability has suffered through a combination of specific statutory rules, practical constraints, and the erosion of limited liability. Fifth, and finally, investor ownership is far from the only paradigm for corporate enterprise in Brazil, given the prevalence of state ownership of business corporations.

This argument about the observed “decorporatization” in Brazil relates to, but differs from, the line of works seeking to “put the corporation in its place” by emphasizing the historical prevalence of other types of business entities, especially in civil law jurisdictions,[[8]](#footnote-8) or by hailing the broad rise of “uncorporate” forms of organization in recent times.[[9]](#footnote-9) Brazil’s experience generally supports these claims. As in other countries, by far the most popular form of business organization is the limited liability company (*sociedade limitada* or *Ltda.*), which can be described as a special or partial corporate form tailored to closely-held companies.[[10]](#footnote-10) Moreover, investment funds under Brazilian legislation take the form of condominiums and, as such, formally lack legal personality.[[11]](#footnote-11) Nevertheless, the fundamental point here is different and more profound: even the S.A.—widely recognized as the functional equivalent of the business corporation—currently displays a lower degree of corporateness than one would assume from both traditional doctrinal lessons and foreign experience. In other words, the “glue” of corporate law binding the legal entity is simply not as potent.[[12]](#footnote-12)

After mapping this phenomenon, an immediate question arises: what, then, explains such deviation? Existing theories about differences in commercial laws around the world offer interesting, but ultimately unsatisfactory, explanations. For instance, one could attribute the fragility of the core corporate elements in Brazil to incomplete or failed legal transplant of the corporate form in the past, which did not take root in unreceptive foreign soil.[[13]](#footnote-13) Alternatively, one could conjecture that other complementary local conditions have led to deep-rooted forms of path dependence involving “uncorporate” forms of organization.[[14]](#footnote-14) Relatedly, the explanation for such disparity could lie entirely in interest group politics.[[15]](#footnote-15)

Defying these assumptions, however, the “decorporatization” of the Brazilian S.A. is hardly a remnant of the distant past. On the contrary, the weakening of the core elements of the corporate form has taken place only in the last few decades, and continues to accelerate. The influence of interest groups is not entirely apparent, either. While parts of this process have roots in federal legislation, a significant portion of it is the product of court-driven indigenous developments that largely favor disorganized constituencies. Moreover, counter to prevailing practice in civil law jurisdictions and emerging markets, the influence of legal scholars and foreign trends on this transformation ranged from modest to non-existent.

In view of this apparent puzzle, this Article explores the potential of different interpretations based on efficiency and distribution considerations. As we will see, in many, though not all, respects, there is at least a theoretical case that Brazil’s toned down corporate regime is the efficient one—not only for Brazil, but everywhere. Brazil could thus be seen as a pioneer in implementing, albeit unknowingly, famous proposals by U.S. law-and-economics scholars. That is, Brazil got there, while other countries have not, or at least not yet.

Brazil’s experiment with decorporatization also raises new theoretical questions. One possibility is that the efficiency of the corporate form is contingent on the quality of the institutional environment. The business corporation permits the externalization of costs and gives rise to severe agency problems; indeed, no one other than Adam Smith was a vehement critic of the corporate form.[[16]](#footnote-16) Policing such agency problems and curbing externalities can be very difficult in practice. In the absence of a sophisticated institutional infrastructure able to restrain such costs, it may be more efficient to mitigate or eliminate their source—the very element of the corporate form that gave rise to the problem in the first place.

For instance, high managerial agency costs, if unaddressed, may lead to a lesser degree of managerial delegation. The lack of protection against minority exploitation through voice or liability may encourage the use of alternative devices, such as strong withdrawal rights. The absence of constraints against opportunism vis-à-vis creditors, or weaknesses in the regulatory system in curbing externalities (such as systemic risk or environmental harm), could militate in favor of diluting the protection of limited liability, or having the state intervene through other means, as by holding shares in major enterprises. In this view, decorporatization is a second-best response to a weak institutional environment.

A different, though complementary, efficiency account posits that, whatever its origins and causes, the phenomenon of decorporatization is, to an important degree, self-reinforcing. The reason is that the different attributes of the corporate form are highly complementary to one another. Once one or some of the elements of the corporate form are gone—for whatever reason—there is a stronger case for diluting the other elements as well. For instance, the shareholders’ newly found ability to withdraw capital from the firm harms creditors, and therefore strengthens the case for unlimited liability for corporate debts. However, the reverse is also true: the application of unlimited liability to minority shareholders provides an argument for granting minority shareholders meaningful exit rights. The prospect of unlimited liability also creates strong incentives for shareholders to take an active part in firm management, reducing their willingness to delegate power to the board. In turn, the absence of capital lock-in, limited liability, and delegated management weakens private legal entities, and, consequently, private enterprise, thereby encouraging state ownership as an alternative.

Another view is that decorporatization in Brazil is best explained by distribution considerations. Brazil might have weakened the core corporate attributes not to increase the size of the pie, but to provide a greater slice of it to the parties that are more likely to be economically vulnerable, such as minority shareholders, workers, consumers, and environmental stakeholders. The mitigation of corporate attributes is also instrumental to the implementation of other public policies seeking to insure that heirs and spouses receive their fair share of assets in the event of death or divorce.

Law-and-economics scholarship has traditionally abhorred the pursuit of distributional goals through private law. The reason is that, at least in theory, the tax-and-transfer system is superior in accomplishing distributional outcomes.[[17]](#footnote-17) Yet the incorporation of distribution concerns into private law adjudication has recently encountered renewed favor even among economically oriented scholars in the United States, given the growing recognition of the costs and political hurdles to an effective tax-and-transfer system.[[18]](#footnote-18)

In Brazil, the incorporation of distributional objectives into corporate law seems particularly fitting to its environment. Brazil’s activist judiciary increasingly takes upon itself the task of directly implementing the constitutional mandate for a “free, fair, and solidary society,”[[19]](#footnote-19) as the country’s system of taxation and spending has largely failed to redress exceedingly high levels of inequality.[[20]](#footnote-20) In most respects, decorporatization seems to favor the interests of the economically weaker parties, though the impact of this move in tackling inequality remains unclear.

The exposition is organized as follows. Part I describes how the core attributes of the corporate form have lost force in the Brazilian context. Part II explores the reasons for the deviation from the canonical corporate attributes in Brazil, and their practical implications. Part III speculates on the possible manifestations of this phenomenon beyond Brazil. Part IV concludes by reflecting on the lessons for comparative scholarship and organizational theory.

**I. Evolution (or Involution) of Corporate Elements in Brazil**

A. Legal personality and lock-in

Let us begin by examining the first and most basic attribute of the corporate form: legal personality. At a fundamental level, this indicates the corporation’s ability to hold assets, enter into contracts, and sue and be sued in its own name. There is no question that the Brazilian S.A., as well as most company and partnership forms (*sociedades*), have legal personality under the Civil Code.[[21]](#footnote-21) There is no novelty here: this attribute dates back to Brazil’s very first corporations in the nineteenth century. The existence of a separate legal personality also entails the formal separation between the assets of the corporation and those of shareholders. The Brazilian S.A. is no different.

In the last decades, however, scholars have underscored that the separation between the assets of the firm and its owners allow different gradations. As first highlighted by Henry Hansmann and Reinier Kraakman, the degree of separation afforded by the corporation is strong: neither shareholders nor personal creditors of the shareholders can withdraw corporate assets unless a majority of the shareholders decides to liquidate the firm—in which case corporate creditors will be paid first.[[22]](#footnote-22) This feature stands in contrast to the weak form of separation provided by the partnership, which traditionally permitted partners, and personal creditors of partners, to force a dissolution of the firm unilaterally.[[23]](#footnote-23)

Corporate shareholders (and, consequently, the shareholders’ creditors) generally have no claim over the corporation’s assets. Once a shareholder makes her investment either by subscribing new shares or by purchasing existing shares in the secondary market, her economic claims vis-à-vis the firm are limited. Absent fundamental changes to the corporation’s structure permitting the exercise of appraisal rights, a shareholder is only entitled to (i) a proportionate share of dividend distributions (which is conditional on both the existence of profits *and* the corporation’s decision to distribute dividends) and (ii) a proportionate share of the residual if the firm is liquidated (provided there is anything left after creditors are paid in full).

This limitation on capital withdrawals by shareholders has been a longstanding feature of the corporate form, dating back at least to the Dutch East India Company of the seventeenth century.[[24]](#footnote-24) Nevertheless, this trait has only recently attracted the dedicated attention of legal scholars and economists. While long subsumed under “legal personality” and patrimonial autonomy, this now popular attribute came to receive specific names of its own. Scholars have coined various labels to refer to this trait: “affirmative asset partitioning” with “liquidation protection” (Hansmann & Kraakman), “strong entity shielding” (Hansmann, Kraakman & Squire), “the absence of a repurchase condition” (Harold Demsetz),[[25]](#footnote-25) “asset separation from shareholders” (William Klein and John Coffee),[[26]](#footnote-26) and “capital lock-in” (Margaret Blair, and, subsequently, Lynn Stout).[[27]](#footnote-27) For convenience purposes, I will use the term “lock-in” to refer to the notion that, save for fundamental changes warranting statutory appraisal rights, corporate shareholders (and their creditors) have no claim over the firm’s assets unless a shareholder majority decides to put an end to the corporation’s existence through formal liquidation proceedings.

The spread of new terminology is the result of the growing recognition that lock-in performs a central economic function, which, according to its enthusiasts, is equally or more fundamental to the success of the corporate form than old favorites such as limited liability.[[28]](#footnote-28) There are a number of reasons for this. First, lock-in ensures that the financial condition or preferences of individual shareholders will not affect the operation of the firm, whose assets will remain intact irrespective of shareholders’ liquidity needs and obligations to creditors.[[29]](#footnote-29) This, in turn, eliminates the need for inter-shareholder monitoring, making lock-in highly complementary to other features of the corporate form, such as delegated management and transferable shares.[[30]](#footnote-30)

Second, lock-in promotes the continuity and integrity of the corporate form over time, thereby encouraging firm-specific investments by different participants in the enterprise.[[31]](#footnote-31) It protects going-concern value and strengthens the pool of assets available to corporate creditors, thereby enhancing the corporation’s creditworthiness and reducing its cost of capital. Fourth, it avoids hold-up problems by minority shareholders when there is a predominance of match assets—that is, assets that are worth more to insiders jointly than to outsiders separately.[[32]](#footnote-32)

Finally, as noted by Hansmann and Kraakman, while private contracting may suffice to produce other features of the corporate form (such as limited liability), lock-in necessarily requires law.[[33]](#footnote-33) Obtaining lock-in vis-à-vis creditors would require shareholders to negotiate individual subordination agreements with each of their personal creditors—a proposition fraught with moral hazard concerns and transaction costs.[[34]](#footnote-34) The provision of lock-in among owners is less daunting, but still legally uncertain. In Brazil, as elsewhere, it is unclear that the owners’ agreement not to partition property would be effective in view of the law’s strong stance toward permitting partitioning of a joint property by tenants in common.[[35]](#footnote-35)

The essential role of law in creating (or recognizing) lock-in is critical for our purposes. Once Brazilian courts eliminate this legal attribute, it is doubtful that parties will be able to obtain the same results through private contracting. For instance, an attempt to write a shareholders agreement providing for lock-in faces two obstacles: (i) it does not bind creditors of shareholders, which are third parties vis-à-vis the contract and (ii) it cannot last for an unlimited or very long period, given the public policy against perpetual contracts.[[36]](#footnote-36) Moreover, courts have at times applied the same rationale used to grant withdrawal rights—breach of *affectio societatis*, as discussed below—to permit disgruntled shareholders to walk away from shareholder agreements.[[37]](#footnote-37)

Nevertheless, lock-in entails costs as well as benefits. If the conceptualization of the economic benefits of lock-in is relatively recent, scholars and practitioners have long taken notice of its drawbacks.[[38]](#footnote-38) By denying shareholders a claim on the corporation’s assets, lock-in increases agency costs and facilitates the expropriation of minority investors. Economic historians Naomi Lamoreaux and Jean-Laurent Rosenthal have argued that the tradeoff between agency costs and untimely dissolution drove the choice between the partnership and the corporation in early U.S. corporate history, when legal minority protections were weak.[[39]](#footnote-39) The persistent popularity of the partnership following the advent of general corporation laws in the nineteenth century suggests that numerous investors and entrepreneurs were willing to endure unlimited liability and the risks of untimely dissolution to avoid the prospect of abuse by controlling shareholders that followed from lock-in.[[40]](#footnote-40)

The agency costs between controlling and non-controlling shareholders are far greater in the close corporation context, where the combination of reduced regulation and the absence of a market for the shares leaves minority shareholders in a particularly fragile position. The absence of an exit option for minority investors has struck many commentators as intolerable. At least since the 1950s various U.S. scholars have proposed the award of dissolution rights to minority shareholders in closely-held corporations *in analogy* to the rights enjoyed by members of a partnership.[[41]](#footnote-41) The central idea of the influential article by Hetherington and Dooley is that “the close corporation is the functional equivalent of the partnership.”[[42]](#footnote-42)

Since then, U.S. courts have been increasingly willing to force the corporation or controlling shareholders to buy back the minority as a remedy in cases of minority oppression.[[43]](#footnote-43) Yet these decisions still require a showing of abuse, falling short of granting minority shareholders a put option against the corporation—which in practice is precisely what Brazilian courts have done. Indeed, most U.S. scholars continue to believe that the prospect of exploitation of minority shareholders in close corporations do not warrant the elimination of lock-in.[[44]](#footnote-44)

It is curious that, just as lock-in was gaining popularity in international scholarship after centuries of quiet existence, Brazilian law made great strides in abolishing it. In the last couple of decades, this longstanding feature of Brazilian corporate law gradually disappeared from the law of close corporations.[[45]](#footnote-45) For the first time, minority shareholders came to enjoy the right to force a partial dissolution at will, effectively forcing the company to buy back their shares.

The recent elimination of lock-in represents a significant departure from Brazil’s corporate law tradition. As in other countries, the emergence of lock-in under Brazilian law dates back to the advent of the corporate form in the country. Up until 1882, Brazil lacked a system of general incorporation, and all corporations were created through special charters granted by the state on an ad hoc basis. As in other countries, these early Brazilian corporations were often established for a specific term (usually of 15 to 50 years), still lacking perpetual experience. However, their charters made clear that, during their statutory terms, shareholders could not withdraw the capital they contributed to the enterprise.[[46]](#footnote-46) Brazil’s first Commercial Code of 1850 also expressly provided that business corporations could only be dissolved upon the expiration of their term, bankruptcy, or proof that the company could not fulfill its purpose.[[47]](#footnote-47) Subsequent corporate statutes followed this standard path.[[48]](#footnote-48)

Brazil’s current corporations law of 1976 (*Lei das Sociedades por Ações*—LSA) permits the voluntary dissolution by a majority shareholder vote, as well as the involuntary judicial dissolution when there is proof that the corporation cannot fulfill its purpose, in an action brought by shareholders representing at least 5% of the company’s capital.[[49]](#footnote-49) In fact, Brazil’s corporate statute appears to be nominally *more* protective of lock-in than the law of other jurisdictions. It qualifies the “liquidation of a prosperous corporation” as “abuse of control power” giving rise to controlling shareholder liability—an unusual provision from a comparative standpoint.[[50]](#footnote-50)

Short of full liquidation of the firm, withdrawal rights only apply to shareholders dissenting from fundamental decisions involving the corporation. Under the LSA, such shareholder “appraisal rights” (to use U.S. parlance) are available in cases of merger, spin-off, changes to the mandatory dividend, creation of new types of preferred shares or modification of their rights, participation in a corporate group, change of corporate purpose, and, more recently, the adoption of an arbitration clause.[[51]](#footnote-51) However, numerous exceptions apply to limit the availability of appraisal rights in these situations, such as the need to show lack of liquidity and dispersion in the event of a merger and a change of corporate purpose, mandatory dividend or participation in a corporate group in the case of a spin-off.[[52]](#footnote-52) Curiously, courts have adopted a restrictive interpretation of shareholder appraisal rights in the public company context, to the point of further restricting the statute’s narrow wording.[[53]](#footnote-53) This means that the scope of appraisal rights under Brazilian law is fairly limited.

In order to understand the doctrinal routes that courts employed to allow partial dissolutions of close corporations, we must first examine the evolution of the law of limited liability companies (*sociedades limitadas* or Ltdas.) in Brazil. The *limitada* was first introduced in Brazilian law in 1919, in what was allegedly a transplant of Portuguese law and an indirect transplant of German law on the *Gesellshaft mit beschränkter Haftung*—GmbH of 1892.[[54]](#footnote-54) The Brazilian *limitada* offered both legal personality and limited liability, but imposed fewer formalities than the business corporation. As in other civil law jurisdictions where a similar entity has long been available, the *limitada* soon became by far the most popular form of organization for commercial enterprise in Brazil.[[55]](#footnote-55)

Whether the *limitada* enjoyed lock-in was less clear. The short statute regulating *limitadas* did not explicitly address this matter. It did, however, state in Art. 18 that, whenever the articles association were silent, the corporations law would apply to *limitadas* as appropriate.[[56]](#footnote-56) One could have naturally interpreted this rule as requiring the application of the corporate law regime—including lock-in—to *limitadas* insofar as it did not conflict with the special statute. In fact, the foreign-law counterparts to the Brazilian *limitada*—the Italian S.r.l., the French Sarl, and the German GmbH—have always enjoyed lock-in.

Brazilian scholars and courts, however, predominantly embraced a different interpretation. In their somewhat mysterious view, Art. 18 meant that the corporations law would only be used to fill gaps in the articles of associations of *limitadas*, not gaps found in the statute itself.[[57]](#footnote-57) This apparent technicality was highly consequential. This interpretation meant that, whenever the statute was silent, the *limitada* would follow not the corporate regime, but the general provisions of the Commercial Code—envisioned with partnerships in mind. These provisions included the traditional rule of partnership law permitting any partner to withdraw at will, prompting the dissolution of the firm.[[58]](#footnote-58)

Evidently, the extension of the partnership regime to *limitadas* triggered the problem of untimely dissolution, since any member’s decision to withdraw, or involuntary events such as death or bankruptcy of the member, would put an end to the firm’s existence. Despite the clear language of the Commercial Code calling for the company’s dissolution, Brazilian courts mitigated the concept. Starting in the 1940s, courts began to grant only partial dissolutions in these cases. They reasoned that the dissolution provisions under the Commercial Code had the nature of default rules. Whenever the articles of association provided for the continuity of the company in case of death or withdrawal (as they usually did), these clauses operated as a waiver of the right to claim full dissolution, but instead led to a partial dissolution.[[59]](#footnote-59) Decades later, courts began grounding their decisions in favor of partial dissolutions on the goal of preserving the enterprise and its social function, irrespective of contract terms.[[60]](#footnote-60)

Furthermore, existing case law on *limitadas* has not only recognized the ability of members to withdraw at any time as a default rule, but also thwarted the parties’ ability to obtain lock-in through private contracting. Courts have repeatedly resorted to notions of good faith and unjust enrichment to invalidate provisions in the articles of association that fixed unfavorable or undercompensatory criteria for the appraisal of membership interests, instead requiring the assessment of the “true and fair value” of the company.[[61]](#footnote-61) However, it remained the case that entrepreneurs seeking lock-in of capital could still obtain it by incorporating the firm as an S.A.

It is precisely this ability that has been compromised in the last decade, at least with respect to close corporations.[[62]](#footnote-62) While the first precedents on this subject date back to the 1980s and 1990s,[[63]](#footnote-63) it was in the middle and late 2000s that Brazilian law effectively abandoned lock-in as an attribute of close corporations. Two key *en banc* decisions by the private law chambers of the Brazilian Superior Court of Justice (*Superior Tribunal de Justiça*–STJ), whose mission is to guarantee the uniform interpretation of federal legislation in Brazil, settled the new legal controversy (including among the court’s own chambers). It essentially extended to the S.A. the regime of partial dissolution then prevailing in the *limitada*, thus permitting disgruntled shareholders to withdraw at will their share of the firm’s assets.

In 2006, the court’s first *en banc* decision concerned a request for judicial dissolution of pulp and paper corporation COCELPA.[[64]](#footnote-64) This lawsuit was filed in 1991 by the estates of two minority shareholders against the company and the remaining shareholders, including the equity arm of the Brazilian National Development Bank (BNDESPAR). Alternatively, the plaintiffs requested the partial dissolution of the corporation. Pointing to irregularities in the company’s management, the lack of profits, and the longstanding absence of dividend distributions, the plaintiffs argued that the company could not fulfill its purpose under Art. 206, II, *b* of the LSA, and therefore ought to be dissolved.

The Court’s decision focused not so much on the absence of dividend distributions, but on another element of the claim—the breach of “*affectio societatis*,” a Roman law concept denoting the willingness to take part in a joint enterprise.[[65]](#footnote-65) The opinion noted that, in Brazil, numerous close corporations have familial ties and are formed *intuitu personae*, which means that the identity of the shareholders is key to corporate success. In these companies, the breach of *affectio*—understood as the “affinity and personal identification among shareholders, marked by mutual confidence”—prevented the corporation from fulfilling its purpose, as provided by the LSA.[[66]](#footnote-66)

Embracing a reasoning that unknowingly mirrored the arguments made by U.S. scholars decades earlier, the opinion held that such a business corporation was, in essence, a “*sociedade limitada* in disguise.”[[67]](#footnote-67) Nevertheless, the Court found that “the rule of full dissolution, in these cases, would not assist the social values involved, with respect to the preservation of jobs, collection of taxes, and the country’s economic development.”[[68]](#footnote-68) As a result, it granted the request for partial dissolution as “the solution that best reconciles the individual interest of the withdrawing shareholders with the principle of preservation of enterprise and its social utility.”[[69]](#footnote-69)

In 2008, the STJ issued its second *en banc* decision on the topic in the case of Luiz Kirchner S/A Indústria de Borrachas.[[70]](#footnote-70) The Court effectively expanded its prior holding by clarifying the admissibility of partial dissolutions for breach of *affectio societatis* alone, without the need to allege economic abuse or the absence of dividend distributions. As in the prior precedent, the plaintiff in this lawsuit was also the estate of a former shareholder. The Court read the prior decision as considering “the preponderance in small and medium corporations of the existence of *affectio societatis*, without which the presumed belligerent climate among the shareholders militates against the preservation of the enterprise, becoming an obstacle to its corporate purpose, which will not be fulfilled.”[[71]](#footnote-71)

Prior to reaching the STJ, the Court of Appeals of the State of São Paulo (TJSP) had decided this case in a split decision that highlighted the stronger arguments for both sides. The majority, which granted the request for dissolution, went as far relying on the constitutional protection of freedom of association, which provided that no one may be compelled to associate or to remain associated (Brazilian constitution, Art. 5, XX). The dissenting opinion, by contrast, emphasized that the company in question began as a *limitada* and later converted to a corporation when it received non-family shareholders precisely to protect the firm from disputes among heirs. It concluded by denying the request for partial dissolution given that the company was lucrative and was fulfilling its purpose, “which is not to maintain harmony among the descendants of the founder.”[[72]](#footnote-72)

Since these landmark decisions, the absence of lock-in in close corporations ceased to be controversial. A search of cases on this topic in the STJ and in the TJSP (which is Brazil largest and most relevant state court for commercial matters) shows that all decisions since 2008 have recognized the right of shareholders in closely-held firms to withdraw at will. Moreover, Brazil’s new Code of Civil Procedure of 2015 now explicitly alludes to the partial dissolution of close corporations that cannot fulfill their purpose.[[73]](#footnote-73) This provision, as well as the caselaw which inspired it, creates the awkward doctrinal construction in which a corporation that is deemed not to fulfill its purpose is nevertheless allowed to subsist. A proposed bill to institute a “simplified corporation” under Brazilian law, with the goal of reducing the formalities to establish and run a business corporation, would grant shareholders the unconditional right to withdraw at any time as a default rule—a mechanism that is absent from foreign precedents of simplified corporation statutes.[[74]](#footnote-74)

Beyond the now traditional claims for partial dissolution by minority shareholders, Brazilian courts have weakened lock-in in another way: by granting requests for expulsion of shareholders that are harming the company’s operations. Unlike dissolution, claims for exclusion are subject to more exacting standards: the remaining shareholders must show wrongdoing by the shareholder they want to expel. As the STJ put it, “exclusion is an extreme measure in view of the efficiency of the enterprise’s activities, for which it becomes necessary to expunge the shareholder that brings about harm or the possibility of grave harm to the firm, being indispensable the existence of proof of just cause.”[[75]](#footnote-75)

Yet requests for exclusion and partial dissolution have the same consequence: the termination of shareholder status and the withdrawal of a proportionate share of the corporation’s assets. To be sure, the draconian remedy of exclusion is also available in other jurisdictions, though only in exceptional circumstances.[[76]](#footnote-76) The corporate form’s attribute of delegated management generally means that only controlling shareholders have duties to the firm.[[77]](#footnote-77) Moreover, the typical remedies for breach of shareholder duties is liability, not expulsion.[[78]](#footnote-78) The distinction is consequential, since the imposition of liability keeps lock-in intact, while expulsion does not. However, at least in one decision by the STJ has blurred the distinction between partial dissolution and expulsion by claiming that there is “no ontological difference” between both categories, thereby permitting the shareholder majority to request the withdrawal of minority shareholders due to breach of *affectio societatis*.[[79]](#footnote-79)

In their embrace of partial dissolution and expulsion, Brazilian courts increasingly rely on exit as a substitute for liability. Considerations of institutional competence and capacity likely play a role in this shift. Assessing the existence of wrongdoing and the amount of damages places a greater burden on courts than simply granting exit rights and leaving the question of valuation to a battle of experts.

Finally, the prevailing legal regime of family law and successions in Brazil also puts pressure on lock-in. Following the French tradition, Brazilian law imposes a principle of “legitimate succession.” Under current law, this principle limits freedom of intestacy to reserve one-half of the estate to the legitimate heirs, which are the descendants and the spouse.[[80]](#footnote-80) The interplay between legitimate succession and the attribute of lock-in has a long history. In France since the mid-nineteenth century and later also in Brazil, one of the main attractions of the corporate form was to avoid the forced partition of family firms due to inheritance laws.[[81]](#footnote-81) In contemporary Brazil, however, courts have instead favored the statutory objective of fair treatment of heirs to the detriment of corporate continuity.[[82]](#footnote-82) A meaningful number of partial dissolution requests—including the two leading cases decided by the STJ—involve claims by heirs or former spouses of original shareholders.

Given the radical break with both Brazil’s legal tradition and comparative experience, the elimination of lock-in has caused surprisingly little scholarly uproar. To be sure, a number of scholars continue to disavow the possibility of partial dissolution of business corporations.[[83]](#footnote-83) The vast majority of commentators, however, has come to approve partial dissolutions with considerable enthusiasm, either unconditionally or with relative modest qualifications, such as the need to prove the breach of *affectio societatis*.[[84]](#footnote-84)

B. Limited liability

The second, and certainly the most celebrated, attribute of the corporate form is limited liability.[[85]](#footnote-85) Limited liability—or, in the terminology of Hansmann, Kraakman and Squire, “owner shielding”—is the reverse of “entity shielding.”[[86]](#footnote-86) It ensures that the personal creditors of shareholders will have exclusive access to shareholders’ assets, just as corporate creditors have exclusive access to the corporation’s assets. Despite the traditional centrality of limited liability to the business corporation and its assumed importance to the modern capitalist economy, Brazilian law has greatly reduced its scope.

The benefits of limited liability are well-known and manifold: it greatly relieves shareholders from the burden of monitoring managers and other shareholders, and thereby encourages transferability and diversification. Because of limited liability, the pricing of corporate shares does not depend on the creditworthiness of owners, which facilitates transferability and the operation of the market for corporate control. Perhaps most importantly, limited liability decreases the costs of investing in business corporations and, therefore, promotes such investments.[[87]](#footnote-87) The recognized importance of legal liability to the corporate form is such that the apparent expansion of veil piercing doctrine in the U.S. in the late twentieth century raised provocative warnings against the “killing of the corporation.”[[88]](#footnote-88)

Although widespread today, limited liability was not a constant feature of early business corporations.[[89]](#footnote-89) For instance, California did not offer limited liability until 1931, and U.S. banks imposed “double liability” on shareholders during the period between the Civil War and the Great Depression.[[90]](#footnote-90) Yet in contrast to other jurisdictions, Brazil was an early adopter of limited liability generally, including for financial institutions.[[91]](#footnote-91) Since the Commercial Code of 1850, all corporate statutes have made clear that shareholders’ liability is limited to the value of the shares held or subscribed.[[92]](#footnote-92)

For most of its corporate history, Brazil lacked any doctrine of veil piercing whatsoever beyond the limited imposition of enterprise liability in the labor context.[[93]](#footnote-93) It was not until 1969 that a Brazilian scholar published the first work on the topic, which denounced how the “absolutism” of legal personality permitted its use for fraudulent purposes. Professor Rubens Requião then advocated the application in Brazil of the so-called “disregard doctrine” of the common law (using the English terminology) to curb such abuses.[[94]](#footnote-94) While this article was highly influential in Brazilian courts—which began applying the doctrine despite the absence of legislative authorization—such embrace of veil piercing was fairly limited, leading to convergence, rather than departure, of Brazilian law vis-à-vis the international norm.

However, recent developments accelerating since the 1990s have significantly eroded the protection of limited liability in Brazil, to the point that in 2014 Brazilian scholar Bruno Salama postulated “the end of limited liability” in the country.[[95]](#footnote-95) This is not to deny that veil-piercing doctrine in other countries, and especially in the United States, can seem messy,[[96]](#footnote-96) highly litigated, [[97]](#footnote-97) as well as controversial and even alarming.[[98]](#footnote-98) Yet, as we shall see below, there is an important difference of degree with respect to the willingness of legislators and courts to do away with limited liability in Brazil. While scholars have claimed that veil piercing “occurs with more frequency in the United States than anywhere else in the world,” arguably due to the effect of the common law,[[99]](#footnote-99) we will see that the U.S. approach pales when compared to Brazil’s. While U.S. scholars have found between circa 9,000 and 11,000 cases in electronic databases,[[100]](#footnote-100) searches for the term in the websites in the Court of Appeals in the State of São Paulo (TJSP) and in the Regional Labor Court for the Second Region (Tribunal Regional do Trabalho da segunda região), which includes São Paulo, unearthed nearly 34,000 and 14,000 judicial opinions addressing this topic, respectively.[[101]](#footnote-101)

The first restriction to limited liability dates back to Brazil’s Labor Law of 1943 (*Consolidação das Leis do Trabalho – CLT*).[[102]](#footnote-102) The statute, which is still in force, provides a version of enterprise liability: that is, whenever one or more firms are under the control of another, constituting an industrial or commercial group, the parent and the subsidiaries will be jointly and severally liable for labor obligations. This meant that, for labor purposes, asset boundaries were eliminated within the group, but not outside of it.[[103]](#footnote-103)

This labor law rule initially did not impinge on the protection of limited liability enjoyed by individual controlling or minority shareholders. However, despite the narrow and clear statutory language, labor courts in the 1970s and 1980s began holding individual shareholders (including, at times, minority shareholders) liable for the company’s labor obligations, a position that became dominant in the last decades.[[104]](#footnote-104) In fact, labor courts have gone further to impose joint and several liability on companies that have the same shareholder, even if not controlling—a regime that is especially troublesome for the private equity and venture capital industries.[[105]](#footnote-105) Veil piercing in labor claims assumes special significance in view of the extraordinarily high volume of litigation in labor courts, in which employers bear the burden of proof and workers typically prevail.[[106]](#footnote-106)

Arguably the first statutory encroachment into limited liability of individual shareholders took place in 1987.[[107]](#footnote-107) By law, financial institutions in Brazil must necessarily adopt the corporate form.[[108]](#footnote-108) The statute provides that the controlling shareholders of financial institutions—be they individuals or legal persons—are jointly and severally liable with managers for the outstanding debts when the institutions become subject to Central Bank intervention, as in the case of insolvency or wrongdoing.

The statute explicitly provides that such liability accrues irrespective of negligence or willful misconduct.[[109]](#footnote-109) This rule extended to controlling shareholders, as well as strengthened, the already strict rule applicable to managers since 1974. According to the statute, the directors and officers of financial institutions are jointly and severally liable for the obligations assumed during their tenure, and their personal assets become inalienable when the institution becomes subject to intervention or insolvency proceedings.[[110]](#footnote-110) A 1997 statute extended the liability of controlling shareholders to other cases of intervention and liquidation.[[111]](#footnote-111)

In view of this, a fair reading of the law is that neither managers nor controlling shareholders of financial institutions enjoy limited liability.[[112]](#footnote-112) As a prominent Brazilian economist and former governor of the Central Bank put it, in Brazil “there is no ‘principle of limited liability’ in the financial system.”[[113]](#footnote-113) An illustrative example was the accounting fraud and near failure of Banco PanAmericano, whose controlling shareholder was TV host and tycoon Silvio Santos. Even though Silvio Santos was not in any way involved in the management of the bank, he ended up providing shares in 34 firms as collateral for a loan from Brazil’s Deposit Insurance Fund (*Fundo Garantidor de Crédito*—FGC) to save the institution. This prevented the bank from undergoing formal liquidation or intervention by the Central Bank, which would have resulted in his personal liability.[[114]](#footnote-114)

Another significant statutory exception to limited liability comes from the Consumer Protection Code of 1990. The relevant provision is the fifth and last paragraph of Art. 28 of the statute, which states that a judge may also disregard the legal entity “whenever its personality is, in any way, an obstacle to the compensation of harm caused to consumers.”[[115]](#footnote-115) Curiously, the enactment of this rule may well have been inadvertent. Scholars involved in the matter have argued that this extreme rule was supposed to have received a presidential veto, but, due to a typographical error, the veto message mentioned the first paragraph of Art. 28 instead.[[116]](#footnote-116)

This provision generated significant doctrinal controversy, with most scholars defending a purposive interpretation according to which paragraph 5 did not permit veil piercing in the absence of fraud or abuse.[[117]](#footnote-117) Nevertheless, courts embraced a literal reading of the statute. The leading case on this issue involved a tragic explosion in a shopping mall, which killed or injured numerous bystanders. In a split opinion, the STJ decided to disregard the legal entity of the shopping mall, a *limitada*, as well as its holding corporation, to hold their managers liable for the damages caused. Since then, numerous decisions have since pierced the corporate veil to reach the assets of shareholders and managers.[[118]](#footnote-118) Moreover, this interpretation spanned far beyond the consumer context.

First, labor courts increasingly applied the consumer protection legislation by analogyto pierce the corporate veil liberally for the benefit of workers.[[119]](#footnote-119) Second, subsequent statutes closely reproduced the language of the consumer protection code. Brazil’s 1998 law on criminal and administrative sanctions for environmental violations contained language that was almost identical to the consumer code’s, providing for the disregard of legal entity “whenever legal personality is an obstacle for the compensation of harm caused to the quality of the environment.”[[120]](#footnote-120) The same language appeared again in a 1999 statute on national fuel supply.[[121]](#footnote-121) The recent environmental disaster provoked by the rupture of dams owned by Samarco, a joint venture between mining giants Vale and BHP Billiton, illustrates the point. Although Samarco takes the form of an S.A., prosecutors have included Vale and BHP Billiton as defendants in the lawsuit seeking compensation for the massive losses caused.[[122]](#footnote-122)

When it comes to corporate groups, the LSA explicitly provides that each entity belonging to a group of companies retains a separate legal personality and a separate patrimony.[[123]](#footnote-123) However, various statutes in the last decades have also weakened the separation of assets among firms belonging to the same corporate group. A 1991 statute imposes joint and several liability on firms belonging to the same “economic group” with respect to unpaid social security contributions.[[124]](#footnote-124) Joint and several liability within the economic group also applies in the tax context insofar as the different firms participated in the taxable activity and/or have an interest in it.[[125]](#footnote-125)

Brazil’s competition law of 2011 also imposes joint and several liability on companies belonging to the same economic group, as well as for veil piercing in cases of insolvency or bankruptcy caused by “poor corporate administration.”[[126]](#footnote-126) Similarly, the new Anticorruption Law of 2013 that “the companies controlling, controlled by or affiliated with, or tied by a consortium contract within the scope of the contract, are jointly and severally liable by the practice of the acts described in the statute, this liability being limited to the obligation of the payment of the fine and the full compensation of the damages caused.”[[127]](#footnote-127) Although such liability does not reach individual controlling shareholders, it is expansive in explicitly encompassing “affiliated companies” (*sociedades coligadas*), defined as companies that are under “significant influence” of another which however falls short of control.[[128]](#footnote-128)

Moreover, courts have disregarded the legal personality of group companies quite liberally even in the absence of such special statutory regimes. An empirical study found that, in the five-year period from 2005 and 2010, the court of appeals for the state of São Paulo decided 214 cases involving veil piercing in economic groups that did not implicate any special statute.[[129]](#footnote-129) Of these, the court disregarded corporate boundaries in 134 cases, or nearly two-thirds of the total.

Bankruptcy law provides another field that has increasingly overcome not only limited liability but the very notion of legal personality more broadly to disregard the internal boundaries of corporate groups and combine the entities into a single pool of assets and group of creditors. Like veil piercing, this mechanism, which is known under U.S. law as “substantive consolidation,” is not unique to Brazil. The difference again lies in the Brazilian courts’ greater willingness to use it, as illustrated by two recent cases.

In the judicial restructuring of Rede Energia, the holding company and a number of subsidiaries were substantively consolidated based on the argument that Rede was “in fact organized as a corporate group, with a common controlling company and credit inter-dependence, as loans exist between the companies that comprise the group.”[[130]](#footnote-130) The application of substantive consolidation led to protests by U.S. creditors of Rede’s subsidiaries, who were harmed by being placed on equal footing with the creditors of the parent company, without regard to their structural subordination. A U.S. bankruptcy court acknowledged that the facts of the case did not satisfy the standards required for substantive consolidation under U.S. law, but agreed to recognize the plan under chapter 15 of the Bankruptcy Code.[[131]](#footnote-131) Another aggressive instance of substantive consolidation concerned the restructuring plan of parent oil company OGX, which included the firm’s Austrian financial subsidiaries, whose credit agreements were governed by U.S. law.[[132]](#footnote-132)

In other areas, such as tax law, higher courts adopt a relatively restrictive stance to veil piercing, imposing liability only on managers and controlling shareholders that have committed unlawful acts beyond the non-payment of the taxes due.[[133]](#footnote-133) Nevertheless, the examination of the “law in action” paints a different picture. Tax authorities often issue tax bills against shareholders and managers, who must then make a deposit of the amounts charged to challenge them in court—a major practical burden. This practice, combined with fisc-friendly interpretations by lower courts and the fact that payment of taxes extinguishes possible criminal penalties under Brazilian law, allegedly leads to a system of “judicial blackmailing” against shareholders and managers.[[134]](#footnote-134)

For the most part, the judiciary has not only endorsed, but even expanded, the statutory instances of shareholder liability for corporate obligations. Labor courts, in particular, have routinely pierced the corporate veil to reach the assets of shareholders (including, at several occasions, minority shareholders) of close corporations, based on a logic of “deep pockets”—or, in their technical terms, the unwritten “principle of non-imputation of the risks of the enterprise to the employee.”[[135]](#footnote-135) Strikingly, the liability imposed on the relevant managers and shareholders is joint and several, not pro rata.[[136]](#footnote-136) Virtually all such cases involve close corporations, so the applicability of veil piercing to public companies remains largely untested. The one precedent by the Superior Court of Labor (*Tribunal Superior do Trabalho* – TST) involving a publicly-traded company permitted veil piercing to reach the assets of a shareholder who had been an offficer prior to the employee’s hiring.[[137]](#footnote-137)

At least in dictum, some Brazilian courts have drawn a distinction between voluntary and involuntary creditors. Even though this distinction lacks any statutory basis, an STJ opinion has noted “the rules on liability of shareholders must be applied with the indispensable balancing of values, depending on whether the controversy emerges from the company and its voluntary creditors, or between the company and its involuntary creditors, as is the case of the fisc, INSS [the social security institute], workers in general, consumers, or tort victims.”[[138]](#footnote-138) While the opinion does not cite relevant authorities on this point, the intellectual origin of this argument likely traces back to the U.S. law-and-economics literature and its partial reception by Brazilian scholars.[[139]](#footnote-139)

The proliferation of exceptions certainly does not eradicate the protection of limited liability in its entirety. In private transactions outside of the labor and consumer settings, the attribute of limited liability is generally upheld.[[140]](#footnote-140) Veil piercing in this case is subject to the more rigorous prerequisites set forth by Art. 50 of the Civil Code, which require “deviation of corporate purpose” or “commingling of assets.” In contrast to their stance in other areas, courts have been reluctant to pierce the corporate veil in civil and commercial contexts, even to the point of imposing conditions that go beyond those prescribed in the Code. For instance, an *en banc* decision by the STJ has held that “irregular dissolution”—which takes place when the company terminates its activities without undergoing formal liquidation proceedings—is not a ground for veil piercing,[[141]](#footnote-141) even though this practice is likely to result in commingling of assets to the detriment of corporate creditors. In fact, the court went as far as to state that veil piercing is inadmissible in the absence of fraud or willful misconduct, when no such requirement can be found in the statutory text.[[142]](#footnote-142)

Moreover, an important precedent by Brazil’s Supreme Court took the bold view that statutory encroachment into limited liability may run afoul of the Constitution. The Court’s decision concerned a 1993 federal statute that made members of *limitadas* jointly and severally liable for the firms’ unpaid social security obligations.[[143]](#footnote-143) The unanimous opinion in the case held the provision unconstitutional as unreasonable and unduly restrictive of private enterprise, thereby violating the constitutional right to freedom of trade, occupation and profession, as well as well as the free exercise of economic activity.[[144]](#footnote-144)

All in all, however, the sweeping application of veil piercing in Brazil shows that the “sacred cow of limited liability”[[145]](#footnote-145) may not be so sacred after all. The Brazilian experience contradicts the conventional wisdom that political obstacles to imposing unlimited liability on shareholders are insurmountable.[[146]](#footnote-146) Curiously, such dramatic erosion of limited liability has taken place in a context in which existing elites have been very effective in opposing unfavorable reform efforts towards increased investor protection.[[147]](#footnote-147)

While business interests and legal scholars alike have repeatedly criticized the expansive and unprincipled application of unlimited liability by the Brazilian judiciary, the main attempts at reform so far have been very narrow in scope and largely unsuccessful. For instance, a broad law reform project aimed at fostering entrepreneurship in Brazil headed by Harvard Law Professor (then minister of Strategic Matters) Roberto Mangabeira Unger, asserts that the threat of shareholder liability hinders the financing of entrepreneurial projects in Brazil.[[148]](#footnote-148) The suggested reform—which has not moved forward—would restrict veil piercing to cases of fraud, but only with respect to “high-risk investors” as defined in the proposed statute.[[149]](#footnote-149)

In addition, following lobbying efforts by business associations, combined with concerns about due process, Brazil’s new Code of Civil Procedure of 2015 creates procedural safeguards for the operation of veil piercing. The statute now explicitly conditions veil piercing on either the inclusion of such request in the complaint and the naming of shareholders or managers as defendants, or the petition by a party or the Public Prosecutor’s Office (*Ministério Público*)to open an incidental procedure to that effect at any time during the judicial proceeding.[[150]](#footnote-150) This unusual provision reacts to previously prevailing judicial practice of seeking to redirect the execution of the amounts due against shareholders or managers, without their previous participation as defendants in the lawsuit. However, the substantive law on veil piercing remains unaltered.

C. Delegated management under a board structure

Another core attribute of the corporate form is the existence of delegated management under a board structure. On a basic level, this element is also present under Brazilian corporate law. Shareholders are not agents of the firm and cannot bind it in contract. This is a prerogative of corporate officers (*diretores*)—duly elected by shareholders or by the board of directors, as the case may be—or agents of corporate officers acting within the scope of the power of attorney.[[151]](#footnote-151)

Various aspects of corporate law and practice, however, greatly mitigate the strength of delegated management. First, highly concentrated ownership in the hands of a single controlling shareholder or group of shareholders is typical of Brazil’s capital markets.[[152]](#footnote-152) Even though the level of ownership concentration has decreased in Brazil in the last decade, dispersed ownership remains exceedingly rare.[[153]](#footnote-153) Whereas the presence of controlling shareholders tends to reduce managerial delegation—since managers and shareholders are more likely to coincide—there is nothing so far that makes the Brazilian case exceptional. Concentrated ownership is the prevailing ownership structure around the world, and is particularly pervasive in emerging markets.[[154]](#footnote-154)

Further divergences appear by looking at the balance of power between shareholders and managers envisioned by Brazil’s corporations law. There is well-established variation among different jurisdictions in this area, with European jurisdictions generally conferring far greater rights on shareholders than board-centric U.S. law.[[155]](#footnote-155) The difference here is one of degree, with Brazilian corporate law being far more shareholder-centric than these famously shareholder-friendly jurisdictions.

For starters, the LSA strikingly permits shareholders to adjudicate the vast majority of corporate decisions beyond the very few matters that fall within the exclusive powers of the board.[[156]](#footnote-156) Art. 121 provides that the “[t]he shareholder assembly, called and installed in according to the law and the charter, has powers to decide *all matters relating to the purpose of the company and make the resolutions that it deems convenient for its defense and development*.” This confers broad powers on shareholders, especially given that the statute grants 5% shareholders the right to call a meeting at any time whenever the board refuses to do so at their request.[[157]](#footnote-157)

The LSA is unusual not only in determining what shareholders *may* decide, but also what they *must* decide. As in other legal systems, Brazilian law requires shareholders to approve certain key corporate decisions. While Brazil follows other jurisdictions in imposing a shareholder vote with respect to charter amendments, mergers, and dissolution, it goes beyond international practice by also demanding shareholder approval of spin-offs and bankruptcy filings, as well as bond issuances by close corporations.[[158]](#footnote-158) In case of urgency, managers must still obtain the informal consent of the controlling shareholder to file for bankruptcy, and a shareholder meeting must follow to ratify the decision.[[159]](#footnote-159) While “say on pay” has only recently spread around the world (and, even so, it is non-binding in most instances), Brazilian law has since 1976 required shareholders to issue a binding vote on executive compensation.[[160]](#footnote-160)

From the comparative hypertrophy of shareholders’ powers under Brazil’s corporate law follows a correspondingly discreet role for the board of directors. According to the statute, the necessary functions of the board of directors are to (i) determine the general orientation of the company’s business, (ii) elect officers and monitor their performance, (iii) call the shareholders’ meeting (though 5% shareholders may also call meetings if the board refuses to do so), (iv) appoint and remove the independent auditors (if applicable), and (iv) authorize the sale of non-circulating assets and the provision of guarantees.[[161]](#footnote-161) Although this list may seem long, key corporate decisions are conspicuously absent. The statute does not technically require the board’s authorization (or even opinion) with respect to fundamental changes, such as mergers, acquisitions, dissolutions, or charter amendments—all of which shareholders must necessarily approve. Except for charter amendments—which typically require board initiative in the United States, but not in other countries—these fundamental decisions usually necessitate board action in most jurisdictions.[[162]](#footnote-162)

Moreover, one of the most controversial mechanisms of the Brazilian system of corporate governance is the particular strength accorded to shareholder agreements. Contrary to international norms—and to the dismay of corporate governance advocates—Brazilian law permits shareholder agreements to bind directors’ votes. Since a 2001 amendment to the statute, votes cast in violation of a duly filed agreement do not even count in shareholder and board meetings.[[163]](#footnote-163) Conversely, if shareholders or directors bound by the agreement are absent from a meeting, the other party may cast a vote on their behalf.[[164]](#footnote-164) Admittedly, the LSA expressly provides that a shareholders’ agreement cannot override controlling shareholders’ fiduciary duties.[[165]](#footnote-165) Nevertheless, shareholder agreements remain largely self-enforcing, to the effect that aggrieved shareholders seeking to challenge decisions mandated by such agreements face an uphill battle.[[166]](#footnote-166)

A recent controversy involving Eletrobras, a listed power company controlled by the federal government, illustrates this weak version of managerial delegation. In that case, the board called a shareholders’ meeting to decide on the proposed renewal of certain concession contracts with the federal government, on terms that appeared to be financially detrimental to the company. The state as shareholder voted to approve the renewal of the contracts, but Brazil’s Securities Commission (CVM) found such vote to be conflicted and, therefore, impermissible, thus imposing a fine on the government.[[167]](#footnote-167) For our purposes, however, it is noteworthy that (i) the shareholders’ meeting decided this question, even though the law did not require shareholder approval in this case, and (ii) there was no disclosure of the board’s position or recommendation with respect to the proposed renewal of the contracts.[[168]](#footnote-168)

All of this suggests that management of Brazilian corporations—including publicly-traded corporations—is not that delegated after all. An additional distinction applies to the qualification of delegated management “*under a board structure*.” The exposition so far has alluded to a board of directors (*conselho de administração*), which is mandatory for publicly-traded corporations, mixed enterprises controlled by the state, and companies subject to the regime of authorized capital under of Brazil’s LSA of 1976.[[169]](#footnote-169) Before then, the concept of a board of directors did not even exist under Brazilian law, with the previous statute of 1946 providing that all corporations would have one or more officers, as well as a “board of supervisors” (*conselho fiscal*) elected by shareholders to monitor the company’s accounts.[[170]](#footnote-170)

Even today, however, closely-held corporations need not have a board of directors, but only a “board of officers” (*diretoria*). Translating *diretoria* as a board, however, is somewhat of a misnomer. The reason for this is that even though the statute provides that *diretoria* must have at least two officers, and certainly contemplates meetings of *diretoria*, as determined by the charter, nothing in the law requires officers to make collegial deliberations. This means that the statutory framework in Brazil assigns a modest role to the board of directors where it exists, and dispenses with a board structure altogether in other contexts.

To be sure, Brazil has not been immune to the international sway of corporate governance best practices, which focus heavily on strong and independent board decision-making. Companies typically attribute greater powers to the board than those required by statute. Brazil’s securities regulators also increasingly rely on independent committees to address conflicts of interest.[[171]](#footnote-171) Nevertheless, the rise of board centrality is often illusory, either because shareholders are present or represented on the board, or because shareholder agreements have previously determined the board’s votes.[[172]](#footnote-172)

This is emphatically not to deny the existence of delegated management in Brazil. The difference is more subtle and one of degree, though critical in assessing the degree of “corporateness” enjoyed by the organization.

D. Transferable shares

The fourth element of the corporate form is transferable shares. In contrast to the other core attributes of the business corporation, the mitigation of this element under Brazilian law is less evident and more nuanced. It is not so much that Brazilian law unusually restricts transferability of shares, though certain limitations apply. Instead, the most important limitations to transferability come from legal rules governing control transfers and the depletion of limited liability.

The general rule under Brazilian law is that close corporations may impose restrictions on the transferability of shares by charter provision, “provided that these limitations do not prevent their tradability nor subject the shareholder to the discretion of management bodies or the shareholder majority.”[[173]](#footnote-173) Restrictions on the transferability of shares imposed by subsequent charter amendment do not bind non-consenting shareholders.[[174]](#footnote-174) So far, there is nothing striking about Brazilian law, since the imposition of restrictions on share transfers in close corporations is prevalent from a comparative perspective.[[175]](#footnote-175)

If the legal restrictions on share transferability look relatively modest, the practical restrictions can be significant. In Brazil, as elsewhere, there is usually no liquid market (or even no market at all) for minority shares in close corporations. Moreover, Brazil has a particularly large number of formally listed companies whose shares are seldom traded and lack liquidity, thereby reducing the practical benefits of free transferability.[[176]](#footnote-176)

Another obstacle to transferability in public companies comes from its mandatory bid rule imposed by law (known in Brazil as “tag-along rights”) and from Brazilian-style “poison pills.” The mandatory bid rule requires the party acquiring control to offer to buy out the remaining shares. According to the LSA, the mandatory bid rule applies only to common shares and requires the payment of at least 80% of the price paid to controlling shareholders.[[177]](#footnote-177) The premium stock exchange listing standards, such as Novo Mercado and Level 2, go beyond the statutory minimum to impose the payment of the same price received by controlling shareholders to all minority shareholders. However, the mandatory bid rule famously discourages both efficient and inefficient control transfers.[[178]](#footnote-178)

This deterrent effect, however, is likely greater in Brazil. According to the influential study by Dyck and Zingales, Brazil had by far the highest levels of private benefits of control among their sample of 39 countries during the 1990s.[[179]](#footnote-179) There is evidence that, despite recent improvements in investor protection, these levels remain high.[[180]](#footnote-180) High private benefits of control mean that controlling shares are disproportionately more valuable than minority shares. By conditioning a control sale on the payment to minority shareholders of the same or similar price paid to controlling shareholders—which presumably far exceeds what their shares are actually worth—, the mandatory bid rule makes it inordinately expensive to acquire control of Brazilian public companies.

Beyond the statutory and stock exchange requirements, many Brazilian public companies have adopted more stringent mandatory bid rules through charter provisions—the so-called Brazilian “poison pills.” These provisions typically lower the required threshold to trigger a mandatory bid (to, say, 15 or 30% of the shares) and at times also impose a minimum mandatory premium. Like U.S. poison pills, the primary goal of these clauses is to discourage control shifts.[[181]](#footnote-181)

Mixed enterprises in which the government holds a majority stake (*sociedades de economia mista*) face greater legal restrictions to transferability. These entities are created by law to promote public policy and profit-making objectives, and, as we will see below, play a major role in Brazilian capital markets. However, the government may not dispose of its controlling stake in these entities in the absence of statutory authorization. In fact, courts have held that even the partial transfer of certain decision (veto) rights to private shareholders by means of a shareholders’ agreement run afoul of the government’s authority.[[182]](#footnote-182)

Yet perhaps the strongest limitation to transferability under Brazilian law does not stem from outright legal restrictions but rather from disincentives to share transfers posed by other features of the legal regime. The mitigation of limited liability, in particular, plays an important part in this respect. There are numerous decisions by labor courts holding former shareholders liable for corporate obligations to workers.[[183]](#footnote-183) Various precedents limit the extent of liability to controlling shareholders and to former shareholders who have withdrawn from the firm within two years, as dictated by the Civil Code rule governing partnerships.[[184]](#footnote-184) However, at least one decision confirmed by the Superior Court of Labor held that the holding voting shares, even if non-controlling, disqualified a former shareholder as a “mere investor,” hence resulting in his continued liability for labor obligations irrespective of the two-year time limit.[[185]](#footnote-185)

Outside of the labor sphere, other potential liabilities of former shareholders can also hamper M&A activity. For instance, business groups have paused before selling subsidiaries that have long-term contracts with consumers, due to fear of remaining on the hook for future liabilities. While some civil law precedents limit the liability of former shareholders to the timeframe of two years, as prescribed by the Civil Code,[[186]](#footnote-186) other decisions have ruled that veil piercing to reach the assets of former shareholders is not subject to any statute of limitations.[[187]](#footnote-187)

The continued liability of selling shareholders—even if limited to a two-year period and if based solely on acts that occurred prior to the sale—can discourage share transfers. In the employment context, for instance, workers typically do not sue until they leave the firm due to layoffs or their own volition. Because the corporation’s conduct post-sale can affect both resignations and dismissals leading to the liability of former shareholders, a sale of corporate control poses a moral hazard problem. Controlling shareholders may therefore prefer to keep control over firm operations to reduce their risk of future liability. While the parties can conceive contractual solutions to address these problems (by, for instance, including indemnities and post-closing covenants in the share purchase agreement), these are unlikely to be bulletproof, especially in view of enforcement difficulties.[[188]](#footnote-188)

All of this suggests that the legal restrictions and practical hurdles to share transferability in Brazil are greater than one would expect based on international experience. I will now turn to the last element of the corporate form—investor ownership—which is also weaker in the Brazilian context.

E. Investor ownership

Investor ownership means that the corporation’s shareholders are primarily interested in a financial return on their investment, and that corporate laws operate with the interests of investors in mind. From a historical perspective, investor ownership is a relatively recent attribute of the corporate form. Given the limited availability of legal entities in the nineteenth century, it was common for consumer cooperatives or even non-profit firms to take the form of business corporations. It was only since the late nineteenth century and early twentieth century that alternative ownership structures came to receive special organizational forms, and the business corporation became specialized in serving investor-owned firms.[[189]](#footnote-189)

Investor ownership, however, is far from the only paradigm for business corporations in Brazil. State ownership—both directly and through state-owned institutional investors—remains pervasive in the country. State-owned enterprises (SOEs) controlled by the federal and state governments accounted for nearly one-third of Brazil’s market capitalization in 2011; at the height of the corruption scandal and crisis involving oil giant Petrobras in 2015, SOEs still represented 15% of market value.[[190]](#footnote-190)

The importance of state shareholdings is also significantly compounded due to the role of state-controlled institutional investors. Brazil’s National Development Bank (BNDES) plays a prominent role as a shareholder in both publicly traded and closely held firms.[[191]](#footnote-191) Public pension funds in Brazil account for over 60% of the pension fund industry, and have larger equity investments and activist inclinations than their private counterparts.[[192]](#footnote-192) This has led to some ostensibly private companies effectively operating as “shadow SOEs” due to indirect shareholdings by the state and SOE pension funds. Mining giant Vale, a former SOE that was privatized in the 1990s, offers a paradigmatic example.

The state, in turn, is not a typical investor. As a controlling shareholder in a mixed enterprise the state does not—and, indeed, some constitutional and administrative lawyers would argue, cannot—run the firm simply to maximize profit.[[193]](#footnote-193) If state intervention is warranted in the first place, then profit maximization is likely to be inappropriate. Moreover, even in contexts where profit maximization may be appropriate—as in the case of state-controlled pension funds or, less forcefully, investments by the development bank—political interference in view of other objectives is often present.

The actual behavior of SOEs or shadow SOEs confirms the suspicion that the state does not act as a typical investor. For instance, in 2011 state-owned institutional investors catered to pressure from then President Lula to dismiss the CEO of Vale, which then had a stellar financial performance, due to concerns about excessive firings of workers and underinvestment in the country.[[194]](#footnote-194) More recently, Petrobras has endured serious losses due to oil price controls imposed by the government to curb inflation, which led the company to purchase oil at the higher international price and sell it at the lower controlled price—a far cry from what a rational investor would do.

The presence of the state as an important controlling and minority shareholder has shaped Brazilian law in important ways. The state has used its political influence to increase its power as a shareholder or decrease minority investor protections.[[195]](#footnote-195) It has also pushed the Corporations Law in directions that are less tailored to the interests of outside investors. For instance, the statute provides that controlling shareholders breach their fiduciary duties when they direct the company to pursue a goal that is foreign to its purpose, to the detriment of minority shareholders or even the “national economy”[[196]](#footnote-196)—hardly a provision conceived with the interests of investors in mind. Moreover, the LSA also provides that managers shall discharge their duties in view of the company’s purpose, but with due regard to the “requirements of public good and of the social function of enterprise.”[[197]](#footnote-197)

**II. Explaining the Dwindling Corporate Attributes in Brazil**

A. Efficiency

At first, examining the efficiency case for the weakening of corporate attributes in Brazil looks like a strange proposition. There is a large and robust literature highlighting the importance of the corporate form and the efficiency of its core elements.[[198]](#footnote-198) The spread of the business corporation over time and around the globe offers further evidence of its functionality. One intuitive conclusion would be that the observed decorporatization in Brazil is not the product of efficiency considerations, but of something else.

Instead of dismissing the efficiency account, however, I will explore it more fully. There are at least three variations of the efficiency claim. The first version posits that the best response to some of the agency problems and externalities produced by the corporate form is to mitigate the strength of its core elements. This is an argument of general applicability, and does not depend on the particular characteristics of the Brazilian environment. By contrast, the two other variations of the efficiency account are, in essence, second-best arguments.[[199]](#footnote-199)

The second version of the efficiency argument is based on the notion of institutional complementarities.[[200]](#footnote-200) It postulates that the core elements of the corporate form will only work satisfactorily in the presence of complementary mechanisms of shareholder protection, creditor protection, and regulation to protect external constituencies. The absence of a strong legal regime to that effect, in turn, may warrant the mitigation of the corporate attributes in developing countries. This is an argument that, in turn, would favor similar developments in emerging economies with similar institutional deficiencies, well beyond Brazil.

The third efficiency interpretation, which reinforces the two prior arguments, relies on the interdependence between the elements of the corporate form. Given the strong complementarity among them, the elimination of one or more of the attributes weakens the case for the persistence of the others. Similarly to the general theory of second best in microeconomics, the elimination of one of the pillars of the efficient regime erodes the justification for the others.

1. *Limited liability*

To explore the potential of efficiency considerations in explaining the mitigation of corporate attributes, let us begin by the attribute of limited liability. The application of limited liability to involuntary creditors has long been controversial.[[201]](#footnote-201) Straightforward economic analysis suggests that limited liability encourages the imposition of externalities on third-parties, since shareholders benefit from the upside of risky activities but are not responsible if certain costs (e.g., of a systemic or environmental nature) materialize. Accordingly, prominent scholars have advocated against the protection of limited liability for torts.[[202]](#footnote-202)

Lucian Bebchuk and Jesse Fried have drawn a more general distinction between adjusting and non-adjusting creditors.[[203]](#footnote-203) Even contractual creditors such as workers and consumers may be non-adjusting—and therefore comparable to tort victims—if their relatively small claims (combined with limited information and foresight) prevent them from adjusting their claims to account for the risk of default.[[204]](#footnote-204) Extending the argument against limited liability from tort creditors to non-adjusting creditors is a relatively small step. By taking it, one will conclude that the mitigation of limited liability in Brazil for the benefit of workers, consumers, and the environment is *the* efficient outcome—not only in Brazil, but also across the board. This means that, while Brazilian law still falls short of eliminating limited liability against all non-adjusting creditors (victims of general torts are not always unprotected), it is ahead of other jurisdictions in overcoming inertia and interest group pressures blocking the adoption of the efficient regime.

The case for enforcing limited liability and capital lock-in within the context of a corporate group is less compelling than outside of it.[[205]](#footnote-205) The separation of assets within the corporate group—what Hansmann and Squire dub “internal partitioning”—generates higher costs but provides only a fraction of the benefits compared to “external partitioning” vis-à-vis the individuals who own the firm.[[206]](#footnote-206) Some of the benefits of lock-in and limited liability, such as liquidity and the reduced need to monitor other shareholders, are generally unavailable in non-pyramidal corporate groups. Others, such as reduced creditor information costs, are also often unavailable due to cross-guarantees.[[207]](#footnote-207) At the same time, the costs of these attributes are higher, as they encourage debtor opportunism in shuffling assets between different companies in the group.[[208]](#footnote-208) This line of reasoning suggests that the greater willingness of Brazilian courts to grant substantive consolidation in bankruptcy may well guarantee the most efficient outcome.[[209]](#footnote-209)

Similarly, the existence of limited liability for shareholders of financial institutions has long attracted scholarly criticism,[[210]](#footnote-210) which only grew stronger since the global financial crisis. The challenge to limited liability in this context follows the same logic: risk-taking by financial institutions can benefit shareholders, but the failure of systemically important financial institutions imposes significant negative externalities on the economy as a whole. In other words, limited liability exacerbates the problem of moral hazard faced by financial institutions.[[211]](#footnote-211)

The traditional approach to this problem has been the governmental imposition of prudential regulation and the provision of deposit insurance. Nevertheless, the clear failure of government regulation in the United States to prevent the global financial crisis—and, in fact, the perception that government policies may have promoted risky behavior by financial institutions—has cast doubt on the effectiveness of this solution. Consequently, new calls for the mitigation or elimination of limited liability for financial institutions have reemerged, in various forms.[[212]](#footnote-212) While these proposals have not yet seen the light of the day in the Wealthy West, Brazilian law has eliminated the protection of limited liability for financial institutions decades ago.[[213]](#footnote-213) As Brazilian commentators have argued, the erosion of limited liability for financial institutions in Brazil intervenes in the *ex ante* incentives of controlling shareholders and managers of banks, a regulatory option that may be more effective than the system of command-and-control regulation of banks.[[214]](#footnote-214)

Whether Brazil’s stance toward unlimited liability deserves wide emulation is debatable. A more moderate, but still controversial, view is that the efficiency of limited shareholder liability for corporate obligations critically depends on the ability of the legal regime to curb opportunism vis-à-vis contractual creditors and restrict the corporation’s ability to impose externalities on third parties. If the legal regime fails in these respects, the case for limited liability falters accordingly. Certain weaknesses in Brazil’s institutional environment help explain the observed pattern of unlimited liability.

As discussed above, Brazilian courts are particularly likely to overcome limited liability (indeed, limited personality altogether) in three contexts, involving (i) claims by involuntary or non-adjusting creditors, such as workers, consumers and victims of environmental harm, (ii) corporate groups, and (iii) financial institutions. In the presence of limited liability, the protection of involuntary or non-adjusting creditors requires a dedicated and effective regulatory infrastructure. Such capabilities of regulatory design and administrative enforcement may be missing in Brazil.

The same difficulties appear with respect to the regulation of financial institutions. The financial industry is politically powerful, as well as especially dynamic and complex, which thwarts regulatory efforts. Yet weaknesses in the regulatory apparatus and the high concentration of the Brazilian financial sector in a few “too-big-to-fail” groups exacerbates systemic risk.[[215]](#footnote-215) The prevailing view is that the Brazilian financial system is both strong and conservative.[[216]](#footnote-216) In praising the financial performance and resilience of the Brazilian financial system after the global financial crisis, the controlling shareholder of BTG Pactual, Brazil’s largest investment bank, explicitly singled out the role of unlimited liability. As he told the Financial Times: “[I]f something goes wrong with Pactual, people can get my house,” which “is a very different philosophy than the US and Europe.”[[217]](#footnote-217)

As we have seen, the application of limited liability to corporate groups is more controversial, given its more limited benefits and greater potential for abuse.[[218]](#footnote-218) Curbing corporate opportunism vis-à-vis creditors in the group context requires courts to (i) satisfactorily police related-party transactions within the group and (ii) rigorously enforce contractual protections negotiated by corporate creditors. Yet policing related-party transactions is an exceedingly difficult task, which Brazilian courts do not seem to perform in a satisfactory manner.[[219]](#footnote-219)

Judicial enforcement of contracts is also suboptimal in Brazil. According to the World Bank’s Doing Business Report, Brazil ranks as the 45th country in terms of contract enforcement, faring especially poorly with respect to the long duration of legal proceedings.[[220]](#footnote-220) Moreover, prominent Brazilian economists have claimed the existence of an anti-creditor bias by Brazilian courts.[[221]](#footnote-221)

Finally, the optimality of limited liability depends on complementary features of the corporate form itself. First, there is a close relationship between lock-in and limited liability—indeed, they constitute opposite dimensions of the separation of assets between the firm and its owners. Whereas limited liability removes shareholder assets from the reach of corporate creditors, lock-in guarantees that corporate creditors will have first priority on the corporation’s assets. The rise of partial dissolutions of SAs in Brazil reverses this logic, permitting disgruntled shareholders to withdraw corporate assets before creditors are paid in full. It thus reduces the creditworthiness of the corporation to the detriment of corporate creditors, thereby strengthening the case for enhanced creditor protection through unlimited liability.

Second, there is also close interdependence between limited liability and delegated management. One of the main justifications for limited liability is precisely to recognize and encourage the delegation of control. It seems unfair to hold shareholder liable for decisions they did not control. However, as we have seen, delegated management is far weaker in Brazil: capital markets are only relatively developed, the vast majority of listed companies have controlling shareholders, and corporate law discourages delegation by granting unusually great powers to shareholders.

Third, limited liability also relates to transferability both indirectly, by encouraging delegated management, and directly, by permitting the uniform pricing of corporate shares irrespective of the financial condition of owners. In fact, another traditional justification for limited liability is that it permits the uniform pricing of corporate shares. This, in turn, facilitates hostile takeovers, whose threat constitutes a powerful remedy against managerial agency costs. Nevertheless, the concentrated ownership structure of Brazilian corporations makes hostile takeovers impossible, thus also eliminating this justification.

In conclusion, the paradigm of investor ownership offers strong support to limited liability, for this requirement aims precisely to limit the risk exposure of financially-motivated shareholders and to encourage participation in risky, but potentially fruitful, ventures. Limited liability is far less consequential in the context of state ownership, especially because it is unclear that, as a practical matter, SOEs present limited liability. Instead, international experience and investors’ perceptions suggest that states are likely to bail out SOEs, and the adoption of the corporate form with limited liability is not a credible commitment to the contrary.[[222]](#footnote-222) In fact, the formal exclusion of SOEs from bankruptcy laws in Brazil offers further support to this reasoning.

2. *Lock-in*

There is also an efficiency case for granting minority shareholders withdrawal rights in close corporations. In abolishing lock-in for close corporations, Brazilian courts have unknowingly implemented the prescription of certain U.S. scholars since the 1950s. The usual justification for this view lies in the lack of protection and liquidity for minority shareholders, which permits exploitative behavior by the majority. Indeed, both historical and contemporary evidence suggests that investors have favored liberal withdrawal rights whenever agency costs are particularly severe.[[223]](#footnote-223)

A modified version of the efficiency argument against lock-in takes into consideration the existence of complementary institutions. Even the strongest defenses of lock-in explicitly rely on “vigorous judicial enforcement” of the rule requiring pro rata distributions.[[224]](#footnote-224) Yet such vigorous judicial enforcement is notoriously absent in Brazil. Recall that existing estimates describe the levels of private benefits of control extracted from public corporations in Brazil as among the largest in the world.[[225]](#footnote-225) Given the lack of regulatory oversight and exit options for minority investors, the opportunity for exploitation is likely greater in the close corporation context. All of this suggests that there is, at least, a stronger case for protecting minority shareholders through exit rights in this context.

To be sure, while lock-in increases the risk of opportunism by majority shareholders, its absence generates the different problem of untimely decapitalization of the firm, either due to opportunistic hold-up by minority shareholders or to their idiosyncratic liquidity needs. The leading case involving pulp and paper firm COCELPA illustrates this risk. Leaving aside the various allegations of tunneling, this is a case involving an industry particularly vulnerable to untimely dissolution, since it takes several years for trees to mature. Nevertheless, even though shareholders filed suit in 1991 and obtain a final decision recognizing the right to a partial dissolution by the Superior Court of Justice in 2007, they have yet to receive the amounts due.[[226]](#footnote-226) A sluggish judiciary therefore reduces the chances of untimely dissolution and the payoff of opportunistic hold-up, though it also limits its benefits to minority shareholders.

Beyond that, the decline of lock-in in Brazil relates in important ways to the other corporate attributes. While the disappearance of lock-in strengthens the case for unlimited liability, as discussed above, the reverse is also true. The rise of unlimited liability militates in favor of providing a fair exit option to minority shareholders, who lack control over corporate operations but may be on the hook for obligations to workers, consumers, and environmental victims if things go sour.

While lock-in likely produces greater costs in Brazil, some of its alleged benefits are less likely to be present in the country. Specifically, the benefit of lock-in in protecting specific investment by non-shareholder constituencies presupposes limited shareholder power. As we know, the overwhelming majority of corporations in Brazil have controlling shareholders. However, lock-in is hardly available against controlling shareholders, since corporate law generally permits a majority or supermajority of shareholders to liquidate the firm.[[227]](#footnote-227) Moreover, delegated management (not to mention board independence) is also particularly fragile in Brazil, hence reinforcing the controlling shareholder’s ability to hold up other constituencies.[[228]](#footnote-228)

Although less apparent, one can also envision a plausible connection between the lack of lock-in and the decline of investor ownership. The absence of lock-in decreases the ability of private corporations to raise debt and commit to long-term projects, thus furthering the case for state ownership. Mixed enterprises, in particular, enjoy a stronger version of lock-in, since the state may not liquidate the firm or sell a substantial part of its assets in the absence of special legislative authorization. Finally, lock-in is the flip side of transferable shares: it is precisely because corporate shares are transferable that shareholders are denied the exit option in the form of withdrawals of capital. To the extent that Brazilian corporate law and market structure hinder transferability, there is also a relatively stronger case for abolishing lock-in and permitting withdrawals at will.

3. *Delegated management*

The optimal degree of managerial delegation and shareholder empowerment is a central, and largely unresolved, question in contemporary corporate governance.[[229]](#footnote-229) For our purposes, suffice it to say that some scholars have argued that there is room for far greater shareholder power than U.S. law has traditionally allowed. Lucian Bebchuk, the most vocal supporter of shareholder empowerment, has argued that, at the very least, it should be up to shareholders to decide the rules of the game by controlling the process of charter amendments.[[230]](#footnote-230) Yet Brazilian law goes far beyond the Bebchuk dream, since the mandatory nature of most corporate law rules makes it difficult for charter amendments to abridge the powers of the shareholder majority in public companies.[[231]](#footnote-231) In contrast to the Brazilian law approach to limited liability and lock-in, we do not see a general argument that such a toned down form of managerial delegation is efficient.

Such a weak version of delegated management may be a plausible response to the weak institutional environment. A system that so poorly protects minority shareholders would likely permit high managerial agency costs. Such a strong level of shareholder involvement in management, then, could be a response to these costs. However, causation may run in the opposite direction, with the lack of delegated management facilitating the extraction of extraordinary private benefits of control. In other words, it may be precisely because controlling shareholders do not face any countervailing checks within the firm that they are able to exploit minority investors with such ease.

Another view is that weak managerial delegation is a second-best response to the dwindling of other corporate attributes. The erosion of shareholder limited liability encourages shareholders to eschew diversification and instead take an active part in company management. Conversely, given that controlling shareholders take an active part in management, the case for limited liability is correspondingly weaker.

There are complementarities with other elements as well. As discussed above, the protection afforded by lock-in to specific investments by various corporate constituencies presupposes the absence of shareholder control. Delegated management also goes hand-in-hand with transferability. The relationship between delegated management and state ownership is less clear. From a political economy perspective, the state’s interests as a shareholder have certainly played a role in the weak form of delegation that we observe. However, the efficiency argument likely runs in the opposite direction, with influential guidelines on SOE governance advocating for strong and independent boards to improve corporate performance.[[232]](#footnote-232)

4. *Transferable shares*

Share transferability is the least controversial feature of the corporate form. Although transferability per se do not pose major costs, this attributes becomes contentious when it comes to control transfers. In the international context, the main debate in this area relates to the board’s ability to thwart hostile takeover threats, as permitted under Delaware law through the use of poison pills, or prohibited under the non-frustration rule of EU law.[[233]](#footnote-233) This debate, however, loses significance in the Brazilian context, since hostile takeovers are virtually non-existent due to the prevalence of concentrated ownership.[[234]](#footnote-234) Instead, the main normative debate in this area concerns the scope and desirability of a mandatory bid rule.

While law-and-economics scholars have questioned the efficiency of the mandatory bid rule,[[235]](#footnote-235) investors in Brazil generally favor this mechanism, as reflected in its adoption by the stock exchange’s most rigorous listing standards.[[236]](#footnote-236) This suggests that the desirability of this rule may depend on the underlying context. In the absence of formal legal protection of minority shareholders, a mandatory bid rule protects outside investors’ reliance on the reputation of the original controlling shareholders.[[237]](#footnote-237) The rule also ensures a fair exit option to shareholders in a system that offers insufficient protection against going-private transactions.[[238]](#footnote-238)

Finally, recall that important obstacles to transferability in Brazil come from the disincentives to share transfers posed by limited liability. The particular choice of a timing rule for the apportionment of shareholder liability is particularly relevant here. The impingement on transferability is stronger when judicial decisions impose liability on shareholders for obligations accruing or claims filed in periods outside of their tenure as shareholder—that is, before such shareholders bought or after they have sold their shares. It is particularly difficult to justify on efficiency grounds the imposition of liability on former shareholders for contracts or torts that take place after the transfer of the shares, as some Brazilian courts have done with respect to labor claims.[[239]](#footnote-239)

5. *Investor ownership*

The mainstream view today is that investor ownership is generally the most efficient form of enterprise organization.[[240]](#footnote-240) At the same time, heterodox critiques, as well as some empirical studies, point to the efficiency of state ownership in certain contexts.[[241]](#footnote-241) In this latter view, which is particularly popular in some Latin American countries, the prevalence of state ownership in Brazil constitutes a sign of economic and social progress.

A more broadly accepted claim is that certain deficiencies in the institutional environment may at times tip the balance in favor of state ownership in developing countries. Even strong defenders of private ownership recognize that its superiority often hinges on the existence of good contract institutions.[[242]](#footnote-242) Likewise, there is a long tradition defending the role of state ownership in the catch-up process in environments where capital market failures prevent sizable investments in long-term projects.[[243]](#footnote-243)

To conclude, as hinted before, the decline of the other elements of the corporate form may play a role in weakening the investment capacity of private enterprise and, consequently, strengthening the case for state ownership. The erosion of limited liability increases the risk and decreases the reward of private entrepreneurship. Even when limited liability is inefficient—as with respect to involuntary or non-adjusting creditors—it constitutes a subsidy for private risk-taking and therefore encourages it. The elimination of lock-in, in turn, hampers investments in long-term or risky projects, and in any case reduces the chances of continuity of the enterprise over time.

1. Distribution

Another line of interpretation is that distribution considerations, not efficiency, best explain the phenomenon of decorporatization in Brazil. This interpretation finds support in the widespread narrative that (re)distribution—specifically, the promotion of “social justice”—is a central objective of the Brazilian constitution and a key factor motivating judicial decisions. In the last decades, Brazil seems to have favored distributive policies in lieu of growth.[[244]](#footnote-244)

Yet multiple considerations complicate the assessment of the distributional rationale. First, while redistribution can enhance social welfare, there is no consensus on the optimal degree of inequality and, therefore, on the optimal level of redistribution. Second, distribution-oriented policies resulting from interest-group pressure can easily be regressive and, as a result, end up decreasing social welfare. Third, and relatedly, there is the well-known risk that a private law policy aimed at reducing inequality or poverty may produce the opposite result. The brief discussions that follows will not attempt to resolve these very difficult questions. Instead, it will be limited to examining whether distributional intentions provide a *prima facie* plausible explanation for the decline of corporate attributes in Brazil, as well as initial reflections on the promise of these strategies to reduce inequality.

At first sight, the distribution account appears to have significant purchase, especially when it comes to explaining features of Brazilian law that seem to entirely lack an efficiency explanation, such as the imposition of joint and several liability among shareholders in cases of veil piercing. Expansive veil piercing under Brazilian law favors parties that are presumably weaker, such as workers and consumers, while the elimination of lock-in favors minority shareholders.[[245]](#footnote-245) Distribution considerations are also a plausible justification for continued state ownership.

While further investigation is necessary to ascertain the effects of such distribution-oriented approach, there is reason to be skeptical about its efficacy in tackling the broader problem of inequality. Veil piercing under labor laws only benefits formal workers—which constitute a little more than half of Brazil’s labor force. Informal workers, often the poorest, remain unprotected. The effects of state ownership on redistribution are also dubious. Brazil’s National Development Bank famously directs highly subsidized interest rates to the country’s largest business groups.[[246]](#footnote-246) In other areas of Brazilian law, most conspicuously in healthcare litigation, there is significant evidence of a myopic distributional approach by Brazil’s judiciary in granting the requests of plaintiffs to the detriment of more effective public policies.[[247]](#footnote-247)

In many respects, Brazilian law epitomizes the dream of progressive corporate law scholars come true, but its effects remain to be determined. Brazil’s continuing high levels of inequality suggests that abating the private business corporation is no panacea, and, to the extent that it discourages investment, might be clearly counterproductive. Indeed, it may be that the agency problems and externalities generated by the corporate form are well worth the candle, and that it is in society’s interest to subsidize corporate enterprise in this form.[[248]](#footnote-248) This profound question, however, remains unsettled.

**III. Beyond Brazil**

The foregoing discussion raises the question about whether Brazil’s experience with decorporatization is exceptional or instead representative of a broader trend among other jurisdictions, and especially developing countries. This is a difficult question to answer. While the prevalence of state ownership in Continental Europe and emerging markets is well documented,[[249]](#footnote-249) we still know little about possible variations in the strength of the other core elements of the corporate form.

The existing literature on this area focuses primarily on limited liability and the exceptions created by the doctrine of veil piercing. As a general matter, developing countries appear to be latecomers in recognizing exceptions to the attribute of limited liability. Recall that this was also the case in Brazil, where the doctrine only gained ground in the last decades. However, most emerging market jurisdictions appear to have been even slower than Brazil in incorporating even the most restrained version of veil piercing premised on the existence of fraud or egregious abuse—the adoption of which would lead to convergence, rather than divergence, from the norm in mature economies.

For instance, recent studies continue to describe the application of veil piercing in Spain and Hispanic America as relatively narrow in scope.[[250]](#footnote-250) There is, however, some evidence of veil piercing and the application of enterprise liability in the context of corporate groups for the benefit of workers and tax authorities in certain Latin American jurisdictions.[[251]](#footnote-251) Nevertheless, the general sense remains that courts are generally reluctant to pierce the corporate veil in civil law jurisdictions.[[252]](#footnote-252)

[Ventoruzzo - generally civil law]

There is by now a fairly robust literature on the adoption and expanding use of veil piercing in China, whose evolution may be indicating a broader trend towards decorporatization. Prior to 2006, Chinese law did not formally recognize a doctrine of veil piercing. Although there were a few isolated cases of judicial application of the concept, scholars viewed the status quo as insufficient to curb abusive uses of legal personality to the detriment of corporate creditors.[[253]](#footnote-253)

As part of its corporate law overhaul in 2006, China enacted specific statutory provisions on veil piercing for the first time. Article 20 of the Company Law provides for joint and several liability of shareholders in case of abuse of the independent status of the company that “seriously damages the interests of any creditors.” Moreover, Article 64 contains a specific rule for one-shareholder companies that reverses the burden of proof, making the single shareholder liable whenever he or she is unable to prove that the company’s property is independent from his or her property.[[254]](#footnote-254) These provisions were allegedly the product of a political compromise that took into account the government’s hostility to veil piercing in view of its interest as a major shareholder in SOEs.[[255]](#footnote-255)

Since the 2006 reform, China has appeared to be far more prone to pierce the corporate veil than mature economies. In a study of judicial application of veil piercing between 2005, Hui Huang found 99 reported opinions on this area—a figure he describes as “remarkably high” from a comparative perspective—and a decision to pierce the veil in nearly two-thirds of the cases.[[256]](#footnote-256) A more recent study by Kimberly Bin Yu and Richard Krever showed that not only did the number of cases rise exponentially in the five years following Huang’s survey, but the success rate of creditors also increased significantly.[[257]](#footnote-257) At least some of these decisions seem to take an expansive reading of the statute. While Art. 20 only seems to cover “vertical piercing” between the parent and subsidiaries, courts have also permitted “horizontal piercing” among companies under common control.[[258]](#footnote-258)

Commentators have offered numerous conjectures to explain the surprisingly high incidence of veil piercing in China. The explanations offered range from the lack of sophistication and paternalistic attitude on the part of Chinese judges to the particular wording of the statutory language shifting the burden of proof in the case of one-member companies.[[259]](#footnote-259) These accounts, however, have failed to consider one of the central hypotheses advanced in this Article—namely, that the weakening of corporate attributes might be a second-best response to a deficient institutional environment.

Moreover, there is evidence that the weakening of corporate attributes in China span beyond limited liability. Curtis Milhaupt has showed that, at least with respect to the SOEs that dominate China’s economy, each of the corporate elements takes a modified and blander form—a phenomenon that he attributes to the “adaptability” of the business corporation.[[260]](#footnote-260) It also appears that some of the peculiar features of the Chinese system—such as the role of the Chinese Communist Party in sidelining the board of directors[[261]](#footnote-261)—are not limited to the SOE context, but are present in private enterprises as well. In Milhaupt’s view, the corporate form has “a chameleon-like ability to take on the characteristics of the political economy in which it operates.”[[262]](#footnote-262) This view, however, may lead one to underestimate the degree of divergence in the relevance of the corporate attributes. It is possible that, at some point along this transformation to fit local features, the organization in question may no longer qualify as a business corporation, but instead become a different animal altogether.

Ascertaining the existence and extent of decorporatization around the world, as well as its potential causes, will undoubtedly require future research. The claim advanced in this Article about the significant erosion of corporate attributes in Brazil is a novel one, and had not been documented to date. Instead, the available descriptions of Brazil’s corporate law by both scholars and practitioners have failed to highlight its significant departure from international practice. Moreover, this is a fairly recent phenomenon, and one that may be only recently beginning to take hold elsewhere. Any verification of the incidence and degree of decorporatization in other contexts will require scholars to scratch beyond the surface of textbook accounts—a type of analysis that demands dedicated country studies.

**IV. Conclusion**

The conventional understanding is that the history of the corporate form is one of acclaimed success, as well as continued and inevitable expansion to different contexts. Once restricted by the government, the corporate attributes are deemed ever more widely available, irrespective of old constraints such as corporate taxation or accompanying mandatory terms. Contemporary Brazilian law, however, shows a certain degree of involution, and is therefore quite subversive to these understandings.

Although scholars have mounted theoretical challenges against the expansive application of certain corporate elements, most conspicuously limited liability, these critiques are generally dismissed as impractical exercises of institutional imagination that stand no chance of actual implementation. Yet the recent Brazilian experience gives pause to the inevitability of the business corporation’s core traits. Through a series of judicial decisions and statutes, Brazilian law has significantly weakened the canonical corporate elements. As a result, the strong version of the corporate form, which is generally assumed to be universal, is no longer available under Brazilian law. Although the roots of the observed decorporatization of Brazilian enterprise are unlikely to be monocausal, there is surprisingly an efficiency case for most—though by no means all—of these new doctrinal developments. As with most things, the efficiency of the corporate form may be contingent on the underlying institutional environment.

At any rate, Brazil’s experiment with decorporatization points to new directions in comparative law and economics. The enduring debate on the degree of convergence and persistence in corporate governance assumes either the approximation of legal systems or the conservation of deep-rooted differences. Most analyses of legal developments in emerging economies focus on foreign transplants from mature economies, greatly discounting the degree of local ingenuity and originality. The prospect of newly-minted divergence, originating in developing countries, is generally left out of the picture. Finally, comparative corporate governance has focused on the content of corporate law, discounting differences in the strength and operation of the corporate form itself, which may be far more substantial than usually acknowledged.

For better or worse, the persistence of the corporate form does not seem to be inexorable. Brazil’s U-turn shows that its history has not ended, which makes the case for reflecting on the merits of corporate attributes all the more pressing. Fortunately, these changes provide an interesting, but thus far underutilized, laboratory for such purposes.

1. \* Professor of Law, Fundação Getulio Vargas School of Law in São Paulo (FGV Direito SP); Global Professor of Law, New York University School of Law.

   John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *What Is Corporate Law?*, *in* The Anatomy of Corporate Law: A Comparative and Functional Approach (Reinier Kraakman et al. eds., 2017) (hereinafter “Anatomy of Corporate Law”). [↑](#footnote-ref-1)
2. Some countries (most notably Germany) have also harnessed corporate law to protect workers. And different countries have increasingly, if controversially, employed corporate governance mechanisms to promote a variety of broader external objectives, from reducing systemic risk and inequality to protecting human rights and the environment. For a detailed exposition of these points, *see* Luca Enriques, Henry Hansmann, Reinier Kraakman, and Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, *in* Anatomy of Corporate Law, *supra* note 1. [↑](#footnote-ref-2)
3. *See*, *e.g.*, Alexander Dyck & Luigi Zingales, Private Benefits of Control: An International Comparison, 59 Journal of Finance 537, 551 (2004); Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US (Klaus J. Hopt et al. eds., 2005); Sofie Cools, *The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers*, 30 Del. J. Corp. L. 697 (2005). [↑](#footnote-ref-3)
4. *See*, *e.g.*, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Law and Finance*, 106 J. Pol. Econ. 1113 (1998); Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing*, 88 J. Fin. Econ. 430 (2008). [↑](#footnote-ref-4)
5. *See*, *e.g.*, Mark J. Roe, Political Determinants of Corporate Governance (2003); Marco Pagano & Paolo F. Volpin, *The Political Economy of Corporate Governance*, 85 Am. Econ. Rev. 1005 (2005); Raghuram Rajan & Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the Twentieth Century*, 69 J. Fin. Econ. 5 (2003). [↑](#footnote-ref-5)
6. Armour et al., *supra* note 1. [↑](#footnote-ref-6)
7. Focusing on commonalities can also be illuminating. For the examination of Brazilian corporate law under such a perspective, *see* my own effort in the most recent edition ofthe Anatomy of Corporate Law, *supra* note 1. [↑](#footnote-ref-7)
8. Timothy Guinnane, Ron Harris, Naomi R. Lamoreaux & Jean-Laurent Rosenthal*, Putting the Corporation in Its Place*, 8 Enterprise & Soc’y 708 (2007); Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Legal Regime and Contractual Flexibility: A Comparison of Business’s Organizational Choices in France and the United States during the Era of Industrialization*, 7 Am. L. & Econ. Rev. 28 (2005). [↑](#footnote-ref-8)
9. *See*, *e.g.*, Joseph A. McCahery, Erik P. M. Vermeulen & Priyanka Priydershini, *A Primer on the Uncorporation*, 14 Eur. Bus. Org. L. Rev. 305 (2013); Larry E. Ribstein, The Rise of the Uncorporation (2010). [↑](#footnote-ref-9)
10. *See* Mariana Pargendler, *O Direito Societário em Ação: Análise Empírica e Proposições de Reforma*, 59 Revista de Direito Bancário e do Mercado de Capitais 215 (2013) (reporting that *limitadas* accounted for 98.68% and SAs for 0.95% of companies registered with the Commercial Registry of the State of São Paulo (JUCESP). In Brazil, the tax laws are not usually a main consideration in the choice of organizational form. The same tax rules generally apply to both SAs and *limitadas*, taxing the entity but not its members or shareholders (since dividend distributions are currently exempt from tax). The main exception concerns small and medium enterprises seeking to benefit from the simplified and lower tax regime called SIMPLES, which does not apply to SAs. [↑](#footnote-ref-10)
11. Law 4,728 of July 14, 1965, Art. 50. Condominiums under Brazilian law display some of the attributes of legal personality, such as the ability to sign contracts through a representative and to sue and be sued in its own name. However, not being a legal entity, the condominium is unable to own property, which is held by the beneficiaries as tenants in common. [↑](#footnote-ref-11)
12. On the view of corporate law as the “glue” binding the corporation together, *see* Simon Deakin, David Gindis, Geoffrey Hodgson, Kainan Huang & Katharina Pistor, *Legal Institutionalism: Capitalism and the Constitutive Role of Law* (working paper, 2015), <https://ssrn.com/abstract=2601035>. [↑](#footnote-ref-12)
13. *See* Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 Am. J. Comp. L. 163 (2003) (arguing that legal transplants are unlikely to be effective unless they map principles that are already familiar internally or are adapted to the new context). [↑](#footnote-ref-13)
14. For an application of path dependence to the corporate context, *see*, *e.g.*, Lucian Bebchuk & Mark Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 Stan. L. Rev. 127 (1999). [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. 1 Adam Smith, The Wealth of Nations 111-17 (P.F. Collier & Son 1909) (1776). [↑](#footnote-ref-16)
17. See, *e.g.,* Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 Am. Econ. Rev. 414 (1981); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income,* 23 J. Legal Stud. 667 (1994) [↑](#footnote-ref-17)
18. *See* Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 Minn. L. Rev. 1051 (2016); Zachary D. Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 Yale L. J. 2134 (2014). [↑](#footnote-ref-18)
19. *See* Mariana Pargendler & Bruno Salama, *Law and Economics in the Civil Law World: The Role of Brazilian Courts*, 90 Tul. L. Rev. 439 (2015). Famous survey results showed Brazilian judges overwhelmingly declaring that considerations of social justice justify breach of contracts. Bolívar Lamounier & Amauri de Souza, As Elites Brasileiras e o Desenvolvimento Nacional (2012); Armando Castelar Pinheiro, Judiciário, Reforma e Economia: A Visão dos Magistrados (2002). [↑](#footnote-ref-19)
20. *See*, *e.g.*, Gemma Corrigan, *Is Brazil Making Progress on Inequality?*, World Economic Forum, Sep. 6, 2015 (“The income gap between the country’s top and bottom decile remains about five times as wide as in advanced economies”). [↑](#footnote-ref-20)
21. Civil Code, arts. 44 and 1.088-9. [↑](#footnote-ref-21)
22. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L. J. 387, 394, 434-5 (2000); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1333 (2006). [↑](#footnote-ref-22)
23. Hansmann & Kraakman, *supra* note 22, at 394. [↑](#footnote-ref-23)
24. Giuseppe Dari‐Mattiacci, *The Emergence of the Corporate Form* (working paper, 2013), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223905>. [↑](#footnote-ref-24)
25. Harold Demsetz, The Economics of Business Firms 50-51 (1995). [↑](#footnote-ref-25)
26. William A. Klein & John C. Coffee, Jr, Business Organizations and Finance 108 (9th ed. 2004). [↑](#footnote-ref-26)
27. Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. Rev. 387 (2003-2004); Lynn Stout, *On the Nature of Corporations*, 2005 U. Ill. L. Rev. 253 (2005). [↑](#footnote-ref-27)
28. Hansmann & Kraakman, *supra* note 22, at 423; Stout, *supra* note 27, at 254. [↑](#footnote-ref-28)
29. Hansmann & Kraakman, *supra* note 22, at 402. [↑](#footnote-ref-29)
30. *Id.* [↑](#footnote-ref-30)
31. Blair, *supra* note 27. [↑](#footnote-ref-31)
32. Edward B. Rock & Michael Wachter, *Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression in Close Corporations*, 24 J. Corp. L. 913 (1999). [↑](#footnote-ref-32)
33. Hansmann & Kraakman, *supra* note 22, at 407-12. [↑](#footnote-ref-33)
34. *Id.* at 408. [↑](#footnote-ref-34)
35. *Id.*; Hansmann et al., *supra* note 22, at 1349. While partnerships have long prevented partner withdrawals during a defined term, these agreements lack the legal force provided by the corporate form. *Id.* at 1342. [↑](#footnote-ref-35)
36. In civil law jurisdictions, courts may qualify an agreement for a very long term as amounting to an indefinite term, thus permitting unilateral termination at will. [↑](#footnote-ref-36)
37. *See*, *e.g.*,Superior Tribunal de Justiça, RESP 388.423-RS, Rel. Min. Sálvio de Figueiredo Teixeira, decided on May 13, 2003, D.J. Aug. 4, 2013 (finding that the breach of *affectio societatis* and the duty of loyalty and cooperation among the parties provides sufficient grounds for termination of a shareholder agreement). [↑](#footnote-ref-37)
38. *See*, e.g.*,* note 41 *infra* and accompanying text. [↑](#footnote-ref-38)
39. Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Corporate Governance and the Plight of Minority Shareholders in the United States before the Great Depression*, *in* Corruption and Reform: Lessons from America’s Economic History (Edward L. Glaeser & Claudia Goldin eds., 2006). [↑](#footnote-ref-39)
40. *Id.*  *See also* Naomi Lamoreaux, *Partnerships, Corporations, and the Theory of the Firm*, 88 Am. Econ. Rev. 66, 66 (1998) (arguing that the high level of “firmness”—or protection against hold-up—provided by the corporate form “was not always desirable from the standpoint of entrepreneurs”). The traditional partnership form differs from the corporate form in numerous respects: (i) it lacks legal personality, (ii) any partner can bind the partnerships in contract, (ii) partners are jointly and severally liable for the partnership’s obligations, (iii) the withdrawal or death of any partner triggers the dissolution of the partnership, and (iv) any creditor of the partner may trigger a dissolution of the partnership. [↑](#footnote-ref-40)
41. Carlos L. Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. Chi. L. Rev. 778 (1952); J. A. C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 Va. L. Rev. 1 (1977). [↑](#footnote-ref-41)
42. Hetherington & Dooley, *supra* note41, at 2. [↑](#footnote-ref-42)
43. For a description of statutory and case law on the subject, *see* Robert B. Thompson, The Shareholder's Cause of Action for Oppression, 48 Bus. Law. 699 (1993)*.* Robert B. Thompson, *Corporate Dissolution and Shareholders’ Reasonable Expectations*, 66 Wash. U. L. Q. 193 (1988) (noting that “the statutory grounds for judicial dissolution are now substantially broader than reasons given in earlier statutes and modern courts are more likely than their predecessors to interpret statutory grounds for dissolution in a way that provides relief for minority shareholders” and that “courts increasingly grant alternative remedies even in the absence of specific statutory authorization”). [↑](#footnote-ref-43)
44. Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 238-43 (1991); Rock & Wachter, *supra* note 32. [↑](#footnote-ref-44)
45. The earliest precedent acceding to a partial dissolution of an S.A. dates back to 1982. TJMG, Apelação Cível 58.092, Rel. Des. Danilo Furtado, J. Nov. 17, 1982, RF 286/281. Throughout the 1990s, however, most courts continued to deny requests for partial dissolution, which only became generally accepted in the late 2000s. Nelson Eizirik, A Lei das S/A Comentada 159-160 (2011). [↑](#footnote-ref-45)
46. *See*, *e.g.*, the charter of navigation company Companhia Pernambucana, established in 1854 (providing that “shareholders may not withdraw the value of their shares before liquidation” and that “the death of a shareholder does not lead to the company’s liquidation, and the heirs or representatives may not in any way hinder the company’s operations”). Decree 1,413 of July 15, 1854, Arts. 9 and 45. [↑](#footnote-ref-46)
47. Código Comercial, Art. 295. [↑](#footnote-ref-47)
48. Law 3,150 of Nov. 4, 1882, Art. 17, 6º; Decree-law 2,627 of Sept. 26, 1940. [↑](#footnote-ref-48)
49. Law 6,404 of Dec. 15, 1976, Art. 206. Other statutory bases for dissolution include the expiration of its term, cases provided in the charter, the existence of a single shareholder, the end of legal authorization to operate (if required), the annulment of the act of incorporation, and the decision of an administrative authority (as determined by special statute). [↑](#footnote-ref-49)
50. *Id.*, Art. 117, § 1º, *b.* For a comparative perspective, *see* Edward Rock et al., *Fundamental Changes*, *in* Anatomy of Corproate Law, *supra* note 1. [↑](#footnote-ref-50)
51. LSA, arts. 136-A and 137. [↑](#footnote-ref-51)
52. LSA, arts. 137, II and III. [↑](#footnote-ref-52)
53. Cite TJSP. [STJ?] [↑](#footnote-ref-53)
54. Waldemar Martins Ferreira, As Directrizes do Direito Comercial Brasileiro 101 (1933). [↑](#footnote-ref-54)
55. Guinnane et al.*, supra* note 8; Pargendler, *supra* note 10. [↑](#footnote-ref-55)
56. Art. 18, Decree 3,708 of Jan. 10, 1919. [↑](#footnote-ref-56)
57. *See*, *e.g.*, Alfredo Russel, Curso de Direito Commercial Brasileiro 369 (1923) (arguing that limitadas are subject to the same dissolution provisions as partnerships); Waldemar Ferreira, Sociedades por Quotas 908 (5th ed. 1958). *But see*, for different interpretations, Mauro Rodrigues Penteado, Dissolução e Liquidação de Sociedades 126-28 (arguing that the corporate regime should apply to limitadas); Egberto Lacerda Teixeira, Das Sociedades por Quotas de Responsabilidade Limitada 126-28 (1956) (arguing that partnership or corporate provisions of the Commercial Code should apply depending on the “capitalist” or “personalist” character of the company). [↑](#footnote-ref-57)
58. Commercial Code, Art. 335. [↑](#footnote-ref-58)
59. STF, RE 9.929, Rel. Min. Flamínio de Rezende, decided on Jan. 4, 1946, RT 166/843. [↑](#footnote-ref-59)
60. For a leading case on this matter, *see* STF, Segunda Turma, RE 89464-SP, Rel. Min. Cordeiro Guerra, Rel. p/ acórdão Min. Décio Miranda, J. Dec. 12, 1978. [↑](#footnote-ref-60)
61. For a discussion and critique of this approach, *see* the professional masters’ thesis by André Luiz Cardoso Santos, *Apuração de Haveres na Sociedade Limitada: Uma Análise Crítica da Jurisprudência* (2015), <http://bibliotecadigital.fgv.br/dspace/handle/10438/15148> (noting the courts’ widespread adoption of the method of “simulated total dissolution,” irrespective of contractual provisions to the contrary). [↑](#footnote-ref-61)
62. I could not locate any judicial precedents involving a request of partial dissolution of a publicly-traded company. Some commentators, however, have advocated this possibility, by analogizing the listed company whose shares are not liquid to the *limitada*. *See* Mauro Rodrigues Penteado, Dissolução e Liquidação de Sociedades 190 (1995); Paulo Sergio Restiffe*, Possibilidade de Dissolução Parcial de Sociedade Anônima Aberta?*, 55 Revista de Direito Bancário e do Mercado de Capitais 237 (ano). [↑](#footnote-ref-62)
63. *See supra* note 45 and accompanying text. [↑](#footnote-ref-63)
64. STJ, ERESP 111,294, Rel. Min. Castro Filho, Jun. 26, 2006, D.J. Sept. 10, 2007. [↑](#footnote-ref-64)
65. *Affectio societatis* is a concept that dates back to Roman law, a legal system that lacked a corporate form. The relevance of the concept of Brazilian law is curious, to say the least, and has been the object of strong, if relatively isolated, scholarly critique. *See* Erasmo Valladão Azevedo e Novaes França, & Marcelo Vieira von Adamek, *Affectio societatis: um conceito jurídico superado no modern direito societário pelo conceito de fim social*, *in* Direito Societário Contemporâneo I 140 (2009) (arguing that *affectio societatis* is “an equivocal concept whose obscurity is strengthened by the use of the Latin expression”). The authors observe that Brazil’s unique devotion to the concept of *affectio societatis* is exceptional among developed legal systems and attributable to “the lack of a healthy and desirable exercise of critique and reflection about the legal rules in force”. *Id.* at 132. [↑](#footnote-ref-65)
66. STJ, *supra* note 64. [↑](#footnote-ref-66)
67. *Id.* [↑](#footnote-ref-67)
68. *Id.* [↑](#footnote-ref-68)
69. *Id.* [↑](#footnote-ref-69)
70. STJ, ERESP 419,174, Rel. Min. Aldir Passarinho, May 28, 2008, D.J. Aug. 4, 2008. [↑](#footnote-ref-70)
71. *Id.* [↑](#footnote-ref-71)
72. TJSP, Apelação 003.299-4/0, Rel. Des. Mohamed Amaro, Feb. 19, 1998. [↑](#footnote-ref-72)
73. Law 13,105 of Mar. 16, 2015, Art. 599, § 2º. [↑](#footnote-ref-73)
74. Projeto de Lei 4302 of 2012. For comparative experience with simplified corporation statutes, *see* Loi no. 94-1 du 3 janvier 1994 instituant la société par actions; L. 1258, deciembre 5, 2008 (Colombia). [↑](#footnote-ref-74)
75. *See*, *e.g.*, STJ, RESP 917,531-RS, Rel. Min. Luis Felipe Salomão, (2007/0007392-5), Nov. 7, 2011, D.J. Feb. 1, 2012. [↑](#footnote-ref-75)
76. *See* Gregor Bachmann et al., Regulating the Closed Corporation 73-4 (2014). [↑](#footnote-ref-76)
77. As explained in Part I.C below, the attribute of delegated management is weaker under Brazilian law. One of the implications is that all shareholders have a duty to exercise their voting rights in the interest of the company. [↑](#footnote-ref-77)
78. Jens Dammann has provocatively argued in favor of expelling controlling shareholders as a remedy. However, his proposed system of “corporate ostracism” does not compromise lock-in: he would simply prevent the controlling shareholder from exercising voting rights or otherwise participating in the company, and requiring him or her to sell the shares to a third party within a certain period (e.g., two years). *See* Jens Dammann, *Corporate Ostracism: Freezing Out Controlling Shareholders*, 33 J. Corp. L. 681 (2008). [↑](#footnote-ref-78)
79. STJ, RESP 1.128.431-SP, Rel. Min. Nancy Andrighi. J. Oct. 11, 2011, D.J. Oct. 25, 2011 (arguing that it is up to the minority shareholders, if they so desire, to file a counterclaim for the withdrawal of majority shareholders). By permitting majority shareholders to freeze out the minority at any time, this case aggravates, rather than mitigates, the problem of minority expropriation. [↑](#footnote-ref-79)
80. Civil Code, Art. 1.845. [↑](#footnote-ref-80)
81. *See* Harold James, Family Capitalism: Wendels, Haniels, Falcks, and the Continental European Model 19 (2009). James also notes that “[i]n the late twentieth century, Pierre Bourdieu argued that the *grande famille* had rescued itself only by using the device of the company as a legal means of protecting itself against the code’s requirement of partition”). *Id*. at 72. [↑](#footnote-ref-81)
82. TJSP, AI 236.462.4/9, Rel. Des. Ruiter Oliva, J. Apr. 30, 2002. [↑](#footnote-ref-82)
83. *See*, *e.g.*, Luiz Gastão Paes de Barros Leães, Pareceres 942-43; 949 (2004); Nelson Eizirik, A Lei das S/A Comentada 157-162 (2011). [↑](#footnote-ref-83)
84. *See*, *e.g.*, Modesto Carvalhosa, Comentários à Lei de Sociedades Anônimas 44-45 (5d ed. 2011); Roberta Nioac Prado, *Dissolução de “Holding” S/A e Apuração de Haveres,* 113 Revista de Direito Mercantil 230, 230-236 (1999). [↑](#footnote-ref-84)
85. For a recent vigorous defense of limited liability, *see* Stephen M. Bainbridge & M. Todd Henderson, Limited Liability: A Legal and Economic Analysis 2 (2016) (describing limited liability as “[t]he key feature of the corporation that makes it such an attractive form of human cooperation and collaboration”). *See also* Easterbrook & Fischel, *supra* note 44, at 40 (“Limited liability is a distinguishing feature of corporate law—perhaps *the* distinguishing feature”); David Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 Colum. L. Rev. 1565, 1566 (1991) (“No principle seems more established in capitalist law, or more essential to the functioning of the modern economy”). [↑](#footnote-ref-85)
86. Hansmann et al., *supra* note 22, at 1339. [↑](#footnote-ref-86)
87. For broad overviews of the benefits of limited liability, *see* Bainbridge & Henderson, *supra* note 85; Easterbrook & Fischel, *supra* note 205; John Armour et al., *supra* note 1. [↑](#footnote-ref-87)
88. Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 Nw. U. L. Rev. 148 (1992-1993). [↑](#footnote-ref-88)
89. Morton J. Horwitz, The Transformation of American Law, 1870-1960 94 (“truly limited shareholder liability was far from the norm in America even as late as 1900”). [↑](#footnote-ref-89)
90. Double liability differs from unlimited liability in that shareholders are only liable up to the par value of their stock. Jonathan Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: History and Implications*, 27 Wake Forest L. Rev. 31 (1992); Mark I. Weinstein, *Share Price Changes and the Arrival of Limited Liability in California*, 1 J. Legal Stud. (2013). [↑](#footnote-ref-90)
91. The royal charter establishing the first Bank of Brazil in 1808 specifically mentioned limited liability of shareholders, and so did subsequent special charters for other banks. *See*, *e.g.*, Decree 888 of Dec. 22, 1851, Art. 10 (Banco da Província de Pernambuco); Decree 4,390 of July 15, 1869, Art. 30 (Banco Commercial do Maranhão). [↑](#footnote-ref-91)
92. Commercial Code, Art. 298. [↑](#footnote-ref-92)
93. *See* note 95 *infra* and accompanying text. [↑](#footnote-ref-93)
94. Rubens Requião, *Abuso de Direito e Fraude através de Personalidade Jurídica (Disregard Doctrine)*, 410 Revista dos Tribunais 13 (1969) (reviewing German and U.S. authorities and advocating for the application of the “disregard doctrine” in Brazil to cases of fraud and abuse). For another highly influential defense of veil piercing based on lessons from foreign experience, *see* J. Lamartine Correa de Oliveira, A Dupla Crise da Pessoa Jurídica (1979). [↑](#footnote-ref-94)
95. Bruno Meyerhof Salama, O Fim da Responsabilidade Limitada: História, Direito e Economia (2014). [↑](#footnote-ref-95)
96. Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 Cornell L. Rev. 99 (2014) (describing the apparently incoherent stance of U.S. courts in applying the traditional doctrinal grounds for veil piercing and proposing an alternative taxonomy). [↑](#footnote-ref-96)
97. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1036 (1991) (“Piercing the corporate veil is the most litigated issue in corporate law”). *But see* Peter Oh, *Veil Piercing*, 89 Tex. L. Rev. 81, 91 (2010) (finding that “[v]eil-piercing is misdubbed the most litigated issue in corporate law”). While veil-piercing cases are numerous, claims on the liability of directors and officers and dissolutions appear to be more common. *Id.* [↑](#footnote-ref-97)
98. Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. Corp. L. 479 (2000-2001); Presser, *supra* note 88. [↑](#footnote-ref-98)
99. Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 Conn. L. Rev. 619 (2004-2005). Scholars have since shown that the rate of veil piercing is arguably greater in China than in the United States. Hui Huang, *Piercing the Corporate Veil China: Where Is It Now and Where Is It Heading?*, 60 Am. J. Comp. L. 743, 774 (2012)(finding that Chinese courts pierced the veil in 63% of the 99 cases adjudicate since the 2005 statute, “a rate significantly higher than in the United States, the United Kingdom and Australia”). [↑](#footnote-ref-99)
100. Macey & Mitts, *supra* note 96, at 141; Oh, *supra* note 97, at 100. [↑](#footnote-ref-100)
101. I conducted this search in July 2016 utilizing the single search expression “desconsideração da personalidade jurídica” (disregard of legal personality) in order to avoid duplicative findings. This is likely to underestimate the number of decisions, especially because not all decisions are published on the courts’ website. [↑](#footnote-ref-101)
102. Decree-Law 5,452, May 1, 1943. [↑](#footnote-ref-102)
103. As discussed below, the conventional view is that the elimination of asset partitioning within a corporate group is far less controversial than outside of it. *See* notes 205 *infra* and accompanying text. [↑](#footnote-ref-103)
104. Salama, *supra* note 95, at 156. [↑](#footnote-ref-104)
105. *See* FGV-GVCepe, Panorama da Indústria Brasileira de Private Equity e de Venture Capital 38 [Panorama of Brazil’s Private Equity and Venture Capital Industry] (2008) (citing veil piercing as one of the emerging challenges for the industry). On the risks that Brazil’s stance on unlimited liability poses to private equity investors, *see also* the lecture by Brazilian attorney Henry Stutzer in the conference “Contract Enforcement in Brazil: Challenges and Substitues”, jointly organized by Fundação Getulio Vargas School of Law at São Paulo and Stanford Law School (video available at <http://contractenforcement.blogspot.com.br/>) [hereinafter “Contract Enforcement in Brazil”) (noting that the threat of liability to “deep-pocket stakeholders” extends to officers, board members, shareholders, fund managers, other portfolio companies, and limited partners related to the shareholders). Stutzer describes the use of mezzanine and convertible debt to minimize the risk of shareholder liability by private equity investors. On the disincentives to angel investors, *see* note 148 *infra* and accompanying text. [↑](#footnote-ref-105)
106. In 2014, nearly 4 million new lawsuits were filed in labor courts in Brazil, leading to over 8 million pending cases. Conselho Nacional de Justiça, Courts in Figures 14 (2015), <http://www.cnj.jus.br/files/conteudo/arquivo/2015/11/491328c33144833370f375278683f955.pdf>. There is also a general perception that labor courts may be biased in favor of workers’ claims. *See* Dias Reuz, *Before Hiring Employees in Brazil, Consider This...*, Nov. 14, 2011, <http://diazreus.com/before-hiring-employees-in-brazil-consider-this/> (“To top it all, courts tend to favor protecting employees and usually grant whatever benefit for which the individual has petitioned”); *Employer, Beware*, The Economist, Mar. 10, 2011 (“In 2009, 2.1m Brazilians opened cases against their employers in the labour courts. These courts rarely side with employers”). As described by the legal counsel of one of Brazil’s largest banks, “[w]e deal with 60 thousand labor claims. Seventy percent of our former employees file suit. It is a horror scenario”), video available at Contract Enforcement in Brazil, *supra* note 105. [↑](#footnote-ref-106)
107. Decree-Law 2,321 of Feb. 25, 1987, Art. 15. Some authors, however, adopt a restrictive interpretation of the liability regime applicable to controlling shareholders of financial institutions. Arnoldo Wald & Alexandre Wald, *O Descabimento da Indisponibilidade dos Bens dos Ex-Administradores de Instituição Financeira em Liquidação Extrajudicial, Quando o Inquérito Realizado pelo Banco Central Não Apura Nexo Causal Entre a Conduta e o Prejuízo*, *in* Intervenção e Liquidação Extrajudicial no Sistema Financeiro Nacional - 25 anos da Lei 6.024 171 (Jairo Saddi ed., 1999) (arguing that the liability regime of managers and controlling shareholders of financial institutions is based on fault); Eduardo Salomão Neto, Direito Bancário 723-7 (2014) (defending that both managers and controlling shareholders are strictly liable on a joint and several basis, but that individual controlling shareholders can escape liability by interposing a holding company). [↑](#footnote-ref-107)
108. Law 4,595, Dec. 31, 1964, Art. 25. [↑](#footnote-ref-108)
109. Decree-Law 2,321 of Feb. 25, 1987, Art. 15. Both the Central Bank and the judiciary have traditionally interpreted the statute as imposing strict liability for the bank’s obligations. However, recent judicial decisions have held that the imposition of liability on managers is fault-based, but subject to a rebuttable presumption of fault. For a discussion of the interpretative controversies and judicial precedents on this topic, *see* Luiz Carlos Sturzenegger, *Apontamentos Sobre Responsabilidade Civil de Controladores e Administradores de Instituições Financeiras – Anteprojeto do Banco Central do Brasil do regime de “saída bancária”*, 52 Revista de Direito Bancário e Mercado de Capitais199 (2011). [↑](#footnote-ref-109)
110. Law 6,024 of Mar. 13, 1974, Arts. 36 and 40. [↑](#footnote-ref-110)
111. Law 9,447 of Mar. 14, 1997. [↑](#footnote-ref-111)
112. Gustavo H.B. Franco & Luiz Alberto C. Rosman, *A Responsabilidade Ilimitada em Instituições Financeiras no Brasil*, *in* A Reforma do Sistema Financeiro Americano: Nova Arquitetura Internacional e o Contexto Regulatório Brasileiro(Instituto de Estudos de Política Econômica - Casa das Garças*,* 2009). *See also* note 217 *infra* and accompanying text. [↑](#footnote-ref-112)
113. Gustavo H.B. Franco, As Leis Secretas da Economia 88 (2012). Franco articulates, with tongue in cheek, the “Single Law of Prudential Regulation,” according to which “the prudence and diligence of the bank are proportionate to the sum of the liability of the controlling shareholder with the square of the liability of the manager”). *Id.* at 87. [↑](#footnote-ref-113)
114. Banco PanAmericano, *Nothing to see here*, The Economist, Nov. 18, 2010. [↑](#footnote-ref-114)
115. Law 8,078 of Sept. 11, 1990. [↑](#footnote-ref-115)
116. *See* Ada Pellegrini Grinover et al., Código de Defesa do Consumidor: Comentado pelos Autores do Anteprojeto 237 (8th ed., 2005). [↑](#footnote-ref-116)
117. *Id.* at 239. [↑](#footnote-ref-117)
118. See, *e.g.*, STJ, TJ, AgRg no Resp 1.106.072-MS, Rel. Min. Marco Buzzi, J. Sep. 02, 2014, D.J. Sep. 18, 2014. For additional precedents involving members of *limitadas*, *see* REsp 1.537.890-RJ, Rel. Min. Paulo de Tarso Sanseverino, J. March 08, 2016, D.J. March, 14, 2016; STJ, REsp 1.111.153-RJ, Rel. Min. Luis Felipe Salomão, J. Dec. 06, 2012, D.J. Feb. 04, 2013; STJ, REsp 737.000-MG, Rel. Min. Paulo de Tarso Sanseverino, J. Sep. 01, 2011, D.J. Sep. 09, 2011. [↑](#footnote-ref-118)
119. Salama, *supra* note 95 [↑](#footnote-ref-119)
120. Law 9,605 of Feb. 12, 1998, Art. 4. [↑](#footnote-ref-120)
121. Law 9,847 of Oct. 26, 1999, Art. 18, §3º (permitting veil piercing whenever legal personality “constitutes an obstacle to the compensation of the harm caused to national fuel supply or to the National System of Fuel Stocks”). [↑](#footnote-ref-121)
122. On the international repercussion of this disaster, *see* Alex MacDonald, Justin Scheck & Rhiannon Hoyle, *Samarco May Not Shield BHP, Vale from Brazil Dam-Breach Repercussions*, Wall St. J., Nov. 11, 2015. [↑](#footnote-ref-122)
123. LSA, Art. 266. This is irrespective of the standards governing related-party transactions within formal or de facto groups. [↑](#footnote-ref-123)
124. Law 8,212 of July 24, 1991, Art. 30, IX. [↑](#footnote-ref-124)
125. Law 5,172 of Oct. 25, 1966, Art. 124, I. *See*, *e.g.*, STJ, AgRg no AREsp 495.233-PE, Rel. Min. Humberto Martins, J. May 27, 2015, D.J. June 2, 2015; STJ, AgRg no REsp 1.433.631-PE, Rel. Min. Humberto Martins, J. March 10, 2015, D.J. March 13, 2015; STJ, AgRg no AREsp 520.056-SP, Rel. Min. Herman Benjamin, J. Sep. 16, 2014, D.J. Oct. 10, 2014. [↑](#footnote-ref-125)
126. Law 12,529 of Nov. 30, 2011, Arts. 33 and 34 “Art. 34. The company responsible for a violation of the economic order may have its corporate veil pierced, upon abuse of rights, abuse of power, violation of law, illegal act or fact, or violation of the bylaws or articles of association. Sole paragraph. The corporate veil may also be pierced in case of bankruptcy, insolvency, closure or downtime caused by poor corporate administration.” [↑](#footnote-ref-126)
127. Law 12,846 of Aug. 1, 2013, Art. 4º, § 2o. [↑](#footnote-ref-127)
128. LSA, Art. 243, § 1 º. [↑](#footnote-ref-128)
129. Anna Beatriz Alves Margoni, *A Desconsideração da Personalidade Jurídica nos Grupos de Sociedades* (2011) (unpublished master’s thesis), <http://www.teses.usp.br/teses/disponiveis/2/2132/tde-04072012-113122/publico/Dissertacao_Anna_Beatriz_Alves_Margoni_Versao_Integral.pdf>. [↑](#footnote-ref-129)
130. Sunny Singh, *Brazilian Reorganization Plan: Fundamentally Fair or Wholesale Trampling of Creditors’ Rights?*, Weil Bankruptcy Blog, Oct. 9, 2014. [↑](#footnote-ref-130)
131. *Id.* *In re Rede Energia S.A.*, U.S. Bankruptcy Court for the Southern District of New York Judge Shelley C. Chapman, Aug. 27, 2013. [↑](#footnote-ref-131)
132. TJRJ, AI 0064658-77.2013.8.19.0000, Rel. Des. Gilberto Campista Guarino, J. Dec. 3, 2013. [↑](#footnote-ref-132)
133. *See*, *e.g.*, STJ, REsp 1.141.977-SC, Rel. Min. Benedito Gonçalves, J. Oct. 21, 2010, D.J. Nov. 04, 2010; STJ, REsp 849.535-RS, Rel. Min. José Delgado, J. Oct. 05, 2006, D.J. Nov. 05, 2006; STJ, REsp 296.304-SP, Rel. Min. Francisco Peçanha Martins, J. May 20, 2003, D.J. Nov. 01, 2003. [↑](#footnote-ref-133)
134. The expression comes from Salama, *supra* note 95, at 185. [↑](#footnote-ref-134)
135. TST, AIRR-1365-56.2011.5.02.0444, 1ª Turma, Rel. Min. Lelio Bentes Corrêa, J. Aug. 21, 2013. *See also* TST, Ag-AIRR - 17200-66.2000.5.02.0316, 8ª Turma, Rel. Min. Márcio Eurico Vitral Amaro, J. Apr. 15, 2015, D.J. Apr. 17, 2015. Some decisions, however, restrict the imposition of liability to controlling shareholders. *See*, *e.g.*, TST, AIRR - 119600-07.1990.5.02.0027, 2ª Turma, Rel. Min. José Roberto Freire Pimenta, J. Apr. 22, 2015, D.EJT Apr. 30, 2015. [↑](#footnote-ref-135)
136. On the benefits of pro rata over joint and several liability, *see* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879, 1892-4 (1991). [↑](#footnote-ref-136)
137. TST, Ag-AIRR - 3262200-18.1997.5.09.0008, 1ª Turma, Rel. Des. Convocado José Maria Quadros de Alencar, J. Nov. 27, 2013, D.J. Nov. 29, 2013. [↑](#footnote-ref-137)
138. STJ, RESP, 1.096.094-DF, 4ª Turma, Rel. Min. Luis Felipe Salomão, J. Aug. 2, 2012, D.J. Oct. 16, 2012. [↑](#footnote-ref-138)
139. On the argument for the disparate treatment voluntary and involuntary creditors, *see* notes 201-202 *infra* and accompanying text. [↑](#footnote-ref-139)
140. Salama, *supra* note 95, at 11 (noting that, unlike other areas, unlimited liability in civil and commercial matters is “quite restrained”). [↑](#footnote-ref-140)
141. STJ, EREsp 1.306.553-SC, Rel. Min. Maria Isabel Gallotti, J. Dec. 10, 2014, D.J. Dec. 12, 2014. [↑](#footnote-ref-141)
142. *Id.* [↑](#footnote-ref-142)
143. Law 8,620 of Jan. 5, 1993, Art. 13. [↑](#footnote-ref-143)
144. STF, RE 562.276-PR, Rel. Min. Ellen Gracie, Nov. 3, 2010. [↑](#footnote-ref-144)
145. Peter Conti-Brown, *Elective Shareholder Liability*, 64 Stan. L. Rev. 409, 456 (2012). [↑](#footnote-ref-145)
146. *Id.* at 460. [↑](#footnote-ref-146)
147. Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 Stan. L. Rev. 475, 482-6 (2013). [↑](#footnote-ref-147)
148. Presidência da República, Secretaria de Assuntos Estratégicos, Subsecretaria de Ações Estratégicas, Produtivismo Includente: Empreendedorismo Vanguardista 50 (2015), <http://www.sae.gov.br/wp-content/uploads/EMPREENDEDORISMO-VANGUARDISTA-FINAL-FUNDO-CLARO.pdf>. According to the Report, “[o]ne of the aspects that impede the development of a market for the financing of innovating ventures in Brazil stems from the possibility that investors in such ventures will come to be held judicially liable, in amounts often exceeding the capital invested, through the so-called disregard of legal entity. An angel investor, for instance, may be forced to pay 100% of the debts of the investee firm, even if though its share is a minority one.” *Id.* [↑](#footnote-ref-148)
149. *Id.* at 19 and 64. [↑](#footnote-ref-149)
150. Law 13,105 of Mar. 16, 2015, Arts. 133-137. [↑](#footnote-ref-150)
151. LSA, Art. 144. For a description of the board structures available under Brazilian law and their applicability, *see* note 169 *infra* and the accompanying text. [↑](#footnote-ref-151)
152. *See* Érica Gorga, *Corporate Control & Governance after a Decade from “Novo Mercado”: Changes in Ownership Structures and Shareholder Power in Brazil*, *in* Research Handbook on Shareholder Power (Jennifer G. Hill & Randall S. Thomas eds., 2015) (hereinafter “Corporate Control”). [↑](#footnote-ref-152)
153. Alexandre di Miceli, Governança Corporativa no Brasil e no Mundo (2015) (finding that, as of 2014, 85% of listed companies in Brazil have a controlling shareholder or group of shareholders holding more than 50% of voting shares, and in only 4% the largest shareholder has less than 15% of the shares). [↑](#footnote-ref-153)
154. *See*, *e.g.*, Mariana Pargendler, *Corporate Governance in Emerging Markets*, *in* Oxford Handbook of Corporate Law and Governance (Jeffrey N. Gordon and Wolf-Georg Ringe eds., forthcoming 2017) (hereinafter “Oxford Handbook”). [↑](#footnote-ref-154)
155. John Armour, Luca Enriques, Henry Hansmann & Reinier Kraakman, *The Basic Governance Structure: The Interests of Shareholders as a Class*, *in* Anatomy of Corporate Law, *supra* note 1, at \_\_; Sofie Cools, *The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers*, 30 Del. J. Corp. L. 697 (2005) (explaining the greater role of shareholders in continental Europe). [↑](#footnote-ref-155)
156. *See* note 161 *infra* and accompanying text. [↑](#footnote-ref-156)
157. LSA, Art. 123, *c* and *d* (granting shareholders holding 5% of total capital, 5% of voting shares or 5% of non-voting shares). [↑](#footnote-ref-157)
158. LSA, Art. 122. A 2011 amendment to the statute now permits the board of directors of publicly-traded companies to authorize bond issuances. [↑](#footnote-ref-158)
159. LSA, Art. 122, sole paragraph. [↑](#footnote-ref-159)
160. LSA, Art. 152. For a comparative perspective, *see* Randall S. Thomas & Christoph Van der Elst, *Say on Pay Around the World*, 92 Wash. U. L. Rev. 653 (2015). [↑](#footnote-ref-160)
161. LSA, Art. 142. [↑](#footnote-ref-161)
162. Edward Rock et al., *Fundamental Changes*, *in* Anatomy of Corporate Law, *supra* note 1, at \_\_. [↑](#footnote-ref-162)
163. LSA, Art. 118, § 8º. [↑](#footnote-ref-163)
164. LSA, Art. 118, § 9º. [↑](#footnote-ref-164)
165. LSA, Art. 118, § 2º. [↑](#footnote-ref-165)
166. Érica Gorga has documented the ample use of shareholder agreements binding director votes, even with respect to matters of exclusive board authority. Gorga, *Corporate Control*, *supra* note 152. [↑](#footnote-ref-166)
167. CVM relied on Art. 115, § 1, of the LSA, which provides that a shareholder cannot vote in any decision that may favor it in a particular manner or in which has an adverse interest to the company. [↑](#footnote-ref-167)
168. For a discussion of this case, *see* Mario Engler Pinto Junior, *Exercício do Controle Acionário na Empresa Estatal: Comentários a Decisão da CVM no Caso Eletrobrás* (2016), <http://ssrn.com/abstract=2765264>. [↑](#footnote-ref-168)
169. LSA, Arts. 138, § 2º, and 239. [↑](#footnote-ref-169)
170. Decree-law 2,627 of Sep. 26, 1940, arts. 116 et seq. and 124 et seq. [↑](#footnote-ref-170)
171. *See*, *e.g.*,Parecer de Orientação CVM [CVM Advisory Opinion] No. 35 (2008). [↑](#footnote-ref-171)
172. On shareholder agreements, *see* Gorga, *id.* [↑](#footnote-ref-172)
173. LSA, Art. 36. [↑](#footnote-ref-173)
174. *Id.*, sole paragraph. [↑](#footnote-ref-174)
175. John Armour et al., *supra* note 1, at \_\_. [↑](#footnote-ref-175)
176. Yuki Yokoi, *Por Que Algumas Empresas Ainda Mantêm o Capital Aberto e As Ações Listadas?*, Capital Aberto, Sep. 1, 2009. [↑](#footnote-ref-176)
177. LSA, Art. 254-A; [↑](#footnote-ref-177)
178. *See*, *e.g.*,Lucian A. Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 1994 Q.J. Econ. 957. [↑](#footnote-ref-178)
179. Dyck & Zingales, *supra* note 5, at 538 (analyzing the control premium paid in sales of control transactions, and estimating private benefits of control that ranged from +65% in Brazil to -4% in Japan). [↑](#footnote-ref-179)
180. Tomas Alvarenga, *Private Benefits of Control in Brazil: What Has Changed in the Past Ten Years?* (working paper, 2016) (on file with author). [↑](#footnote-ref-180)
181. While poison pill provisions purported to be “unamendable,” the CVM has opined that such dead-hand clauses are contrary to Brazilian law and therefore unenforceable. *See* Gilson et al., *supra* note 147, at 499. For a critique of Brazilian poison pills, *see* Carlos Klein Zanini, A *Poison Pill Brasileira: Desvirtuamento, Antijuridicidade e Ineficiência*, *in* Temas de Direito Societário e Empresarial Conteporâneos (Marcelo von Adamek ed., 210). [↑](#footnote-ref-181)
182. *See* TJMG, AC 1.0000.00.199781-6/000 (1), Rel. Des. Garcia Leão, J. Aug. 7, 2001, DJ Sept. 7, 2001. For an excellent exposition of this argument, *see* Fábio Konder Comparato, *Sociedade de Economia Mista Transformada em Sociedade Anônima Ordinária – Inconstitucionalidade*, 25 Revista Trimestral de Direito Público 63 (1999). [↑](#footnote-ref-182)
183. *See*, *e.g.*, TST, AIRR - 7300-66.1994.5.01.0035, 4ª Turma, Rel. Min. João Oreste Dalazen, J. Aug. 13, 2014; TST, AIRR - 96000-30.2009.5.03.0037, 8ª Turma, Rel. Des. Jane Granzoto Torres da Silva, J. Apr. 8, 2015. [↑](#footnote-ref-183)
184. *Id.* Código Civil, Art. 1.003, sole paragraph (“For up to two years after the registration of the change to the agreement, the transferring partner is jointly and severally liable together with the transferee, to the partnership and third-parties, for the obligations it had as partner”). For relevant precedents, *see* TST, AIRR - 7300-66.1994.5.01.0035, 4ª Turma, Rel. Min. João Oreste Dalazen, J. Aug. 13, 2014; TST, AIRR - 96000-30.2009.5.03.0037, 8ª Turma, Rel. Des. Jane Granzoto Torres da Silva, J. Apr. 8, 2015. [↑](#footnote-ref-184)
185. TST, AIRR-1365-56.2011.5.02.0444, 1ª Turma, Rel. Min. Lelio Bentes Corrêa, J. Aug. 21, 2013. [↑](#footnote-ref-185)
186. *See* note 184 and accompanying text. [↑](#footnote-ref-186)
187. For an example of the latter, more rigorous approach, *see* STJ, RESP 1.180.714-RJ, Quarta Turma. Rel. Min. Luís Felipe Salomão. D.J. Apr. 5, 2011. In this case, however, there was evidence of fraud. [↑](#footnote-ref-187)
188. On the challenges to contract enforcement in Brazil, *see* notes 220-221 and accompanying text. [↑](#footnote-ref-188)
189. *See* Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption,* 123 Yale. L. J. 101 (2014). [↑](#footnote-ref-189)
190. BM&FBOVESPA, SOE Governance Program 3 (2015), <http://www.bmfbovespa.com.br/lumis/portal/file/fileDownload.jsp?fileId=8A828D295048C0EF0150CE2C3F077741>. [↑](#footnote-ref-190)
191. *Id.* at 385. [↑](#footnote-ref-191)
192. Mariana Pargendler, *Governing State Capitalism: The Case of Brazil*, *in* Regulating the Visible Hand 386 (Benjamin H. Liebman & Curtis J. Milhaupt eds. 2015). [↑](#footnote-ref-192)
193. *See*, *e.g.*, Mario Engler Pinto Jr., *A Atuação Empresarial do Estado e o Papel da Empresa Estatal*, 151-152 Revista de Direito Mercantil 256, 263 (2009). [↑](#footnote-ref-193)
194. Mariana Pargendler, *Governing State Capitalism: The Case of Brazil*, *in* Regulating the Visible Hand 386 (Benjamin H. Liebman & Curtis J. Milhaupt eds. 2015). [↑](#footnote-ref-194)
195. For an expanded version of this argument, *see* Mariana Pargendler, *State Ownership and Corporate Governance*, 80 Fordham L. Rev. 2917 (2012); Mariana Pargendler, *The Unintended Consequences of State Ownership: The Brazilian Experience*, 13 Theoretical. Inq. L.503(2012). [↑](#footnote-ref-195)
196. Law 6,404 of 1976, Art. 117, § 1º, *a* (qualifying as abuse of control power the action of a controlling shareholder that “guides the company towards an objective that is foreign to its corporate purpose or damaging to national interest, or that leads it to favor another company, domestic or foreign, to the detriment of minority shareholder’s participation in the profits or assets of the company, or the national economy”). [↑](#footnote-ref-196)
197. Law 6,404 of 1976, Art. 154. [↑](#footnote-ref-197)
198. *See*, *e.g.*, Frank H. Esterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law (1991); John Armour et al., *supra* note 1. [↑](#footnote-ref-198)
199. For the classic articulation of this argument, *see* R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 Rev. Econ. Stud. 11 (1956). [↑](#footnote-ref-199)
200. The term comes from Varieties of Capitalism (Peter A. Hall & David Soskice eds., 2001). For the application of second-best argument in the institutional context, *see* Dani Rodrik, *Second-Best Institutions*, 98 Am. Econ. Rev. 100 (2008). [↑](#footnote-ref-200)
201. *See*, *e.g.*, Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. Chi. L. Rev. 499, 520 (1976) (noting that pursuing separate incorporations for purposes of evading tort liability permits the externalization of costs and is socially inefficient); Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573, 576 (1986) (“limited liability that insulates shareholders, particularly parent corporations, from liability for the claims of involuntary creditors of the controlled corporation causes even economists convinced of the utility of limited liability generally to concede that limited liability raises serious problems because it enables the enterprise to externalize its costs”). [↑](#footnote-ref-201)
202. Hansmann & Kraakman, *supra* note 136. [↑](#footnote-ref-202)
203. Lucian A. Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 Yale L. J. 857 (1996). Bebchuk and Fried formulate the distinction between adjusting and non-adjusting creditors in the context of priority of secured claims in bankruptcy, a regime that, like limited liability, imposes negative externalities on non-adjusting creditors and, therefore, distorts behavior. For a discussion in the context of limited liability, *see* John Armour et al., *Transactions with Creditors*, *in* Anatomy of Corporate Law, *supra* note 1. [↑](#footnote-ref-203)
204. *Id.* [↑](#footnote-ref-204)
205. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 111 (1985);Henry Hansmann & Richard Squire, *External and Internal Asset Partitioning: Corporations and Their Subsidiaries*, *in* Oxford Handbook, *supra* note 154; Bainbridge, *supra* note 98, at 526. [↑](#footnote-ref-205)
206. Hansmann & Squire, *supra* note 205. [↑](#footnote-ref-206)
207. *Id.* [↑](#footnote-ref-207)
208. *Id.* [↑](#footnote-ref-208)
209. It is important to recognize, however, that the disregard of legal entities within corporate groups in Brazil tends to be a more drastic step than in the U.S. context. The reason is that, while the overwhelming majority of subsidiaries in the United States are wholly owned, Brazil has a fair share of pyramidal business groups in which outside shareholders hold minority stakes in the firm. Consequently, veil piercing and substantive consolidation frustrate not reduce the benefits of specialized monitoring by corporate creditors, but also by minority shareholders. *See* George Triantis, *Organizations and Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 Harv. L. Rev. 1102, 1134 (2004) (discussing how the sales of minority stakes in subsidiaries intensify investor monitoring). [↑](#footnote-ref-209)
210. Jonathan Macey & Geoffrey P. Miller have argued that the system of “double liability” prevailing in the United States between the Civil War and the Great Depression was superior to the later system of deposit insurance administered by the government. Macey & Miller, *supra* note 90. [↑](#footnote-ref-210)
211. Marie-Laure Djelic & Joel Bothello, *Limited Liability and Moral Hazard Implications: An Alternative Reading of the Financial Crisis* (2014), http://ssrn.com/abstract=2418901. [↑](#footnote-ref-211)
212. *See*, *e.g.*, Kevin Dowd, *Moral Hazard and the Financial Crisis*, 29 CATO J. 141 (2009); Willem H. Buiter, *Lessons from the Global Financial Crisis for Regulators and Supervisors* (working paper, 2009), http://www.lse.ac.uk/fmg/workingPapers/discussionPapers/fmgdps/DP635.pdf;Djelic & Bohello, *supra* note 211; Conti-Brown, *supra* note 145; Claire Hill & Richard Painter, *Berle’s Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Liability*, 33 Seattle U. L. Rev. 1173 (2010). [↑](#footnote-ref-212)
213. *See supra* notes \_\_ and accompanying text. [↑](#footnote-ref-213)
214. Franco & Rosman, *supra* note 112; Franco, *supra* note 113. Brazilian law uses this strategy in other contexts as well. For instance, securities regulations require independent auditing firms to provide for joint and several liability of their members. CVM Instruction 308, of May 14, 1999, Art. 4, III. [↑](#footnote-ref-214)
215. *See* Christiano A. Coelho, João M.P. de Mello & Leonardo Rezende, *Do Public Banks Compete with Private Banks? Evidence from Concentrated Local Markets in Brazil?*, 45 J. Money, Credit & Banking 1581, 1583 (2013) (noting that, in 2004, the shares of deposits held in the five and three largest banks were 55.1% and 42.6%, respectively, and that markups on consumer loans amounted to staggering 48.8%);Raquel de F. Oliveira et al., *Too Big to Fail Perception by Depositors: An Empirical Investigation*, Banco Central do Brasil Working Paper Series 233 (2011), <http://www.bcb.gov.br/pec/wps/ingl/wps233.pdf>. [↑](#footnote-ref-215)
216. Franco, *supra* note 113, at 90 (noting that Brazilian banks are among the most capitalized in the world, far exceeding the Central Bank’s requirements); Bruno Meyerhof Salama & Thiago Jabor Pinheiro, *Citizens versus Banks: Institutional Drivers of Financial Market Litigiousness in Brazil* (working paper, 2013) (describing the banking industry as conservative). [↑](#footnote-ref-216)
217. Joe Leahy, *Brazil Banks Outshine Global Rivals: Reforms over the Past 20 Years Appear to Be Paying Off for the Sector*, Fin. Times, Nov. 6, 2011. [↑](#footnote-ref-217)
218. *See* notes \_\_ *supra* and accompanying text. [↑](#footnote-ref-218)
219. The extremely high levels of private benefits of control in Brazil suggest that this is indeed the case. *See* notes 179-180 *supra* and accompanying text. [↑](#footnote-ref-219)
220. *See* World Bank Group, *Doing Business 2016*, Ease of Doing Business in Brazil, <http://www.doingbusiness.org/data/exploreeconomies/brazil/#enforcing-contracts>. [↑](#footnote-ref-220)
221. Persio Arida, Edmar Lisboa Bacha & André Lara-Resende, *Credit, Interest, and Jurisdictional Uncertainty: Conjuectures on the Case of Brazil*, *in* Inflation Targeting and Debt: The Case of Brazil 271-3 (Francesco Giavazzi, Ilan Goldfajn & Santiago Herrera eds., 2005) (“In the Brazilian case, jurisdictional uncertainty may thus be decomposed, in its anti-creditor bias, as the risk of acts of the Prince changing the value of contracts before or at the moment of the execution and as the risk of unfavorable interpretation of the contract in case of a court ruling and as the risk of an unfavorable interpretation of the contract in case of a court ruling”). According to the authors, distinguished Brazilian economists who have occupied prominent positions in government and business, this is an “an anti-creditor bias, and not an anti-business bias.” Whatever the merits of the claim of anti-creditor bias in contract enforcement, this Article shows that Brazilian courts go out of their way to favor certain creditors of “worthy” obligations through generous veil piercing. More recent works have casted doubt on the existence of this bias. *See*, *e.g.*,Luciana Yeung & Paulo Furquim de Azevedo, *Neither Robin Hood nor King John: Testing the Anti-Creditor and Anti-Debtor Bias in Brazilian Judges* (working paper, 2012), <http://ssrn.com/abstract=2096996> (showing that the data suggests that decisions by Brazilian courts can be unpredictable, but do not seem plagued by judicial bias). [↑](#footnote-ref-221)
222. *See* Mauricio Jara-Bertin, Sérgio G. Lazzarini, Aldo Musacchio & Andres Rodrigo Wagner, *Does the Bond Market Discipline State Owned Enterprises?* (working paper, 2016), <http://ssrn.com/abstract=2670899> (finding that SOEs have access to more favorable financing terms due to expectations of an implicit guarantee). [↑](#footnote-ref-222)
223. For historical evidence, *see* Lamoreaux & Rosenthal, *supra* note 39. For contemporary evidence on the different transaction structures used by the venture capital industry, *see* Kate Litvak, *Firm Governance as a Determinant of Capital Lock-In* (working paper, 2007), at: <http://ssrn.com/abstract=915004>. [↑](#footnote-ref-223)
224. Rock & Wachter, *supra* note 32, at 915. For a similar argument conditioning the efficiency of lock-in to other forms of legal investor protection, *see* Easterbrook & Fischel, *supra* note 44, at 241 (claiming that proposals for shareholders to be cashed out on demand “depend on the suppressed assumptions that existing law does not adequately constrain those in control from taking actions to the detriment of the minority and that allowing shareholders to force dissolution of the firm is costless. Neither is accurate. (…) Other remedies such as damages for breach of fiduciary duty…. are available”). Similarly, George Triantis’s defense of legal personality as internal capital markets also presupposes that corporate laws effectively police related-party transactions. Triantis, *supra* note 209, at 1125-6. [↑](#footnote-ref-224)
225. *See* notes 179-180 *supra and accompanying text.* [↑](#footnote-ref-225)
226. In 2012, the withdrawing shareholders lost their appeal in a claim for inspection of books and records, on their basis that they had their lost their shareholder status with the award of the partial dissolution. Their credit right with respect to the value of their shares was still under debate in a separate lawsuit. *See* TJSP, AI 938.470-1, Rel. Des. Vicente del Prete Misurelli, J. July 24, 2012. [↑](#footnote-ref-226)
227. *See* Lynn A. Stout, *The Corporation as Time Machine: Intergenerational Equity, Intergenerational Efficiency and the Corporate Form*, 38 Seattle U. L. Rev. 685 (2016) (“it is much harder to lock assets into a company that has controlling shareholders”). In fact, the rise of partial dissolutions can be understood as promoting symmetry and equal treatment, that is, extending to minority shareholders a right that controlling shareholders already enjoy. However, the right to liquidate the firm by majority dissolution or to request a partial dissolution of the corporation have different consequences for creditors, which are paid first in a full dissolution but not in a partial dissolution. [↑](#footnote-ref-227)
228. *Id.* (“Only as directors become independent of shareholders does asset lock-in become possible”). [↑](#footnote-ref-228)
229. For a discussion of the tradeoffs involved, *see* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance* (working paper, 2015), <https://ssrn.com/abstract=2571739>. [↑](#footnote-ref-229)
230. Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 Harv. L. Rev. 833 (2005). [↑](#footnote-ref-230)
231. LSA, Art. 36, which only permits close corporations to adopt supermajority approval requirements for shareholder decisions. [↑](#footnote-ref-231)
232. *See* OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015). [↑](#footnote-ref-232)
233. For a discussion of these mechanisms, *see* Paul Davis et al., *Control Transactions*, *in* Anatomy of Corporate Law, *supra* note 1. [↑](#footnote-ref-233)
234. Pargendler, *supra* note 154. [↑](#footnote-ref-234)
235. Clas Bergström et al., *The Optimality of the Mandatory Bid Rule*, 13 J.L. Econ. & Org. 433, 44748 (1997); Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 Yale L.J. 698, 716, 737 (1982); and Marcel Kahan, *Sales of Corporate Control*, 9 J.L. Econ. & Org. 368, 378 (1993). [↑](#footnote-ref-235)
236. Gilson et al., *supra* note 147, at 491. [↑](#footnote-ref-236)
237. On the hypothesis that controlling shareholders in developing countries serve as reputation bearers, *see* Ronald J. Gilson, *Controlling Family Shareholders in Developing Countries: Anchoring Relational Exchange*, 60 Stan. L. Rev. 633 (2007). [↑](#footnote-ref-237)
238. *Id.* [↑](#footnote-ref-238)
239. In their famous defense of unlimited liability for corporate torts, Hansmann and Kraakman have proposed a system by which liability would attach to the shareholders who held shares at the time the tort claim was filed, when management became aware that such claims would be filed, or the corporation was dissolved without leaving a successor. In this system, shares would be transferred to new holders free of liability for prior acts. Hansmann & Kraakman, *supra* note 136, at 1896-1898. [↑](#footnote-ref-239)
240. *See*, *e.g.*, William L. Megginson & Jeffry M. Netter, *From State to Market: A Survey of Empirical Studies on Privatization*, 39 J. Econ. Lit. 321, 380 (2001) (concluding that “privately owned firms are more efficient and more profitable than otherwise-comparable state-owned firms”); Mary M. Shirley & Patrick Walsh, Public Versus Private Ownership: The Current State of the Debate (World Bank Policy Research, Working Paper No. 2420, 2001), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=261854> (stating that out of fifty-two studies, thirty-two conclude that private and privatized firms significantly outperform public firms, fifteen do not find a significant link between ownership and performance, and five studies conclude that public firms perform better than private firms). For an economic analysis of different forms of private ownership beyond investor ownership, *see* Henry Hansmann, The Ownership of Enterprise (1996). [↑](#footnote-ref-240)
241. *See*, *e.g.*, Ha-Joon Chang, Globalization, Economic Development and the Role of the State (2003); Stephen Martin & David Parker, *Privatization and Economic Performance Throughout the UK Business Cycle*, 16 Managerial & Decision Econ. 225, 235–36 (1995) (finding no evidence that private ownership is inherently more efficient than state ownership). [↑](#footnote-ref-241)
242. *See*, *e.g.*, Andrei Shleifer, *State versus Private Ownership*, J. Econ. Persp. 133, 135 (1998) (claiming that “the conditions under which government ownership is superior *in a country with good contract enforcement* are very limited”) (emphasis added). For instance, Shleifer favors privatizations of prisons in the United States, but not in Russia. *Id.* at 144. *See also* Clifford Zinnes et al., *The Gains from Privatization in Transition Economies: Is “Change of Ownership” Enough?*, 48 IMF Staff Papers 146, 146–48 (2001) (finding that privatization fails to produce economic performance improvements in the absence of deep institutional reforms). [↑](#footnote-ref-242)
243. *See generally* Alexander Gerschenkron, Economic Backwardness in Historical Perspective (1962). [↑](#footnote-ref-243)
244. Fernando de Holanda Barbosa Filho & Samuel de Abreu Pessoa*, A Desaceleração Veio da Nova Matriz, Não do Contrato Social*, *in* Ensaios IBRE de Economia Brasileira – II 27 (Regis Bonelli & Fernando Veloso eds., 2014). [↑](#footnote-ref-244)
245. While veil piercing per se could be explained in terms of efficiency, the imposition of joint and several liability lacks an efficiency explanation and can therefore be best understood in terms of distribution. [↑](#footnote-ref-245)
246. *See* Sergio G. Lazzarini et al., *What Do Development Banks Do? Evidence from BNDES 2002-2009* (working paper, 2014), <http://ssrn.com/abstract=1969843>. [↑](#footnote-ref-246)
247. Courts have granted individual requests for expensive medicines and hospital beds without regard general public policies administering such scarce resources. The results have arguably been regressive, hurting the “poorest among the poor.” *See* Carlos Portugal Gouvêa, *Social Rights against the Poor*, 7 Vienna J. Int’l Const. L. 454 (2013). [↑](#footnote-ref-247)
248. For a similar argument, *see* Presser, *supra* note 88, at 172. [↑](#footnote-ref-248)
249. *See* Pargendler, *supra* note 154. [↑](#footnote-ref-249)
250. *See*, *e.g.*,José Maria Lezcano Navarro, Piercing the Corporate Veil in Latin American Jurisprudence (2016); Dante Figueroa, *Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America*, 50 Duq. L. Rev. 683 (2012). [↑](#footnote-ref-250)
251. Figueroa, *supra* note 250, at 738 and 772-5. [↑](#footnote-ref-251)
252. Marco Ventoruzzo et al., Comparative Corporate Law 130-31, 170-71 (2015). [↑](#footnote-ref-252)
253. *See*, *e.g.*, David M. Albert, *Addressing Abuse of the Corporate Entity in the People’s Republic of China: New Thoughts on China’s Need for a Defined Veil Piercing Doctrine*, 23 U. Pa. J. Int’l Econ. L. 873 (2002). [↑](#footnote-ref-253)
254. For a translation and discussion of the relevant provisions, *see* Mark Wu, *Piercing China’s Corporate Veil: Open Questions from the New Company Law*, 117 Yale L. J. 329, 333-5 (2007). [↑](#footnote-ref-254)
255. Huang, *supra* note 99, at 772-3. [↑](#footnote-ref-255)
256. *Id.* at 748-9. [↑](#footnote-ref-256)
257. Kimberly Bin Yu & Richard Krever, *The High Frequency of Piercing the Corporate Veil in China*, 23 Asia Pac. L. Rev. 63 (2015). [↑](#footnote-ref-257)
258. Chao Xi, *Piercing the Corporate Veil in China: How Did We Get There?*, 2011 J. Bus. L. 413, 429. [↑](#footnote-ref-258)
259. *Id.* at 81-2. [↑](#footnote-ref-259)
260. Curtis J. Milhaupt, *Chinese Corporate Capitalism in Comparative Context*, *in* How China Has Changed the Western Ideas of Law and Economic Development (Weitseng Chen ed., forthcoming 2016). [↑](#footnote-ref-260)
261. *Id.* at 10. [↑](#footnote-ref-261)
262. *Id.* at 13. [↑](#footnote-ref-262)