PROCEDURE AT THE INTERSECTION OF LAW AND EQUITY: VEIL PIERCING AND THE SEVENTH AMENDMENT

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INTRODUCTION

The corporate form is one of the world's greatest legal innovations when measured in terms of its contribution to modern economic growth and prosperity. With roots in medieval law,[1] beginning in the seventeenth century, corporations emerged as a method of resource pooling and investor protection that enabled business ventures on a level never before seen outside state-controlled enterprises.[2] Corporations are "individuals" in the truest sense, being able to do almost anything that a natural person could, from holding assets to entering contracts and notably, having judgments entered against them while remaining functionally distinct entities from individual shareholders.[3] The benefits of the corporate form when taking on business risk are obvious, but it is just as clear how a corporation is capable of being used to defraud and shield ill-meaning shareholders from their creditors.

In such cases, creditors have recourse to the doctrine of "piercing the corporate veil" that permits courts to hold shareholders personally liable for the debts of their corporation. As leading articles on this topic have identified, veil piercing is a "vexing" concept that exists in

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1 *See generally* John Morley, Essay, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145 (2016). While the corporate form itself is a relatively recent phenomenon, humans have formed partnerships and similar entities that can take on some independent legal activities throughout history.

2 *See* Giuseppe Dari-Mattiacci, Oscar Gelderblom, Joost Jonker & Enrico C. Perotti, *The Emergence of the Corporate Form*, 33 J.L. ECON & ORG. 193, 198–99, 203–13 (2017).

3 *See generally id.*

a murky area on the fringes of law and equity.[4] This aspect of veil piercing has a notable interplay with the Seventh Amendment that demarcates the line beyond which plaintiffs have a right to a civil jury trial directly in the murky area that veil piercing occupies.

This Note addresses the multicircuit split that veil piercing's "vexing" nature has created.[5] The First, Second and Fifth Circuits, on varying theories, have found that there exists a federal right to a jury trial on veil-piercing issues.[6] Conversely, the Sixth and Seventh Circuits have disagreed, holding that veil piercing is an action sounding primarily in equity outside the scope of the Seventh Amendment.[7] Part I will briefly discuss the Supreme Court's Seventh Amendment jurisprudence and explain how veil piercing falls into the Court's awkward demarcation of law and equity. Part II will explore the legal and equitable history of veil-piercing actions, a topic that "courts and commentators rarely address . . . at length."[8] Part III will lay out the current Federal precedent on the issue. Finally, Part IV will argue that history and policy support putting veil-piercing questions to juries, that juries are well suited to this task, and address counterarguments by showing that judges and parties retain an array of tools to manage and control juries.

I. THE RIGHT TO A JURY TRIAL

The split in authority regarding the right to a jury trial in veil-piercing actions comes directly from the difficulty in applying the Supreme Court's Seventh Amendment jurisprudence to an action that is neither a claim nor a remedy, and that does not sound clearly in either law or equity. Before evaluating the origins of veil piercing in courts

4 Brian D. Koosed, Anthony P. Badaracco & Erica R. Iverson, *Disregarding the Corporate Form: Why Judges, Not Juries, Should Decide the Quiddits and Quillets of Veil Piercing*, 13 N.Y.U. J.L. & BUS. 95, 96 (2016).

5 *Id.*

6 *See* Wm. Passalacqua Builders, Inc. v. Resnick Devs. S., Inc., 933 F.2d 131, 134–37 (2d Cir. 1991) (finding that an action to pierce the corporate veil "does not sound solely in equity," and the nature of the plaintiff's relief (money damages) is the controlling factor in Seventh Amendment analysis); Am. Protein Corp. v. AB Volvo, 844 F.2d 56, 59 (2d Cir. 1988) ("[T]he issue of corporate disregard is generally submitted to the jury."); Crane v. Green & Freedman Baking Co., 134 F.3d 17, 22 (1st Cir. 1998) (holding that "it is principally the jury's function . . . to decide whether or not the . . . veil-piercing standards were met"); FMC Fin. Corp. v. Murphree, 632 F.2d 413, 421–24 (5th Cir. 1980) (holding that the decision to pierce the corporate veil must be decided on facts put to a jury).

7 *See* Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 737 (7th Cir. 2004) (holding that an underlying action for money damages does not automatically entitle a plaintiff to a jury trial on the question of veil piercing because "[a] jury trial does not have to include all or nothing"); CNH Cap. Am. LLC v. Hunt Tractor, Inc., 568 F. App'x 461, 467 (6th Cir. 2014) (holding that veil piercing is an action arising in equity).

8 *Passalacqua*, 933 F.2d at 135.

of law and equity, it is worthwhile to examine the Seventh Amendment and its application in the Supreme Court to give context as to where a veil-piercing action falls.

The Seventh Amendment states in relevant part that "[i]n suits at *common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[9] In practical terms, the Seventh Amendment preserves the right to a civil jury trial only in actions that would have been brought at law in English courts in 1791, carving out an exception for equitable claims.[10]

A. Competing Tests

The Seventh Amendment does not limit the availability of a civil jury to only those actions that would have been heard in front of a jury in 1791. Instead the analysis "depends on the nature of the issue to be tried rather than the character of the overall action."[11] As such, even if the overall cause of action may have been heard in an English court of equity in 1791, a civil jury must "be available if the action involves rights and remedies of the sort typically enforced in an action at law."[12] To navigate this assessment, the Court has handed down a two-part test.[13] In *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*,[14] the Court asked first if the claim was analogous to one that would have been brought at law or in equity in 1791.[15] Second, the Court asked if the remedy sought was legal or equitable.[16] In resolving disagreements between answers to each question, the Court stated that the second question should be given more weight.[17]

The test articulated in *Terry*, while theoretically good law, has been superseded by later cases that merge the two-step test into a single analysis that asks "whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least

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9 U.S. CONST. amend. VII (emphasis added).

10 *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333 (1979) ("'[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791.' At common law, a litigant was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity." (alterations in original) (citation omitted) (quoting Curtis v. Loether 415 U.S. 189, 193 (1974))).

11 Koosed et al., *supra* note 4, at 101 (quoting Ross v. Bernhard, 396 U.S. 531, 538 (1970)).

12 *Id.* (quoting *Curtis*, 415 U.S. at 195).

13 Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV 467, 478 (2022).

14 Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry, 494 U.S. 558 (1990).

15 *See id.* at 565; Bray, *supra* note 13, at 478–79.

16 *See* Bray, *supra* note 13, at 478–79.

17 *Id.*

analogous to one that was."[18] This new analysis, described as the *Monterey* test by some academics in reference to the Court's most recent Seventh Amendment case *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[19] removed *Terry's* emphasis on the remedy sought and instead seeks to discern "whether the 'claim' or 'cause of action' is legal or equitable" in nature.[20] The Court added a new part two that asks if "the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."[21] While this newer test is incompatible with *Terry*, the Court has never stated that *Terry* and its predecessors are no longer good law.

As a result of the Court's conflicting jurisprudence, the determination of veil piercing's place on either side of the Seventh Amendment line has a threshold issue that needs to be resolved before the substance of the action can be evaluated. A district court facing this issue would first have to decide which framework it will use to evaluate a veil-piercing action, and there is a notable variance in which tests district courts around the country choose to adopt.[22] Even once a judge has chosen a test with which to approach the veil-piercing question, they are not out of the woods. The judge must then analogize a veil-piercing action to some common-law writ or equitable doctrine that existed in 1791.[23] This course is problematic in and of itself: asking whether a veil-piercing action is analogous to common-law writs or equitable doctrines of 1791 likely means looking for something that does not exist.[24]

Equity does not operate in the same manner as law. At common law in 1791, there existed a list of writs, each distinct in its own right and analogous in function to a modern "claim" or "cause of action."[25] While some equitable doctrines have developed into their own coherent bodies of substantive law, capable of being listed alongside the

18 *Id.* at 479 (quoting City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999)).

19 *Monterey*, 526 U.S. 687.

20 Bray, *supra* note 13, at 480.

21 *Monterey*, 526 U.S. at 708 (quoting Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996)).

22 While *Monterey* is the newer precedent, most district courts are bound by circuit precedent grounded in the *Terry* analysis. Some circuits have even decided to take elements from each test and fashion their own tests, further complicating Seventh Amendment jurisprudence at the district court level. For an example of blurred tests in the veil piercing context, see *G-I Holdings, Inc. v. Bennet, (In re G-I Holdings, Inc.)*, 380 F. Supp. 2d. 469, 472 (D.N.J. 2005) (citing to a case describing an analysis similar in kind to the *Monterey* test, before analyzing a veil piercing claim under a *Terry* framework); *infra* Section III.C.

23 *See* Bray, *supra* note 13, at 484.

24 *See id.*

25 *Id.* at 484–85; *see also* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784–85 (2004).

common-law writs, equity generally existed as a supplement to the common law.[26] Instead of having a list of writs serving as buckets that a law judge can group like actions together in, the function of chancery was to use equitable maxims as "gap fillers" where no adequate law existed.[27] Though both *Terry* and *Monterey* ask courts to analogize to "claims" or "causes of action" arising in equity, chancellors in 1791 would not have considered their decisions using this criteria. Instead, they would have evaluated solely whether there existed a defect in the available legal remedy that prevented a plaintiff from being justly compensated and applied an equitable maxim in its place.[28] As Professor Samuel Bray puts it: "[*Terry*] requires a separate inquiry into 'claims' and 'remedies' . . . . This separation of equitable 'remedies' from equitable 'claims' has no basis in history or logic."[29]

The more recent *Monterey* test also asks courts conducting Seventh Amendment analysis to evaluate whether "the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."[30] To do so, they need to embark on a historical analysis to determine whether the issue at hand (or those analogous to it) were traditionally decided by juries.[31] Oftentimes, the historical analysis is inconclusive, and a court must instead address "precedent and functional considerations,"[32] inviting a discussion of the relative merits of judges and juries as decision makers.[33] As this Note will discuss, the overwhelming majority of jurisprudence on the applicability of the Seventh Amendment to veil-piercing actions is based on interpretations of the *Terry* test, even though cases that used a *Monterey* framework had already been published. For that reason, an application of the *Monterey* test to a veil-piercing action is currently a theoretical endeavor.

B. The Threshold Issue in Practice

In the context of veil piercing and the Seventh Amendment, the procedural choice of tests is as significant an issue as the substantive analysis itself. The tests a court chooses to use will have a substantial

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26 *See* Bray, *supra* note 13, at 484–85 (citing F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 1–22 (A.H. Chaytor & W.J. Whittaker eds., 2d rev. ed. 1936)).

27 *See* Paul B. Miller, *Equity as Supplemental Law*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 92, 101–11 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020).

28 *See* Bray, *supra* note 13, 484–85.

29 *Id.* at 487.

30 *E.g.*, Markman v. Westview Instruments Inc., 517 U.S. 370, 376 (1996).

31 *See* Bray, *supra* note 13, at 468–73.

32 City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 718 (1999) (citing *Markman*, 517 U.S. at 384).

33 *See* Koosed et al., *supra* note 4, at 96–97.

impact on the conclusion reached on the analysis of a veil-piercing claim. Under the *Terry* test, the remedy is the dominant question. If a court assumes that veil piercing is not a remedy, but simply a mechanism by which courts can achieve a legal remedy, then it would follow that veil-piercing actions are covered by the Seventh Amendment (because the remedy sought is almost certainly damages).[34]

However, if the correct test to use is the *Monterey* test, the analysis becomes more complex and requires a deeper look into the history of veil piercing. The *Monterey* test requires that a court discern if a claim or cause of action is legal or equitable *in nature*. There is no emphasis on the remedy sought. This is where the competing historical views of veil piercing become key: is veil piercing more analogous to a creditor's bill and related actions undertaken by a court of equity? Or is it simply a process to help resolve an action that is, at its core, seeking to address a legal right in tort or contract? This Note takes the view that the use of either test does not preclude the conclusion that veil piercing can be considered a legal action for the purpose of Seventh Amendment analysis, but failing to acknowledge this conflicting authority would render the argument inapplicable in many lower courts bound by circuit precedent.

II. A HISTORY OF LIMITED LIABILITY AND VEIL PIERCING'S ORIGINS IN LAW AND EQUITY

As this Note's discussion of the Seventh Amendment has indicated, successful Seventh Amendment analysis is dependent on a strong understanding of history by those applying it, yet there does not exist a singular history or explanation of the roots of veil piercing.[35] The fact that judges, commentators, and academics alike find the concept of veil piercing "among the most confusing in corporate law" is unsurprising.[36] The emergence of limited liability, and accordingly veil piercing, was a crude and piecemeal process,[37] and as a result the exact origins of veil piercing are unknown.[38] When corporations first emerged in seventeenth-century European nations, they existed as a

34 *But see* Geltzer v. Kollel Mateh Efraim, LLC (*In re* Kollel Mateh Efraim, LLC), 406 B.R. 24, 28 (Bankr. S.D.N.Y. 2009) (holding that declaratory judgment was a form of relief that did not preclude a jury trial on a veil piercing claim).

35 *See infra* Section III.A.

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

37 *See* Ron Harris, *A New Understanding of the History of Limited Liability: An Invitation for Theoretical Reframing*, 16 J. INSTITUTIONAL ECON. 643, 644 (2020) ("[I]t is a mistake to view limited liability as a well-defined watershed invention . . . .").

38 Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 83 (2010).

vehicle for resource pooling, not to shield owners from liability.[39] The British East India Company is the best known example of an early corporation, using a separate legal entity to collect and utilize assets from multiple investors, distributing profits and pooling risk.[40] By legislative charter, the East India Company gained a "full set of legal capacities" including the ability to own land or other assets, litigate in court, and enter into contracts.[41] At no point did the East India Company organize itself with the intent to shield investors from liability, but the corporate economy in Britain continued to grow, and by the eighteenth century there is evidence that the English courts and Parliament had presupposed some notion of limited liability from the separate legal personality of early corporations.[42] While English courts refrained from finding true limited liability before Acts of Parliament gave it statutory existence, Scottish courts as early as 1756 held that shareholders could not be liable for the debts of a corporation beyond the share of their contribution.[43]

The American colonies when drafting their own laws took inspiration from the British corporate charter, but there existed no formal self-incorporation or limited-liability entity classifications until the early nineteenth century.[44] Without limited liability, creditors seeking to recover from entities could simply sue shareholders at common law, and there existed no formal limitations on recovery. It was not until 1811 that the State of New York implemented the first known bill granting statutory limited liability rights.[45] The Act Relative to Incorporations for Manufacturing Purposes of 1811 was groundbreaking in several ways.[46] It provided for the self-incorporation of manufacturing businesses in New York (as opposed to formation by legislative charter) and was the first to formalize rudimentary limited liability for the shareholders of these newly formed corporations.[47] In relevant part, the Act stated that "for all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective

39 *See* Harris, *supra* note 37, at 644.

40 *See id.* at 645.

41 *Id.* at 645, 645–46.

42 *See id.* at 646, 648.

43 *See* Stevenson v. Macnair [1757] 5 Brn. 340, 340 (holding that "partners are not liable beyond their subscriptions [the value of their shares]")).

44 *See The Key to Industrial Capitalism: Limited Liability*, ECONOMIST (Dec. 23, 1999), https://www.economist.com/finance-and-economics/1999/12/23/the-key-to-industrial-capitalism-limited-liability [https://perma.cc/GKT8-FCHS].

45 *See* Ronald E. Seavoy, *Laws to Encourage Manufacturing: New York Policy and the 1811 General Incorporation Statute*, 46 BUS. HIST. REV. 85, 90 (1972).

46 Act of Mar. 22, 1811, ch. 67, 1811 N.Y. Laws 151.

47 *See* Seavoy, *supra* note 45, at 90–92.

shares of stock in the said company, and no further."[48] While not all states were as quick as New York to allow self-incorporation and cap the liability of shareholders, other states saw the success of New York's new scheme, and began to follow suit. New British laws followed in 1855 and 1856. The Limited Liability Act of 1855[49] and Joint Stock Companies Act of 1856[50] fixed the amount that a shareholder could be liable for the debts of their corporations and expanded the opportunities for investors to register and self-incorporate entities.[51]

With the advent of limited liability statutes rose with them the critique that limited liability was simply a vehicle by which investors could fraudulently profit at the expense of those around them. In response, when such wrongdoing was exceptional, courts would look past the corporate form and hold shareholders personally liable for corporate actions. Just as legislatures' implementation of self-incorporation and limited-liability statutes differed in timing and substance, judiciaries' willingness to look past these new corporate forms was anything but a uniform development. There is no seminal "veil piercing" case in which the doctrine was first introduced to American jurisprudence, instead there is a gradual development of the doctrine through both courts of law and courts of equity.[52]

A. Veil Piercing Actions as Actions at Law

Some commentators suggest that it is a "simple insight" that veil piercing is an equitable remedy.[53] Such a sweeping statement is inaccurate in the context of early veil-piercing cases, and it is even inaccurate to describe veil piercing as a remedy as opposed to a "mechanism that allows a creditor to enforce a judgment against a party able to

48 Act of Mar. 22, 1811, ch. 67, 1811 N.Y. Laws 152. For additional background on the impacts of the 1811 Act, see generally Stanley E. Howard, *Stockholders' Liability Under the New York Act of March 22, 1811*, 46 J. POL. ECON. 499 (1938); Frederick G. Kempin, Jr., *Limited Liability in Historical Perspective*, 4 AM. BUS. L. ASS'N BULL. 11 (1960).

49 Limited Liability Act 1855, 18 & 19 Vict. c. 133 (Eng.).

50 Joint Stock Companies Act 1856, 19 & 20 Vict. c. 47 (Eng.).

51 *See* Phillip Lipton, *The Introduction of Limited Liability into the English and Australian Colonial Companies Acts: Inevitable Progression or Chaotic History?*, 41 MELB. U. L. REV. 1278, 1298–99 (2018).

52 It is likely that the merger of law and equity ongoing throughout state judiciaries in the United States further muddied the historical origins of veil piercing. With limited liability not yet well established in 1791, the record date for Seventh Amendment analysis, there was no basis in law or equity for federal courts to look back to. Instead, much of the early jurisprudence on the issue came from newly merged courts with both legal and equitable powers. *See generally* Aaron Friedberg, Note, *The Merger of Law and Equity*, 12 ST. JOHN'S L. REV. 317 (1938).

53 Peter B. Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89, 90 (2013).

satisfy it."[54] It is easy to defer to equity's flexibility and willingness to look past the corporate form in the pursuit of justice as evidence of a solely equitable concept, but doing so is to hide a deep body of precedent in courts of law. As early as 1912, the leading article on the topic of veil piercing was quick to note that "courts of law have, again and again, refused to be trammeled by scholastic logic and mediæval corporate ideas, which frequently serve only to distort or hide the truth."[55]

As limited liability became a default standard in the late nineteenth and early twentieth century, some investors realized the potential that limited liability corporations held for shielding assets from creditors. The phrase "veil piercing" was introduced into American jurisprudence by the Supreme Court as early as 1809 in *Bank of the United States v. Deveaux*,[56] but in the nineteenth century, claims that involved piercing the corporate veil generally arose from fraudulent transfers of assets to evade creditors—tort claims brought in courts of law.

In *Booth v. Bunce*,[57] an action typical of early veil piercing, the New York Court of Appeals upheld a *jury* instruction that resulted in a verdict disregarding a corporate form used to shield assets from the incorporator's insolvent partnership.[58] *Booth* arose from a dispute between two creditors. An insolvent partnership of which Booth was a creditor had transferred a steam engine to a newly formed corporation that then became indebted to Bunce.[59] Booth sued on the theory that the transfer of the steam engine to the new corporation was fraudulent, and his claim to it superseded that of Bunce.[60] In the context of *Booth*, it becomes clear that veil piercing alone cannot be considered a remedy. The partners and incorporators that owned the steam engine were not party to the litigation, and Booth did not seek redress in the form of disregarding the new corporation's separate existence. Booth sued in tort and sought a *legal* remedy in the value of the steam engine, and veil piercing was simply a mechanism by which the court could achieve that outcome.[61] As the court in *Booth* noted: "Deeds, obligations, contracts, judgments, and even *corporate bodies* may be the instruments through which parties may obtain the most unrighteous

54 Koosed et al., *supra* note 4, at 96.

55 I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 497 (1912).

56 Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 75 (1809) ("[I]t is said that you may raise the veil which the corporate name interposes, and see who stand behind it."); *see* Koosed et al., *supra* note 4, at 109.

57 Booth v. Bunce, 33 N.Y. 139 (1865).

58 *See id.* at 156.

59 *Id.* at 139–41.

60 *Id.* at 141.

61 *See id.*

advantages. All such devices and instruments have been resorted to to cover up fraud, but whenever the *law* is invoked all such instruments are declared nullities . . . ."[62]

Nineteenth-century courts of law were also willing to pierce the corporate veil in legal actions brought in contract. In *Brundred v. Rice*,[63] an Ohio court found that a corporation formed solely for the purpose of entering into an illegal contract could not be used to shield its owners from liability, writing that "[i]f [the corporation] was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement, and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense."[64] The Ohio court further explained its authority to disregard the corporate form by stating that "[t]he court fairly submitted this question to the jury . . . and there is nothing so sacred in a certificate of incorporation as to take it out of the reach of this maxim [that courts of law can act to rectify fraud]."[65] It is actions such as those in *Booth* and *Brundred* that represent the "crude system in which any creditor with an unsatisfied judgment against the corporation sued [shareholders] at common law," and the original predecessor to veil piercing actions.[66]

B. Veil Piercing Actions as Actions in Equity

Though we have seen that courts of law routinely looked past the corporate form in actions brought in tort and contract to prevent collection of legal judgment by resorting to fraudulent corporations, the remainder of the development of the modern doctrine of veil piercing does have its origin in courts of equity. As the rise in incorporations and entity formation statutes proved the disjointed legal system for holding shareholders liable unworkable, litigants resorted to equity. A creditor's bill is an action arising in equity that had in effect the same function as courts of law refusing to recognize corporations. It is "a

62 *Id.* at 157 (emphasis added); *see also* Wormser, *supra* note 55, at 499 ("In other words, courts of law do not tolerate any attempt to hinder, delay, or defraud creditors by means of a resort to 'the veil of corporate entity.'"). Courts of law were also willing to pierce the corporate veil in actions brought in contract. *See* Brundred v. Rice, 32 N.E. 169, 172 (Ohio 1892) (holding that a corporation created solely for the purpose of entering into unlawful contracts was invalid and holding the incorporators personally liable for such contracts).

63 *Brundred*, 32 N.E. 169.

64 *Id.* at 172.

65 *Id.*

66 Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 603 (1986).

resort to equitable powers to subject some kinds of assets, or assets under some conditions, to the satisfaction of a judgment."[67]

Procedure for a creditor's bill had two parts: a proceeding in equity to assign the share of remaining assets that each shareholder could be liable for, and a subsequent legal proceeding to enforce outstanding debts or judgments against the creditors.[68] The creditor's bill was developed by courts of equity not in response to the fact that it was impossible to disregard the corporate form in a court of law, but because there was no unified system for *all* creditors to assess *all* corporate liabilities, and which shareholders should be held responsible for them.[69] Relief sought in the initial, equitable proceeding "typically included the appointment of a receiver for the corporation, the determination of aggregate corporate liabilities unsatisfied by the assets of the corporation, and [most importantly] a determination of the liability per share of the shareholders for the unsatisfied obligations"—equitable relief that enabled the collection of outstanding debts and money judgments.[70]

C. Summary

Over time, the creditor's bill became a well-established equitable procedure, and by the 1930s, limited liability's presence in corporate spheres became ever present, and the doctrine of shareholder liability was well established in a form similar to modern veil piercing. In the leading treatise on the topic at the time, *Parent & Subsidiary Corps.*, Frederick Powell attempted to make sense of the doctrine's blended origins.[71] While many courts were quick to state that disregard of the corporate form is an action sounding in equity, a reference to the formality of the creditor's bill as opposed to the disjointed legal processes that preceded it, Powell noted that cases from the time discussed that it was "well-settled that both law and equity will, when necessary . . . , disregard [a corporation's] distinct existence and treat them as identical [to their shareholders]."[72] Powell also singled out federal courts as a jurisdiction in which courts of law have "evinced no hesitation in brushing aside the fiction of corporate entity."[73] Though veil

67 Charles W. Fornoff, *The Creditor's Bill*, 16 OHIO ST. L.J. 32, 32 (1955).

68 *See* Wm. Passalacqua Builders, Inc. v. Resnick Devs. S., Inc., 933 F.2d 131, 136 (2d Cir. 1991).

69 *See* Blumberg, *supra* note 66, at 603.

70 *Id.*

71 *See* FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT CORPORATION FOR THE OBLIGATIONS OF ITS SUBSIDIARY 126 (1931).

72 *Id.* at 128 (quoting Erkenbrecher v. Grant, 200 P. 641, 642 (Cal. 1921)).

73 *Id.* at 129.

piercing's procedure stems from an equitable action, such developments can only mask, and not destroy its legal roots.

III. THE PRESENT SPLIT OF AUTHORITY

At the time of writing, six circuits (including decisions carried over from the Fifth/Eleventh Circuit split) have precedent on the issue of whether a litigant[74] bringing a veil piercing claim has the right to a jury trial on the issue.[75] Four circuits (the First, Second, Fifth, and Eleventh) have taken the position that veil piercing is an action for which the right to a jury trial is preserved, while two (the Sixth and Seventh) have taken the opposite position, holding that veil piercing is an action of an equitable nature.[76] In district courts from circuits without any binding precedent, the split is even more apparent with an array of conclusions cobbled together from existing circuit court precedent.[77]

A. Circuits Preserving the Right to a Jury Trial

Of the courts that have determined the right to a jury trial under the Seventh Amendment is preserved, the Second Circuit's opinion in *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*[78] is the most prominent. *Passalacqua* concerned an action by a contractor to collect a debt owed by a family-owned development company.[79] The two had previously contracted during construction of a condominium in Florida.[80] Disputes over the construction were sent to arbitration, resulting in an award of over one million dollars.[81] When Resnick Developers failed to pay the entire amount, Wm. Passalacqua sued on a theory of entity disregard in an attempt to collect the outstanding sum from Jack Resnick & Sons and other entities that were affiliated with

74 The Seventh Amendment makes no distinction between plaintiffs and defendants, so this precedent applies equally to defendants seeking to pierce the plaintiff's corporate veil. However, defendants seeking veil piercing is less common unless they are acting concurrently as a counterclaim plaintiff. In some cases, a defendant may seek a strategic jury trial when being sued by a foreign entity in their home jurisdiction, hoping for a sympathetic jury pool. This was the case in *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131 (2d Cir. 1991). Passalacqua was a Florida entity seeking to collect an arbitration award against the owner of a New York entity. *Id.* at 134.

75 *See* Koosed et al., *supra* note 4, at 113–25 (collecting cases).

76 *Id.*

77 *Id.* at 125.

78 Wm. Passalacqua Builders, Inc. v. Resnick Devs. S., Inc., 933 F.2d 131 (2d Cir. 1991).

79 *See id.* at 133.

80 Wm. Passalacqua Builders, Inc. v. Resnick Devs. S., Inc., 608 F. Supp. 1261, 1263 (S.D.N.Y. 1985), *rev'd* 933 F.2d 131 (2d Cir. 1991).

81 *Id.*

Resnick Developers.[82] The Southern District of New York held a jury trial on the issue, with the jury concluding that Resnick Developers was not the alter ego of the family company and refused to pierce the corporate veil to impose the arbitration amount on Jack Resnick & Sons.[83] This rendered the outstanding balance of the arbitration award uncollectable.[84]

The ensuing appeal contained several thorny issues but centered on Wm. Passalacqua's claim that Resnick Developers should not have been entitled to a jury trial on the question of entity disregard.[85] The Second Circuit's opinion had no threshold issue confronting courts today, as the opinion was issued shortly after the Supreme Court handed down *Terry*, making it seemingly obvious at the time which test was to be used.

Given that the *Passalacqua* court was undertaking the *Terry* test, it sought to compare the legal and equitable origins of a veil-piercing action to eighteenth-century actions brought in English courts and an emphasis the nature of the remedy sought, placing emphasis on the remedy.[86]

As the *Passalacqua* court noted, its analysis was far from straightforward.[87] The Supreme Court, while silent on the issue of the Seventh Amendment in the context of veil piercing, itself fell into the same trap as other commentators in assuming that veil piercing was generally a creature of equity.[88] The *Passalacqua* court refused to base its holding on this dicta, and instead embarked on an examination of veil piercing's origins. Many cases cited in *Passalacqua* are simply those reaching a broad-strokes conclusion about the equitable nature of a veil-piercing action, or the fact-intensive nature of the action that makes them ripe for determination by a jury.[89] The Second Circuit saw that these

82 *See Passalacqua*, 933 F.2d at 133–34.

83 *See id.* at 134.

84 *Id.*

85 *See id.* at 134–37. While it is more typical for plaintiffs to seek jury trials on entity disregard, defendants may do so when it gives them some strategic advantage. *See supra* note 74.

86 *See Passalacqua*, 933 F.2d at 135 (quoting Tull v. United States, 481 U.S. 412, 417–18 (1987)).

87 *See id.* ("Applying this analysis is difficult because courts and commentators rarely address the historic origins of the piercing doctrine at length.").

88 *See* Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703, 713 (1974) ("In [cases disregarding the corporate form], courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form.").

89 *See* United States v. Golden Acres, Inc., 684 F. Supp. 96, 103 (D. Del. 1988) (conducting little historical research but holding that "[p]iercing the corporate veil is an action that sounds in equity" (citing *Bangor*, 417 U.S. 703)); Am. Protein Corp. v. AB Volvo, 844

determinations without historical support were inadequate for the issue at hand and conducted a historical inquiry into the origins of veil-piercing actions. Of note, the court relied on historical sources to show that there was no single moment at which veil piercing came into existence; instead it arose from a "crude system in which any creditor with an unsatisfied judgment . . . sued any shareholder *at common law*."[90] Finding evidence that veil piercing began as a legal action, and was later developed through an equitable procedure, but lacking definitive support for the assertion that veil piercing actions would have arisen in equity in 1791, the *Passalacqua* court's determination hinged on the relief sought in the action.[91] The relief sought here was the enforcement of a money judgment against the holding company. As such, the court found it to be a legal remedy, dismissing the contention that an action for the enforcement of a money judgment could be an equitable proceeding while the action for the money judgment itself was of a legal nature.[92] Lastly, the Second Circuit evaluated the "fact intensive" nature of veil-piercing claims. Drawing on precedent that supported separating issues of fact and issues of law, and underscoring the importance of passing disputed issues of fact to impartial juries, the *Passalacqua* court held that such an intense factual determination warranted putting the issue to a jury.[93]

B. Circuits Rejecting the Right to a Jury Trial

The leading case rejecting the right to a jury trial in veil-piercing cases is the Seventh Circuit's opinion in *International Financial Services Corp. v. Chromas Technologies Canada, Inc.*[94] International Financial Services was a corporation with a line of business for financing printing presses.[95] In 2000, it advanced nearly one million dollars to Didde Web Press, a printing press manufacturer that was "well on its way to bankruptcy," and shared the same parent organization of Chromas Technologies.[96] To recover the funds advanced to Didde Web Press from Chromas, International Financial Services needed to show that there was no separate corporate existence between each company.

F.2d 56, 59 (2d Cir. 1988) (conducting little historical research but reaching the conclusion that "the issue of corporate disregard is generally submitted to the jury").

90 *Passalacqua*, 933 F.2d at 135–36 (emphasis added) (quoting PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 2.02, at 52 (1987)).

91 *See id.* at 136–37.

92 *See id.*

93 *See id.*at 137.

94 Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731 (7th Cir. 2004).

95 *Id.* at 734.

96 *Id.*

The district court held a trial on the veil-piercing issue, ultimately finding that Didde Web Press was the alter ego of Chromas, making Chromas liable for the funds advanced to its sister entity.[97] In reviewing the decision to submit the veil-piercing issue to a jury, the Seventh Circuit also embarked on a *Terry*-style analysis, granting more weight to the remedy sought than the nature of the action itself.[98] The Seventh Circuit agreed with the *Passalacqua* court that veil piercing was neither a purely legal nor purely equitable doctrine, and agreed that it could not strictly be classified as a remedy, in conflict with some commentators.[99] This led the Seventh Circuit to the second prong of the *Terry* test.

The Seventh Circuit, instead of evaluating the ultimate remedy sought by International Financial Services (contract damages for failure to repay the loan it advanced), sought to evaluate the status of veil piercing under Illinois law.[100] Despite stating at the outset of its opinion that veil piercing was "merely a procedural means of allowing liability on a substantive claim," the court went on to hold that veil piercing *was* an equitable remedy under Illinois law.[101] Supporting its opinion, the Seventh Circuit explained that there is an intermediate step before granting money damages: an equitable determination by the court that not doing so would promote injustice or inequity.[102]

C. The Lower Court Landscape

In lower courts, the ambiguity of the determination of veil piercing's standing under the Seventh Amendment has become even more troublesome. Many circuits lack binding precedent on the issue, so courts are forced to cobble together their own tests from scratch.[103] A district court seeking to evaluate a Seventh Amendment demand for a jury trial in a veil-piercing action would need to first untangle the

97 *See id.* at 734.

98 Despite the opinion in *International Financial Services* being written five years after the Supreme Court's decision in *Monterey*, the Seventh Circuit still chose to use the older *Terry* precedent. *See id.* at 735–36 (first quoting Tull v. United States, 481 U.S. 412, 417–18 (1987); and then citing Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 42 (1989)).

99 *See id.* at 736 ("[Veil-piercing] is merely a procedural means of allowing liability on a substantive claim . . . ."). *Contra* Oh, *supra* note 53, at 90 (arguing that it is a simple insight that veil piercing is an equitable remedy).

100 *See Int'l Fin. Servs.*, 356 F.3d at 736–37 ("[W]e take issue with the conclusion that, because a plaintiff pursues a legal remedy (a money judgment), he is entitled to a jury trial not only on the merits but also on whether the corporate entity should [be] disregarded.").

101 *Id.* at 736, 737–38.

102 *See id.* at 738–40.

103 *See* Bray, *supra* note 13, at 480–81.

Supreme Court's Seventh Amendment tests, before wading into the quagmire of competing circuit court analyses of veil piercing's nature itself.

An opinion from the District Court of New Jersey, *In re G-I Holdings, Inc.*,[104] shows exactly how difficult this analysis becomes without guidance from circuit court precedent or the Supreme Court. The issue before the court was an appeal from a bankruptcy proceeding tasked with determining whether a group of subsidiaries could be held liable for money judgements relating to asbestos claims against their parent corporation.[105] The court lacked Third Circuit precedent on the issue of a Seventh Amendment test and put together its own interpretation of the *Terry* test.[106] A clear example of the Supreme Court's disjointed jurisprudence on the Seventh Amendment, the *G-I Holdings* court used a more recent case on the issue, *Feltner v. Columbia Pictures Television, Inc.*,[107] to introduce the Seventh Amendment test, before reverting to an interpretation of *Terry* and *Tull* with emphasis placed on the remedy sought.[108] The district court did this despite the test enumerated in *Feltner* giving no indication that the remedy should bear more weight in the analysis, only that: "[t]o determine whether [an] action is more analogous to cases tried in courts of law than to suits tried in courts of equity or admiralty, we examine both the nature of the statutory action and the remedy sought."[109] As a result of the Supreme Court's linguistic choices in *Feltner*, the district court settled on the *Terry* test, without realizing that just a few lines earlier it had cited a predecessor to the competing *Monterey* test.[110]

The court then embarked on the same historical analysis faced by the *International Financial Services* and *Passalacqua* courts. As the Second Circuit did in *Passalacqua*, the District of New Jersey declined to blindly follow precedent that had repeated the misconception that veil-piercing actions sound solely in equity. The District Court recognized the mixed roots in law and equity of veil piercing, and instead

104 G-I Holdings, Inc. v. Bennet, (*In re* G-I Holdings, Inc.), 380 F. Supp. 2d 469 (D.N.J. 2005).

105 *See id.* at 471.

106 *See id.* at 472.

107 Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998). *Feltner* was one of the first cases that redefined the test away from *Terry*'s two-step analysis. In *Feltner*, the test is stated as "[t]o determine whether [an] action is more analogous to cases tried in courts of law than to suits tried in courts of equity or admiralty, we examine both the nature of the statutory action and the remedy sought." *Id.* at 348. There is no mention of the remedy being given more weight. *See id.*

108 *See G-I Holdings*, 380 F. Supp. 2d at 472 (first quoting *Feltner*, 523 U.S. at 348; and then quoting Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 42 (1989)).

109 *Feltner*, 523 U.S. at 348.

110 *See G-I Holdings*, 380 F. Supp. 2d at 472.

highlighted the remedy prong of the *Terry* test.[111] The court sought to determine what the "remedy" was in a veil-piercing case. Some courts have found the "remedy" in a veil-piercing case to be the stripping of corporate protections itself, an outcome more akin to an injunction or declaratory relief, and thus an equitable remedy.[112] Rejecting this view, the *G-I Holdings* court found it "[c]ommon sense" that "no party seeks to pierce the corporate veil merely to strip a company of its corporate protection."[113] When court procedure is stripped away, the underlying purpose of the veil-piercing action is to recover money damages free from the restraints of the corporate form. Accordingly, as in *Passalacqua*, the court used the remedy prong of the *Terry* test to find that the veil-piercing actions were appropriate for submission to a jury.[114] It is far from clear if the same result would have been reached if the court used the Seventh Amendment test in *Feltner* (an early version of the *Monterey* test).[115]

Lastly, the *G-I Holdings* opinion addressed the Seventh Circuit's opinion in *International Financial Services*. Recall that the Seventh Circuit considered the decision to permit or deny a jury trial on the issue of entity disregard as procedural.[116] Accordingly, the court deferred to state law in evaluating the nature of a veil-piercing action. Under Illinois law, veil piercing is only available where adhering to the corporate form would result in "inequity," leading the Seventh Circuit to hold that it was an equitable remedy not entitled to a jury trial.[117] The *G-I Holdings* court refused to extend this holding to New Jersey, evaluating the definitions of veil piercing under New Jersey law to find that it is highly fact intensive and there is no discretion vested in New Jersey courts to determine when a veil-piercing action should be put to a jury.[118] The court refused to extend the *International Financial Services* holding beyond states with statutes or precedent defining when a jury trial right was available in veil-piercing cases.[119]

G-I Holdings discussed the issue in the greatest depth, but bankruptcy courts have also addressed the issue with conflicting results. Some have followed *Passalacqua*, using the second prong of the *Terry* test to place emphasis on the remedy sought over the nature of veil

111 *See id.* at 476.
112 *See id.* at 476–77.
113 *Id.* at 477.
114 *See id.* at 477–78.
115 For a discussion of outcomes under each test, see *infra* Section IV.A.
116 *See* Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc., 356 F.3d 731, 736 (7th Cir. 2004).
117 *See id.* at 738–39.
118 *See G-I Holdings*, 380 F. Supp. 2d at 477.
119 *See id.* at 477–78.

piercing while others have followed the assumption that the stripping of corporate protections is a remedy, holding that the second step of the *Terry* test weights in favor of denying the right to a jury trial.[120] More recently, in the Ninth Circuit there was a case of *intra*circuit disagreement, with two conflicting opinions in the Central District and Eastern District of California. The Central District, in *Siegel v. Warner Bros. Entertainment Inc.*, found that there was no right to a jury trial in veil-piercing actions.[121]

Siegel is notable as it agreed with the Second Circuit on the blurred legal and equitable origins of veil piercing, but when addressing the second prong of the *Terry* test refused to find that the underlying monetary damages were the determinative factor.[122] According to the Central District of California, the test enumerated in *Terry* provides a qualification on what courts should consider to be a remedy: "it is the *nature* of the relief sought, not what ultimately results or is to be secured by the same, that should be dispositive."[123] For the *Siegel* court, there is a step between a finding of fact and a ruling on the veil-piercing issue: an equitable determination of whether upholding the corporate form would be unjust. As the court wrote: "whether a corporation is an alter ego of its corporate sibling rests, in the end, on an exercise of *discretion*, not of compulsion, as would be the case, for example, if all the factual elements of a tort or a contract claim had been established."[124]

> [E]ven if all the objective factors [that weigh in favor of piercing the corporate veil] are present, whether the corporate veil should be shredded still requires an equitable assessment of whether maintaining the corporate form would be "inequitable," something that is ultimately a matter of discretion for which no instruction could adequately be provided to a jury as to how to perform such a task.[125]

Just two years later, the Eastern District of California embraced *Passalacqua* and *G-I Holdings*. In *United States v. Vacante*,[126] the United

120 *Compare* Magers v. Bonds (*In re* Bonds Distrib. Co.), No. 97-52130C-7W, 98-6044, 2000 WL 33682815, at *8 (Bankr. M.D.N.C. Nov. 15, 2000) (holding that the ultimate remedy sought in a veil piercing case as the determinative factor when deciding on the right to a jury trial), *with* Martinson v. Towe (*In re* Towe), 151 B.R. 262, 264 (Bankr. D. Mont. 1993) (holding that the relief requested in a veil piercing action is the removal of the protections of the corporate form itself, and accordingly it is an equitable remedy that does not carry with it a right to a jury trial).

121 Siegel v. Warner Bros. Ent. Inc., 581 F. Supp. 2d 1067, 1076 (C.D. Cal. 2008).

122 *See Siegel*, 581 F. Supp. 2d at 1071–73.

123 *Id.* at 1075.

124 *Id.*

125 *Id.* at 1075–76.

126 United States v. Vacante, No. 08cv1349, 2010 WL 2219405 (E.D. Cal. June 2, 2010).

States sought veil piercing to enforce a tax lien against a shareholder.[127] Decided in 2010, *Vacante* was well positioned to consider and balance the holdings of *Passalacqua* and *International Financial Services* and summarize the analysis conducted in district courts. The *Vacante* court spent time in its opinion weighing the opinions reached in *Passalacqua* and *G-I Holdings* that the ultimate remedy sought (money damages) dominated the analysis with the opinions of the *International Financial Services* and *Siegel* courts that evaluated the nature of veil piercing itself.[128] The court ultimately found *Passalacqua* "persuasive," following the reasoning that plaintiffs are rarely, if ever, seeking to pierce the corporate veil without an underlying remedy.[129] The tax lien, as with the judgments in *Passalacqua* and *G-I Holdings*, was a form of monetary relief that indicated a legal remedy, dominating the second step of the *Terry* test.[130] Notably absent from the district court precedent on this issue is a case that conducts an analysis of veil piercing using the *Monterey* framework.

IV. THE CASE FOR THE JURY

A. *Veil Piercing's Nature Preserves the Right to a Jury Trial in These Cases*

What is a court confronted with a Seventh Amendment veil-piercing question to do? Based on the historical analysis from Part II, it seems evident that veil piercing cannot be accurately classified as either a legal or equitable doctrine—veil piercing began as an action to hold shareholders accountable for corporate debts in courts of law, and it was not until this system proved cumbersome and unworkable that courts of equity stepped in to define a procedure. This analysis conforms with the evidence found by the Second Circuit in *Passalacqua*. But *Passalacqua* hinges on two things: courts continuing to use the *Terry* test, and veil-piercing actions that seek explicitly legal remedies. There exist cases in which a plaintiff is requesting a veil-piercing order from a court, but there is no underlying legal remedy (e.g., the plaintiff is seeking declaratory relief or an injunction against a shareholder of the corporation).[131] There, the analysis may not be so simple, and it will ultimately hinge on the test chosen by the court in each specific

127 *See id.* at *3.

128 *See id.* at *4–5.

129 *Id.* at *4 ("Plaintiff does not simply seek a determination as to whether the corporate veil should be pierced. Instead, Plaintiff seeks to reduce the tax liabilities [of entities controlled by the defendant] to a monetary judgment against the Vacantes.").

130 *Id.* (citing Dairy Queen, Inc. v. Wood, 369 U.S. 469, 476 (1962)).

131 *See, e.g.*, Geltzer v. Kollel Mateh Efraim, LLC (*In re* Kollel Mateh Efraim, LLC), 406 B.R. 24, 28 (Bankr. S.D.N.Y. 2009) (holding that declaratory judgment was a form of relief that did not preclude a jury trial on a veil-piercing claim).

case until the Supreme Court explicitly overrules *Terry*. Using the *Terry* test, the remedy will dominate, and as described earlier, veil piercing is not a remedy. Therefore, the court should look to the fact that the plaintiff seeks injunctive relief as the determinative factor and conclude that there is no right to a jury trial in these cases. *Kollel Mateh Efraim* was an anomaly of a case that considered the merits of sending veil-piercing cases to juries but was seemingly following *Terry*.[132] It seems unlikely that another court applying *Terry* would see a claim that does not seek an equitable remedy as one that gives rise to Seventh Amendment rights.

Using the *Monterey* test, courts would look at veil piercing in a vacuum without regards to the remedy presented and should reach the same conclusion that veil piercing cannot be neatly defined as legal or equitable. From there, they should consider the merits of putting veil piercing actions to juries.

B. Policy Arguments in Favor of the Jury: Preserving the Jury Trial Right

Though the *Monterey* test requires us to take a practical look at the efficacy of juries in borderline cases, for decades commentators have been doubtful of the merits of the civil jury. The common critiques follow the same line of thinking: juries lack the knowledge necessary to make determinations in complex cases, and this lack of knowledge leads to a drain on judicial resources and inconsistent outcomes on similar facts. The critique of the jury in veil-piercing cases breaks this critique into three components: (1) juries are unable to understand the legal fiction of corporate separateness, and facts in veil-piercing cases are too complex for nonlawyers; (2) juries may reach inconsistent decisions or find themselves being overturned on appeal; and (3) charging juries with veil-piercing decisions will drain precious judicial resources.[133]

The argument that a particular case is too difficult for a jury to understand, and thus warrants submission to a judge, is not new. The "complexity exception" is a common argument against juries and has been levied against them in context of patent cases, complex financial issues and scientific disputes.[134] The Supreme Court has implied that

132 *See id.* at 27 (citing Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry, 494 U.S. 558, 565 (1990)). The opinion does not once cite *Monterey* or any of the later precedent that permits courts to evaluate the relative merits of putting a claim to a jury.

133 *See, e.g.*, Koosed et al., *supra* note 4, at 131–36; Joseph C. Wilkinson, Jr., Frank D. Zielinski & George M. Curtis, III, *A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases*, 37 U. KAN. L. REV. 61, 62 (1988) (arguing that juries be eliminated in complex cases).

134 Kathleen M. O'Malley, *Trial by Jury: Why It Works and Why It Matters*, 68 AM. U. L. REV. 1095, 1100 (2019).

an evaluation of a jury's competency is not an element of Seventh Amendment analysis. When evaluating the scope of the Seventh Amendment, the Supreme Court has stated that the "practical abilities and limitations" of juries are a factor to consider when submitting an issue to a jury would interfere with a legislative scheme devised by Congress.[135] There is no mention of this language as a reference to a jury's ability as a factfinder.

Predictability of outcomes is shown by the evidence to be an unnecessary concern as well. Experts in and studies of the issue show that juries tend to reach the same conclusions as judges, even in complex cases, and when they do not, it is rarely an issue of comprehension of the facts and inability to reason to an informed conclusion by the jury.[136] Speaking on the topic at N.Y.U. Law School in 2016, Justice Sonia Sotomayor stated that during her time as a district court judge she often reached the same conclusion as her juries, even in complex cases.[137] Veil piercing is not the most complex issue that has been successfully delegated to juries. While the notion of corporate "personhood" is certainly not everyday knowledge, neither is the content of complex patents, financial fraud, medical malpractice, or mass tort claims, legal actions for which the right to a jury trial is preserved.

Judicial efficiency is not stymied by delegating complex issues to juries. Furthermore, the existence of a jury fosters intelligibility and simplicity in argument and decisionmaking for judges and attorneys alike. In order to prove a set of facts to a jury, attorneys must distill it into a digestible argument, instead of bombarding an inquisitorial factfinder with discovery under the assumption that their legal education enables them to understand it without explanation. In especially complex cases, knowing that each piece of evidence must be explained to a jury of laypeople could serve to prevent frivolous discovery requests, knowing that these additional materials would have no bearing on outcomes at trial. Clear and concise jury instructions can further ensure

135 *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 n.4 (1989) (noting that cases identifying "practical abilities and limitations" of juries as a factor in Seventh Amendment analysis were contemplating compatibility with Congress' legislative schemes).

136 *See* O'Malley, *supra* note 135, at 1102 & n.31 (first citing Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 485–86 (2005); and then citing Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1166–67 (2001) ("Although jurors struggle and are occasionally misled, they generally make reasonable use of complex material, utilizing the expert testimony when it is presented in a form that they can use.")).

137 *See Justice Sonia Sotomayor Reflects on Civil Juries and Is Honored By* Annual Survey of American Law, N.Y.U. L. NEWS (Feb. 12, 2016), law.nyu.edu/news/sonia-sotomayor-supreme-court-annual-survey-american-law-civil-jury-project [https://perma.cc/V4F9-3J4P].

that juries are positioned to weigh complex evidence accurately and thoroughly.[138]

Finally, there are benefits to allowing increased access to juries that arguments against strengthening Seventh Amendment rights fail to address. The intention behind the Seventh Amendment was as a safeguard against governmental power, keeping the lay population in step with the decisions of the judiciary, and the judiciary accountable to the population at large.[139] Civil juries promote communal involvement in society—juries keep individuals engaged with the judicial system, making it visible and accessible. Reserving actions to bench trials without clear evidence that they are akin to equitable actions of 1791 alienates judiciaries from the communities they serve.

Attorneys also possess numerous tools for controlling the actions of juries that provide safeguards as to their decisionmaking. The Federal Rules of Civil Procedure contain numerous provisions that courts and attorneys can take advantage of in complex actions such as these, such as advisory juries and post-trial motions to undo jury verdicts that are clearly erroneous.[140]

C. Incorporation of the Seventh Amendment, Challenges Ahead

This Note does not discuss the right to a jury trial in state veil-piercing actions in great depth, but differing state laws bear on federal analysis in a significant fashion. Should the Supreme Court adopt a procedural interpretation of veil-piercing doctrine dependent on state law, as the Seventh Circuit did in *International Financial Services*, the status of veil piercing under state law becomes a key element of the Seventh Amendment analysis. In some states, state law considers veil piercing to be an equitable doctrine not submitted to juries.[141] As discussed in *International Financial Services*, Illinois law gives discretion to trial courts as to the issue of piercing the corporate veil where failing to do so would promote injustice or inequity: the hallmark of an equitable action. In Delaware, for example, veil-piercing actions may only be heard in the state's Court of Chancery—one of the few remaining courts of equity in the United States.[142] Under the *International Financial Services* interpretation of the nature of veil-piercing actions, state

138 *See* Jeffrey M. Pollock, *Helping Juries Succeed*, LAW.COM: N.J. L.J. (Dec. 18, 2017), https://www.law.com/njlawjournal/2017/12/18/helping-juries-succeed/ [https://perma.cc/7JS8-KBTP].

139 *See* Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1251–53 (2014).

140 *See, e.g.*, FED. R. CIV. P. 59.

141 *See* Koosed et al., *supra* note 4, at 125–27.

142 *See* Sonne v. Sacks, 314 A.2d 194, 197 (Del. 1973) ("[P]iercing the corporate veil may be done only in the Court of Chancery . . . .").

definitions became a key differentiator in the *Terry* analysis,[143] and could tip the scales in favor of denying the right to a jury trial under *Monterey* analysis. Using this approach, a litigant could be entitled to a jury trial on veil-piercing claims in New York, but not in Delaware.

The Seventh Amendment is a procedural right not yet incorporated against the states. Though states are required to uphold individual rights to free speech, freedom of religion, and other substantive rights, there remains no obligation for states to provide baseline access to civil jury trials. Most states do have constitutional provisions dictating the availability of jury trials within their borders, but they vary in scope and applicability.[144] Were the Seventh Amendment incorporated against states in the same manner as other provisions of the Bill of Rights, these heterogeneous provisions of state constitutional law would be heavily scrutinized.

CONCLUSION

The purpose of this Note was to provide some insight into the origins of limited liability and veil piercing and pull it from the "mists of metaphor"[145] out into the open. It is evident that the gradual and piecemeal development of limited liability clouded the origins of veil piercing. While some courts of law took initiative, piercing the corporate veil in actions brought in tort and contract, courts of equity simultaneously developed mechanisms for allocating liability among shareholders. While the history on the origins of veil piercing is truly split, other literature on this topic has disregarded the body of precedent that is courts of law undertaking veil piercing with no regard to equity. No case or event can be singled out as the origin of the doctrine, and when contemporary courts sought to define the limit of the Seventh Amendment's right to a civil jury in veil-piercing actions, this history created a "muddled mess of precedent."[146]

Regardless of which Seventh Amendment analysis a court chooses when deciding on this issue, history is key, and, besides some special cases (e.g., seeking an equitable remedy through veil piercing), the legal roots and fact-intensive nature of veil-piercing cases suggests that the analysis should come out that the right to a jury trial is preserved. Lastly, judges and academics alike agree that juries are capable of, if not ideal for, making factually intensive decisions.

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143 *See supra* Section III.B.

144 *See* Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 855–59 (2013).

145 Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926).

146 Koosed et al., *supra* note 4, at 135.